United States Sentencing Commission

2022-2023 Amendment Cycle

Proposed Amendments/Public Comment
88 FR 7180

UNITED STATES SENTENCING COMMISSION

2022-2023 PROPOSED AMENDMENTS
PUBLIC COMMENT
88 FR 7180

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice and request for public comment and hearing.

SUMMARY: The United States Sentencing Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth several issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information section of this notice.

DATES: *Written Public Comment*. Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 14, 2023. Any public comment received after the close of the comment period may not be considered.

Public Hearing. The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESSES: There are two methods for submitting public comment.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov. Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Proposed Amendments.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts

pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* USSC Rules of Practice and Procedure 2.2, 4.4. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See id*. 2.2; 28 U.S.C. 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) A proposed amendment to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. 3582(c)(1)(A) (Policy Statement)) to implement the First Step Act of 2018 (Pub. L. 115–391) and revise the list of circumstances that should be considered extraordinary and compelling reasons for sentence reductions under 18 U.S.C. 3582(c)(1)(A), and related issues for comment;

(2) A two-part proposed amendment to implement the First Step Act of 2018 (Pub. L. 115–391) including (A) (i) amendments to §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to reflect the broader class of defendants who are eligible for safety valve relief under the First Step Act and to provide additional conforming changes; (ii) amendments to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to make conforming changes; (iii) two options for amending §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) in light of the proposed revisions to §5C1.2; and (iv) related issues for comment; and (B) amendments to §2D1.1 to make the guideline's base offense levels consistent with the First Step Act's changes to the type of prior offenses that trigger enhanced mandatory minimum penalties;

(3) A multi-part proposed amendment to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to implement the Bipartisan Safer Communities Act (Pub. L. 117–159) and make other changes that may be warranted to appropriately address firearms offenses, including (A) amendments to Appendix A (Statutory Index) and two options for amending §2K2.1 to address (i) the new offenses established by the Bipartisan Safer Communities Act and to increase penalties for offenses involving straw purchases and firearms trafficking as required by the directive contained in the Act; (ii) the part of the directive in the Bipartisan Safer Communities Act that requires the Commission to "consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors"; (iii) the part of the directive in the Bipartisan Safer Communities Act that requires the Commission to "review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual"; and (iv) related issues for comment; (B) amendments to §2K2.1 in response to concerns expressed by some commenters that the guideline does not adequately address firearms that are not marked by a serial number (*i.e.*, "ghost guns"), and a related issue for comment; and (C) a series of issues for comment on

possible further revisions to §2K2.1 that may be warranted to appropriately address firearms offenses;

(4) A two-part proposed amendment addressing certain circuit conflicts involving §3E1.1 (Acceptance of Responsibility) and §4B1.2 (Definitions of Terms Used in Section 4B1.1), including (A) amendments to §3E1.1 to address circuit conflicts regarding the permissible bases for withholding a reduction under §3E1.1(b), and a related issue for comment; and (B) two options for amending §4B1.2 to address a circuit conflict concerning whether the definition of "controlled substance offense" in §4B1.2(b) only covers offenses involving substances controlled by federal law, and a related issue for comment;

(5) A multi-part proposed amendment in response to recently enacted legislation, including (A) amendments to Appendix A (Statutory Index) and the Commentary to §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product) in response to the FDA Reauthorization Act of 2017 (Pub. L. 115–52), and to the Commentary to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury) to make a technical correction, and a related issue for comment; (B) amendments to Appendix A, §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex

Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), as well as bracketing the possibility of amending the Commentary to §§4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and 5D1.2 (Term of Supervised Release), in response to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (Pub. L. 115–164), and related issues for comment; (C) amendments to Appendix A and §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the Commentary to §§2A2.4 (Obstructing or Impeding Officers) and 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)), in response to the FAA Reauthorization Act of 2018 (Pub. L. 115–254), and a related issue for comment; (D) amendments to Appendix A and the Commentary to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) in response to the SUPPORT for Patients and Communities Act (Pub. L. 115–271), and a related issue for comment; (E) amendments to Appendix A and the Commentary to §2X5.2 in response to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 (Pub. L. 115–299), and a related issue for comment; (F) amendments to Appendix A and the Commentary to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) in response to the Foundations for Evidence-Based Policymaking Act of 2018 (Pub. L. 115–435), and a related issue for comment; (G) amendments to Appendix A and the Commentary to §2X5.2 in response to the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), and a related issue for comment; (H) amendments to

Appendix A and the Commentary to §2B1.1 in response to the Representative Payee Fraud Prevention Act of 2019 (Pub. L. 116–126), and a related issue for comment; (I) amendments to Appendix A and the Commentary to §2B1.1 in response to the Stop Student Debt Relief Scams Act of 2019 (Pub. L. 116–251), and a related issue for comment; (J) amendments to Appendix A in response to the Protecting Lawful Streaming Act of 2020, part of the Consolidation Appropriation Act, 2021 (Pub. L. 116–260), and related issues for comment; and (K) amendments to Appendix A and the Commentary to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts) in response to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283), and a related issue for comment;

(6) A multi-part proposed amendment relating to §4B1.2 (Definitions of Terms Used in Section 4B1.1), including (A) (i) amendments §4B1.2 to eliminate the categorical approach from the guidelines by defining "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an offense; (ii) conforming changes to the guidelines that use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2; and (iii) related issues for comment; (B) amendments to §4B1.2 and the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States) to address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer

constitute a "crime of violence" under §4B1.2, as amended in 2016, because these offenses do not meet either the generic definition of "robbery" or the new guidelines definition of "extortion," and related issues for comment; (C) two options for amending §4B1.2 to address two circuit conflicts regarding the commentary provision stating that the terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a "crime of violence" and a "controlled substance offense," and related issues for comment; and (D) revisions to the definition of "controlled substance offense" in §4B1.2(b) to include offenses involving an offer to sell a controlled substance and offenses described in 46 U.S.C. 70503(a) and 70506(b), and a related issue for comment;

(7) A multi-part proposed amendment relating to criminal history, including (A) three options for amending the *Guidelines Manual* to address the impact of "status points" under subsection (d) of section 4A1.1 (Criminal History Category), and related issues for comment; (B) (i) two options for establishing a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), that would provide an offense level decrease for offenders with zero criminal history points who meet certain criteria; (ii) amendments to the Commentary to §5C1.1 (Imposition of a Term of Imprisonment) to address the alternatives to incarceration available to offenders with zero criminal history points who receive an adjustment under the proposed §4C1.1, and conforming changes to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) and Chapter One, Part A, Subpart 1(4)(d) (Probation and Split Sentences); and (iii) related issues for comment; (C) amendments to the Commentary to

§4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to include sentences resulting from possession of marihuana offenses as an example of when a downward departure from the defendant's criminal history may be warranted, and related issues for comment;

(8) A proposed amendment to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) and §6A1.3 (Resolution of Disputed Factors (Policy Statement)) to generally limit the use of acquitted conduct for purposes of determining the guideline range, except when such conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, the instant offense of conviction, and related issues for comment;

(9) A two-part proposed amendment to certain guidelines applicable to sexual abuse offenses, including (A) amendments to Appendix A (Statutory Index), §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), and the Commentary to §2H1.1 (Offenses Involving Individual Rights) in response to the Violence Against Women Act Reauthorization Act of 2022, which was part of the Consolidated Appropriations Act, 2022 (Pub. L. 117–103), and related issues for comment; and (B) amendments to §2A3.3 to address concerns regarding the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision, and related issues for comment;

(10) Issues for comment regarding a potential study of federal alternative-to-incarceration court programs and possible amendments to the *Guidelines Manual* to address such programs;

(11) A proposed amendment to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address offenses involving "fake pills" (*i.e.*, illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills) containing fentanyl or fentanyl analogue, and a related issue for comment;

(12) A two-part proposed amendment addressing miscellaneous guideline issues, including (A) amendments to §3D1.2 (Grouping of Closely Related Counts) to address the interaction between §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) and §3D1.2(d); and (B) amendments to the Commentary to §5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect the fact that the Bureau of Prisons no longer operates a shock incarceration program; and

(13) A multi-part proposed amendment to make technical and other non-substantive changes to the *Guidelines Manual*, including (A) technical changes to provide updated references to certain sections in the United States Code that were redesignated in

legislation; (B) technical changes to reflect the editorial reclassification of certain sections in the United States Code; (C) technical changes throughout the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to, among other things, reorganize in alphabetical order the controlled substances contained in the tables therein to make them more user-friendly; (D) technical changes to the commentary of several guidelines to provide references to the specific applicable provisions of 18 U.S.C. 876; (E) technical changes to the commentary of several guidelines in Chapter Eight (Sentencing of Organizations); and (F) clerical changes to correct typographical errors in several guidelines, policy statements, and commentary.

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The Background Commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at www.ussc.gov.

AUTHORITY: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 2.2, 4.3, 4.4.

Carlton W. Reeves,

Chair.

PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. FIRST STEP ACT—REDUCTION IN TERM OF IMPRISONMENT UNDER 18 U.S.C. § 3582(c)(1)(A)

Synopsis of Proposed Amendment: This proposed amendment responds to the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018) ("First Step Act" or "Act"), which contains numerous provisions related to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. Specifically, the sentencing reform provisions of the Act (1) amended the sentencing modification procedures set forth in 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to file a motion seeking a reduction in the defendant's term of imprisonment under certain circumstances; (2) reduced certain enhanced penalties imposed pursuant to 21 U.S.C. § 851 for some repeat offenders and changed the prior offenses that qualify for such enhanced penalties; (3) broadened the eligibility criteria of the "safety valve" provision at 18 U.S.C. § 3553(f); (4) limited the "stacking" of certain mandatory minimum penalties imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense; and (5) allowed for retroactive application of the Fair Sentencing Act of 2010. Revisions to the *Guidelines Manual* may be appropriate to implement the Act's changes to 18 U.S.C. § 3582(c)(1)(A).

The Sentencing Reform Act of 1984 ("SRA") established a system of determinate sentencing, prohibiting a court from modifying a term of imprisonment once it had been imposed except in certain instances specified in section 3582(c) of title 18, United States Code. One of those instances is set forth in 18 U.S.C. § 3582(c)(1)(A), which authorizes a court to reduce the term of imprisonment of a defendant, after considering the factors in 18 U.S.C. § 3553(a) to the extent they are applicable, if "extraordinary and compelling reasons" warrant such a reduction or the defendant is at least 70 years of age and meets certain other criteria. Such a reduction must be consistent with applicable policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3582(c)(1).

Prior to the First Step Act, a court was authorized to grant a reduction in a defendant's term of imprisonment under section 3582(c)(1)(A) only "upon motion of the Director of the Bureau of Prisons." Section 603(b) of the First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to file a motion seeking a sentence reduction after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons ("BOP") to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier.

Section 3582(c)(1)(A) does not define the phrase "extraordinary and compelling reasons." Instead, the SRA directs that "[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary

and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). Section 994(t) also directs that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id*. The SRA provides the Commission with the authority to set the policy regarding what reasons should qualify as "extraordinary and compelling reasons" for a sentence reduction under section 3582(c)(1)(A) and the courts with the authority to find that the "extraordinary and compelling reasons warrant such a reduction . . . and that such reduction is consistent with applicable policy statements issued by the Sentencing Commission." *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t), & 995(b); 18 U.S.C. § 3582(c)(1)(A).

The Commission implemented the section 994(t) directive by promulgating the policy statement at §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)). *See* U.S. Sent'g Comm'n, *Guidelines Manual*, §1B1.13 (Nov. 2021). Currently, §1B1.13 provides only for motions filed by the Director of the BOP and does not account for motions filed by a defendant under the amended statute. The policy statement describes the circumstances that constitute "extraordinary and compelling reasons" in the Commentary to §1B1.13. Application Note 1(A) through (C) provides for three categories of extraordinary and compelling reasons, *i.e.*, "Medical Condition of the Defendant," "Age of the Defendant," and "Family Circumstances." *See* USSG §1B1.13, comment. (n.1(A)–(C)). Application Note 1(D) provides that the Director of the BOP may determine whether there exists in a defendant's case "other reasons" that are extraordinary and compelling "other than, or in combination with," the

reasons described in Application Note 1(A) through (C). USSG §1B1.13, comment. (n.1(D)).

The proposed amendment would implement the First Step Act's relevant provisions by amending §1B1.13 and its accompanying commentary. Specifically, the proposed amendment would revise the policy statement to reflect that 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, authorizes a defendant to a file a motion seeking a sentence reduction.

The proposed amendment would also revise the list of "extraordinary and compelling reasons" in §1B1.13 in several ways.

First, the proposed amendment would move the list of extraordinary and compelling reasons from the Commentary to the guideline itself as a new subsection (b). The new subsection (b) would set forth the same three categories of extraordinary and compelling reasons currently found in Application Note 1(A) through (C) (with the revisions described below), add two new categories, and revise the "Other Reasons" category currently found in Application Note 1(D). New subsection (b) would also provide that extraordinary and compelling reasons exist under any of the circumstances, or a combination thereof, described in such categories.

Second, the proposed amendment would add two new subcategories to the "Medical Condition of the Defendant" category at new subsection (b)(1). The first new subcategory

is for a defendant suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner. The other new subcategory is for a defendant who presents the following circumstances: (1) the defendant is housed at a correctional facility affected or at risk of being affected by an ongoing outbreak of infectious disease or an ongoing public health emergency declared by the appropriate governmental authority; (2) the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or ongoing public health emergency; and (3) such risk cannot be mitigated in a timely or adequate manner.

Third, the proposed amendment would modify the "Family Circumstances" category at new subsection (b)(3) in three ways. First, the proposed amendment would revise the current subcategory relating to the death or incapacitation of the caregiver of a defendant's minor child by making it also applicable to a defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition. Second, the proposed amendment would add a new subcategory to the "Family Circumstances" category for cases where a defendant's parent is incapacitated and the defendant would be the only available caregiver for the parent. Third, the proposed amendment brackets the possibility of adding a more general subcategory applicable if the defendant presents circumstances similar to those listed in the other subcategories of "Family Circumstances" involving any other immediate family

member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.

Fourth, the proposed amendment brackets the possibility of adding two new categories: (1) Victim of Assault ("The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody."); and (2) Changes in Law ("The defendant is serving a sentence that is inequitable in light of changes in the law.").

Fifth, the proposed amendment would revise the provision currently found in Application Note 1(D) of §1B1.13. Three options are provided. All three options would redesignate this category as "Other Circumstances" and expand the scope of the category to apply to all motions filed under 18 U.S.C. § 3582(c)(1)(A), regardless of whether such motion is filed by the Director of the BOP or the defendant. Option 1 would provide that this category of extraordinary and compelling reasons applies in cases where a defendant presents any other circumstance or a combination of circumstances *similar in nature and consequence* to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)] of §1B1.13. Option 2 would provide that that this category applies if, as a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence. Option 3 would track the language in current Application Note 1(D) of §1B1.13 and apply if the defendant presents an extraordinary and compelling reason other than, or

in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].

Finally, the proposed amendment would move current Application Note 3 (stating that, pursuant to 28 U.S.C. § 994(t), rehabilitation of a defendant is not, by itself, an extraordinary and compelling reason for purposes of §1B1.13) into the guideline as a new subsection (c). In addition, as conforming changes, the proposed amendment would delete application notes 2 (concerning the foreseeability of extraordinary and compelling reasons), 4 (concerning a motion by the Director of the Bureau of Prisons), and 5 (concerning application of subdivision 3), and make a minor technical change to the Background commentary.

Issues for comment are also provided.

Proposed Amendment:

Section 1B1.13 is amended—

by inserting at the beginning the following new heading: "(a) *In General*.—";

by striking "Bureau of Prisons under" and inserting "Bureau of Prisons or the defendant pursuant to";

and inserting at the end the following:

"(b) *Extraordinary and Compelling Reasons*.—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(1) *Medical Circumstances of the Defendant*.—

(A) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(B) The defendant is—

(i) suffering from a serious physical or medical condition,

(ii) suffering from a serious functional or cognitive impairment, or

(iii) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner.

(D) The defendant presents the following circumstances—

(i) the defendant is housed at a correctional facility affected or at risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be mitigated in a timely or adequate manner.

(2) *Age of the Defendant*.— The defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(3) *Family Circumstances of the Defendant*.—

(A) The death or incapacitation of the caregiver of the defendant's minor child or the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.

(B) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

[(D) The defendant presents circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.**]**

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

[(5) *Changes in Law*.—The defendant is serving a sentence that is inequitable in light of changes in the law.**]**

[Option 1:

(6) *Other Circumstances*.—The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through **[**(3)**][**(4)**][**(5)**].]**

[Option 2:

(6) *Other Circumstances*.—As a result of changes in the defendant's circumstances **[**or intervening events that occurred after the defendant's sentence was imposed**]**, it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.**]**

[Option 3:

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

(c) *Rehabilitation of the Defendant*.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.".

The Commentary to §1B1.13 captioned "Application Notes" is amended by striking it as follows:

"*Application Notes*:

1. *Extraordinary and Compelling Reasons*.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

(A) *Medical Condition of the Defendant*.—

(i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) *Age of the Defendant*.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) *Family Circumstances*.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) *Other Reasons*.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling

reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

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

3. *Rehabilitation of the Defendant*.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.

4. *Motion by the Director of the Bureau of Prisons*.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the

defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.

5. *Application of Subdivision (3)*.—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.".

The Commentary to §1B1.13 captioned "Background" is amended by striking "the Commission is authorized" and inserting "the Commission is required".

Issues for Comment:

1. The proposed amendment would revise the list of "extraordinary and compelling reasons" in §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) in several ways. The Commission invites comment on whether the proposed amendment—in particular proposed subsections (b)(5) and (6)—exceeds the Commission's authority under 28 U.S.C. § 994(a) and (t), or any other provision of federal law.

2. The proposed amendment would make changes to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) and its corresponding commentary to implement the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018). The Commission seeks general comment on the proposed changes and whether the Commission should make any different or additional changes to implement the Act.

3. The proposed amendment would revise the categories of circumstances in which "extraordinary and compelling reasons" exist under the Commission's policy statement at §1B1.13. The Commission adopted the policy statement at §1B1.13 to implement the directive in 28 U.S.C. § 994(t). As noted above, the directive requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The Commission also has the authority to promulgate general policy statements regarding the application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). *See* 28 U.S.C. § 994(a)(2)(C).

The Commission seeks comment on whether the proposed categories of circumstances are appropriate and provide clear guidance to the courts and the Bureau of Prisons. Should the Commission further define and expand the

categories? Should the Commission provide additional or different criteria or examples of circumstances that constitute "extraordinary and compelling reasons"? If so, what specific criteria or examples should the Commission provide? Should the Commission consider an altogether different approach for describing "what should be considered extraordinary and compelling reasons for sentence reduction"?

4. The proposed amendment brackets the possibility of adding a new category of "extraordinary and compelling reasons" to §1B1.13 relating to defendants who are victims of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody. The Commission seeks comment on whether this provision should be expanded to include defendants who have been victims of sexual assault or physical abuse resulting in serious bodily injury committed by another inmate.

5. Section 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) sets forth the applicable policy statement for determining in what circumstances and to what extent a reduction in a term of imprisonment as a result of an amended guideline range may be granted. In *Dillon v. United States*, 560 U.S. 817 (2010), the Supreme Court held that proceedings under 18 U.S.C. § 3582(c)(2) are not governed by *United States v.*

Booker, 543 U.S. 220 (2005), and that §1B1.10 remains binding on courts in such proceedings.

The Commission seeks comment on whether the proposed amendment—in particular proposed subsections (b)(5) and (6)—is in tension with the Commission's determinations regarding retroactivity of guideline amendments under §1B1.10. If so, how should the Commission resolve this tension? Should the Commission clarify the interaction between §1B1.10 and §1B1.13? If so, how?

2. FIRST STEP ACT—DRUG OFFENSES

Synopsis of Proposed Amendment: This proposed amendment responds to the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018) ("First Step Act" or "Act"), which contains numerous provisions related to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. Although Commission action is not necessary to implement most of the First Step Act, revisions to the *Guidelines Manual* may be appropriate to implement the Act's changes to the eligibility criteria of the "safety valve" provision at 18 U.S.C. § 3553(f), and the recidivist penalties for drug offenders at 21 U.S.C. §§ 841(b) and 960(b). The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

(A) Safety Valve

Section 3553(f) of title 18, United States Code, allows a court to impose a sentence without regard to any statutory minimum penalty if it finds that a defendant meets certain criteria. As originally enacted, the safety valve applied only to offenses under 21 U.S.C. §§ 841, 844, 846, 960, and 963 and to defendants who, among other things, had not more than one criminal history point, as determined under the guidelines. When it first enacted the safety valve, Congress directed the Commission to promulgate or amend guidelines and policy statements to "carry out the purposes of [section 3553(f)]." *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 80001(b). The Commission implemented the directive by incorporating the statutory text of section 3553(f) into the guidelines at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). Two other guidelines provisions, subsection (b)(18) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and subsection (b)(6) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), currently provide a 2-level reduction in a defendant's offense level if the defendant meets the criteria in paragraphs (1) through (5) of §5C1.2(a).

Section 402 of the First Step Act expanded the safety valve provision at 18 U.S.C. § 3553(f) in two ways. First, the Act extended the applicability of the safety valve to maritime offenses under 46 U.S.C. §§ 70503 and 70506. Second, the Act amended

section 3553(f)(1) to broaden the eligibility criteria of the safety valve to include defendants who do not have: (1) "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines"; (2) a "prior 3-point offense, as determined under the sentencing guidelines"; and (3) a "prior 2-point violent offense, as determined under the sentencing guidelines." The Act defines "violent offense" as a "crime of violence," as defined in 18 U.S.C. § 16, that is punishable by imprisonment. In addition, the First Step Act incorporated into section 3553(f) a provision instructing that "[i]nformation disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense."

Following the enactment of the First Step Act, circuit courts have disagreed about how the word "and" connecting subsections (A) through (C) in section 3553(f)(1) operates. The Fifth, Sixth, Seventh, and Eighth Circuits have held that section 3553(f)(1) should be read to exclude a defendant who meets any single disqualifying condition listed in subsections (A) through (C). *See* United States v. Palomares, 52 F.4th 640, 642 (5th Cir. 2022) ("To be eligible for safety valve relief, a defendant must show that she does not have more than 4 criminal history points, does not have a 3-point offense, *and* does not have a 2-point violent offense."); United States v. Haynes, 55 F.4th 1075 (6th Cir. 2022) (same); United States v. Pace, 48 F.4th 741, 756 (7th Cir. 2022) ("[A] defendant who meets any one of subsections (A), (B), or (C) does not qualify for safety-valve relief."); United States v. Pulsifer, 39 F.4th 1018, 1022 (8th Cir. 2022) ("A court will find that § 3553(f)(1) is satisfied only when the defendant (A) does not have more than four

criminal history points, (B) does not have a prior three-point offense, and (C) does not have a prior two-point violent offense."). Specifically, the Eighth Circuit concluded that the word "and" is conjunctive in a "distributive" sense rather than in a "joint" sense. Thus, the phrase "does not have" is distributed across all three subsections (*i.e.*, should be read as repeated before each of the three conditions) such that a defendant is ineligible for safety valve relief if the defendant meets any one of the three conditions. *Pulsifer*, 39 F.4th at 1022 ("The distributive reading therefore gives meaning to each subsection in § 3553(f)(1), and we conclude that it is the better reading of the statute."); *see also Palomares*, 52 F.4th at 642 ("We agree with the Eighth Circuit that Congress's use of an em-dash following 'does not have' is best interpreted to 'distribute' that phrase to each following subsection."); *Haynes*, 55 F.4th at 1080 ("We agree with the Eighth Circuit that, of the interpretations on offer here, '[o]nly the distributive interpretation avoids surplusage.'").

The Ninth and Eleventh Circuits, in contrast, have held that the "and" connecting subparagraphs (A), (B), and (C) of section 3553(f)(1) is "conjunctive" and joins together the enumerated characteristics in those provisions. United States v. Lopez, 998 F.3d 431 (9th Cir. 2021); United States v. Garcon, 54 F.4th 1274 (11th Cir. 2022) (en banc). Accordingly, a defendant "must have (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense, cumulatively," to be disqualified from safety valve relief under section 3553(f). *Lopez*, 998 F.3d at 433. Unlike the Fifth, Sixth, and Eighth Circuits, the Ninth and Eleventh Circuits interpret the word "and" to be conjunctive in a "joint," rather than "distributive," sense.

Using fiscal year 2021 data, Commission analysis estimated that of 17,520 drug trafficking offenders, 11,866 offenders meet the non-criminal history requirements of the safety valve (18 U.S.C. § 3553(f)(2)–(5)). Of those 11,866 offenders, 5,768 offenders have no more than one criminal history point and would be eligible under the unamended pre-First Step Act criminal history requirement. Under a disjunctive interpretation of the expanded criminal history provision, 1,987 offenders would become eligible. The remaining 4,111 offenders would be ineligible. In comparison, under the Ninth Circuit's conjunctive interpretation of the expanded criminal history provision, 5,778 offenders would become eligible. The remaining 320 offenders would be ineligible.

Part A of the proposed amendment would implement the provisions of the First Step Act expanding the applicability of the safety valve provision by amending §5C1.2 and its corresponding commentary. Specifically, it would revise §5C1.2(a) to reflect the broader class of defendants who are eligible for safety valve relief under the Act. Part A of the proposed amendment would also bracket a possible revision to the minimum offense level that §5C1.2(b) requires for certain offenders. Revision of this provision, which implements a directive to the Commission in section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–222 (Sept. 13, 1994), may be appropriate given the expanded class of defendants who would qualify for safety valve relief under the proposed revisions to §5C1.2(a).

In addition, Part A of the proposed amendment would make changes to the Commentary to §5C1.2. First, it would revise Application Note 1 by deleting the current language and adding the statutory definition for the term "violent offense." Second, Part A of the proposed amendment brackets the possibility of adding a new application note stating that "[i]n determining whether the defendant meets the criteria in subsection (a)(1), refer to §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)." Third, Part A of the proposed amendment would also revise Application Note 7, to implement the new statutory provision stating that information disclosed by a defendant pursuant to 18 U.S.C. § 3553(f) may not be used to enhance the defendant's sentence unless the information relates to a violent offense. Finally, it would make additional technical changes to the rest of the Commentary by renumbering and inserting headings at the beginning of certain notes.

Part A of the proposed amendment would also make conforming changes to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)), which makes a specific reference to the number of criminal history points allowed by §5C1.2(a)(1).

Finally, Part A of the proposed amendment would also make changes to §2D1.1 and §2D1.11, as the 2-level reductions in both guidelines are tethered to the eligibility criteria

of paragraphs (1)–(5) of §5C1.2(a). It provides two options for amending §2D1.1(b)(18) and §2D1.11(b)(6).

Option 1 would not make any substantive changes to §2D1.1(b)(18) and §2D1.11(b)(6), allowing their 2-level reductions to automatically apply to any defendant who meets the revised criteria of §5C1.2. Because §5C1.2(a)(1) would closely track the language in 18 U.S.C. § 3553(f)(1), as amended by the First Step Act, the "and" used to set forth the criminal history criteria in §5C1.2 might be read by some courts as *disjunctive* (*e.g.*, the courts in the Fifth, Sixth, Seventh, and Eighth Circuits) and by other courts as *conjunctive* (*e.g.*, the courts in the Ninth and Eleventh Circuits). Option 1 would not resolve the circuit conflict for purposes of §2D1.1(b)(18) and §2D1.11(b)(6).

Option 2 would amend §2D1.1(b)(18) and §2D1.11(b)(6) to provide that their 2-level reductions apply to all defendants who meet the criteria in §5C1.2(a)(2)–(5). It would also incorporate into those provisions the same criminal history criteria from revised §5C1.2(a)(1) but set forth the criteria *disjunctively*, consistent with the approach of the Fifth, Sixth, Seventh, and Eighth Circuits. As a result, a defendant would not be eligible for the 2-level reduction in §2D1.1(b)(18) or §2D1.11(b)(6) if the defendant presents *any* of the disqualifying conditions relating to criminal history.

Both options also would make changes to the Commentary to §§2D1.1 and 2D1.11 that correspond to the applicable provisions of the revised Commentary to §5C1.2.

Part A of the proposed amendment also includes issues for comment.

(B) Recidivist Penalties for Drug Offenders

The most common drug offenses that carry mandatory minimum penalties are set forth in 21 U.S.C. §§ 841 and 960. Under both provisions, the mandatory minimum penalties are tied to the quantity and type of controlled substance involved in an offense. Enhanced mandatory minimum penalties are set forth in 21 U.S.C. §§ 841(b) and 960(b) for defendants whose instant offense resulted in death or serious bodily injury, *or* who have prior convictions for certain specified offenses. Greater enhanced mandatory minimum penalties are provided for those defendants whose instant offense resulted in death or serious bodily injury *and* who have a qualifying prior conviction.

Prior to the First Step Act, all of the recidivist penalty provisions within sections 841(b) and 960(b) provided for an enhanced mandatory minimum penalty if a defendant had one or more convictions for a prior "felony drug offense," which is defined in 21 U.S.C. § 802(44) as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." Section 401 of the Act both narrowed and expanded the type of prior offenses that trigger enhanced mandatory minimum penalties under 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2). The Act narrowed the triggering prior offenses for these statutory provisions by replacing the term "felony drug offense"

with "serious drug felony." The term "serious drug felony" is defined in 21 U.S.C. § 802(57) as "an offense described in [18 U.S.C. § 924(e)(2)] for which—(A) the offender served a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense." The Act also expanded the class of triggering offenses for the same statutory provisions by adding "serious violent felony." The term "serious violent felony" is defined in 21 U.S.C. § 802(58) as "(A) an offense described in [18 U.S.C. § 3559(c)(2)] for which the offender served a term of imprisonment of more than 12 months; and (B) any offense that would be a felony violation of [18 U.S.C. §113], if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months." The First Step Act did not amend 21 U.S.C. § 841(b)(1)(C), 841(b)(1)(E), 960(b)(3), or 960(b)(5), which still provide for enhanced mandatory minimum penalties if a defendant was convicted of a prior "felony drug offense."

Part B of the proposed amendment would revise subsection (a) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to make the guideline's base offense levels consistent with the First Step Act's changes to the type of prior offenses that trigger enhanced mandatory minimum penalties. Specifically, the proposed amendment would revise subsections (a)(1) and (a)(3) to replace the term "similar offense" used in these guideline provisions with the appropriate terms set forth in the relevant statutory provisions, as amended by the First Step Act.

First, Part B of the proposed amendment would amend §2D1.1(a)(1) and split it into two subparagraphs. Subparagraph (A) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2), where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a "serious drug felony or serious violent felony." Subparagraph (B) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a "felony drug offense."

Second, Part B of the proposed amendment would amend §2D1.1(a)(3), which provides for a base offense level of 30 for a defendant convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a "similar offense." Specifically, it would replace the term "similar offense" with "felony drug offense," as provided in the relevant statutory provisions.

(A) Safety Valve

Proposed Amendment:

Section 5C1.2(a) is amended—

by inserting after "§ 963," the following: "or 46 U.S.C. § 70503 or § 70506,";

by striking "set forth below" and inserting "as follows";

by striking paragraph (1) as follows:

"(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);";

and by inserting the following new paragraph (1):

"(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;".

[Section 5C1.2(b) is amended by striking "the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall not be less than 17" and inserting "the applicable guideline range shall not be less than 24 to 30 months of imprisonment".**]**

The Commentary to §5C1.2 captioned "Application Notes" is amended—

by striking Notes 1, 2, and 3 as follows:

"1. 'More than 1 criminal history point, as determined under the sentencing guidelines,' as used in subsection (a)(1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

2. ‘Dangerous weapon’ and ‘firearm,’ as used in subsection (a)(2), and ‘serious bodily injury,’ as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).

3. ‘Offense,’ as used in subsection (a)(2)–(4), and ‘offense or offenses that were part of the same course of conduct or of a common scheme or plan,’ as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.”;

and inserting the following new Note 1 **[**and Note 2**]**:

“1. *Definitions*.—

(A) The term ‘violent offense’ means a ‘crime of violence,’ as defined in 18 U.S.C. § 16, that is punishable by imprisonment.

(B) ‘Dangerous weapon’ and ‘firearm,’ as used in subsection (a)(2), and ‘serious bodily injury,’ as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).

(C) ‘Offense,’ as used in subsection (a)(2)–(4), and ‘offense or offenses that were part of the same course of conduct or of a common scheme or plan,’ as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.

[2. *Application of subsection (a)(1)*.—In determining whether the defendant meets the criteria in subsection (a)(1), refer to §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).**]**";

by redesignating Note 4 as Note 3;

in Note 3 (as so redesignated) by inserting at the beginning the following new heading: "*Application of subsection (a)(2)*.—";

by striking Notes 5, 6, and 7 as follows:

"5. 'Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines,' as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).

6. 'Engaged in a continuing criminal enterprise,' as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who 'engaged in a

continuing criminal enterprise' but is convicted of an offense to which this section applies will be an 'organizer, leader, manager, or supervisor of others in the offense.'

7. Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.";

by inserting the following new Notes 4 and 5:

"4. *Application of Subsection (a)(4).*—

(A) *'Organizer, leader, manager, or supervisor of others in the offense'.*—The first prong of subsection (a)(4) requires that the defendant was not subject to an adjustment for an aggravating role under §3B1.1 (Aggravating Role).

(B) *'Engaged in a continuing criminal enterprise'.*—'Engaged in a continuing criminal enterprise,' as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who 'engaged in

a continuing criminal enterprise' but is convicted of an offense to which this section applies will be an 'organizer, leader, manager, or supervisor of others in the offense.'

5. *Use of Information Disclosed under Subsection (a)*.—Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).";

by redesignating Notes 8 and 9 as Notes 6 and 7, respectively;

in Note 6 (as so redesignated) by inserting at the beginning the following new heading: "*Government's Opportunity to Make Recommendation*.—";

and in Note 7 (as so redesignated) by inserting at the beginning the following new heading: "*Exemption from Otherwise Applicable Statutory Minimum Sentences*.—".

The Commentary to §5C1.2 captioned "Background" is amended by inserting after "Violent Crime Control and Law Enforcement Act of 1994" the following: "and subsequently amended".

Section 4A1.3(b)(3)(B) is amended—

in the heading by striking "*to Category I*";

by striking "whose criminal history category is Category I after receipt of" and inserting "who receives";

by striking "criterion" and inserting "criminal history requirement";

and by striking "if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category)" and inserting "if the defendant did not otherwise meet such requirement before receipt of the downward departure".

[Option 1:

Section 2D1.1(b)(18) is amended by striking "subdivisions" and inserting "paragraphs".

[The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 21 by striking "a minimum offense level of level 17" and inserting "that the applicable guideline range shall not be less than 24 to 30 months of imprisonment".**]**

Section 2D1.11(b)(6) is amended by striking "subdivisions" and inserting "paragraphs".

[The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 7 by striking "a minimum offense level of level 17" and inserting "an applicable guideline range of not less than 24 to 30 months of imprisonment".**]]**

[Option 2:

Section 2D1.1(b)(18) is amended by striking the following:

"If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.",

and inserting the following:

"If the defendant—

(A) meets the criteria set forth in paragraphs (2)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); and

(B) does not have any of the following:

(i) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense;

(ii) a prior 3-point offense; or

(iii) a prior 2-point violent offense;

as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);

decrease by 2 levels.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 21 by striking the following:

"*Applicability of Subsection (b)(18)*.—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment.
Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(18) applies.",

and inserting the following:

"*Application of Subsection (b)(18)*.—

(A) *General Applicability*.—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides **[**a minimum offense level of level 17**][**that the applicable guideline range shall not be less than 24 to 30 months of imprisonment**]**, is not pertinent to the determination of whether subsection (b)(18) applies.

(B) *Definition of Violent Offense*.—The term 'violent offense' means a 'crime of violence,' as defined in 18 U.S.C. § 16, that is punishable by imprisonment.".

Section 2D1.11(b)(6) is amended by striking the following:

"If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.",

and inserting the following:

"If the defendant—

(A) meets the criteria set forth in paragraphs (2)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); and

(B) does not have any of the following:

(i) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense;

(ii) a prior 3-point offense; or

(iii) a prior 2-point violent offense;

as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);

decrease by 2 levels.".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 7 by striking the following:

"*Applicability of Subsection (b)(6)*.—The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. *See* §5C1.2(b)(2)(requiring a minimum offense level of level 17 if the 'statutorily required minimum sentence is at least five years').",

and inserting the following:

"*Application of Subsection (b)(6)*.—

(A) *General Applicability*.—The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. *See* §5C1.2(b)(2) (requiring **[**a minimum offense level of level 17**][**an applicable guideline range of not less than 24 to 30 months of imprisonment**]** if the 'statutorily required minimum sentence is at least five years').

(B) *Definition of Violent Offense*.—The term 'violent offense' means a 'crime of violence,' as defined in 18 U.S.C. § 16, that is punishable by imprisonment.".**]**

Issues for Comment:

1. As described above, Part A of the proposed amendment would make changes to §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and its corresponding commentary to implement the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018). The Commission seeks general comment on whether the Commission should make any different or additional changes to implement the Act.

2. Section 3553(f)(1) of title 18, United States Code, sets forth the criminal history criteria for the safety valve in subparagraphs (A) through (C). Each subparagraph sets forth the specific criminal history condition followed by the phrase "as determined under the sentencing guidelines." Circuit courts have reached different conclusions about what constitutes a "1-point," "2-point," or "3-point" offense, and also seem to disagree on whether such interpretation arises from the statute itself or from proper guideline operation. *Compare, e.g.*, United States v. Garcon, 54 F.4th 1274, 1280–84 (11th Cir. 2022) (en banc) (concluding that criminal history events are considered differently for purposes of subsections 3553(f)(1)(B) and (C) than subsection (A), and articulating that interpretation as primarily stemming from the statute), *with* United States v. Haynes, 55 F.4th 1075, 1080 (6th Cir. 2022) ("[Section] 3553(f)(1) refers only to 'prior 3-point' and 'prior 2-point violent' offenses 'as determined under the sentencing guidelines'—which means *all* the Guidelines, including §4A1.2(e).").

The Commission seeks comment on whether it should provide guidance on what constitutes a "1-point," "2-point," or "3-point" offense, "as determined under the sentencing guidelines," for purposes of §5C1.2.

3. Part A of the proposed amendment provides two options for amending subsection (b)(18) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and subsection (b)(6) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) in light of the proposed revisions to §5C1.2(a), which reflect the changes to 18 U.S.C. § 3553(f) enacted by the First Step Act.

Option 1 would leave the text of §2D1.1(b)(18) and §2D1.11(b)(6) unchanged, so that their offense-level reductions would apply to all defendants who meet the criteria in revised §5C1.2(a)(1)–(5). As discussed above, a circuit conflict has arisen as to whether the "and" connecting the subparagraphs that set forth the criminal history criteria in 18 U.S.C. § 3553(f)(1) operates *disjunctively* or *conjunctively*.

Option 2 of the proposed amendment would amend §2D1.1(b)(18) and §2D1.11(b)(6) to provide that their 2-level reductions would apply to all defendants who meet the criteria in §5C1.2(a)(2)–(5). It would also incorporate into those provisions the same criminal history criteria from revised §5C1.2(a)(1)

but set forth the criteria *disjunctively*, so that the reductions would be available only to defendants who do not present any of the listed disqualifying conditions.

The Commission seeks comment on each of these options. Which option, if any, is appropriate? In the alternative, should the Commission incorporate into §2D1.1(b)(18) and §2D1.11(b)(6) the same criminal history criteria from revised §5C1.2(a)(1) but set forth the criteria *conjunctively*, so that defendants must present all of the listed disqualifying conditions to be ineligible for their reductions? Should the Commission consider an altogether different approach? If so, what approach should the Commission provide and why?

(B) Recidivist Penalties for Drug Offenders

Proposed Amendment:

Section 2D1.1(a)(1) is amended by striking the following:

"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 com-mitted the offense after one or more prior convictions for a similar offense; or",

and inserting the following:

"43, if—

(A) the defendant is convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2), and the offense of conviction establishes that 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 serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) and the offense of conviction establishes that 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 felony drug offense; or".

Section 2D1.1(a)(3) is amended by striking "similar offense" and inserting "felony drug offense".

The Commentary to §2D1.1 caption "Application Notes" is amended—

by striking Note 2 as follows:

"2. *'Plant'*.—For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.*, a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).";

by redesignating Note 1 as Note 2;

and by inserting at the beginning the following new Note 1:

"1. *Definitions*.—

For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.*, a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

For purposes of subsection (a), 'serious drug felony,' 'serious violent felony,' and 'felony drug offense' have the meaning given those terms in 21 U.S.C. § 802.".

3. FIREARMS OFFENSES

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to (A) implement the Bipartisan Safer Communities

Act (Pub. L. 117–159); and (B) make any other changes that may be warranted to appropriately address firearms offenses. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022). The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend §2K2.1 to respond to the Bipartisan Safer Communities Act. Two options are presented. Issues for comment are also provided.

Part B of the proposed amendment addresses concerns expressed by some commenters about firearms that are not marked by a serial number (*i.e.*, "ghost guns"). An issue for comment is also provided.

Part C of the proposed amendment provides issues for comment on possible further revisions to §2K2.1.

(A) Bipartisan Safer Communities Act

Synopsis of Proposed Amendment: The Bipartisan Safer Communities Act (the "Act"), among other things, created two new firearms offenses, amended definitions, increased penalties for certain firearms offenses, and contained a directive to the Commission relating to straw purchases and trafficking of firearms offenses.

Specifically, the Act created two new offenses at 18 U.S.C. §§ 932 and 933. Section 932 prohibits knowingly purchasing, or conspiring to purchase, any firearm on behalf of, or at the request or demand of, another person with knowledge or reasonable cause to believe that such other person: (1) meets at least one of the criteria set forth in 18 U.S.C. § 922(d); (2) intends to use, carry, possess, sell, or otherwise dispose of the firearm in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking crime; or (3) intends to sell or otherwise dispose of the firearm to a person who meets either of the previous criteria. *See* 18 U.S.C. § 932(b). Section 933 prohibits: (1) shipping, transporting, transferring, causing to be transported, or otherwise disposing of, any firearm to another person with knowledge or reasonable cause to believe that the use, carrying, or possession of a firearm by the recipient would constitute a felony; (2) receiving from another person any firearm with knowledge or reasonable cause to believe that such receipt would constitute a felony; or (3) attempt or conspiracy to commit either of the acts described before. *See* 18 U.S.C. § 933(a).

Both new offenses carry a statutory maximum term of imprisonment of 15 years. The statutory maximum term of imprisonment for offenses under section 932 increases to 25 years if the offense was committed with knowledge or reasonable cause to believe that any firearm involved will be used to commit a felony, a Federal crime of terrorism, or a drug trafficking crime. *See* 18 U.S.C. § 932(c)(2).

In addition, the Act increased the statutory maximum term of imprisonment for the offenses under 18 U.S.C. §§ 922(d), 922(g), 924(h), and 924(k) from ten to 15 years. The Act also made changes to the elements of some of these offenses. First, the Act expanded the scope of section 922(d) by adding two additional categories of persons to whom it is unlawful to sell or otherwise dispose of any firearm or ammunition: (1) persons who intend to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense; and (2) persons who intend to sell or otherwise dispose of the firearm or ammunition to a person to whom sale or disposition is prohibited under the other categories in section 922(d). *See* 18 U.S.C. § 922(d)(10)–(11).

Second, the Act amended section 924(h). Prior to the Act, section 924(h) prohibited knowingly transferring a firearm with knowledge that such firearm will be used to commit a crime of violence or drug trafficking crime. As amended by the Act, section 924(h) prohibits knowingly receiving or transferring a firearm or ammunition, or attempting or conspiring to do so, with knowledge or reasonable cause to believe that such firearm or ammunition will be used to commit a felony, a Federal crime of terrorism, a drug trafficking crime, or a crime under the Arms Export Control Act (22 U.S.C. § 2751 *et seq*.), the Export Control Reform Act of 2018 (50 U.S.C. § 4801 *et seq*.), the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq*.), or the Foreign Narcotics Kingpin Designation Act (21 U.S.C. § 1901 *et seq*.). *See* 18 U.S.C § 924(h).

Third, the Act also amended section 924(k). Prior to the Act, section 924(k) prohibited smuggling or knowingly bringing into the United States a firearm, or attempting to do so, with intent to engage in or to promote conduct that: (1) is punishable 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, United States Code; (2) violates any law of a State relating to any controlled substance; or (3) constitutes a crime of violence. Section 924(k), as amended by the Act, prohibits smuggling or knowingly bringing into or out of the United States a firearm or ammunition, or attempting or conspiring to do so, with intent to engage in or to promote conduct that: (1) is punishable under the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq*.), or chapter 705 of title 46, United States Code; or (2) constitutes a felony, a Federal crime of terrorism, or a drug trafficking crime. *See* 18 U.S.C. § 924(k)

The Act also expanded the definition of "misdemeanor crime of domestic violence" at 18 U.S.C. § 921(a)(33) to include offenses against a person in "a current or recent former dating relationship." *See* 18 U.S.C. § 921(a)(33)(A). In addition, the Act added a new provision to section 921(a)(33) indicating that a person is not disqualified from shipping, transporting, possessing, receiving, or purchasing a firearm under chapter 44 of title 18, United States Code, by reason of a conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship if certain criteria are met. *See* 18 U.S.C. § 921(a)(33)(C).

Finally, the Act includes a directive requiring the Commission, pursuant to its authority under 28 U.S.C. § 994, to

> review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses. In its review, the Commission shall consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors. The Commission shall also review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.

Pub. L. 117–159, §12004(a)(5) (2022).

New Offenses and Increased Penalties for Straw Purchasing and Firearms Trafficking Offenses

Part A of the proposed amendment implements part of the directive of the Bipartisan Safer Communities Act by addressing the new offenses at 18 U.S.C. § 932 and 933 and increasing penalties for other offenses applicable to straw purchases and trafficking of firearms. First, Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. §§ 932 and 933 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Offenses involving firearms trafficking and straw purchases are generally referenced to this guideline.

Second, Part A of the proposed amendment would amend §2K2.1 to address the new offenses and increase penalties for offenses applicable to straw purchases and trafficking of firearms, as required by the directive. Two options are presented.

Option 1 addresses the new offenses at 18 U.S.C. §§ 932 and 933 and increases penalties for offenses applicable to straw purchases and trafficking of firearms. It would accomplish this by adding references to the new offenses in §2K2.1(a) and revising the firearms trafficking enhancement at §2K2.1(b)(5) to apply to straw purchase and other trafficking offenses.

Specifically, Option 1 would add references to 18 U.S.C. §§ 932 and 933 in subsections (a)(4)(B)(ii)(II) and (a)(6)(B). In addition, Option 1 would revise the 4-level enhancement for firearms trafficking at §2K2.1(b)(5) to make it a tiered-enhancement applicable to defendants who transferred or intended to transfer firearms or ammunition to certain individuals, which would provide the requisite increase for a defendant convicted of violating 18 U.S.C. § 922(d), § 932, or § 933(a)(1), as well as other offenses, including violations of 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) committed with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The revised enhancement would also apply to defendants convicted under 18 U.S.C. § 933(a)(2) or (a)(3). Specifically, a [1][2]-level enhancement would apply if the defendant was convicted under 18 U.S.C. § 933(a)(2) or (a)(3). A [1][2]-level increase would apply if the defendant (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i). A [5][6]-level enhancement would apply if the defendant (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal

justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i).

In addition, Option 1 would amend Application Note 13 to conform its content with the revised version of §2K2.1(b)(5). It would also include a new provision in response to the changes that the Act made to section 921(a)(33). Specifically, the new provision states that new subsection (b)(5)(C) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual [had no prior conviction for a crime of violence or controlled substance offense and had not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered 18 U.S.C. § 922(g)][met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C)]. In addition, Option 1 would amend the departure provision in Application Note 13 to provide that if the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms [or an unusually large amount of ammunition], an upward departure may be warranted.

Option 2 would restructure the base offense level provisions at §2K2.1(a) by providing references to specific statutes with statutory maximum terms of imprisonment of 15 years or more. Option 2 identifies the "other offenses applicable" to trafficking and straw purchasing as those for which Congress increased penalties in the Act. As mentioned, the Act increased the maximum term of imprisonment from ten to 15 years for four offenses: 18 U.S.C. §§ 922(d) (transferring a firearm or ammunition to a prohibited person); 922(g) (possession, receipt, or transfer of a firearm or ammunition by a prohibited person); 924(h) (transferring a firearm or ammunition to commit a felony); and 924(k) (smuggling a firearm or ammunition to commit a felony). The 15-year statutory maximum for these four offenses is the same as the new section 932 (without aggravating circumstances) and section 933 offenses. Three of the offenses with the amended statutory penalties (sections 922(g), 922(d), and 924(h)) share core elements with the new straw purchase (section 932) and trafficking (section 933) statutes: the transfer of a firearm to a felon or knowing it would be used to commit a felony; and the receipt of a firearm by a felon or knowing it would be used to commit a felony. The third (section 924(k)) similarly concerns itself with the intent to engage in or promote a further felony (after smuggling a firearm or ammunition into or out of the United States). Because the penalties and elements of these four offenses are similar to those of the new offenses, and they were modified by the same Act, Option 2 applies the increase to defendants convicted of those four offenses in addition to defendants convicted under 18 U.S.C. §§ 932 and 933.

First, Option 2 would increase by [1][2] levels the base offense levels at subsections (a)(1) through (a)(3). Second, Option 2 would add a new provision at

subsection (a)(4) that sets forth a base offense level of [21][22] if (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or (B) (i) the defendant is convicted under 18 U.S.C. § 922(d), § 922(g), § 924(h), § 924(k), § 932, or § 933; and (ii) the offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a). Third, Option 2 would delete current subsection (a)(4)(A) and make conforming changes to current subsection (a)(4)(B). Fourth, Option 2 would add a new provision at §2K2.1(a)(7) that would set forth a new base offense level of [15][16] if the defendant was convicted under 18 U.S.C. § 922(d), § 922(g), § 924(h), § 924(k), § 932, or § 933. Fifth, Option 2 would delete current subsection (a)(6)(B). Sixth, Option 2 would amend the provision that follows §2K2.1(b)(4) containing a cumulative impact "cap," to increase such limit from level 29 to level [30][31]. Finally, Option 2 would add a new [1][2]-level reduction at §2K1.1(b)(9) applicable if (A) the base offense level is determined under new subsection (a)(7); (B) none of the enhancements in subsection (b) apply; and (C) the offense of conviction established only the possession or receipt of firearms or ammunition.

Option 2 would also amend current Application Note 13(B) in response to the changes that the Act made to section 921(a)(33). The note currently provides that "misdemeanor crime of violence" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A). Option 2 would amend Application Note 13(B) to expressly provide that an individual shall not be considered an "individual whose possession or receipt of the firearm would

be unlawful" [if, at the time of the instant offense, the individual was not otherwise covered by such definition and has not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of: another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered by the definition of "individual whose possession or receipt of the firearm would be unlawful"][based upon a conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, if the individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C) at the time of the instant offense].

"Straw Purchasers" with Mitigating Factors

Part A of the proposed amendment also addresses the part of the directive that requires the Commission to "consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors." *See* Pub. L. 117–159, §12004(a)(5) (2022).

In response to the directive, Options 1 and 2 of Part A of the proposed amendment would add a new [1][2]-level reduction based on certain mitigating factors.

Option 1 would set forth the new [1][2]-level reduction at subsection (b)(9). The reduction would be applicable if the defendant (A) [receives an enhancement under subsection (b)(5)][is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person]; (B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and (C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity].

Option 2 would set forth the new [1][2]-level reduction at subsection (b)(10). The reduction would be applicable if subsection (b)(9) does not apply and the defendant (A) is convicted under 18 U.S.C. § 922(d), § 924(h), § 924(k), § 932, or § 933; (B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History),

read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and (C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity].

In relation to this part of the directive, both options in Part A of the proposed amendment bracket the deletion of the departure provision at Application Note 15 of §2K2.1.

Enhancement for Defendants with Criminal Affiliations

Finally, Part A of the proposed amendment addresses the part of the directive that requires the Commission to "review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual." *See* Pub. L. 117–159, §12004(a)(5) (2022). Options 1 and 2 of Part A of the proposed amendment would provide a new [2][3][4]-level enhancement in response to this part of the directive.

Option 1 would set forth the new [2][3][4]-level enhancement at subsection (b)(8). The enhancement would be applicable if the defendant (A) [receives an enhancement under

subsection (b)(5)][is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person]; (B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and (C) committed the offense with the intent to promote or further the felonious activities of, or with the intent to maintain or increase his or her position in, such group, club, organization, or association.

Option 2 would set forth the new [2][3][4]-level enhancement at subsection (b)(8). The enhancement would be applicable if the defendant (A) is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person; (B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and (C) committed the offense with the intent to promote or further the felonious activities of, or with the intent to maintain or increase his or her position in, such group, club, organization, or association.

Issues for Comment

Part A of the proposed amendment also provides issues for comment.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 956 the following new line references:

"18 U.S.C. § 932	2K2.1
18 U.S.C. § 933	2K2.1".

[Option 1 (Revised SOC Enhancement for Straw Purchase and Trafficking Offenses):

Section 2K2.1(a)(4)(B) is amended by inserting after "18 U.S.C. § 922(d)" the following: ", § 932, or § 933".

Section 2K2.1(a)(6)(B) is amended by inserting after "18 U.S.C. § 922(d)" the following: ", § 932, or § 933".

Section 2K2.1(b) is amended—

in paragraph (5) by striking "If the defendant engaged in the trafficking of firearms, increase by 4 levels." and inserting the following:

"(Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by **[**1**][**2**]** levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i), increase by **[**1**][**2**]** levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i), increase by **[**5**][**6**]** levels.";

and by inserting at the end the following new paragraphs (8) and (9):

"(8) If the defendant—

(A) **[**receives an enhancement under subsection (b)(5)**][**is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person**]**;

(B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and

(C) committed the offense with the intent to promote or further the felonious activities of, or with the intent to maintain or increase his or her position in, such group, club, organization, or association;

increase by **[**2**][**3**][**4**]** levels.

(9) If the defendant—

(A) **[**receives an enhancement under subsection (b)(5)**][**is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person**]**;

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; **[**or**][**and**]** (ii) received little or no compensation from the offense; **[**or**][**and**]** (iii) had minimal knowledge **[**of the scope and structure of the enterprise**][**that the firearm would be used or possessed in connection with further criminal activity**]**;

decrease by **[**1**][**2**]** levels.”.

The Commentary to § 2K2.1 captioned "Statutory Provisions" is amended by inserting after "(k)–(o)," the following: "932, 933,".

The Commentary to § 2K2.1 captioned "Application Notes" is amended—

in Note 3 by striking "subsections (a)(4)(B) and (a)(6)" and inserting "subsections (a)(4)(B), (a)(6), (b)(5), **[**(b)(8), and (b)(9)**]**";

in Note 10 by striking "subsection (a)(1) and (a)(2)" and inserting "subsections (a)(1) and (a)(2)";

in Note 13—

by striking paragraph (A) as follows:

"(A) *In General*.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful; or

(II) who intended to use or dispose of the firearm unlawfully.";

by redesignating paragraph (B) as paragraph (A);

in paragraph (A) (as so redesignated) by striking the first paragraph as follows:

" 'Individual whose possession or receipt of the firearm would be unlawful' means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. 'Crime of violence' and 'controlled substance offense' have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). 'Misdemeanor crime of domestic violence' has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).",

and inserting the following:

" 'Crime of violence' and 'controlled substance offense' have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Misdemeanor crime of domestic violence' has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term 'criminal justice sentence' includes probation, parole, supervised release, imprisonment, work release, or escape status.";

by inserting the following new paragraph (B):

"(B) *Application of Subsection (b)(5)(C)*.—Subsection (b)(5)(C) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual **[**had no prior conviction for a crime of violence or controlled substance offense and had not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered in

18 U.S.C. § 922(g)**][**met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C)**]**.";

and in paragraph (C) by striking "If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted" and inserting "If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms **[**or an unusually large amount of ammunition**]**, an upward departure may be warranted"**[**;**]**

[and by striking Note 15 as follows:

"15. *Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A)*.—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense."**]**.

[Option 2 (Increase Penalties for Offenses with Statutory Maximum of 15 years or more):

Section 2K2.1(a) is amended—

in paragraph (1) by striking "26," and inserting "**[**26**][**27**][**28**],**";

in paragraph (2) by striking "24," and inserting "**[**24**][**25**][**26**],**";

in paragraph (3) by striking "22," and inserting "**[**22**][**23**][**24**],**";

by striking paragraph (4) as follows:

"(4) 20, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or

§ 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;";

by redesignating paragraphs (5), (6), (7), and (8) as paragraphs (6), (8), (9), and (10), respectively;

by inserting the following new paragraphs (4) and (5):

"(4) **[**21**][**22**]**, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) (i) the defendant is convicted under 18 U.S.C. § 922(d), § 922(g), § 924(h), § 924(k), § 932, or § 933; and (ii) the offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a);

(5) 20, if the (A) offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(a)(6) or

§ 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;";

by inserting the following new paragraph (7):

"(7) **[**15**][**16**]**, if the defendant is convicted under 18 U.S.C. § 922(d), § 922(g), § 924(h), § 924(k), § 932, or § 933;";

and in paragraph (8) (as so redesignated) by striking "(B) is convicted under 18 U.S.C. § 922(d); or (C)" and inserting "or (B)".

Section 2K2.1(b) is amended—

in paragraph (2) by striking "(a)(4), or (a)(5)" and inserting "(a)(4), (a)(5), or (a)(6)";

in the paragraph after paragraph (4) by striking "level 29" and inserting "level **[**29**][**30**][**31**]**";

and by adding at the end the following new paragraphs (8), (9), and (10):

"(8) If the defendant—

(A) is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and

(C) committed the offense with the intent to promote or further the felonious activities of, or with the intent to maintain or increase his or her position in, such group, club, organization, or association;

increase by **[**2**][**3**][**4**]** levels.

(9) If (A) the base offense level is determined under subsection (a)(7); (B) none of the enhancements in subsection (b) apply; and (C) the offense of conviction established only the possession or receipt of firearms or ammunition, decrease by **[**1 level**][**2 levels**]**.

(10) If subsection (b)(9) does not apply and the defendant—

(A) is convicted under 18 U.S.C. § 922(d), § 924(h), § 924(k), § 932, or § 933;

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; **[**or**][**and**]** (ii) received little or no compensation from the offense; **[**or**][**and**]** (iii) had minimal knowledge **[**of the scope and structure of the enterprise**][**that the firearm would be used or possessed in connection with further criminal activity**]**;

decrease by **[**1**][**2**]** levels.”.

The Commentary to § 2K2.1 captioned “Statutory Provisions” is amended by inserting after “(k)–(o),” the following: “932, 933,”.

The Commentary to § 2K2.1 captioned “Application Notes” is amended—

in Note 2 by striking “and (a)(4)” and inserting “(a)(4), and (a)(5)”;

in Note 3 by striking “(a)(4)(B) and (a)(6)” and inserting “(a)(5), (a)(8), and (b)(8)”;

in Note 4 by striking “Subsection (a)(7)” both places such term appears and inserting “Subsection (a)(9)”;

in Note 6 by striking “subsections (a)(1)–(a)(5)” and inserting “subsections (a)(1)–(a)(6)”;

in Note 7 by striking “(a)(4)(B), or (a)(5)” and inserting “(a)(4)(B), (a)(5), or (a)(6)”;

in Note 8(A)—

in the heading by striking “Subsection (a)(7)” and inserting “Subsection (a)(9)”;

and by striking “under subsection (a)(7)” both places such phrase appears and inserting “under subsection (a)(9)”;

in Note 9 by striking “prohibited person” both places such term appears and inserting “person described in 18 U.S.C. § 922(g) or § 922(n)”;

in Note 10 by striking "subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6)" and inserting "subsection (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), or (a)(8)";

in Note 13(B) by inserting after "18 U.S.C. § 921(a)(33)(A)." the following: "However, an individual shall not be considered an 'individual whose possession or receipt of the firearm would be unlawful' **[**if, at the time of the instant offense, the individual was not otherwise covered by such definition and had not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of: another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered by the definition of 'individual whose possession or receipt of the firearm would be unlawful.'**]** **[**based upon a conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, if the individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C) at the time of the instant offense.**]**"**[**;**]**

[and by striking Note 15 as follows:

"15. *Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A)*.—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the

enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense."**]**.

Issues for Comment

1. The directive in the Bipartisan Safer Communities Act requires the Commission to ensure that defendants convicted of the new offenses at 18 U.S.C. §§ 932 and 933 and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines for such straw purchasing and trafficking of firearms offenses. The two options presented in Part A of the proposed amendment would amend §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to increase penalties in response to the Act. The Commission seeks comment on whether either of the options presented in Part A of the proposed amendment would provide appropriate penalties for cases involving straw purchases and trafficking of firearms. Should the Commission adopt either of these options or neither? Are there particular changes to the penalty levels in either of these options that should be made?

In addition, the Commission seeks comment on whether additional changes should be made to §2K2.1 in response to the part of the directive that requires the Commission to increase penalties for offenses involving straw purchases and trafficking of firearms. If so, what additional changes would be appropriate?

2. As described above, the Bipartisan Safer Communities Act also amended the definition of "misdemeanor crime of domestic violence" at 18 U.S.C. § 921(a)(33) to include misdemeanor offenses against a person in "a current or recent former dating relationship." The Act also added a new provision at section 921(a)(33)(C) stating as follows:

> A person shall not be considered to have been convicted of a misdemeanor crime of domestic violence against an individual in a dating relationship for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had firearm rights restored unless the expungement, pardon, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms: *Provided*, That, in the case of a person who has not more than 1 conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship, and is not otherwise prohibited under this chapter, the person shall not be disqualified from shipping, transport, possession, receipt, or

> purchase of a firearm under this chapter if 5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted of another such offense, a misdemeanor under Federal, State, Tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, or any other offense that would disqualify the person under [18 U.S.C. §] 922(g). The national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act (34 U.S.C. 40901) shall be updated to reflect the status of the person. Restoration under this subparagraph is not available for a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.

In light of this new provision, a person with a conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship is not disqualified from shipping, transporting, possessing, receiving, or purchasing a firearm under chapter 44 of title 18, United States Code, if the criteria described above are met. Are the changes to the Commentary to §2K2.1 set forth in

Options 1 and 2 adequate to address this new provision? If not, how should the Commission address it?

3. In response to the directive in the Bipartisan Safer Communities Act, Part A of the proposed amendment includes an Option 1 that would amend §2K2.1 to, among other things, revise the firearms trafficking enhancement at §2K2.1(b)(5) to apply to straw purchases and trafficking offenses. The revised enhancement would result in higher penalties for straw purchasers and firearms traffickers. The Commission seeks comment on whether having higher penalties for straw purchasers than prohibited persons raises proportionality concerns the Commission should address. If so, how should the Commission address those concerns?

4. Part A of the proposed amendment includes an Option 2 that would revise §2K2.1(a) in several ways. Among other things, it would keep current §2K2.1(a)(4)(B) with a base offense level of 20 applicable if the (A) offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. In addition, Option 2 would delete current §2K2.1(a)(6)(B) but keep the

base offense level of 14 applicable to any defendant who (A) was a prohibited person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The Commission seeks comment on whether it should change the current base offense levels of 14 and 20 applicable to the defendants described above. If so, what offense level would be appropriate to any such defendant, and why?

5. Options 1 and 2 of Part A of the proposed amendment would add to §2K2.1 a new [1][2]-level reduction based on certain mitigating factors. Option 1 provides that the reduction applies if the defendant [received an enhancement under the new subsection (b)(5) proposed in Option 1][was convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person] and meets other certain criteria. Option 2 provides that the reduction applies if subsection (b)(9) does not apply and the defendant is convicted under 18 U.S.C. § 922(d), § 924(h), § 924(k), § 932, or § 933, and meets the same other criteria provided in Option 1. The Commission seeks comment on whether this new adjustment should apply more broadly. Instead of providing a [1][2]-level reduction, should the Commission provide a departure provision applicable to defendants who meet the criteria?

The Commission also seeks comment on whether the criteria provided in Options 1 and 2 for this new reduction are appropriate. Should any criterion be deleted or changed? Should the Commission provide additional or different criteria?

The Commission further seeks comment on the criminal history requirement provided in Options 1 and 2. Is the proposed requirement appropriate to respond to Congress's intent to address "straw purchasers without significant criminal histories"? Should the Commission instead use a different criminal history requirement than the one proposed in Options 1 and 2?

6. Application Note 15 of §2K2.1 contains a downward departure provision for cases in which the defendant is convicted under 18 U.S.C. § 922(a)(6), § 922(d), or § 924(a)(1)(A) and meets certain criteria, similar to some of the criteria included in the new proposed reduction provided in Option 1 at subsection (b)(9) and in Option 2 at subsection (b)(10). Hence, both options bracket the possibility of deleting the current departure provision. If the Commission were to promulgate any of the options in Part A of the proposed amendment, either as an adjustment or a downward departure provision, should the Commission delete the current departure provision at Application Note 15? If not, how should the new reduction interact with the current departure provision? Should the current departure provision be modified in any way?

7. In response to the directive contained in the Bipartisan Safer Communities Act, Options 1 and 2 of Part A of the proposed amendment would provide a new [2][3][4]-level enhancement in §2K2.1 based on the criminal affiliations of the defendant. Option 1 provides that the new enhancement would be applicable if the defendant [received an enhancement under the new subsection (b)(5) proposed in Option 1][was convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person] and meets other criteria. Option 2 provides that the new enhancement would be applicable if the defendant is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person; and meets the same other criteria provided in Option 1. The Commission seeks comment on whether the new enhancement should apply more broadly. Should the Commission provide additional or different criteria for purposes of applying this enhancement? In addition, how should this new enhancement interact with the existing enhancements at §2K2.1? Should the new enhancement be cumulative with other enhancements, or should it interact with other enhancements in some other way (*e.g.*, by establishing a "cap" on its cumulative impact with other enhancements)? Should the Commission

instead provide an altogether different approach to respond to this part of the congressional directive?

(B) Firearms Not Marked with Serial Number ("Ghost Guns")

Synopsis of Proposed Amendment: Subsection (b)(4) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an alternative enhancement for a firearm that was stolen or that has an altered or obliterated serial number. Specifically, subsection (b)(4)(A) provides for a 2-level increase where a firearm is stolen, while subsection (b)(4)(B) provides for a 4-level increase where a firearm has an altered or obliterated serial number. The Commentary to §2K2.1 provides that the enhancement applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number. USSG §2K2.1, comment. (n.8(B)).

The enhancement at §2K2.1 currently does not apply to "ghost guns." "Ghost guns" is the term commonly used to refer to firearms that are not marked by a serial number by which they can be identified and traced, and that are typically made by an unlicensed individual from purchased components (such as standalone parts or weapon parts kits) or homemade components. Because of their lack of identifying markings, it is difficult to trace ghost guns and determine where and who manufactured them, and to whom they were sold or otherwise disposed. The Commission has heard from commenters that the very purpose

of "ghost guns" is to avoid the tracking and tracing systems associated with a firearm's serial number and that they increasingly are associated with violent crime. Commenters have also indicated that §2K2.1 does not adequately address "ghost guns," as the enhancement at §2K2.1(b)(4)(B) only covers firearms that were marked with a serial number when manufactured but where such identifier was later altered or obliterated.

Part B of the proposed amendment would respond to these concerns by revising §2K2.1(b)(4)(B) to provide that the 4-level enhancement applies if any firearm had an altered or obliterated serial number or was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16))].

An issue for comment is provided.

Proposed Amendment:

Section 2K2.1(b)(4)(B) is amended by striking "had an altered or obliterated serial number" and inserting "(i) had an altered or obliterated serial number; or (ii) was not otherwise marked with a serial number **[**(other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16))**]**".

The Commentary to § 2K2.1 captioned "Application Notes" is amended—

in Note 8(A)—

in the first paragraph by striking "However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B)" and inserting "However, if the offense involved a firearm with an altered or obliterated serial number, or that was not otherwise marked with a serial number **[**(other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16))**]**, apply subsection (b)(4)(B)(i) or (ii)";

and by striking the second paragraph as follows:

"Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).",

and inserting the following:

"Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)(i). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a

stolen firearm or stolen ammunition, or a firearm that was not otherwise marked with a serial number **[**(other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16))**]**, apply subsection (b)(4)(A) or (B)(ii).";

and in Note 8(B) by striking "Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number" and inserting "Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen, had an altered or obliterated serial number, or was not otherwise marked with a serial number **[**(other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16))**]**".

Issue for Comment

1. Part B of the proposed amendment would expand the scope of subsection (b)(4) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to address firearms that are not marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16))], in addition to firearms that were stolen or had an altered or obliterated serial number. The Commission seeks comment on whether it should further revise the enhancement at §2K2.1(b)(4). For example, should the Commission insert into §2K2.1(b)(4) a mental state (*mens rea*) requirement that the defendant knew, or had reason to believe, that the firearm was stolen, had an altered or obliterated serial number, or was not

otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16))?

(C) Issues for Comment on Further Revisions to §2K2.1

1. Parts A of the proposed amendment would amend §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to respond to the Bipartisan Safer Communities Act. Part B of the proposed amendment would amend §2K2.1 to address concerns expressed by some commenters about firearms that are not marked by a serial number (*i.e.*, "ghost guns"). The Commission seeks comment on whether it should further revise §2K2.1 to appropriately address firearms offenses.

2. Offenses under 18 U.S.C. § 922(u) are referenced to §2K2.1. Section 922(u) prohibits stealing or unlawfully taking or carrying away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce. The Department of Justice has expressed concerns that all offenses under 18 U.S.C. § 922(u), which covers conduct of varying severity (including simple theft, burglary, and robbery), are treated the same in §2K2.1. According to the Department of Justice, burglaries and robberies of federal firearms licensees are

particularly dangerous crimes that often involve multiple weapons. Currently, §2K2.1 provides at subsection (b)(4)(A) a 2-level enhancement if any firearm was stolen. Application Note 8(A) of §2K2.1 provides that this 2-level enhancement should not apply if the base offense level is set at level 12 under §2K2.1(a)(7) (*e.g.*, a defendant convicted under 18 U.S.C. § 922(u)) because the base offense level takes into account that the firearm or ammunition was stolen. The Commission seeks comment on whether it should amend §2K2.1 to specifically address offenses where the offense involved the burglary or robbery of a federal firearms licensee. For example, should the Commission add an enhancement to §2K2.1 that would be applicable if the offense involved the burglary or robbery of a federal firearms licensee? If so, what level of enhancement should the Commission set forth for such conduct? How should this enhancement interact with the stolen firearms enhancement at §2K2.1(b)(4)(A)? Should the Commission provide that both enhancements are to be applied cumulatively or in the alternative?

3. The base offense levels at §2K2.1(a) include as factors that form the basis for their application certain recidivism requirements, such as whether the defendant committed the instant offense subsequent to sustaining one or more felony convictions of either a crime of violence or controlled substance offense. The Commission seeks comment on whether it should add other types of prior convictions as the basis for applying base offense levels or specific offense characteristics, and what base offense level or offense level increase should the

Commission provide for any such prior conviction. For example, should the Commission provide for increased penalties if the defendant committed the instant offense subsequent to sustaining a conviction or multiple convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm? If so, should the Commission treat prior convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm the same as prior convictions for a crime of violence or a controlled substance offense and provide the same level of enhancement? If not, what base offense level or offense level increase should the Commission set forth for prior convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm?

4. The general definition of "firearm" in §2K2.1 at Application Note 1 is drawn from 18 U.S.C. § 921(a)(3). However, §2K2.1 applies a higher base offense level to offenses involving firearms described in 26 U.S.C. § 5845(a). Although section 5845(a) generally defines a more limited class of firearms than section 921(a)(3), there are a limited number of devices—such as those "designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun" which are "firearms" under section 5845(a) but not section 921(a)(3). Thus, such devices are "firearms" for purposes of the increased base offenses levels in §2K2.1(a)(1), (a)(3), (a)(4)(B)(i)(II), and (a)(5), but not for purposes of specific offense characteristics referring to "firearms," such as §2K2.1(b)(1). The Commission seeks comment on whether it should amend the definition of

"firearms" in Application Note 1 of §2K2.1 to include devices which are "firearms" under section 5845(a) but not section 921(a)(3).

5. The Commission seeks general comment on whether it should amend §2K2.1 to increase penalties for defendants who transfer a firearm to a minor. If so, how?

4. CIRCUIT CONFLICTS

Synopsis of Proposed Amendment: This proposed amendment addresses certain circuit conflicts involving §3E1.1 (Acceptance of Responsibility) and §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying resolution of circuit conflicts as a priority, including the circuit conflicts concerning (A) whether the government may withhold a motion pursuant to §3E1.1(b) because a defendant moved to suppress evidence; and (B) whether an offense must involve a substance controlled by the Controlled Substances Act (21 U.S.C. § 801 *et seq*.) to qualify as a "controlled substance offense" under §4B1.2(b)). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend §3E1.1 and its accompanying commentary to address circuit conflicts regarding the permissible bases for withholding a reduction under §3E1.1(b). It would set forth a definition of the term "preparing for trial"

that provides more clarity on what actions typically constitute preparing for trial for the purposes of §3E1.1(b). An issue for comment is also provided.

Part B of the proposed amendment would amend §4B1.2 by adding a definition of the term "controlled substance" to address a circuit conflict concerning whether the definition of "controlled substance offense" in §4B1.2(b) only covers offenses involving substances controlled by federal law. Two options are presented. An issue for comment is also included.

(A) Circuit Conflicts Concerning §3E1.1(b)

Synopsis of Proposed Amendment: Subsection (a) of §3E1.1 (Acceptance of Responsibility) provides for a 2-level reduction for a defendant who clearly demonstrates acceptance of responsibility for the offense. *See* USSG §3E1.1(a). Subsection (b) of §3E1.1 sets forth the circumstances under which a defendant is eligible for an additional 1-level reduction by providing:

> 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 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, decrease the offense level by 1 additional level.
>
> USSG §3E1.1(b).

Section 401(g) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act"), among other things, directly amended §3E1.1(b) to include the language requiring a government motion and consideration of government resources. *See* Pub. L. 108–21, § 401(g)(1), 117 Stat. 650 (2003). The PROTECT Act also added the following sentence to Application Note 6 of the Commentary to §3E1.1: "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." *Id.* § 401(g)(2).

In 2013, the Commission promulgated Amendment 775 to address two circuit conflicts over the §3E1.1(b) motion requirement. *See* USSG App. C, amend. 775 (effective Nov. 1, 2013). Among other things, the amendment added the following sentence to Application Note 6: "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal." *Id.*

Two circuit conflicts have arisen relating to §3E1.1(b). The first conflict concerns whether a §3E1.1(b) reduction may be withheld or denied because a defendant moved to

suppress evidence. Justice Sotomayor, joined by Justice Gorsuch, recently "emphasize[d] the need for clarification from the Commission" on this "important and longstanding split." Longoria v. United States, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., with whom Gorsuch, J. joins, respecting the denial of certiorari). The second conflict concerns whether the government may withhold a §3E1.1(b) motion where the defendant has raised sentencing challenges.

These conflicts largely turn on how much discretion the government has to withhold a motion under §3E1.1(b). Some circuits use the analytical framework from *Wade v. United States*, 504 U.S. 181, 185–86 (1992), applicable to substantial assistance motions under §5K1.1 (Substantial Assistance to Authorities) (Policy Statement) and 18 U.S.C. § 3553(e)—that the government's discretion is broad, but refusal to file a motion cannot be based on "an unconstitutional motive" or a reason "not rationally related to any legitimate Government end." Other circuits specify that withholding is permissible if based on an interest identified in §3E1.1. Courts also have grappled with whether the government's discretion is limited to situations involving trial preparation, and whether suppression motions or sentencing disputes are enough like trial preparation to withhold a motion.

In relation to the first circuit conflict, the Third, Fifth, and Sixth Circuits have permitted the government to withhold a §3E1.1(b) motion based on a suppression motion. *See, e.g.,* United States v. Longoria, 958 F.3d 372, 376–78 (5th Cir. 2020) (Amendment 775 did not clearly overrule its caselaw "allowing the government to

withhold the third point when it must litigate a suppression motion"; suppression hearing was largely the "substantive equivalent of a full trial" (quoting United States v. Gonzales, 19 F.3d 982, 984 (5th Cir. 1994))), *cert. denied*, 141 S. Ct. 978 (2021); United States v. Collins, 683 F.3d 697, 707 (6th Cir. 2012) (suppression motion required the government "to undertake trial-like preparations"; "Avoiding litigation on a motion to suppress is rationally related to the legitimate government interest in the efficient allocation of its resources. Accordingly . . . the government's decision to withhold the §3E1.1(b) motion was not arbitrary or unconstitutionally motivated."); United States v. Drennon, 516 F.3d 160, 161, 163 (3d Cir. 2008) (suppression hearing involved "the large majority of the work to prepare for trial"; motion withheld due to "concern for the efficient allocation of the government's litigating resources," not an unconstitutional motive).

The First, Second, Ninth, Tenth, and D.C. Circuits have held that a reduction may not be denied based on a suppression motion. *See, e.g.*, United States v. Vargas, 961 F.3d 566, 582–84 (2d Cir. 2020) (district court erred in denying government's §3E1.1(b) motion because of suppression hearing; any "experienced criminal lawyer knows that preparing for a jury trial involves more work than preparing for a suppression hearing"); United States v. Price, 409 F.3d 436, 443–44 (D.C. Cir. 2005) (district court erred in denying additional reduction based on suppression motion; while government had to prepare for a suppression hearing, "it never had to prepare for trial"); United States v. Marquez, 337 F.3d 1203, 1212 (10th Cir. 2003) ("district court may not rely on the fact that the defendant filed a motion to suppress requiring a 'lengthy suppression hearing' to justify a denial of the third level reduction"; even where issues substantially overlap, "preparation

for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples"); United States v. Marroquin, 136 F.3d 220, 225 (1st Cir. 1998) ("[g]uidelines do not force a defendant to forgo the filing of routine pre-trial motions as the price of receiving a one-step decrease"); United States v. Kimple, 27 F.3d 1409, 1415 (9th Cir. 1994) (district court erred in denying the additional reduction where "resources were expended not in conducting trial preparation, but in considering pretrial motions [including suppression motion] necessary to protect [the defendant's] rights").

With respect to the second circuit conflict, the First, Third, Seventh, and Eighth Circuits have held that the government may withhold a §3E1.1(b) motion where the defendant has raised sentencing challenges. *See, e.g.*, United States v. Adair, 38 F.4th 341, 361 (3d Cir. 2022) (government properly withheld motion where defendant "caused [the government] to have to prepare for a two-day sentencing hearing"; government did not act with an unconstitutional motive); United States v. Jordan, 877 F.3d 391, 395 (8th Cir. 2017) (defendant's denial of conduct relevant to sentencing did not "permit[ ] the government and the court to allocate their resources efficiently" (citation omitted)); United States v. Sainz-Preciado, 566 F.3d 708, 716 (7th Cir. 2009) (government had "good reason" to withhold motion where it had to prepare "testimony and other evidence to prove the full scope of [defendant's] criminal conduct at the sentencing hearing"); United States v. Beatty, 538 F.3d 8, 16–17 (1st Cir. 2008) (within the government's broad discretion to withhold motion where government reasonably determined that the defendant frivolously contested issues related to sentencing). The Second and Fifth Circuits have held that the

government may not withhold a motion on this basis. *See, e.g.*, United States v. Castillo, 779 F.3d 318, 324–26 (5th Cir. 2015) ("we disagree that the government may withhold a §3E1.1(b) motion simply because it has had to use its resources to litigate a sentencing issue"; however, dispute must be in good faith); United States v. Lee, 653 F.3d 170, 174 (2d Cir. 2011) ("As long as the defendant disputes the accuracy of a factual assertion in the PSR in good faith, the government abuses its authority by refusing to move for a third-point reduction because the defendant has invoked his right to a *Fatico* hearing.").

Part A of the proposed amendment would amend §3E1.1(b) to provide a definition of the term "preparing for trial." It would also delete the following sentence in Application Note 6 of the Commentary to §3E1.1: "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."

An issue for comment is provided.

Proposed Amendment:

Section 3E1.1(b) is amended by inserting after "1 additional level." the following:

"For the purposes of this guideline, the term 'preparing for trial' means 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. 'Preparing for trial' is ordinarily indicated by

actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. 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. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered 'preparing for trial.' ".

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 6 by striking "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.".

Issue for Comment

1. Part A of the proposed amendment would amend §3E1.1 (Acceptance of Responsibility) to address the circuit conflicts described in the synopsis above. The proposed amendment would amend subsection (b) of §3E1.1 to provide a definition for the term "preparing for trial." The Commission seeks comment on whether the proposed definition of "preparing for trial" is appropriate for purposes of §3E1.1(b). If not, what definition should the Commission provide?

   In the alternative, should the Commission address the circuit conflicts in a manner other than the one provided in Part A of the proposed amendment? For example,

should the Commission address the breadth of the government's discretion to withhold a §3E1.1(b) motion, either by incorporating the framework outlined in *Wade v. United States*, 504 U.S. 181, 185–86 (1992) (*i.e.*, an "unconstitutional motive" or a reason "not rationally related to any legitimate Government end") (*see, e.g.*, *United States v. Adair*, 38 F.4th 341, 361 (3d Cir. 2022)), or by specifying a different standard?

(B) Circuit Conflicts Concerning §4B1.2(b)

Synopsis of Proposed Amendment: Subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) defines a "controlled substance offense" as "an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing 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, distribute, or dispense." USSG §4B1.2(b). The definition in §4B1.2(b) principally applies to the career offender guideline at §4B1.1 (Career Offender). However, several other guidelines incorporate this definition by reference, often providing for higher base offense levels if the defendant committed the instant offense after sustaining a conviction for a "controlled substance offense." *See* USSG §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 4B1.4 (Armed Career Criminal), 5K2.17 (Semiautomatic Firearms Capable of Accepting Large

Capacity Magazine (Policy Statement)), and 7B1.1 (Classification of Violations (Policy Statement)).

The circuits are split regarding whether the definition of a "controlled substance offense" in §4B1.2(b) only covers offenses involving substances controlled by the federal Controlled Substances Act ("CSA") (21 U.S.C. § 801 *et seq*.), or whether the definition also applies to offenses involving substances controlled by applicable state law. This circuit conflict prompted Justice Sotomayor, joined by Justice Barrett, to call for the Commission to "address this division to ensure fair and uniform application of the [g]uidelines." Guerrant v. United States, 142 S. Ct. 640, 640–41 (2022) (statement of Sotomayor, J., with whom Barrett, J. joins, respecting the denial of certiorari).

The Second and Ninth Circuits have held that a "controlled substance offense" only includes offenses involving substances controlled by federal law (the CSA), not offenses involving substances that a state's schedule lists as a controlled substance, but the CSA does not. *See* United States v. Bautista, 989 F.3d 698, 705 (9th Cir. 2021) (conviction under Arizona statute criminalizing hemp as well as marijuana is not a "controlled substance offense" because hemp is not listed in the CSA); United States v. Townsend, 897 F.3d 66, 74 (2d Cir. 2018) (conviction under New York statute prohibiting the sale of Human Chorionic Gonadotropin ("HCG") is not a "controlled substance offense" because HCG is not controlled under the CSA).

By contrast, the Fourth, Seventh, Eighth, and Tenth Circuits have held that a state conviction involving a controlled substance that is not identified in the CSA can qualify as a "controlled substance offense" under the guidelines. *See* United States v. Jones, 15 F.4th 1288, 1295 (10th Cir. 2021) (definition of "controlled substance offense" includes "state-law controlled substance offenses, involving substances not found on the CSA"), *cert. denied*, 143 S. Ct. 268 (2022); United States v. Henderson, 11 F.4th 713, 718 (8th Cir. 2021) ("There is no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law."), *cert. denied*, 142 S. Ct. 1696 (2022); United States v. Ward, 972 F.3d 364, 374 (4th Cir. 2020) ("the Commission has specified that we look to *either* the federal or state law of conviction to define whether an offense will qualify [as a controlled substance offense]."), *cert denied*, 141 S. Ct. 2864 (2021); United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) ("The career-offender guideline defines the term controlled substance offense broadly, and the definition is most plainly read to 'include state-law offenses[.]' " (citation quotation omitted)), *cert. denied*, 141 S. Ct. 1239 (2021).

Part B of the proposed amendment would amend §4B1.2(b) to include a definition for "controlled substance" to address the circuit conflict. Two options are provided.

Option 1 would set forth a definition of "controlled substance" that adopts the approach of the Second and Ninth Circuits. It would limit the definition of the term to substances that are specifically included in the CSA.

Option 2 would set forth a definition of "controlled substance" that adopts the approach of the Fourth, Seventh, Eighth, and Tenth Circuits. It would provide that the term "controlled substance" refers to substances either included in the CSA or otherwise controlled under applicable state law.

An issue for comment is also provided.

Proposed Amendment:

Section 4B1.2(b) is amended by adding at the end the following new paragraph:

[Option 1 (Controlled Substances under Federal Law):

" 'Controlled substance' refers to 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*.).".**]**

[Option 2 (Controlled Substances under Federal or State Law):

" 'Controlled substance' refers to 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.".**]**

Issue for Comment

1. Part B of the proposed amendment would amend subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) to set forth a definition of "controlled substance." Two options are provided for such definition.

   The Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States) contains a definition for the term "drug trafficking offense" that closely tracks the definition of "controlled substance offense" in §4B1.2(b). *See* USSG §2L1.2, comment. (n.2). If the Commission were to amend §4B1.2(b) to include a definition of "controlled substance," should the Commission also amend Application Note 2 to §2L1.2 to include the same definition of "controlled substance" for purposes of the "drug trafficking offense" definition?

5. CRIME LEGISLATION

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying as a priority "[i]mplementation of any legislation warranting Commission action").

The proposed amendment contains eleven parts (Parts A through K). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (2017), by amending Appendix A (Statutory Index) and the Commentary to §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). It also makes a technical correction to the Commentary to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). An issue for comment is also provided.

Part B responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018), by amending Appendix A, §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). In addition, Part B brackets the possibility of amending the Commentary to §§4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and 5D1.2 (Term of Supervised Release) to exclude offenses under 18 U.S.C. § 2421A from the definitions of "covered sex offense" and "sex offense." Issues for comment are also provided.

Part C responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (2018), by amending Appendix A and §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the Commentary to §§2A2.4 (Obstructing or Impeding Officers) and 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). An issue for comment is also provided.

Part D responds to the SUPPORT for Patients and Communities Act, Pub. L. 115–271 (2018), by amending Appendix A and the Commentary to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). An issue for comment is also provided.

Part E responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. 115–299 (2018), by amending Appendix A and the Commentary to §2X5.2. An issue for comment is also provided.

Part F responds to the Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435 (2019), by amending Appendix A and the Commentary to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). An issue for comment is also provided.

Part G responds to the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92 (2019), by amending Appendix A and the Commentary to §2X5.2. An issue for comment is also provided.

Part H responds to the Representative Payee Fraud Prevention Act of 2019, Pub. L. 116–126 (2020), by amending Appendix A and the Commentary to §2B1.1. An issue for comment is also provided.

Part I responds to the Stop Student Debt Relief Scams Act of 2019, Pub. L. 116–251 (2020), by amending Appendix A and the Commentary to §2B1.1. An issue for comment is also provided.

Part J responds to the Protecting Lawful Streaming Act of 2020, part of the Consolidation Appropriation Act, 2021, Pub. L. 116–260 (2020), by amending Appendix A. Issues for comment are also provided.

Part K responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (2021), by amending Appendix A and the Commentary to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). An issue for comment is also provided.

(A) FDA Reauthorization Act of 2017

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (2017).

That act amended 21 U.S.C. § 333 (Penalties [for certain violations of the Federal Food, Drug, and Cosmetic Act]) to add a new criminal offense for the manufacture or distribution of a counterfeit drug. The new offense states that

> any person who violates [21 U.S.C. § 331(i)(3)] by knowingly making, selling, or dispensing, or holding for sale or dispensing, a counterfeit drug shall be imprisoned for not more than 10 years or fined in accordance with title 18, [United States Code,] or both.

21 U.S.C. § 333(b)(8). Section 331(i)(3) prohibits any action which causes a drug to be a counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug.

Currently, subsections (b)(1) through (b)(6) of 21 U.S.C. § 333 are referenced in Appendix A (Statutory Index) to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). Subsection (b)(7) is referenced to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). New subsection (b)(8) is not referenced to any guideline.

Part A of the proposed amendment would amend Appendix A to reference 21 U.S.C. § 333(b)(8) to §2N2.1. Part A would also amend the Commentary to §2N2.1 to reflect that subsection (b)(8), as well as subsections (b)(1) through (b)(6), of 21 U.S.C. § 333 are all referenced to §2N2.1. Finally, Part A also makes a technical change to the Commentary to §2N1.1, adding 21 U.S.C. § 333(b)(7) to the list of statutory provisions referenced to that guideline.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 21 U.S.C. § 458 the following new line reference:

"21 U.S.C. § 333(b)(8) 2N2.1".

The Commentary to §2N2.1 captioned "Statutory Provisions" is amended by striking "333(a)(1), (a)(2), (b)" and inserting "333(a)(1), (a)(2), (b)(1)–(6), (b)(8)".

The Commentary to §2N1.1 captioned "Statutory Provisions" is amended by striking "18 U.S.C. § 1365(a), (e)" and inserting "18 U.S.C. § 1365(a), (e); 21 U.S.C. § 333(b)(7). For additional statutory provision(s), *see* Appendix A (Statutory Index)".

Issue for Comment:

1. In response to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (2017), Part A of the proposed amendment would reference 21 U.S.C. § 333(b)(8) to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). The Commission seeks comment on whether any additional changes to the guidelines are required to account for section 333(b)(8)'s offense conduct. Specifically, should the Commission amend §2N2.1 to provide a higher or lower base offense level if 21 U.S.C. § 333(b)(8) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to §2N2.1 in response to section 333(b)(8)? If so, what should that specific offense characteristic provide and why?

(B) Allow States and Victims to Fight Online Sex Trafficking Act of 2017

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018).

That act created two new criminal offenses codified at 18 U.S.C. § 2421A (Promotion or facilitation of prostitution and reckless disregard of sex trafficking). The first new offense, codified at 18 U.S.C. § 2421A(a), provides that

> [w]hoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service . . ., or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

The second new offense, codified at 18 U.S.C. § 2421A(b), is an aggravated form of the first. It provides an enhanced statutory maximum penalty of 25 years for anyone who commits the first offense and either "(1) promotes or facilitates the prostitution of 5 or more persons" or "(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of [18 U.S.C. §] 1591(a)." Section 1591(a) criminalizes sex trafficking of a minor or sex trafficking of anyone by force, threats of force, fraud, or coercion.

Part B of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2421A to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to

Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). Offenses involving the promotion or facilitation of commercial sex acts are generally referenced to these guidelines.

If the offense did not involve a minor, §2G1.1 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(2) would apply, and the defendant's base offense level would be level 14. Part B of the proposed amendment would amend §2G1.1(b)(1) so that the four-level increase in the defendant's offense level provided by that specific offense characteristic would also apply if subsection (a)(2) applies and [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2). Section 2421A(b)(2) is the version of the new aggravated offense under which the defendant has acted in reckless disregard of the fact that their conduct contributed to sex trafficking in violation of 18 U.S.C. § 1591(a).

If the offense involved a minor, §2G1.3 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(4) would apply, and the defendant's base offense level would be level 24. Part B of the proposed amendment would amend §2G1.3(b)(4) to renumber the existing specific offense characteristic as §2G1.3(b)(4)(A) and to add a new §2G1.3(b)(4)(B), which provides for a [4]-level increase in the defendant's offense level if (i) subsection (a)(4) applies; and (ii) [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2). Only the greater of §2G1.3(b)(4)(A) or §2G1.3(b)(4)(B) would apply.

Part B of the proposed amendment also would amend the Commentary to §2G1.3 to add a new application note instructing that if 18 U.S.C. §2421A(a) or §2421A(b)(1) is the offense of conviction, the specific offense characteristic at §2G1.3(b)(3)(B) does not apply. That special offense characteristic provides for a two-level increase in the defendant's offense level if the offense involved the use of a computer or an interactive computer service to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor.

Part B of the proposed amendment would make conforming changes to §§2G1.1 and 2G1.3 and their accompanying commentary.

Finally, 18 U.S.C. § 2421A is codified in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 of the United States Code, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. Various guidelines refer to chapter 117 overall, including §4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and §5D1.2 (Term of Supervised Release). Specifically, §4B1.5 provides for increases in the defendant's offense level if the offense of conviction is a "covered sex crime." The Commentary to §4B1.5 states that a "covered sex crime" generally includes offenses under chapter 117 but excludes from coverage the offenses of "transmitting information about a minor or filing a factual statement about an alien individual." Section 5D1.2 includes a policy statement recommending that the court impose the statutory maximum term of supervised release if the instant offense of

conviction is a "sex offense." The Commentary to §5D1.2 defines "sex offense" to mean, among other things, an offense, perpetrated against a minor, under chapter 117, "not including transmitting information about a minor or filing a factual statement about an alien individual." Part B of the proposed amendment brackets the possibility of amending the Commentary to §§4B1.5 and 5D1.2 to exclude offenses under 18 U.S.C. § 2421A from the definitions of "covered sex offense" and "sex offense."

Issues for comment are also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 2422 the following new line reference:

"18 U.S.C. § 2421A 2G1.1, 2G1.3".

Section 2G1.1(b)(1)(B) is amended by striking "the offense involved fraud or coercion" and inserting "(i) the offense involved fraud or coercion, or (ii) **[**the offense of conviction is**][**the offense involved conduct described in**]** 18 U.S.C. § 2421(A)(b)(2)".

The Commentary to §2G1.1 captioned "Statutory Provisions" is amended by striking "2422(a) (only if the offense involved a victim other than a minor)" and inserting "2421A (only if the offense involved a victim other than a minor), 2422(a) (only if the offense

involved a victim other than a minor). For additional statutory provision(s), *see* Appendix A (Statutory Index)".

Section 2G1.3(b) is amended in paragraph (4) by striking "If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.", and inserting the following:

"(Apply the greater):

(A) If (i) the offense involved the commission of a sex act or sexual contact; or (ii) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.

(B) If (i) subsection (a)(4) applies; and (ii) **[**the offense of conviction is**][**the offense involved conduct described in**]** 18 U.S.C. § 2421A(b)(2), increase by **[**4**]** levels.".

The Commentary to §2G1.3 captioned "Statutory Provisions" is amended by striking "2422 (only if the offense involved a minor), 2423, 2425" and inserting "2421A (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425. For additional statutory provision(s), *see* Appendix A (Statutory Index)".

The Commentary to §2G1.3 captioned "Application Notes" is amended in Note 4 by striking the following:

"*Application of Subsection (b)(3)(A)*.—Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.",

and inserting the following:

"*Application of Subsection (b)(3)*.—

(A) *Application of Subsection (b)(3)(A)*.—Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

(B) *Application of Subsection (b)(3)(B)*.—If the offense of conviction is 18 U.S.C. § 2421A(a) or § 2421A(b)(1), do not apply subsection (b)(3)(B).".

[The Commentary to §4B1.5 captioned "Application Notes" is amended in Note 2 by striking "chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual" and inserting "chapter 117 of such title, not including transmitting information about a minor, filing a factual statement about an alien individual, or an offense under 18 U.S.C. § 2421A".**]**

[The Commentary to §5D1.2 captioned "Application Notes" is amended in Note 1, in the paragraph that begins " 'Sex offense' means", by striking "chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual" and inserting "chapter 117 of such title, not including transmitting information about a minor, filing a factual statement about an alien individual, or an offense under 18 U.S.C. § 2421A".**]**

Issues for Comment:

1. In response to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018), Part B of the proposed amendment would reference 18 U.S.C. § 2421A to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual

Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and would make various revisions to those guidelines to account for the new statute's offense conduct. The Commission seeks comment on whether the proposed revisions are appropriate and on whether the Commission should make other changes to the guidelines to account for section 2421A's offense conduct.

In particular, Part B of the proposed amendment would rely on the specific offense characteristics and special instructions in §§2G1.1 and 2G1.3 to produce the appropriate offense levels for the aggravated offense at 18 U.S.C. § 2421A(b). Should the Commission account for the aggravated offense in a different way, for example, by providing a higher base offense level if a defendant is convicted of that offense? If so, should the Commission use one of the base offense levels currently provided for convictions under other offenses, such as level 28, provided by §2G1.3 for a conviction under 18 U.S.C. § 2422(b) or 2423(a), or level 34, provided by §§2G1.1 and 2G1.3 for a conviction under 18 U.S.C. § 1591(b)(1)?

2. The new offenses codified at 18 U.S.C. § 2421A are included in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 of the United States Code, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. As indicated in the synopsis, §§4B1.5 and 5D1.2 provide definitions for the terms "covered sex crime" and

"sex offense," respectively, that generally include offenses in chapter 117 of title 18, with notable exceptions. The chapter 117 offenses that the Commission excluded from the definitions of "covered sex crime" and "sex offense" do not criminalize conduct involving the direct sexual exploitation of a minor by the defendant, but rather are primarily concerned with the transmission or filing of information about individuals.

Part B of the proposed amendment brackets the possibility of amending the Commentary to §§4B1.5 and 5D1.2 to exclude offenses under 18 U.S.C. § 2421A from the definitions of "covered sex offense" and "sex offense." Section 2421A offenses generally involve the posting or sharing (*i.e.*, transmission) of information about an individual, which may not necessarily involve the direct exploitation of a minor victim by the defendant. The Commission seeks comment on whether excluding offenses under 18 U.S.C. § 2421A from the definitions of "covered sex crime" and "sex offense" for purposes of §§4B1.5 and 5D1.2 is appropriate due to the nature of such offenses. Should the Commission, instead, include the aggravated form of the offense under 18 U.S.C. § 2421A(b) in the definitions of "covered sex crime" and "sex offense"?

(C) FAA Reauthorization Act of 2018

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (2018). That act created two new

criminal offenses concerning the operation of unmanned aircraft, commonly known as "drones," and added a new provision to an existing criminal statute that also concerns drones.

The first new criminal offense, codified at 18 U.S.C. § 39B (Unsafe operation of unmanned aircraft), prohibits the unsafe operation of drones. Specifically, section 39B(a)(1) prohibits any person from operating an unmanned aircraft and knowingly interfering with the operation of an aircraft carrying one or more persons in a manner that poses an imminent safety hazard to the aircraft's occupants. Section 39B(a)(2) prohibits any person from operating an unmanned aircraft and recklessly interfering with the operation of an aircraft carrying one or more persons in a manner that poses an imminent safety hazard to the aircraft's occupants. Section 39B(b) prohibits any person from knowingly operating an unmanned aircraft near an airport runway without authorization. A violation of any of these prohibitions is punishable by a fine, not more than one year in prison, or both. A violation of subsection (a)(2) that causes serious bodily injury or death is punishable by a fine, not more than 10 years of imprisonment, or both. A violation of subsection (a)(1) or subsection (b) that causes serious bodily injury or death is punishable by a fine, imprisonment for any term of years or for life, or both.

The second new criminal offense, codified at 18 U.S.C. § 40A (Operation of unauthorized unmanned aircraft over wildfires), generally prohibits any individual from operating an unmanned aircraft and knowingly or recklessly interfering with a wildfire

suppression or with law enforcement or emergency response efforts related to a wildfire suppression. A violation of this offense is punishable by a fine, imprisonment for not more than two years, or both.

The act also adds a new subsection (a)(5) to 18 U.S.C. § 1752 (Restricted building or grounds). The new subsection prohibits anyone from knowingly and willfully operating an unmanned aircraft system with the intent to knowingly and willfully direct or otherwise cause the system to enter or operate within or above a restricted building or grounds. A violation of section 1752 is punishable by a fine, imprisonment for not more than one year, or both. If the violator used or carried a deadly or dangerous weapon or firearm or if the offense results in significant bodily injury, the maximum term of imprisonment increases to ten years.

Part C of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 39B to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Accordingly, courts would use §2A5.2 for felony violations of section 39B and §2X5.2 for misdemeanor violations. Part C would also make conforming changes to §2A5.2 and its commentary and to the Commentary to §2X5.2. Part C of the proposed amendment would also amend the title of §2A5.2 to add "Unsafe Operation of Unmanned Aircraft."

In addition, Part C of the proposed amendment would amend Appendix A to reference 18 U.S.C. § 40A to §2A2.4 (Obstructing or Impeding Officers). It would also make conforming changes to the Commentary to §2A2.4.

Section 1752 is currently referenced in Appendix A to §2A2.4 and §2B2.3 (Trespass). Accordingly, courts would use those guidelines for violations of 18 U.S.C. § 1752(a)(5). Part C of the proposed amendment would make no changes to the guidelines to account for that provision.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 43 the following new line references:

"18 U.S.C. § 39B	2A5.2, 2X5.2
18 U.S.C. § 40A	2A2.4".

Section 2A5.2 is amended in the heading by striking "Vehicle" and inserting "Vehicle; Unsafe Operation of Unmanned Aircraft".

The Commentary to §2A5.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. § 1992(a)(1)" and inserting "18 U.S.C. §§ 39B, 1992(a)(1)".

The Commentary to §2X5.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 1365(f), 1801; 34 U.S.C. § 12593; 49 U.S.C. § 31310." and inserting "18 U.S.C. §§ 39B, 1365(f), 1801; 34 U.S.C. § 12593; 49 U.S.C. § 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).".

The Commentary to §2A2.4 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 111" and inserting "18 U.S.C. §§ 40A, 111".

Issue for Comment:

1. In response to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (2018), Part C of the proposed amendment would reference 18 U.S.C. § 39B to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Part C of the proposed amendment would also reference 18 U.S.C. § 40A to §2A2.4 (Obstructing or Impeding Officers). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for the new criminal offenses created by the FAA Reauthorization Act.

(D) SUPPORT for Patients and Communities Act

Synopsis of Proposed Amendment: Part D of the proposed amendment responds to the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act ("the SUPPORT for Patients and Communities Act"), Pub. L. 115–271 (2018).

This Act includes the Eliminating Kickbacks in Recovery Act of 2018, which added a new offense at 18 U.S.C. § 220 (Illegal remunerations for referrals to recovery homes, clinical treatment facilities, and laboratories). Section 220(a) prohibits, with respect to services covered by a "health care benefit program," knowing or willfully: (1) soliciting or receiving any remuneration (including kickbacks, bribes, or rebates), in cash or in kind, for referring a patient or patronage to a recovery home, clinical treatment facility, or laboratory; and (2) paying or offering any remuneration (including kickbacks, bribes, or rebates), in cash or in kind, for inducing a referral of a patient to or in exchange for a patient using the services of a recovery home, clinical treatment facility, or laboratory. The new offense has a statutory maximum term of imprisonment of ten years.

A "health care benefit program," for purposes of section 220, includes public and private plans and contracts affecting commerce. *See* 18 U.S.C. § 220(e)(3) (referring to the definition of such term at 18 U.S.C. § 24(b)). Section 220 also sets forth exemptions to the offense relating to certain discounts, payments, and waivers. *See* 18 U.S.C. § 220(b).

Part D of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 220 to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). The conduct prohibited in 18 U.S.C. § 220 is similar to the conduct prohibited in 42 U.S.C. § 1320a-7b(b) (Criminal penalties for acts involving Federal health care programs). Currently, section 1320a-7b offenses are referenced in Appendix A to both §§2B1.1 and 2B4.1.

Part D of the proposed amendment would also amend the commentaries to §§2B1.1 and 2B4.1 to reflect that 18 U.S.C. § 220 is referenced to these guidelines.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 224 the following new line reference:

"18 U.S.C. § 220 2B1.1, 2B4.1".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 38" and inserting "18 U.S.C. §§ 38, 220".

The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 215" and inserting "18 U.S.C. §§ 215, 220".

Issue for Comment:

1. In response to the SUPPORT for Patients and Communities Act, Part D of the proposed amendment would reference 18 U.S.C. § 220 to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for section 220's offense conduct. Specifically, should the Commission amend §2B1.1 or §2B4.1 to provide a higher or lower base offense level if 18 U.S.C. § 220 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to section 220? If so, what should that specific offense characteristic provide and why?

(E) Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018

Synopsis of Proposed Amendment: Part E of the proposed amendment responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. 115–299 (2018).

Among other things, the Act amended 18 U.S.C. § 2259 (Mandatory restitution), with respect to victims of child pornography, by adding a new subsection (d). This new subsection permits any victim of child pornography trafficking to receive "defined monetary assistance" from the Child Pornography Victims Reserve when a defendant is convicted of trafficking in child pornography. It also sets forth rules for determining the amount of "defined monetary assistance" a victim may receive and certain limitations relating to the effect of restitution and on eligibility. In addition, new subsection (d)(4)(A) states that that any attorney representing a victim seeking "defined monetary assistance" may not charge, receive, or collect (nor may the court approve) the payment of fees and costs that in the aggregate exceeds 15 percent of any payment made under new subsection (d) in general. It also provides that an attorney who violates subsection (d)(4)(A) may be subject to a statutory maximum term of imprisonment of not more than one year. *See* 18 U.S.C. § 2259(d)(4)(B).

Part E of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2259(d)(4) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). It would also amend the Commentary to §2X5.2 to reflect that 18 U.S.C. § 2259(d)(4) is referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 2260(a) the following new line reference:

"18 U.S.C. § 2259(d)(4) 2X5.2".

The Commentary to §2X5.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 1365(f), 1801; 34 U.S.C. § 12593; 49 U.S.C. § 31310." and inserting "18 U.S.C. §§ 1365(f), 1801, 2259(d)(4); 34 U.S.C. § 12593; 49 U.S.C. § 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).".

Issue for Comment:

1. In response to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Part E of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2259(d)(4) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for the new offense conduct at 18 U.S.C. § 2259(d)(4).

(F) Foundations for Evidence-Based Policymaking Act of 2018

Synopsis of Proposed Amendment: Part F of the proposed amendment responds to the Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435 (2019).

This Act includes the Confidential Information Protection and Statistical Efficiency Act of 2018, which added a new offense at 44 U.S.C. § 3572 (Confidential information protection). Section 3572 prohibits the unauthorized disclosure of information collected by an agency under a pledge of confidentiality and for exclusively statistical purposes, or the use of such information for other than statistical purposes. Any willful unauthorized disclosure of such information by an officer, employee, or agent of an agency acquiring information for exclusively statistical purposes is punishable by a statutory maximum term of imprisonment of five years. *See* 44 U.S.C. § 3572(f).

Part F of the proposed amendment would amend Appendix A (Statutory Index) to reference 44 U.S.C. § 3572 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Similar confidential information disclosure offenses, such as 18 U.S.C. § 1039 and 26 U.S.C. § 7213(a), are referenced to this guideline. Part F of the proposed amendment would also amend the Commentary to §2H3.1 to reflect that 44 U.S.C. § 3572 is referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 45 U.S.C. § 359(a) the following new line reference:

"44 U.S.C. § 3572 2H3.1".

The Commentary to §2H3.1 captioned "Statutory Provisions" is amended by striking "47 U.S.C. § 605" and inserting "44 U.S.C. § 3572; 47 U.S.C. § 605".

Issue for Comment:

1. In response to the Foundations for Evidence-Based Policymaking Act of 2018, Part F of the proposed amendment would reference 44 U.S.C. § 3572 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 3572's offense conduct. Specifically, should the Commission amend §2H3.1 to provide a higher or lower base offense level if 44 U.S.C. § 3572 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to §2H3.1 in response to section 3572? If so, what should that specific offense characteristic provide and why?

(G) National Defense Authorization Act for Fiscal Year 2020

Synopsis of Proposed Amendment: Part G of the proposed amendment responds to the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92 (2019).

The Act added a new statute at 10 U.S.C. § 2733a regarding medical malpractice claims by members of the uniformed services. The new statute authorizes the Secretary of Defense to allow, settle, and pay a claim against the United States for personal injury or death that occurred during the service of a member of the uniformed services and that was caused by the medical malpractice of a health care provider of the Department of Defense, if certain requirements are met. Under section 2733a(c)(2), the Department of Defense is not liable for the payment of attorney fees for a claim under the new statute. However, section 2733(g)(1) prohibits any attorney from charging, demanding, receiving, or collecting fees in excess of 20 percent of any claim paid pursuant to the new statute. Any attorney who charges, demands, receives, or collects a fee in excess of 20 percent faces a statutory maximum term of imprisonment of not more than one year. *See* 10 U.S.C. § 2733a(g)(2).

Part G of the proposed amendment would amend Appendix A (Statutory Index) to reference 10 U.S.C. § 2733a(g)(2) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). It would also amend the Commentary to §2X5.2 to reflect that 10 U.S.C. § 2733a(g)(2) is referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 12 U.S.C. § 631 the following new line reference:

"10 U.S.C. § 2733a(g)(2) 2X5.2".

The Commentary to §2X5.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 1365(f), 1801; 34 U.S.C. § 12593; 49 U.S.C. § 31310." and inserting "10 U.S.C. § 2733a(g)(2); 18 U.S.C. §§ 1365(f), 1801; 34 U.S.C. § 12593; 49 U.S.C. § 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).".

Issue for Comment:

1. In response to the National Defense Authorization Act for Fiscal Year 2020, Part G of the proposed amendment would amend Appendix A (Statutory Index) to reference 10 U.S.C. § 2733a(g)(2) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The Commission seeks comment on whether this proposed reference is appropriate and whether any

additional changes to the guidelines are required to account for the new offense conduct at 10 U.S.C. § 2733a(g)(2).

(H) Representative Payee Fraud Prevention Act of 2019

Synopsis of Proposed Amendment: Part H of the proposed amendment responds to the Representative Payee Fraud Prevention Act of 2019, Pub. L. 116–126 (2020).

The Act amended certain sections in chapters 83 (Retirement) and 84 (Federal Employees' Retirement System) of title 5 (Government Organization and Employees), United States, Code, relating to the Civil Services Retirement System ("CSRS") and the Federal Employees Retirement System ("FERS"). Under both retirement programs, annuities that are due to a minor or an individual mentally incompetent or under other legal disability may be made to the guardian or other fiduciary of such individual. *See* 5 U.S.C. §§ 8345(e), 8466(c).

The Act added two identical new offenses at 5 U.S.C. §§ 8345a and 8466a, regarding embezzlement or conversion of payments due to a minor or an individual mentally incompetent or under other legal disability under CSRS and FERS. Both offenses apply to a "representative payee." The Act added similar provisions to both chapters 83 and 84 of title 5 defining the term as "a person (including an organization) designated under [section 8345(e)(1) or section 8466(c)(1)] to receive payments on behalf of a minor or an

individual mentally incompetent or under other legal disability." 5 U.S.C. §§ 8331(33), 8401(39).

The new offense at 5 U.S.C. § 8345a prohibits a representative payee from embezzling or in any manner converting all or any part of the amounts received from payments under the CSRS retirement program for a use other than for the use and benefit of the minor or individual on whose behalf the payments were received. The new offense at 5 U.S.C. § 8466a prohibits a representative payee from engaging in the same conduct prohibited under section 8345a for purposes of payments received under the FERS retirement program. Offenses under both sections 8345a and 8466a are punishable by a statutory maximum term of imprisonment of five years.

Part H of the proposed amendment would amend Appendix A (Statutory Index) to reference 5 U.S.C. §§ 8345a and 8466a to §2B1.1 (Theft, Property Destruction, and Fraud). Similar financial fraud and embezzlement offenses relating to social security, veterans' benefits, and welfare benefit and pension plans (such as 18 U.S.C. § 664, 38 U.S.C. § 6102, and 42 U.S.C. §§ 408(a)(5), 1011(a)(4) and 1383a(a)(4)) are referenced to §2B1.1. Part H of the proposed amendment would also amend the Commentary to §2B1.1 to reflect that 5 U.S.C. §§ 8345a and 8466a are referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 7 U.S.C. § 6 the following new line references:

"5 U.S.C. § 8345a	2B1.1
5 U.S.C. § 8466a	2B1.1".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by striking "7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23" and inserting "5 U.S.C. §§ 8345a, 8466a; 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23".

Issue for Comment:

1. In response to the Representative Payee Fraud Prevention Act of 2019, Part H of the proposed amendment would reference 5 U.S.C. §§ 8345a and 8466a to §2B1.1 (Theft, Property Destruction, and Fraud). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for the offense conduct covered by sections 8345a and 8466a. Specifically, should the Commission amend §2B1.1 to provide a higher or lower base offense level if 5 U.S.C. § 8345a or § 8466a is the offense of conviction? If so, what should that base offense level be for each of these sections and why? Should the Commission add a specific offense

characteristic to §2B1.1 in response to 5 U.S.C. § 8345a or § 8466a? If so, what should that specific offense characteristic provide and why?

(I) Stop Student Debt Relief Scams Act of 2019

Synopsis of Proposed Amendment: Part I of the proposed amendment responds to the Stop Student Debt Relief Scams Act of 2019, Pub. L. 116–251 (2020).

The Act created a new offense at 20 U.S.C. § 1097(e). Current subsections (a) through (d) of section 1097 provide criminal penalties for crimes relating to student assistance programs, including embezzlement, theft, fraud, forgery, and making unlawful payments to a lender to acquire a loan. New subsection (e) of section 1097 prohibits knowingly using an access device (as defined in 18 U.S.C. § 1029(e)(1)) issued to another person or obtained by fraud or false statement to access information technology systems of the Department of Education for purposes of obtaining commercial advantage or private financial gain, or in furtherance of any criminal or tortious act. The statutory maximum term of imprisonment for the offense is five years.

Part I of the proposed amendment would amend Appendix A (Statutory Index) to reference 20 U.S.C. § 1097(e) to §2B1.1 (Theft, Property Destruction, and Fraud). Section 1097(a), (b), and (d) offenses (theft, embezzlement, and fraud) are currently referenced to §2B1.1, while section 1097(c) offenses (unlawful payments to acquire a loan) are referenced to §2B4.1 (Bribery in Procurement of Bank Loan and Other

Commercial Bribery). Part I of the proposed amendment would also amend the Commentary to §2B1.1 to reflect that 20 U.S.C. § 1097(a), (b), (d), and (e) are referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 21 U.S.C. § 101 the following new line reference:

"20 U.S.C. § 1097(e) 2B1.1".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by striking "19 U.S.C. § 2401f" and inserting "19 U.S.C. § 2401f; 20 U.S.C. § 1097(a), (b), (d), (e)".

Issue for Comment:

1. In response to the Stop Student Debt Relief Scams Act of 2019, Part I of the proposed amendment would reference 20 U.S.C. § 1097(e) to §2B1.1 (Theft, Property Destruction, and Fraud). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 1097(e) offenses. Specifically,

should the Commission amend §2B1.1 to provide a higher or lower base offense level if 20 U.S.C. § 1097(e) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to §2B1.1 in response to 20 U.S.C. § 1097(e)? If so, what should that specific offense characteristic provide and why?

(J) Protecting Lawful Streaming Act of 2020

Synopsis of Proposed Amendment: Part J responds to title II of Division Q of the Consolidated Appropriations Act, 2021, referred to as the Protecting Lawful Streaming Act of 2020, Pub. L. 116–260 (2020).

The Act created a new commercial streaming piracy offense at 18 U.S.C. § 2319C (Illicit digital transmission services). Section 2319C(b) makes it unlawful to willfully, and for purposes of commercial advantage or private financial gain, offer or provide to the public a digital transmission service that (1) is primarily designed or provided for the purpose of publicly performing works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law; (2) has no commercially significant purpose or use other than to publicly perform works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law; or (3) is intentionally marketed to promote its use in publicly performing works protected under copyright law by means of a digital transmission

without the authority of the copyright owner or the law. Section 2319C(a) provides definitions for some of the terms used in the statute.

A violation of section 2319C has a statutory maximum term of imprisonment of three years. 18 U.S.C. § 2319C(c)(1). However, the maximum penalty increases to five years if (1) the offense was committed in connection with one or more works being prepared for commercial public performance; and (2) the offender knew or should have known that the work was being prepared for commercial public performance. *Id*. § 2319C(c)(2). A ten-year maximum penalty applies if the offense is a second or subsequent offense under 18 U.S.C. § 2319C or § 2319(a). *Id*. § 2319C(c)(3).

Part J of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2319C to §2B5.3 (Criminal Infringement of Copyright or Trademark). Similar offenses, such as 17 U.S.C. § 506 (prohibiting infringing a copyright of a work being prepared for commercial distribution) and 18 U.S.C. §§ 2319A and 2319B (prohibiting the unauthorized recording and trafficking of live musical performances for commercial advantage or private financial gain, and the unauthorized recording of motion pictures in movie theaters), are referenced to §2B5.3.

Issues for comment are also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 2320 the following new line reference:

"18 U.S.C. § 2319C 2B5.3".

Issues for Comment

1. In response to the Protecting Lawful Streaming Act of 2020, Part J of the proposed amendment would reference 18 U.S.C. § 2319C to §2B5.3 (Criminal Infringement of Copyright or Trademark). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 2319C offenses. Specifically, should the Commission amend §2B5.3 to provide a higher or lower base offense level if 18 U.S.C. § 2319C is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to §2B5.3 in response to 18 U.S.C. § 2319C? If so, what should that specific offense characteristic provide and why?

   The new statute at 18 U.S.C. § 2319C provides enhanced penalties if (1) the offense was committed in connection with one or more works being prepared for commercial public performance, and the offender knew or should have known

that the work was being prepared for commercial public performance; or (2) if the offense is a second or subsequent offense under 18 U.S.C. § 2319C or § 2319(a). Should the Commission amend §2B5.3 to address these enhanced penalties? If so, how should the Commission address them and why?

2. Currently, §2B5.3 includes a specific offense characteristic at subsection (b)(2) providing a 2-level enhancement "[i]f the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution." The new offense at 18 U.S.C. § 2319C mainly addresses the streaming (*i.e.*, offering or providing "to the public a digital transmission service") of works "being prepared for commercial public performance." The Commission seeks comment on whether current §2B5.3(b)(2) adequately accounts for section 2319C's offense conduct. If not, what revisions to §2B5.3(b)(2) would be appropriate to account for this conduct? Should the Commission instead revise §2B5.3 in general provide one or more specific offense characteristics or departure provisions to better account for this conduct? If so, what should the Commission provide?

(K) William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

Synopsis of Proposed Amendment: Part K of the proposed amendment responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021,

Pub. L. 116–283 (2021). The Act created several new offenses at 31 U.S.C. §§ 5335 and 5336.

The Act included two regulatory offenses in a new section 5335 of title 31, United States Code. Section 5335(b) prohibits knowingly concealing, falsifying, or misrepresenting (or attempting to do so) from or to a financial institution, a material fact concerning the ownership or control of assets involved in a monetary transaction if (1) the person or entity who owns or controls the assets is a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure; and (2) the aggregate value of the assets involved in one or more monetary transactions is not less than $1,000,000. Section 5335(c) prohibits knowingly concealing, falsifying, or misrepresenting (or attempting to do so) from or to a financial institution, a material fact concerning the source of funds in a monetary transaction that (1) involves an entity found to be a primary money laundering concern under 31 U.S.C. § 5318A or applicable regulations; and (2) violates the prohibitions or conditions prescribed under 31 U.S.C. § 5318A(b)(5) or applicable regulations. Both new offenses cover conspiracies to commit the prohibited conduct and have a statutory maximum term of imprisonment of ten years. *See* 31 U.S.C. § 5335(d).

The Act also added a new section 5336 to title 31, United States Code, concerning reporting requirements of beneficial ownership of certain entities. Specifically, section 5336(b) requires certain United States and foreign corporations, limited liability companies, and similar entities, to file annual reports with the Department of the

Treasury's Financial Crimes Enforcement Network ("FinCEN"). The annual reports must identify an entity's beneficial owners (*i.e.*, those exercising substantial control or who own or control no less than 25% of the ownership interests), including names, dates of birth, street address, and unique identification numbers (such as passport numbers, driver's license numbers, or FinCEN identifiers). Section 5336(c) provides certain conditions under which FinCEN may disclose the beneficial ownership information to certain requesting agencies, including federal agencies, state, local and tribal law enforcement agencies, federal agencies on behalf of law enforcement, or a prosecutor or judge of a foreign country.

Section 5336 includes three new offenses relating to the provisions described above. First, section 5336(h)(1) prohibits (1) willfully providing, or attempting to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN; or (2) willfully failing to report complete or updated beneficial ownership information to FinCEN. The statutory maximum term of imprisonment for this offense is two years. Second, section 5336(c)(4) prohibits any employee or officer of a requesting agency from violating the protocols established by the regulations promulgated by the Secretary of the Treasury under section 5336, including unauthorized disclosure or use of the beneficial ownership information obtained from FinCEN. Third, section 5336(h)(2) prohibits the knowing disclosure or knowing use, without authorization, of beneficial ownership information obtained through a report submitted to FinCEN or a disclosure made by FinCEN. Both sections 5336(c)(4) and 5336(h)(2) offenses face a statutory maximum term of

imprisonment of five years, with an enhanced penalty of up to ten years if the offense was committed while violating another law or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period.

Part K of the proposed amendment would amend Appendix A (Statutory Index) to reference 31 U.S.C. §§ 5335 and 5336 to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). Similar offenses, such as offenses under 31 U.S.C. §§ 5313 and 5318(g)(2), are referenced to §2S1.3. Part K of the proposed amendment would also amend the Commentary to §2S1.3 to reflect that 31 U.S.C. §§ 5335 and 5336 are referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 31 U.S.C. § 5363 the following new line references:

"31 U.S.C. § 5335	2S1.3
31 U.S.C. § 5336	2S1.3".

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by striking "5332" and inserting "5332, 5335, 5336".

Issue for Comment

1. In response to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Part K of the proposed amendment would reference 31 U.S.C. §§ 5335 and 5336 to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for sections 5335 and 5336 offenses. Specifically, should the Commission amend §2S1.3 to provide a higher or lower base offense level if 31 U.S.C. § 5335 or § 5336 is the offense of conviction? If so, what should that base offense level be for each of these sections and why? Should the Commission add a specific offense characteristic to §2S1.3 in response to 31 U.S.C. §§ 5335 and 5336? If so, what should that specific offense characteristic provide and why?

   The new statute provides an enhanced penalty for offenses under 31 U.S.C. §§ 5336(c)(4) and 5336(h)(2) offenses if the offense was committed while violating another law or as part of a pattern of any illegal activity involving more

than $100,000 in a 12-month period. Should the Commission amend §2S1.3 to address this enhanced penalty? If so, how should the Commission address it and why?

6. CAREER OFFENDER

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's multiyear work on §4B1.2 (Definitions of Terms Used in Section 4B1.1), including possible amendments to (A) provide an alternative approach to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense"; and (B) address various application issues, including the meaning of "robbery" and "extortion," and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022). The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend §4B1.2 to address recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of §4B1.1 (Career Offender). It eliminates the categorical approach from the guidelines by defining "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an offense. Part A would also make conforming changes to the guidelines that use the terms "crime of violence"

and "controlled substance offense" and define these terms by making specific reference to §4B1.2. Issues for comment are also provided.

Part B of the proposed amendment would address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a "crime of violence" under §4B1.2, as amended in 2016. It would amend §4B1.2 to add a definition of "robbery" that mirrors the Hobbs Act robbery definition at 18 U.S.C. § 1951(b)(1). Part B of the proposed amendment also brackets a provision defining the phrase "actual or threatened force," for purposes of the new "robbery" definition, as "force sufficient to overcome a victim's resistance," informed by the Supreme Court's holding in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). Finally, Part B of the proposed amendment would make conforming changes to the definition of "crime of violence" in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense. Issues for comment are also provided.

Part C of the proposed amendment would amend §4B1.2 to address two circuit conflicts regarding the commentary provision stating that the terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a "crime of violence" and a "controlled substance offense." Two options are presented. Issues for comment are also provided.

Part D of the proposed amendment would amend the definition of "controlled substance offense" in §4B1.2(b) to include offenses involving an offer to sell a controlled substance

and offenses described in 46 U.S.C. § 70503(a) and § 70506(b). An issue for comment is also provided.

(A) Listed Guidelines Approach

Synopsis of Proposed Amendment: Part A of the proposed amendment addresses recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of §4B1.1 (Career Offender). It eliminates the categorical approach from the guidelines by defining "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an offense.

The Categorical Approach as Developed by Supreme Court Jurisprudence

A number of statutes and guidelines provide enhanced penalties for defendants convicted of offenses that meet the definition of a particular category of crimes. Courts typically determine whether a conviction fits within the definition of a particular category of crimes through the application of the "categorical approach" and "modified categorical approach," as set forth by Supreme Court jurisprudence. The categorical approach requires courts to look only to the statute of conviction, rather than the particular facts underlying the conviction, to determine whether the offense meets the definition of a particular category of crimes. In applying the modified categorical approach, courts are allowed to look to certain additional sources of information, now commonly referred to

as the "*Shepard* documents," to determine the elements of the offense of conviction. *See* Taylor v. United States, 495 U.S. 575 (1990) (holding that, under the "categorical approach," courts must compare the elements of the offense as described in the statute of conviction to the elements of the applicable definition of a particular category of crimes to determine if such offense criminalizes the same or a narrower range of conduct than the definition captures in order to serve as a predicate offense); Shepard v. United States, 544 U.S. 13 (2005) (holding that courts may use a "modified categorical approach" in cases where the statute of conviction is "overbroad," that is, the statute defines both conduct that fits within the applicable definition and conduct that does not). However, the Supreme Court later held that a court may only apply the modified categorical approach if the court first conducts a threshold inquiry to determine whether a statute of conviction is "divisible." *See* Descamps v. United States, 570 U.S. 254 (2013); Mathis v. United States, 579 U.S. 500 (2016). Thus, under *Descamps* and *Mathis*, if a statute of conviction is "indivisible" and criminalizes a broader range of conduct than the applicable definition, the entire statute is categorically disqualified from serving as a predicate offense, even if a defendant was convicted under a part of the statute that falls within the definition.

Application of the Categorical Approach in the Guidelines

Even though Supreme Court jurisprudence on this subject pertains only to statutory provisions (*e.g.*, 18 U.S.C. § 924(e)), courts have applied the categorical approach and the modified categorical approach to guideline provisions. For example, courts have used

these approaches to determine if a conviction is a "crime of violence" or a "controlled substance offense" for purposes of applying the career offender guideline at §4B1.1. Additionally, several other guidelines, such as §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), also rely upon the career offender guideline's definitions of "crime of violence" and "controlled substance offense." Therefore, courts have also used the categorical approach for purposes of these guidelines.

Commission data indicates that of the 53,779 offenders sentenced in fiscal year 2021, 1,246 offenders (2.3%) were sentenced under the career offender guideline. An additional 3,239 offenders (6.0% of the offenders sentenced in fiscal year 2021) sentenced under §2K2.1 were assigned to a base offense level that requires a prior conviction for a "crime of violence" or "controlled substance offense."

While representing a relatively small portion of the federal caseload each year, the categorical approach continues to result in substantial litigation. Since 1990, the Supreme Court has issued dozens of opinions that have shaped the categorical approach and modified categorical approach. The Commission identified over 3,300 written opinions over the past five years in which federal courts have invoked, discussed, or applied the categorical approach. More than half of those opinions focused on categorical approach issues raised in applying guideline provisions while the remainder dealt with statutory provisions (*e.g.*, 18 U.S.C. § 924(c)).

General Criticism of the Categorical Approach as Developed by Supreme Court Jurisprudence

The Commission has received significant comment over the years regarding the complexity and limitations of the categorical approach, as developed by Supreme Court jurisprudence. Specifically, courts and stakeholders have criticized the requirement of a threshold inquiry of whether a statute of conviction is divisible or indivisible as resulting in an overly complex and time-consuming analysis that often leads to counterintuitive and arbitrary results. For example, dissenting justices in *Descamps* and *Mathis* expressed concern that the "divisibility" inquiry is confusing and "will cause serious practical problems" (*e.g.*, *Descamps*, 570 U.S. at 284 (Alito, J., dissenting); *Mathis*, 579 U.S. at 523–33 (Breyer, J., joined by Ginsberg, J., dissenting)), and noted that "lower court judges[,] who must regularly grapple with the modified categorical approach, struggle[] to understand *Descamps*" (*Mathis*, 579 U.S. at 538 (Alito, J., dissenting)).

In the aftermath of *Descamps* and *Mathis*, commenters have stressed that the categorical approach has become increasingly difficult to apply, while simultaneously producing results less reflective of the types of conduct §4B1.1 was intended to capture. *See, e.g.*, Public Comment on Proposed Amendments (Feb. 2019), *at* https://www.ussc.gov/policymaking/public-comment/public-comment-february-19-2019. Courts have further criticized the categorical approach as a "legal fiction," in which an offense that a defendant commits violently is deemed to be a non-violent offense because other defendants at other times could have been convicted of violating the same statute

without violence, often leading to "odd" and "arbitrary" results. *See*, *e.g.*, United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017); United States v. McCollum, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id*. (Wilkinson, J., dissenting).

Proposed Approach for §4B1.2

Part A of the proposed amendment eliminates the categorical approach from the guidelines by defining "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an offense. The list of Chapter Two guidelines included in the definition of "crime of violence" is informed by the guidelines that the Commission has identified as covering "violent instant offenses" for purposes of the study of recidivism of federal offenders. *See* Courtney R. Semisch, Cassandra Syckes & Landyn Rookard, U.S. Sent'g Comm'n, Recidivism of Federal Violent Offenders Released in 2010 (2022), https://www.ussc.gov/research/research-reports/recidivism-federal-violent-offenders-released-2010. The Chapter Two guidelines listed in the definition of "controlled substance offense" are the guidelines that cover the offenses expressly referenced in the career offender directive at 28 U.S.C. § 994(h).

The focus of inquiry set forth in the proposed approach is whether the defendant was convicted of a federal offense for which the "applicable Chapter Two guideline" is listed in §4B1.2 or a state offense for which the "most appropriate" offense guideline would have been one of the Chapter Two guidelines listed in §4B1.2 had the defendant been sentenced under the guideline in federal court. The court would make this determination

based on: (1) the elements, and any means of committing such an element, that formed the basis of the defendant's conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means.

The proposed approach is intended to remove the complexity inherent in determining whether a statute of conviction is "divisible" or "indivisible" based on a threshold "elements-means" inquiry. Thus, the court would not be required to determine whether an indivisible statute criminalizes conduct that does not meet the applicable definition; rather, the court would be required to determine only whether the Chapter Two guideline that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted is listed in §4B1.2. The proposed approach would also expand the use of additional sources of information by permitting courts to use the *Shepard* documents when necessary to make the career offender determination.

Conforming Changes to Other Guidelines

Finally, Part A of the proposed amendment would make conforming changes to the guidelines that use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2. Accordingly, the proposed amendment would amend the Commentary to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or

Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), §4A1.2 (Definitions and Instructions for Computing Criminal History), §4B1.4 (Armed Career Criminal), and §7B1.1 (Classification of Violations (Policy Statement)).

Issues for comment are also provided.

Proposed Amendment:

Section 4B1.2(a) is amended by striking the following:

"The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).",

and inserting the following:

"*Crime of Violence*.—

(1) *In General*.—The term 'crime of violence' means any of the following offenses:

(A) Any offense under federal law, punishable by imprisonment for a term exceeding one year—

(i) for which the applicable Chapter Two guideline (as determined under the provisions of §1B1.2 (Applicable Guidelines)); or

(ii) to which §2X1.1 (Attempt, Solicitation, or Conspiracy) or §2X2.1 (Aiding and Abetting) applies and the appropriate guideline for the offense the defendant aided or abetted, or conspired, solicited, or attempted to commit;

is one of the guidelines listed in paragraph (2).

(B) Any offense under state law (or the offense of aiding or abetting, or conspiring, soliciting, or attempting to commit any such offense), punishable by imprisonment for a term exceeding one year, for which the most appropriate guideline would have been one of the Chapter Two

guidelines listed in paragraph (2) had the defendant been sentenced under the guidelines in federal court (as determined under subsection (c)).

(2) *Guidelines Listed*.—For purposes of the 'crime of violence' definition, use the following Chapter Two guidelines:

- *Homicide*.—§§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.5 (Conspiracy or Solicitation to Commit Murder);
- *Assault*.—§§2A2.1 (Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.4 (Obstructing or Impeding Officers);
- *Criminal Sexual Abuse*.—§§2A3.1 (Sexual Abuse), 2A3.3 (Sexual Abuse of a Ward), 2A3.4 (Abusive Sexual Contact);
- *Kidnapping, Abduction, and Unlawful Restraint*.—§2A4.1 (Kidnapping, Abduction, Unlawful Restraint);
- *Air Piracy and Offenses Against Mass Transportation Systems*.—§§2A5.1 (Aircraft Piracy), 2A5.2 (Interference with Flight or Cabin Crew, or Mass Transportation);
- *Threatening or Harassing Communications, Hoaxes, Stalking, and Domestic Violence*.—§§2A6.1 (Threatening or Harassing Communications, Hoaxes, or False Liens) (only if the offense involve a threat to injure a person or property), 2A6.2 (Stalking or Domestic Violence);

- *Robbery and Extortion*.—§§2B3.1 (Robbery), 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage);
- *Racketeering*.—§§2E1.1 (Unlawful Conduct Relating to Racketeering), 2E1.2 (Travel or Transportation Aiding Racketeering), 2E1.3 (Violent Crimes Aiding Racketeering), 2E1.4 (Using Certain Facilities to Commit Murder-For-Hire);
- *Promoting a Commercial Sex Act or Prohibited Sexual Conduct with Minors*.—§2G1.3 (Promoting Commercial Sex Acts or Prohibited Sexual Conduct with Minors; Using Certain Facilities to Transport Information about Minors);
- *Sexual Exploitation of Minors*.—§§2G2.1 (Sexual Exploitation of Minors; Production of Child Pornography), 2G2.3 (Selling or Buying Children for Pornography Production), 2G2.6 (Child Exploitation Enterprises);
- *Peonage and Slavery*.—§2H4.1 (Peonage, Slavery, Child Soldiers);
- *Explosives and Arson*.—§§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials), 2K1.4 (Arson);
- *Firearms*.—§§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) (only if the offense involved possession of a firearm that is described in 26 U.S.C. § 5845(a)), 2K2.4 (Using Certain Firearms, Ammunition, or Explosives During or in Relation to Certain Crimes);
- *Material Support to Terrorists*.—§2M5.3 (Providing Material Support to Certain Terrorists or for Terrorist Purposes);

- *Nuclear, Biological, and Chemical Weapons and Materials*.—§2M6.1 (Unlawful Activity Involving Nuclear, Biological, or Chemical Weapons or Materials, or Other Weapons of Mass Destruction);
- *Use of Minors in Crimes of Violence*.—§2X6.1 (Using Minors in Crimes of Violence).

(3) *Exclusion*.—For purposes of this guideline, a conviction under federal or state law based upon a finding of recklessness or negligence is not a 'crime of violence.' ".

Section 4B1.2(b) is amended by striking the following:

"The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing 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, distribute, or dispense.",

and inserting the following:

Controlled Substance Offense.—

(1) *In General*.—The term 'controlled substance offense' means any of the following offenses:

(A) Any offense under federal law, punishable by imprisonment for a term exceeding one year—

(i) for which the applicable Chapter Two guideline (as determined under the provisions of §1B1.2 (Applicable Guidelines)); or

(ii) to which §2X1.1 (Attempt, Solicitation, or Conspiracy) or §2X2.1 (Aiding and Abetting) applies and the appropriate guideline for the offense the defendant aided or abetted, or conspired, solicited, or attempted to commit;

is one of the guidelines listed in paragraph (2).

(B) Any offense under state law (or the offense of aiding or abetting, or conspiring, soliciting, or attempting to commit any such offense), punishable by imprisonment for a term exceeding one year, for which the most appropriate guideline would have been one of the Chapter Two guidelines listed in paragraph (2) had the defendant been sentenced under the guidelines in federal court (as determined under subsection (c)).

(C) Any offense described in chapter 705 of title 46, United States Code.

(2) *Guidelines List*ed.—For purposes of the 'controlled substance offense' definition, use the following Chapter Two guidelines:

- §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking); 2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect Unlawful Production of Drugs); 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing Listed Chemicals)**[**;**]**
- **[**§§2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Certain Individuals); 2D1.6 (Use of Communication Facility in Committing Drug Offense), if the appropriate guideline for the underlying offense is also listed in this paragraph; 2D1.8 (Renting or Managing Drug Establishments); 2D1.10 (Life Endangerment While Manufacturing Drugs); 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Items)**]**.

(3) *Exclusion*.—For purposes of this guideline, a conviction under federal or state law based upon a finding of recklessness or negligence is not a 'controlled substance offense.' ".

Section 4B1.2 is amended—

by redesignating subsection (c) as subsection (d);

by adding the following new subsection (c):

"(c) *Determination of Whether a State Offense Is a 'Crime of Violence' or a 'Controlled Substance Offense'*.—For purposes of determining whether a state offense is a 'crime of violence' or a 'controlled substance offense' under subsection (a)(1)(B) or (b)(1)(B), the 'most appropriate guideline' is the Chapter Two guideline that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted. The court shall make this determination based on: (1) the elements, and any means of committing such an element, that formed the basis of the defendant's conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means.";

and in subsection (d) (as so redesignated) by inserting at the beginning the following new heading "*Two Prior Felony Convictions*.—".

The Commentary to §4B1.2 captioned "Application Notes" is amended—

in Note 1 by striking the following:

"*Definitions*.—For purposes of this guideline—

‘Crime of violence’ and ‘controlled substance offense’ include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

‘Forcible sex offense’ includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

‘Extortion’ is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a ‘controlled substance offense.’

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a ‘controlled substance offense.’

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a ‘controlled substance offense’ if the offense of conviction established that the underlying offense (the offense facilitated) was a ‘controlled substance offense.’

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a 'controlled substance offense.'

A violation of 18 U.S.C. § 924(c) or § 929(a) is a 'crime of violence' or a 'controlled substance offense' if the offense of conviction established that the underlying offense was a 'crime of violence' or a 'controlled substance offense'. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).",

and inserting the following:

" *'Prior Felony Conviction' Defined*.—'Prior felony conviction,' for purposes of this guideline, means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).";

in Note 2 by striking the following:

"*Offense of Conviction as Focus of Inquiry*.—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.",

and inserting the following:

"*Determination of Whether a State Offense Is a 'Crime of Violence' or a 'Controlled Substance Offense.'*—In determining whether a state offense is a 'crime of violence' or a 'controlled substance offense' under subsection (a)(1)(B) or (b)(1)(B), the court may only consider the statute of conviction and the following sources of information:

(A) The judgment of conviction.

(B) The charging document.

(C) The jury instructions.

(D) The judge's formal rulings of law or findings of fact.

(E) The plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

(F) Any explicit factual finding by the trial judge to which the defendant assented.

(G) Any comparable judicial record of the sources described in paragraphs (A) through (F).

The fact that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the Chapter Two guidelines listed in subsection (a)(2) or (b)(2) is not determinative.";

in Note 3 by striking "The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1." and inserting the following:

"The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1. Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2(a)(2).";

and by striking Note 4 as follows:

"*Upward Departure for Burglary Involving Violence*.—There may be cases in which a burglary involves violence, but does not qualify as a 'crime of violence' as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a 'crime of violence.' In such a case, an upward departure may be appropriate.".

The Commentary to §4B1.2 is amended by adding at the end the following:

"*Background*: Section 4B1.2 defines the terms 'crime of violence,' 'controlled substance offense,' and 'two prior felony convictions' for purposes of §4B1.1 (Career Offender). Prior to **[**2023**]**, to determine if an offense met the definition of 'crime of violence' or 'controlled substance offense' in §4B1.2, courts typically used the categorical approach and the modified categorical approach, as set forth in Supreme Court jurisprudence. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 579 U.S. 500 (2016). These Supreme Court cases, however, involved statutory provisions (*e.g.*, 18 U.S.C. § 924(e)) rather than guideline provisions.

In **[**2023**]**, the Commission amended §4B1.2 to set forth an approach for determining whether an offense is a 'crime of violence' or a 'controlled substance offense' that does not require the application of the categorical approach and modified categorical approach established by Supreme Court jurisprudence. *See* USSG App. C, Amendment **[**___**]** (effective **[**Date**]**). The definitions of 'crime of violence' and 'controlled substance offense,' rather than describing offenses or elements of an offense, are based upon a list of guidelines. The focus of inquiry is whether the defendant was convicted of a federal offense for which the applicable Chapter Two guideline is one of the listed guidelines, or a state offense for which the 'most appropriate' Chapter Two guideline would have been one of the listed guidelines had the defendant been sentenced in federal court under the guidelines. The approach set forth by this guideline requires the court to consider not only the statute of conviction, but also the offense conduct cited in the count of

conviction, or a fact admitted or confirmed by the defendant, that establishes any of the elements, and any means of committing such an element, that formed the basis of the defendant's conviction. The court is also permitted to use certain additional sources of information, as appropriate, while conducting this inquiry.".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 2—

in the paragraph that begins " 'Controlled substance offense' has the meaning" by striking "has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "means a 'controlled substance offense' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)";

and in the paragraph that begins " 'Crime of violence' has the meaning" by striking "has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2" and inserting "means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

The Commentary to §2K2.1 captioned "Application Notes" is amended—

in Note 1—

in the paragraph that begins " 'Controlled substance offense' has the meaning" by striking "has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "means a 'controlled substance offense' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)";

and in the paragraph that begins " 'Crime of violence' has the meaning" by striking "has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2" and inserting "means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)";

and in Note 13(B) by striking "have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "mean a 'crime of violence' and a 'controlled substance offense' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

The Commentary to §2S1.1 captioned "Application Notes" is amended in Note 1, in the paragraph that begins " 'Crime of violence' has the meaning" by striking "has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

The Commentary to §4A1.1 captioned "Application Notes" is amended in Note 5 by striking "has the meaning given that term in §4B1.2(a)" and inserting "means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

Section 4A1.2(p) is amended by striking "the definition of 'crime of violence' is that set forth in §4B1.2(a)" and inserting " 'crime of violence' means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

Section 4B1.4 is amended—

in subsection (b)(3)(A) by striking "in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b)" and inserting "in connection with either a crime of violence or a controlled substance offense, as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)";

and in subsection (c)(2) by striking "in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b)" and inserting "in connection with either a crime of violence or a controlled substance offense, as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

The Commentary to §5K2.17 captioned "Application Note" is amended in Note 1 by striking "are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "mean a 'crime of violence' and a 'controlled substance offense' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

The Commentary to §7B1.1 captioned "Application Notes" is amended—

in Note 2 by striking "is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2" and inserting "means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)";

and in Note 3 by striking "is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2" and inserting "means a 'controlled substance offense' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

Issues for Comment:

1. Part A of the proposed amendment would allow courts to look to the documents expressly approved in *Taylor v. United States*, 495 U.S. 575 (1990), and

Shepard v. United States, 544 U.S. 13 (2005), in determining whether a conviction is a "crime of violence" or a "controlled substance offense."

The Commission seeks comment on whether additional or different guidance should be provided. For example, should the Commission provide a specific set of factors to assess the reliability of a source of information, such as whether the document came out of the adversarial process, was accepted by both parties, or was made by an impartial third party? Should the Commission list specific sources or types of sources that courts may consider, in addition to the sources expressly approved in *Taylor* and *Shepard* (*i.e.*, the *Shepard* documents)? Are there any documents or types of information that should be expressly excluded?

2. The Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States) contains definitions for the terms "crime of violence" and "drug trafficking offense" that closely track the definitions of "crime of violence" and "controlled substance offense," respectively, in §4B1.2(b). *See* USSG §2L1.2, comment. (n.2).

If the Commission were to promulgate Part A of the proposed amendment, should the Commission also amend the Commentary to §2L1.2 to mirror the proposed approach for §4B1.2?

(B) Meaning of "Robbery"

Synopsis of Proposed Amendment: In 2016, the Commission amended §4B1.2 (Definitions of Terms Used in Section 4B1.1) to, among other things, delete the "residual clause" and revise the "enumerated offenses clause" by moving enumerated offenses that were previously listed in the commentary to the guideline itself. *See* USSG, App. C, Amendment 798 (effective Aug. 1, 2016). The "enumerated offenses clause" identifies specific offenses that qualify as crimes of violence. Although the guideline relies on existing case law for purposes of defining most enumerated offenses, the amendment added to the Commentary to §4B1.2 definitions for two of the enumerated offenses: "forcible sex offense" and "extortion."

"Extortion" is defined as "obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury." USSG §4B1.2, comment. (n.1). Under case law existing at the time of the amendment, courts generally defined extortion as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats," based on the Supreme Court's holding in *United States v. Nardello*, 393 U.S. 286, 290 (1969) (defining "extortion" for purposes of 18 U.S.C. § 1952). However, consistent with the Commission's goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrowed the generic definition of extortion by limiting it to offenses having an element of force or an element of fear or threats "of physical injury," as opposed to non-violent threats such as injury to reputation.

The Department of Justice has expressed concern that courts have held that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a "crime of violence" under the guideline, as amended in 2016, because the statute of conviction does not fit either the generic definition of "robbery" or the new guideline definition of "extortion." *See, e.g.,* Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf. The Hobbs Act defines the term "robbery" as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person *or property* . . . . " 18 U.S.C. § 1951(b)(1) (emphasis added). Following the 2016 amendment, every circuit court addressing the issue has concluded that Hobbs Act robbery does not fall within §4B1.2's narrow definition of "crime of violence." *See* United States v. Chappelle, 41 F.4th 102 (2d Cir. 2022); United States v. Scott, 14 F.4th 190 (3d Cir. 2021); United States v. Prigan, 8 F.4th 1115 (9th Cir. 2021); United States v. Green, 996 F.3d 176 (4th Cir. 2021); Bridges v. United States, 991 F.3d 793 (7th Cir. 2021); United States v. Eason, 953 F.3d 1184 (11th Cir. 2020); United States v. Camp, 903 F.3d 594 (6th Cir. 2018); United States v. Edling, 895 F.3d 1153 (9th Cir. 2018); United States v. O'Connor, 874 F.3d 1147 (10th Cir. 2017). At least two circuits—the Ninth and Tenth Circuits—have found ambiguity as to whether the guideline definition of extortion includes injury to property, and (under the rule of lenity) both circuits have interpreted the new definition as excluding prior convictions where the statute encompasses injury to property offenses,

such as Hobbs Act robbery. *See, e.g.*, United States v. O'Connor, 874 F.3d 1147 (10th Cir. 2017) (Hobbs Act robbery); United States v. Edling, 895 F.3d 1153 (9th Cir. 2018) (Nevada robbery).

Part B of the proposed amendment would amend §4B1.2 to address this issue. First, it would move the definitions of enumerated offenses (*i.e.*, "forcible sex offense" and "extortion") and "prior felony conviction" from the Commentary to §4B1.2 to a new subsection (d) in the guideline itself. Second, Part B of the proposed amendment would add to new subsection (d) a definition of "robbery" that mirrors the "robbery" definition at 18 U.S.C. § 1951(b)(1). Specifically, it would provide that "robbery" is "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." Finally, Part B of the proposed amendment brackets the possibility of defining the phrase "actual or threatened use of force," for purposes of the "robbery" definition, as "force that is sufficient to overcome a victim's resistance." This definition is informed by the Supreme Court's holding in *Stokeling v. United States*, 139 S. Ct. 544 (2019).

In addition, Part B of the proposed amendment sets forth conforming changes to the definition of "crime of violence" in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense.

Issues for comment are also provided.

Proposed Amendment:

Section 4B1.2(a) is amended by inserting at the beginning the following new heading "*Crime of Violence*.—".

Section 4B1.2(b) is amended by inserting at the beginning the following new heading "*Controlled Substance Offense*.—".

Section 4B1.2(c) is amended by inserting at the beginning the following new heading "*Two Prior Felony Convictions*.—".

Section 4B1.2 is amended by adding at the end the following new subsection (d):

"(d) *Additional Definitions*.—

(1) *Forcible Sex Offense*.—'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in

18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(2) *Extortion*.—'Extortion' is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(3) *Robbery*.—'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. **[**The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.**]**

(4) *Prior Felony Conviction*.—'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed

prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1—

in the heading by striking "*Definitions*.—" and inserting "*Further Considerations Regarding 'Crimes of Violence' and 'Controlled Substance Offenses'*.—";

by striking the following two paragraphs:

" 'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

'Extortion' is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.";

and by striking the last paragraph as follows:

" 'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).".

The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 2, in the paragraph that begins " 'Crime of violence' means" by inserting after "territorial jurisdiction of the United States." the following: " 'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. **[**The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.**]**".

Issues for Comment:

1. Part B of the proposed amendment would provide a definition of "robbery" for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1) and §2L1.2 (Unlawfully Entering or Remaining in the United States) that mirrors the Hobbs Act definition of "robbery" at 18 U.S.C. § 1951(b)(1). The Commission seeks comment on whether the proposed definition of "robbery" is appropriate. Are there robbery offenses that are covered by the proposed definition but should not be? Are there robbery offenses that are not covered by the proposed definition but should be?

2. Part B of the proposed amendment brackets the possibility of defining the phrase "actual or threatened force," for purposes of the proposed "robbery" definition, as "force that is sufficient to overcome a victim's resistance," which is consistent with the Supreme Court's holding in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). The Commission seeks comment regarding whether the definition of "actual or threatened force" is necessary after the *Stokeling* decision. If so, is the proposed definition of the phrase appropriate? Are there robbery offenses that would be covered by defining "actual or threatened force" in such a way but should not be? Are there robbery offenses that would not be covered but should be?

(C) Inchoate Offenses

Synopsis of Proposed Amendment: The career offender guideline includes convictions for inchoate offenses and offenses arising from accomplice liability, such as aiding and abetting, conspiring to commit, and attempting to commit a "crime of violence" and a "controlled substance offense." *See* USSG §4B1.2, comment. (n.1). In the original 1987 *Guidelines Manual*, these offenses were included only in the definition of "controlled substance offense." *See* USSG §4B1.2, comment. (n.2) (effective Nov. 1, 1987). In 1989, the Commission amended the guideline to provide that both definitions—"crime of violence" and "controlled substance offense"—include the offenses of aiding and abetting, conspiracy, and attempt to commit such crimes. *See* USSG App. C, Amendment 268 (effective Nov. 1, 1989). Two circuit conflicts have now arisen relating to the definitions of "crime of violence" and "controlled substance offense" in §4B1.2 (Definitions of Terms Used in Section 4B1.1) and their inclusion of inchoate offenses.

The first circuit conflict concerns whether the definition of controlled substance offense in §4B1.2(b) includes the inchoate offenses listed in Application Note 1 to §4B1.2. Although courts had previously held that §4B1.2's definitions include inchoate offenses based on the Commentary to §4B1.2 and the Supreme Court's decision in *Stinson v. United States,* 508 U.S. 36 (1993), four circuits have now held that §4B1.2(b)'s definition of a "controlled substance offense" does not include inchoate offenses because such offenses are not expressly included in the guideline text, while five have continued with their long-standing holding that such offenses are included.

The Third, Fourth, Sixth, and D.C. Circuits have held that inchoate offenses are not included in the definition of a "controlled substance offense" because the commentary is inconsistent with the text of the guideline and, thus, does not control. These courts have concluded that that the Commission exceeded its authority under *Stinson* when it attempted to incorporate inchoate offenses to §4B1.2(b)'s definition through the commentary, because the commentary can only interpret or explain the guideline, it cannot expand its scope by adding qualifying offenses. *See* United States v. Winstead, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018) (Where the guideline "present[ed] a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses," the Commentary's inclusion of such offenses had "no grounding in the guidelines themselves."); United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) ("To make attempt crimes a part of §4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in §4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline."); United States v. Nasir*,* 982 F.3d 144, 156–60 (3d Cir. 2020) (en banc), *vacated and remanded on other grounds*, 142 S. Ct. 56, 211 L.Ed.2d 1 (2021), *aff'd on remand*, 17 F.4th 459, 467–72 (3d Cir. 2021) (en banc); United States v. Campbell, 22 F.4th 438, 444–47 (4th Cir. 2022).

The First, Second, Seventh, Eighth, Ninth, and Eleventh Circuits continue to hold that inchoate offenses like attempt and conspiracy qualify as controlled substance offenses, reasoning that the commentary is consistent with the text of §4B1.2(b) because it does

not include any offense that is explicitly excluded by the text of the guideline. *See* United States v. Smith, 989 F.3d 575, 583–85 (7th Cir. 2021) (citing United States v. Adams, 934 F.3d 720, 727–29 (7th Cir. 2019) ("conclud[ing] that §4B1.2's Application Note 1 is authoritative and that 'controlled substance offense' includes inchoate offenses" (citation omitted)), *cert. denied*, 142 S.Ct. 488 (2021); *accord* United States v. Lewis, 963 F.3d 16, 21–23 (1st Cir. 2020); United States v. Richardson, 958 F.3d 151, 154–55 (2d Cir. 2020) (citing United States v. Tabb, 949 F.3d 81, 87–89 (2d Cir. 2020)); United States v. Garcia, 946 F.3d 413, 417 (8th Cir. 2019); United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019); United States v. Lange, 862 F.3d 1290, 1295 (11th Cir. 2017). *See also* United States v. Goodin, 835 F. App'x 771, 782 n.1 (5th Cir. 2021) (unpublished) (noting that circuit precedent provides that Application Note 1 in the career offender guideline is binding).

The second circuit conflict concerns whether certain conspiracy offenses qualify as crimes of violence or controlled substance offenses. Some courts have employed a two-step analysis in determining whether a prior conviction for conspiracy to commit a crime of violence or controlled substance offense is itself a crime of violence or controlled substance offense, by first comparing the substantive offense to its generic definition and then separately comparing the inchoate offense to its generic definition. *See, e.g.,* United States v. McCollum, 885 F.3d 300, 303 (4th Cir. 2018) (Employing a two-step categorical approach and concluding that conspiracy to commit murder in aid of racketeering is not categorically a crime of violence because generic conspiracy requires an overt act while the conspiracy at issue does not). In doing so, these courts have held

that because the generic definition of conspiracy requires proof of an overt act, certain conspiracy offenses that do not contain an "overt act" element are categorically excluded as crimes of violence or controlled substance offenses, even though the substantive crime is a crime of violence or a controlled substance offense. *See, e.g.,* United States v. Norman, 935 F.3d 232, 237–39 (4th Cir. 2019) (finding that prior federal convictions for conspiracy to distribute and possess with intent to distribute crack cocaine under 21 U.S.C. § 846 do not qualify as controlled substance offenses, even though there is no dispute that the underlying drug trafficking crimes qualify as controlled substance offenses); United States v. Martinez-Cruz, 836 F.3d 1305, 1314 (10th Cir. 2016) (holding that there is "no evidence [of the intent of the Sentencing Commission] regarding whether a conspiracy conviction requires an overt act—except for the plain language of the guideline, which uses a generic, undefined term, ripe for the categorical approach.")

In contrast, the First and Second Circuits have declined to follow this reasoning, holding instead that "[t]he text and structure of Application Note 1 demonstrate that it was intended to include Section 846 narcotics conspiracy. Application Note 1 clarifies that 'controlled substance offenses' include 'the offense[ ] of ... conspiring ... to commit such offenses,' language that on its face encompasses federal narcotics conspiracy." United States v. Tabb, 949 F.3d 81, 88 (2d Cir. 2020), *cert. denied,* 141 S. Ct. 2793 (2021) ("To us, it is patently evident that Application Note 1 was intended to and does encompass Section 846 narcotics conspiracy."); *see also* United States v. Lewis, 963 F.3d 16, 26–27 (1st Cir. 2020).

Part C of the proposed amendment would address these circuit conflicts by amending §4B1.2 and its commentary. First, it would move the inchoate offenses provision from the Commentary to §4B1.2 to the guideline itself as a new subsection (c). Second, Part C of the proposed amendment would revise the provision to provide that the terms "crime of violence" and "controlled substance offense" include aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or a "controlled substance offense."

Third, Part C of the proposed amendment addresses the circuit conflict regarding whether certain conspiracy offenses qualify as crimes of violence or controlled substance offenses. Two options are provided.

Option 1 would address the conspiracy issue in a comprehensive manner that would be applicable to all other inchoate offenses and offenses arising from accomplice liability. It would eliminate the need for the two-step analysis discussed above by adding the following to new subsection (c): "To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability."

Option 2 would take a narrower approach, addressing only conspiracy offenses without addressing whether a court must perform the two-step analysis described above with regard to other inchoate offenses. Option 2 would instead add a provision to new subsection (c) that brackets two alternatives addressing conspiracy to commit a "crime of violence" or a "controlled substance offense." The first bracketed alternative provides that an offense of conspiring to commit a "crime of violence" or a "controlled substance offense" qualifies as a "crime of violence" or a "controlled substance offense," regardless of whether an overt act must be proved as an element of the conspiracy offense. The second bracketed alternative provides that an offense of conspiring to commit a "crime of violence" or a "controlled substance offense" qualifies as a "crime of violence" or a "controlled substance offense," only if an overt act must be proved as an element of the conspiracy offense.

Issues for comment are also provided.

Proposed Amendment:

Section 4B1.2 is amended by redesignating subsection (c) as subsection (d), and by adding the following new subsection (c):

[Option 1 (includes changes to the commentary):

(c) The terms ‘crime of violence’ and ‘controlled substance offense’ include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a ‘crime of violence’ or a ‘controlled substance offense.’ To determine whether any offense described above qualifies as a ‘crime of violence’ or ‘controlled substance offense,’ the court shall only determine whether the underlying substantive offense is a ‘crime of violence’ or a ‘controlled substance offense,’ and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.”.**]**

[Option 2 (includes changes to the commentary):

(c) The terms ‘crime of violence’ and ‘controlled substance offense’ include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a ‘crime of violence’ or a ‘controlled substance offense.’ **[**An offense of conspiring to commit a ‘crime of violence’ or a ‘controlled substance offense’ qualifies as a ‘crime of violence’ or a ‘controlled substance offense,’ regardless of whether an overt act must be proved as an element of the conspiracy offense**][**However, an offense of conspiring to commit a ‘crime of violence’ or a ‘controlled substance offense’ qualifies as a ‘crime of violence’ or a ‘controlled substance offense,’ only if an overt act must be proved as an element of the conspiracy offense**]**.”.**]**

[Options 1 and 2 (continued):

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by striking the following paragraph:

" 'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.".**]**

Issues for Comment:

1. In determining whether an inchoate offense is a "crime of violence" or a "controlled substance offense," some courts have employed a two-step analysis. First, courts compare the substantive offense to its generic definition to determine whether it is a "crime of violence" or a "controlled substance offense." Then, these courts make a second and separate analysis comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. Option 1 of Part C of the proposed amendment would amend §4B1.2 (Definitions of Terms Used in Section 4B1.1) to clarify that the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit a "crime of violence" or a "controlled substance offense," or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or a "controlled substance offense" are a "crime of violence" or a

"controlled substance offense" if the substantive offense is a "crime of violence" or a "controlled substance offense."

The Commission seeks comment on whether the guidelines should be amended to make this clarification by eliminating the two-step analysis some courts use in determining whether an inchoate offense is a "crime of violence" or a "controlled substance offense." Should the guidelines adopt a different approach?

2. The Commission also seeks comment more broadly on how the guidelines definitions of "crime of violence" and "controlled substance offense" should address aiding and abetting, attempting to commit, soliciting to commit, or conspiring to commit a "crime of violence" or a "controlled substance offense," or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or a "controlled substance offense." Specifically, should the Commission promulgate any of the options provided above? Should the Commission provide additional requirements or guidance to address these types of offenses? What additional requirements or guidance, if any, should the Commission provide? Should the Commission differentiate between "crimes of violence" and "controlled substance offenses"? For example, should the guidelines require proof of an overt act for purposes of a conspiracy to commit a controlled substance offense, but not include such a requirement for conspiracy to commit a crime of violence?

Alternatively, should the Commission exclude inchoate offenses and offenses arising from accomplice liability altogether as predicate offenses for purposes of the "crime of violence" and "controlled substance offenses" definitions?

(D) Definition of "Controlled Substance Offense"

Synopsis of Proposed Amendment: Subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) defines a "controlled substance offense" as an offense that prohibits "the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." USSG §4B1.2(b).

The Department of Justice has raised a concern that courts have held that state drug statutes that include an offense involving an "offer to sell" a controlled substance do not qualify as a "controlled substance offense" under §4B1.2(b) because such statutes encompass conduct that is broader than §4B1.2(b)'s definition of a "controlled substance offense." *See, e.g.,* Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf. The Commission previously addressed a similar issue regarding the definition of a "drug trafficking offense" in the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States). In 2008, the Commission amended the Commentary to §2L1.2 to clarify that an offer to sell a

controlled substance is a "drug trafficking offense" for purposes of that guideline, by adding "offer to sell" to the conduct listed in the definition of "drug trafficking offense." *See* USSG App. C, Amendment 722 (effective Nov. 1, 2008). In 2016, the Commission comprehensively revised §2L1.2. Among the changes made, the Commission amended the definition of "crime of violence" in the Commentary to §2L1.2 to conform it to the definition in §4B1.2, but the Commission did not make changes to the "drug trafficking offense" definition in the Commentary to §2L1.2.

In addition, a separate issue has arisen as a result of statutory changes to chapter 705 of title 46 ("Maritime Drug Law Enforcement Act"). The career offender directive at 28 U.S.C. § 994(h) directed the Commission to assure that "the guidelines specify a term of imprisonment at or near the maximum term authorized" for offenders who are 18 years or older and have been convicted of a felony that is, and also have previously been convicted of two or more felonies that are, a "crime of violence" or "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*." 28 U.S.C. § 994(h) (emphasis added). Until 2016, the only substantive criminal offense included in "chapter 705 of title 46" was codified in section 70503(a) and read as follows:

> An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board—

> (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or
>
> (2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

46 U.S.C. § 70503(a) (2012). Section 70506(b) provided that a person attempting or conspiring to violate section 70503 was subject to the same penalties as provided for violating section 70503.

In 2016, Congress enacted the Coast Guard Authorization Act of 2015, Pub. L. 114–120 (2016), amending, among other things, Chapter 705 of Title 46. Specifically, Congress revised section 70503(a) as follows:

> While on board a covered vessel, an individual may not knowingly or intentionally—
>
> (1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;
>
> (2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 881(a)); or

> (3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

46 U.S.C. § 70503(a). Section 70506(b) remained unchanged. The Act added two new offenses to section 70503(a), in subparagraphs (2) and (3). Following this statutory change, these two new offenses may not be covered by the current definition of "controlled substance offense" in §4B1.2.

Part D of the proposed amendment would amend the definition of "controlled substance offense" in §4B1.2(b) to address these issues. First, it would amend the definition to include offenses involving an offer to sell a controlled substance, which would align it with the current definition of "drug trafficking offense" in the Commentary to §2L1.2. Second, it would revise the "controlled substance offense" definition to also include "an offense described in 46 U.S.C. § 70503(a) or § 70506(b)."

An issue for comment is also provided.

Proposed Amendment:

Section 4B1.2(b) is amended by striking the following:

"The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing 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, distribute, or dispense.",

and inserting the following:

"The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

(2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).".

Issue for Comment:

1. Part D of the proposed amendment would amend the definition of "controlled substance offense" in subsection (b) of §4B1.2 (Definitions of Terms Used in

Section 4B1.1) to include offenses involving an offer to sell a controlled substance. The Commission seeks comment on the extent to which such offenses should be included as "controlled substance offenses" for purposes of the career offender guideline. Are there other drug offenses that are not included under this definition, but should be?

If the Commission were to amend the definition of "controlled substance offense" in §4B1.2(b) to include other drug offenses, in addition to offenses involving an offer to sell a controlled substance, should the Commission revise the definition of "controlled substance offense" at §2L1.2 (Unlawfully Entering or Remaining in the United States) to conform it to the revised definition set forth in §4B1.2(b)?

7. CRIMINAL HISTORY

Synopsis of Proposed Amendment: The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive. Parts A through C of the proposed amendment all address the Commission's priority on criminal history. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) ("In light of Commission studies, consideration of possible amendments to the *Guidelines Manual* relating to criminal history to address (A) the impact of 'status' points under subsection (d) of section 4A1.1 (Criminal History Category); (B) the treatment of defendants with zero criminal history points; and (C) the impact of simple possession of

marihuana offenses."). Part B of the proposed amendment also addresses the Commission's priority on 28 U.S.C. § 994(j). *Id*. ("Consideration of possible amendments to the *Guidelines Manual* addressing 28 U.S.C. § 994(j).").

A defendant's criminal history score is calculated pursuant to Chapter Four, Part A (Criminal History). To calculate a criminal history score, courts are instructed to assign one, two, or three points to qualifying prior sentences under subsections (a) through (c) of §4A1.1 (Criminal History Category). One point is also added under §4A1.1(e) for any prior sentence resulting from a crime of violence that was not otherwise already assigned points. Finally, two criminal history points are added under §4A1.1(d) if the defendant committed the instant offense "while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." USSG §4A1.1(e). A "criminal justice sentence" refers to a "sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required." USSG §4A1.1, comment. (n.4).

(A) Status Points under §4A1.1

"Status points" are relatively common in cases with at least one criminal history point, having been applied in 37.5 percent of cases with criminal history points over the last five fiscal years. Of the offenders who received "status points", 61.5 percent had a higher CHC as a result of the status points. Like other provisions in Chapter Four, "status

points" are included in the calculation of a defendant's criminal history as a reflection of several statutory purposes of sentencing. As described in the Introductory Commentary to Chapter Four, accounting for a defendant's criminal history in the guidelines, including status points, addresses the need for the sentence "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; [and] (C) to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(A)–(C). A series of recent Commission publications has focused on just one of these purposes of sentencing—specific deterrence—through detailed analyses regarding the recidivism rates of federal offenders. *See*, *e.g.*, U.S. Sent'g Comm'n, Recidivism of Offenders Released in 2010 (2021), *available at* https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010. These reports again concluded that a defendant's criminal history calculation under the guidelines is strongly associated with the likelihood of future recidivism by the defendant. In a related publication, the Commission also found, however, that status points add little to the overall predictive value associated with the criminal history score. U.S. Sent'g Comm'n, Revisiting Status Points (2022), *available at* https://www.ussc.gov/research/research-reports/revisiting-status-points.

Part A of the proposed amendment addresses the impact of "status points" under the guidelines. Three options are provided.

Option 1 would add a downward departure provision in Application Note 4 of the Commentary to §4A1.1 for cases in which "status points" are applied.

Option 2 would reduce the impact of "status points" overall, by decreasing the criminal history points added under §4A1.1(d) from two points to one point. It would also add a departure provision in Application Note 4 of the Commentary to §4A1.1 that could result in either an upward departure or a downward departure, depending on the circumstances.

Option 3 would eliminate the "status points" provided in §4A1.1(d). It would also make conforming changes to §2P1.1 (Escape, Instigating or Assisting Escape) and §4A1.2 to reflect the removal of "status points" from the *Guidelines Manual*. In addition, Option 3 would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which an upward departure from the defendant's criminal history may be warranted.

Issues for comment are also provided.

(B) Zero Point Offenders

The Sentencing Table in Chapter Five, Part A of the *Guidelines Manual* comprises two components: offense level and criminal history category. Criminal history forms the horizontal axis of the table and is divided into six categories, from I (lowest) to VI (highest). Chapter Four, Part A of the *Guidelines Manual* provides instructions on how to calculate a defendant's criminal history category by assigning points for certain prior convictions. Criminal History Category I includes offenders with zero criminal history

points and those with one criminal history point. Accordingly, the following types of offenders are classified under the same category: (1) offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because they were not within the time limits set forth in subsection (d) and (e) of §4A1.2 (Definitions and Instructions for Computing Criminal History); (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their "staleness" (*e.g.*, sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions, or infractions); and (4) offenders with a prior conviction that received only one criminal history point. In fiscal year 2021, there were approximately 17,500 offenders who received zero criminal history points, of whom approximately 13,200 had no prior convictions.

Chapter Five also address what types of sentences a court may impose (*e.g.*, probation or imprisonment), according to the location of the defendant's applicable sentencing range in one of the four Zones (A–D) of the Sentencing Table. Specifically, §5C1.1 (Imposition of a Term of Imprisonment) provides that defendants in Zones A and B may receive, in the court's discretion, a probationary sentence or a sentence of incarceration; defendants in Zone C may receive a "split" sentence of incarceration followed by community confinement or a sentence of incarceration only at the court's discretion; and defendants in Zone D may only receive a sentence of imprisonment absent a downward departure or variance from that zone. The Commentary to §5C1.1 contains an application note that provides that "[i]f the defendant is a nonviolent first offender and the applicable guideline

range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment." USSG §5C1.1, comment. (n.4).

Recidivism data analyzed by the Commission suggest that offenders with zero criminal history points ("zero-point" offenders) have considerably lower recidivism rates than other offenders, including lower recidivism rates than the offenders in Criminal History Category I with one criminal history point. *See* U.S. Sent'g Comm'n, Recidivism of Federal Offenders Released in 2010 (2021), *available at* https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010. Among other findings, the report concluded that "zero-point" offenders were less likely to be rearrested than "one point" offenders (26.8% compared to 42.3%), the largest variation of any comparison of offenders within the same Criminal History Category. In addition, 28 U.S.C. § 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense.

Part B of the proposed amendment sets forth a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders). New §4C1.1 would provide a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three for zero-point offenders who meet certain criteria. It provides two options for establishing the criteria.

Option 1 would make the adjustment applicable to zero-point offenders with no prior convictions. It would provide a [1][2]-level decrease if the defendant meets all of the

following criteria: (1) the defendant did not receive any criminal history points from Chapter Four, Part A, and had no prior convictions or other comparable judicial dispositions of any kind; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims]; (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime]. Under Option 1, approximately 10,500 offenders sentenced in fiscal year 2021 would have been eligible under §4C1.1 depending on the exclusionary criteria.

Option 2 would make the adjustment applicable to all offenders who had no countable convictions (*i.e.*, offenders who received zero criminal history points based upon the criminal history rules in Chapter Four). It would provide a [1 level][2 levels] decrease if the defendant meets all of the following criteria: (1) the defendant did not receive any criminal history points from Chapter Four, Part A; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result

in death or serious bodily injury; (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims]; (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime]. Option 2 also provides for an upward departure that would be applicable if the adjustment under new §4C1.1 substantially underrepresents the seriousness of the defendant's criminal history. Under Option 2, approximately 13,500 offenders sentenced in fiscal year 2021 would have been eligible under §4C1.1 depending on the exclusionary criteria.

Both options include a subsection (c) that provides definitions and additional considerations for purposes of applying the guideline.

Part B of the proposed amendment would also amend the Commentary to §5C1.1 (Imposition of a Term of Imprisonment) as part of the Commission's implementation of 28 U.S.C. § 994(j). Section 994(j) directed the Commission to ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. Part B of the proposed amendment would address the alternatives to incarceration available to "zero-point" offenders by revising

the application note in §5C1.1 that addresses "nonviolent first offenders" to focus on "zero-point" offenders. Two new provisions would be added. New Application Note 4(A) would provide that if the defendant received an adjustment under new §4C1.1 and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. New Application Note 4(B) would provide that if the defendant received an adjustment under new §4C1.1, the defendant's applicable guideline range is in Zone C or D of the Sentencing Table, and the defendant's instant offense of conviction is not an otherwise serious offense, a departure to a sentence other than a sentence of imprisonment [may be appropriate][is generally appropriate]. Of the approximately 10,500 offenders who received zero criminal history points and had no prior convictions in fiscal year 2021 who would be eligible under §4C1.1 under Option 1, about one-quarter were in Zones A and B, about ten percent were in Zone C, and over 60 percent were in Zone D. Of the approximately 13,500 offenders who received zero criminal history points in fiscal year 2021 who would be eligible under §4C1.1 under Option 2, about 30 percent were in Zones A and B, ten percent were in Zone C, and about 60 percent were in Zone D.

In addition, Part B of the proposed amendment would amend subsection (b)(2)(A) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide that a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited, "unless otherwise specified." Part B of the proposed amendment would also amend Chapter One, Part A, Subpart 1(4)(d)

(Probation and Split Sentences) to provide an explanatory note addressing amendments to the *Guidelines Manual* related to the implementation of 28 U.S.C. § 994(j), first offenders, and "zero-point" offenders.

Finally, Part B of the proposed amendment provides issues for comment.

(C) Impact of Simple Possession of Marihuana Offenses

While marihuana remains a Schedule I controlled substance under the federal Controlled Substances Act (CSA), subjecting offenders to up to one year in prison (and up to two or three years in prison for repeat offenders), many states and territories have reduced or eliminated the penalties for possessing small quantities of marihuana for personal use. Twenty-one states and territories have removed legal prohibitions, including criminal and civil penalties, for the possession of small quantities for recreational use. An additional 14 states and territories have lowered the punishment for possession of small quantities for recreational use from criminal penalties (such as imprisonment) to solely civil penalties (such as a fine). At the end of fiscal year 2021, possession of marihuana remained illegal for all purposes only in 12 states and territories.

The Commission recently published a report on the impact of simple possession of marihuana offenses on sentencing. *See* U.S. Sent'g Comm'n, Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System (2023),

available at https://www.ussc.gov/research/research-reports/weighing-impact-simple-possession-marijuana.

The key findings from the report include—

- In fiscal year 2021, 4,405 federal offenders (8.0%) received criminal history points under the federal sentencing guidelines for prior marihuana possession sentences. Most (79.3%) of the prior sentences were for less than 60 days in prison, including non-custodial sentences. Furthermore, ten percent (10.2%) of these 4,405 offenders had no other criminal history points.
- The criminal history points for prior marihuana possession sentences resulted in a higher Criminal History Category for 40 percent (40.1%) of the 4,405 offenders (1,765).

Part C of the proposed amendment would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to include sentences resulting from possession of marihuana offenses as an example of when a downward departure from the defendant's criminal history may be warranted. Specifically, Part C of the proposed amendment would provide that a downward departure may be warranted if the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

Issues for comment are provided.

(A) Status Points under §4A1.1

Proposed Amendment:

[Option 1 (Departure Provision for Status Points):

The Commentary to § 4A1.1 captioned "Application Notes" is amended in Note 4 by adding at the end the following new paragraph:

"There may be cases in which adding points under §4A1.1(d) results in a Criminal History Category that substantially overrepresents the seriousness of the defendant's criminal history. In such a case, a downward departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History Category).".**]**

[Option 2 (Reducing Status Points):

Section 4A1.1(d) is amended by striking "2 points" and inserting "1 point".

The Commentary to §4A1.1 captioned "Application Notes" is amended in Note 4 by striking "Two points are added" and inserting "One point is added", and by adding at the end the following new paragraph:

"There may be cases in which adding a point under §4A1.1(d) results in a Criminal History Category that substantially overrepresents or underrepresents the seriousness of the defendant's criminal history. In such a case, a departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History Category).".

The Commentary to §4A1.1 captioned "Background" is amended by striking "Section 4A1.1(d) adds two points" and inserting "Section 4A1.1(d) adds one point".**]**

[Option 3 (Eliminating Status Points):

Section 4A.1.1 is amended—

by striking subsection (d) as follows:

"(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.";

and by redesignating subsection (e) as subsection (d).

The Commentary to § 4A1.1 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. *§4A1.1(d)*. Two points are added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* §4A1.2(n). For the purposes of this subsection, a "criminal justice sentence" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* §4A1.2(m).";

by redesignating Note 5 as Note 4;

and in Note 4 (as so redesignated) by striking "§4A1.1(e)" each place such term appears and inserting "§4A.1.1(d)", and by striking "§4A1.2(p)" and inserting "§4A1.2(n)".

The Commentary to §4A1.1 captioned "Background" is amended by striking the last paragraph as follows:

"Section 4A1.1(d) adds two points if the defendant was under a criminal justice sentence during any part of the instant offense.".

The Commentary to §2P1.1 captioned "Application Notes" is amended in Note 5 by striking "and §4A1.1(d) (custody status)".

Section 4A1.2 is amended—

in subsection (a)(2) by striking "§4A1.1(e)" and inserting "§4A1.1(d)";

in subsection (l) by striking "§4A1.1(a), (b), (c), (d), and (e)" and inserting "§4A1.1(a), (b), (c), and (d)";

by striking subsections (m) and (n) as follows:

"(m) *Effect of a Violation Warrant*

For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) *Failure to Report for Service of Sentence of Imprisonment*

For the purposes of §4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.";

by redesignation subsections (o) and (p) as subsections (m) and (n), respectively;

and in subsection (n) (as so redesignated) by striking "§4A1.1(e)" and inserting "§4A1.1(d)".

The Commentary to §4A1.3 captioned "Application Notes" is amended in Note 2(A) by adding at the end the following new subparagraph:

"(v) The defendant committed the instant offense (*i.e.*, any relevant conduct to the instant offense under §1B1.3 (Relevant Conduct)) while under any criminal

justice sentence having a custodial or supervisory component (including probation, parole, supervised release, imprisonment, work release, or escape status).”.

Issues for Comment

1. Option 3 of Part A of the proposed amendment would eliminate the “status points” provided in subsection (d) of §4A1.1 (Criminal History Category). Instead of eliminating “status points” altogether, should the Commission eliminate “status points” related to certain categories of prior offenses, but not others? For example, should “status points” continue to apply if the defendant was under a criminal justice sentence resulting from a violent prior offense? Should “status points” continue to apply if the defendant was recently placed under a criminal justice sentence involving a custodial or supervisory component?

2. Option 3 of Part A of the proposed amendment would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which an upward departure from the defendant’s criminal history may be warranted. Instead of a departure provision, should the Commission account in some other way for the “custody status” of the defendant during the commission of the instant offense? If so, how should the Commission account for such “status”?

(B) Zero Point Offenders

Proposed Amendment:

Chapter Four is amended by inserting at the end the following new Part C:

" PART C — ADJUSTMENT FOR CERTAIN ZERO-POINT OFFENDERS

§4C1.1. *Adjustment for Certain Zero-Point Offenders*

[Option 1 (Zero-Point Offenders with No Prior Convictions):

(a) *Adjustment*.—If the defendant meets all of the following criteria:

(1) the defendant did not receive any criminal history points from Chapter Four, Part A, and had no prior convictions or other comparable judicial dispositions of any kind;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury;

(4) the defendant's acts or omissions did not result in substantial financial hardship to **[**one or more victims**][**five or more victims**][**25 or more victims**]**;

(5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(6) **[**the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)**][**the instant offense of conviction is not a covered sex crime**]**;

decrease the offense level determined under Chapters Two and Three by **[**1 level**][**2 levels**]**.

(b) *Definitions And Additional Considerations*.—

(1) The phrase 'comparable judicial dispositions of any kind' includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications.

(2) 'Dangerous weapon,' 'firearm,' 'offense,' and 'serious bodily injury' have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

(3) Consistent with §1B1.3 (Relevant Conduct), the term 'defendant' limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(4) In determining whether the defendant's acts or omissions resulted in 'substantial financial hardship' to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

[(5) "Covered sex crime" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an

attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this definition.**]**".**]**

[Option 2 (Zero-Point Offenders with No Countable Convictions):

(a) *Adjustment*.—If the defendant meets all of the following criteria:

(1) the defendant did not receive any criminal history points from Chapter Four, Part A;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury;

(4) the defendant's acts or omissions did not result in substantial financial hardship to **[**one or more victims**][**five or more victims**][**25 or more victims**]**;

(5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and

was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(6) **[**the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)**][**the instant offense of conviction is not a covered sex crime**]**;

decrease the offense level determined under Chapters Two and Three by **[**1 level**][**2 levels**]**.

(b) *Definitions And Additional Considerations*.—

(1) 'Dangerous weapon,' 'firearm,' 'offense,' and 'serious bodily injury' have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

(2) Consistent with §1B1.3 (Relevant Conduct), the term 'defendant' limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(3) In determining whether the defendant's acts or omissions resulted in 'substantial financial hardship' to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

[(4) 'Covered sex crime' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this definition.**]**

Commentary

Application Notes:

1. *Upward Departure*.—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.".**]**

The Commentary to §5C1.1 captioned "Application Notes" is amended—

by inserting at the beginning of Note 1 the following new heading: "*Application of Subsection (a)*.—";

by inserting at the beginning of Note 2 the following new heading: "*Application of Subsection (b)*.—";

by inserting at the beginning of Note 3 the following new heading: "*Application of Subsection (c)*.—";

in Note 4 by striking the following:

"If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). *See* 28 U.S.C. § 994(j). For purposes of this application note, a 'nonviolent first offender' is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase "comparable judicial dispositions of any kind" includes diversionary or deferred

dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.",

and inserting the following:

"*Zero-Point Offenders*.—

(A) *Zero-Point Offenders in Zones A and B of the Sentencing Table*.—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. § 994(j).

(B) *Zero-Point Offenders in Zones C and D of the Sentencing Table*.—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders), the defendant's applicable guideline range is in Zone C or D of the Sentencing Table, and the defendant's instant offense of conviction is not an otherwise serious offense, a departure to a sentence other than a sentence of imprisonment **[**may be appropriate**][**is generally appropriate**]**. *See* 28 U.S.C. § 994(j).";

by inserting at the beginning of Note 5 the following new heading: "*Application of Subsection (d)*.—";

by inserting at the beginning of Note 6 the following new heading: "*Application of Subsection (e)*.—";

by inserting at the beginning of Note 7 the following new heading: "*Departures Based on Specific Treatment Purpose*.—";

by inserting at the beginning of Note 8 the following new heading: "*Use of Substitutes for Imprisonment*.—";

by inserting at the beginning of Note 9 the following new heading: "*Residential Treatment Program*.—";

and by inserting at the beginning of Note 10 the following new heading: "*Application of Subsection (f)*.—".

Section 4A1.3(b)(2)(A) is amended by striking "A departure" and inserting "Unless otherwise specified, a departure".

The Commentary to §4A1.3 captioned "Application Notes" is amended in Note 3 by striking "due to the fact that the lower limit of the guideline range for Criminal History

Category I is set for a first offender with the lowest risk of recidivism" and inserting "unless otherwise specified".

Chapter One, Part A is amended in Subpart 1(4)(d) (Probation and Split Sentences)—

by adding an asterisk after "community confinement or home detention.";

by adding a second asterisk after "through departures.*";

and by striking the following:

"*Note: Although the Commission had not addressed "single acts of aberrant behavior" at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See USSG App. C, amendment 603.)",

and inserting the following:

"*Note: The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (*See* USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to §5C1.1 (Imposition of a Term of Imprisonment), stating that if a defendant is a 'nonviolent first offender and the applicable guideline range is in Zone

A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.' (*See* USSG App. C, amendment 801.) In **[**2023**]**, the Commission added a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three for 'zero-point' offenders who meet certain criteria. In addition, the Commission further amended the Commentary to §5C1.1 to address the alternatives to incarceration available to 'zero-point' offenders by revising the application note in §5C1.1 that addressed 'nonviolent first offenders' to focus on 'zero-point' offenders. (*See* USSG App. C, amendment **[___]**.)

**Note: Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (*See* USSG App. C, amendment 603.)".

Issues for Comment:

1. Part B of the proposed amendment would set forth a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), that provides a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three if the defendant meets certain criteria. It provides two options: one option for zero-point offenders with no prior convictions and another option for zero-point offenders with no countable convictions. The Commission seeks comment

on which option is preferable, or whether there is an alternative approach that the Commission should consider. For example, if the Commission decides to exclude offenders with prior convictions, should the Commission consider a third option that nevertheless makes the new adjustment available to offenders with prior convictions that were not counted under a specific provision of §4A1.2 (Definitions and Instructions for Computing Criminal History)? If so, what type of prior convictions that did not receive criminal history points should not be excluded? For example, should the Commission allow the new adjustment to apply to offenders with prior convictions for misdemeanors and petty offenses that were not counted under §4A1.2(c)? Should the Commission instead exclude offenders with certain prior convictions that were not otherwise counted under §4A1.2? For example, should the Commission exclude offenders with prior convictions for sex offenses or violent offenses that were not counted for criminal history purposes?

If the Commission were to promulgate an option of §4C1.1 that excludes offenders with prior convictions not countable under Chapter Four, Part A (Criminal History), are there any practical issues or challenges that such an approach would present due to the availability of records documenting such convictions? If so, what are these practical issues or challenges?

2. Part B of the proposed amendment provides that the [1 level][2 levels] decrease under the new guideline applies if the defendant meets all of the criteria set forth

in the two options. Should the Commission incorporate additional or different exclusionary criteria into either of the options set forth in Part B of the proposed amendment? Should the Commission change or remove any of the exclusionary criteria set forth in either of the options thereby making the adjustment available to a broader group of defendants?

3. If the Commission were to promulgate one of the proposed options, what conforming changes, if any, should the Commission make to other provisions of the *Guidelines Manual*?

4. Part B of the proposed amendment would also amend the Commentary to §5C1.1 (Imposition of a Term of Imprisonment) to address the alternatives to incarceration available to "zero-point" offenders. The Commission seeks comment on whether it should provide additional guidance about how to apply this new departure provision. If so, what additional guidance should the Commission provide? For example, should the Commission provide guidance on how courts should determine whether the instant offense of conviction is "not an otherwise serious offense"?

(C) Impact of Simple Possession of Marihuana Offenses

Proposed Amendment:

The Commentary to §4A1.3 captioned "Application Notes" is amended in Note 3 by striking the following:

"*Downward Departures*.—A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.",

and inserting the following:

"*Downward Departures*.—

(A) *Examples*.—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) *Downward Departures from Criminal History Category I.*—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.".

Issues for Comment

1. Part C of the proposed amendment provides for a possible downward departure if the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person. The Commission seeks comment on whether it should provide additional guidance for purposes of determining whether a downward departure is warranted in such cases. If so, what additional guidance should the Commission provide?

2. The Commission also seeks comment on whether there is an alternative approach it should consider for addressing sentences for possession of marihuana. For example, instead of a departure, should the Commission exclude such sentences from the criminal history score calculation if the offense is no longer subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense? Alternatively, should the Commission exclude all sentences for possession of marihuana offenses from the criminal history score calculation, regardless of whether such offenses are punishable by a term of imprisonment or subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense?

8. ACQUITTED CONDUCT

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to the *Guidelines Manual* to prohibit the use of acquitted conduct in applying the guidelines. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022).

Acquitted conduct is not expressly addressed in the *Guidelines Manual*, except for a reference in the parenthetical summary of the holding in *United States v. Watts*, 519 U.S. 148 (1997). *See* USSG §6A1.3, Comment. However, consistent with the Supreme Court's holding in *Watts*, consideration of acquitted conduct is permitted under the guidelines through the operation of §1B1.3 (Relevant Conduct (Factors that Determine the

Guideline Range)), in conjunction with §1B1.4 (Information to be Used in Imposing Sentence) and §6A1.3 (Resolution of Disputed Factors (Policy Statement)).

Section 1B1.3 sets forth the principles and limits of sentencing accountability for purposes of determining a defendant's guideline range, a concept referred to as "relevant conduct." Relevant conduct impacts nearly every aspect of guidelines application, including the determination of: base offense levels where more than one level is provided, specific offense characteristics, and any cross references in Chapter Two (Offense Conduct); any adjustments in Chapter Three (Adjustment); the criminal history calculations in Chapter Four, Part A (Criminal History); and departures and adjustments in Chapter Five (Determining the Sentence).

Specifically, §1B1.3(a)(1) provides that relevant conduct comprises "all acts and omissions . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." Relevant conduct includes, in subsection (a)(1)(A), "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and, in subsection (a)(1)(B), all acts and omissions of others "in the case of a jointly undertaken criminal activity," that "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." *See* USSG §1B1.3(a)(1).

Relevant conduct also includes, for some offense types, "all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction," "all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions," and "any other information specified in the applicable guideline." *See* USSG §1B1.3(a)(2)–(a)(4). The background commentary to §1B1.3 explains that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."

The *Guidelines Manual* also includes Chapter Six, Part A (Sentencing Procedures) addressing sentencing procedures that are applicable in all cases. Specifically, §6A1.3 provides for resolution of any reasonably disputed factors important to the sentencing determination. Consistent with 18 U.S.C. § 3661, §6A1.3(a) provides, in pertinent part, that "[i]n resolving any dispute concerning a factor important to sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." The Commentary to §6A1.3 instructs that "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial" and that "[a]ny information may be considered" so long as it has sufficient indicia of reliability to support its probable accuracy. The Commentary cites to 18 U.S.C. § 3661 and Supreme Court case law upholding the sentencing court's unrestricted discretion in considering any

information at sentencing, so long as it is proved by a preponderance of the evidence. Consistent with the Supreme Court case law, the Commentary also provides that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

In fiscal year 2021, nearly all offenders (56,324; 98.3%) were convicted through a guilty plea. The remaining 963 offenders (1.7% of all offenders) were convicted and sentenced after a trial, and of those offenders, 157 offenders (0.3% of all offenders) were acquitted of at least one offense.

The proposed amendment would amend §1B1.3 to add a new subsection (c) providing that acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless the conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, the instant offense of conviction. The new provision would define "acquitted conduct" as conduct underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.

The proposed amendment would also amend the Commentary to §6A1.3 (Resolution of Disputed Factors (Policy Statement)) to make conforming revisions addressing the use of acquitted conduct for purposes of determining the guideline range.

Two issues for comment are also provided.

Proposed Amendment:

Section 1B1.3 is amended by adding at the end the following new subsection (c):

"(c) *Acquitted Conduct*.—

(1) *Limitation*.—Acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless such conduct—

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

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

to establish, in whole or in part, the instant offense of conviction.

(2) *Definition of Acquitted Conduct*.—For purposes of this guideline, 'acquitted conduct' means conduct (*i.e.*, any acts or omission) underlying

a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.".

The Commentary to §6A1.3 is amended—

by striking "*see also United States v. Watts*, 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399–401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution);" and inserting "*Witte v. United States*, 515 U.S. 389, 397–401 (1995) (noting that sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial, including information concerning uncharged criminal conduct, in sentencing a defendant within the range authorized by statute);";

by striking "Watts, 519 U.S. at 157" and inserting "Witte, 515 U.S. at 399–401";

and by inserting at the end of the paragraph that begins "The Commission believes that use of a preponderance of the evidence standard" the following: "Acquitted conduct, however, generally shall not be considered relevant conduct for purposes of determining

the guideline range. *See* subsection (c) of §1B1.3 (Relevant Conduct). Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).".

Issues for Comment

1. The proposed amendment is intended to generally prohibit the use of acquitted conduct for purposes of determining the guideline range, except when such conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish the instant offense of conviction. However, conduct underlying an acquitted charge may overlap with conduct found by the trier of fact beyond a reasonable doubt to establish the instant offense of conviction. Does this proposed amendment allow a court to consider such "overlapping" conduct for purposes of determining the guideline range? Should the Commission provide additional guidance to address this conduct?

2. The Commission seeks comment on whether the limitation on the use of acquitted conduct is too broad or too narrow. If so, how? For example, should the Commission account for acquittals for reasons such as jurisdiction, venue, or statute of limitations, that are otherwise unrelated to the substantive evidence?

9. SEXUAL ABUSE OFFENSES

Synopsis of Proposed Amendment: The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive. Part A of the proposed amendment responds to recently enacted legislation. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying as a priority "[i]mplementation of any legislation warranting Commission action"). Part B of the proposed amendment is a result of the Commission's "[c]onsideration of possible amendments to the *Guidelines Manual* to address sexual abuse or contact offenses against a victim in the custody, care, or supervision of, and committed by law enforcement or correctional personnel." *Id*.

(A) Violence Against Women Act Reauthorization Act of 2022

Part A of the proposed amendment responds to title XII of the Violence Against Women Act Reauthorization Act of 2022 ("the Act"). The Act is part of the Consolidated Appropriations Act, 2022, Pub. L. 117–103 (2022). It created two new offenses concerning sexual misconduct while committing civil rights offenses and sexual abuse of an individual in federal custody.

First, the Act created a new offense at 18 U.S.C. § 250 (Penalties for civil rights offenses involving sexual misconduct). New section 250(a) prohibits any person from engaging in,

or causing another to engage in, sexual misconduct while committing a civil rights offense under chapter 13 (Civil Rights) of part I (Crimes) of title 18, United States Code, or an offense under section 901 of the Fair Housing Act (42 U.S.C. § 3631). The statute does not define "sexual misconduct," but new section 250(b) delineates different maximum statutory terms of imprisonment for different degrees of sexual misconduct, ranging from two years to any term of years or life. The maximum penalties are: (1) any term of years or life if the offense involved aggravated sexual abuse, as defined in 18 U.S.C. § 2241, or sexual abuse, as defined in 18 U.S.C. § 2242, or any attempts to commit such conduct; (2) any term of years or life if the offense involved abusive sexual contact of a child who has not attained the age of 16, of the type prohibited by 18 U.S.C. § 2244(a)(5); (3) 40 years if the offense involved a sexual act, as defined in 18 U.S.C. § 2246, without the other person's permission and the sexual act does not amount to sexual abuse or aggravated sexual abuse; (4) 10 years if the offense involved abusive sexual contact of the type prohibited by 18 U.S.C. § 2244(a)(1) or (b) (excluding abusive sexual contact through the clothing), with an enhanced maximum penalty of 30 years if such abusive sexual contact involved a child under the age of 12; (5) 3 years if the offense involved abusive sexual contact of the type prohibited by 18 U.S.C. § 2244(a)(2), with an enhanced maximum penalty of 20 years if such abusive sexual contact involved a child under the age of 12; (6) 2 years if the offense involved abusive sexual contact through the clothing of the type prohibited by 18 U.S.C. § 2244(a)(3), (a)(4), or (b), with an enhanced maximum penalty of 10 years if such abusive sexual conduct through the clothing involved a child under the age of 12.

Second, the Act amended 18 U.S.C. § 2243 and created a new offense at subsection (c). The new section 2243(c) prohibits an individual, while acting in their capacity as a federal law enforcement officer, from knowingly engaging in a sexual act with an individual who is under arrest, under supervision, in detention, or in federal custody. The statutory maximum term of imprisonment for the offense is 15 years, which is the same maximum penalty for offenses under sections 2243(a) (prohibiting knowingly engaging in a sexual act with a minor who had attained the age of twelve but not the age of sixteen and is at least four years younger than the person so engaging) and 2243(b) (prohibiting knowingly engaging in a sexual act with a ward in official detention (including in a federal prison or any prison, institution, or facility where people are held in custody by the direction of, or pursuant to a contract or agreement with, any federal department or agency) and under the custodial, supervisory, or disciplinary authority of the person so engaging).

The Act also included a provision defining "federal law enforcement officer" at 18 U.S.C. § 2246(7) as having the meaning given the term in 18 U.S.C. § 115 (*i.e.*, "any officer, agent, or employee of the United States authorized by law or by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law."). In addition, the Act amended 18 U.S.C. § 2244 (Abusive sexual contact) to add a new penalty provision at subsection (a)(6) stating any person that knowingly engages in or causes sexual contact with or by another person, if doing so would violate new section 2243(c), would face a maximum statutory term of imprisonment of two years.

Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference offenses under 18 U.S.C. § 250 to §2H1.1 (Offenses Involving Individual Rights), and offenses under 18 U.S.C. § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). Part A of the proposed amendment would also amend the Commentary to §§2A3.3 and 2H1.1 to reflect that these statutes are referenced to these guidelines. In addition, it would amend the title of §2A3.3 to add "Criminal Sexual Abuse of an Individual in Federal Custody."

Issues for comment are also provided.

(B) Sexual Abuse Offenses Committed by Law Enforcement and Correctional Personnel

Part B of the proposed amendment addresses concerns regarding the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision. In its annual letter to the Commission, the Department of Justice urged the Commission to consider amending the *Guidelines Manual* to better account for such sexual abuse offenses, including offenses under 18 U.S.C. § 2243(b) and the offense conduct covered by the new statute at 18 U.S.C. § 2243(c) (discussed in Part A of the proposed amendment). According to the Department of Justice, the provisions of the guideline applicable to such offenses, §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), do not sufficiently

account for the severity of the conduct in such offenses, nor provide adequate penalties in accordance with the statutory maximum terms of imprisonment provided for these offenses.

Part B of the proposed amendment would amend §2A3.3 in several ways to address these concerns. First, it would increase the base offense level of the guideline from 14 to [22]. Second, Part B of the proposed amendment would address the presence of aggravating factors in sexual abuse offenses, such as causing serious bodily injury and the use or threat of force, in the same way §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) currently does, by providing a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) for cases where the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242).

Issues for comment are also provided.

(A) Violence Against Women Act Reauthorization Act of 2022

Proposed Amendment:

Appendix A (Statutory Index) is amended—

by inserting before the line referenced to 18 U.S.C. § 281 the following new line reference:

"18 U.S.C. § 250 2H1.1";

and by inserting before the line referenced to 18 U.S.C. § 2244 the following new line reference:

"18 U.S.C. § 2243(c) 2A3.3".

Section 2A3.3 is amended in the heading by inserting after "Acts" the following: "; Criminal Sexual Abuse of an Individual in Federal Custody".

The Commentary to §2A3.3 captioned "Statutory Provision" is amended by inserting after "§ 2243(b)" the following: ", 2243(c)".

The Commentary to §2H1.1 captioned "Statutory Provisions" is amended by striking "246, 247, 248, 249" and inserting "246–250".

Issues for Comment

1. In response to the Violence Against Women Act Reauthorization Act of 2022, Part A of the proposed amendment would reference 18 U.S.C. § 250 to §2H1.1

(Offenses Involving Individual Rights). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 250's offense conduct. Specifically, should the Commission amend §2H1.1 to provide a higher or lower base offense level if 18 U.S.C. § 250 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add specific offense characteristics to §2H1.1 in response to section 250? If so, what should any such specific offense characteristic provide and why?

The new statute at 18 U.S.C. § 250 provides different maximum statutory terms of imprisonment, ranging from two years to any term of years or life, depending on the sexual misconduct involved in the offense. Should the Commission amend §2H1.1 to address this range of penalties? If so, how should the Commission address these different penalties and why?

2. In response to the Violence Against Women Act Reauthorization Act of 2022, Part A of the proposed amendment would reference 18 U.S.C. § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 2243(c)'s offense conduct. Specifically, should the Commission amend §2A3.3 to provide a higher or lower base offense level if 18 U.S.C. § 2243(c) is the offense of conviction? If so, what should that base

offense level be and why? Should the Commission add a specific offense characteristic to §2A3.3 in response to section 2243(c)? If so, what should that specific offense characteristic provide and why?

(B) Sexual Abuse Offenses Committed by Law Enforcement and Correctional Personnel

Proposed Amendment:

Section 2A3.3 is amended—

in subsection (a) by striking "14" and inserting "**[**22**]**";

and by inserting at the end the following new subsection (c):

"(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the 'consent' of the victim.".

Issues for Comment

1. Part B of the proposed amendment would amend §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts) to increase the base offense level of the guideline from 14 to [22]. The proposed base offense level of [22] for §2A3.3 would result in proportionate penalties with offenses sentenced under §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), where, like §2A3.3, the victim is incapable of granting consent. Specifically, §2A3.2 provides a base offense level of 18 and a 4-level increase at §2A3.2(b)(1) that applies in cases where the victim was in the custody, care, or supervisory control of the defendant. The Commission seeks comment on whether the proposed base offense level for §2A3.3 is appropriate and, if not, what should the base offense level be and why. Are there distinctions between sexual offenses against minors and sexual offenses against wards that may warrant different base offense levels? If so, what are those distinctions and how should they be accounted for in §2A3.3?

2. Part B of the proposed amendment would also amend §2A3.3 to provide a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) for cases where the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242). This cross reference is the same as the one currently provided for in §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years

(Statutory Rape) or Attempt to Commit Such Acts). The Commission seeks comment on whether adding a cross reference to §2A3.1 in §2A3.3 is appropriate to address the presence of aggravating factors in the offenses referenced to this guideline, such as causing serious bodily injury and the use or threat of force. If not, how should the Commission take into account such aggravating factors? For example, should the Commission add specific offense characteristics to address these aggravating factors?

10. ALTERNATIVES-TO-INCARCERATION PROGRAMS

In November 2022, the Commission identified as one of its policy priorities a "[m]ultiyear study of court-sponsored diversion and alternatives-to-incarceration programs (*e.g.*, Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program), including consideration of possible amendments to the *Guidelines Manual* that might be appropriate." U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022). As part of its work on this priority, the Commission is publishing these issues for comment on alternative-to-incarceration programs to inform the Commission's consideration of this policy priority.

Issues for Comment

1. The Commission invites general comment on how it should approach any study related to this policy priority. What should be the scope, duration, and sources of information of such a study, and what specific questions should be addressed?

   The Commission further seeks comment on any relevant developments in recent legal or social science literature on court-sponsored diversion and alternatives-to-incarceration programs.

2. The Commission invites general comment on whether the *Guidelines Manual* should be amended to address court-sponsored diversion and alternatives-to-incarceration programs. The Commission also seeks comment on whether it should consider amending the guidelines for such purposes during this amendment cycle, or whether it should first undertake further study of court-sponsored diversion and alternatives-to-incarceration programs. In either case, how should the Commission amend the *Guidelines Manual* to address court-sponsored diversion and alternatives-to-incarceration programs?

   For example, should the Commission add to Chapter Five, Part K, Subpart 2 (Other Grounds for Departure) a new policy statement permitting a downward departure if the defendant successfully completed the necessary requirements of an alternative-to-incarceration court program? If so, what type of programs should

be addressed by such departure provision? Should the Commission provide criteria for purposes of applying a departure provision related to alternative-to-incarceration court programs? If so, what criteria should the Commission use? For example, should such a downward departure only apply to defendants who successfully completed the necessary requirements of an alternative-to-incarceration court program? In the alternative, should the Commission allow the departure to apply also to defendants who productively participated in any such program without fulfilling all requirements because they were administratively discharged from the program due to reasons beyond the defendant's control (*e.g.*, health reasons, scheduling issues)?

11. FAKE PILLS

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of miscellaneous guidelines application issues. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying as a priority "[c]onsideration of other miscellaneous issues, including possible amendments to (A) section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address offenses involving misrepresentation or marketing of a controlled substance as another substance . . . .").

The proposed amendment responds to concerns expressed by the Drug Enforcement Administration (DEA) about the proliferation of "fake pills" (*i.e.*, illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills) containing fentanyl or fentanyl analogue.

According to the DEA, these fake pills resemble legitimately manufactured pharmaceutical pills (such as OxyContin, Xanax, and Adderall) but can result in sudden death or poisoning due to the unknown presence and quantities of dangerous substances, such as fentanyl and fentanyl analogues.

The DEA reported that it seized over 50.6 million fentanyl-laced, fake prescription pills in calendar year 2022. *See* Drug Enforcement Administration, Press Release: Drug Enforcement Administration Announces the Seizure of Over 379 million Deadly Doses of Fentanyl in 2022 (Dec. 20, 2022), https://www.dea.gov/press-releases/2022/12/20/drug-enforcement-administration-announces-seizure-over-379-million-deadly. DEA laboratory testing indicates that the number of fake pills laced with fentanyl have sharply increased in recent years and that six out of ten fentanyl-laced faked pills have been found to contain a potentially fatal dose of fentanyl. *See* Drug Enforcement Administration, Public Safety Alert: DEA Laboratory Testing Reveals that 6 out of 10 Fentanyl-Laced Fake Prescription Pills Now Contain a Potentially Lethal Dose of Fentanyl (2022), https://www.dea.gov/alert/dea-laboratory-testing-reveals-6-out-10-fentanyl-laced-fake-prescription-pills-now-contain.

According to the Centers for Disease Control and Prevention (CDC), overdose deaths from synthetic opioids containing fentanyl, including pills purporting to be legitimate pharmaceuticals, have sharply increased in recent years. *See* Christine L. Mattson et al., *Trends and Geographic Patterns in Drug and Synthetic Opioid Overdose Deaths — United States, 2013–2019*, 70 Morb Mortal Wkly Rep 6 (Feb. 12, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7006a4.htm.

In order to address this issue, the DEA recommended that the Commission review the 4-level enhancement for knowingly distributing or marketing as another substance a mixture or substance containing fentanyl or fentanyl analogue as a different substance at subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking). Specifically, the DEA suggested that the Commission consider changing the *mens rea* requirement to expand the application of the enhancement to offenders who may not have known fentanyl or fentanyl analogue was in the substance but distributed or marketed a substance without regard to whether such dangerous substances could have been present.

The proposed amendment would amend §2D1.1(b)(13) to add a new subparagraph with an alternative 2-level enhancement for cases where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately

manufactured drug. The new provision would refer to 21 U.S.C. § 321(g)(1) for purposes of defining the term "drug."

An issue for comment is provided.

Proposed Amendment:

Section 2D1.1(b)(13) is amended—

by inserting after "defendant" the following: "(A)";

and by inserting after "4 levels" the following: "; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug, increase by **[**2**]** levels. For purposes of subsection (b)(13)(B), the term 'drug' has the meaning given that term in 21 U.S.C. § 321(g)(1)".

Issue for Comment

1. The proposed amendment would amend subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to add an alternative

2-level enhancement applicable if the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug. The Commission seeks comment on whether the proposed alternative enhancement at §2D1.1(b)(13)(B) is appropriate to address the concerns raised by the Drug Enforcement Administration. If not, is there an alternative approach that the Commission should consider? Should the Commission expand the scope of §2D1.1(b)(13)(B) to include other synthetic opioids? If so, what other synthetic opioids should be included?

The Commission also seeks comment on whether the *mens rea* requirement proposed for §2D1.1(b)(13)(B) is appropriate. Should the Commission provide a different *mens rea* requirement for the new provision? If so, what *mens rea* requirement should the Commission provide? Should the Commission instead make §2D1.1(b)(13)(B) an offense-based enhancement as opposed to exclusively defendant-based?

12. MISCELLANEOUS

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of miscellaneous guidelines application issues. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying as

a priority "[c]onsideration of other miscellaneous issues, including possible amendments to . . . (B) section 3D1.2 (Grouping of Closely Related Counts) to address the interaction between section 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) and section 3D1.2(d); and (C) section 5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect that the Bureau of Prisons no longer operates a shock incarceration program."). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

Part A responds to a guideline application issue concerning the interaction of §2G1.3 and §3D1.2 (Grouping of Closely Related Counts). Although subsection (d) of §3D1.2 specifies that offenses covered by §2G1.1 are not grouped under the subsection, it does not specify whether or not offenses covered by §2G1.3 are so grouped. Part A would amend §3D1.2(d) to provide that offenses covered by §2G1.3, like offenses covered by §2G1.1, are not grouped under subsection (d).

Part B revises the guidelines to address the fact that the Bureau of Prisons ("BOP") no longer operates a shock incarceration program as described in §5F1.7 (Shock Incarceration Program (Policy Statement)). Part B would amend the Commentary to §5F1.7 to reflect the fact that BOP no longer operates the program.

(A) Grouping of Offenses Covered by §2G1.3

Synopsis of Proposed Amendment: Part A of the proposed amendment revises §3D1.2 (Grouping of Closely Related Counts) to provide that offenses covered by §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) are not grouped under §3D1.2(d).

Section 3D1.2 addresses the grouping of closely related counts for purposes of determining the offense level when a defendant has been convicted on multiple counts. Subsection (d) states that counts are grouped together "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." Subsection (d) also contains lists of (1) guidelines for which the offenses covered by the guideline are to be grouped under the subsection and (2) guidelines for which the covered offenses are specifically excluded from grouping under the subsection.

Section 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) is included in the list of guidelines for which the covered

offenses are excluded from grouping under §3D1.2(d). Section 2G1.3 is, however, not included on that list, even though several offenses that are referenced to §2G1.3 when the offense involves a minor are referenced to §2G1.1 when the offense involves an individual other than a minor. In addition, several offenses that were referenced to §2G1.1 before §2G1.3 was promulgated are now referenced to §2G1.3. *See* USSG App. C, Amendment 664 (effective Nov. 1, 2004). Furthermore, Application Note 6 of the Commentary to §2G1.3 states that multiple counts under §2G1.3 are not to be grouped.

Section 2G1.3 is also not included on the list of guidelines for which the covered offenses are to be grouped under §3D1.2(d). Because §2G1.3 is included on neither list, §3D.1(d) provides that "grouping under [the] subsection may or may not be appropriate and a "case-by-case determination must be made based upon the facts of the case and the applicable guideline (including specific offense characteristics and other adjustments) used to determine the offense level."

Part A of the proposed amendment would amend §3D1.2(d) to add §2G1.3 to the list of guidelines for which the covered offenses are specifically excluded from grouping.

Proposed Amendment:

Section 3D1.2(d) is amended by striking "§§2G1.1, 2G2.1" and inserting "§§2G1.1, 2G1.3, 2G2.1".

(B) Policy Statement on Shock Incarceration Programs

Synopsis of Proposed Amendment: Part B of the proposed amendment revises the guidelines to address the fact that the Bureau of Prisons ("BOP") no longer operates a shock incarceration program as described in §5F1.7 (Shock Incarceration Program (Policy Statement)) and the corresponding commentary.

Section 4046 of title 18, United States Code, authorizes BOP to place any person who has been sentenced to a term of imprisonment of more than 12 but not more than 30 months in a shock incarceration program if the person consents to that placement.
Sections 3582(a) and 3621(b)(4) of title 18 authorize a court, in imposing sentence, to make a recommendation regarding the type of prison facility that would be appropriate for the defendant. In making such a recommendation, the court "shall consider any pertinent policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(a).

Section 5F1.7 provides that, pursuant to sections 3582(a) and 3621(b)(4), a sentencing court may recommend that a defendant who meets the criteria set forth in section 4046 participate in a shock incarceration program. The Commentary to §5F1.7 describes the authority for BOP to operate a shock incarceration program and the procedures that the BOP established in 1990 regarding operation of such a program.

In 2008, BOP terminated its shock incarceration program and removed the rules governing its operation. Part B of the proposed amendment would amend the Commentary to §5F1.7 to reflect those developments. It would also correct two typographical errors in the commentary.

Proposed Amendment:

The Commentary to §5F1.7 captioned "Background" is amended—

by striking "six months" and inserting "6 months";

by striking "as the Bureau deems appropriate. 18 U.S.C. § 4046.' " and inserting "as the Bureau deems appropriate.' 18 U.S.C. § 4046.";

and by striking the final paragraph as follows:

" The Bureau of Prisons has issued an operations memorandum (174-90 (5390), November 20, 1990) that outlines eligibility criteria and procedures for the implementation of this program (which the Bureau of Prisons has titled 'intensive confinement program'). Under these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the 'intensive

confinement' portion of the program, the defendant is eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of community corrections center and home confinement phases.",

and inserting the following:

" In 1990, the Bureau of Prisons issued an operations memorandum (174-90 (5390), November 20, 1990) that outlined eligibility criteria and procedures for the implementation of a shock incarceration program (which the Bureau of Prisons titled the 'intensive confinement program'). In 2008, however, the Bureau of Prisons terminated the program and removed the rules governing its operation. *See* 73 Fed. Reg. 39863 (July 11, 2008).".

13. TECHNICAL

Synopsis of Proposed Amendment: This proposed amendment would make technical and other non-substantive changes to the *Guidelines Manual*.

Part A of the proposed amendment would make technical changes to provide updated references to certain sections in the United States Code that were redesignated in legislation. The Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. 115–282 (Dec. 4, 2018) (hereinafter "the Act"), among other things, established a new chapter 700 (Ports and Waterway Safety) in subtitle VII (Security and Drug

Enforcement) of title 46 (Shipping) of the United States Code. Section 401 of the Act repealed the Ports and Waterways Safety Act of 1972, previously codified in 33 U.S.C. §§ 1221–1232b, and restated its provisions with some revisions in the new chapter 700 of title 46, specifically at 46 U.S.C. §§ 70001–70036. Appendix A (Statutory Index) includes references to Chapter Two guidelines for both former 33 U.S.C. §§ 1227(b) and 1232(b). Specifically, former section 1227(b) is referenced to §§2J1.1 (Contempt) and 2J1.5 (Failure to Appear by Defendant), while former section 1232(b) is referenced to §2A2.4 (Obstructing or Impeding Officers). Part A of the proposed amendment would amend Appendix A to delete the references to 33 U.S.C. §§ 1227(b) and 1232(b) and replace them with updated references to 46 U.S.C. §§ 70035(b) and 70036(b). The Act did not make substantive revisions to either of these provisions.

Part B of the proposed amendment would make technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective December 1, 2015, the Office of Law Revision Counsel eliminated the Appendix to title 50 of the United States Code and transferred the non-obsolete provisions to new chapters 49 to 57 of title 50 and to other titles of the United States Code. To reflect the new section numbers of the reclassified provisions, Part B of the proposed amendment would make changes to §2M4.1 (Failure to Register and Evasion of Military Service), §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism), and Appendix A. Similarly, effective September 1, 2016, the Office of Law Revision Counsel also transferred certain provisions from Chapter 14 of title 25 to four new chapters in title 25 in order to improve the organization of the title.

To reflect these changes, Part B of the proposed amendment would make further changes to Appendix A.

Part C of the proposed amendment would make certain technical changes to the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). First, Part C of the proposed amendment would amend the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9 to reorganize the controlled substances contained therein in alphabetical order to make the tables more user-friendly. It would also make minor changes to the controlled substance references to promote consistency in the use of capitalization, commas, parentheticals, and slash symbols throughout the Drug Conversion Tables. For example, the proposed amendment would change the reference to "Phencyclidine (actual) /PCP (actual)" to "Phencyclidine (PCP) (actual)." Second, Part C of the proposed amendment would make clerical changes throughout the Commentary to correct some typographical errors. Finally, Part C of the proposed amendment would amend the Background Commentary to add a specific reference to Amendment 808, which replaced the term "marihuana equivalency" with the new term "converted drug weight" and changed the title of the "Drug Equivalency Tables" to "Drug Conversion Tables." *See* USSG App. C, amend. 808 (effective Nov. 1, 2018).

Part D of the proposed amendment would make technical changes to the Commentary to §§2A4.2 (Demanding or Receiving Ransom Money), 2A6.1 (Threatening or Harassing

Communications; Hoaxes; False Liens), and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and to Appendix A, to provide references to the specific applicable provisions of 18 U.S.C. § 876.

Part E of the proposed amendment would make technical changes to the commentary of several guidelines in Chapter Eight (Sentencing of Organizations). First, the proposed amendment would replace the term "prior criminal adjudication," as found and defined in Application Note 3(G) of §8A1.2 (Application Instructions — Organizations), with "criminal adjudication" to better reflect how that term is used throughout Chapter Eight. In addition, the proposed amendment would make conforming changes to the Commentary to §8C2.5 (Culpability Score) to account for the new term. Part E of the proposed amendment would also make changes to the Commentary to §8C3.2 (Payment of the Fine — Organizations). Section 207 of the Mandatory Victims Restitution Act of 1996, Pub. L. 104–132 (Apr. 24, 1996), amended 18 U.S.C. § 3572(d) to eliminate the requirement that if the court permits something other than the immediate payment of a fine or other monetary payment, the period for payment shall not exceed five years. Part E of the proposed amendment would revise Application Note 1 of §8C3.2 to reflect the current language of 18 U.S.C. § 3572(d) by providing that if the court permits other than immediate payment of a fine or other monetary payment, the period provided for payment shall be the shortest time in which full payment can reasonably be made.

Part F of the proposed amendment would make clerical changes to correct typographical errors in: §1B1.1 (Application Instructions); §1B1.3 (Relevant Conduct (Factors that

Determine the Guideline Range)); §1B1.4 (Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)); §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)); §2D2.3 (Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs); §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production); §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information); §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition); §2M1.1 (Treason); §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents); the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes); the Introductory Commentary to Chapter Two, Part T, Subpart 3 (Customs Taxes); the Introductory Commentary to Chapter Three, Part A (Victim-Related Adjustments); §3A1.1 (Hate Crime Motivation or Vulnerable Victim); the Introductory Commentary to Chapter Three, Part B (Role in the Offense); §3C1.1 (Obstructing or Impeding the Administration of Justice); the Introductory Commentary to Chapter Three, Part D (Multiple Counts); §3D1.1 (Procedure for Determining Offense Level on Multiple Counts); §3D1.2 (Groups of Closely Related Counts); §3D1.3 (Offense Level Applicable to Each Group of Closely Related Counts); §3D1.4 (Determining the Combined Offense Level); §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)); §4B1.1 (Career Offender); §5C1.1

(Imposition of a Term of Imprisonment); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); the Introductory Commentary to Chapter Five, Part H (Specific Offender Characteristics); the Introductory Commentary to Chapter Six, Part A (Sentencing Procedures); Chapter Seven, Part A (Introduction to Chapter Seven); §8B1.1 (Restitution — Organizations); §8B2.1 (Effective Compliance and Ethics Program); §8C3.3 (Reduction of Fine Based on Inability to Pay); and §8E1.1 (Special Assessments — Organizations).

Part G of the proposed amendments would also make clerical changes to the Commentary to §§1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)) and 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment), to update the citation of Supreme Court cases. In addition, Part G of the proposed amendment would amend (1) the Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to add a missing reference to 18 U.S.C.§ 844(o); (2) the Commentary to §2M6.1 (Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons Of Mass Destruction; Attempt or Conspiracy), to delete the definitions of two terms that are not currently used in the guideline; (3) the Commentary to §§2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose) and 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or

Other Documents), to correct references to the Code of Federal Regulations; and (4) the Commentary to §3A1.2 (Official Victim), to add missing content in Application Note 3.

Proposed Amendment:

(A) Frank LoBiondo Coast Guard Authorization Act of 2018

Appendix A (Statutory Index) is amended—

by striking the following line references:

"33 U.S.C. § 1227(b)	2J1.1, 2J1.5
33 U.S.C. § 1232(b)(2)	2A2.4";

and by inserting before the line referenced to 46 U.S.C. App. § 1707a(f)(2) the following new line references:

"46 U.S.C. § 70035(b)	2J1.1, 2J1.5
46 U.S.C. § 70036(b)	2A2.4".

(B) Reclassification of Sections of United States Code

The Commentary to §2M4.1 captioned "Statutory Provisions" is amended by striking "50 U.S.C. App. § 462" and inserting "50 U.S.C. § 3811".

The Commentary to §2M5.1 captioned "Statutory Provisions" is amended by striking "50 U.S.C. App. §§ 2401–2420" and inserting "50 U.S.C. §§ 4601–4623. For additional statutory provision(s), *see* Appendix A (Statutory Index)".

The Commentary to §2M5.1 captioned "Application Notes" is amended—

in Note 3 by striking "50 U.S.C. App. § 2410" and inserting "50 U.S.C. § 4610";

and in Note 4 by striking "50 U.S.C. App. 2405" and inserting "50 U.S.C. § 4605".

Appendix A (Statutory Index) is amended—

in the line referenced to 25 U.S.C. § 450d by striking "§ 450d" and inserting "§ 5306";

by striking the following line references:

"50 U.S.C. App. § 462	2M4.1
50 U.S.C. App. § 527(e)	2X5.2

50 U.S.C. App. § 2410 2M5.1";

and inserting before the line referenced to 52 U.S.C. § 10307(c) the following new line references:

"50 U.S.C. § 3811 2M4.1

50 U.S.C. § 3937(e) 2X5.2

50 U.S.C. § 4610 2M5.1".

(C) Technical Changes to Commentary to §2D1.1

The Commentary to §2D1.1 captioned "Application Notes" is amended—

in Note 8(A) by striking "the statute (21 U.S.C. § 841(b)(1)), as the primary basis" and inserting "the statute (21 U.S.C. § 841(b)(1)) as the primary basis", and by striking "fentanyl, LSD and marihuana" and inserting "fentanyl, LSD, and marihuana";

in Note 8(D)—

under the heading relating to Schedule I or II Opiates, by striking the following:

"1 gm of Heroin = 1 kg

1 gm of Dextromoramide = 670 gm

1 gm of Dipipanone =	250 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm
1 gm of Alphaprodine =	100 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg
1 gm of Levorphanol =	2.5 kg
1 gm of Meperidine/Pethidine =	50 gm
1 gm of Methadone =	500 gm
1 gm of 6-Monoacetylmorphine =	1 kg
1 gm of Morphine =	500 gm
1 gm of Oxycodone (actual) =	6700 gm
1 gm of Oxymorphone =	5 kg
1 gm of Racemorphan =	800 gm
1 gm of Codeine =	80 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm
1 gm of Ethylmorphine =	165 gm
1 gm of Hydrocodone (actual) =	6700 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Opium =	50 gm
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg”,

and inserting the following:

“1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine (PEPAP) =	700 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine (MPPP) =	700 gm
1 gm of 6-Monoacetylmorphine =	1 kg
1 gm of Alphaprodine =	100 gm
1 gm of Codeine =	80 gm
1 gm of Dextromoramide =	670 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm
1 gm of Dipipanone =	250 gm
1 gm of Ethylmorphine =	165 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Heroin =	1 kg
1 gm of Hydrocodone (actual) =	6,700 gm
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg
1 gm of Levorphanol =	2.5 kg
1 gm of Meperidine/Pethidine =	50 gm
1 gm of Methadone =	500 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Morphine =	500 gm
1 gm of Opium =	50 gm

1 gm of Oxycodone (actual) = 6,700 gm

1 gm of Oxymorphone = 5 kg

1 gm of Racemorphan = 800 gm";

under the heading relating to Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the following:

"1 gm of Cocaine = 200 gm

1 gm of N-Ethylamphetamine = 80 gm

1 gm of Fenethylline = 40 gm

1 gm of Amphetamine = 2 kg

1 gm of Amphetamine (Actual) = 20 kg

1 gm of Methamphetamine = 2 kg

1 gm of Methamphetamine (Actual) = 20 kg

1 gm of "Ice" = 20 kg

1 gm of Khat = .01 gm

1 gm of 4-Methylaminorex ('Euphoria') = 100 gm

1 gm of Methylphenidate (Ritalin) = 100 gm

1 gm of Phenmetrazine = 80 gm

1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) = 416 gm

1 gm Phenylacetone/P_2P (in any other case) = 75 gm

1 gm Cocaine Base ('Crack') = 3,571 gm

1 gm of Aminorex =	100 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of N-Benzylpiperazine =	100 gm",

and inserting the following:

"1 gm of 4-Methylaminorex ('Euphoria') =	100 gm
1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base ('Crack') =	3,571 gm
1 gm of Fenethylline =	40 gm
1 gm of 'Ice' =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (actual) =	20 kg
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose	

of manufacturing methamphetamine) = 416 gm

1 gm of Phenylacetone (P_2P) (in any other case) = 75 gm";

under the heading relating to Synthetic Cathinones (except Schedule III, IV, and V Substances), by striking "a synthetic cathinone" and inserting "a Synthetic Cathinone";

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the following:

"1 gm of Bufotenine = 70 gm

1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD = 100 kg

1 gm of Diethyltryptamine/DET = 80 gm

1 gm of Dimethyltryptamine/DM = 100 gm

1 gm of Mescaline = 10 gm

1 gm of Mushrooms containing Psilocin and/or

Psilocybin (Dry) = 1 gm

1 gm of Mushrooms containing Psilocin and/or

Psilocybin (Wet) = 0.1 gm

1 gm of Peyote (Dry) = 0.5 gm

1 gm of Peyote (Wet) = 0.05 gm

1 gm of Phencyclidine/PCP = 1 kg

1 gm of Phencyclidine (actual) /PCP (actual) = 10 kg

1 gm of Psilocin = 500 gm

1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	500 gm
1 gm of Paramethoxymethamphetamine/PMA =	500 gm
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg",

and inserting the following:

"1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm
1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) =	100 kg
1 gm of Diethyltryptamine (DET) =	80 gm

1 gm of Dimethyltryptamine (DM) =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) =	0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg
1 gm of Paramethoxymethamphetamine (PMA) =	500 gm
1 gm of Peyote (dry) =	0.5 gm
1 gm of Peyote (wet) =	0.05 gm
1 gm of Phencyclidine (PCP) =	1 kg
1 gm of Phencyclidine (PCP) (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) =	1 kg
1 gm of Thiophene Analog of Phencyclidine (TCP) =	1 kg”;

under the heading relating to Schedule I Marihuana, by striking the following:

“1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm
1 gm of Hashish Oil =	50 gm
1 gm of Cannabis Resin or Hashish =	5 gm
1 gm of Tetrahydrocannabinol, Organic =	167 gm

1 gm of Tetrahydrocannabinol, Synthetic = 167 gm",

and inserting the following:

"1 gm of Cannabis Resin or Hashish = 5 gm

1 gm of Hashish Oil = 50 gm

1 gm of Marihuana/Cannabis (granulated, powdered, etc.) = 1 gm

1 gm of Tetrahydrocannabinol (organic) = 167 gm

1 gm of Tetrahydrocannabinol (synthetic) = 167 gm";

under the heading relating to Synthetic Cannabinoids (except Schedule III, IV, and V Substances), by striking "a synthetic cannabinoid" and inserting "a Synthetic Cannabinoid", and by striking " 'Synthetic cannabinoid,' for purposes of this guideline" and inserting " 'Synthetic Cannabinoid,' for purposes of this guideline";

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking "except gamma-hydroxybutyric acid" both places such term appears and inserting "except Gamma-hydroxybutyric Acid";

under the heading relating to Gamma-hydroxybutyric Acid, by striking "of gamma-hydroxybutyric acid" and inserting "of Gamma-hydroxybutyric Acid";

under the heading relating to Schedule III Substances (except ketamine), by striking "except ketamine" in the heading and inserting "except Ketamine";

under the heading relating to Ketamine, by striking "of ketamine" and inserting "of Ketamine";

under the heading relating to Schedule IV (except flunitrazepam), by striking "except flunitrazepam" in the heading and inserting "except Flunitrazepam";

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking "of amphetamine or methamphetamine" in the heading and inserting "of Amphetamine or Methamphetamine";

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking "except flunitrazepam, GHB, or ketamine" in the heading and inserting "except Flunitrazepam, GHB, or Ketamine", by striking "of 1,4-butanediol" and inserting "of 1,4-Butanediol", and by striking "of gamma butyrolactone" and inserting "of Gamma Butyrolactone";

in Note 9, under the heading relating to Hallucinogens, by striking the following:

"MDA	250 mg
MDMA	250 mg

Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg",

and inserting the following:

"2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg";

and in Note 21, by striking "Section §5C1.2(b)" and inserting "Section 5C1.2(b)".

The Commentary to §2D1.1 captioned "Background" is amended by striking "Public Law 103–237" and inserting "Public Law 104–237", and by inserting after "to change the title of the Drug Equivalency Tables to the 'Drug Conversion Tables.' " the following: "*See* USSG App. C, Amendment 808 (effective November 1, 2018).".

(D) References to 18 U.S.C. § 876

The Commentary to §2A4.2 captioned "Statutory Provisions" is amended by striking "§§ 876," and inserting "§§ 876(a),".

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by striking "876," and inserting "876(c),".

The Commentary to §2B3.2 captioned "Statutory Provisions" is amended by striking "§§ 875(b), 876," and inserting "§§ 875(b), (d), 876(b), (d),".

Appendix A (Statutory Index) is amended—

by striking the following line reference:

“18 U.S.C. § 876	2A4.2, 2A6.1, 2B3.2, 2B3.3”;

and by inserting before the line referenced to 18 U.S.C. § 877 the following new line references:

“18 U.S.C. § 876(a)	2A4.2, 2B3.2
18 U.S.C. § 876(b)	2B3.2
18 U.S.C. § 876(c)	2A6.1
18 U.S.C. § 876(d)	2B3.2, 2B3.3”.

(E) Technical Changes to Commentary in Chapter Eight

The Commentary to §8A1.2 captioned “Application Notes” is amended in Note 3(G) by striking “ ‘Prior criminal adjudication’ ” and inserting “ ‘Criminal Adjudication’ ”.

The Commentary to §8C2.5 captioned “Application Notes” is amended in Note 1 by striking “ ‘prior criminal adjudication’ ” and inserting “ ‘criminal adjudication’ ”.

The Commentary to §8C3.2 captioned “Application Note” is amended in Note 1 by striking “the period provided for payment shall in no event exceed five years” and inserting “the period provided for payment shall be the shortest time in which full payment can reasonably be made”.

(F) Clerical Changes to Correct Typographical Errors

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(E) by striking "(*e.g.* a defendant" and inserting "(*e.g.*, a defendant".

The Commentary to §1B1.3 captioned "Background" is amended by striking "the guidelines in those Chapters" and inserting "the guidelines in those chapters".

The Commentary to §1B1.4 captioned "Background" is amended by striking "in imposing sentence within that range" and inserting "in imposing a sentence within that range".

The Commentary to §1B1.10 captioned "Background" is amended by striking "Title 18" and inserting "title 18".

The Commentary to §2D2.3 captioned "Background" is amended by striking "Section 6482" and inserting "section 6482".

Section 2G2.1(b)(6)(A) is amended by striking "engage sexually explicit conduct" and inserting "engage in sexually explicit conduct".

The Commentary to §2H3.1 captioned "Application Notes" is amended in Note 5(B) by striking "(*e.g.* physical harm" and inserting "(*e.g.*, physical harm".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 8(A) by striking "However, it the offense involved a stolen firearm" and inserting "However, if the offense involved a stolen firearm".

The Commentary to §2M1.1 captioned "Application Notes" is amended by striking "this Part" and inserting "this part".

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 7 by striking "Subchapter C corporation" and inserting "subchapter C corporation".

The Commentary to §2T1.1 captioned "Background" is amended by striking "the treasury" and inserting "the Treasury".

Chapter Two, Part T, Subpart 2 is amended in the introductory commentary by striking "Parts I–IV of Subchapter J of Chapter 51 of Subtitle E of Title 26" and inserting "parts I–IV of subchapter J of chapter 51 of subtitle E of title 26, United States Code".

Chapter Two, Part T, Subpart 3 is amended in the introductory commentary by striking "Subpart" both places such term appears and inserting "subpart".

Chapter Three, Part A is amended in the introductory commentary by striking "Part" and inserting "part".

The Commentary to §3A1.1 captioned “Background” is amended by striking “Section 280003” and inserting “section 280003”.

Chapter Three, Part B is amended in the introductory commentary by striking “Part” and inserting “part”.

The Commentary to §3C1.1 captioned “Application Notes” is amended in Note 4(I) by striking “Title 18” and inserting “title 18”.

Chapter Three, Part D is amended in the introductory commentary by striking “Part” each place such term appears and inserting “part”.

The Commentary to §3D1.1 captioned “Application Notes” is amended in Note 2 by striking “Part” both places such term appears and inserting “part”.

The Commentary to §3D1.1 captioned “Background” is amended by striking “Chapter 3” and inserting “Chapter Three”, and by striking “Chapter Four” and inserting “Chapter Four”.

The Commentary to §3D1.2 captioned “Background” is amended by striking “Part” both places such term appears and inserting “part”.

The Commentary to §3D1.3 captioned “Background” is amended by striking “Part” and inserting “part”.

The Commentary to §3D1.4 captioned “Background” is amended by striking “Part” and inserting “part”.

The Commentary to §4A1.3 captioned “Application Notes” is amended in Note 2(C)(v) by striking “this Chapter” and inserting “this chapter”.

The Commentary to §4B1.1 captioned “Background” is amended by striking “Title 28” and inserting “title 28”.

The Commentary to §5C1.1 captioned “Application Notes” is amended in Note 1 by striking “this Chapter” and inserting “this chapter”.

The Commentary to §5E1.1 captioned “Application Notes” is amended in Note 1 by striking “Chapter” both places such term appears and inserting “chapter”; by striking “Title 18” both places such term appears and inserting “title 18”; and by striking “Subchapter C” and inserting “subchapter C”.

The Commentary to §5E1.1 captioned “Background” is amended by striking “Title 18” and inserting “title 18”.

The Commentary to §5E1.3 captioned “Background” is amended by striking “Title 18” and inserting “title 18”, and by striking “The Victims” and inserting “the Victims”.

The Commentary to §5E1.4 captioned “Background” is amended by striking “Titles” and inserting “titles”.

Chapter Five, Part H is amended in the introductory commentary by striking “Part” each place such term appears and inserting “part”.

Chapter Six, Part A is amended in the introductory commentary by striking “Part” and inserting “part”.

Chapter Seven, Part A, Subpart 3(b) (Choice between Theories) is amended by striking “Title 21” and inserting “title 21”.

The Commentary to §8B1.1 captioned “Background” is amended by striking “Title 18” and inserting “title 18”.

The Commentary to §8B2.1 captioned “Application Notes” is amended in Note 1, in the paragraph that begins “ ‘Governing authority’ means” by striking “means the (A) the Board” and inserting “means (A) the Board”.

Section 8C3.3(a) is amended by striking "its ability" and inserting "the ability of the organization".

The Commentary to §8E1.1 captioned "Background" is amended by striking "Title 18" and inserting "title 18".

(G) Additional Clerical Changes to Guideline Commentary

The Commentary to §1B1.11 captioned "Background" is amended by striking "133 S. Ct. 2072, 2078" and inserting "569 U.S. 530, 533".

The Commentary to §2K2.4 captioned "Statutory Provisions" is amended by striking "§§ 844(h)" and inserting "§§ 844(h), (o)".

The Commentary to §2M5.3 captioned "Application Notes" is amended in Note 1, in the paragraph that begins " 'Specially designated global terrorist' has" by striking "§ 594.513" and inserting "§ 594.310".

The Commentary to §2M6.1 captioned "Application Notes" is amended in Note 1—

by striking the following paragraph:

" 'Restricted person' has the meaning given that term in 18 U.S.C. § 175b(d)(2).",

and by striking the following paragraph:

" 'Vector' has the meaning given that term in 18 U.S.C. § 178(4).".

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 6, in the paragraph that begins " 'Gross income' has" by striking "§1.61" and inserting "§ 1.61-1".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 3 by striking "the victim was a government officer or employee, or a member of the immediate family thereof" and inserting "the victim was a government officer or employee, a former government officer or employee, or a member of the immediate family thereof".

The Commentary to §5G1.3 captioned "Background" is amended by striking "132 S. Ct. 1463, 1468" and inserting "566 U.S. 231, 236", and by striking "132 S. Ct. at 1468" and inserting "566 U.S. at 236".

MITCH McCONNELL
KENTUCKY

United States Senate
REPUBLICAN LEADER

February 8, 2023

The Honorable Carlton W. Reeves
Chairman
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, NE
Washington, D.C. 20544

Dear Judge Reeves:

In our system of government, Congress writes the laws. The legislative process is tricky and complicated, full of back-and-forth deliberations and delicate compromises. Any significant bill that becomes law has been steered around dozens if not hundreds of potential obstacles at which it could have come to a screeching halt. And inevitably, enacted laws do not go as far as various interest groups may like. But this is how the process works, and the process belongs to the legislature.

For example, the First Step Act of 2018 followed a long and challenging process. No issue was more controversial during the debate than whether it would be applied retroactively. As I am sure you know, Congress is extremely careful when we deal with retroactivity, and both existing statute and judicial precedent assume that Congress will state it clearly when we intend to change criminal sentencing and apply it retroactively. Put more simply, when Congress wants to reduce criminal penalties retroactively, we say so clearly.

I was therefore dismayed to see the proposed amendment to §1B1.13 which would add a strange new reason that could justify "compassionate release": namely, whether "the defendant is serving a sentence that is inequitable in light of changes in the law." This is nothing short of an extra-legislative attempt to apply new sentences retroactively. Judges do not have license to infer retroactivity in the absence of a clear directive from Congress. The presumption lies against retroactivity unless legislation is crystal-clear to the contrary.

This proposed amendment would seem to invent a novel rule that Congress would need to go out of our way to affirmatively deny retroactivity anytime we intend to change sentencing laws going forward. This would be a significant change that seems intended to let judges "do some justice" in the eyes of many academic and legal elites, notwithstanding a lack of actual statutory authorization to do so.

S–230, THE CAPITOL, WASHINGTON, DC 20510–7012
202–224–3135

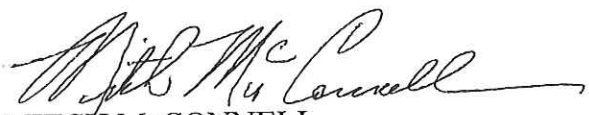
In addition to my general concerns regarding the separation of powers and the rule of law, there is an even more pragmatic reason why I would strongly caution against improperly asserting First Step Act retroactivity in this way, even to those who might applaud the policy. Such a step will poison the well in Congress with respect to any future proposed changes in law to reduce sentences. If we legislators are given reason to expect that any future legislation of this kind will reduce the sentences of *current* prisoners whether we intend it or not—whether we actually legislate it or not—we will simply not pass such laws. By trying to short-circuit your way to this one quasi-legislative change in the near term, you would destroy any possibility of additional future legislation in this area.

Here's a concrete example. Last year, Democrats' push to pass the so-called "EQUAL Act" spawned bipartisan discussions about ways Congress might bring the authorized sentences for crack cocaine and powder cocaine closer to parity. My understanding is that some negotiators had reached a preliminary deal that would have brought the ratio from 18:1 down to 2.5:1 — non-retroactively. But while these talks were underway, Senator Durbin met with you and your colleagues and urged you to change the Guidelines in this exact way, such that post-sentencing legislation—like crack-cocaine parity—could count as an extraordinary or compelling reason for compassionate release. He acknowledged this publicly. It instantly became clear to Senators that it did not matter if Congress declined to make the new crack-cocaine sentences retroactive, because the Sentencing Commission would change the rules later to make them retroactive anyway. The specter of this extra-legislative backdoor amnesty for crack dealers ended any possibility of a compromise then and there.

If you enact this amendment, you will be ensuring this story repeats itself whenever members of Congress might otherwise have considered reducing sentences in the future. With violent crime soaring across the country, there will be no meaningful bipartisan appetite for passing measures that would give indulgent judges an excuse to open the prison gates—regardless of the actual text of our legislation.

I urge you and your colleagues to reject this amendment and leave the legislating to Congress.

Sincerely,



MITCH McCONNELL
SENATE REPUBLICAN LEADER

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

March 14, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002
Attention: Public Affairs

Dear Chair Reeves:

Congratulations on commencing your tenure as Chair of the newly-reconstituted United States Sentencing Commission as it embarks on its first amendment cycle. We write to express our views on some of the proposed amendments which the Commission has promulgated.

Proposed Amendment #1: First Step Act—Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)

We find it heartening and appropriate that the Commission's top two priorities for the current amendment cycle involve implementation of the First Step Act (FSA). We support the amendment of § 1B1.13 (policy statement) to reflect that 18 U.S.C. § 3582(c)(1)(A), as amended by Section 603(b) of the FSA, authorizes an incarcerated person to file a motion seeking a sentence reduction and is not limited to motions filed by the Bureau of Prisons.

We further support the Commission's decision to provide courts identical discretion to determine what constitutes "extraordinary and compelling reasons" for self-filed motions as exists for warden-filed motions. This approach appropriately recognizes that courts are in the best position to determine what constitutes an extraordinary and compelling reason within the specific circumstances of an individual § 3582(c)(1)(A) motion, regardless of whether it is filed by a warden or by an incarcerated person directly.

Victim of Assault

We agree that the Commission should include the proposed Victim of Assault enumerated circumstance:

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

However, several modifications would better effectuate the Commission's purpose. First, the phrase "sexual assault or physical abuse" should be replaced with "sexual or physical assault or abuse," to ensure that sexual abuse of the type prohibited under 18 U.S.C. § 2243(b) is covered. As horrifically illustrated by recent events at Federal Correctional Institution (FCI) Dublin, sexual abuse of incarcerated people by correctional staff is frequently perpetrated by express or implied coercion, rather than physical force.[1]

Second, the requirement of "serious bodily injury" should be removed. The trauma of an assault, especially a sexual assault, does not necessarily depend on the degree of bodily injury that it causes. To the extent that degree of injury is relevant, courts are in the best position to evaluate its significance without a rigid limitation imposed by the Policy Statement.

Third, the phrase "correctional officer or other employee or contractor of the Bureau of Prisons" should be expanded to include "; the United States Marshals Service; of a state, local, or private corrections agency; or by another incarcerated person." Federal prisoners are no less traumatized by sexual or physical assault or abuse when it occurs in the custody of these additional agencies or at the hands of another incarcerated person.

Changes in Law

We strongly support inclusion of the proposed Changes in Law enumerated circumstance:

> (5) CHANGES IN LAW.—The defendant is serving a sentence that is inequitable in light of changes in the law.

The statutory language of § 3582(c)(1)(A) is certainly broad enough to encompass legal changes which have occurred since the defendant's original sentencing.

For example, Section 401 of the FSA substantially reduced enhanced penalties for individuals with prior drug convictions. An individual serving a life sentence under these provisions might raise in her motion the fact that the same offense would garner a 25-year sentence today. Of course, this legal development alone would not entitle her to relief—the court would also have to consider the 18 U.S.C. § 3553(a) factors and the remainder of § 1B1.13. But clearly a court could find that the difference between the sentence the defendant received, and the one she would receive today for identical conduct, is an extraordinary and compelling reason for the court to reconsider whether this individual should continue to serve the rest of her life in prison.

Other Circumstances Options

In light of the broad statutory discretion given to district courts under § 3582(c)(1)(A), we view the Commission's Option 3 as the most appropriate approach to the "catchall" basis for relief:

[1] See U.S. Senate Perm. Subcomm. on Investigations, *Sexual Abuse of Female Inmates in Fed. Prisons – Staff Rpt.* (Dec. 13, 2022).

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

Options 1 and 2 insert additional restrictions that are not supported by the statutory text. With one exception (rehabilitation alone[2]), Congress included no categorical limits on what may qualify as extraordinary and compelling reasons, which by their nature are varied, frequently unanticipated, and not reducible to an exhaustive list.

Indeed, the experience of compassionate release over the past several years, when courts have been operating without an applicable policy statement, shows that judges have appropriately used their discretion to determine whether extraordinary and compelling reasons exist, and have taken seriously the requirement to consider the § 3553(a) factors as well. The Commission's data show that of the 25,416 compassionate release motions filed between October 2019 and September 2022, only 16.2 percent were granted.[3] The Commission's policy statement should preserve and support federal courts' discretion and expertise in adjudicating compassionate release motions.

Proposed Amendments #6 & #7: Career Offender and Criminal History

We write about these two proposed amendments together because each fundamentally presents the same issue: to what degree should a person's criminal history affect their sentence in their current case? In a different context, Congress confronted this same issue in enacting Sections 401, 402, and 403 of the First Step Act, which, for Sections 401 and 403, tempered certain draconian prior-conviction enhancements, or, for Section 402, made individuals with more criminal history points eligible for safety valve relief. We urge the Commission, in each instance presented in Proposed Amendments #6 & #7, to move in the direction of assigning criminal history less weight as a factor in sentencing.

Among many problems, overreliance on criminal history in sentencing exacerbates the effect of racially disparate arrest and prosecution rates. A 2014 examination of 3,528 police departments found that Black Americans are more likely to be arrested in almost every city for almost every type of crime; at least 70 police departments arrested Black people at a rate ten times higher than non-Black people.[4] For this reason, criminal history can often be more of a proxy for race than for any factor that is valid and relevant to sentencing.

"Status points" present one example of criminal history-based sentencing without evidentiary justification. These are criminal history points assigned under § 4A1.1(d) to a defendant who was "under any criminal justice sentence" (most commonly on probation) at the time of the current offense. Status points often result in what amounts to "triple-counting" of a prior conviction in determining how much incarceration a person will serve as a consequence of

[2] 28 U.S.C. § 994(t).

[3] United States Sentencing Commission, *Compassionate Release Data Report Fiscal Years 2020 to 2022*, tbl. 1 (Dec. 19, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf.

[4] Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'* USA Today, Nov. 19, 2014, http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/.

his current offense. The prior conviction itself raises the criminal history score, the status points raise it further, and the prior sentencing court often imposes consecutive punishment for the probation violation.

Sentencing Commission data from 2022 reveals that in the five preceding fiscal years, 37.5 percent of federal offenders received status points, resulting in a higher criminal history category for 61.5 percent of those individuals. And yet for the cohort of individuals released from incarceration in 2010 and tracked for the following 12 years, the Commission concluded that: "[t]hose who received status points were rearrested at similar rates to those without status points who had the same criminal history score," and "[s]tatus points only minimally improve the criminal history score's successful prediction of rearrest—by 0.2 percent."[5] These data points suggest that lengthening sentences based on this aspect of criminal history is not empirically justified.

Career Offender sentencing under §4B1.1 presents an example where prior convictions can dramatically and arbitrarily escalate the guideline range, out of proportion to any other factor about the person or the offense. In its 2016 report to Congress on Career Offender sentencing, the Commission highlighted that most people designated as "career offenders" were sentenced for drug trafficking, and that those whose prior "qualifying" offenses were drug-only (i.e., not violent offenses), "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."[6]

Federal judges clearly recognize that the Career Offender guideline usually calls for sentences that are too high: in FY2021, judges imposed within-guideline sentences for only 19.7 percent of those sentenced as career offenders.[7] Yet each of the Commission's proposed modifications to the Career Offender guideline and definitions appears to *increase* the number of people who would be subject to sentencing as a Career Offender. We urge the Commission to avoid expanding the reach of this flawed guideline provision and, more broadly, to revise Proposed Amendments #6 & #7, to assign criminal history less weight as a factor in sentencing.

Proposed Amendment #8: Acquitted Conduct

We commend the Sentencing Commission on proposing amendments to the Guidelines Manual that would limit federal courts from considering acquitted conduct while applying the guidelines. We applaud the Commission for recognizing consideration of this issue as a priority during its 2022-2023 amendment cycle, and we ask the Commission to take the following issues into account during the amendment process.

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[5] United States Sentencing Commission, *Revisiting Status Points* 2-3 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf.

[6] United States Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements* 2 (2016), https://www.ussc.gov/research/congressional-reports/2016-report-congresscareer-offender-enhancements.

[7] United States Sentencing Commission, *Quick Facts on Career Offender* (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf.

Fifth and Sixth Amendment Guarantees of Due Process and the Right to a Jury Trial

Federal courts have interpreted §§ 1B1.3 and 1B1.4 to permit the use of acquitted conduct during sentencing, as the latter section indicates that "the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant." This language has been construed to include not only conduct for which a defendant has been convicted, but also conduct for which he or she has not been convicted, without distinguishing between uncharged conduct for which a defendant has not been convicted and conduct for which a defendant has actually been acquitted. The distinctions between uncharged and acquitted conduct justify treating acquitted conduct differently for the purposes of sentencing (though examination of the use of uncharged conduct at sentencing may be appropriate in future amendment cycles, for related reasons). An acquittal indicates that a finder of fact, usually a jury of one's peers, has determined that the government failed to prove a defendant guilty beyond a reasonable doubt of each element of an offense. While some have argued that an acquittal is not equivalent to a finding of actual innocence, failing to treat it as such in the sentencing context would result in an acquitted defendant essentially reaping no benefits from the jury's finding of not guilty and continuing to carry the stigma and consequences of being accused of a crime.

Further, when a judge considers relevant conduct during sentencing, the burden of proof is a preponderance of evidence, the lowest standard, compared to proof beyond a reasonable doubt, which applies to a jury's consideration during a criminal trial. When a judge is permitted to reevaluate a jury's verdict regarding alleged conduct at a lower standard during sentencing, and allow those factual findings to influence the defendant's sentencing on separate charges, he or she effectively sets aside the jury's verdict. Moreover, the judge may reconsider this conduct without affording a defendant the various other protections he or she enjoys during a trial, such as the right to confront witnesses or the exclusion of impermissible hearsay. Consideration of acquitted conduct during the sentencing process effectively strips the defendant of his or her constitutional rights to due process and a trial by jury as to those allegations, as it allows a judge to circumvent a jury's verdict without the same procedural safeguards, and impose his or her own factual conclusions.

The Statutory Purposes of Sentencing

The sentencing guidelines established by the Commission are designed in part to incorporate the statutory purposes of sentencing (including just punishment, deterrence, incapacitation, rehabilitation, and respect for the law) and to provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct. Permitting the consideration of acquitted conduct at sentencing disregards many of these goals.

First, defendants are frequently factually innocent of conduct for which they have been acquitted. A defendant cannot be rehabilitated from a crime he did not commit, nor deterred from committing future criminal activity related to conduct in which the defendant did not engage. Similarly, since most people are unaware that they can be punished for acquitted conduct, the availability of such punishment does not result in either specific or general deterrence. Just punishment implies principles of equity and reasonableness, which are not evoked in a sentencing process that allows punishment for conduct for which a jury has acquitted a

defendant. Further, consideration of acquitted conduct can exacerbate unwarranted disparities among similarly situated defendants, particularly where co-defendants are tried together for a myriad of offenses resulting in different convictions for each. In such a scenario, a judge may still consider charges of which some defendants were acquitted when contemplating their sentences. Because of its fundamental unfairness, punishing a defendant for acquitted conduct fails to promote respect for the law and in fact does the opposite.

Proposed Exceptions to the Limitation on Consideration of Acquitted Conduct

The Commission's proposed amendment to § 1B1.3 would provide that "acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless the conduct was admitted during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, the instant offense of conviction."

We urge the Commission to refrain from promulgating any exceptions to its limitation on the consideration of acquitted conduct, including excepting conduct admitted during a guilty plea colloquy in a subsequent prosecution. We recognize that defendants may plead guilty for reasons sometimes unrelated to actual guilt, and thus an acquittal by a trier of fact should supersede statements made during such plea colloquies. We also support the Commission's proposed definition of "acquitted conduct," which includes "conduct underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction." A motion of acquittal granted on any grounds should carry the same weight and finality as an acquittal by a trier of fact, in order to promote principles of fairness and respect for the justice system and the law.

In addition, we urge the Commission to reconsider its proposed amendment to § 6A1.3 indicating that "acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted." This language may have the effect of condoning the unjust practice of considering acquitted conduct, and its explicit inclusion is unnecessary, because the extent to which the Guidelines Manual permits consideration of "acquitted conduct" is clear based on the Commission's new definition of the term.

For all of the aforementioned reasons, the Commission should use the discretion Congress has granted it to amend the Guidelines Manual to promulgate amendments prohibiting the use of acquitted conduct in applying the guidelines. Legislation introduced before Congress to prohibit punishment for acquitted conduct has enjoyed broad bipartisan support,[8] and multiple Supreme Court Justices have challenged the constitutionality of this practice. We echo the late Justice Scalia, joined by Justice Thomas and the late Justice Ginsburg, in the sentiment that "this has gone on long enough."

[8] We recognize that the Sentencing Commission's authority extends only to prohibiting the use of acquitted conduct for determination of an applicable guideline range, and thus does not encroach on Congress's lawmaking authority as expressed in S.601 (117th Cong.), which would prohibit *all* consideration of acquitted conduct at sentencing, except for mitigation. We nonetheless believe that this action by the Commission would be a substantial step toward fairness and constitutionality in federal sentencing.

Proposed Amendment #9: Sexual Abuse Offenses

We commend the Commission on proposing amendments to the Guidelines Manual in response to the passage of the Violence Against Women Act (VAWA) Reauthorization Act of 2022, which reauthorizes VAWA through 2027 and modernizes current law to better address the evolving needs of domestic violence and sexual assault survivors. Senators Feinstein, Ernst, Durbin, and Murkowski led this reauthorization on a bipartisan basis with the intent to renew our longstanding commitment to protecting the most vulnerable members of our communities.

The 2022 VAWA reauthorization created two new offenses that (1) prohibit any person from engaging in, or causing another to engage in, sexual misconduct while committing a civil rights offense; and (2) prohibit any individual, while acting in their capacity as a federal law enforcement officer, from knowingly engaging in a sexual act with an individual who is under arrest, under supervision, in detention, or in federal custody. Last year, several Senators sent multiple letters urging the Department of Justice and the Bureau of Prisons (BOP) to immediately act to enhance prevention, reporting, investigation, prosecution, and discipline of sexual misconduct perpetrated by staff against incarcerated people.[9] We were pleased to learn that the Department has convened a working group of senior officials dedicated to addressing this issue. The working group has proposed recommendations and reforms to better protect individuals in BOP's custody from sexual abuse, and we understand that some of these plans have already been implemented. We urge the Commission to join us in the effort to promote safe, secure, and effective correctional facilities by promulgating carefully deliberated amendments to the Guidelines that will implement the VAWA reauthorization provisions and appropriately hold offenders accountable.

Proposed Amendment #10: Alternatives-to-Incarceration Programs

We commend the Commission on identifying "a multiyear study of court-sponsored diversion and alternatives-to-incarceration programs" as one of its policy priorities this amendment cycle. The United States has one of the highest incarceration rates in the world, averaging approximately 505 prisoners per 100,000 people.[10] According to the Prison Policy Initiative, United States correctional systems, including federal, state, local, and tribal facilities, hold nearly two million people at any given time.[11]

While incarcerated, these individuals are unable to contribute to their households and communities, and they are subject to the many adverse physical, emotional, and psychological challenges associated with being confined. Additionally, once individuals are released from correctional facilities, they are likely to be disadvantaged by the collateral consequences of incarceration and convictions, which may include barriers to securing housing, employment,

[9] Durbin, Grassley, Feinstein, Padilla Press DOJ for More Information on Sexual Misconduct at BOP, Press Release, (December 12, 2022), https://www.durbin.senate.gov/newsroom/press-releases/durbin-grassley-feinstein-padilla-press-doj-for-more-information-on-sexual-misconduct-at-bop.

[10] *Countries with the Largest Number of Prisoners Per 100,000 of the National Population, as of January 2023*, STATISTA (Jan. 2023), https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants.

[11] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html.

education, and voting access. These social and economic barriers can contribute to less successful reintegration into society and thus an increased likelihood of recidivism.

Furthermore, not only is mass incarceration damaging to our communities and the families that reside in them, but it places a heavy burden on our economy. The Bureau of Justice Statistics has estimated that the United States spends near $81 billion on correctional facilities each year,[12] and factoring in other intertwined expenses associated with the criminal justice system, the total annual amount spent on incarceration is closer to $182 billion.[13] Recent data indicate that the average annual cost of incarceration for a Federal prisoner is about $39,158.[14]

We encourage the Commission to comprehensively explore the expansive array of diversion programs available to prevent low-risk individuals from ever entering correctional facilities, including community service, education, deferred prosecution or deferred sentencing agreements, and courts that specialize in mental health programs, veterans' services, and substance use disorder treatment. Studying the various models, their measures of success and rates of recidivism, and the demographic and offense characteristics of participants would likely be instructive as to when and how judges should be granted wide discretion to utilize such programs and how the programs can be implemented without unwarranted disparities. We also encourage the Commission to examine the same factors in its study of the variety of other alternatives to incarceration, including probation, home confinement, electronic monitoring, residential reentry centers, restorative justice practices, and other sentencing options designed to promote accountability, community safety, and productivity.

Thank you for considering our views.

Sincerely,

Richard J. Durbin
Chair

Cory A. Booker
United States Senator

Mazie K. Hirono
United States Senator

[12] Peter J. Tomasek, *Annual Prison Costs Going into 2023*, INTERROGATING JUST. (Dec. 28, 2022), https://interrogatingjustice.org/ending-mass-incarceration/annual-prison-costs-going-into-2023.

[13] Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html.

[14] Annual Determination of Average Cost of Incarceration Fee (COIF), 86 Fed. Reg. 49060, 49060 (Sept. 1, 2021).

United States Senate
WASHINGTON, DC 20510

March 14, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002
Attention: Public Affairs

Dear Chair Reeves:

We write in support of the proposed amendment to United States Sentencing Guidelines (USSG) Section 2D1.1(b)(13). This amendment adds a two-level enhancement for representing a substance as a legitimately manufactured drug despite having reason to believe that the substance contains fentanyl or a fentanyl analogue. In the 117th Congress, we introduced the Stop Pills That Kill Act (S. 4151), which directed the United States Sentencing Commission (USSC) to review the USSG and, where appropriate, increase penalties for offenders who knowingly market fentanyl as legitimate pharmaceuticals. Thank you for conducting this review.

As you know, nearly 108,000 Americans died in 2021 from drug overdoses, and we expect similar numbers for 2022. Many of them did not know they were taking fentanyl or an analogue of fentanyl. Often, they believed they were consuming a name-brand pharmaceutical. Frequently, the victims were children.

Individuals who deceive their victims into taking deadly substances deserve tougher sentences. The USSC's proposed two-level enhancement is positive step towards holding them accountable. We appreciate the Commission taking the direction of the Stop Pills That Kill Act into account. We look forward to its implementation and to continuing our work with the USSC.

Sincerely,

Charles E. Grassley
United States Senator

Dianne Feinstein
United States Senator

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 19, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Carlton W. Reeves
Chairman
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, NE
Washington, D.C. 20544

Dear Judge Reeves:

As lead author of the First Step Act of 2018, I write to express my views regarding the U.S. Sentencing Commission's *Proposed Amendments to the Sentencing Guidelines*, which were published on January 12, 2023. While many of the Commission's proposed amendments appear to be reasonable and sensible, I strongly encourage the Commission to reject the proposed amendment to §1B1.13(b)(5) – Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A). This proposal would create a "Changes in Law" definition of "extraordinary and compelling reasons" that could justify a reduction of sentence for a defendant regardless of Congressional intent to make a law retroactive. I also encourage the Commission to select Option 1 among the three options for "Other Circumstances" in §1B1.13(b)(6).

The proposed amendment to §1B1.13(b)(5) would convert post-sentence legal developments, including legislative, judicial, and Sentencing Commission activity, into "extraordinary and compelling" reasons upon which a court may grant a defendant's motion for compassionate release. Such a proposal is contrary to U.S. law and to the principles underlying it, a usurpation of authority delegated to the legislative branch, and it would open the floodgates of compassionate release motions. Such motions have – and will continue to – submerge federal prosecutors and courts in costly and time-consuming litigation by inviting federal judges to assume the role of a legislator and reduce a defendant's sentence if the judge finds that the original sentence is, in the words of the proposal, "inequitable in light of changes in the law."

First, the proposal is contrary to specific U.S. law. A criminal statute that lowers the sentence applicable to a defendant's criminal conduct isn't retroactive unless Congress specifically makes the statute retroactive. Federal law mandates that a statute reducing the penalty for a criminal offense doesn't apply to offenses committed prior to its enactment, "unless the repealing Act shall so expressly provide." 1 U.S.C. § 109. The Supreme Court recognized this principle when it said that "in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Dorsey v. United States*, 567 U.S. 260, 280 (2012).

Second, the proposal is contrary to legal principles. The Supreme Court explained that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265 (1994). This presumption is based on the simple concern that retroactive application of laws risks undermining the fundamental principles of equality, certainty, and predictability underlying the rule of law. For these reasons, Congress must clearly intend for an amendment to criminal law to be retroactive in order for it to justify retroactive relief. Certainty and predictability are especially implicated here because the proposal is likely to make it more difficult for federal prosecutors, victims, and the public to trust in the permanency of settled plea agreements and sentences in light of potential legislative changes in the future. This could result in less leniency being granted in many cases by prosecutors who are concerned about a sentence being subsequently undermined.

Third, the proposal is contrary to Congressional intent. As lead author of the First Step Act, I can tell you that Congress didn't intend to make the entire act retroactive. Instead, Congress made careful retroactivity determinations with regard to specific provisions within the First Step Act itself. For example, Section 403 of the First Step Act, which amended the mandatory stacking provision of 18 U.S.C. §924(c), wasn't made retroactive, but Section 404, which further implemented the Fair Sentencing Act as it relates to crack-cocaine offenses, was made retroactive. Accordingly, Congress determined that some provisions are retroactive, while others are not. Yet this proposal would, contrary to well-established law, set aside Congress's specific determinations.

In this way, the proposal usurps authority that belongs to Congress. Congress alone has the authority and responsibility to determine when a criminal statute or a specific provision within a criminal statute has retroactive application. Retroactivity determinations are critical components of legislative negotiations, and this proposal – which allows judges to arrogate legislative power to themselves whenever they feel the need to smooth out an "inequitable" sentence – will make bipartisan work much harder to do in the future.

Fourth, the proposal will result in voluminous and costly litigation, which will jeopardize public safety. The Sentencing Commission's data showed a sharp increase in compassionate release motions filed during the COVID-19 pandemic. But this proposal will serve to keep those motions at an unacceptably high level by creating an incentive for defendants to frequently file compassionate release motions with the hope that they draw judges inclined to lower sentences perceived to be "inequitable" due to laws that judges think too harsh. For example, under this proposal, every slight amendment to the First Step Act enacted by Congress could constitute a basis for a new claim even where an old one was denied. Such a practice will also result disparate sentences across the country because not all federal judges will assume the legislative role that this proposal improperly creates. As lead author of the First Step Act, compassionate release motions based on "extraordinary and compelling" reasons means that granting such motions would be a rare instance and used with great discretion, particularly as weighed against the charge, danger to society, and risk of recidivism.

For these reasons, I expect the Commission to reject the proposed amendment of §1B1.13(b)(5) from consideration.

For similar reasons, the Commission should select Option 1 of §1B1.13(b)(6). Here, the Commission presents three options, each of which would create a catchall clause for "Other Circumstances" in §1B1.13(b). Option 1 would require the defendant to show "any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described" in the rest of §1B1.13(b).

By contrast, both Option 2 and Option 3 are not tethered to be "similar in nature and consequence" to the other circumstances described in §1B1.13(b). Option 2 simply requires a showing of changes in circumstances that would make the defendant's sentence "inequitable," but it provides no objective definition or limit as to what could create this sort of inequity. Option 3 is even worse, requiring only that a defendant show an extraordinary and compelling circumstance "other than" the ones enumerated elsewhere in §1B1.13(b).

Both Option 2 and Option 3 would grant far too much discretion in allowing limitless interpretation of "extraordinary and compelling circumstances," which would basically destroy the benefit of enacting §1B1.13(b) in the first place. Not only would this permit courts to apply post-sentence legal developments to justify reductions in sentences, but it would permit *any theory at all* to justify a sentence reduction so long as a judge found it persuasive. We'd end up back where we started, with federal judges in different jurisdictions coming up with their own interpretations and creating a hodgepodge of law and sentencing outcomes nationwide. The Commission should not encourage this result.

Sincerely,

Chuck Grassley
Ranking Member
Senate Judiciary Committee

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States District Court
333 Constitution Avenue, N.W., Room 4317
Washington, DC 20001

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Honorable Kenneth D. Bell
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Honorable Randolph D. Moss, Chair

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March 13, 2023

Hon. Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chairman Reeves and Members of the Sentencing Commission:

On behalf of the Criminal Law Committee of the Judicial Conference of the United States, thank you for providing us the opportunity to comment on proposed amendments to the sentencing guidelines. The Judicial Conference has authorized the Criminal Law Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the Guidelines."[1] These comments focus on Part A of the proposed amendment to §4B1.2 (Definitions of Terms Used in Section 4B1.1), which would provide an alternative approach to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense" for purposes of determining whether a defendant should be treated as a "career offender." Part A would eliminate the categorical approach by defining "crime of violence" and "controlled substance offense" based on a list of guidelines rather than offenses or elements of an offense.[2]

[1] JCUS-SEP 90, p.69.

[2] Part A also would make conforming changes to the guidelines that use those terms and those that refer to §4B1.2.

As noted in previous testimony, the Criminal Law Committee's comments will focus on administration of justice issues—including the clarity of the governing rule and ease of application—and the potential effect on judicial resources. The views expressed are those of the Committee, as we do not speak for the entire judiciary or each of its judges.

General Comments on Proposed Changes

The Committee fully supports finding better alternatives to the existing "categorical approach" for determining whether an offense is a "crime of violence" or a "controlled substance offense." As the Commission has noted, the categorical approach has been accurately described as overly complex, time-consuming, and difficult to apply, often resulting in arbitrary results.[3] The categorical approach, with its resulting substantial litigation, also significantly burdens the resources of the courts and the Probation and Pretrial Services Offices.

Given the considerable effort the Commission is undertaking to develop a workable alternative to the categorical approach, in addition to considering the proposed amendment that defines crimes of violence and controlled substance offences based on a list of guidelines rather than by focusing on elements of an offense, the Commission may wish to consider allowing sentencing judges to have greater flexibility to most effectively determine, based on the underlying facts, whether a prior state offense is a crime of violence.[4] The Commission's proposed approach, as it now stands, would have the sentencing court rely on the *Shepard* documents. The Committee suggests it might also be appropriate to allow the sentencing court to supplement the *Shepard* documents, in appropriate cases, with testimony and other evidence. The Judicial Conference has resolved "that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible." JCUS-MAR 2005, p.15. The Committee believes that allowing the sentencing court additional flexibility as to the evidence it may consider in determining whether a defendant is a career offender is consistent with the Judicial Conference's resolution.[5] The Committee recognizes, however, that this approach may result in additional hearings (or lengthening them) for our judges.

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[3] U.S. Sentencing Comm'n, *Proposed Amendments to the Sent'g Guidelines, Reader-Friendly* (Feb. 2, 2023) at 146.

[4] Prior convictions under federal law will necessarily fit within the Chapter Two list of "crime of violence" guidelines. Looking beyond the *Shepard* documents would therefore be most helpful when determining the most appropriate guideline that should apply to the state law convictions being evaluated in many career offender determinations.

Given the narrower range of controlled substance offenses, the Committee believes looking beyond the *Shepard* documents might be less important for controlled substance offense determinations.

[5] Were this approach adopted, it would be advisable to move the list of *Shepard*-type documents from Application Note 2 into the body of the guideline, and to explicitly provide that the sentencing court could consider testimony and other evidence in addition to receiving the listed documents.

To be clear, the Committee does not know whether the overall number of individuals found to fall under §4B1.1 will be higher or lower if Part A of the proposed amendment is adopted (whether or not our proposed comments are taken into account), and we take no position on whether either should be the goal. Rather, we leave questions of policy to others.

Comments on Proposed §4B1.2

1. Documents and Other Evidence Courts May Consult

In an issue for comment, the Commission asks whether additional or different guidance should be provided regarding the documents a court can look to when determining whether a conviction is a "crime of violence" or a "controlled substance offense." The Committee believes Proposed Guideline §4B1.2(c) would benefit from additional clarity on several fronts. The Proposed Guideline states:

> DETERMINATION OF WHETHER A STATE OFFENSE IS A "CRIME OF VIOLENCE" OR A "CONTROLLED SUBSTANCE OFFENSE".
>
> For purposes of determining whether a state offense is a "crime of violence" or a "controlled substance offense" under subsection (a)(1)(B) or (b)(1)(B), the "most appropriate guideline" is the Chapter Two guideline that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted. The court shall make this determination based on: (1) the elements, and any means of committing such an element, that formed the basis of the defendant's conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means.

First, the Committee believes the guideline should specify exactly what material the Commission intends for district courts to consult in making these determinations. If this always includes the *Shepard* documents, the Committee believes the guideline should so specify, and should list the specific categories of *Shepard* documents. *See Shepard v. United States*, 544 U.S. 13 (2005). And given the questions raised about the binding force of application notes, the Committee believes it would be appropriate to move the list of *Shepard* documents from proposed Application Note 2[6] to the guideline itself. For the reasons explained above, it might

[6] Proposed Application Note 2 states:

> In determining whether a state offense is a 'crime of violence' or a 'controlled substance offense' under subsection (a)(1)(B) or (b)(1)(B), the court may consider the statute of conviction and the following sources of information:
>
> (A) The judgment of conviction.
> (B) The charging document.
> (C) The jury instructions.
> (D) The judge's formal rulings of law or findings of fact.
> (E) The plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

also be appropriate to provide courts with the flexibility to consider, where appropriate, other evidence relating to the relevant offense conduct.

Second, the proposed guideline uses the phrase "offense conduct cited in the count of conviction." It is unclear to the Committee just what this means. If it refers to the charging document, the Committee notes that indictments, for example, do not typically set forth the conduct in which the defendant engaged that supports the charged offense. But again, if the Commission intends to allow the district court to make the relevant determinations based on *Shepard* documents (or based on the *Shepard* documents+), stating that explicitly would likely remove any ambiguity. In line with our general comment that it may be appropriate to allow courts to look at testimony and other evidence, the Commission may also wish to consider amending the second element of this language to state "(2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, **or found by the court sentencing the defendant for the instant offense,** that establishes any such elements or means."

Third, proposed Application Note 2(F) lists as one source a district court may use: "Any explicit factual finding by the trial judge to which the defendant assented." Because the Committee believes the meaning of this is unclear, examples might be helpful.

2. Proposed List of Chapter Two Guidelines at §4B1.2(a)(2)

The Committee applauds the Commission's effort to simplify the method for determining whether a prior conviction is a predicate for an enhancement under the career offender or other guidelines by eliminating the need to consider divisibility and the means/elements distinctions. But the list of guideline sections to be referred to in defining "crime of violence," as set out in Proposed Guideline §4B1.2(a)(2), may result in new litigation challenging why certain Chapter Two guidelines were listed and whether they should be considered crimes of violence. To assist the courts and reduce potential litigation challenging the list, the Commission may wish to consider setting forth the reasons for, or considerations that informed, its selection of the listed guidelines.

Under the proposed approach, the focus of inquiry is whether the defendant was convicted of a federal offense for which the "applicable Chapter Two guideline" is listed in §4B1.2 or a state offense for which the "most appropriate" offense guideline would have been one of the Chapter Two guidelines listed in §4B1.2 had the defendant been sentenced under the guideline in federal court. But questions – and the risk of potential litigation – remain around how this process would work in practice. How should the court determine the "most

(F) Any explicit factual finding by the trial judge to which the defendant assented.
(G) Any comparable judicial record of the sources described in clauses (i) through (vi).

If the Commission were inclined to adopt an approach that would allow the sentencing court the discretion to look beyond the *Shepard* documents in determining the facts underlying the state offense, then it could add another subsection to this list, such as: "(H) Testimony or other evidence presented to the court during a hearing concerning whether the defendant qualifies as a career offender under these guidelines" or "(H) Any conduct found by the court, including conduct based on reliable testimony or evidence presented at a hearing in the instant case."

appropriate" offense guideline? Courts and officers may already be familiar with the "most analogous" guideline analysis required by §2X5.1 to determine which Chapter Two guideline to use for federal offenses that are not listed in Appendix A and for state offenses that are charged federally under the Assimilative Crimes Act. But the analysis required by the proposal – to identify the "most appropriate" guideline — arguably differs from the "most analogous" guideline determination required by §2X5.1. Could the Commission provide more guidance for selecting the "most appropriate" guideline, perhaps by providing a few examples in an application note?

The Committee also has concerns that the list of guideline sections to be referred to in defining "crime of violence under Proposed Guideline §4B1.2(a)(2)," might include offenses that do not contain an element or means of the use or threatened use of force. For example, Section 2E1.1 is a listed guideline and covers racketeering. But racketeering covers a broad range of offenses, such as mail fraud, wire fraud, and bank fraud. 18 U.S.C. § 1961(1)(B) (citing those offenses in the definition of "racketeering activity" for 18 U.S.C. § 1962 and § 1963). Although some racketeering offenses involve the use or threatened use of force, not all do. It might be helpful for the guideline to specify that the racketeering predicate offenses themselves must also meet a listed guideline. As a related point, some listed guidelines appear to cover offenses that present the *risk* of violence rather than the use of force. For example, §2K2.1 is a listed guideline and covers possession of the firearms described in 26 U.S.C. § 5845(a). If the Commission listed some guidelines for their risk of violence rather than the use or threatened use of force, then it would help litigants and courts for the Commission to explain that reasoning. In sum, these examples emphasize the advisability of including an explanation for the Commission's choice of the particular guidelines on the list of qualifying guidelines.

3. Exclusion for Recklessness

The proposed exclusions set out in subsection (3) of §§4B1.2(a) and (b) appear to exclude offenses that are crimes of violence.[7]

As the Commission knows, criminal offenses have what the Model Penal Code calls material elements of an offense, which can include the "nature of conduct," the "result of conduct," and "attendant circumstances." Each can have a separate scienter requirement.[8] The

[7] Those subsections state:

> (3) EXCLUSION.—For purposes of this guideline, a conviction under federal or state law based upon a finding of recklessness or negligence is not a "crime of violence."
>
> ***
>
> (3) EXCLUSION.—For purposes of this guideline, a conviction under federal or state law based upon a finding of recklessness or negligence is not a "controlled substance offense."

[8] Model Penal Code §§ 2.02(2)(b) & (2)(c) describe two such scienter standards:

> (b) **Knowingly.**
> A person acts knowingly with respect to a material element of an offense when:

proposed guideline appears to exclude any conviction based on any finding of recklessness, even if the recklessness goes to an attendant circumstance or a possible enhancing factor. As one of many examples, 18 U.S.C. § 1992 provides in part:

> **§ 1992. Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air**
>
> (a) General Prohibitions.—Whoever, in a circumstance described in subsection (c), *knowingly and without lawful authority or permission—*
>
> ***
>
> (3) places or releases a hazardous material or a biological agent or toxin on or near any property described in subparagraph (A) or (B) of paragraph (4), with intent to endanger the safety of any person, or *with reckless disregard for the safety of human life*

(emphasis added).

Even though this statute requires that a person acted "knowingly" in placing hazardous materials or toxins in certain places, it *also* requires that the person acted with either the intent to endanger the safety of any person *or* with reckless disregard for the safety of human life. Could some convictions for this terrorism offense not qualify as crimes of violence because of the proposed guideline exclusion, which seems to exclude *any* conviction based on "*a* finding of recklessness"?

If this is not the Commission's intent, perhaps the Commission could clarify that the exclusion applies only if the least culpable state of mind required for conviction for a "crime of

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(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) **Recklessly.**
A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

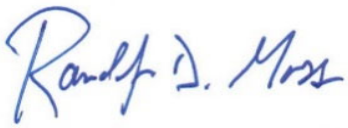
violence" or "controlled substance offense"[9] is recklessness or negligence.[10] In the alternative, if this suggestion or one like it is not implemented, the guideline could specify that the "finding" referenced in the proposed "recklessness" guideline be made based on the materials listed in proposed Application Note 2 (which the Committee recommends be moved to the guideline instead).

Under the proposed exclusion, federal second-degree murder (as well as similar state convictions) might not qualify as a crime of violence, even though the proposed guideline list has a crime of violence "match" with federal second-degree murder. That is because federal second-degree murder requires that the defendant act with "malice aforethought," *see* 18 U.S.C. § 1111(a), and "malice aforethought" is often defined as including extreme recklessness. *See, e.g.*, Ninth Circuit Manual of Model Criminal Jury Instruction § 16.2 ("To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life."); *see also United States v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (en banc). The Commission might wish to consider clarifying whether the recklessness exclusion (which excludes convictions "based upon a finding of recklessness") covers extreme recklessness.

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on these proposed changes to the sentencing guidelines. As we have in the past, the members of the Criminal Law Committee look forward to working with the Commission to ensure that our sentencing system is consistent with the tenets of the Sentencing Reform Act.

Sincerely,



Randolph D. Moss

cc: Hon. Roslynn R. Mauskopf

[9] A drug sale statute could punish the knowing sale of heroin but could provide for an enhanced punishment if the sale were to a person under 16, with the defendant recklessly disregarding the risk that the buyer was under 16. Again, a conviction under this hypothetical statute could be a conviction "based upon" recklessness even though the sale of heroin was knowing, because the scienter required for an attendant circumstance was recklessness.

[10] If the Commission adopts this suggestion, it could provide examples in an application note of statutes like 18 U.S.C. § 1992 that would *not* be excluded because they contain another scienter requirement more culpable than recklessness--in the case of section 1992, "knowingly."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
JOHN JOSEPH MOAKLEY UNITED STATES COURTHOUSE
SUITE 7710
1 COURTHOUSE WAY
BOSTON, MASSACHUSETTS 02210

DAVID J. BARRON
CHIEF JUDGE

(617) 748-9008

March 13, 2023

Honorable Carlton W. Reeves, Chair
Attn: Public Affairs -- Proposed Amendments
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500
Washington, D.C. 20002-8002

By Submission Portal: https://comment.ussc.gov/apex/ussc_apex/r/publiccomment/home

Re: United States Sentencing Commission, Proposed Amendments to the Sentencing Guidelines, February 2, 2023

Dear Judge Reeves,

We write, on behalf of the First Circuit Judicial Council Alternative Sentencing Committee (First Circuit Alternative Sentencing Committee),[1] in response to the U.S. Sentencing Commission's request for comments on Item No. 10, Issues for Comment: Alternatives-to-Incarceration Programs, of the February 2, 2023 Proposed Amendments to the Sentencing Guidelines. Specifically, the First Circuit Alternative Sentencing Committee offers a comment in response to the second issue regarding whether, when, and how "the Guidelines Manual should be amended to address court-sponsored diversion and alternatives-to-incarceration programs."

It is the consensus of the First Circuit Alternative Sentencing Committee that it would be a mistake to consider any amendment that could limit the discretion of the sentencing court; the risks of adopting any new policy or guideline regarding diversion and alternatives-to-incarceration programs that curtails the sentencing court's discretion to consider individual circumstances would significantly outweigh any potential benefits that could result from its inclusion. In any event, any such proposed amendments would be premature prior to completion and review of the results of the U.S. Sentencing Commission's proposed study of these programs.

[1] The First Circuit Judicial Council Alternative Sentencing Committee was formed in 2022 to explore the alternative sentencing programs in the First Circuit and nationally, and to develop recommendations for potential improvement in their structure, scope, and implementation.

We appreciate the opportunity to comment. Please feel free to contact us if we can provide additional information.

Respectfully Submitted,

David J. Barron,
Chief Judge, U.S. Court of Appeals for the First Circuit

Leo Sorokin,
U.S. District Judge, District of Massachusetts
Chair, First Circuit Alternative Sentencing Committee

William Smith,
U.S. District Judge, District of Rhode Island
Chair, First Circuit Alternative Sentencing Committee

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

JULIE E. CARNES
SENIOR CIRCUIT JUDGE

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March 14, 2023

Honorable Carlton W. Reeves, Chair
U.S. Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves and Esteemed Members of the United States Sentencing Commission:

I write in response to your request for comment on proposed amendments to the federal sentencing guidelines. By way of introduction, I served as a United States Sentencing Commissioner from 1990-1996. While on the Commission, I was appointed to the federal district court bench in Atlanta, Georgia, where I sentenced many defendants during my 22-year tenure. While on the district court, I was appointed as a member of the Judicial Conference's Committee on Criminal Law in 2005 and selected by the Chief Justice as the Chair of that Committee from 2007-2010. In 2014, I was appointed to the Eleventh Circuit Court of Appeals, where I now continue to serve as a senior judge.

In short, I have devoted much of my career to the study and implementation of sentencing policy, and I greatly appreciate the significance and the challenges of the work that you all are embarking on. You should be congratulated for how productive you have been in the short time since your appointment; you have certainly set out an ambitious agenda. I do, however,

have concerns about some of the proposed amendments. And I discuss below those proposed amendments over which I have the greatest concern: the compassionate release provision and the creation of a "0" criminal history category. I favor many of the amendments that you suggest but, with two exceptions,[1] I do not mention those proposed amendments I favor to avoid making longer what is already a lengthy letter. I first address my concerns involving two proposed amendments.

I. Reduction of Imprisonment Term Under 18 U.S.C. § 3582(c)(1)(A) (aka "Compassionate Release")

Not surprisingly, this relatively untrod area creates difficult policy and drafting decisions. My greatest concern focuses on two of the catch-all "Other Circumstances" options you have proposed for comment, as well as one of the specific examples of "exceptional compelling reasons" warranting a reduction of sentence set out in the proposal: "(5) Changes In Law."

A. Catch-all Provisions (Subsection 6)

I begin with the catch-all options numbered as subsection 6 of § 3582(c)(1)(A)(b). Option 1 is the most specific—providing for a reduction in sentence if the defendant presents circumstances similar in nature and consequence to the examples of such circumstances set out in the policy statement. I am unsure that articulation of a catch-all provision is a necessary step to take at this juncture of the Commission's work in this area,[2] but

[1] The proposed amendment revising the acceptance of responsibility reduction (§ 3E1.1(b)) and Option 2 under the proposed amendment concerning status points (§ 4A1.1(d)).

[2] According to the letter from the Criminal Law Committee's Chair, Judge Moss, thousands of compassionate release motions have been filed by prisoners since Congress amended the statute to allow such filings. Vaguely written provisions further expanding the grounds for release, as do Options 2 and 3, will surely increase, by a great margin, such motions. One might argue that before enacting any catch-all provision, it could prove more prudent for the Commission to first study those motions that will actually be filed under the amended specific grounds to identify other potentially viable grounds for a reduction. In addition, we have had over 30 years

assuming that it is, Option 1 seems to me to be the least vague and the most preferable of the options. Option 2 provides for a reduction if there are changes in the defendant's circumstances or intervening events that make it "inequitable" for the defendant to continue serving his[3] sentence, with no attempt at defining what the term "inequitable" means. Option 3, similarly vague, allows for a reduction if the defendant presents an extraordinary and compelling reason other than, or in combination with, the specific examples set out above. As the purpose of the policy statement is to explain what an extraordinary and compelling reason is, a provision that merely parrots the same phrase as a ground for reduction provides no guidance to anyone and does not fulfill the Commission's duty to articulate a policy statement illuminating the meaning of the term.

Thus, if Options 2 or 3 are adopted, district and appellate courts will soon be overwhelmed by release motions filed by prisoners.[4] Indeed, the policy statement creates no procedural bars to prevent a defendant from filing the same motion over and over again. And there being no standard by which to gauge the merits of such a motion, a judge's decision will necessarily be subjective, meaning inmates who have alleged similar "extraordinary and compelling" reasons for early release can—and likely will—be treated differently, depending on the subjective views of their sentencing judges. Such

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experience with determinate sentencing and should be able at this point to identify pretty much all the reasons why prisoners think their sentences are too long and that they should be released. From that identification, decisions can be made as to whether those grounds constitute extraordinary or compelling reasons to reduce the defendant's sentence.

[3] As 83% of federal prisoners are male, I use the pronoun "he," although these observations apply to female defendants as well.

[4] In fact, Option 1 will also likely generate a lot of motions as well, as inmates will understandably try to cast whatever circumstance they are advancing in support of their motion as being similar to one of the specified reasons for a sentencing reduction.

a result will predictably create discord among losing prisoners and could result in more problems for wardens whose difficult job it is to maintain order over populations that can include some very dangerous people.

In effect, Options 2 and 3 would seemingly recreate a system of parole, with district and appellate judges now serving as the parole board. But this new system would have none of the positive features of the old parole system—guidelines that can be applied evenly to all inmates—and all the negative features that led Congress to replace it with a more determinate sentencing system. In effect, most defendants' motions under these options will constitute nothing more than a request that the judge reconsider the sentence the judge originally imposed: a result that a determinate system is supposed to avoid.

Certainly, as to sentences imposed pre-*Booker* when the Guidelines were mandatory, some judges might well impose a lower sentence if allowed to give a second look at those sentences. But going forward in the post-*Booker* era, it is unclear why a do-over sentencing protocol mechanism is necessary or even desirable. It is at the sentencing hearing that all the interested parties are present to argue their positions as to a sentence. The judge will have reviewed a very thorough presentence report, any necessary witnesses will have testified before the court, and the defendant will have had an opportunity to object to any matters in that report. Further, whatever the court's calculation of the Guidelines range, that decision no longer determines the ultimate sentence imposed. Instead, a defendant is free to argue—and his family members are free to urge—the court to impose a sentence lower than the Guidelines would require, based on the defendant's particular circumstances. And given the robust downward variance rate, we know that defendants frequently succeed in these efforts. Thus, there is no reason to doubt—and every reason to believe—that at the sentencing hearing, the judge has given it his or her best shot and has imposed a sentence that the judge believes to be the appropriate sentence: one that is "not greater than necessary to comply with the purposes of [the Sentencing Reform Act]." 18 U.S.C. § 3553(a).

That mission having already been accomplished in a very thorough and transparent proceeding, it is unclear why a subsequent motion to revisit that sentence is appropriate under what is supposed to be a determinate sentencing regime. Presumably, the allegations supporting the motion to reduce will likely focus on the defendant's accomplishments in prison—e.g., the obtaining of a GED or taking various classes—and his disciplinary record. Yet, the judge will likely not have the time to convene a pseudo-parole hearing to test the defendant's allegations about his progress in prison nor will the typical judge possess a background in prison administration adequate to assess the significance of that alleged progress. For sure, it's a great thing for prisoners to try to better themselves while incarcerated—and we should continue to develop programs that attempt to mold prisoners into law-abiding citizens upon their release—but those efforts are already accounted for by good-time credit. Indeed, Congress has recently increased the amount of good-time credit. But if more credit needs to be given to various pursuits as an incentive to a prisoner to avail himself of those opportunities, that credit needs to be conferred by Congress via a statutory amendment. Judges who try to assess the additional benefits that such activities should generate in terms of a reduced sentence are way out of their collective wheelhouse, and undoubtedly there will be a great disparity in how individual judges make that assessment.

In short, I find greatly problematic the existence of vague, open-ended, catch-all provisions justifying reductions of sentence based on the extraordinary-and-compelling-reasons ground.

B. Changes In Law (Subsection 5)

Subsection 5 lists as an example of an extraordinary and compelling reason for a reduced sentence "changes in law." Specifically, under this provision a court would be able to reduce a sentence whenever the judge determines that the defendant's sentence is "inequitable" given those changes. The Criminal Law Committee and the Department of Justice have expressed concerns about this provision; I join them in those concerns.

The first and obvious concern is the question whether a court can legally reduce a sentence based on (1) the enactment by Congress of a statute that eliminates or reduces the mandatory minimum term of incarceration compelled by an earlier statute under which the defendant was sentenced or (2) the amendment by the Sentencing Commission of a guideline used to determine the defendant's guidelines range (3) when Congress and the Commission, respectively, declined to make retroactive those statutory changes or Guidelines amendments. I offer no legal opinion on the legality of such a move by the Commission; courts will have to sort that out if it happens. But regardless of whether such a broad policy statement by the Commission would ultimately be sustained by the Supreme Court, a decision by the Commission to undermine those governing bodies' earlier decisions not to make particular amendments retroactive would clearly be seen as a very bold step.

Further, should the Commission opt to go this route, how does a district court (or a reviewing appellate court) determine whether it would be inequitable not to reduce a sentence when a non-retroactive statute or Guideline enacted after imposition of the sentence would, or might have, led to a lower sentence? The simple answer might be that it is always inequitable not to reduce the sentence under those circumstances. But a response on such a large scale would represent a real body blow to the notion of non-retroactivity now well established in the law, not to mention deluging district courts with so many reduction motions that there would be little time to deal with anything else.

If then a more modulated response to the question when a sentence become inequitable under these circumstances is "sometimes, but not always," what will be the standards by which district courts make that determination? Figuring out when it would be inequitable not to reduce a sentence will burden appellate courts by necessitating their creation of a de facto set of guidelines to regulate this newly created litigation—shadow guidelines that may well differ between each circuit. And whatever the standard may be for gauging this inquiry, what is certain is that a policy statement providing that <u>any</u> change of

law may be sufficient to warrant a sentence reduction will prompt the filing of hundreds of motions to test the limits of the provision.

That said, when a Congressional statute effectively declares a previous lengthy mandatory-minimum penalty to be greatly excessive to the sentence that is now deemed to be appropriate for the crime, I can understand dissatisfaction at Congress's decision not to make the statute retroactive. And two of the First Step Act's provisions likely generate that reaction. Specifically, 21 U.S.C § 842(b)(1) previously imposed a mandatory-minimum life sentence when a defendant who has sustained two prior felony drug convictions is convicted of a drug crime warranting a 10-year mandatory minimum sentence; the First Step Act amended that provision to apply only a 25-year mandatory sentence, and it also made it a bit more difficult for the prior drug conviction to qualify as one of the required two predicate convictions. I greatly appreciate all the many positive steps Congress took in the First Step Act, but I do regret Congress's decision not to make this statute retroactive. It would have been a relatively easy task for a district court to figure out whether the First Step Act amendment applied and, while nothing to sneeze at, a 25-year sentence will typically be much less harsh than a life sentence. But Congress chose not to do so.

Second, the First Step Act eliminated the stacking aspect of multiple § 924(c) counts of conviction. Prior to enactment of the statute, a defendant charged and convicted of multiple counts of § 924(c) (possession of a firearm during a crime of violence or drug trafficking crime) received a 5-year sentence for the first count, and then a 25-year consecutive sentence for each additional count. Since passage of the Act, a defendant now receives only 5 years for each § 924(c) count on which he is convicted—unless the defendant was convicted of a § 924(c) offense prior to the current § 924(c) conduct for which he is currently being sentenced, in which case the defendant would be subject to a mandatory-minimum 25-year sentence. For a defendant convicted of two § 924(c) counts, the sentence dictated by the mandatory-minimum statute will

now be 10 years total, compared to a pre-Act conviction, which would have resulted in a sentence of 30 years. I therefore assume that the typical multiple-count § 924(c) conviction resulted in a substantially higher sentence pre-First Step Act passage than would occur now, albeit that is not necessarily true in every case.[5]

Both of the above-discussed statutes typically resulted in lengthy sentences that were substantially higher prior to passage of the First Step Act than they would be now. It remains true, however, that Congress is well aware of its ability to make a criminal statute retroactive, and it purposely chose not to make the amendments to these two statutes retroactive. Thus, some may deem it unwise, ungrateful, or perhaps even unlawful for the Commission to countermand so soon Congress's very recent pronouncement on this matter. But should the Commission determine it best to ignore the long-standing constraints regarding the retroactive application of a statutory (or Guideline) amendment, I respectfully suggest that, instead of a broad policy statement permitting all changes in law to be implemented via the extraordinary-compelling reason exception, the Commission take a more surgical approach in trying to identify the particular changes in law that it deems worthy of implementing via this exception. A deep dive into a particular statutory change would not just include adding up the number of affected defendants, but would also involve a qualitative analysis of these defendants records and the details of

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[5] It is tricky because of plea bargaining. Hobbs Act defendants charged with multiple § 924(c) counts were among the most dangerous offenders I saw in my 22 years on the district court. They were typically young men who held up multiple commercial establishments (pizza parlors, bars, pawn shops) at gun point. For a defendant who had held up six such establishments, a prosecutor might well bargain the case down to 2 counts, yielding a 5 year + 25-year consecutive sentence, for a total of 30 years. But with the 25-year sentence no longer available for multiple convictions in the same indictment, a guilty plea to only two counts would now yield only a 10-year sentence, a plea bargain that many prosecutors might view as too lenient for such a violent offender and a plea bargain that the prosecutor would therefore not agree to today. Requiring strict retroactivity for such an offender might therefore result in a windfall for him.

their offense conduct—all of which would yield a better understanding of the kind of offender one is dealing with and the real impact of the retroactive implementation of the statute in question.

In addition, the results of a more in-depth, targeted inquiry might give rise to alternative approaches to this issue: approaches that would hopefully not give the appearance that the Commission is sticking a thumb in Congress's eyes.[6] While this study would delay until next year's amendment cycle a firm resolution of this question, it would enable the Commission to arrive at the most thoughtful response to this very thorny matter.

II. Zero-Point Offenders (§ 4C1.1)

I must admit that I am flummoxed by this proposed amendment and do not understand why it is needed. Criminal History Category I includes defendants with 0 and 1 criminal history point. The stated reason for the proposal to create a new Criminal History Category 0 is that defendants with no points get arrested less often after release than do defendants with 1 point. That is, one out of every five Category I defendants with 0 points get arrested after release, whereas two out of every five defendants with 1 point get arrested after release. But I'm not sure why this warrants creation of a special lower category for the defendant getting arrested less, as opposed to moving the defendant with the 1 point to Category II.

The original notion behind Category I is that it would include defendants with the least criminal record. Category I clearly does that, as, according to the proposal's explanatory introduction, 75.4% of the category consists of defendants with no points. Including defendants with 1 point in this lowest category was a nod to leniency toward defendants who had had only one brush with the law leading to a conviction. For sure, I don't want to move the 1-point defendant (who represents only 25% of the defendants within this category) to

[6] For one thing, such a study would provide valuable information to the Pardons Attorney at DOJ, who would then be better equipped to recommend reduced sentences in appropriate cases.

a harsher category, but that would seem to be a more logical decision than creating a new "lowest" category for the defendant with no points.

Second, one of the proposed disqualifiers for the zero status, with three alternate options, is that the defendant did not cause substantial financial harm to either [one victim], [five or more victims], or [25 or more victims]. It seems to me that conferring this benefit on a defendant who has substantially harmed any victim—much less multiple victims—is not in keeping with the goal of the provision to identify a defendant most deserving of leniency. Regardless of his lack of a past conviction record,[7] a defendant who has harmed 5-25 victims is someone who, on 5-25 different occasions, has purposely tried to damage an unsuspecting person.

Yet, regardless of whatever list of disqualifiers the Commission comes up with, I see no reason to give a 1-2 level reduction to a defendant simply because he has no points. That accomplishment has already been accounted for by his placement in Category I.

An even more serious concern about the amendment though is the proposed companion amendment to § 5C1.1, Application Note 4(B). That proposed provision states that for any zero-point defendant who is in Zone C or D (the highest two zones) and who receives an adjustment (which the proposed amendment recommends to be a 1 or 2- level reduction), a downward departure to a sentence requiring no imprisonment [may be appropriate] or [is generally appropriate] so long as the offense of conviction is "not an otherwise serious offense."

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[7] Under the proposed amendment, a defendant could have had multiple arrests, but so long as none of them led to a conviction, he would be eligible for zero-point status. We certainly don't want to enhance a defendant's sentence based solely on an arrest or nolle-prossed charge. On the other hand, given the revolving door, catch-and-release phenomenon often found within beleaguered state court criminal justice systems, a defendant with multiple arrests on his record does not inspire confidence that the present offense is his first foray into the world of law-breaking.

This provision largely guts the structure of the existing Guidelines system, giving way outsized significance to a defendant's status as a zero-point defendant. Essentially it codifies a notion that it is presumptively wrong to sentence a first-offender to prison. And sometimes perhaps it is. But to make a sentence of no imprisonment the presumptive (or highly suggested) sentence for a first offender—no matter how high his offense level—is a drastic change in the way the Guidelines system has been operating for the last 30-plus years. Which prompts one to ask what is the impetus for this radical change?

And it is an unnecessary change. The statistics show that, since *Booker*, judges have become more and more comfortable varying downward from the Guidelines. As far as I can determine, they rarely get reversed when they do so. Thus, a judge who is sentencing a defendant with no criminal history points is free to vary downward to the extent the judge deems it reasonable to do so. A valid criticism of the Guidelines pre-*Booker* was that a binding guidelines system created too much rigidity, that judges needed to have more discretion. Now, they do. But this proposed amendment will tend to discourage the exercise of that discretion and suggest, not too subtly, that a district judge had better not impose prison on a zero-point defendant. Further, a statement in the Guidelines that a sentence of no imprisonment will generally be appropriate—or even a suggestion that it may be appropriate—will prompt every zero-point defendant who does not receive such a sentence to appeal on the ground that his sentence is unreasonable.

And how will an appellate court evaluate such a claim? The proposed amendment indicates that the presumptive no-prison sentence is available only when the offense of conviction is not "an otherwise serious offense." But what is the definition of "an otherwise serious offense", or conversely "a minor

offense"? Supposedly, the Guidelines have already supplied that answer by assigning an offense level to the particular criminal conduct.[8]

Ultimately, this provision, albeit *sub silentio*, will constitute a first offender provision for many drug dealers. A drug offender with zero criminal history points whose crime is serous enough to have earned him an offense level of 32 (which yields a 121-131 month sentencing range), will now be presumptively entitled to receive a sentence that involves no jail time. Think of the unintended consequences of a such a result. Drug organizations will be incentivized to recruit young people with no prior record, knowing that if the latter are caught, there will be no prison term in the offing, meaning no reason for these individuals to agree to cooperate against their higher-ups in order to receive a § 5K1 departure. This seems to me to be a really bad idea.

In short, I am greatly troubled by this proposed amendment.

III. Acceptance of Responsibility - Third-Point Motion (§ 3E1.1(b))

This proposed amendment seeks to settle a circuit court conflict as to whether the Government can decline to move for a third-point reduction for a defendant who has otherwise accepted responsibility merely because the latter has filed pretrial motions or has contested sentencing enhancements recommended in the presentence report.

Some circuits have held that the Government can decline to file the motion if, for example, the defendant has filed a suppression motion; others disagree. I am glad that the Commission is going to settle this matter. And, as a policy matter, I agree with the Commission's resolution of this question. In my opinion, a criminal defendant who has notified the Government of his

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[8] I thought the Commission had already informally identified minor offenses when it promulgated language indicating that a district court consider not imposing a sentence of imprisonment for defendants in Zones A & B, which zones are populated with defendants who have the lowest combined offense levels and criminal history. In other words, given these lower total scores, these offense are, by their nature, deemed less serious. The proposed amendment essentially suggests that even some serious crimes should not warrant a prison term so long as the defendant has no prior conviction.

intention to plead guilty early enough to avoid the unnecessary use of prosecutorial resources in preparing for trial should not be deprived of the third-point reduction merely because he has exercised his constitutional right to litigate the propriety of the prosecution itself, via motions to dismiss or suppress.

Likewise, I agree with the Commission's determination that the filing of sentencing objections should not deprive the defendant of this third point, and agree with the language that you use in the proposed amendment.[9]

IV. Status Points, Option 2 (§ 4A1.1(d)

Section § 4A1.1(d) adds 2 points to the calculation of a defendant's criminal history score if he committed the instant offense while on probation, parole, or serving his sentence. According to the explanation for the current proposed changes, the assessment of these points has created a higher criminal history score for approximately 23% of all defendants who have any criminal history points.

I disagree with Option 3, which would eliminate the assessment of any additional points for a defendant who commits a new crime while still not finished with the consequences of his last violation of the law. A defendant who has received probation on his prior sentence probably promised the judge at that proceeding that he would sin no more. As a district judge, the breach of that promise was always very telling to me. Plus, the existence of an additional negative consequence for the commission of a new crime while still under

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[9] It's not on your plate this year, but next amendment cycle I hope you will consider eliminating or revising § 3E1.1, App. Note 4, which provides that if a defendant has received an enhancement for obstruction of justice, this "ordinarily" indicates he has not accepted responsibility, albeit there may be "extraordinary cases" in which both the acceptance reduction and the obstruction enhancement can apply. This language has created confusion for appellate courts in trying to figure out when a case is extraordinary. But more fundamentally, it hits the defendant with a double whammy. If a defendant has lied or presented false testimony at his sentencing hearing, a 2-level obstruction of justice enhancement is warranted, but that should not mean that the defendant is then deprived of his 2 or 3-level reduction for acceptance of responsibility. After all, he pled guilty and saved much public resources by doing so.

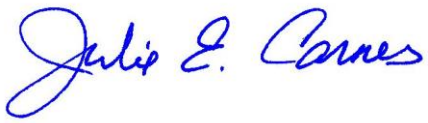
supervision or serving an existing sentence provides an extra disincentive to commit the new crime.

Nonetheless, as a district judge, I always thought that a 2-point increase in the criminal history score was overkill in many cases and I probably downwardly departed sufficiently to remove the impact of a full 2-point enhancement in those situations. It seems to me that a 1-point increase under 4A1.1(d) hits the sweet spot as it recognizes the conduct, but does not overly punish it. And language reminding the district court of the power to depart if the 1-point increase does not adequately represent the seriousness of the defendant's criminal history further insures that the district court will understand its discretion in this matter. For these reasons, I think that Option 2 is a good idea.

V. Conclusion

I greatly appreciate the opportunity to comment on these important proposed changes. Having sat where you sit, I know how difficult some of these decisions can be. And the sheer workload that you face in addressing all the new Congressional enactments appears daunting. Thank you very much for your service and for your receptivity to public comment. Good luck!

Sincerely,



Julie Carnes

U.S. Sentencing Commission

I write to encourage the U.S. Sentencing Commission to adopt proposed amendment (b)(5) Changes in Law - The defendant is serving a sentence that is inequitable in light of changes in the law.

I have served as a federal judge in the Eastern District of Wisconsin since 1997. As a consequence, I have sentenced hundreds of defendants, many of them to mandatory minimum terms set by Congress. Mandatory minimums, in my view, have led to unjust and excessive outcomes in many individual cases and contributed to the mass incarceration that has plagued our federal justice system.

I have written a great deal about the necessity for judicial sentencing discretion, which for many years was all but absent in the federal system due to the dual impact of the Sentencing Reform Act, which ushered in mandatory guidelines, and mandatory minimum sentences in most drug and many gun cases. While mandatory guidelines were set aside by the Supreme Court in *Booker*, the change was not retroactive and courts were unable to review previously imposed sentences that they considered at the time or later to have been excessive and unjust in light of the features of the case, characteristics and history of the defendant, and the need to avoid unwarranted disparities.

Over the years, the Commission has made several drug guideline reductions retroactive, providing limited but still important sentencing relief to thousands of federal prisoners, including 341 here in the Eastern District. I have previously written to the Commission in support of retroactivity, once on my own, and once on behalf of a group of district court judges from the Seventh Circuit.[1] Now, the Commission has an opportunity to breathe some life into judicial discretion in cases where the law has changed but that change has not been applied retroactively, leaving people incarcerated under the old law behind.

Before the avenue was foreclosed by the Seventh Circuit, I had the chance to consider reducing the sentence of an individual I had sentenced in 2014. Jose Montalvo-Borrero was found guilty by a jury of conspiracy to distribute a kilogram or more of heroin. Because he elected to reject the government's ten-year plea offer and go to trial, the government filed an information based on two prior felony heroin possession convictions. I had no choice but to sentence Mr. Montalvo-Borrero to prison for the rest of his life. No one else in this rather large conspiracy received a sentence greater than ten years and many received much shorter sentences. Mr. Montalvo was

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[1] See Letter from Hon. Lynn Adelman to Hon. Ricardo H. Hinojosa (July 30, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711_016.pdf; see also, Letter from Hon. Lynn Adelman & District Court judges from the Seventh Circuit to United States Sentencing Commission (July 7, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140711/Seventh_Circuit_Comment.pdf.

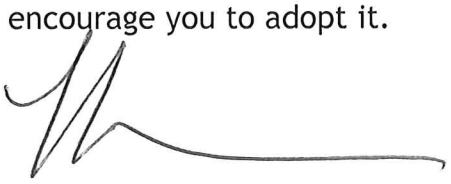
essentially a courier addict with a criminal history, who would die in prison, while the conspiracy leaders received sentences of 87 months.

Were he sentenced in 2021, Mr. Montalvo would have been subject to a ten-year mandatory minimum. Not only had the First Step Act eliminated the mandatory life sentence, it rendered the two prior heroin possession convictions not "serious drug offenses" and thus incapable of serving as enhancement predicates.

I asked the government for its position on Mr. Montalvo's motion. The government did not oppose it. On February 11, 2021, I was able to order his release.[2]

Your proposal would make it possible for me and judges around the country to take another look at, and, in appropriate cases where we find the sentence inequitable and the § 3553(a) factors met, to reduce an individual's sentence that cannot be imposed today.

I strongly support this proposed amendment and encourage you to adopt it.



Lynn Adelman
U.S. District Court
Eastern District of Wisconsin

[2] United States v. Montalvo-Borrero, No. 11-cr-133, ECF 1083, Decision and Order (Feb. 11, 2021).

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

District Judge Micaela Alvarez, Texas, Southern

Topics:

8. Acquitted Conduct

Comments:

Prohibiting a court from considering acquitted conduct will put a defendant who enters a plea of guilty at a disadvantage as compared to one who goes to trial and is acquitted on certain counts. For the defendant who pleads guilty, the court may still consider relevant conduct of counts to which that defendant did not plead, by a preponderance of the evidence, yet for a co-defendant who proceeded to trial, that same relevant conduct will be prohibited if acquitted.

Submitted on: March 14, 2023

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Hon. Stephen R. Bough
District Judge

M E M O R A N D U M

TO: U.S. Sentencing Commission

RE: Reduction in Term of Imprisonment under 18 USC § 3582

DATE: March 8, 2023

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I write to congratulate you on the hard work completed and Option 3 "Other Circumstances." The only thing that is constant is change. Changes in Supreme Court precedent regarding residual clauses, changes in societal views on marijuana, changes in pandemics. We don't know what is coming next, but the flexibility to address the changing circumstances of life is essential. I believe that Option 3 "(6) Other Circumstances" for the updated Frist Step Act – Reduction in Term of Imprisonment Under 18 USC § 3582 gives judges the flexibility to do their jobs. Thank you for considering my thoughts.

Alternative Courts and Intensive Supervision Work

"The incarceration level that we're seeing – we can't keep doing that. Locking them up is not the answer." – Missouri Governor Mike Parson (R)[1]

By: Stephen R. Bough[2]

Re-entering society after incarceration is a tough process and, by most accounts, a horrible failure for too many people. While incarcerated, all aspects of these citizens' lives are controlled. When we require inmates to walk in single-file lines, limit their mealtimes, and restrict their movements, they are forced to develop new cultural norms just to get through the day. When they are released, we give them little to no resources and often direct them to a halfway house or tell them to get a job. On top of that, society is nothing like the world they left five, ten, or twenty years ago. Facing a challenge like this, it is no wonder most fail to adjust to life on the outside.

America locks up more people per capita than any other nation and yet has one of the highest recidivism rates in the world at 76.6%.[3] In the federal system, 49% of offenders are rearrested. This number did not change between 2005 and 2010, despite the Supreme Court's landmark decision in *Booker*[4] that gave judges greater latitude in sentencing decisions and

[1] Celisa Calacal, *Missouri Governor Parson Signs Drug Treatment Court Bill Into Law*, KCUR 89.3, (Oct. 24, 2018), https://www.kcur.org/government/2018-10-24/missouri-governor-parson-signs-drug-treatment-court-bill-into-law/.

[2] Stephen R. Bough is a United States District Judge for the Western District of Missouri. For the last seven years, he has served on the Western District of Missouri's Reentry Court. Thank you to all the past and present members and participants of the Western District of Missouri's reentry and drug courts. The justice system is stronger because of you.

[3] Liz Benecchi, *Recidivism Imprisons American Progress*, HARVARD POLITICAL REVIEW (Aug. 8, 2021), https://harvardpolitics.com/recidivism-american-progress/.

[4] *United States v. Booker*, 543 U.S. 220 (2005) (holding that the United States Sentencing Guidelines are advisory, not mandatory).

"increased [the] use of evidence-based practices in federal supervision."[5] There are currently almost two million people in prisons or jails.[6] Incarcerating this many people comes with an extraordinary price tag – the average cost of federal incarceration in 2020 was $39,158 per inmate per year.[7] Incarceration is both expensive and inhumane for many non-violent offenders.

Incarceration is not the only option.[8] We know that Reentry programs and intensive supervision programs like drug courts are effective alternatives that reduce recidivism. For example, the United States District Court for the Western District of Missouri's Reentry Court has an 85.7% success rate for graduates, meaning they complete their term of supervised release without any new charges.[9] A reduction of recidivism means hefty savings of tax-payer dollars. More importantly, successful Reentry means people engage in their communities, raise families, work productive jobs, and pay taxes.

Ideally, the criminal justice system would start thinking about successful Reentry starting with an individual's very first interaction with the police. However, too many employees in the criminal justice system don't have either the time or desire to think about how we, as a society, can effectively use our resources to prevent individuals from having any contact with the criminal justice system at all. In a system that has a high recidivism rate,

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[5] Ryan Cotter, et al., *Recidivism of Federal Offenders Released in 2010*, U.S. SENTENCING COMM'N, (Sept. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf.

[6] Ashley Nellis, *Mass Incarceration Trends*, THE SENTENCING PROJECT (Jan. 25, 2023), https://www.sentencingproject.org/reports/mass-incarceration-trends/?emci=f77c2d5b-0a9c-ed11-994c-00224832eb73&emdi=4c3d69bf-bc9c-ed11-994c-00224832eb73&ceid=10192031/.

[7] Annual Determination of Average Cost of Incarceration Fee (COIF), 86 Fed. Reg. 49060 (Aug. 31, 2021).

[8] Incarceration is the only option when dealing with a mandatory minimum sentence as defined by Congress.

[9] *Reentry Court*, U.S. COURTS FOR THE WESTERN DISTRICT OF MISSOURI, https://www.mow.uscourts.gov/reentry-court (last visited Jan. 31, 2023). Our comparators are individuals who were invited to participate in Reentry court but turned us down. We are enormously proud of our graduates.

everyone from police officers to judges to probation officers to the Bureau of Prisons[10] (hereinafter "BOP") needs to be thinking about how we can reduce recidivism.

This article will explore what is currently being done to aid Reentry and reduce recidivism in both state and federal courts, as well as what can be done to improve on such programs. Section I addresses the First Step Act and current Reentry functions undertaken by the BOP. Section II analyzes alternative court programs, both in state and federal courts. Section III highlights judges who got off the bench and into the game, resulting in fantastic results for society.

I. What Does the BOP Do to Prepare Citizens to Come Home?

The BOP has a tough job – running a prison is difficult and dangerous work. The BOP is responsible for not just maintaining prisons, but also preparing inmates for release.[11] Kori Thiessen, Reentry Affairs Coordinator for the BOP, says

> People come to success in the BOP and reentry in a variety of ways. Some just get tired of it and they miss their spouse, kids, and freedom. Some people really have the "AH HA" moment. Other people come to recognize that it was their choices that got them put behind the wall. The saddest ones are those that never had a chance, those that were raised in an environment of crime, and this last group just needs a safe environment to explore alternatives. There's clearly a mindset change for people who are successful, but they all come from very different places.[12]

[10] U.S. Dep't of Justice, *First Step Act Annual Report* (Apr. 2022), https://www.bop.gov/inmates/fsa/docs/First-Step-Act-Annual-Report-April-2022.pdf ("The BOP's philosophy and strategy for inmate Reentry into the community is based on the premise that Reentry preparation begins on the first day of an inmate's incarceration.").

[11] 18 U.S.C. § 4042(a)(6-7).

[12] E-mail from Kori Thiessen, Reentry Affairs Coordinator, to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Feb. 1, 2023) (on file with author).

This section will cover (A) the First Step Act; (B) Reentry programs provided by the BOP; and (C) residential Reentry centers.

(A) The First Step Act

The BOP is normally the first institution in the criminal justice system to address Reentry. The BOP is statutorily required to establish prerelease planning procedures (i.e., getting an ID, social security card, etc.) and Reentry planning procedures (i.e., providing inmates with information to ease the Reentry process).[13]

In 2018, President Donald Trump signed the First Step Act, which directed the BOP to expand "any evidence-based recidivism reduction programs" and allowed the BOP to offer "incentives and rewards" for completing the programs.[14] The First Step Act required the Attorney General to develop policies allowing for partnerships with private entities to provide cultural, religious, and vocational support and training.[15] Most importantly, the First Step Act mandated the BOP to "provide *all* prisoners with the opportunity to actively participate in evidence-based recidivism reduction programs and productive activities[.]"[16] Due to the First Step Act, the BOP has developed or strengthened a series of programs that can only help formerly incarcerated people succeed.[17]

(B) Reentry Programs Provided by the BOP

The BOP provides a breadth of Reentry programs, including 500-hour apprenticeship training, literacy programs, certification course training, a host of cognitive behavioral training

[13] 18 U.S.C. § 4042(a)(6-7).
[14] 18 U.S.C § 3621(h)(1)(B), (h)(4).
[15] 18 U.S.C. § 3621(h)(5).
[16] 18 U.S.C. § 3621(h)(6) (emphasis added).
[17] U.S. Dep't of Justice, *First Step Act Approved Programs Guide* (Aug. 2022), https://www.bop.gov/inmates/fsa/docs/fsa_guide_0822.pdf.

programs, and post-secondary educational opportunities.[18] Vocational work programs include Occupational Education Programs (hereinafter "OEP") and Federal Prison Industries, also known as UNICOR.[19] OEP are offered to all eligible inmates "for the purpose of obtaining marketable skills designed to enhance post-release employment opportunities."[20] OEPs consist of teaching specific job skills, and certification from a state or association.[21] Examples of vocations include air conditioning, automotive mechanic, cook, cosmetology (barber), insurance billing, culinary arts, and carpentry.[22] The United States Sentencing Commission found that inmates who volunteered and completed an OEP were about 6% less likely to recidivate.[23]

EOPs may also link with UNICOR, which is "a vital correctional program that assists offenders in learning the skills necessary to successfully transition from convicted criminals to law-abiding, contributing members of society."[24] The mission of UNICOR is to "protect society and reduce crime by preparing inmates to successful reentry through job training."[25] The BOP reports that inmates who participated in UNICOR are 24% less likely to recidivate, and 14% more likely to maintain employment after release.[26] Approximately 25,000 inmates are on a

[18] *Id.* at 17.
[19] Kristin M. Tennyson, et al., *Recidivism and Federal Bureau of Prisons Programs, Vocational Program Participants Released in 2010*, U.S. SENTENCING COMM'N (June 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220614_Recidivism-BOP-Work.pdf.
[20] Fed. Bureau of Prisons, *Program Statement*, U.S. DEP'T OF JUSTICE (Dec. 17, 2003), https://www.bop.gov/policy/progstat/5353_001.pdf.
[21] *Id.*
[22] Fed. Bureau of Prisons, *Inmate Occupational Training Directory* (Mar. 31, 2017), https://www.bop.gov/inmates/custody_and_care/docs/inmate_occupational_training_directory.pdf.
[23] Tennyson, et al., *supra* note 18, at 5.
[24] *Unicor*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor.jsp.
[25] *Id.*
[26] Fed. Bureau of Prisons, *FPI and Vocational Training Works: Post-Release Employment Project (PREP)*, https://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf.

waiting list to participate, and priority is given to individuals within three years of release.[27] The US Sentencing Commission reports a less glowing number of 3% less likely to recidivate than offenders who did not participate in UNICOR "after controlling for criminal history category, age at release, gender, and crime type."[28]

Given that 40% of federal inmates have diagnosable substance abuse problems, the BOP also offers substance abuse treatment.[29] The BOP reports that drug treatment programs result in reducing recidivism, reducing relapse, and improving health and relationships.[30] Two major programs are Non-Residential Drug Abuse Treatment Program (hereinafter "NRDAP") and Residential Drug Abuse Treatment Program (hereinafter "RDAP").[31] NRDAP is a Cognitive-Behavioral Treatment program that lasts twelve weeks.[32] Offenders participating in NRDAP may have shorter sentences that make them ineligible for RDAP or have had a positive urinalysis test.[33] RDAP is a much more intensive live-in program that consists of 500 hours of treatment over the course of 9 to 12 months, along with a host of follow-up programs.[34] RDAP is an attractive program because completion can result in a reduction of an inmate's sentence and because inmates and BOP employees report that the RDAP wing is the cleanest and safest

[27] *First Step Act Approved Programs Guide*, *supra* note 15, at 17.
[28] Tennyson, et al., *supra* note 19, at 5.
[29] ALAN ELLIS, FEDERAL PRISON GUIDEBOOK § 3:10 (4th ed. 2017).
[30] *Substance Abuse Treatment*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited Jan. 31, 2023).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*; Kristin M. Tennyson, et al., *Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010,* U.S. SENTENCING COMM'N, (May 2022), www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220517_Recidivism-BOP-Drugs.pdf.

wing in a prison.[35] The US Sentencing Commission reports that RDAP completers were 27% less likely and NRDAP completers were 17% less likely to recidivate.[36]

(C) Residential Reentry Centers

Another way BOP eases Reentry is through a halfway house or residential Reentry center (hereinafter "RRC"). Often individuals have little to no resources when released. Without any additional support, it is highly likely that people will fail to adjust to life on the outside. This is where RRCs come into play.

An RRC is essentially a mid-point between prison and free society. Traditionally, most offenders receive some amount of time in an RRC, whether 30 days, six-months, or more.[37] According to the BOP, RRCs provide individuals "who are nearing release a safe, structured, supervised environment, as well as employment counseling, job placement, financial management assistance, and other programs and services."[38] However, critics are quick to point out that RRCs "are an extension of the carceral experience, complete with surveillance, onerous restrictions, and intense scrutiny."[39] In the Kansas City region, due to the BOP no longer contracting with existing RRCs, the closest halfway house is in Leavenworth, almost one hour and numerous bus rides away from most offenders' homes, family, and jobs. More recently, the BOP has begun to favor home confinement where possible.[40] In fact, "the BOP

[35] 18 U.S.C. §3621(e)(2)(B).
[36] Tennyson, et al., *supra* note 33, at 10.
[37] ELLIS, *supra* note 29, at § 4:10.8.
[38] *Completing the Transition*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp.
[39] Roxanne Daniel & Wendy Sawyer, *What you should know about halfway houses*, PRISON POLICY INITIATIVE (Sept. 3, 2020) https://www.prisonpolicy.org/blog/2020/09/03/halfway/.
[40] ELLIS, *supra* note 29, at § 5:30.

has dramatically increased home confinement utilization by more than ten-fold," growing that population from 3,000 individuals to over 30,000 inmates.[41]

While there are a host of suggested improvements to RRCs, including performance standards and a rating metric of performance, they remain an important tool for the difficult transition of reentering society.[42]

II. Alternative Courts and Intensive Supervision

State Court criminal justice systems have led the charge in developing alternative court and intensive supervision programs that focus on successful reentry and reducing recidivism. The first drug court was created in Miami, Florida in 1989, and the second was established in 1993 in Jackson County, Missouri, by former Senator Claire McCaskill.[43] Alternative programs have since expanded to address a host of societal ills, including drug courts, problem-solving courts, veterans' courts, and youthful offender courts. Reentry courts generally fall into two categories: (1) "back-end" programs which offenders participate in after serving a term of imprisonment; or (2) "front-end" or no-entry" programs where an individual typically doesn't go to prison.[44] This article focuses primarily on "back-end" programs.

Since their creation, there has been an explosion of alternative courts across the state court system. For example, Minnesota has developed a variety of treatment courts, including an Adult Drug Court, DWI Court, Family Dependency Treatment Court, Juvenile Drug Court,

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[41] *First Step Act Annual Report*, *supra* note 10.
[42] Rutgers Center for Behavioral Health Services Criminal Justice Research, *Halfway From Prison to the Community: From Current Practice to Best Practice* (April 2013), https://cafwd.app.box.com/s/oit9lo07b72124qjjcik.
[43] *Drug Court*, JACKSON CTY. COMBAT, https://www.jacksoncountycombat.com/168/Drug-Court (last visited Jan. 31, 2023).
[44] WILLIAM H. PRYOR, JR. ET AL., U.S. SENTENCING COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS at 6–7 (September 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf.

Mental Health Court, and Veterans Court.[45] Missouri Governor Mike Parson passed bills expanding drug treatment courts to every county in Missouri and creating veteran's treatment courts, allowing for diversion programs for military members or veterans dealing with substance abuse or mental health conditions.[46] The BRIDGE program in the United States District of South Carolina was one of the first alternative-to-incarceration drug court programs. Over six years, the program saved taxpayers $3.5 million.[47] Of the 43 graduates during that time, only five of them had additional encounters with the law – an 89% success rate! Judge Brucie Hendricks runs the South Carolina program and noted "you need to get to the root of the problem – the substance abuse disorder – or you will have recidivism."[48] In Kansas City, Missouri, municipal court Chief Judge Courtney Wachal developed a Domestic Violence Court that "seeks to improve victim safety and hold offenders accountable through increased supervision and a holistic approach towards offender needs."[49] Judge Wachal's success in reducing recidivism on domestic violence cases will be more thoroughly explored in Section III.

While there are important distinctions between Reentry courts, the reality is that each program's intensive supervision and lack of adversarial approach results in successful avoidance of recidivism.[50] These alternative courts are not without critics "who contend that they are not

[45] *Treatment Courts*, MINNESOTA JUDICIAL BRANCH, https://www.mncourts.gov/Help-Topics/DrugCourts.aspx (last visited Jan. 31, 2023).
[46] Alisa Nelson, *Parson Signs Bill to Create Veterans' Treatment Courts in Missouri*, MISSOURINET (July 10, 2019), https://www.missourinet.com/2019/07/10/parson-signs-bill-to-create-veterans-treatment-courts-in-missouri/.
[47] The Honorable Judge Bruce Howe Hendricks, U.S. Dist. Ct. for the Dist. Of S.C., *Written Statement to U.S. Sentencing Commission – Drug Courts* (Mar. 2, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Hendricks.pdf.
[48] E-mail from the Honorable Judge Bruce Howe Hendricks, U.S. Dist. Ct. for the Dist. of SC, to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Feb. 3, 2023) (on file with author).
[49] *Domestic Violence Brochure*, KANSAS CITY MUNICIPAL DOMESTIC VIOLENCE COURT, https://www.kcmo.gov/home/showpublisheddocument/2472/637454368119570000 (last visited Jan. 31, 2023).
[50] PRYOR, JR. ET AL., *supra* note 44, at 5–7.

effective in treating addiction and reducing recidivism, wrongly reduce the punishment of culpable offenders for their volitional conduct, or wrongly criminalize drug addicts rather than genuinely treat them."[51] However, the Department of Justice, National Institute of Justice, reports that "in an unprecedented longitudinal study that accumulated recidivism and cost analyses of drug court cohorts over 10 years, NIJ researchers found that drug courts may lower recidivism rates (re-arrests) and significantly lower costs."[52]

Despite the success of these alternative programs, the federal system was slow to embrace them.[53] This hesitation continued until 2013 when then-Attorney General Eric Holder endorsed alternative-to-incarceration programs.[54] In 2014, General Holder, speaking at a federal drug court graduation in Charleston, South Carolina, noted that "[s]ince its inception, the BRIDGE pilot program has shown tremendous promise in helping to reduce recidivism by empowering determined people . . . to overcome addiction, to fight through adversity, and to contribute to their communities."[55] In 2022, current Attorney General Merrick Garland announced a Reentry Coordination Council, stating:

> Removing barriers to successful reentry for previously incarcerated individuals is an important part of the Justice Department's mission to keep our country safe, uphold the rule of law, and pursue equal justice under [the] law. Whether it is safe, secure housing, employment, or food on the table, supporting formerly incarcerated people in accessing tools to reach their potential makes our communities safer and stronger.[56]

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[51] *Id.* at 8.
[52] *Do Drug Courts Work? Findings From Drug Court Research*, NATIONAL INSTITUTE OF JUSTICE (May 11, 2008) https://nij.ojp.gov/topics/articles/do-drug-courts-work-findings-drug-court-research.
[53] PRYOR, JR. ET AL., *supra* note 44, at 5.
[54] *Id.* at 16.
[55] Eric Holder, U.S. Attorney General, U.S. Dep't of Justice, *Remark at BRIDGE Drug Court Ceremony* (Apr. 11, 2014), https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-bridge-drug-court-ceremony-charleston-south.
[56] Press Release, U.S. Dep't of Justice, *Justice Department Releases Reentry Coordination Council Report Recommending Evidence-Based Approaches to Reduce Barriers to Successful Reentry* (Apr. 29, 2022),

In the federal system, the last three administrations have fully embraced alternative courts.

The Western District of Missouri's Reentry Court, a program that I have been involved with for seven years, is an example of an extremely intensive back-end supervision program. Graduation from the program results in a substantial reduction of the term of supervised release and, hopefully, a wealth of tools and skills to avoid re-offending. Like other courts, we have a four-phase program that usually takes between one year to 18 months to complete.[57] Each of the four phases has different requirements for completion:

> Phase I: Attend five bi-weekly meetings, obtain employment, pass drug and alcohol testing for thirty-five days, and present a historical life inventory;
>
> Phase II: Attend eight bi-weekly meetings, continue steady employment, pass drug and alcohol testing for forty-five days, and present a "comprehensive relapse prevention plan;"
>
> Phase III: Attend monthly meetings, maintain steady employment, be successful in substance abuse treatment, pass drug tests for sixty days, and participate in pro-social activities;
>
> Phase IV: Attend monthly meetings, maintain steady employment, complete twenty-five hours of community service, pass drug tests for 133 days, and present a graduation speech.[58]

For each week of compliance, participants receive one week of credit towards their term of supervised release. If a participant violates any requirement (i.e., tests positive for a controlled substance) during a week, they may face additional sanctions, such as location monitoring or more counseling. Continued violations can result in removal from the program. Throughout the program, participants are treated by outside providers, subject to

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https://www.justice.gov/opa/pr/justice-department-releases-reentry-coordination-council-report-recommending-evidence-based.

[57] For a more thorough discussion of the program, *see Reentry Court*, *supra* note 9.

[58] U.S. Courts for the Western District of Missouri, *A Guide to Reentry Court Program* at 11–14, https://www.mow.uscourts.gov/sites/mow/files/ReentryCourtGuide.pdf.

unannounced home and work visits from their probation officers, and rewarded with gift cards, praise, and fewer restrictions.[59]

A common criticism of drug courts is that the prosecutor has broad discretion in referring individuals to the program, which can result in injustice.[60] The same is true for alternative courts, including in the Western District of Missouri's Reentry Program, which allows the U.S. Attorney to veto any participant, including based on the seriousness of the crime. The U.S. Attorney's office has been reluctant to participate in alternative courts because it allegedly only brings serious cases.[61] There is no doubt that "alternative-to-incarceration courts are not for every offender."[62] However, some cases are more suited to alternative courts than others – I have had to sentence a cancer survivor with a low-level criminal history who was buying marijuana from his drug-dealing son-in-law.

Categorical exclusions for participation based on the nature of the crime can also produce inequities. For example, the Western District of Missouri's Reentry Program, which was created in 2010, excludes anyone with a Criminal History Category IV or higher, prior felonies involving violence, and sometimes a pattern (three or more) of misdemeanor assaults.[63] Violence is defined to include using a weapon, but this definition is broad and can encompass absurd situations, like possession of a gun in a locked safe in a locked storage unit

[59] *Id.*
[60] Drug Policy Alliance, *Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use*, at 5 (March 2011), https://drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf.
[61] PRYOR, JR. ET AL., *supra* note 44, at 10.
[62] E-mail from the Honorable Judge Bruce Howe Hendricks, *supra* note 48.
[63] *A Guide to Reentry Court Program*, *supra* note 58, at 7.

when drugs were found in the kitchen.[64] Broadly speaking, most non-legislatively created alternative courts are a partnership between the courts, probation, prosecutor, and defender. One partner cannot just override the rules and allow a prohibited individual from participating. In the post-*Booker* world of advisory guidelines, more case-by-case analysis is needed. All parties to alternative courts, but especially judges, should reconsider who is automatically being excluded from participation.

The Western District of Missouri's Reentry Court is typical of intensive supervision programs – whether they are Reentry programs or alternative to prison programs.[65] Alternative programs are so successful because the hostility is taken out of the hearings and replaced with a collegial nature. These programs have been developed, honed, tweaked – but dare I say not yet perfected – over the last 30 years.

III. How Can We Do Better?

If there can ever be an agreement among all Americans, surely it is the criminal justice system is not working. The United States has the most expensive system, the highest recidivism rate, and incarcerates the highest percentage of our population. This is not the American exceptionalism we expect. There is an obvious solution – problem-solving courts are cheaper and have improved recidivism rates. However, each level of the criminal justice system needs to rethink the reluctance to fully embrace these innovations. As I judge, I will focus on my lane.

Many judges stop their involvement in a case the second a defendant is sentenced. Other judges see the inadequacies in the criminal justice system and actively participate in

[64] *United States v. Anderson*, 618 F.3d 873, 877 (8th Cir. 2010) (affirming a two-point enhancement under U.S.S.G. § 2D1.1(b)(1) for possessing a dangerous weapon).
[65] PRYOR, JR. ET AL., *supra* note 44, at 10.

improving it. Literally getting off the bench and engaging with defendants as humans is life-changing, for both the defendant and the judge. Employing a "'collegial' model that seeks to maximize rehabilitations minimize recidivism" is beneficial to all.[66]

United States Magistrate Judge Lajuana Counts, who worked for over 20 years in the U.S. Attorney's Office and serves on the Western District of Missouri's Reentry Court, is a passionate supporter of alternative courts:

> Once someone has been held accountable for their criminal actions, that person deserves to have a chance to move forward in life in a positive direction. As a prosecutor, my focus was on holding persons accountable for any illegal activity. As a judge[,] I'm seeing this human being as someone who has served their time and now has decided to change the trajectory of their life by being a part of the Reentry Court program. This is a person who has taken a step forward to live a better, more productive[,] and positive life, and it takes caring people (a village) to help. Everyone deserves the chance to redeem themselves, and that is just what Reentry Court focuses on and why I made the conscious decision to volunteer to be a part of this program.[67]

United States District Judge Richard Webber from the Eastern of District Missouri epitomizes the get-off-the-bench attitude:

> The best part of my service as a judge was realizing I was sending too many people back to prison for violating supervised release, and I pondered what I could do to stop or retard seeing violators on supervised release. When individuals are released from prison and go into a half-way house, the assigned probation officer informs them on their first visit they will see me at the probation office in a reception room. The individual sits at the end of the table, I am seated at her or his right side at the corner of the table, so we are separated face-to-face [by] about 16 inches. I start the conversation by saying, "This is my opportunity to try to convince you I personally care about you and I do not want to send you back to prison for violating conditions of supervised release. The probation officer (the only other person in the room) will explain you can get enrolled in college, get a CDL, get special technical training in many fields, and I mention other issues pertaining to each individual. I tell them not to ask the probation officer for early discharge, but if she or he recommends it, I will grant the request and the three of

[66] PRYOR, JR. ET AL., *supra* note 44, at 7.

[67] E-mail from the Honorable Judge Lajuana Counts, U.S. Magistrate Court for the W. Dist. of Mo., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 20, 2023) (on file with author).

> us will go to lunch on me to celebrate. The results have been dramatic in the reduction of violations in my cases. The first two Happy Thanksgiving and Merry Christmas texts come from two of these individuals. I have paid for many lunches, the best money I spend. One individual told me after our visit, "You are the only one who ever cared for me."[68]

Judge Webber is not alone. Retired United States District Judge Mark Bennett from the Northern District of Iowa would go visit people in prison. Judge Bennett, now the Director of the Institute for Justice Reform and Innovation at Drake Law School, noted:

> I visited over 400 inmates I personally sentenced because I thought it was important that they knew I cared about them. I spoke with them about many things including expectations for supervised release. The visits helped me learn about BOP programs and the offender[']s view on them. These visits helped shape my sentencing approach. We had a residential Reentry facility in Sioux City that I visited for lunch with the residents every 60 days to see how they were doing and to talk about expectations and how they were getting along with their PO.[69]

As discussed above, state courts started this movement and are seeing the greatest results. One example is Judge Courtney Wachal's Domestic Violence (hereinafter "DV") Court in Kansas City, Missouri. Judge Wachal's DV Court has been nationally recognized by the U.S. Department of Justice and serves as a mentor court for other jurisdictions.[70] Judge Wachal described the formation of her innovative court:

> Through continued work and training with the Center for Court Innovation, as well as the experience I garnered becoming the regular non-DV drug court judge in 2019, we ultimately chose to separate the compliance docket into two tracks – one for high-risk offenders without substance abuse issues (compliance docket) and one for those with substance abuse issues (DV Drug Court). This approach allowed for varying sanctions for violations regarding re-offending or no-contact orders (swift and certain sanctions, typically incarceration) versus substance abuse related violations (therapeutic in nature). It also allowed us to use funding

[68] E-mail from the Honorable Judge Richard Webber, U.S. Dist. Ct. for the E. Dist. of Mo., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 17, 2023) (on file with author).
[69] E-mail from the Honorable Judge Mark Bennett, Dir. for the Inst. for Just. Reform and Innovation, Drake L. Sch., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 17, 2023) (on file with author).
[70] *Domestic Violence Court*, KANSAS CITY MISSOURI, https://www.kcmo.gov/city-hall/departments/municipal-court/probation-and-problem-solving-courts/domestic-violence-court (last visited Jan. 31, 2023).

> from our regular drug court programming to send DV offenders with substance abuse issues to in-patient treatment.
>
> While the courts were closed during COVID I applied for and received a Bureau of Justice Assistance/Department of Justice grant for two early intervention programs. The grant was awarded in October of 2021. The first program is a free 3-hour class that is ordered as a condition of bond for all first-time offenders. There are separate curriculums for males and females, as statistics show that often females charged on our docket may also be victims of DV. The idea behind this requirement was to increase DV awareness with first-time offenders whose cases may ultimately be dismissed for want of prosecution. The second is the RSVP (Relationship and Sexual Violence Prevention) docket, which targets young adult male offenders (ages 18-24) charged with intimate partner violence. It's a diversion program for those with limited DV criminal history. The recidivism rate for offenders on the compliance docket was significantly lower than those on regular court-supervised probation. In addition, those that were not compliant received swift sanctions, which is in the best interest of public safety.
>
> My job is to pursue justice. While applying for grants and establishing multiple specialty courts for domestic violence cases may not fit neatly into the job description of being a municipal judge, in Kansas City we are seeing a decrease in recidivism. This is a result of targeting the highest-risk populations with specialized services. Serving the needs of the community by promoting public safety and holding offenders accountable is what justice is about.[71]

Participating in alternative courts can open a judge's eyes to the reality of successful Reentry. Judges who do not participate only see defendants when they violate the terms of supervised release and come back to court. It can be easy to become jaded when that is all the judge sees – to believe that no one has a job, that everyone is using drugs, and that no one communicates with their Probation Officer.[72] That is not the whole picture.

[71] E-Mail from the Honorable Judge Courtney Wachal, Mun. Ct. of Kansas City, Mo., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 20, 2023) (on file with author).

[72] As a corollary, inmates can fall into the same trap. The only people who return to the BOP are those that have had their supervised release terminated. Those individuals occasionally report that probation officers are out to get them and that no one succeeds on supervised release.

In the Western District of Missouri, the Reentry Court helps restore my faith in humanity and allows me to do my part in reducing recidivism. One of the biggest joys of the program is graduation – I see 86% of Reentry Court participants succeed, give them a graduation plaque with our picture on it, and share a celebration cake. Everyone benefits from these moments. The graduates get celebrated in a fashion that may have never otherwise occurred in their lives. Other participants benefit from seeing their peers succeed. It also reminds the Judges, Probation Officers, Federal Public Defenders, and U.S. Attorneys, who all can get a little hardened, of why they do what they do.

Carie Allen, the public defender in the Western District of Missouri's Reentry court, finds inspiration from her participation:

> At graduation, participants have gone from prisoner #24601, to a person who is supported and championed by people working in the criminal justice system. Seeing them embrace a new life, and knowing they are on the road for a successful future, is the most rewarding part of being a criminal defense attorney.[73]

Anthony Wheatley, a probation officer in the Western District of Missouri's Reentry and Drug Courts, commented "they say 'hard times make tough people and easy times make weak people.' Reentry Court challenges individuals to make tough decisions. At the graduation, you can hear and feel their sense of accomplishments and progress they have made in turning their life around."[74] Jeff McCarther, the assistant U.S. Attorney assigned to Reentry Court, noted "smiles abound from participants and their families, Reentry graduation is the culmination and celebration of the incredible hard work of the participants. That a person graduates from

[73] E-mail from Carie Allen, Pub. Def., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 23, 2023) (on file with author).
[74] E-mail from Anthony Wheatley, Prob. Officer, to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 23, 2023) (on file with author).

Reentry Court is a strong signal that they are choosing to turn away from their past life and embrace a new beginning."[75]

Our graduates give speeches, and sometimes we laugh, sometimes we cry:

> My name is Derwayne Williams.[76] I'm 37 years old. In 2009 I was sentenced to 240 months in prison, and I think that was the lowest I ever felt in my life. I was sent over 500 miles away from the only people I had. I started off bitter and hard-headed because it was the only way I knew to cope. Over time I obtained my GED and upholstery certification. I started reading and learning more about myself and started facing the truth. The truth was that I was wrong and lost and I started working on myself. In 2016 I got a blessing from President Obama and was granted clemency and release in 2018.
>
> I started this program not knowing what the outcome would be. I just knew it would be a good start for a new lifestyle. I came in[to] this program ready for change and I did. I still have roadblocks and temptation, but I focus on what's more important. So now that I'm finishing this program doesn't mean that it's the end. It's the beginning of my drug-free and positive lifestyle.
>
> Since release[,] I have held a job the whole time. I put out an album that's doing pretty well. I have a clothing line that's getting started. I get to see my kids graduate high school and I'm doing all this with no complaints. It may sound crazy to some, but prison is one of the best things to happen to me. Sometimes your biggest blessing is a reality check.

Participating in alternative courts is not the only way a judge can make a difference in a defendant's life. I often make trips to visit Leavenworth's federal prison, attend the RDAP program, and meet with people I have sentenced. I wouldn't talk about their case, but often led with "what do I need to know about prison?" Another variation in "normal" sentencing is having people write me letters. I don't set this as a special condition in every case, just when I feel like there's some special attribute about a person, some glimmer of hope. I ask them to

[75] E-mail from Jeff McCarther, Assistant U.S. Att'y, to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 23, 2023) (on file with author).
[76] Graduation speech from Derwayne Williams to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. and Reentry Court (Feb. 21, 2020) (on file with author).

write about stable home plans, stable employment, and stable relationships – my recipe for supervised release success. They are told the letters also go to the probation officer and I think of them as promises. Sometimes I write back, but every time I get a letter I learn. Here's an example of those letters:

> Other than studying and working, I have been trying to figure to get done what needs to happen to get a hardship [driver's license] and to be able to afford having the ignition interlock for a very long time. Sometimes it feels like I will never catch up in life and it is frustrating to be in the position I am. I do have to remember where I came from and where I was seven years ago, and that alone is amazing. With all these things going on, I have been doing a step study with my sponsor and some other people and will be doing another fourth and fifth step.[77]

Another individual wrote:

> Well, work is great. I'm still at [my same employer]. I just love my job so much, and the relationships that are built, the difference I can make in someone's life, just as great as the difference they make in mine. My co-workers are terrific, we work so well together and have so much fun. It's helped me with my anxiety, and being socially awkward, and to always practice patience, which in turn helps me in my day-to-day life. I make decent money and I'm doing great there. I just love it.[78]

Do all the letter-writers live up to their promises? Of course not. Do some letter-writers have their supervised release terminated only to be sent back to prison? Sadly yes. Do some of them succeed? You bet. Overall, it is another tool that gets me more actively engaged in hopefully successful outcomes.

There is no shortage of ways for judges to make a difference. Politicians of all stripes recognize that the 50-year experiment with mass incarceration is financially and humanely

[77] Permission granted by the author but not to be identified.
[78] Permission granted by the author but not to be identified.

unsustainable.[79] To stop this cycle, all that is needed is for judges to get off the bench and get engaged to achieve what United States District Judge Richard Webber calls the "best part of [his] service as a judge."[80]

IV. Conclusion

Why get off the bench and get into the game? Why not let Congress create these courts? Why not let probation officers handle these people? All good questions. According to Professor Shon Hopwood of Georgetown Law School:

> Long ago, America decided that the only way to hold someone accountable is to put them in prison. The great irony is the longer you put someone in the Department of Corrections the less likely they are to be corrected. There are different types of ways to hold people accountable in their communities that are more effective and cheaper.[81]

As judges, I believe we are an essential part of the criminal justice system, and we have a duty to lead. We know our recidivism rates are high, the system is too expensive for the results we are getting, and someone should do something about it. We also have an outsized influence over our system and can't afford to leave it to anyone else – Congress, presidents, probation, prosecutors, or defenders – to address problems that we encounter every day. "There's plenty of space in the criminal justice system for alternative-to-incarceration courts to succeed. Intensive supervision through cooperation with probation, the U.S. Attorney's Office, and the Federal Public Defender is better for the community by saving tax-payer dollars and

[79] Nellis, *supra* note 6. The number of American citizens has risen from 360,000 in the early 1970s to nearly two million today.
[80] E-mail from the Honorable Judge Richard Webber, *supra* note 68.
[81] E-mail from Shon Hopwood, Assoc. Professor of L., Georgetown L., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan 25, 2023) (on file with author).

improving the lives of the participants and their families."[82] All we need is the courage to lead and change.

[82] E-mail from the Honorable Judge Bruce Howe Hendricks, *supra* note 48.

CHAMBERS OF THE HONORABLE
VICTORIA M. CALVERT
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Atlanta, GA 30303-3309
(404) 215-1390

March 10, 2023

Hon. L. Felipe Restrepo
United States Court of Appeals
for the Third Circuit
Vice-Chair of the U.S. Sentencing Commission
Restrepo@CA3.uscourts.gov

Dear Judge Restrepo,

My colleague, Judge Steve Grimberg, stated that judges could write directly to you in your capacity as Vice-Chair of the Sentencing Commission and that you would share it with the other members of the Commission. A few of us met about the proposed amendments and I believe that the opinions I express below are shared by others in the Northern District of Georgia. However, in the interest of submitting this letter by the deadline, I will just speak for myself.

I first want to commend the Commission on the following proposed amendments: expansion of what constitutes the universe of "extraordinary and compelling" reasons for granting compassionate release; clarification of what constitutes "preparing for trial" for purposes of U.S.S.G. §3E1.1; and disallowing acquitted conduct to be considered as relevant conduct. I will now move on to my concerns.

U.S.S.G. §5C1.2. Given the Eleventh Circuit's sound reasoning in *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022), I support Option 1 and would not be in favor of any substantive changes to §2D1.1(b)(18) and §2D1.11(b)(6).

U.S.S.G. §2K1.1. Overall, I am concerned with all of the increases, both to the base offense levels, and to the trafficking enhancement. I am not sure how the Commission determined that these levels were appropriate. The changes will result in higher sentences across the board, and I do not know if they are backed by empirical evidence showing that higher sentences are needed to achieve the goals of sentencing. I am also concerned, in cases where there is no admission by the defendant, what evidence is appropriate for the judge to rely on to determine whether someone has a criminal affiliation, or whether the offense was committed by the defendant on his/her

own or because of his/her membership in this organization. Finally, as a related issue, although I appreciate the reduction for defendants who commit a straw-purchasing offense simply to appease an intimate partner, I wonder if the reduction should be more than one or two levels.

U.S.S.G. §4B1.2. I am in favor of Option 1 with respect to the definition of "controlled substance." Adopting the federal definition of a given drug, through the schedules defined by Congress, is already widely used and promotes uniformity in sentencings. If the Commission goes with Option 2, every state drug offense will be a predicate regardless of whether it is currently listed on Congress's schedules.

U.S.S.G. §4B1.1. I believe this proposed change would be concerning to all judges. Although the categorical approach has its flaws, we are all accustomed to it, and there is plenty of case law to guide us. Using the Chapter Two guideline will not lead to efficiency and predictability because judges will have to interpret state law and state court documents, look at both the elements of the offense, the means of committing the offense, and the conduct cited in the offense of conviction or admitted by the defendant. State court documents often lack detail, are incomplete, or impossible to obtain. Reliance on judicial findings of fact could violate the Sixth Amendment. In sum, I fear the new approach would lead to uncertainty, result in longer sentencing hearings and increased litigation, and not promote uniformity. I understand the desire for a new approach, but I am not sure this will be any better than the current approach.

U.S.S.G. §4A1.1(d). The Commission has found that imposition of status points does not predict that a defendant is more likely to commit new crimes or pose a danger to the community once released. Given these findings, I would be in favor of eliminating this provision entirely (Option 3).

I hope these comments are helpful. I thank you and the rest of the Commission for your important work and for taking the time to read this letter.

Sincerely,

Victoria M. Calvert
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

324 W. MARKET STREET
GREENSBORO, NORTH CAROLINA 27401

CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE

TELEPHONE (336) 332-6070
FAX (336) 332-6078

February 22, 2023

The United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 2002-8002

Dear Commissioners:

Thank you for your hard work developing proposed amendments to the guidelines implementing the provisions of the First Step Act authorizing defendant-filed motions for sentence reductions under 18 U.S.C. § 3582(c)(1)(A). I appreciate the opportunity to suggest revisions, based on my experience with scores of these motions since 2019. I support some of the proposals, suggest that others need some fine-tuning, and request that some of the proposed language, particularly the overbroad and vague provision in Proposed § 1B1.13(b)(5) authorizing sentence reductions when a sentence is "inequitable in light of changes in the law," be significantly narrowed.

Proposed § 1B1.13(b)(1)(C) is a good addition and has my support. I have seen at least two cases where the Bureau of Prisons has provided such poor medical care, or has failed to provide necessary care, that a sentence reduction was appropriate.[1] The test provided in the proposal is reasonably specific and not overbroad.

I also support the addition of proposed § 1B1.13(b)(3). This comes up frequently with defendants who have elderly parents,[2] and the test provided is reasonably specific and not overbroad.

There are some matters which the proposed policy statement does not address which seem worthy of attention.

> First, I am often confronted with arguments related to the sentences of co-defendants and unwarranted sentencing disparities. It would be helpful if the policy statement gave some guidance on how to evaluate this argument, which I suggest should be to give such arguments minimal to no weight.

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[1] *See United States v. Beck*, 425 F. Supp. 3d 573 (M.D.N.C. 2019); *United States v. Burr*, No. 15-CR-362-1, 2022 WL 17357233 (M.D.N.C. Dec. 1, 2022).

[2] *See United States v. Henriquez*, No. 15-CR-225, 2021 WL 5771543 (M.D.N.C. Dec. 6, 2021); *United States v. VanLaar*, No. 13-CR-119, 2022 WL 2290618 (M.D.N.C. June 24, 2022).

Second, it would be helpful if the Commission addressed repeat/successive motions for compassionate release. Many inmates file them over and over again, often raising little that is new.[3]

Third, it would be helpful if the Commission explicitly addressed who has the burden of proof and the standard of proof.

Fourth, if it is within your purview, and particularly if the "inequitable" provision in § 1B1.13(b)(5) is retained, it would be helpful if the Commission explicitly addressed the need to appoint counsel for defendants raising difficult change of law issues based on the needs of the Court and the specificity of the issue.

Fifth, it would be helpful if the Commission would address how a judge who was not the sentencing judge should take into account any comments made by the sentencing judge during earlier proceedings.[4]

Sixth, the Commission should make it clear that conditions existing at the time of sentencing do not constitute extraordinary and compelling reasons. For example, if a court has sentenced someone on dialysis to prison, which would seem to

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[3] *See, e.g.*, *United States v. Minor*, No. 17-CR-224, 2021 WL 5567420 (W.D.N.C. Nov. 29, 2021) ("Defendant filed a third motion for compassionate release, reasserting the same arguments made to this Court in his prior filings."); *United States v. Williams*, No. 11-CR-2064, 2022 WL 17834097, at *1 (D.S.C. Dec. 21, 2022) ("The court denied the defendant's first motion for compassionate release and the defendant now returns to this court with a new motion asserting many of the same arguments he raised in his earlier motions."); *United States v. Branch*, No. 12-CR-339, 2022 WL 7127495 (E.D.N.C. Oct. 12, 2022) ("In [defendant's] second motion for compassionate release, [he] largely repeats the same arguments that the court already rejected . . . ."); *United States v. Ramirez-Barrera*, No. 18-CR-477, Doc. 68 (denying a motion for reconsideration when defendant twice had compassionate release motions denied but put forth little to no new arguments or facts); *United States v. Johnson*, No. 22-6065, 2022 WL 2437582 (4th Cir. July 5, 2022) (per curiam) (unpublished).

[4] *See United States v. Dilworth*, No. 4-CR-412, 2021 WL 861495, at *6 n.8 (M.D.N.C. Mar. 8, 2021) ("[C]ourts should be wary of using the motion to correct the sentencing court's original judgment or introduce unprincipled variance into the execution of duly-imposed sentences." (cleaned up)); *United States v. Hancock*, Nos. 6-CR-206-2, 7-CR-71, 2021 WL 848708, at *4 (M.D.N.C. Mar. 5, 2021) (noting the Court's decision was "appropriately informed by the original judge's reasoned and discretionary sentence"); *United States v. Berry*, Nos. 5-CR-118, 5-CR-119, 2021 WL 4310598, at *4 (M.D.N.C. Sept. 22, 2021) (denying motion without prejudice in part because the reduced sentence "would be well shorter than any sentence the sentencing judge contemplated as possibly appropriate").

constitute "end-stage organ disease" under proposed § 1B1.13(b)(1)(A), and if the court knew it at the time of sentencing, then absent a change of circumstances there would not be extraordinary and compelling circumstances.[5] The same is true of any "serious physical or medical condition" or "serious functional or cognitive impairment" in proposed § 1B1.13(b)(1)(B)(i) and (ii). Courts often sentence persons to prison who have serious medical conditions that make self-care in prison a challenge, and that alone should not be an extraordinary and compelling circumstance if it has already been taken into account.

Some of the remaining proposed amendments give rise to substantial concerns. Speaking generally, the amendments overall define "extraordinary and compelling circumstances" so broadly as to provide only minimal guidance and are likely to make the concept of finality in sentencing something we honor only in the breach. Specifically, I offer the following observations.

First, if the Commission leaves in a "serious physical or medical condition" under proposed § 1B1.13(b)(1)(B)(i), I suggest you define that phrase and the phrase "self-care" more specifically. They are vague, provide little to no guidance to courts, and are a recipe for litigation.

Second, proposed § 1B1.13(b)(5) – the "inequitable in light of changes in the law" provision – is overbroad and vague and gives rise to serious concerns over sentencing discrepancies among judges. In my view, any inclusion of a "change in the law" circumstances should be very narrow or it risks resulting in wholesale and repeat reconsideration of sentences, which it seems unlikely Congress meant to authorize. To the extent the Commission takes into account the workload an amendment places on the courts and the Probation Office, this one should get that attention, given the requirements for a written order examining these motions in detail and explaining in detail.[6] As drafted, the proposed addition raises more questions than it answers:

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[5] *See United States v. Johnson*, No. 11-CR-359-1, Doc. 134 at 6 (M.D.N.C. Oct. 13, 2021) ("[The defendant's] health conditions did not prevent him from committing the underlying offenses, as he was also on dialysis at the time of those crimes, and his health was taken into account by the sentencing judge. His health problems, alone or in light of the pandemic, do not constitute extraordinary and compelling circumstances." (cleaned up)).

[6] *See, e.g.*, *United States v. Gutierrez*, No. 21-7092, 2023 WL 245001, at *5 (4th Cir. Oct. 25, 2023) (unpublished) (remanding denial of compassionate release for "a fuller explanation"); *United States v. Mangarella*, 57 F.4th 197 (4th Cir. 2023) (remanding a denial of compassionate

Exactly what does "inequitable in light of changes in the law" mean?

Does that include non-retroactive changes in the guideline range? If so, doesn't that mean all non-retroactive changes are in fact retroactive?

Doesn't it give rise to the possibility of a conflict with a sentencing law that Congress has decided should not be retroactively applied? Or is it meant to apply only to developments/changes in the case law that interpret statutory sentencing provisions or the guidelines?

Is the Court required to recalculate guidelines ranges when this argument is raised, as is required for section 404 motions under *Concepcion*?[7]

Shouldn't this section, if it is adopted, explicitly require courts to take into account the provisions of any applicable plea agreement[8] and changes in the law that are not in the defendant's favor?[9]

Does "inequitable" mean that a judge can reduce the sentence based merely on a re-evaluation of all the § 3553(a) factors?

Finally, Options 1, 2, and 3 for "Other Circumstances" under § 1B1.1(13)(b)(6) are all vague and not helpful. Any catch-all needs to be more specific.

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release based on inadequate explanation); *United States v. Powers*, No. 21-6914, 2022 WL 16960907 (4th Cir. Nov. 16, 2022) (per curiam) (unpublished) (same); *United States v. Cohen*, No. 21-6116, 2022 WL 2314300 (4th Cir. June 28, 2022) (per curiam) (unpublished) (same); *see also* footnote 10 *infra*.

[7] *See Concepcion v. United States*, 142 S. Ct. 2389 (2022).

[8] *See United States v. Clark*, No. 19-CR-152, 2023 WL 1967627, at *4 (M.D.N.C. Feb. 13, 2023) (noting a sentence reduction would "undermine[] both legitimate and serious interests in the finality of sentences and the expectations of the parties at the time they were each evaluating whether a trial was a more appropriate choice than a plea bargain." (cleaned up)); *United States v. Bond*, 56 F.4th 381, 385 (4th Cir. 2023).

[9] *See United States v. Dilworth*, No. 4-CR-412, 2021 WL 861495, at *6 (M.D.N.C. Mar. 8, 2021) (noting that the "sentencing disparities based on changes in federal case law were somewhat temporary in view of subsequent changes to state sentencing law").

As these comments reflect, I read some of the proposed amendments to undermine principles of finality to an unacceptable level and to allow sentence reductions for any reason except rehabilitation alone. They do not provide adequate guidance for the exercise of discretion in evaluating such motions. They allow a court to reduce a sentence based on changes in judicial philosophy or, if the judge considering the motion was not the sentencing judge, based on a difference in opinion over an appropriate sentence. They risk overwhelming the district courts with an ongoing flood of repeat motions asking that sentences be re-evaluated and the task of writing time-consuming opinions addressing all such arguments each time such a motion is filed.[10]

Feel free to contact me if you have questions about my comments, and good luck with this large and complicated task.

Sincerely,

Catherine C. Eagles

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[10] *See, e.g.*, *United States v. Hancock*, Nos. 6-CR-206-2, 7-CR-71, 2021 WL 3710739, at *1 (M.D.N.C. Aug. 20, 2021) (noting the defendant filed a renewed motion "essentially ask[ing] the Court to reconsider its previous order"); *United States v. Reams*, No. 14-CR-426-1, Doc. 128 (M.D.N.C. July 20, 2022) (thirteen-page Order); *United States v. Clark*, No. 19-CR-152, Doc. 102, at *1 (M.D.N.C. Feb. 13, 2023) (nine-page Order noting an earlier motion and a motion for reconsideration were previously denied "based largely on the § 3553(a) factors"); *Clark*, No. 19-CR-152, Doc. 76 (M.D.N.C. Apr. 5, 2021) (seventeen-page Order granting motion for reconsideration but again denying underlying compassionate release motion).

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

District Judge Sara Ellis, Illinois, Northern

Topics:

1. Compassionate Release

Comments:

I am writing to comment on the Commission's proposed amendments to 1B1.13 regarding compassionate release. I fully support the Commission's proposed changes to this guideline. The Commission should address what judges may consider as "extraordinary and compelling" reasons warranting a sentence reduction. The Commission's consideration of this issue would bring clarity and consistency across circuits. Further, any concerns regarding a strain on judicial resources or the difficulty in exercising judicial discretion are overblown. We regularly ask judges to exercise discretion in determining a sentence that is sufficient but not greater than necessary. Thus, when circumstances change, it is not a significant burden, and indeed it is our duty, to exercise discretion to ensure that the sentence originally imposed remains sufficient but not greater than necessary to meet the goals of sentencing. And if a judge finds that the original sentence no longer serves sentencing objectives for the case, the judge ought to grant the motion. Therefore, I fully encourage the passage of the Commission's proposed amendments to 1B1.13.

Submitted on: March 13, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

Nancy D. Freudenthal
U.S. Senior District Judge

(307)433-2190
Fax (307)433-2194
wyojudgendf@wyd.uscourts.gov

January 27, 2023

United States Sentencing Commission
Attention: Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Re: Proposed 2022-2023 Amendments to the Sentencing Guideline § 1B1.13, Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)A) (Compassionate Release)

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed 2022-2023 Amendments to the Sentencing Guideline § 1B1.13, Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(A) (Compassionate Release). My comments follow:

1. For § (b)(4), Victim of Assault category. To avoid allowing or encouraging a compassionate release motion to become a vehicle for seeking a determination as to whether an inmate was in fact a victim of assault, I recommend adding the following language (shown in red italics):

> The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by *(i)* a correctional officer or other employee or contractor of the Bureau of Prisons while in custody, *as recognized either by written acknowledgement of the defendant's warden or higher official of the Bureau of Prisons, or by a court's final judgment; or (ii) another inmate, when a Bureau of Prisons officer, employee or contractor has been held responsible (by the Bureau of Prisons or by a court) for allowing that sexual assault or physical abuse.*

2. For § (b)(5), Changes in Law category. To avoid confusion, the "Changes in Law" category should be clear that it does not apply when § 1B1.10 applies, or when a subsequent statutory reduction has been made retroactively applicable. To accomplish this end, I recommend adding the following language (shown in red italics):

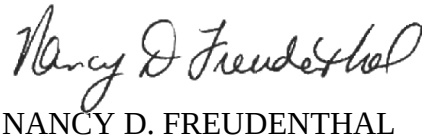
> The defendant is serving a sentence that is inequitable in light of changes in the law, *except (i) guideline range amendments that are subject to USSG Section 1B1.10 and (ii) statutory amendments that are retroactively applicable.*

3. For § (b)(6), the "Other Circumstances" category, I recommend adopting Option 3. As the Commission likely appreciates, every circuit but one to rule on the scope of compassionate release in the absence of applicable USSC policy has taken the Option 3 approach. For instance, *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021) and *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021) did not limit judicial discretion to only circumstances similar to those enumerated in § 1B1.13 (which would be Option 1). Those cases also did not frame the question as one involving the circumstance when a sentence is later made inequitable by changes in circumstances (which would be Option 2). I believe Option 1 should not be supported as it is too narrow in that it does not permit for the rare case in which an offender's circumstances are extraordinary and compelling despite not falling within the confines of the enumerated categories. I do not favor Option 2 as it frames the issue in terms of equity instead of remaining loyal to the statutory phrase, "extraordinary and compelling."

4. For the question posed in the Proposed Amendment at 9, ¶ 3, whether to further define or expand the categories, I recommend if the Commission adopts Option 3 for the residual "Other Circumstances" category, the Commission should not further expand the categories at this time.

Thank you for considering these comments.

Yours very truly,



NANCY D. FREUDENTHAL
United States Senior District Judge

March 14, 2023

Dear Judge Reeves,

This letter is drafted to provide some brief comments to the Proposed Amendments to the Federal Sentencing Guidelines. First, I want to thank you and the Commission for the vast amount of thoughtful work that has gone into developing these proposed amendments. The time, intellect, and heart that each Commissioner and the staff has dedicated to is apparent and appreciated. The shear scope prohibits me from commenting on every proposal; and time prohibits me from providing the fulsome comments that I would like to make. I, therefore, have selected the issues that have arisen most in my work as a sentencing judge.

FIRST STEP ACT: VICTIMS OF ASSAULT

I wholeheartedly support the addition of a category to take into account the changed and extraordinary circumstances of victims of sexual assault in our prisons. I do not, however, see any reason to distinguish between those assaulted by employees of the BOP and those assaulted by inmates. The trauma experienced by the victim is severe in either case. Certainly, there is a distinct suffering when the perpetrator is an official with authority over the victim, but that does not discount the trauma of being a victim of such a violation. There certainly will be circumstances that compassionate release is warranted in cases of inmate-on-inmate sexual violence, and cases where it is not warranted in cases of official on inmate violence. Judges are going to have to exercise discretion and take the totality of the circumstances into account whether to grant compassionate relief regardless of the perpetrator, and this amendment should allow for the greatest amount of discretion in this limited circumstance.

FIRST STEP ACT: COMPASSIONATE RELEASE – OTHER CIRCUMSTANCES

The Commission invited comment as to various options regarding non-enumerated circumstances that could warrant compassionate release. While I generally favor the broad language of Option 3, in light of the current state of caselaw, I believe that Option 2 will have greater effect in allowing the appropriate discretion and latitude to consider extraordinary cases warranting compassionate release as was intended by Congress with the passage of the First Step Act.

FIRST STEP ACT: SAFETY VALVE

The Commission invited comment on whether it should adopt commentary relative to how the criteria set forth to expand eligibility for Safety Valve consideration should be considered. If forced to select between Option 1 and Option 2, I would select Option 1 which hews more closely to the language of the statute and does more to effectuate the stated goals of the statute – to expand eligibility for the reduction. Reading the criteria in the conjunctive is

appropriate for the reasons set forth by the Ninth and Eleventh Circuits. My only hesitation with Option 1 is that it does not include language that would resolve the Circuit split. If adopted as written, not only will the will of Congress be circumscribed, but the Guidelines will be applied in an inconsistent manner resulting in unwarranted sentencing disparities.

CRIMINAL HISTORY: STATUS OFFENDERS

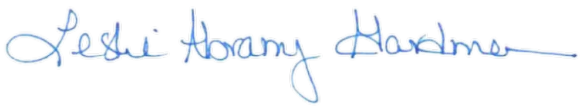
The Commission invites comment as to revision of how criminal history points are counted with regard to "status" points. As noted by the Commission, there is evidence that assessing status points does not result in a lower risk of recidivism; and I would hazard an educated guess that it serves little purpose with regard to various other sentencing considerations. It appears to be a blunt tool with limited efficacy. How many people, for example, would get assessed status points simply because they are poor? According to the Bureau of Justice Statistics, in 2020, 1 in 66 Americans were on some form of community supervision. (https://bjs.ojp.gov/library/publications/probation-and-parole-united-states-2020) Anecdotal evidence suggests that a large number of these people are under supervision for no other reason than that they simply cannot afford to pay off their fines. Is justice served if we are increasing the advisory guideline range simply because of financial status? While a person's status is an important consideration in sentencing, I am persuaded by the research that it is better left as part of the consideration of the 3553(a) factors, such as the Nature and Circumstances of the Offense or the History and Characteristics of the Defendant. Accordingly, I believe that Option 3 is an appropriate amendment.

CRIMINAL HISTORY: ZERO POINT OFFENDER

The Commission invited comment on options for downward adjustments for offenders who have Zero Criminal History points. I am in favor of the adjustment for the reasons articulated by the Commission. I favor Option 2 because it takes into account those persons who have gone a significant amount of time without offending – in line with the principles underlying the overall Criminal History calculation.

Thank you again for the work you are doing and for considering my modest thoughts.

Yours,



Leslie Abrams Gardner
United States District Court Judge
Middle District of Georgia

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
350 WEST FIRST STREET, SUITE 4311
LOS ANGELES, CALIFORNIA 90012-4565

CHAMBERS OF
DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

March 13, 2023

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

By Electronic Submission to https://comment.ussc.gov.

Re: CASA Program (CDCA) Comments on Alternatives-to-Incarceration Programs

Dear Judge Reeves:

In June 2012, the Central District of California (CDCA) established the Conviction And Sentence Alternatives (CASA) program. CASA is a federal post-guilty plea diversion program designed to reduce rates of recidivism and substance abuse, at lower costs than through the traditional sentencing and incarceration model. CASA participants typically have been drawn into criminal conduct due to substance abuse, mental health disorders, medical concerns, life skill deficits, or negative family or peer influences. Those participants who demonstrate the commitment to become productive members of society, despite past transgressions, and who have shown an ability and willingness to make significant and meaningful changes in their lives graduate from the program with a non-custodial sentence. Since its inception in 2012, CASA has become a premier alternatives-to-incarceration (ATI) program in the federal court system.

CASA is a collaboration between the U.S. District Court; the U.S. Attorney's Office; the Federal Public Defender's Office; and the U.S. Probation and Pretrial Services Office. At present, there are four CASA courts operating in the CDCA.

Los Angeles operates two at the direction of myself and U.S. District Judge André Birotte, Jr. In Riverside and Santa Ana, CASA operates under the supervision of U.S. District Judges Jesús Bernal and Fred W. Slaughter, respectively. Several of our Magistrate Judges also make up an integral part of our CASA Teams at the four locations.

At its core, CASA is a collaborative criminal justice program that promotes public safety and reduces the risk of recidivism by providing rehabilitative services and life skills training to its participants. The program fosters law-abiding behavior and accountability by offering treatment resources and a cost-efficient alternative to incarceration in a structured and supportive court environment. By any measure, community supervision is significantly less expensive and intrusive than imprisonment, and it offers participants an opportunity to reflect on underlying issues that have brought them to the criminal legal system, resources to address those issues with more productive coping skills, and the development of a "game plan" going forward.

As stated in our Mission Statement, CASA creates relational bridges and helps its participants foster positive attitudes, develop new skills, and become law-abiding citizens. Guiding principles of the program as expressed by all CASA judges and team members are honesty as a foundational value coupled with a desire to make meaningful changes in the lives of our participants. Within the framework of rehabilitation and the goal of reducing recidivism, CASA continues to work on a curriculum that provides its participants with the accountability and structure needed to accomplish these objectives.

The CDCA is made up of seven counties: Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura. With a population of over 19 million, it is by far the most populous federal judicial district and comprises a cultural diversity unmatched in the United States. Over the past ten years, more than one thousand CASA applications have been received, with approximately 400 admissions and 343 graduates to date. Track One graduates (213, or 62%) are allowed to withdraw their guilty plea and have their indictment dismissed with prejudice, while Track Two graduates (130, or 38%) are sentenced to a term of probation in lieu of a potentially lengthy prison term. Needless to say, we are very proud of our graduates and the significant alternatives to incarceration that our program has offered these individuals, their families, and our communities at large.

On behalf of our CASA Program—upon consultation with representative stakeholders—I offer the following statements in response to the Commission's current request for comments. It should be noted here that each participating entity may submit its own set of comments directly to the Commission.

Issue #1 – Should a Study Be Conducted of Alternatives-to-Incarceration ("ATI") programs?

Although our CASA Team endorses an in-depth, multi-year study to be undertaken in the long run, such a study would present a complex and daunting challenge for any social science research organization. This is particularly true given that the Federal Judicial Center has listed approximately 44 pre-trial diversion court-sponsored programs (along with more than 100 post-conviction programs). The Commission has already identified a vast number of variables that would first need to be discussed and agreed upon before embarking upon such a study—this will take years and is likely to place us well beyond the current amendment cycle and several successive ones.

As a precursor to any contemplated impact study, our CASA Team recommends an expedited descriptive survey of the practices of ATI courts with a completion, compilation, and publishing timetable of one year. Such a survey would be useful to understand the practices and procedures of the ATI courts nationwide, and perhaps facilitate the recognition of such ATI programs in the Sentencing Guidelines sooner rather than later.

The survey should describe, at least, the following features:

1. Overview: the location of the ATI program, the length of time it has been operating, the court personnel and agencies assigned and contact persons working within the program, the number of participants, eligibility criteria, the frequency of meetings, the length of time that is required for graduation, and whether the program is a "front end" diversion program or a post-incarceration re-entry program, and what methods are in place to capture data about participants including characteristics of participants, progress through the program, and post-program recidivism and relapse rates.

   Other relevant data could include the identification of barriers to timely or successful completion such as lack of sufficient resources (from pretrial-probation or elsewhere), the use of evidence-based practices, and relevant

training opportunities for ATI program team members.

2. Characteristics of the Participants: what are the typical crimes with which those coming into the program are charged; what are the demographic characteristics including race, gender, and age; what challenges predominate that would benefit from a period of intensive supervision (*e.g.*, substance abuse, mental illness, *etc.*); what percentage of participants have prior felony convictions; what percentage of participants successfully complete the program; how long does the average participant take to complete the program.

   In addition, information on any impact that the program has on recidivism would be instructive. For example, we may also want to explore more qualitative indicators of long-term positive changes in the participants' lives, such as relationships, employment, education, physical, mental, and emotional health, access to healthcare, and financial independence.

3. Characteristics of the Program: whether there are published criteria for admission; whether a guilty plea precedes participation in the program; what result and outcome does a successful participant receive (*e.g.*, dismissal, non-custodial sentence, *etc.*); what is the outcome and procedure for unsuccessful participants; what entity determines whether a participant has been successful; what incentives and sanctions are available to the program.

   The issues identified by the Commission—such as scope, duration, sources of information, specific questions to address and relevant developments in recent legal and social science literature—will take a national discussion that cannot be easily or quickly accomplished.

Issue #2 – Should the *Guidelines Manual* be amended to address court-sponsored diversion and alternatives-to-incarceration programs?

Yes. The existence of court-sponsored diversion and ATI programs has gotten considerably ahead of what is recognized in the *Guidelines Manual*. There are currently several dozen such programs in the federal courts. The CDCA's CASA program has existed for over 10 years, relying solely on variances for those who graduate with a probationary sentence. Some recognition of the widespread existence of these programs should be made as soon as practicable in the *Guidelines Manual*.

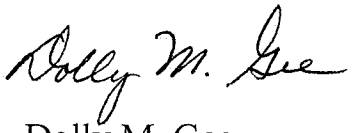
The appropriate sections of the *Guidelines Manual* to insert both a recognition of ATI programs and that a successful completion may form the basis of a downward departure include the following: **§3E1.1** (Acceptance of Responsibility), **§5B1.1** (Imposition of a Sentence of Probation), **§5F** (Sentencing Options), **§5H** (Specific Offender Characteristics), and/or in a newly added provision under **§5K2.0**, along with the inclusion of a "Policy Statement" as suggested here:

> A downward departure may be warranted for the successful completion of a court-sponsored diversion or alternatives-to-incarceration program. In determining whether the court should depart under this policy statement, a court may consider the length of the defendant's participation in the program, and the nature and quality of the defendant's participation in the program.

On behalf of the CASA Program, I welcome and thank the Commission for this opportunity to provide these comments in support of your efforts to account for and consider ATI programs in the Sentencing Guidelines. As we have witnessed over the past several years, a sizable number of programs like CASA have developed in the federal system and many of my colleagues will appreciate the Commission's policy directives in granting "credit where credit is due."

Please feel free to contact me [redacted] if you have any questions about these comments or our CASA Program.

Sincerely,



Dolly M. Gee

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

District Judge John Mcconnell, Rhode Island

Topics:

1. Compassionate Release

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

7. Criminal History

8. Acquitted Conduct

12. Miscellaneous Issues

Comments:

I fully support the Commission's Proposed Changes. You all have done outstanding work. Thank you.
A few comments:

• The § 1.B1.13(b)(5) – adding "Changes in the Law" is essential to district courts' ability to continue to do equal justice that the public would also perceive as fair. To have a person continued to be incarcerated when the law has changed is simply unjust.

• I strongly recommend that the Commission add another reason (7?), that would effectuate congressional intent – i.e., a provision for a modifying a sentence that is now considered unusually long. The Senate report says:

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

S. Rep. 98-225, at 55-56 (1983–1984) (emphasis added).

• § 1.B1.13(b)(6) - I believe Option 3 is the most appropriate; it continues to give the district judge the most discretion to do individual justice as may be presented in the case before them.

• § 4A1.1 - Status Points: Option 3 is most appropriate – status points should be eliminated.

• All criminal history points should be eliminated for marijuana possession considering the

movement by states to decriminalize marijuana.

• § 1B1.3 – I fully support the elimination of "acquitted conduct" – it is simply wrong and unjust to count conduct against a person when a judge or jury as found them not guilty.

• Alternative-to-Incarceration: My only suggestion is that any study not rely solely on recidivism rates as a measure of success. Keeping folks out of prison can itself have positive effects regardless of whether the person recidivates – e.g., lowering the costs of incarceration; family unity; not depleting communities of the induvial; etc. All other such factors should be included when evaluating the benefit of alternative-to-incarceration programs.

Submitted on: February 28, 2023

United States District Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001

CHAMBERS OF
TREVOR N. MCFADDEN
UNITED STATES DISTRICT JUDGE

March 13, 2023

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Commissioners:

I write to provide comments on proposed amendments to § 1B1.13, which explains when a court may reduce a defendant's term of imprisonment under the First Step Act. I am concerned that the proposed amendments will (1) exacerbate the strain that compassionate release motions place on judicial and governmental resources; (2) favor wealthier, non-minority defendants with the ability to hire counsel; and (3) duplicate claims available under the Eighth Amendment.

Strain on Judicial Resources: As a district judge, I have witnessed the flood of compassionate release motions from incarcerated defendants since the First Step Act passed. I try to address these motions, like others, in a timely manner. But no sooner do I deny such a motion than many defendants simply file another one. Several of my defendants have filed three successive motions for compassionate release, and one filed eight. My colleagues also face repeat filers. Often these repeat motions raise the same, rejected arguments, although others raise new claims. Most lack any merit.

The sheer volume of such motions strains judicial resources and hampers the fair and efficient administration of justice. More, if the defendant is a repeat filer, the Government is often forced to waste time responding to the same arguments that I have already rejected. That is a poor use of the Government's time, especially if the case is old and new prosecutors have to scramble to get up to speed.

I am concerned that the proposed additions to § 1B1.13(b)(1)(D)—which relate to public health—will turn the stream of compassionate release motions into a deluge. You propose that the mere fact of being housed in a prison "affected or *at risk of being affected* by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency" may present extraordinary and compelling circumstances. Proposed Amendment at 5.

This standard is troubling. For one, it seems contrary to the plain meaning of "extraordinary and compelling." Your proposal would seem to apply to *all* prisoners *every time* there is some public health emergency. That is particularly concerning given that any number of things could constitute public health emergencies. It cannot be that every prisoner's situation during a public

health crisis is "extraordinary" and "compelling." More, it is unclear how judges should decide whether a prison is at risk of being affected by an ongoing outbreak or public health emergency. How should judges gauge likelihood? Rather than clarifying what constitutes extraordinary and compelling circumstances, this language broadens the standard and incentivizes prisoners to file more motions.

Racial and Socioeconomic Disparities: I am also concerned that the proposed additions to § 1B1.13(b)(1)(D) will benefit wealthy, non-minority defendants who are able to hire sophisticated counsel. The Commission has already found in a series of reports that racial disparities have increased post-*Booker*. *See, e.g.*, Demographic Differences in Sentencing: An Update to the 2012 *Booker* Report at 2, U.S. Sentencing Comm'n (2017) (summarizing prior studies). Broad, discretionary standards such as the ones you propose may exacerbate such disparities. Wealthier, non-minority defendants may be able to exploit the proposed language to obtain release more easily than minority, *pro se* defendants. Any such disparities would undermine equal treatment under the law.

Duplicates the Eighth Amendment: Finally, proposed subsection § 1B1.13(b)(4)—which permits compassionate release if a prisoner was the victim of "sexual assault or physical abuse"—is problematic. While it goes without saying that sexual assault is abhorrent, prisoners can already raise similar claims under the Eighth Amendment. And the draft language provides no clear standard.

Circuit courts have held that the Eighth Amendment's prohibition of cruel and unusual punishment extends to sexual assault in prison. *See, e.g.*, *Bearchild v. Cobban*, 947 F.3d 1130, 1142 (9th Cir. 2020); *DeJesus v. Lewis*, 14 F.4th 1182, 1195 (11th Cir. 2021). And claims of physical abuse by correctional officers are typically governed by excessive use-of-force standards. *See, e.g.*, *Sconiers v. Lockhart*, 946 F.3d 1256, 1265 (11th Cir. 2020). But the analysis for each type of claim is fact-bound and complex. *See, e.g., id.* at 1265–66 (assessing "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm").

The broad language you propose—"sexual assault or physical abuse"—provides a different form of relief (release) than has traditionally be available for identical claims under the Eighth Amendment (damages). So it provides a new remedy without any of the guardrails of Eighth Amendment precedent. To name a few concerns: Who defines what constitutes a "sexual assault" or "physical abuse" sufficient to grant release? *See, e.g.*, *DeJesus*, 14 F.4th at 1197 ("A broad[] range of conduct clearly qualifies as sexual assault [in the Eighth Amendment context], depending on the facts of a given situation," which may include non-physical contact). Is it enough for a defendant to merely allege that he was assaulted or abused? Need he present witnesses? What is the relevant burden of proof?

Section 1B1.13(b)(4)'s "sexual assault or physical abuse" language would permit defendants to circumvent established Eighth Amendment precedent to obtain a more dramatic remedy. Motions under this subsection would almost certainly raise pressing administrability concerns because the terms are nebulous. And unlike in habeas or Eighth Amendment cases, these

motions will likely be heard in courts far from where the defendant is incarcerated. Finally, such motions will further strain our resources because of the evidentiary inquiries required to assess their truth.

For all these reasons, I encourage you to reconsider proposed §§ 1B1.13(b)(1)(D), and (b)(4).

Respectfully,

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
2388 UNITED STATES COURTHOUSE
75 TED TURNER DRIVE, S.W.
ATLANTA, GA 30303-3309

CHAMBERS OF AMY TOTENBERG **404-215-1438**
UNITED STATES DISTRICT JUDGE AMY_TOTENBERG@GAND.USCOURTS.GOV

March 15, 2023

Hon. Carlton W. Reeves
United States Judge, Southern District of Mississippi
Chair, United States Sentencing Commission

Hon. Luis Felipe Restrepo
United States Judge, Court of Appeals for the Third Circuit
Vice Chair, United States Sentencing Commission

Dear Judge Reeves and Judge Restrepo:

I want to applaud the Sentencing Commission for the extraordinary work it has done to publish proposed revised sentencing guidelines and the thoughtful commentary accompanying the guidelines. I regret that I have been snowed under and unable to write sooner to provide input regarding the proposed guideline revisions. However, I do want to share with you some of my thoughts and concerns regarding the proposed guidelines and existing guidelines. I would be most appreciative if you could share these comments with other Commission members as well as relevant Commission staff. I also would welcome the opportunity to discuss these issues and other related issues with the Commission or Commission staff.

I. Compassionate Release, U.S.S.G. § 1B1.13

I strongly support the delineated expansion of the universe of "extraordinary and compelling reasons" for considering and potentially granting compassionate release to include the array of chronic, serious inmate health issues, incapacitated parents and adult children, and exceptional childcare and other caretaking issues that may arise related to the impairment or death of all suitable family members and friends, and other exceptional circumstances. The challenge will be now to delineate these expressly in the guidelines in a manageable fashion – and not simply in the commentary that may likely not be deemed legally binding. *See United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023).

I also strongly support modification of the rule to ensure that courts in the Eleventh Circuit as well as in all circuits are expressly authorized to review and/or grant compassionate release petitions.[1] Major disparities in the sentencing system across the country are created by restrictive application of the First Step Act in one region that is in conflict with wholly different regimes for implementation of the First Step Act in many other circuits.

II. Safety Valve, U.S.S.G. § 5C1.2

I support interpretation of the safety valve criteria that is verbatim consistent with the First Step Act, 18 U.S.C. § 3553(f), as set forth in the majority opinion in *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022). Any other reading of the safety valve provision guts Congress's intended criminal sentencing legislative reform and the impact of such reform.

III. Acceptance of Responsibility, U.S.S.G. § 3E1.1

The amendment's clarification that pretrial motion practice will not be deemed to bar the Court's award of a third point for acceptance is important and essential. There may also be some other circumstances – post trial – where courts should be able to consider the reduction of points for acceptance of responsibility – e.g., when coercion, the defendant's youth, or mental health issues impacted the defendant's judgment in moving forward with trial or where genuine acceptance of responsibility is patently manifest.

IV. Offense Conduct and Guideline Determination (Chapter 2, Guidelines)

The Commission should perform an appropriate interdisciplinary, rigorous comprehensive study of the drug guidelines (i.e., for methamphetamines, ice or actual heroin, etc.). The guidelines are not proportional. Nor are the guidelines sufficiently tied to an appropriate interdisciplinary review based on information, science, and other perspectives drawn from the medical and public health arena, law enforcement, drug rehabilitation experience, and national public policy. Finally, the drug sentencing guidelines are far higher than comparable state sentencing standards – which in turn, gives rise to a sense that the sentencing is not fair or proportional, with obvious consequences relative to variances.

As noted in the Commission's comments on research relating to pornography computerized downloading conduct, the guidelines are outdated by technological reality and do not contribute to a reasonable or rational sentencing process.[2]

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[1] Currently, the Eleventh Circuit as well as some other circuits preclude district court judges under almost all circumstances from exercising authority under the First Step Act to grant compassionate release petitions. *See e.g., U.S. v. Bryant*, 996 F.3d 1243 (11th Cir. 2021).

[2] *See* https://www.ussc.gov/research/research-reports/federal-sentencing-child-pornography-non-production-offenses.

V. Career Offender (including proposal to eliminate use of categorical approach), U.S.S.G. § 4B1.1

As difficult and abstract as the categorical approach is, the proposal might thrust district courts into the murky territory of determining what state judicial findings were actually made as well as parsing state law and state court documents in a large number of cases. There often is little reliability or consistency in what records or hearing information is maintained by state courts. These circumstances would pose real challenges for district courts attempting to use this information for purposes of career offender analysis and might well result in disparate, inconsistent results in judicial decision-making. I think the categorical approach is not transparent or comprehensible to defendants – and to many lawyers as well. But the current proposal, given the challenges before our state courts flooded with criminal cases, may be equally if not more difficult. My thought is that this issue needs more work.

VI. Criminal History Points, U.S.S.G. § 4A1.1(d) and U.S.S.G. § 4C1.1

U.S.S.G. § 4A1.1(d): The Commission has published a recent report[3] that concludes that the imposition of status points to criminal history based on the Defendant being on probation or parole at the time of a new charged offense does not reliably predict the defendant's likelihood of committing new crimes or posing a danger to the community. The Commission therefore should simply eliminate the use of additional status points in assessing criminal history.

U.S.S.G. § 4C1.1: I support the proposal for use of zero-points for offenders with no criminal history that can be properly counted under the guidelines.

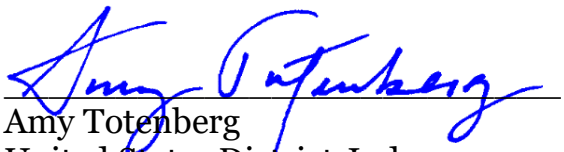
VII. OTHER COMMENTS

Certain sentencing guidelines are overly complex, adding points here and there and via references to other provisions that then refer the reader to still other provisions in turn that may yield more adverse points as well as legal disputes. In essence, sometimes judges and lawyers are required to treat the guidelines as a whole as if part of the IRS Code – all of which is difficult to explain to defendants before the Court. I would urge the Commission to bear this in mind when reviewing and drafting amendments.

[3] *See* https://www.ussc.gov/research/research-reports/revisiting-status-points.

Thank you once again for your devotion to this important revision process. If I can be of any assistance whatsoever, please feel free to contact me.

Sincerely,



Amy Totenberg
United States District Judge

UNITED STATES DISTRICT COURT
District of New Mexico
Santiago E. Campos Courthouse
106 South Federal Place, Second Floor
Santa Fe, New Mexico 87501

Mar. 7, 2023

MARTHA VÁZQUEZ
Senior District Judge

Office: (505) 988-6330
Fax: (505) 988-6332
E-mail: martha_vazquez@nmd.uscourts.gov

Re: Amendments to the compassionate release policy statement

Dear Chair Reeves, Vice Chairs, and Commissioners,

I write to comment on your proposed amendments to the compassionate release policy statement (U.S.S.G. § 1B1.13). I am a Senior District Court Judge in the District of New Mexico. I have been on the bench since 1993.

I read the Judicial Conference's Criminal Law Committee's (CLC) written testimony with interest and would like to provide a different perspective on the administrability concerns raised by the CLC. On these issues, the CLC does not speak for me. I support broad judicial discretion for 18 U.S.C. § 3582(c)(1)(A) motions and am in favor of adding additional enumerated categories, such as Proposals (b)(4) and (b)(5), and adopting Option 3 for the catch-all category.

During the overwhelming majority of my tenure as a district judge, the Bureau of Prisons did not use its discretion to move for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). These failures had catastrophic results—people died in prison when they never should have.

The Commission's proposals will make our system more just and will be administrable. Since the passage of the First Step Act, I have decided numerous compassionate release motions. During the COVID-19 pandemic, I granted motions to reduce the sentences of defendants who were at high risk of death or serious complications from COVID-19 and met the other statutory requirements. Section 3582(c)(1)(A) motions were at their height during the pandemic but remained manageable. Filings have gone down substantially since that time.

I sit in the Tenth Circuit, which allows district judges broad discretion to identify other unenumerated extraordinary and compelling reasons for release, including changes in the law. *See generally United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021). As a result, I have granted compassionate release for unenumerated reasons, such as changes in the law in combination with rehabilitation. I am grateful that I have had broad discretion to consider the totality of a defendant's extraordinary and compelling reasons. Such an exercise of discretion is familiar, as we engage in similar analyses in many other areas of law. The new enumerated categories will help guide our discretion, but it would be a mistake to unduly limit our discretion

to those enumerated categories. To do justice, we sometimes need discretion that is largely unencumbered, even if that means occasionally acting in the absence of rigid standards.

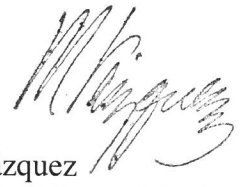
With regard to Proposal (b)(5) in particular, my view is that district judges are well-suited to separate routine changes in the law from those that are truly extraordinary and compelling. Fellow district judges in my Circuit have done just that—consider whether a specific change in the law renders a person's individualized situation extraordinary and compelling. The Commission's "inequitable" standard provides appropriate guidance, as that is how we have considered changes in the law when evaluating § 3582(c)(1)(A) motions under my Circuit's precedent.

As this Commission well knows, even if a defendant establishes extraordinary and compelling reasons for a sentencing reduction, district judges must still consider the 18 U.S.C. § 3553(a) factors and whether the defendant poses a danger to the safety or another person or the community. These additional requirements have led me to deny § 3582(c)(1)(A) motions, even when a defendant might have otherwise presented extraordinary and compelling circumstances.

My experience in the District of New Mexico for the last four years is that this is an administrable system. Even with the ability to consider a wide range of other extraordinary and compelling reasons for relief, it has not led to a flood of motions and my docket has remained manageable. Indeed, even though changes in the law can support compassionate release in the Tenth Circuit, I have not experienced a deluge of motions on that basis. Although some § 3582(c)(1)(A) motions are time-intensive, they are no more so than a serious sentencing hearing. Regardless, in the First Step Act, Congress entrusted us to decide § 3582(c)(1)(A) motions, and it is our duty to do so—regardless of its effect on our dockets.

Thank you for considering other judicial perspectives on this important issue.

Sincerely,



Martha Vázquez
Senior United States District Judge

To: United States Sentencing Commission

From: Robert E. Wier (USDJ, E.D. Ky.)

Re: Proposed Amendments

Date: February 14, 2023

Thanks to the Commission and staff for this thorough and responsive product. I know the long quorum gap left much to be done. I'm so grateful for the time, effort, and thoughtfulness of this group of public servants. The product is sensible, balanced, and quite fair across the many included topics. I've got little to offer as criticism or suggestion.

My few comments are these:

On the §1B1.13 amendment, I caution against including the (b)(5) "Changes in Law" ground. Creating this relief avenue, hinging on perceived inequity "in light of changes in the law" would awkwardly place the district courts somewhere between lawmakers (who have the primary role of dealing with retroactivity matters and promoting sentence equity) and the executive branch (which has the pardon power and can correct individual inequities produced by systematic processes in the law). Habeas options (all heavily litigated and steeped in statute) exist, where appropriate and warranted, for changes wrought by the judiciary, but an open-ended remedy of this type invites lack of predictability, consistency, and finality, turning on the personal view of the deciding judge. I do not view (b)(5) as within the intended scope of §§ 994(t)/3582(c)(1)(A). Every other exemplar reason is *factual*; (b)(5) is an outlier.

I'd encourage use of Option 1 for §1B1.13(b)(6). Congress seems to expect specificity and precision in the Commission's § 3582 guidance. Though (b)(6) fairly seeks to assure flexibility in the rubric, verbiage untethered to itemized criteria and specific examples could make (b)(6) the primary relief vehicle rather than an option merely paralleling the base concepts in the other sections. Option 1 properly leans on the rest of the Policy Statement. Options 2 and 3 threaten to supplant or replace the careful metrics of the Statement. Option 1 is most faithful to § 994(t) and will best assure the opportunity for relief without inviting disparities and arbitrariness across the land.

On the status points concept (§ 4A1.1), I'm intrigued and surprised by the circulated research. That will help inform my view on the predictive effect of that CHC aspect. While I often see the +2 added in circumstances that unfairly exaggerate the impact, I also often see a real lack of respect for law, need for sharper punishment, or gravity aggravation in recidivism despite being under a criminal justice sentence. I'd welcome the departure power reflected in Option 1, or even the reduction to +1 within Option 2, but would not encourage the more dramatic step of discarding status points altogether.

I appreciate the Commission's consideration of these points.

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 15, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.[1] This letter addresses the proposals and issues for comment regarding First Step Act—Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A), Acquitted Conduct, and Sexual Abuse Offenses. We will submit a second letter on the remaining matters before the Commission's March meeting. This letter also serves as the Department's written testimony for the Commission's upcoming hearing on February 23, 2023.

We thank the members of the Commission and the staff for being responsive to the sentencing priorities of the Department of Justice and to the needs and responsibilities, more generally, of the Executive Branch. We look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come.

* * *

[1] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts*, 88 Fed. Reg. 7180 (Feb. 2, 2023).

U.S. DEPARTMENT OF JUSTICE VIEWS ON THE PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT APPROVED BY THE U.S. SENTENCING COMMISSION ON JANUARY 12, 2023, AND PUBLISHED IN THE FEDERAL REGISTER ON FEBRUARY 2, 2023.

1. Department of Justice Comments on Proposed Amendments and Issues for Comment on Compassionate Release

The Commission requests comment on proposed amendments to the policy statement at §1B1.13, relating to reductions of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), commonly known as "compassionate release."

The Department welcomes the Commission's decision to prioritize this issue for review, and we encourage the Commission to use this opportunity to establish a clear compassionate release policy. Section 994(t) of Title 28, United States Code, requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." Since the statutory provision was amended in the First Step Act of 2018, most courts have held that the Commission's existing policy statement on compassionate release is outdated and inapplicable and have thus operated without Commission guidance. The Commission's own data—and a review of federal district and appellate court decisions—show that without that guidance, disparities in sentencing outcomes have occurred and will continue to occur. The Department therefore encourages the Commission to clearly articulate in the Guidelines the circumstances where compassionate release is appropriate.

The Department supports many of the articulated criteria in the proposed policy statement that will expand the availability of compassionate release. The Department agrees, for instance, that compassionate release may be warranted, in appropriate cases, in response to a public health emergency. Likewise, the Department believes that in appropriate cases, compassionate release should be available for victims of sexual misconduct in prison, so long as that misconduct has been established by an administrative or legal proceeding. As stated previously in litigation, however, the Department's position is that Section 3582(c) does not authorize courts to reduce sentences based on a nonretroactive development in sentencing law. Consistent with that position, the Commission should reject the proposed "changes in law" provision.

The Department also supports the adoption of a "catch-all" provision. Option 1, which tracks the enumerated criteria for compassionate release, best comports with the Department's litigating position. This approach would hew to Congress's statutory mandates, thus providing appropriate guidance to courts while still granting them discretion to identify new extraordinary and compelling reasons similar in kind to the specific circumstances already identified. This approach would reduce the uncertainty, circuit conflicts, and sentencing disparities that have proliferated in the absence of any binding policy statement.

Our responses to the specific issues for comment follow, and we welcome the opportunity to continue to engage with the Commission on this matter.

A. Background

Under 18 U.S.C. § 3582(c)(1)(A)(i), a court may reduce a sentence based on "extraordinary and compelling reasons," after consideration of the 18 U.S.C. § 3553(a) sentencing factors, if such a reduction is consistent with "applicable" policy statements of the Sentencing Commission. Section 3582(c)(1)(A)(i) was adopted as part of the bipartisan Sentencing Reform Act of 1984, which abolished parole in favor of a system in which a defendant's term of imprisonment was determined by a judge, applying presumptive sentencing guidelines, at a public sentencing hearing. [2] Congress entrusted the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). It provided that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.*

The Commission's relevant policy statement, §1B1.13, has traditionally defined "extraordinary and compelling" reasons to include a terminal illness, serious physical or mental health concerns, and age-related physical or mental deterioration. *See* USSG §1B1.13 (2018). The Commission has also recognized that such health and safety concerns may extend to family members, and thus has permitted defendants' release so that they can provide for their minor children, incapacitated spouse, or domestic partner. *Id.* The policy statement also permits the Bureau of Prisons (BOP) to identify additional "extraordinary and compelling" reasons. In developing its program statement, the BOP has likewise identified such health and safety concerns for defendants and their families. *See* Bureau of Prisons (BOP) Program Statement 5050.50.[3]

Before 2018, a court could only reduce a sentence upon motion by the BOP Director. *See* 18 U.S.C. § 3582I(1)(A)(i) (2017). But in the First Step Act of 2018, Congress amended Section 3582(c)(1)(A) to allow defendants to file motions directly with courts. *See* Pub. L. No. 115-391, Tit. VI, § 603(b)(1), 132 Stat. 5239. Because the Commission lacked the requisite quorum to update the compassionate release policy statement to reflect the procedural changes made by the First Step Act, most courts of appeals have held that the current policy statement is inapplicable to defendant-filed motions. *See United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022) (collecting cases); *but see United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021). Recent caselaw, discussed below, has thus focused on whether particular circumstances are "extraordinary and compelling" within the meaning of the statutory term.

B. Defining "Extraordinary and Compelling Reasons" to Include Additional Medical and Family Circumstances

The Department agrees that the Commission should expand the definition of "extraordinary and compelling reasons" in the policy statement, including to address additional circumstances affecting the health and safety of defendants and their families. We recommend,

[2] In 2002, Congress modified Section 3582(c)(1)(A)(i) to permit a court reducing a sentence to "impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment." *See* Pub. L. 107-273.

[3] *Available at* https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

however, some minor changes to the Commission's proposals to provide greater clarity to courts and the BOP.

i. Medical Circumstances of the Defendant

The Department agrees that compassionate release may be warranted where a defendant faces a risk of serious medical complications in connection with public health emergencies. Consistent with this position, during the COVID-19 pandemic, the Department agreed that release was appropriate for many at-risk defendants.

The Department suggests, however, some minor clarifications to the proposed "infectious disease" provision:

- The Department recommends changes to proposed §1B1.13(b)(1)(D)(i) to make clear that the purpose of this provision is to address any future outbreak of disease that is similar in severity to the COVID-19 pandemic, rather than routine seasonal outbreaks, such as the annual cold and flu season, or an outbreak of a less serious disease, such as chickenpox. We believe the Commission should clarify that the provision applies when "the defendant is housed at a correctional facility affected or at <u>imminent</u> risk of being affected by (I) an ongoing <u>and extraordinary</u> outbreak of infectious disease."

- The Department understands that the Commission intends for the infectious-disease provision to apply where the defendant's correctional facility is affected by (or at risk of being affected by) an infectious disease or public health emergency and where, because of the "medical circumstances of the defendant," the defendant is at "increased risk" of adverse outcomes as compared to other individuals who contract the disease, based on the inmate's personal medical circumstances (such as a compromised immune system). To avoid rendering §1B1.13(b)(1)(D)(i) superfluous, the Department does not understand the Commission's proposal to turn on the increased public health risk an inmate may face, when compared to the non-prison population, solely by virtue of the defendant's incarceration. The Department thus recommends that §1B1.13(b)(1)(D)(ii) be amended to read: "<u>due to personal medical risk factors and custodial status</u>, the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the outbreak of infectious disease or the public health emergency. . ."

ii. Family Circumstances of the Defendant

The Department also agrees that there may be additional circumstances, beyond those provided for in the current Guidelines, when release is warranted because of family circumstances. The Department recommends, however, that the Commission provide further guidance as to what constitutes an "immediate family member," as federal regulatory definitions of that term vary widely. *Compare* 29 C.F.R. § 780.308 (defining "immediate family" to include parents, spouses, children, and those similarly situated, such as step-children and foster children) *with* 40 C.F.R. § 170.305 (defining "immediate family" to include grandparents, aunts/uncles, nieces/nephews, and cousins). The former definition is more consistent with the historical understanding of the compassionate release provision and other federal caregiving laws,

including the Family and Medical Leave Act, which governs care for parents, spouses, and children. The Department also notes that defendants should have the burden of establishing the family relationship in question. Certain familial bonds, such as parent-child and spouse, can be established with official, verifiable documentation, such as a birth certificate or marriage license. While the Department supports expanding this category to include other persons with whom the defendant has a relationship similar to that of an immediate family member, the proposed amendment will make it much more difficult for the government and courts to verify the relationship for compassionate release purposes. We therefore recommend that the Commission specify that compassionate release may be available where "the defendant establishes" the applicable circumstances and familial relationships as well as significant ties.

Moreover, the Department presumes that proposed provision 3(D) (for "circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member") applies only when "the defendant would be the only available caregiver," as otherwise provision 3(D) could effectively eliminate that "only available caregiver" requirements of provisions 3(B) and 3(C). The Department suggests clarifying as such—

> "The defendant <u>establishes</u> circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member <u>when the defendant would be the only available caregiver for the individual in question</u>."

C. <u>Commission "Victim of Assault" Proposal</u>

The Department takes very seriously allegations that individuals have suffered sexual and physical abuse at the hands of correctional officers or other BOP employees or contractors while in custody. The Department is committed to preventing abuse in the federal prison system, providing care for those individuals who have nonetheless suffered abuse, and prosecuting those responsible. In July 2022, Deputy Attorney General Lisa O. Monaco issued a memorandum identifying deep concerns about such misconduct and convening a working group of senior Department officials to review the Department's approach to rooting out and preventing sexual misconduct by BOP employees. That working group issued a report on November 2, 2022, outlining recommendations for immediate action, and areas for further review, to better protect the safety and wellbeing of those in BOP custody and better hold accountable those who abuse positions of trust. The Department continues to implement those recommendations to improve our prevention of, and response to, abuse in prison.

The Department agrees that, in certain circumstances, a sentence reduction may be warranted for an individual who suffered sexual assault, or physical abuse resulting in serious bodily injury, committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody. Indeed, the government has sought reductions for victims of this type of abuse, pursuant to Federal Rule of Criminal Procedure 35(b), where the victim has provided substantial assistance in investigating or prosecuting corrections officers who have abused them. The Department believes that compassionate release also may be appropriate, in

certain circumstances, for individuals who are the victims of sexual misconduct perpetrated by BOP employees, and the Director of the Bureau of Prisons has made clear that she will consider moving for a sentence reduction on that ground.

The Department, however, has some concerns about the Commission's current proposal. First, the proposed amendment does not currently cover circumstances where a corrections officer directs another individual—including an inmate—to perpetrate an assault, nor does it cover other individuals who may abuse a federal inmate in their custody or control. Second, under the current proposal, district courts deciding compassionate release motions could be asked to assess the validity of allegations of criminal misconduct without the benefit of an investigation. This may inadvertently hinder the Department's ability to hold perpetrators accountable, secure justice, and vindicate the rights of victims.

The Department therefore recommends that the Commission consider permitting reduction only after misconduct has been independently substantiated—such as after there has been a criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case.[4] Permitting compassionate release hearings only after the completion of other administrative or legal proceedings will help ensure that allegations are more fairly adjudicated, prevent mini-trials on allegations, and reduce interference with pending investigations and prosecutions. Moreover, it will help resolve questions about the scope of the term "sexual assault," as release must be predicated on a finding of wrongdoing.

We would thus suggest the following language:

> "While in custody for the offense of conviction, the defendant was a victim of sexual assault, or physical abuse resulting in serious bodily injury, that was committed by, or at the direction of, a correctional officer or other employee or contractor of the Bureau of Prisons ~~while in custody,~~ or other individual who had custody or control over the inmate, as established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case."

D. Commission Proposal to Include "Changes in Law" as an Enumerated "Extraordinary and Compelling" Reason

The Commission proposes language that would permit courts to reduce a sentence whenever "[t]he defendant is serving a sentence that is inequitable in light of changes in the law." The Department appreciates the concerns underlying this proposal and is concerned about equity in the criminal justice system, including as it pertains to unusually long sentences. However, the Department has taken the position in numerous court filings that Section 3582(c)(1)(A)(i) does not authorize sentence reductions based on nonretroactive changes in sentencing law.

[4] The Department recognizes that there may be rare circumstances where these limitations are not appropriate—such as where the perpetrator of misconduct dies before any administrative proceeding or prosecution is complete. In such circumstances, relief through a catchall provision (discussed below) may be appropriate.

In particular, the Department has repeatedly argued in litigation that the fact that a change in sentencing law is not retroactive is not "extraordinary" within the meaning of the statute.[5] Five courts of appeals have agreed.[6] And although four courts of appeals permit a court to consider non-retroactive changes in sentencing law in combination with other extraordinary and compelling reasons,[7] those circuits nevertheless hold that "the mere fact" that the defendant's sentence may be lower if the defendant were sentenced today "cannot, standing alone, serve as the basis for a sentence reduction."[8] The Commission's "changes in law" proposal could be understood to conflict with even those more permissive courts of appeals, if it were to permit reductions based on the mere fact that sentencing law had changed.

The Commission's proposal thus conflicts with the Department's interpretation Section 3582(c)(2). To be sure, the decisions discussed above were made in the absence of a binding policy statement. While the Supreme Court has left open whether the Commission might receive deference on its interpretation of the statute, *DePierre v. United States*, 564 U.S. 70, 87 (2011), it has also clearly held that the Commission cannot contravene the statute's plain text. *United States v. LaBonte*, 520 U.S. 751, 757 (1997) ("Broad as [the Commission's] discretion may be, however, it must bow to the specific directives of Congress."); *Stinson v. United States*, 508 U.S. 36, 38 (1993). None of the circuits that hold changes in law cannot establish "extraordinary and compelling" circumstances have suggested that the statutory term is ambiguous. And in the face of unambiguous text, the Commission's directives "must give way." *LaBonte*, 520 U.S. at 757.

At the same time, the Department appreciates the policy concerns animating the Commission's proposal. The Department of Justice supports legislation to make certain statutory penalty changes—particularly those set forth in Sections 401 and 403 of the First Step Act—retroactive. And the Department would support legislation permitting district courts to reconsider the longest sentences for certain defendants who have rehabilitated and demonstrated readiness for reentry into society, with appropriate restrictions on timing and filing that are absent from Section 3582(c)(1)(A)(i).

But the Department has concerns about using compassionate release as the mechanism to address these concerns for several reasons. First, this proposal risks undermining the principles of finality and consistency that are the hallmarks of the Sentencing Reform Act. The Commission's proposal could be understood to allow defendants to move for compassionate release any time there is any change in law, including when any court decision—even one that is not from the Supreme Court and therefore does not definitively settle the issue—arguably affects any aspect of the conviction or sentencing; they could reapply for compassionate release the day after denial; and they could continue to reapply without limit. Second, and relatedly, a

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[5] *See, e.g.*, Brief in Opposition, *Jarvis v. United States*, No. 21-568 (Dec. 8, 2021); Brief in Opposition, *Tomes v. United States*, No. 21-5104 (Nov. 29, 2021); Brief in Opposition, *Gashe v. United States*, No. 20-8284 (Nov. 12, 2021); *see also* U.S. Supplemental En Banc Brief, *United States v. McCall*, No. 21-3400 (6th Cir. May 11, 2022).
[6] *See United States v. McCall*, 56 F.4th 1048, 1050 (6th Cir. 2022) (en banc); *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (citing *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022); *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021)).
[7] *See United States v. Chen*, 48 F.4th 1092, 1096 (9th Cir. 2022); *Ruvalcaba*, 26 F.4th at 28 (1st Cir. 2022); *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020).
[8] *Ruvalcaba*, 26 F.4th at 28 (quotations omitted); *see McGee*, 992 F.3d at 1048; *McCoy*, 981 F.3d at 287; *Chen*, 48 F.4th at 1100.

compassionate-release mechanism without further guardrails or procedural protections would seriously affect the victims of crime and adversely affect the ability of many victims to move beyond the criminal conduct they experienced. Third, the burden on the judicial system would be immense. If the Commission were to endorse the availability of a sentence reduction based solely on changes in law, it may prompt a flood of motions on such basis.[9] In addition to the impact on victims and the court system overall, an unmanageable volume of motions could lead to delays in courts being able to adjudicate and grant meritorious motions. Fourth, the proposal will lead to widespread sentencing disparities, as the Commission's proposal will exacerbate the conflict among the courts of appeals on the statutory scope of Section 3582(c)(1)(A)(i).

Finally, in the list of "Issues for Comment," the Commission has recognized the tension between the "changes in law" proposal and the specific, limited mechanisms the Sentencing Reform Act provided for reducing otherwise-final sentences. Section 3582(c)(2) of Title 18—adopted as part of the Sentencing Reform Act, at the same time as Section 3582(c)(1)(A)—permits courts to reduce a sentence in light of a Guidelines amendment, so long as the reduction is consistent with Commission policy statements. The relevant policy statement, §1B1.10, permits reductions based only on those Guidelines amendments that the Commission expressly designates as applying retroactively, precludes consideration of any other changes in the application of the Guidelines, and, absent certain specific exceptions, precludes the court from reducing the sentence below the newly applicable Guidelines range, even if the defendant previously received a below-Guidelines sentence. *See* USSG §1B1.10. By contrast, courts face no such constraints when considering a compassionate release motion. If the Commission adopts the "changes in law" proposal—or, as explained below, Options 2 or 3—it will essentially eliminate the restrictions that Section 3582 and §1B1.10 place on sentence reductions predicated upon a Guideline amendment. Section 1B1.13, then, would on its face permit courts to reduce a sentence regardless of whether it was based upon a retroactive Guidelines amendment; to consider changes other than those set forth in the amendment; and to impose a sentence below the newly applicable Guidelines range. *Cf.* 18 U.S.C. § 3582(c)(2); USSG §1B1.10.

E. Commission Proposals Regarding Additional "Extraordinary and Compelling" Reasons

The Department agrees with the Commission's proposal to grant courts authority to identify additional extraordinary and compelling circumstances not expressly enumerated in Section 1B1.13. As we have learned in the last few years, it can be difficult, if not impossible, to predict what will constitute extraordinary and compelling circumstances in the future, and courts should have the flexibility to identify new extraordinary and compelling circumstances that are within the scope of their statutory authority to reduce sentences.

Option 1, which limits extraordinary and compelling reasons to those similar in nature and consequence to the list of enumerated reasons, comports with the Department's view of the Commission's authority, so long as the Commission does not adopt the "changes in law"

[9] The fact that a large majority of these motions might be denied, and that courts could develop rules for addressing successive motions that abuse the authority to seek relief, will not change the fact that being compelled to consider and address these motions will impose a significant burden on victims and on courts.

provision proposed in subsection (b)(6). Unlike the remaining options, Option 1 makes clear that Section 3582(c)(1)(A) does not permit reductions based on disagreement with an applicable mandatory term of imprisonment, challenges to a conviction or sentence, or changes in sentencing law. By contrast, Options 2 and 3 of the Commission's proposal purport to grant courts broad authority to identify additional "extraordinary and compelling" circumstances.

Of the Commission's proposals, Option 1 also best provides guidance to courts and the Bureau of Prisons in evaluating compassionate release motions. Unlike Options 2 and 3, Option 1 (without the "changes in law" provision) would help to reduce, if not eliminate, circuit conflicts over the scope of statutory authority under Section 3582(c)(1)(A). The courts of appeals agree that a district court cannot reduce a sentence if such a reduction is inconsistent with the policy statement. If the Commission were to adopt a policy statement that does not include such reasons, it would preempt the statutory question and resolve the circuit conflict. Options 2 and 3, meanwhile, make it more likely that courts will continue to grant compassionate release to modify sentences in ways that exceed statutory limits on district courts' authority.[10]

F. Additional Guidance Regarding Victims' Rights

Finally, the Department suggests that the Guidelines provide additional guidance to courts regarding victims' rights to be notified, heard, conferred with, and treated with dignity and respect during any proceeding related to compassionate release, including where consistent with the Crime Victims' Rights Act, 18 U.S.C. § 3771(a). Currently, the proposed amendment does not address victims and their important interests. While not all victims will wish to be heard, the Department encourages the Commission to require courts to afford victims that opportunity before granting any motion for compassionate release. In particular, the Commission should consider amending Section 1B1.13 to include the following provision:

> NOTICE TO VICTIMS – Before granting any motion for compassionate release, the court must provide reasonable notice to any victims and provide them an opportunity to be heard unless the victim has requested not to be informed of any possible reduction in sentence pursuant to this provision.

* * *

On the following page is a redline of the Commission's published amendment proposal. It shows the difference between the Commission version (which has changes itself) and the Department's recommended approach. It keeps the shading/strike-throughs from the Commission proposal, adds strike-throughs wherever we would strike the Commission's proposed language, and adds additional blue shading where we suggest adding new language. The Department welcomes the opportunity to continue engaging with the Commission as it considers appropriate changes.

[10] The Department would welcome the opportunity to work with the Commission to fashion alternatives that address those concerns.

PROPOSED AMENDMENT:

§1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

(a) IN GENERAL.—Upon motion of the Director of the Bureau of Prisons or the defendant ~~under~~ pursuant to 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

(1) (A) extraordinary and compelling reasons warrant the reduction; or
(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

(b) EXTRAORDINARY AND COMPELLING REASONS.—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(1) MEDICAL CIRCUMSTANCES OF THE DEFENDANT.—

(A) {The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.}*

(B) {The defendant is— (i) suffering from a serious physical or medical condition, (ii) suffering from a serious functional or cognitive impairment, or (iii) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide selfcare within the environment of a correctional facility and from which he or she is not expected to recover.}*

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner.

(D) The defendant presents the following circumstances—

(i) the defendant is housed at a correctional facility affected or at imminent risk of being affected by (I) an ongoing and extraordinary outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) due to personal medical risk factors and custodial status, the defendant is at increased risk of suffering severe medical complications or death, as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be mitigated in a timely or adequate manner.

(2) AGE OF THE DEFENDANT.—The defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.}*

(3) FAMILY CIRCUMSTANCES OF THE DEFENDANT.—

(A) {The death or incapacitation of the caregiver of the defendant's minor child or ~~minor children~~ the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.}**

(B) {The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.}*

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

[(D) The defendant ~~presents~~ establishes circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member, when the defendant would be the only available caregiver for the individual in question.]

[(E) For the purposes of this policy statement, an immediate family member is a parent, child, spouse, step-parent, step-child, foster parent, foster child, or registered partner.]

[(4) VICTIM OF ASSAULT.—While in custody for the offense of conviction, the defendant was a victim of sexual assault, or physical abuse resulting in serious bodily injury, that was committed by, or at the direction of, a correctional officer or other employee or contractor of the Bureau of Prisons ~~while in custody~~or other individual who had custody or control over the inmate, as established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case.]

~~[(5) CHANGES IN LAW.—The defendant is serving a sentence that is inequitable in light of changes in the law.]~~

[Option 1:

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

[Option 2:

~~(6) OTHER CIRCUMSTANCES.—As a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.]~~

[Option 3:

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

(c) {REHABILITATION OF THE DEFENDANT.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.}*

(d) NOTICE TO VICTIMS – Before granting any motion for compassionate release, the court must provide reasonable notice to any victims and provide them an opportunity to be heard unless the victim has requested not to be informed of any possible reduction in sentence pursuant to this provision.

2. Department of Justice Comments on Proposed Amendments and Issues for Comment on Acquitted Conduct

The Commission has proposed an amendment to the Guidelines limiting the use of acquitted conduct in determining the Guidelines range. Consistent with federal statutes, the proposal would continue to allow district courts to consider acquitted conduct when determining where within the applicable Guidelines range to sentence a defendant and whether a departure (or, *a priori*, a variance) is warranted. *See* 18 U.S.C. § 3661 ("[N]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

For the reasons set forth below, the Department does not believe the Commission can practicably exclude acquitted conduct from the definition of relevant conduct. If the Commission nonetheless proceeds with the amendment, the Department believes the definition of acquitted conduct should be amended.

A. Background

The Supreme Court has long recognized judges' broad discretion to impose sentences based on facts found by a preponderance of the evidence at sentencing. *See, e.g., United States v. Watts*, 519 U.S. 148, 157 (1997) ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as the conduct has been proven by a preponderance"); *Alleyne v. United States*, 570 U.S. 99, 116 (2013) ("We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment"). The Court in *Watts* reiterated its holding in *Williams v. New York,* that "[h]ighly relevant—if not essential to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics" and that "[n]either the broad language of section 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing." *Watts*, 519 U.S. at 151-52 (quoting *Williams,* 337 U.S. 241, 247 (1949)).

Since *Watts*, the Court has continued to affirm that there are no limitations on the information concerning a defendant's background, character, and conduct that courts may consider in determining an appropriate sentence. Curtailing the consideration of acquitted conduct at sentencing would be a significant departure from longstanding sentencing practice. *See Watts*, 519 U.S. at 152 (noting that even "[u]nder the pre-Guidelines sentencing regime, it was well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted") (internal citations omitted).[11]

Section 3553(a) of Title 18, United States Code, meanwhile, requires judges to consider, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant" in imposing a "sufficient, but not greater than necessary" sentence. Congress recognized and codified the broad availability of information for judges in imposing sentence in Section 3661, which directs that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

B. The Commission's Proposal Would Be Difficult for Courts to Administer

Consistent with Supreme Court precedent, the commentary to §1B1.3 currently provide that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Likewise, §6A1.3 specifies that "[i]n resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." Citing 18 U.S.C. § 3661 and the Court's decision in *Watts*, the commentary to that provision explains that "a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

The Commission's proposed amendment would make three changes to the Guidelines and the commentary. It would –

- add a new subsection (c) to §1B1.3, in the Guidelines text, prohibiting consideration of acquitted conduct as relevant conduct under §1B1.3 "unless such conduct was admitted by the defendant or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, a violation of the instant offense of conviction";

[11] The Supreme Court has also recognized the constitutionality, under the advisory Guidelines regime, of judicial factfinding within the prescribed statutory range established by the jury verdict. *See, e.g., Alleyne v. United States*, 570 U.S. 99, 116 (2013) (majority opinion) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (noting that nothing in the Court's history suggests that it is "impermissible for judges to exercise discretion—taking into consideration various factors relating to both offense and offender—in imposing a judgement *within the range* prescribed by statute) (emphasis in the original); *see also* 18 U.S.C. § 3661.

- define acquitted conduct, in the Guidelines text, as, "conduct (*i.e.*, any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction"; and

- amend the commentary to §6A1.3 (Resolution of Disputed Factors), by adding that "[a]cquitted conduct, however, generally, shall not be considered relevant conduct for the purposes of determining the guideline range;" remove the reference to *United States v. Watts* and edit other caselaw references; affirm the preponderance standard; and affirm the use of acquitted conduct to determine "the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.4."

The Department does not believe that the Commission can practicably prohibit the consideration of acquitted conduct in determining the Guidelines range. Though well intentioned, the Commission's proposal will unduly restrict judicial factfinding, create unnecessary confusion and litigation burdening the courts, and result in sentences that fail to account for the full range of a defendant's conduct.[12] As the Supreme Court recognized in *Watts*, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." *Watts*, 519 U.S. at 149. Jury verdicts reflect a finding of whether the elements of a charge were established beyond a reasonable doubt but not necessarily whether a defendant did or did not commit certain acts. Indeed, jury verdicts are usually opaque. Because there is no administrable way to define "acquitted conduct," the Department fears that this provision will invite litigation on its application and inconsistency as differing interpretations emerge.

As an initial matter, if adopted, the proposed definition of acquitted conduct would create challenges in parsing the acts and omissions that can and cannot be considered by a sentencing court. Defining acquitted conduct as conduct "*underlying a charge of which the defendant has been acquitted"* will prove difficult to administer, especially for complex cases involving overlapping charges, split or inconsistent verdicts, or acquittals based on technical elements unrelated to a defendant's innocence.[13] The Department is particularly concerned about cases in which the charges are linked together, as in cases involving conspiracy, false statements, civil rights, sexual abuse, and firearms charges.

More specifically, the Commission's proposal fails to account for an acquittal unrelated to the defendant's innocence as to the conduct at issue—for example, an acquittal based on failure of proof at trial on a technical element of the offense, including, but not limited to, venue,

[12] Indeed, the Department has explained in litigation why the use of acquitted conduct at sentencing is constitutionally sound, and why an alternative approach would "be unsound as a practical matter." *See* Brief in Opposition, *McClinton v. United States*, No. 21-1557 (October 28, 2022).

[13] We appreciate the Commission's inclusion of "*a charge"* to recognize that triers of fact decide charges, not conduct, and we recognize that the phrase "*underlying a charge"* adopts the same language as used in *Watts* and other cases. But those cases were broadly describing acquitted conduct, not distinguishing it from other relevant conduct.

a jurisdictional element, or the conduct occurring outside the statute of limitations. These circumstances often arise in civil rights cases, sexual misconduct cases, child exploitation cases, and cases involving particularly vulnerable victims who may not report a crime until long after the offense was committed. Under the current Guidelines, courts may treat the substantive conduct underlying a charge for which the defendant was acquitted as relevant conduct as to other offenses of conviction, so long as the court believes that evidence established by a preponderance of the evidence. The court thus has discretion to consider conduct underlying an acquittal that rested on technical grounds, while always retaining authority to disregard the conduct if the evidence is insufficient or if the conduct was insufficiently related to the offense of conviction. The Commission's proposal would strip courts of that discretion, categorically prohibiting courts from considering this conduct for purposes of determining the Guidelines range.

The Commission's proposal also fails to sufficiently address split or inconsistent verdicts where the conduct underlying a count of acquittal is relevant conduct for a count of conviction but does not necessarily satisfy the elements of the count of conviction. Often in civil rights cases, juries may convict a defendant of an obstruction of justice offense, *e.g.*, violations of 18 U.S.C. §§ 1001, 1512(b)(3), 1519, but acquit on the substantive civil rights offense. Under the current regime, the substantive conduct would be appropriately considered relevant conduct if the court finds it was proved by a preponderance of the evidence. Under the Commission's proposal, the substantive conduct would be excluded from consideration in determining the Guidelines range because the elements of the substantive offense were not necessarily "found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction," *i.e.*, obstruction of justice.

Finally, the Department does not believe that the Commission's proposed exclusion of conduct "*admitted by the defendant or [that was] found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, a violation of the instant offense of conviction*" adequately addresses this concern. The Department appreciates this effort to address overlapping verdicts. But this language will be difficult to administer, as the sentencing court is typically not the trier of fact, and the proposal will require the sentencing court to make a factual finding about the basis for a jury verdict. It is unclear how a court could make this inquiry because verdicts generally only include findings on charges, not particular facts. Even if the sentencing court could discern the jury's factual finding with respect to certain conduct, it would need to make a legal determination whether the conduct at issue "underl[ies] a charge of which the defendant has been acquitted" or "establish[es], in whole or in part, the instant offense of conviction." There is ambiguity regarding what a court should do when the conduct falls in both of those boxes. Ultimately, the Department worries that this difficult exercise will result in litigation regarding what the trier of fact found proven beyond a reasonable doubt.

C. A Narrower Definition

Were the Commission to proceed with excluding acquitted conduct from relevant conduct, the Department would recommend a narrower definition of acquitted conduct that would include: (1) specific exceptions, and (2) clarify the definition to reduce administrability concerns, while retaining the Commission's proposed standard. Because some circuits have

questioned the authority and validity of certain provisions of the Sentencing Guidelines commentary, the Department also recommends moving the commentary in §6A1.3 regarding the permitted use of acquitted conduct to the text of §1B1.3.

While these changes will not fully resolve the Department's administrability concerns, changes to the definition of acquitted conduct would better account for overlapping, split, or inconsistent verdicts. The Department's recommended changes are underlined below.

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

(C) Acquitted Conduct. (1) Limitation. Acquitted Conduct shall not be considered relevant conduct for the purposes of determining the guideline range. Acquitted conduct may be considered in determining the sentence to impose within the Guidelines range, or whether a departure or a variance from the Guidelines is warranted. *See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).

(2) Definition of Acquitted Conduct. For the purposes of this guideline, "***acquitted conduct"*** means conduct (*i.e.*, any acts or omissions) underlying the elements of a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion of acquittal under the applicable law of a state, local, or tribal jurisdiction, except that it does not include any conduct (*i.e.*, any acts or omissions):

A) admitted by the defendant or that underlies the elements of a charge of which the defendant has been convicted, including lesser included offenses or related counts; or

B) that the trier of fact found the defendant committed beyond a reasonable doubt, as established by a special verdict form or by a judge's statement after a non-jury trial; or

C) underlying the elements of a charge for which the defendant was acquitted based on the court's determination, by a preponderance of evidence, that the defendant was acquitted for a reason unrelated to his conduct, such as the government's failure to establish venue, prove a jurisdictional element, or overcome an affirmative defense based on the statute of limitations.

The Department recommends changing the language to refocus the sentencing court's inquiry from what the trier of fact found to what the evidence at trial established.

- To account for split or inconsistent verdicts, the Department proposes amending the definition of acquitted conduct to capture acts or omissions "underlying the elements of a charge of which the defendant been acquitted," while also proposing in Subsection A an exception for conduct that "underlies the elements of a charge of which the defendant has been *convicted*." This proposal will help clarify that the Commission's proposal is not intended to prevent a sentencing court from considering conduct underlying the elements of a charge for which the defendant was

convicted, and thus which a jury necessarily found beyond a reasonable doubt. The Department also recommends moving the limitation proposed in (c)(1) to the definition of acquitted conduct in (c)(2) for greater clarity.

- Subsection B accounts for cases where a special verdict form or a judge's statement after a non-jury trial reflects the trier of fact's findings as to specific acts or omissions.

- Subsection C accounts for circumstances in which the evidence at trial otherwise establishes that the defendant committed the acts or omissions in question, but the defendant was acquitted of a particular count because of a technical or non-substantive limitation. This language would allow courts to consider conduct underlying a count of acquittal when the court determines that the acquittal was unrelated to the defendant's factual innocence and instead was based on failure of proof at trial on a technical element of the offense, including, but not limited to, venue, a jurisdictional element, or the conduct occurring outside the statute of limitations. Allowing for the consideration of conduct otherwise proven beyond a reasonable doubt addresses cases involving particularly vulnerable victims who may not report an offense until after the statute of limitations has run.

To ensure that limiting a sentencing court's ability to consider acquitted conduct in determining the Guidelines range does not unintentionally limit the ability of a victim to be "reasonably heard" under 18 U.S.C. § 3771(a)(4) or unduly limit the court's discretion to consider any information concerning the conduct of a defendant, we recommend adding to the commentary of §1B1.13 the following provision:

> "Nothing in this section or in §1B1.4 shall limit the rights of a victim under 18 U.S.C. § 3771, or the court's discretion to consider any information concerning the background, character, and conduct of a defendant, including to hear from a person who at any time in the prosecution was considered a victim under § 3771. *See* 18 U.S.C. § 3661.

3. Department of Justice Comments on Proposed Amendment and Issues for Comment on Sexual Abuse Offenses

As the Deputy Attorney General urged in her letter to the Commission last fall, it is critically important for the Commission to strengthen the provisions addressing sexual abuse committed by federal corrections employees against those in their custody, and to implement sentencing Guidelines for new sexual misconduct statutes that were enacted as part of the Violence Against Women Reauthorization Act of 2022 (VAWA 2022). The Department appreciates that the Commission has identified this issue as a priority for this amendment year.

The Department strongly supports the Commission's proposed amendments to §2A3.3. As explained in more detail below, the Department believes that accountability and deterrence are key elements of any effective strategy to eliminate sexual abuse in prison, including through criminal prosecution and proportionate sentencing. As the Department stated in its annual report,

the current Guideline provisions applicable to sexual abuse of a ward, in violation of 18 U.S.C. § 2243(b), are insufficiently punitive in light of the egregious conduct at issue. The Commission's proposed amendment would take a significant step towards addressing that concern.

The Department also supports the Commission's proposed amendment to §2H1.1, which would apply to violations of 18 U.S.C. § 250, the newly enacted statute providing a graduated penalty structure for civil rights offenses involving sexual misconduct. As explained below, the Department will charge 18 U.S.C. § 250 in conjunction with a substantive civil rights offense, and it therefore agrees that both offenses of conviction should be governed by the same Guidelines provision. The Department likewise supports the Commission's proposed amendment to §2A3.3 so that it addresses violations of 18 U.S.C. § 2243(c), another newly enacted provision under VAWA that makes it a crime for a federal law enforcement officer to knowingly engage in a sexual act with someone under arrest, under supervision, in detention, or in federal custody. Because this statute criminalizes the same sexual misconduct that 18 U.S.C. § 2243(b) criminalizes for federal corrections employees, it should be governed by the same Guidelines provision.

A. <u>The Commission's Proposed Amendments to Raise the Base Offense Level of §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts)</u>.

The Department frequently uses 18 U.S.C. § 2243(b) to prosecute federal corrections employees who sexually assault incarcerated individuals, typically within Bureau of Prisons (BOP) or federally contracted facilities. The statute specifically applies to conduct that involves sexual acts, as defined by 18 U.S.C. § 2246(2),[14] as opposed to sexual contact, as defined by 18 U.S.C. § 2246(3).[15] Each violation of Section 2243(b) carries a maximum penalty of 15 years in prison.

Section 2A3.3, the Guidelines provision applicable to convictions under Section 2243(b) currently carries a base offense level of 14. This base offense level is rarely increased, as the two specific offense characteristics in §2A3.3 rarely apply, and few Chapter Three adjustments apply to the typical Section 2243(b) case. For example, application note 4 of §2A3.3 currently directs courts not to apply an adjustment for Abuse of Position of Trust or Use of a Special Skill. *See* USSG §3B1.3 ("If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels."). Because these defendants—who are largely BOP employees—typically

[14] "The term 'sexual act' means (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(2).

[15] "The term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3).

do not have a criminal history, the base offense level drives the final recommended Guidelines range of either 15 to 21 months after conviction at trial or 10 to 16 months after a guilty plea.[16]

The Department of Justice supports the Commission's proposal to increase the base offense level for this offense from 14 to 22. In the Department's view, the current base offense level of 14 and the corresponding Guidelines ranges of 15 to 21 months (after trial) or 10 to 16 months (after guilty plea) are inadequate to account for this egregious criminal conduct. When corrections officers sexually abuse individuals entrusted to their custody and care, they exploit the defenseless and abuse the public trust. These Guidelines ranges are also grossly disproportionate to the statutory maximum penalty of 15 years in prison.

Sentencing courts have likewise found that §2A3.3 offense levels fail to account for defendants' conduct and culpability. For example, in August 2022, a prison chaplain from FCI-Dublin in the Northern District of California pleaded guilty to sexual abuse of a ward, abusive sexual contact, and false statements based on his sexually assault of an inmate over a nine-month period and then lying to federal agents about his conduct. The defendant's recommended Guidelines range was only 24 to 31 months. In granting an upward variance and imposing an 84-month sentence, the judge stated he "was amazed when [he] saw what the guidelines range for this conduct is. It seems radically inconsistent with the actual nature of the harm done." *United States v. James Highhouse*, 12-cr-16-HSG (N.D. Cal. August 31, 2022). He highlighted the unique vulnerability of inmate victims:

> The defendant relied on the inherent coercion that came with this victim and the other victims being inmates at a prison. He essentially preyed on women who could not consent and were not free to say no. And beyond that, the defendant used his position as a chaplain to further the coercion and predation that he committed in this offense.

Id. The judge also noted that he could not "think of a case in which [the Court had] ever varied upward, but this case strikes me as that case." *Id.* (excerpts of the transcript of the sentencing proceeding are attached as an Appendix to this letter).

This concern is longstanding and oft repeated, across courthouses and circuits. In 2008, a judge sitting in the Northern District of Texas sentenced a priest from FMC-Carsville for two Section 2243(b) violations. At that time, the maximum penalty for each violation was five years in prison, and the applicable Guidelines range was 10 to 16 months. In varying upward and imposing a sentence of 48 months, the court noted that "the nature and circumstances of the offense are surprisingly heinous and shocking, especially so given the relatively gentle guideline range produced by the total offense level and the criminal history category. The offenses, while euphemistically described in the information and the statute as sexual abuse of a ward, are actually rape and sodomy." *United States v. Vincent Inametti*, 07-cr-171-Y (N.D. Tex. May 5, 2008); *see also United States v. Hosea Lee*, 5:21-cr-00084-DCR-MAS (E.D. Ky. August 1, 2022) (district court granted an upward variance and imposed an 80-month sentence on a BOP

[16] Where a defendant clearly demonstrates acceptance of responsibility—for example, through a plea of guilty—the offense level is decreased by two to level 12, triggering a Guidelines range of 10 to 16 months for a defendant in criminal history category I.

corrections officer who abused four victims while serving as a drug treatment specialist); *United States v. Grimes*, 18-cr-00069 (S.D. W. Va. Jan. 2019) (district court varied upward and imposed a sentence of 120 months in prison where the advisory Guidelines range was 27 to 33 months in prison for a conviction on four counts of 18 U.S.C. § 2243(b) and two counts of 18 U.S.C. § 2244(a)(4) involving multiple victims); *United States v. Mullings*, 713 F. App'x 46, 47 (2d Cir. 2017) (unpublished) (court affirmed an upward variance as substantively reasonable where the district court imposed an 84-month sentence for one count of violating 18 U.S.C. § 2243(b), where the advisory Guidelines range was 12 to 18 months).

As this precedent reflects, the Commission should increase the base offense level of §2A3.3 for three main reasons: (1) To appropriately distinguish offenses involving sexual acts under Section 2243(b), *i.e.*, penetration and oral sex, from offenses involving sexual contact under 18 U.S.C. § 2244, *i.e.*, touching and groping; (2) To close the gap in how the Guidelines treat violations of Section 2243(b) and other sex offenses; and (3) To reflect the seriousness of the conduct and fully implement congressional intent, as marked by Congress's decision to raise the statutory maximum for this offense twice in the past twenty years.

i. The Guidelines Currently Fail to Distinguish Between Corrections Officers Who Commit Sexual Acts and Those Who Commit Sexual Contact

The Guidelines currently recommend the same sentencing range for corrections officers who engage in sexual contact (groping or touching) as they do for corrections officers who engage in sexual acts (penetration or oral sex). Corrections officers in BOP facilities who engage in sexual contact with inmates violate 18 U.S.C. § 2244(a)(4), a statute punishable by up to two years in prison. Under the applicable guideline, §2A3.4, the offense level is 14, which reflects a base offense level of 12 with a two-level increase because the victim is in the custody, care, or under supervisory control of the defendant. Thus, as currently written, the Guidelines recommend the same sentence for a defendant who commits a touching or groping offense as it does for a defendant whose offense involves penetration or oral sex.

This parity is unjustifiable. To be sure, all sexual misconduct is serious, and victims may experience trauma regardless of the nature of the misconduct. Congress has recognized, however, the self-evident distinction in severity between the offenses, which is reflected in the significantly greater statutory maximum penalty for sexual acts —15 years—than the two-year maximum penalty for sexual contact. The Guidelines should similarly reflect that distinction.[17]

[17] The appropriate solution is to increase the base offense level for offenses involving sexual acts rather than to lower the base offense level for offenses involving sexual contact. A range of 15 to 21 months in prison is a minimally adequate range for unwanted touching, groping, and fondling in a custodial setting. This aligns with Congressional intent. As part of the VAWA reauthorization, Congress recently enacted 18 U.S.C. § 250, which makes all forms of civil rights offenses involving sexual misconduct a felony. This predominantly affects sexual assaults committed by those acting under color of law in violation of 18 U.S.C. § 242, many of which previously were misdemeanors. With the passage of Section 250, Congress has recognized the severity of sexual assault committed by those with authority.

ii. The Guidelines Treat Sexual Abuse of a Ward Markedly Different than Other Forms of Sexual Abuse

The base offense level for sexual abuse of a ward, §2A3.3, is disparately lower than the levels established by the Guidelines provision that governs the other two federal sexual abuse statutes involving adult victims, 18 U.S.C. § 2241 (aggravated sexual abuse) and § 2242 (sexual abuse), where the base offense level is at least 32 where the victim is in custody. *See* USSG §2A3.1. To be sure, violations of those other sexual abuse statutes involve additional conduct elements, *e.g.*, physical force, threats of physical harm, incapacitation, or proof of coercion. Nonetheless, a 16- to18-level difference in base offense levels between §2A3.1 and §2A3.3 is unwarranted.

Such a large disparity fails to capture the inherently coercive nature of the prison environment and the power that corrections employees wield over inmates. These dynamics enable a corrections employee to abuse a victim, often without needing to resort to physical violence, threats, or overt coercion. As the Department's prosecutions bear out, the victims—who are mostly women—are often prior victims of sexual abuse or suffer from mental health issues. Frequently, they do not speak English or battle drug addiction. Abusive BOP employees, who often have access to these histories, may exploit these vulnerabilities in targeting victims. And in the Department's experience, victims are less likely to report their abuse for fear of losing access to privileges and vital services like drug treatment, psychological or spiritual counsel, or access to vocational training. Indeed, in some instances, the very BOP employees who provide those lifelines, *i.e.*, the drug treatment counselor, the education specialist, the prison chaplain, are the ones committing the abuse. Moreover, inmate-victims of sexual abuse also fear that if they report abuse, they will be transferred to another facility farther from their family or placed in the Special Housing Unit (SHU) to protect them from retaliation. Corrections employees can exploit these dynamics and commit sexual assault without employing physical force or expressly threatening their victims.

It is also useful to compare the current base offense level for sexual abuse of a ward to the base offense level for sex trafficking by force, fraud, or coercion in violation of 18 U.S.C. § 1591(b)(1). Like sexual abuse of a ward, sex trafficking often involves an inherently coercive setting that enables a perpetrator to establish control over a vulnerable victim without having to resort to physical violence. The base offense level for such an offense is 34, pursuant to §2G1.1(a)(1), which corresponds to a Guidelines range of 151 to 188 months for a defendant without a criminal history—far greater than the 15 to 21 months applicable to a standard violation of 18 U.S.C. § 2243(b). Increasing the base offense level for sexual abuse of a ward to 22 will more appropriately account for the seriousness of the offense.

iii. An Increase in the Base Offense Level to 22 Implements Congressional Intent to Reflect the Seriousness of Sexual Abuse of Those in Custody.

The legislative history of the past twenty years reflects Congress's view that sexual abuse by corrections employees is a serious offense. From 1987 to 2003, the base offense level under §2A3.3 was 9. Thereafter, Congress directed the Commission to "ensure that the Guidelines adequately reflect the seriousness of the offenses under 18 U.S.C. § 2243(b)." *Prosecutorial*

Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21, Section 401. In response, the Commission raised the base offense level to 12 in 2004, though, at the time, the statutory maximum for a violation of Section 2243(b) was only one year. Two years later, Congress raised the statutory maximum penalty to five years in prison as part of the 2005 reauthorization of VAWA. Pub. L. 109–162, Sec. 1177 (Increased Penalties and Expanded Jurisdiction for Sexual Abuse Offenses in Correctional Facilities). Later that same year, Congress passed the Adam Walsh Child Protection and Safety Act of 2006, again increasing the statutory maximum penalty for violations of Section 2243(b), this time to its current maximum penalty of 15 years in prison. Pub. L. 109–248, Section 207 (Sexual Abuse of Wards).

Yet, to date, the Commission has not kept pace with the substantial increases in the statutory maximum penalty for Section 2243(b) violations. In 2007, the Commission raised the base offense level for sexual abuse of a ward by two levels, to its current level at 14. At the same time, the Commission prohibited the applicability of the two-level adjustment for Abuse of Position of Trust, pursuant to §3B1.3, essentially nullifying the increase of the base offense level. *See* USSG Appendix C, Amendment 701. In effect, the Sentencing Commission has held the Guidelines range constant, even as Congress has increased the penalty for a violation of 18 U.S.C. § 2243(b) from one year to five years to 15 years in prison. It should use this opportunity to better align the Guidelines with the statutory maximum.

B. The Commission's Proposed Amendments to Amend §2A3.3 to Cross Reference §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse)

The Department supports the Commission's proposed amendment to include in §2A3.3 a cross reference to §2A3.1 for offenses with aggravating factors, and as the Department previously urged in its annual report, it encourages the Commission to also make applicable the Abuse of Position of Trust adjustment under §3B1.3. As discussed above, there are currently few applicable specific offense characteristics and adjustments to the offense level for sexual abuse of a ward. The Department believes the absence of enhancements or upward adjustments in §2A3.3 leaves the Guidelines range inadequate to address more egregious offenses in the prison setting.

The Commission's proposed cross reference would take a significant step towards addressing those concerns. Like the proposed increase in the base offense level, the cross reference would treat all violations of 18 U.S.C. § 2243 the same for Guidelines purposes, regardless of whether the violation is based on a victim's status as a minor or in custody. For good reason—Congress has determined that victims of these offenses cannot consent based on their statuses, and aggravating factors such as the use of physical force should thus apply equally to both categories.

The proposed amendments to §2A3.3 will not only provide more just punishment but also should help deter future misconduct. Deterrence is particularly important where law enforcement officers abuse their authority, as they occupy positions that give them "the freedom to commit a difficult-to-detect wrong." *United States v. Hirsch*, 239 F.3d 221 (2d Cir. 2001). That is all the more true with respect to sexual misconduct, which is often hard to detect, particularly where the victims are abused by those with authority over them and fear they will not be believed. In

United States v. Highhouse, for example, a prison chaplain abused multiple victims who sought spiritual counseling, telling one victim that even if she did report him, he would merely get "a slap on the wrist." In the Department's experience, lengthier sentences tend to change the culture in individual prisons and deter future misconduct. The proposed amendments to §2A3.3 will help send the message that corrections employees who sexually abuse inmates will face serious consequences.

For similar reasons, we recommend that the Commission revisit the complete unavailability of the Abuse of Position of Trust adjustment under §3B1.3 in sex crimes cases involving federal corrections staff, as well as other government actors. Section 3B1.3 directs a two-level increase where a defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense. But the application notes for §2A3.3 currently prohibit application of this enhancement in all sexual abuse of a ward cases,[18] apparently because the victim's custodial status and the defendant's misuse of authority are already factored into the base offense level. We believe this across-the-board limitation on the abuse of trust enhancement in such cases is unwarranted and unjust. There are particular circumstances where the enhancement is warranted and not redundant of the base offense level or other applicable enhancements. *Highhouse* is a case in point—the defendant there was not only a correctional officer, but also a prison chaplain, and he exploited that particular position of trust, as well as the faith of victims, to facilitate his crimes. *See supra* 19-20 (describing this case). Where a special position of trust is exploited for the offense—beyond the abuse of trust performed by any officer who abuses victims in their custody or control—a §3B1.3 enhancement is necessary and appropriate to properly calibrate the offense level. The Department would be pleased to provide the Commission additional examples and propose application note language that limits applicability of the enhancement to situations involving particularly egregious abuses of trust.

C. The Commission's Proposed Amendments to Reference Offenses Under 18 U.S.C. § 250 to §2H1.1 (Offenses Involving Individual Rights)

The Department supports the Commission's proposal to include 18 U.S.C. § 250 among the civil rights offenses governed by §2H1.1. Section 250 is a penalty statute that makes offenses involving nonconsensual sexual acts or sexual contact committed under color of law felonies. Prior to the enactment of 18 U.S.C. § 250, most sexual assaults committed by those acting under color of law were misdemeanors under 18 U.S.C. § 242 because the most common felony statutory enhancements—*i.e.*, causing bodily injury, using a dangerous weapon, or using physical force to commit a sexual act—are not common in sexual assaults perpetrated by law enforcement and others acting under color of law.

The substantive offenses to which Section 250 applies—found in Chapter 13 of Title 18 and at 42 U.S.C. § 3631 (the criminal portion of the Fair Housing Act)—are already governed by §2H1.1. Because §2H1.1(a)(1) cross references "the offense level from the offense guideline applicable to any underlying offense," when violations of these statutes involve either sexual abuse or abusive sexual contact, they fall under §2A3.1 (Criminal Sexual Abuse) and §2A3.4

[18] *See* §2A3.3, Application Note 4; *see also* §2H1.1, Application Note 5, §2A3.1(b)(3), Application Note 3(B), and §2A3.4, Application Note 4(B).

(Abusive Sexual Contact), respectively. Because 18 U.S.C. § 250 only increases the maximum penalties of such substantive violations, it should be governed by the same provisions of the Guidelines as the substantive offenses.

Section 250 brings parity to the sentencing scheme for civil rights offenses involving sexual misconduct and other federal sexual abuse crimes. Section 250's graduated sentencing structure largely tracks the sentencing schemes of 18 U.S.C. § 2241 (aggravated sexual abuse), § 2242 (sexual abuse), and § 2244 (abusive sexual contact). It likewise follows that the statute should be governed by the same Guidelines provisions as those Chapter 109A offenses, which is accomplished by the cross reference to §2A3.1 and §2A3.4 in §2H1.1.

D. The Commission's Proposed Amendments to Reference 18 U.S.C. § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts).

The Department agrees that a violation of 18 U.S.C. § 2243(c) (sexual abuse of an individual in Federal custody) should be governed by Guidelines §2A3.3, the same provision of the Guidelines that governs 18 U.S.C. § 2243(b) (sexual abuse of a ward). They criminalize similar conduct—sexual abuse of someone in government custody. Enacted as part of the 2022 VAWA Reauthorization, Section 2243(c) expands liability for sexual abuse beyond the prison walls by applying where victims are under arrest, under supervision, or otherwise in detention. Like Section 2243(b), the maximum penalty for a violation of Section 2243(c) is 15 years in prison. Thus, it is appropriate for §2A3.3 to govern convictions under Section 2243(c) and provide a base offense level of 22.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together. We continue to believe that a strong, consistent, and balanced federal sentencing system is important to improving public safety across the country and furthering justice.

Sincerely,

Jonathan J. Wroblewski

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cc: Commissioners
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APPENDIX

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable HAYWOOD S. GILLIAM, JR., Judge

UNITED STATES OF AMERICA,	)	**Judgment & Sentencing**
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR 22-00016HSG
	)	
JAMES THEODORE HIGHHOUSE,	)	Pages 1 - 60
	)	
Defendant.	)	Oakland, California
_____	)	Wednesday, August 31, 2022

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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P R O C E E D I N G S

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THE CLERK: Your Honor, we're calling CR22-00016, the United States of America versus James Theodore Highhouse.

Please step forward and state your appearances for the record, please.

MS. GOLD: Good afternoon, Your Honor. My name is Fara Gold on behalf of the United States.

MR. DORENBAUM: Good afternoon, Your Honor. Jaime Dorenbaum for Mr. Highhouse, who is present and out of custody.

THE COURT: Good afternoon.

THE PROBATION OFFICER: Good afternoon, Your Honor. Katrina Chu with U.S. Probation.

THE COURT: All right. Good afternoon to all counsel and Ms. Chu.

We're here for a sentencing hearing in this matter as well. And I have reviewed the presentence investigation report that was disclosed on August 18th, as well as the sentencing memorandum and motion for upward departure or variance filed by the United States, which attached a number of victim impact statements from victims LI, TM, and WP.

I also have reviewed the sentencing memorandum filed on Mr. Highhouse's behalf.

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appropriate way to go, although I think that to -- excuse me -- it's a 5K2.0 and 3553(b) allows a departure for sex offenses. So I think it could be a departure, although I think it's properly -- or it's better suited for a variance.

THE COURT: All right. Fair enough. I will table -- I'll table that question. I think the least thorny way to address it would be in a variance if that's the direction I decided to go.

Any motion for departure on the defendant's part, Mr. Dorenbaum?

MR. DORENBAUM: No, Your Honor.

THE COURT: All right. So I'm then required under Section 3553(a) to consider a number of factors to arrive at a sentence that is sufficient but no greater than necessary to accomplish the objectives of the sentencing law, taking into account the nature and circumstances of the offense, the history and characteristics of the defendant, the need to avoid unwarranted sentencing disparities, and the types of sentences available. I can consider factors such as the seriousness of the offense, the need to foster respect for the law, the need to impose just punishment, the need to accomplish both general and specific deterrence, and accommodate the potential for rehabilitation.

So as is my usual practice, I'll share with you my impressions of -- of those factors. And then I'll hear from

the parties.

With respect to the nature and circumstances of the offense, it's hard to come up with the right words to describe how egregious an abuse of these victims this was.

The record here shows that for a period of around nine months, the victim to which the defendant pled guilty to abusing engaged in coerced sexual assault, oral sex, and coerced sexual intercourse with some form of coerced sexual activity essentially at least weekly, escalating from groping to fondling through forced oral sex and forced sexual intercourse.

And so the frequency of this conduct is clearly something that contributes to my view that the offense was exceptionally serious. Unspeakably serious.

It also is clear from the record that the defendant relied on the inherent coercion that came with this victim and the other victims being inmates at a prison. He essentially preyed on women who could not consent and were not free to say no.

And beyond that, the defendant used his position as a chaplain to further the coercion and predation that he committed in this offense.

It's clear from the record that a number of victims had significant past trauma including sexual assault. They were incredibly vulnerable. They came to the defendant for

counseling because of his position as a religious leader, and instead he used that authority to commit the abuse. And one of the victims even reports that the defendant referenced Bible stories and verses as part of the pressure to coerce the victim into the sexual acts that were committed here.

And the victim also says that the defendant told her that no one would believe her if she told someone because no one would question a chaplain. So this was -- whether or not the abuse of position of trust enhancement under the guidelines formally applies, there's no question that the record shows that this offense was the result of very direct abuse of both the defendant's position as a prison official and, in particular, an abuse of the vulnerability of women who came to him for spiritual counseling and instead were abused.

And I note that a number of other victims have come forward with very similar accounts of sexual abuse, physical sexual abuse, sexual language, and emotional abuse by asking clearly inappropriate sexually-related questions. So this was part of a far-ranging pattern.

It is also very significant to me that when confronted by federal investigators, the defendant lied on multiple occasions and denied what he did. He blamed the victims and he characterized them as manipulative or grandiose storytellers when in fact they were telling the complete truth.

And he made up a story about the victim being the initiator of the criminal sexual contact, which was false. And then he even recanted that story and went back to his original false claim that he never had any sexual contact with the victim. And that is, in my view, a significantly aggravating factor as well.

So just to summarize all of that, it's very clear to the Court that this offense was an egregious abuse of the public trust that comes with serving in a correctional institution. The defendant violated the oath that he swore to uphold the Constitution and fulfill his duty as a public servant. And that egregious abuse, as the letters and other materials submitted by the victims make clear, had devastating consequences for physically and emotionally vulnerable women and has caused them lasting and devastating harm. And their statements speak very clearly to that.

And as I mentioned, some of the victims had been prior victims of sexual assault which only increases the depth of the trauma that the defendant's crimes inflicted on them.

With respect to the history and characteristics of the defendant, I think the record is fairly characterized as mixed in many ways. The defendant had no prior criminal record. He served in the military in Afghanistan and Iraq and received a number of commendations for his service there. It appears undisputed that has been diagnosed with post traumatic stress

disorder based on that service.

And so all of that is in many ways a jarring contrast to the crimes for which the defendant now stands here for sentencing.

I did also find the court's findings from the family law case involving the defendant and his wife -- I believe it was a custody case -- troubling. And obviously it's one thing if there are allegations and parties have different perspectives on what happened, but there were actual findings at paragraph 130 that are -- paragraphs 130 and 131 that were recounted in which the family court actually found that there was overwhelming evidence that there was considerable risk to the minor if she had continued contact with the defendant here, and made a number of findings based on the record before it about some very disturbing things that were reported by the defendant's daughter.

And that is something that the Court also has to take into account in assessing the nature and circumstances or history and characteristics of this defendant in assessing the nature of the need for protection of the public going forward.

Now, here the question of sentencing disparity is again an interesting one in that, as I said, I was amazed when I saw what the guidelines range for this conduct is. It seems, as the government is pointing out and the Probation Department is essentially agreeing, radically inconsistent with the actual

nature of the harm done in terms of the frequency, the seriousness of the offense, and all the factors that I just talked about.

So on the one hand, sentencing disparity, you know, always tends in some general sense to cut toward a guideline sentence, but on the other hand, I think here the particular facts including the sheer number of instances of abuse, not all of which could even be cataloged and charged, I think the government had to pick some number, but it's clear based on the record that there were many more instances of this sort of abuse, that it just strikes me that the guidelines here substantially underrepresent the seriousness of the conduct.

I can't think of a case in which I've ever varied upward, but this case strikes me as that case.

And then finally in terms of promoting respect for the law, accomplishing just punishment and accomplishing general and specific deterrence, all of those weigh heavily on my mind and weigh in favor of a substantial sentence of imprisonment.

And the fact that the defendant was reported as saying something to the effect of, "Well, if you report me anyway I'll just get a slap on the wrist," I think speaks to what appears -- and this is not in the record in this case -- but appears to have been a culture of the rat at Dublin. And it is important that the world see that this egregious conduct carries egregious and serious consequences in terms of

penalty.

So with that, I will hear from counsel for the United States, I'll hear from counsel for Mr. Highhouse.

And, Mr. Highhouse, you'll have the opportunity to say anything that you would like.

Now, obviously the government and the Probation Department are asking for not just a variance but a many multiples of the guidelines range. And I will be interested to understand as best I can what the basis in the record is for the departure or the variance of the magnitude that's being requested because, you know, I'm sure everyone would agree it's an unusual request. And the request may be unusual and appropriate given the factors that I've talked about, but I am interested to understand the basis for the conclusion that the recommended upward variance is sufficient but no greater than necessary, which is what I'm charged to determine in a circumstance like this.

Ms. Gold.

MS. GOLD: Yes, Judge. Before I start argument, I just want to acknowledge that there's an open phone line for interested parties and specifically the victims to call in. So I just want to acknowledge those that are likely on the phone. I wasn't able to confirm, but I do know that we reached out to them.

I'm going to refer to them with first names if that's okay

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THE DEFENDANT: Yes, Your Honor. I'd like to express my apology and regret to the victim, to the government, and to the Court. I'm deeply sorry. And I regret to be in this position, and I regret putting anyone in a place of harm and sincerely apologize. And I ask for forgiveness.

Thank you.

THE COURT: All right. Thank you.

All right. Anything further before I impose sentence?

MS. GOLD: No, Your Honor.

MR. DORENBAUM: No, Your Honor.

THE COURT: All right.

I'll begin where I started at the beginning of the hearing, which is I can't recall seeing an instance in which there's such a disconnect between the guidelines range that is prescribed for an offense and the severity of the conduct actually at issue here.

And I really do take government counsel's point that capping essentially the consideration under the guidelines at six instances just radically under-accounts for the seriousness of a circumstance like this which is systematic, knowing, predatory conduct over a long period of time that is enabled by the inherent power imbalance between the defendant and a prison inmate, and is a function of the fact that they are both legally incapable of consenting and, as a practical matter, incapable of truly consenting.

It's not going too far to say that this is rape in the way that the government counsel put it.

And so I do have a policy disagreement with the guidelines in that regard. It's just -- in a circumstance like this one, it's clear to me that the guidelines range does not adequately capture the seriousness of the offense and adequately accomplish the objectives of Section 3553(a), including the protection of the public, imposing just punishment, and accomplishing general and specific deterrence.

The difficult question then becomes what is the principal basis for arriving at a number. It's helpful to understand the mathematical basis behind the government's proposal and the Probation Department's proposal.

And ultimately I'm in agreement with the recommendation of the Probation Department that an 84-month sentence is sufficient but no greater than necessary to account for the exceptional severity of this offense. And that is a substantial upward variance. It's almost three times the high end of the guidelines range.

And that decision is justified by the fact, as we've talked about at length here, the systematic nature of the conduct, the length of time that the conduct occurred, the number of instances of abuse, sexual assault and rape, the involvement of multiple victims who were also inmates at Dublin and were subjected to the same sort of abuse. And in

at least one instance, another victim was subjected to sexual intercourse three to five times. Others were asked obviously grossly inappropriate sexual questions.

The overall record here is of sustained predatory behavior against traumatized and defenseless women in prison.

So I am confident and comfortable that an upward variance of the degree that we have talked about and that the Probation Department recommends is sufficient but no greater than necessary to accomplish those objectives.

And I respect the recommendation the United States has made. I respect the arguments that the defense has made. I gave you all the time to be heard fully because this is an important issue to have fully vetted.

But ultimately on -- and I do take the government's point, too, that by definition, you would think that prison officials will not have prior records. That is something that hadn't occurred to me, but it's true.

So this is somewhat different circumstance than a Criminal History Category I might normally be because, by definition, it's hard to believe that someone with a Criminal History Category VI could ever be in this position.

But regardless, I do take the point that this is possibly the only -- the first time that the defendant was caught. But on balance and in light of the undisputed PTSD that the defendant has -- which, just to be very clear, and I think the

government put this exactly right, that is not an explanation, it's not an excuse, it's not something that I view as in the nature of "I couldn't help myself" -- I think that the defendant made a lot of statements like that -- and I think that those have to be absolutely rejected.

The idea that "These were temptresses and I was in a position where I didn't do a good enough job of staying out of temptation's way," that is absolutely something I reject.

But in terms of deciding this question of what is sufficient but no greater than necessary under the circumstances and viewing the defendant in the context of his entire life, as I'm required to do, I am of the view that a seven-year sentence is sufficient. It is serious. It's appropriately serious. And it is, in my view, the correct balance, taking all the factors that I'm required to consider into account.

And so consistent with that finding, I will impose sentence as follows:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that James Theodore Highhouse is hereby committed to the custody of Bureau of Prisons to be imprisoned for a term of 84 months.

This term consists of 84 months on Counts One, Two, and Five, and 24 months on Counts Three and Four, all counts to run concurrently.

And I take it, Ms. Chu, that is still an accurate statement with the -- even with the correction.

THE PROBATION OFFICER: Yes, Your Honor.

THE COURT: All right.

Upon release from imprisonment, the defendant shall be placed on supervised release for a total term of three years. This term consists of three years on each of Counts One through Four and one year on Count Five, all terms to run concurrently.

Within 72 hours of release from the custody of Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with the standard conditions that have been adopted by this Court, except that the mandatory drug testing provision is suspended, and shall comply with the following additional conditions including that the defendant must comply with the third-party risk notification.

Now I know on that issue there's been recent Ninth Circuit law, and I trust that the notification language has been modified or conformed to that?

THE PROBATION OFFICER: So, Your Honor, I believe our office is working on that because the J and C is a court document. We've been considering different options. But what

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don't, I'm sure the government will move for immediate remand, and that's something I would strongly consider.

So between now and your self-surrender date, be certain to comply scrupulously with all of the terms of your release.

THE DEFENDANT: (Nods head.)

THE COURT: Do you agree?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Is there anything further for today?

MS. GOLD: No. Thank you, Your Honor.

THE PROBATION OFFICER: No, Your Honor. Thank you.

MR. DORENBAUM: Thank you.

(Proceedings were concluded at 3:59 P.M.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Monday, September 5, 2022

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 27, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.[1] This letter addresses the proposals and issues for comment regarding Firearms Offenses, First Step Act—Drug Offenses, Circuit Conflicts, Crime Legislation, Career Offender, Criminal History, Alternatives to Incarceration Programs, Fake Pills, and Miscellaneous and Technical Matters. We submitted a letter on the remaining matters on February 15, 2023. This letter also serves as the Department's written testimony for the Commission's upcoming hearing on March 7 and 8, 2023.

We look forward to the hearing and to working with you and the other commissioners during the remainder of the amendment year on all of the published amendment proposals.

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[1] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts,* 88 Fed. Reg. 7180 (Feb. 2, 2023).

U.S. DEPARTMENT OF JUSTICE VIEWS ON THE PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT APPROVED BY THE U.S. SENTENCING COMMISSION ON JANUARY 12, 2023, AND PUBLISHED IN THE FEDERAL REGISTER ON FEBRUARY 2, 2023.

1. Firearms Offenses

The Department appreciates and supports the Sentencing Commission's efforts to implement the Bipartisan Safer Communities Act ("BSCA"). During the pandemic, the country has seen a rise in homicides, aggravated assaults, and firearms offenses more generally, and the Department has instituted a number of initiatives to address violent crime. The BSCA is an element of the solution, and the Department also continues to urge the Commission to consider broader reforms to Section 2K2.1.

The Commission has proposed two options to implement the BSCA. Both options include a general one- or two-level increase to the offense level for straw purchasers and traffickers. Option 1 increases offense levels by adding an enhancement for trafficking and straw purchasing, while Option 2 increases base offense levels. Option 1 increases offense levels for all straw-purchasing-related offenses, including those that predate the BSCA, but does not include any increase for prohibited persons. Option 2, by contrast, includes an increase for prohibited persons and for some of the straw-purchasing-related offenses that predate the BSCA, but does not include increases for all straw-purchasing-related offenses. Both Options 1 and 2 also include a mitigating-conduct reduction to implement the BSCA.

The Department recommends that the Commission adopt Option 2 with two significant changes: the Commission should (1) include all straw-purchasing-related offenses in the offense-level increase; and (2) increase the base offense levels by three or four levels, not one or two levels. The Department also supports the Commission's mitigating-conduct proposal, but recommends that it be phrased in the conjunctive, requiring that a defendant meet all listed conditions (and not just any one listed condition).

A. Part A—The Bipartisan Safer Communities Act

1. The Commission Should Adopt Option 2 Because Prohibited Persons Should Receive the Same Increase as Straw Purchasers and Traffickers and Because it Provides More Clarity than Option 1

The Department believes that Option 2 is preferable to Option 1 for two primary reasons. First, increasing the penalties for straw purchasers and traffickers, but not for the prohibited persons who benefit from such straw purchasing and trafficking, is inconsistent with the core principles of the Sentencing Reform Act. The BSCA made "it a serious crime to buy a gun for someone else when you know that person will use the gun to commit a felony or that they are not allowed to buy a gun themselves. . . . The consequences of this simple change will be real. It will keep deadly weapons out of the hands of people who would use them to hurt others, and it will level serious consequences for those who break the law." 168 Cong. Rec. S3105–06 (statement of Senator Heinrich in support of the BSCA). In other words, when enacting the BSCA,

Congress was concerned about straw purchasing and trafficking precisely because these crimes are used to provide guns to prohibited persons. Thus, Congress did not stop at creating new straw-purchaser and trafficking offenses; Congress also increased the statutory maximum penalties for gun possession by prohibited persons from 10 to 15 years in prison.

Moreover, before the BSCA, the Sentencing Guidelines appropriately treated straw purchasers and prohibited persons as equally culpable; under current §2K2.1, both types of offenders are subject to a base offense level of 14. The current guideline thus recognizes that prohibited persons are at least as culpable as individuals who purchase weapons on their behalf. However, under Option 1, a felon who asks a confederate to purchase a gun on his behalf would face a lower Guidelines range than the confederate who purchased the gun. Congress cannot have intended such anomalous results when it instructed the Sentencing Commission to increase the applicable Guidelines range for straw purchasing offenses while at the same time raising the maximum penalty for possession of weapons by prohibited persons.

Option 2 is also preferable to Option 1 because it provides more clarity to all parties including defendants and their counsel.[2] As the Department has previously noted, §2K2.1 is a complicated Guidelines provision; base offense levels are determined by not just the type of offense, but also the characteristics of the defendant and of the offense. Because this complicated structure often leads to mistakes in the Guidelines' application, the Department proposed specific language to simplify the guideline. Option 1—which proposes an enhancement rather than an increase to the base offense level—would exacerbate the challenges resulting from §2K2.1's structure. The Department continues to urge the Commission to simplify the guideline but, failing that, supports Option 2 to avoid making the guideline more complex.

If the Commission does adopt Option 1, the Department recommends amending the enhancement for straw purchasing and trafficking so that it applies not just to those who purchase guns for, or transfer to guns to, prohibited persons, but also to the prohibited persons who receive any weapons through such a straw-purchasing or trafficking arrangement. This would ensure that the individuals on both sides of the arrangement face the same offense level. The Department thus recommends the following edits to Option 1's enhancement:

(5) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by [1][2] levels;

(B)(i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any

[2] Option 2, entitled "Increase Penalties for Offenses with Statutory Maximum of 15 years or more[,]" provides, at proposed §2K2.1(a)(7), for an offense level of 15 or 16 for all Section 922(g) offenses. Section 922(g), in turn, prohibits possession of weapons by certain persons, commonly referred to as "prohibited persons." But Option 2 also provides, at proposed §2K2.1(a)(8), for an offense level of 14 "if the defendant . . . was a prohibited person at the time the defendant committed the instant offense." The Department presumes that this reference to "prohibited persons" in §2K2.1(a)(8) is intended to apply only to individuals who cannot legally possess a weapon, but were not convicted under Section 922(g)—such as a prohibited person who is convicted under Section 922(a)(6) for lying on a gun application, but never possesses the weapon in question. We recommend making clear that proposed Section 2K2.1(a)(8) applies to "prohibited persons who are not convicted under Section 922(g)."

ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of the conduct described in clause (i), increase by [1][2] levels; or (C)(i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of the conduct described in clause (i), increase by [5][6] levels.

2. Retaining the Existing Base Offense Level for Violations of Section 922(a)(6) and 924(a)(1)(A) is Inconsistent with Prior Commission Treatment of the Provisions and the BSCA

Before the BSCA, several statutory provisions were used to prosecute straw purchasers, including Section 922(d), which prohibits transfers to prohibited persons, and Sections 922(a)(6) and 924(a)(1)(A), which prohibit making false statements in connection with a firearm purchase. In 2011, the Commission amended §2K2.1 to provide the same base offense level for Section 922(d) and offenses under Sections 922(a)(6) and 924(a)(1)(A) when committed "with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person." *See* Amendment 753 (effective Nov. 1, 2011). As the Commission explained at the time, "[t]he amendment ensures that defendants convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) receive the same punishment as defendants convicted under a third statute used to prosecute straw purchasers, 18 U.S.C. § 922(d), when the conduct is similar." *Id.*

Section 922(d) and the new straw-purchasing and trafficking offenses carry a 15-year maximum term of imprisonment, while Sections 922(a)(6) and 924(a)(1)(A) carry only a 10-year and 5-year maximum term of imprisonment, respectively. But, under the current Guidelines, the increased base offense level does not apply to all offenses under Sections 922(a)(6) and 924(a)(1)(A), but only to those committed with the requisite heightened intent. Moreover, in the BSCA, Congress instructed the Commission to ensure increased penalties not only for the new straw-purchaser and trafficking offenses, but also "other offenses applicable to the straw purchases and trafficking of firearms"—a category that, as the Commission itself has repeatedly recognized, includes offenses under Sections 922(a)(6) and 924(a)(1)(A) when committed "with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person." Although the BSCA created new straw-purchasing and trafficking offenses, prosecutors are still likely to use Sections 922(a)(6) and 924(a)(1)(A) to prosecute straw purchasing offenses. We thus recommend that the Commission adopt Option 2 but extend the base offense level increase to Section 922(a)(6) and 924(a)(1)(A) offenses

committed "with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person."

3. The Department Does Not Believe that a 1 to 2 Level Increase is Sufficient to Comply with Congress's Directive in the BSCA

The Department believes that a greater increase of four levels is warranted for the amendment "to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities." See Pub. L. 117–159, §12004(a)(5) (2022). Because straw purchasers, by definition, have not been convicted of a felony, they generally fall within Criminal History Category I, and, with a two-point reduction for acceptance of responsibility and no other enhancements, would face a Guidelines range of 10 to 16 months based on a base offense level of 14. Because that range is in Zone C, the sentencing court can substitute half of the recommended prison time for house arrest. USSG §5C1.1(d)(2). Thus, a straw purchaser can face as little as 5 months of imprisonment under the current Guidelines. The Commission's proposal to raise the base offense levels by only one or two levels would lead to the same straw purchaser facing as little as six months in prison, after reductions for acceptance of responsibility.[3] A single additional month of imprisonment is not consistent with the congressional directive to ensure "that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities."

A four-level increase to the base offense level would be most consistent with Congress's directive. Both a three- and four-level increase would put the same straw purchaser at a total offense level within Zone D, which would ensure that they serve a sufficient amount of time in prison rather than on house arrest.

4. The Mitigating Reduction Should be Phrased in the Conjunctive

The BSCA directed the Sentencing Commission to consider "an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that . . . reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors." In both Options 1 and 2, the Commission has proposed a one- or two-level reduction where the offense involves a straw purchaser and "(i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity]." The Department supports this provision but recommends that the Commission adopt the conjunctive ("and") formulation.[4]

[3] For many defendants, a two-level increase in the base offense level would produce the same Guidelines range as a one-level increase; at an offense level 16, the defendant would be eligible for a three-point acceptance-of-responsibility reduction, instead of the two-point reduction available at an offense level 15.

[4] If the Commission agrees that the base offense level should be increased for all straw-purchasers, including those convicted under Section 922(a)(6) or 924(a)(1), where the offense was committed "with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person," those offenses should be included in the reduction for certain straw-purchasers.

First, if the Commission adopts the disjunctive approach, it is likely that the mitigating-role reduction will apply to the vast majority of straw-purchaser cases. Many people receive little to no monetary compensation for serving as straw purchasers, and most straw purchasers have either limited knowledge of the crimes in which the gun will be used or the criminal enterprise that is using the gun. In addition, because the proposed reduction is equivalent to the Commission's proposed increase for straw purchasers, the vast majority of straw purchasers would face the same offense level under the amended guideline that they face now, even though Congress expressly intended that straw purchasers be "subject to increased penalties in comparison to those currently provided by the guidelines."

Moreover, the disjunctive formulation leads to absurd results. A defendant would be eligible for a reduction, for example, if he provided a gun to a criminal gang, with full knowledge of the scope of the criminal enterprise or that the weapon would be used in connection with criminal activity, and even if he transferred the gun to obtain status in the organization, so long as he received only minimal financial compensation. Likewise, a defendant who was paid an exorbitant sum of money to provide a gun, knowing that it would be used in a felony, could argue that he is eligible for a reduction because the crime was "motivated by a . . . familial relationship," as evidenced by the fact that he used the money to help a family member. And a firearms trafficker who sells 10 semi-automatic firearms to a prohibited person for a substantial profit would be eligible for a reduction, so long as he was not aware that the gun would be used in a crime or just did not have knowledge of the full scope to the criminal enterprise. The Commission should adopt the conjunctive formulation to ensure that the proposed reduction is limited to less culpable defendants, as Congress intended.

B. Part B—Firearms not Marked with Serial Numbers ("Ghost Guns")

The Department supports the Commission's proposal to apply the Guideline's four-level enhancement for firearms with altered or obliterated serial numbers to "ghost guns"—guns that are missing a serial number—but recommends a rebuttable presumption for the *mens rea* requirement.

1. The Department Supports a Four-Level Enhancement for Ghost Guns

Section 2K2.1 currently provides a four-level enhancement where a firearm involved in the offense had an altered or obliterated serial number. As the Commission has previously explained, this enhancement "reflects both the increased likelihood that the firearm will be used in the commission of a crime and the difficulty in tracing firearms with altered or obliterated serial numbers." U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?* (2022) at 12. Ghost guns are even more difficult to trace than guns with altered or obliterated serial numbers, because ATF firearm examiners can sometimes still detect altered or obliterated serial numbers using chemicals and microscopic analysis. The same is not true for ghost guns.

Ghost guns, moreover, present a significant and growing problem. As the White House recently indicated, "[l]ast year alone, there were approximately 20,000 suspected ghost guns

reported to ATF as having been recovered by law enforcement in criminal investigations—a ten-fold increase from 2016." White House Fact Sheet (2022).[5]

ATF recently issued a regulation—the "frame and receiver" rule—that was partially aimed at reducing the proliferation of ghost guns. The Department supports the Commission's efforts to deter the possession and use of these dangerous untraceable weapons by adding ghost guns to the four-level enhancement for guns with altered or obliterated serial numbers.

2. The Department Supports Adding a Rebuttable Presumption Mens Rea Requirement to §2K2.1(b)(4)

The Department understands the reasoning behind the proposal to add a *mens rea* requirement to the enhancement for untraceable guns, particularly for stolen guns. Although the fact that a gun has a missing, altered, or obliterated serial number is generally readily apparent from the gun itself, it may not be as readily apparent that a gun is stolen. And it may not be equitable to apply an enhancement when the defendant reasonably believed in good faith that the gun was not stolen, or that it had an accurate serial number. The defendant, however, is often in sole possession of evidence establishing his good faith belief that the gun in question was not stolen, or did not have an altered, obliterated, or missing serial number. The Department thus suggests that the Commission create a rebuttable presumption with regard to the *mens rea* element. That is, the enhancement would apply presumptively, but a defendant would be permitted to prove that he or she lacked actual or constructive knowledge, with the defendant bearing the burden of such proof. The Department would thus recommend the following language:

> Subsection (b)(4) applies unless the defendant establishes by a preponderance of the evidence that he or she did not know, and had no reason to believe, that the firearm was stolen, missing a serial number, or had an altered or obliterated serial number.

C. <u>Part C—Further Revisions</u>

1. Burglary from Federal Firearms Licensees

The Department supports an enhancement for offenses involving the burglary or robbery of firearms from Federal Firearms Licensees (FFLs). Section 922(u), which prohibits the unlawful taking of any firearm from an FFL, covers offenses of varying severity, ranging from simple theft to burglary to robbery. But, unless the defendant is a prohibited person, §2K2.1(a)(7) provides the same base offense level of 12 for a Section 922(u) conviction, regardless of the severity of the offense. Moreover, although §2K2.1 provides for a two-level increase for offenses that involve a stolen gun, that enhancement does not apply to any offense subject to §2K2.1(a)(7). *See* USSG §2K2.1 cmt n.8(A).

Burglaries and robberies—especially of firearms from an FFL—are particularly dangerous crimes. FFL burglaries and robberies often involve the theft of multiple weapons that

[5] Available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-cracks-down-on-ghost-guns-ensures-that-atf-has-the-leadership-it-needs-to-enforce-our-gun-laws/.

are destined for the illegal market and for use in later crimes.[6] They thus endanger not only the licensees who are robbed or burglarized, bystanders to the crimes, and law enforcement personnel who respond, but also victims of all subsequent crimes involving the stolen firearms. Burglaries and robberies of FFLs are also a chronic problem. In 2020, more than 6,000 firearms were stolen in more than 500 burglaries and robberies of FFLs.[7] Given the prevalence and significance of the problem and the potential harm caused by these thefts, a six-level enhancement is warranted.

2. Predicate Convictions for Misdemeanor Crimes of Domestic Violence

The Department supports treating prior convictions for a misdemeanor crime of domestic violence as equivalent in seriousness to other prior violent crimes.

As the Commission has observed, "[a] majority (60.6%) of firearms offenders had at least one prior conviction for a violent offense, which is more than twice the rate of violent prior convictions for other offenders." U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like* at 19. In determining how many firearms offenders had a violent prior conviction, the Commission identified offenses "that are generally accepted as having some level of violence," including aggravated and simple assault. *Id.* at 37 n.40. Indeed, the most common violent predicate was assault—almost half (49.4%) of all §2K2.1 offenders had a prior assault conviction. But even though §2K2.1 increases the base offense level for defendants with prior violent felony convictions, the "crime of violence" enhancement does not apply to many assault convictions. Most notably, misdemeanor assault of a family member is not a "crime of violence," even though Section 922(g)(9) prohibits gun possession by individuals with prior misdemeanor crimes of domestic violence.

Congress enacted Section 922(g)(9)—which treats misdemeanor crimes of domestic violence as equivalent in seriousness to felony offenses—precisely because "existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *United States v. Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. S10377-01 (1996) (statement of Senator Lautenberg)). As Senator Lautenberg explained, "most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors." 142 Cong. Rec. S10377-78; *see also id.* at S10378 ("In all too many cases unfortunately, if you beat up or batter your neighbor's wife it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor.") (statement of Senator Wellstone).

Under the current Guidelines, a defendant faces a significantly lower sentence if he possesses a gun after "brutaliz[ing his] own wife or [his] own child" than he does after "beat[ing]

[6] As but one example, on August 3, 2020, Shoot Point Blank FFL, in Memphis, TN, was burglarized and 32 firearms were stolen. *See* https://www.justice.gov/usao-wdtn/pr/three-men-charged-burglarizing-gun-range-and-theft-firearms.

[7] See https://www.atf.gov/firearms/docs/undefined/federalfirearmslicenseefftheftlossreportjan2020-dec2020508pdf/download.

up or batter[ing his] neighbor's wife." The latter crime is more likely to result in a felony crime-of-violence conviction; a defendant who possesses a gun after such a crime would thus have a base offense level of 20. With a 3-level acceptance-of-responsibility reduction, and a Criminal History Category of I, the defendant would face a Guidelines range of at least 24-30 months. But the former crime—a domestic assault—is much more likely to be prosecuted as a misdemeanor. In that case, a defendant who subsequently possess a gun would face a base offense level of 14, and with a 2-level reduction for acceptance of responsibility, would face a Guidelines range of only 10-16 months in prison. Because that range is in Zone C, the Guidelines provide that the sentencing court can substitute half of the recommended prison time for house arrest. A Guidelines sentence requiring that the defendant serve only five months in prison does not provide adequate punishment or deterrence to those who abuse their family members and later illegally possess a gun.

Indeed, even though domestic violence crimes are frequently charged as misdemeanors, they are among the most dangerous of violent crimes, and are even more dangerous when a gun is present. According to CDC statistics, one of the leading causes of death of women aged 44 or younger is homicide, with intimate partner violence accounting for about half of those murders.[8] Moreover, research published in the American Journal of Public Health found that the presence of a gun in domestic violence situations significantly increases the risk of homicide.[9] Abusers with access to a gun are five times more likely to murder a domestic relation.[10] As Senator Lautenberg said nearly 30 years ago, "all too often, the only difference between a battered woman and a dead woman is the presence of a gun." 142 Cong. Rec. S10377. Finally, the majority of intimate partner homicides involve prior physical abuse.[11] Indeed, more than three quarters of women who experience domestic violence were previously victimized by the same offender.[12] And there is evidence that a majority of individuals who commit mass shootings have a history of domestic violence. According to one peer-reviewed study, 59.1% of mass shootings between 2014 and 2019 were domestic violence-related, and in 68.2% of mass shootings, the perpetrator either killed at least one partner or family member or had a history of domestic violence. See Lisa B. Geller, Marisa Booty & Cassandra K. Crifasi, *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019* (2021).[13] Despite all this, defendants with multiple convictions for misdemeanor crimes of domestic violence currently face the same offense level, under the Guidelines, as a defendant with only a single non-violent felony offense.

In the BSCA, Congress closed the so-called "boyfriend loophole" in the misdemeanor crime of domestic violence definition.[14] In doing so, and in reauthorizing the Violence Against Women Act in 2022, Congress demonstrated its ongoing commitment to protecting victims of domestic abuse from gun violence. The Commission should likewise seek to protect such victims from gun violence, by appropriately punishing those who possess weapons after domestic abuse

[8] https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=mm6628a1_w.
[9] https://www.justice.gov/archives/ovw/blog/firearms-and-domestic-violence-intersections.
[10] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/.
[11] *Id.*
[12] https://nicic.gov/sites/default/files/031384_0.pdf.
[13] Available at https://injepijournal.biomedcentral.com/articles/10.1186/s40621-021-00330-0.
[14] Sec. 12005, "Misdemeanor Crime of Domestic Violence," Bipartisan Safer Communities Act, Pl 117-159, June 25, 2022, 136 Stat 1313 (defining dating relationship).

convictions. Domestic abusers should face more serious consequences under the Guidelines than individuals with convictions only for non-violent or property offenses and should face consequences that are on par with other defendants with violent criminal histories. Section 922 treats misdemeanor crimes of domestic violence as seriously as it treats other violent crimes. The Guidelines should do the same, by providing that any offense that meets the statutory definition of "misdemeanor crime of domestic violence" results in the same enhancement, for the purposes of Section 2K2.1, as any other "crime of violence."

3. Predicate Convictions for Firearm Offenses not Constituting Crimes of Violence

The Department supports a recidivism enhancement for prior firearm convictions that are not otherwise considered crimes of violence. As the Commission itself has observed, recidivism of firearm offenders is a significant problem: "Firearms offenders recidivated at a higher rate than non-firearms offenders. Over two-thirds (68.1%) of firearms offenders were rearrested for a new crime during the eight-year follow-up period compared to less than half of non-firearms offenders (46.3%)." U.S. Sentencing Commission, *Recidivism Among Federal Firearm Offenders* (2019), at 4. And "nearly half of the §2K2.1 offenders had previously been convicted of a weapons offense (44.2%)." U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?*, at 20. Firearms offenders are not only more likely to reoffend than other offenders, but they are also more likely to commit a future violent crime. As the Commission has previously observed, as compared to non-firearms offenders, "a greater percentage of firearms offenders were rearrested for a violent crime as the most serious new offense." U.S. Sentencing Commission, *Recidivism Among Federal Firearm Offenders*, at 19.

In short, the Commission's own findings demonstrate that firearms offenders—particularly those with prior firearms convictions—are more dangerous than other offenders. But because the Guidelines do not include felon-in-possession offenses (or other offenses involving a firearm) as "crimes of violence," a defendant with multiple firearm convictions may face the same offense level as a defendant with a single non-violent felony, such as a fraud conviction. Instead, the firearms guidelines should reflect the Commission's findings on the danger of repeat firearms offenders. While it may not be appropriate to treat prior firearms offenses as equivalent in seriousness to prior violent offenses, a 2-level enhancement for a prior firearms offense will help ensure that §2K2.1 more appropriately punishes and deters repeat firearm offenders.

4. Definition of Firearm in Application Note 1

The Department recommends amending the definition of "firearms" in Application Note 1 of §2K2.1 to include devices defined as "firearms" under both 26 U.S.C. § 5845(a) and 18 U.S.C. § 921.

As currently drafted, §2K2.1 contains inconsistent definitions of the term "firearm." Currently, §2K2.1(a)(1), (3), and (5) all provide for certain offense levels when an offense involved "a firearm described in 26 U.S.C. § 5845(a)." Application Note 1, meanwhile, defines the term "firearm" to have "the meaning given that term in 18 U.S.C. § 921(a)(3)." Section 921(a)(3), however, does not include all firearms "described in 26 U.S.C. § 5845(a)." In particular, Section 5845(a), but not Section 921(a), includes within its definition Machinegun

Conversion Devices—commonly referred to as "switches" or "Glock switches"—which are designed to convert semiautomatic firearms into machineguns. These "Glock switches" present an extraordinary threat to public safety, as they can be readily made using a 3D printer and will quickly turn a gun into a fully automatic weapon. Moreover, the Department has seen a sharp increase in the distribution of Glock switches, including cases involving the manufacture and distribution of numerous switches.[15]

Even though Glock switches are considered "firearms" under Section 5845(a), and even though they are one of the most dangerous "firearms" used by criminals, they do not trigger §2K2.1's enhancement for trafficking or number of firearms because of the incomplete definition of "firearm" in §2K2.1's application notes. The Department urges the Commission to amend the definition of "firearm" to include Glock switches and eliminate the inconsistency, as proposed below.

In addition, ATF recently amended the regulatory definition of "firearm" to provide that "[t]he term shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive. The term shall not include a weapon, including a weapon parts kit, in which the frame or receiver of such weapon is destroyed as described in the definition 'frame or receiver'." *See* 27 C.F.R. 478.11. As discussed above, this "frame and receiver" rule was designed to address the proliferation of ghost guns, which are often made from kits that consumers can readily assemble at home. Although such kits are now considered firearms under federal law, and although the guns made from such kits are particularly dangerous because they are untraceable, they do not trigger §2K2.1's enhancement for trafficking or number of firearms because of the incomplete definition of "firearm" in §2K2.1's application notes.

We thus recommend replacing the definition of "firearm" in Application Note 1 with the following definition:

> A "firearm" includes any device defined as a firearm in 18 U.S.C. § 921(a)(3), 26 U.S.C. § 5845(a), or 27 C.F.R. § 478.11.

5. Transfers to Minors

The Department supports a two-level increase for offenders who transfer firearms to minors. Although federal and state laws restrict the ability of minors to obtain and possess many types of firearms,[16] gun violence among youths is nonetheless increasing significantly. As the White House has observed, "[y]oung people are disproportionately likely to be involved in gun

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[15] *See, e.g.,,* https://www.atf.gov/news/pr/houston-area-residents-charged-unlawfully-possessing-full-auto-switches; https://www.atf.gov/news/pr/fort-worth-manufacturer-charged-glock-switch-case; https://www.atf.gov/news/pr/indictment-so-called-%E2%80%98glock-switches%E2%80%99-would-have-turned-pistols-machineguns.

[16] *See, e.g.*, 18 U.S.C. § 922(x)(1) (prohibiting the sale or transfer of a handgun or handgun ammunition to a juvenile); 18 U.S.C. § 922(x)(2) (prohibiting a juvenile from knowingly possessing a handgun or handgun ammunition); *see generally* https://www.kff.org/other/state-indicator/firearms-and-children-legislation/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D .

violence, either as perpetrators or victims." Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety.[17] In particular, in 2020, firearms were, for the first time, the leading cause of death among children.[18] And, according to the ATF, the agency recovered 9,677 firearms from juveniles in 2021 and 12,008 in 2022.

Moreover, illegal firearm possession by minors is particularly problematic because, as the Supreme Court has recognized, "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . . These qualities often result in impetuous and ill-considered actions and decisions." *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citation, alteration, and internal quotation marks omitted). Guns are simply more dangerous in the hands of minors.[19]

In the BSCA, Congress took action to curb youth violence, providing for an enhanced background check process for firearm purchases by individuals under the age of 21, and authorizing grants supporting mental health services for children. In so doing, Congress recognized the increased dangers associated with illegal gun possession by minors. The Commission should likewise act to curb the growing problem of youth gun violence by deterring offenders from transferring firearms connected to illegal activity to minors. The Department therefore supports a two-level increase for offenses that involve such transfers, taking care not to capture certain lawful activity by providing that the enhancement will not apply if the transfer is solely for a lawful sporting purpose or collection.

The Department thus suggests the following language:

> If the offense involved the defendant transferring a firearm to an individual under the age of 18 years, increase by 2 levels, unless the transfer was solely for lawful sporting purposes or collection.

2. <u>First Step Act—Drug Offenses</u>

The Commission requests comment on proposed amendments to §§5C1.2, 2D1.1, and 2D1.11 in connection with statutory amendments to the "safety valve" provision, 18 U.S.C. § 3553(f).

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[17] *Available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/.

[18] *See* https://www.nejm.org/doi/full/10.1056/NEJMc2201761.

[19] *See, e.g.*, https://www.justice.gov/usao-edtn/pr/knoxville-man-sentenced-10-months-federal-firearms-violation (firearm unlawfully transferred to juvenile and that firearm was later "recovered by law enforcement in connection with an officer-involved shooting of Thompson at Austin-East Magnet High School on April 12, 2021."); *United States v. Siri-Reynoso*, 17 Cr. 418 (S.D.N.Y.) (gang member provides gun to juvenile to shoot rival gang member resulting in the murder of a Bronx mother watching her kids on the playground); https://www.nytimes.com/2017/07/26/nyregion/after-yearlong-inquiry-2-are-charged-with-killing-bronx-mother.html (article about the killing).

A. Background

Under 18 U.S.C. § 3553(f), defendants convicted of specified drug offenses "may obtain 'safety valve' relief" if they satisfy certain requirements. *Dorsey v. United States*, 567 U.S. 260, 285 (2012). Such relief allows a district court to impose a sentence below the otherwise-applicable statutory minimum. 18 U.S.C. § 3553(f). Before 2018, safety-valve relief was available only if the court first found that "the defendant d[id] not have more than 1 criminal history point, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1) (2012 ed.). The statute set forth other eligibility requirements, all relating to the offense of conviction, in four additional paragraphs. *Id.* § 3553(f)(2)-(5).

Section 402 of the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, 132 Stat. 5221, amended Section 3553(f) in two ways. First, Section 3553(f) is now applicable to maritime offenses under 46 U.S.C. §§ 70503 and 70506. Second, Section 3553(f)(1) now provides that a defendant is safety-valve eligible if "(1) the defendant does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; and (C) a prior 2-point violent offense, as determined under the sentencing guideline." 18 U.S.C. § 3553(f)(1).

Since the First Step Act, four courts of appeals have agreed with the Department's position that a defendant is ineligible for the safety valve if he meets any one of the criminal-history factors listed in Section 3553(f)(1)'s subparagraphs.[20] The Ninth and the Eleventh Circuits, however, have adopted a contrary interpretation, holding that a defendant is eligible for safety-valve relief so long as he does not satisfy all three factors.[21] Under this approach, defendants remain eligible for the safety valve despite lengthy criminal histories, including defendants with over a dozen criminal convictions and over 30 criminal history points.[22] The conflict between the Fifth, Sixth, Seventh, and Eighth Circuits, on the one hand, and the Ninth and Eleventh Circuits, on the other hand, is entrenched. Thus, on January 12, 2023, the Department of Justice filed a brief advocating that the Supreme Court grant certiorari and resolve the issue. And today, the Supreme Court granted certiorari in that case.[23]

B. The Commission Proposal to Amend §5C1.2

The Department agrees with the Commission's proposal to amend §5C1.2 to reflect the current statutory language. Section 5C1.2 implements the safety-valve for the purposes of the Guidelines, and it should thus mirror the language of Section 3553(f). The Commission does not

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[20] *United States v. Pulsifer*, 39 F.4th 1018, 1019 (8th Cir. 2022), petition for cert. granted, No. 22-340 (Feb. 27, 2023); *United States v. Palomares*, 52 F.4th 640, 643-44 (5th Cir. 2022), petition for cert. pending, No. 22-6391 (filed Dec. 21, 2022); *United States v. Haynes*, 55 F.4th 1075, 1081 (6th Cir. 2022); *United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022).

[21] *See United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021), petition for reh'g denied, No. 19-50305, 2023 WL 501452 (9th Cir. Jan. 27, 2023); *United States v. Garcon*, 54 F.4th 1274, 1276 (11th Cir. 2022) (en banc).

[22] *See, e.g.*, *United States v. Jaime Paz*, 20-CR-2198 (S.D. Cal.) (defendant with 33 criminal history points deemed eligible for safety valve); *United States v. Inthavong*, 21-CR-1117 (S.D. Cal.) (defendant with 14 prior convictions and 23 criminal history points deemed eligible for the safety valve).

[23] *United States v. Pulsifer*, *supra* note 20 (https://www.supremecourt.gov/orders/courtorders/022723zor_6537.pdf).

have authority to either expand or contract the eligibility requirements under Section 3553(f), and courts must continue to follow the law of their circuit regarding safety-valve eligibility regardless of the language in §5C1.2. Although the disagreements among the circuits over the proper interpretation of Section 3553(f)(1) will lead to disparate application of mandatory terms of imprisonment, such disparities are inevitable until the Supreme Court resolves the issue, or Congress amends the statute.

The Department does not agree, however, with the Commission's proposal to revise the minimum offense level in §5C1.2(b). At present, §5C1.2(b) provides that "[i]n the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17." That provision, added in Amendment 624 (Nov. 1, 2001), implements Section 80001(b)(1)(B) of the Violent Crime Control and Law Enforcement Act of 1994, which directed the Commission to ensure that the range for a defendant who faces a mandatory minimum term of five years and meets the safety-valve criteria should not be less than 24 months. The Commission applied a minimum base offense level of 17 because an offender in Criminal History Category I at that offense level faces a range of 24 to 30 months.

The Commission's optional proposal would replace the level-17 floor with a statement that "the applicable guideline range shall not be less than 24 to 30 months of imprisonment." But that revision would not adequately account for a defendant with a more serious criminal history. By instead providing for a minimum base offense level, rather than a minimum Guidelines range, the current version of §5C1.2 appropriately recognizes that the Guidelines range for a safety-valve-eligible defendant should depend, at least in part, on the defendant's criminal history. A defendant who is safety-valve eligible because he has little or no criminal history should face a lower Guidelines range than a defendant who is safety-valve eligible despite an extensive criminal history, particularly given that the Guidelines already provide that "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted." USSG §4A1.3(b)(1). To provide otherwise would not appropriately account for "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

C. Guidance on what Constitutes a "1-point," "2-point," or "3-point" offense, "as Determined Under the Sentencing Guidelines"

Circuit courts have reached different conclusions as what constitutes a "1-point," "2-point," or "3-point" offense under Section 3553(f)(1). *Compare Haynes*, 55 F.4th at 1080 ("[Section] 3553(f)(1) refers only to 'prior 3-point' and 'prior 2-point violent' offenses 'as determined under the sentencing guidelines'—which means *all* the Guidelines, including §4A1.2(e)."") *with Garcon*, 54 F.4th at 1280-84 (11th Cir.) (en banc) (interpreting subsections 3553(f)(1)(B) and (C) to include offenses that do not contribute to the total criminal-history score). Criminal-history points are determined according to §§4A1.1 and 4A1.2, which—by the Guidelines' own directive—"must be read together." USSG §4A1.1 commentary. The Department believes that this reading of the statute is clear, and the Court in *Haynes* correctly

interpreted it. But in light of the Eleventh Circuit's decision in *Garcon*, the Department supports the Commission's proposal to align the Guidelines text more clearly with the Sixth Circuit's decision in *Haynes*.

D. §§2D1.1 and 2D1.11

The Department recommends that as to §§2D1.1 and 2D1.11, the Commission adopt Option 2, which provides for a two-level reduction in the base offense level for drug offenders only if the defendant does not have any of the criminal history factors listed in Section 3553(f)(1). Option 2 is consistent with the correct interpretation of Section 3553(f). The Department has successfully argued this position in four courts of appeals, *supra* n.20, and by adopting this interpretation in the Guidelines, the Commission would reduce sentencing disparities resulting from the extant conflict over that provision's interpretation. 28 U.S.C. § 911(b)(1)(B).

Moreover, the two-level reduction in §§2D1.1 and 2D1.11 need not depend on, or be coterminous with, Section 3553(f) or its implementing guideline, §5C1.2. Section 3553(f)(1) is fully implemented through §5C1.2, which was first adopted as an emergency amendment in September 1994.[24] The Commission did not adopt the two-level reduction in §2D1.1 until a year later, USSG App. C, Amendment 515 (effective November 1, 1995), and did not further incorporate a similar reduction into §2D1.11 until 2012. *See* USSG App. C, Amendment 763 (effective November 1, 2012). Nor has the two-level reduction's applicability ever been coterminous with the applicability of Section 3553(f)(1). Initially, the two-level reduction applied only to those defendants with an offense level of level 26 or higher. *See* USSG §2D1.1 (1996). The Commission later removed that restriction and subsequently explained that the two-level reduction is broader than Section 3553(f) because its application "does not depend on whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment." USSG App. C, Amendment 640 (November 1, 2002). In short, the two-level reduction in §§2D1.1 and 2D1.11 need not depend entirely on Section 3553(f) or its implementing guideline, §5C1.2, but rather has been available in narcotics prosecutions whether the defendant faces a statutory mandatory minimum penalty or not.

Finally, Option 2 is more consistent with the underlying purposes of the two-level reduction. When expanding the two-level reduction in §2D1.1 to apply to offenders with an offense level lower than level 26, the Commission explained that the "general principle underlying this two-level reduction" is "to provide lesser punishment for first time, nonviolent offenders." *See* USSG App. C, Amendment 624 (effective November 1, 2001). But, as discussed above, the Ninth and Eleventh Circuits' interpretation of Section 3553(f)(1) has resulted in defendants with extensive criminal histories being deemed eligible for safety-valve relief under Section 3553(f)(1). It would be inconsistent with the purpose of the two-level reduction to reduce the offense level of defendants with such significant criminal histories.

[24] *See* USSG App. C, Amendment 509 (effective September 23, 1994); *see also id.* at Amendment 515 (effective November 1, 1995) (describing emergency amendment).

E. Recidivist Penalties for Drug Offenders

The Department does not believe that it is necessary to amend Section 2D1.1's penalties for offenders with prior similar convictions in order to implement the First Step Act. The recidivism enhancements in Section 2D1.1—which apply only in cases involving death or serious bodily injury, and thus apply relatively infrequently—have never precisely tracked the language of the statute, and the Department is not aware of any reason why the First Step Act requires that they do so now. Moreover, the proposed edits do not treat similarly situated defendants similarly, as they provide for enhancements based on different qualifying predicate convictions depending on whether a defendant was convicted under 21 U.S.C. § 841(b)(1)(A) or (B), on the one hand, and 21 U.S.C. § 841(b)(1)(C) or (E), on the other.

3. "Circuit Conflicts"

A. Part A—Acceptance of Responsibility (§3E1.1)

In response to a disagreement among the courts of appeals regarding the government's authority under §3E1.1(b) to withhold a third point for acceptance of responsibility, the Commission proposes to amend that section to define the term "preparing for trial."[25] Although the Department agrees that the Commission should resolve the issue by clarifying the circumstances in which the government can withhold a third point for acceptance of responsibility, the government does not support doing so through an attempt to define "preparing for trial."

1. The Department Supports Resolving the Disagreement Among the Circuits by Preserving the Government's Congressionally Afforded Discretion to Withhold a Third-point Reduction

Under §3E1.1, a defendant who "clearly demonstrates acceptance of responsibility for his offense" is entitled to a two-level reduction in offense level. USSG §3E1.1(a). A defendant may receive an additional one-level reduction "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct 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." *Id.* §3E1.1(b).

Although the Commission primarily proposes to define the term "preparing for trial," it requests comment on alternative solutions, such as by incorporating the framework from *Wade v. United States*, 504 U.S. 181 (1992). The Department supports this alternative proposal. In *Wade*, the Supreme Court held that the government may decline to move for a downward departure for substantial assistance to law enforcement under 18 U.S.C. § 3553(e) or §5K1.1—provisions that

[25] In a statement respecting denial of a petition for certiorari in a case in which the government withheld a third-level reduction in offense level for acceptance of responsibility because a defendant litigated a motion to suppress, two Supreme Court Justices stressed the "need for clarification from the Commission" concerning the application of §3E1.1(b). *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari).

similarly require a "motion of the government"—even if the defendant has in fact provided substantial assistance, so long as the government's decision "rationally related to [a] legitimate Government end," and not, for example "based on an unconstitutional motive" such as "the defendant's race or religion." *Id.* at 185-87. As the Department has explained in court filings, *see, e.g.*, Br. in Opp. 6-15, *Longoria v. United States*, No. 20-5715 (filed Jan. 29, 2021), §3E1.1(b) confers on the government discretion to move for an additional third-point reduction in the defendant's offense level if the stated criteria are satisfied, but it does not require the government to file such a motion. The requirement that the government file a motion before a defendant may receive the third-point reduction was inserted directly by Congress in 2003, and Congress used the same language interpreted in *Wade* to confer broad discretion on the government. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 671-672. Congress further emphasized the government's discretion by directly amending the application note to §3E1.1 to emphasize that "[b]ecause 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." *Id*. § 401(g)(2)(B); *see* USSG §3E1.1, comment. (n.6). Accordingly, the standard articulated in *Wade* is the appropriate one, and the Department supports amending §3E1.1(b) to state that the government may not withhold a motion based on an unconstitutional motive or a reason not rationally related to any legitimate government end.

2. The Commission's Proposal to Define "Preparing for Trial" Would not Resolve the Disagreement Among the Circuits, Would be Unworkable, and may Lead to Arbitrary Results

The Commission's proposal to amend §3E1.1 to define "preparing for trial" would not fully resolve the existing disagreement among the circuits and, in any event, would likely prove unworkable.

As a threshold matter, nothing in §3E1.1 or its commentary suggests that Congress intended to permit the government to consider only certain trial-preparatory activities when determining whether to move for a third-level reduction. Section 3E1.1(b), as amended by the PROTECT Act, does not focus exclusively on the government's interest in avoiding "preparing for trial" but more generally recognizes the government's interest in "allocat[ing its] resources efficiently." Most circuits that have reached the question therefore have rejected the view that the interests encompassed by §3E1.1(b) are limited to those unique to trial preparation.[26] As a result,

[26] *See, e.g.*, *United States v. Jordan*, 877 F.3d 391, 396 (8th Cir. 2017) (a defendant's denial of relevant conduct at sentencing "did not allow the government and the court to allocate their resources efficiently" and thus was appropriate basis for government to decline to recommend the third point); *United States v. Collins*, 683 F.3d 697, 706 (6th Cir. 2012) (Section 3E1.1(b) is not limited solely to the "government interest in avoiding preparing for trial," but instead "explicitly identifies a broader government interest in allocating its resources efficiently"); *United States v. Sainz-Preciado*, 566 F.3d 708, 715 (7th Cir. 2009) (Section 3E1.1(b) reflects "Congress's intent to leave third-point reductions to the government's discretion"); *United States v. Beatty*, 538 F.3d 8, 16 (1st Cir. 2008) ("As amended, the touchstone of § 3E1.1 is no longer trial preparation, but rather the presence of a government motion for the third-level reduction."); *United States v. Drennon*, 516 F.3d 160, 163 (3d Cir. 2008) (upholding government's decision not to file a third-point reduction motion where the court found "no basis for concluding that

regardless of whether a defendant's challenge to a charging document, motion to suppress evidence, or challenge to sentencing issues could be described as falling within (or outside) a definition of "preparing for trial," under many circuits' governing law, the government could still appropriately withhold a motion if those activities prevented the government from allocating its resources efficiently.

In any event, it will be difficult in many cases to distinguish between the litigation of suppression motions (or various other pre- and post-trial challenges) and trial preparation. Indeed, the litigation of suppression or other motions quite often can be tantamount to trial—involving the same witnesses, evidence, and testimony. The Commission proposes to define "preparing for trial" as "ordinarily indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists." In the Department's experience, however, the most significant amount of time spent preparing for trial typically involves witness preparation. And where the evidence in a case turns on items recovered as a result of a search or seizure, the trial evidence may overlap substantially with the evidence proffered during the litigation of a suppression hearing.[27] A defendant who elects to litigate a suppression motion before determining whether to plead guilty and accept responsibility therefore may not have "timely" notified authorities of his intention to plead guilty or have "permit[ed] the government to avoid preparing for trial" or "to allocate [its] resources effectively." USSG §3E1.1(b). The same may be true in cases where a defendant pleads guilty but challenges the factual basis for particular sentencing enhancements, which in effect may require litigating the factual basis for some of the conduct underlying his conviction.[28] At a minimum, should the Commission choose to define "preparing for trial," it should include efforts to prepare witnesses and evidence that would be presented at trial.[29]

The proposed definition of "preparing for trial"—particularly its focus on excluding "early pretrial proceedings"—also will create difficult line-drawing problems that may lead to

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[the decision] was motivated by anything other than a concern for the efficient allocation of the government's litigating resources"); *United States v. Blanco*, 466 F.3d 916, 918 (10th Cir. 2006) ("Ensuring efficient resource allocation is a legitimate government end and a stated purpose of §3E1.1(b).").

[27] *See, e.g.*, *United States v. Sanders*, 208 F. App'x 160, 163 (3d Cir. 2006) (explaining that although the defendant "allowed the government to avoid voir dire, jury instructions and jury selection" his suppression motion "forced the government to litigate the essential element of a § 922(g)(1) offense—[his] possession of a firearm—and his only arguable defense"; because the motion "compelled the government to prepare and examine [the arresting officer] and to cross-examine five defense witnesses," the government "essentially tried [the defendant] at the suppression hearing").

[28] *See, e.g.*, *Blanco*, 466 F.3d at 919 (defendant's request that cocaine base be reweighed at an independent testing facility before sentencing resulted in a "concomitant resource expenditure" of "governmental time, resources, and energy of agents to ensure that the evidentiary chain of custody remains unbroken"); *Jordan*, 877 F.3d at 395 (defendant's denial of relevant conduct at sentencing—that defendant possessed a firearm in connection with another felony—necessitated the government having "to subpoena and present testimony of six witnesses in a hearing lasting almost four hours").

[29] Many witnesses require preparation well in advance of trial. For example, Rule 16 of Federal Criminal Procedure requires that parties disclose, inter alia, the opinions of expert witness "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence. Fed. R. Crm. P. 16(a)(1)(G), (b)(1)(C). For some witnesses, the parties must retain interpreters to assist at preparation and at trial. Other witnesses require pre-trial travel for preparation. And for many witnesses, recorded calls must be transcribed and translated. In short, the government frequently incurs many expenses, and expends significant amounts of time, preparing witnesses well in advance of trial.

extensive ancillary litigation and arbitrary application of §3E1.1(b). Some courts permit suppression motions to be filed on the eve of trial, but even when a defendant files a motion early in the district court proceedings, the court may not resolve the motion until close to or on the eve of trial. The filing of an early motion thus may not relieve the government of its obligation to prepare for trial, and if a defendant decides to change his plea on the eve of trial after losing such a motion, the government will have substantially completed its trial preparation. This may be true even if a defendant indicates a willingness to enter a conditional guilty plea that would preserve his right to appeal the denial of a motion to suppress. If a court does not rule on the motion to suppress until the eve of trial, the government will have to prepare for trial in the event the motion to suppress is granted (particularly if there is other evidence in the case that would prove some or all of the charges). Nor, in all cases, can a defendant meaningfully be expected to evaluate whether to plead guilty without knowing what evidence the government will be permitted to offer at trial. In many circumstances, then, whether the government has been required to begin preparations for trial will depend substantially on the district court's own docket-management decisions, and not on circumstances within the defendant's control. The proposed definition of "preparing for trial" thus may have disparate outcomes, resulting in applications of §3E1.1(b) that might not correlate with each defendant's relevant level of cooperation.

For these reasons, and consistent with Congress's determination in the PROTECT ACT,[30] the government is best positioned to determine whether the defendant's assistance to authorities in any particular case—including by timely notifying authorities of his intention to enter a plea of guilty—in fact avoided the need to prepare for trial or assisted the government in allocating its resources efficiently. The Commission should decline to define "preparing for trial" and instead incorporate the *Wade* standard in §3E1.1(b).

3. Because the Guidelines are Advisory, Constraining the Government's Discretion in §3E1.1(b) is Unnecessary

Finally, and importantly, amending §3E1.1(b) to constrain the discretion Congress afforded to the government to recommend a third-point reduction is unnecessary to ensure that district courts are able to sentence a defendant commensurate with the court's evaluation of the defendant's acceptance of responsibility. Because the Guidelines are advisory, if a district court disagrees with the government's decision not to recommend a third-point reduction in a particular case, the court is free to vary downwards from the advisory Guidelines' range when imposing its sentence.[31]

[30] Pub. L. No. 108-21, § 401(g)(2)(B), 117 Stat. 672.

[31] *See, e.g.*, *Blanco*, 466 F.3d at 918 (varying downward after the government declined to recommend a third point, to a sentence "seven months shorter than what the low end of the Guidelines range would have been had the government moved for a § 3E1.1(b) departure").

B. Part B—Definition of "Controlled Substance Offense" (§4B1.2)

As the Commission has noted, two courts of appeals have concluded that the term "controlled substance" in §4B1.2(b) refers exclusively to a substance controlled by the federal Controlled Substances Act, while several others have interpreted the term to include substances that are either federally controlled or controlled under applicable state law. In a statement respecting the denial of a petition for certiorari, two Justices of the Supreme Court called for the Commission to "address this division" among the courts of appeals "to ensure fair and uniform application of the Guidelines." *Guerrant v. United States*, 142 S. Ct. 640, 640-41 (2022) (statement of Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari). In response to this issue, the Commission proposes to amend §4B1.2(b) to define "controlled substance," and the Commission has provided two options for that definition. The Department agrees that the Commission should resolve the issue by defining "controlled substance" in §4B1.2(b), and the Department supports the definition in Option 2, which would provide that the term "controlled substance" refers to substances that are either included in the federal Controlled Substances Act or otherwise controlled under appliable state law.

1. The Commission Should Adopt the Broader Definition of "Controlled Substance" set Forth in Option 2

Section 4B1.2(b) defines the term "controlled substance offense" to mean "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." USSG §4B1.2(b). Two courts of appeals—the Second and Ninth Circuits—have concluded that the term "controlled substance" in §4B1.2(b) "refers exclusively to a substance controlled by the" federal Controlled Substances Act.[32] In contrast, at least five other courts of appeals—including, most recently, the Third Circuit—have issued decisions that decline "to engraft the federal Controlled Substances Act's definition of 'controlled substance'" onto §4B1.2(b).[33]

The Commission proposes adding a definition for the term "controlled substance" to §4B1.2(b) and has provided two options for that definition. Option 1 would define "controlled

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[32] *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018); *see United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021). Because New York controls several substances that are not scheduled under the Controlled Substances Act, almost no New York state drug trafficking offenses are considered "controlled substances offenses" in the Second Circuit, even though the additional substances (such as naloxegol and positional isomers of cocaine) are rarely if ever prosecuted in New York state. This has been a huge windfall for some recidivist drug traffickers. *See United States v. Swinton*, 495 F. Supp. 3d 197 (W.D.N.Y. 2020)(New York offense of Criminal Possession of a Controlled Substance in the Third Degree not a prior controlled substance offense because state's list of "narcotic drugs" includes naloxegol, which is not federally scheduled); *United States v. Fernandez-Taveras*, No. 18-CR-455 (NGG), 2021 WL 66485, at *4-5 (E.D.N.Y. Jan. 7, 2021), appeal withdrawn sub nom. *United States v. Taveras*, No. 21-155, 2021 WL 1664107 (2d Cir. Apr. 5, 2021) (New York offense of Criminal Possession of a Controlled Substance in the Second Degree not a prior controlled substance offense because state's list of "narcotic drugs" includes positional isomers of cocaine that are not federally scheduled).

[33] *United States v. Ruth*, 966 F.3d 642, 652 (7th Cir. 2020); *see, e.g.*, *United States v. Lewis*, __ F.4th __, 2023 WL 411362 (3d Cir. Jan. 26, 2023); *United States v. Ward*, 972 F.3d 364, 372 (4th Cir. 2020); *United States v. Henderson*, 11 F.4th 713, 718-19 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288, 1291-96 (10th Cir. 2021).

substance" to mean "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.*)." Option 2 would define "controlled substance" to mean "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 should adopt the broader definition set forth in Option 2. Option 2's definition of "controlled substance" is faithful to the current language of §4B1.2(b), which defines a "controlled substance offense" as an offense "under federal *or state law*" that prohibits the manufacture, import, export, distribution, or dispensing of a "controlled substance," or the possession of a "controlled substance" with intent to engage in one of those activities. USSG §4B1.2(b) (emphasis added). Because §4B1.2(b) specifically refers to state law in defining the offense, it follows that §4B1.2(b)'s definition of "controlled substance offense" covers offenses involving substances controlled under federal *or* relevant state law.[34]

Option 2 also avoids the substantial problems presented by Option 1, which is that Option 1 is unduly narrow and would lead to unnecessary complexities at sentencing. Because Option 1 defines "controlled substances" to mean only those substances listed in the federal drug schedules, a state drug offense would qualify as a "controlled substance offense" under Option 1 only if the state's definition of a particular controlled substance is no broader than the federal definition. If the state's definition of the controlled substance is even slightly broader than the federal definition, then every state conviction involving that substance would no longer qualify as a "controlled substance offense" under §4B1.2(b). Likewise, if a particular state drug offense is not divisible by drug type, and the relevant state drug schedules include any chemical compound that is not federally controlled, then every violation of that state statute would fail to qualify as a "controlled substance offense," even if a particular defendant's offense conduct indisputably involved a federally controlled substance.

This concern is not merely speculative. In recent years, federal courts have grappled with slight differences between the federal and state definitions of cocaine, heroin, and methamphetamine, including in the context of §4B1.2(b), with some courts holding that the relevant state definitions are categorically broader than the federal definitions.[35] For example, in 2015, the federal definition of cocaine was amended to exclude ioflupane, a substance used in the diagnosis of Parkinson's disease that previously fell within the federal definition of cocaine.[36] As far as the government is aware, no one has ever been criminally prosecuted for a drug offense involving ioflupane. Nevertheless, because many state definitions of cocaine still encompass ioflupane, criminal defendants have argued—sometimes successfully—that *all* cocaine convictions under those states' laws fail to qualify as "controlled substance offenses"

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[34] *See* U.S. Br. in Opp., *Guerrant v. United States*, S. Ct. No. 21-5099, at 9 (filed Nov. 3, 2021).

[35] *See, e.g.*, *Ruth*, 966 F.3d at 645-51 (holding that Illinois's definition of cocaine is categorically broader than the federal definition because the relevant Illinois statute includes cocaine's positional isomers, while the federal definition covers only cocaine's optical and geometric isomers); *United States v. Owen*, 51 F.4th 292 (8th Cir. 2022) (holding that Minnesota's definition of cocaine is categorically broader than the federal definition because Minnesota's statute bans all cocaine isomers); *United States v. Rodriguez-Gamboa*, 946 F.3d 548, 551-53 (9th Cir. 2019) (considering whether California's definition of methamphetamine, which includes its geometric and optical isomers, is categorically broader than the federal definition, which includes only its optical isomers.)

[36] *See* 80 Fed. Reg. 54715-01 (Sept. 11, 2015), available at 2015 WL 5265212; 21 C.F.R. § 1308.12(b)(4)(ii).

under §4B1.2(b) or "serious drug offenses" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).[37]

If the Commission were to adopt the "controlled substance" definition in Option 1, this kind of litigation would only increase, as would the associated burden on the sentencing courts. For example, in some cases, the United States might have to present scientific evidence to the sentencing court to demonstrate that a particular state's drug definition is not actually broader than the corresponding federal definition.[38]

2. The Commission Should Clarify that the Substance at Issue Must Have Been Controlled when the Defendant Committed the Predicate Offense

The Department also suggests that the Commission add language to the end of Option 2's definition to clarify that the substance at issue must have been controlled "at the time the defendant committed the predicate offense." Because the "controlled substance offense" definition applies to prior convictions, a federal sentencing court should look to the applicable drug schedules in effect at the time of the prior crime to determine whether the defendant engaged in conduct involving a "controlled substance." Without that clarification, the courts of appeals might continue to adopt different views about which version of the applicable drug schedules a sentencing court should consult when deciding whether a prior offense qualifies as a predicate "controlled substance offense."[39] Clarification would also preclude defendants who committed serious drug crimes from arguing that any subsequent narrowing of a particular drug definition—for example, the exclusion of ioflupane from a state's cocaine definition—renders all prior state convictions involving that drug categorically overbroad for purposes of §4B1.2(b).[40]

3. The Department Supports Adding Option 2's Definition to Application Note 2 to §2L1.2

The Commission has also requested comment on a possible amendment to Application Note 2 to §2L1.2, which contains a definition of "drug trafficking offense" that is similar to the definition of "controlled substance offense" in §4B1.2(b). If the Commission were to amend §4B1.2(b) to include the definition of "controlled substance" set forth in Option 2, the Department recommends that the Commission add the same definition to Application Note 2 to §2L1.2, without otherwise changing Application Note 2's definition of "drug trafficking offense," in order to promote consistency in the Guidelines Manual.

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[37] *See, e.g.*, *United States v. Perez*, 46 F.4th 691, 701 (8th Cir. 2022) (finding that defendant's prior Iowa cocaine offenses were not serious drug offenses under the ACCA because the relevant Iowa statute "included Ioflupane").
[38] *See, e.g.*, *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1155 (9th Cir. 2020) ("In this case, the district court held an evidentiary hearing, heard the testimony of expert witnesses, and concluded that geometric isomers of methamphetamine do not chemically exist.").
[39] *See, e.g.*, *United States v. Clark*, 46 F.4th 404, 408 (6th Cir. 2022) (concluding that a sentencing court should "consult[] the drug schedules in place at the time of the prior conviction" to determine whether the conviction is a controlled substance offense); *Bautista*, 989 F.3d at 704 (concluding that a sentencing court should consult "federal law at the time of [the] federal sentencing" to determine whether a prior state conviction qualifies as a controlled substance offense).
[40] *See Lewis*, __ F.4th __, 2023 WL 411362, at *6-*7.

4. Crime Legislation

A. Part A—FDA Reauthorization Act of 2017

In the FDA Reauthorization Act of 2017, Congress created a new offense for knowingly making, selling, or dispensing, or holding for sale or dispensing, a counterfeit drug, which is now punishable with up to 10 years of imprisonment. Pub. L. 115-52, Sec. 604(b) (2017); 21 U.S.C. § 333(b)(8). Before this change, the maximum penalty for all counterfeit drug offenses under the Federal Food, Drug, and Cosmetic Act ("FDCA"), including the manufacture, sale, or dispensing of a counterfeit drug, was three years in prison.

The Commission proposes to amend Appendix A to reference the new offense at 21 U.S.C. § 333(b)(8) to §2N2.1. We support this change. In our assessment, however, §2N2.1 as currently drafted does not adequately capture the gravity of an offense under Section 333(b)(8), and an additional specific offense characteristic and/or application note should be added for violations of Section 333(b)(8). Currently, §2N2.1 sets a base offense level of 6, which has been appropriate for FDCA misdemeanor violations (and felony violations not involving fraud). However, a base offense level of 6 is not appropriate for an offense under the new Section 333(b)(8). Congress more than tripled the statutory maximum penalty (from three years to 10) for a knowing violation of the FDCA "by knowingly making, selling or dispensing, or holding for sale or dispensing, a counterfeit drug." Section 604 of Pub. L. 115–52. In distinguishing that specific conduct from other forms of misbranding, Congress intended to strengthen the penalties far beyond those for both a misdemeanor and typical felony violation of the FDCA. Applying §2N2.1 to the new offense, without any other changes, risks sending a message contrary to that which Congress intended—that the knowing sale of counterfeit consumer drugs could start at a 0-6 month sentence and is conceptually no more culpable than a strict-liability FDCA misdemeanor offense. Moreover, the legislative history of the provision indicates the author of this provision intended it to protect "patient safety" from the "knockoffs that have infiltrated the U.S. supply chain." 163 Cong. Rec. H5454-02, H5480 (2017). We believe the Commission should implement the new offense in a manner reflecting Congress's intent that a more severe penalty applies to Section 333(b)(8) offenses. To account for Congress's decision to strengthen the penalty of counterfeit drugs, the Commission could proceed in several ways.

The concept of a counterfeit drug necessarily includes a fraudulent or misleading intent to pass off an illegitimate drug as a legitimate one (see 21 U.S.C. § 321(g)(2) defining "counterfeit drug" as a drug that falsely purports to be the product of a drug manufacturer, processor, packer, or distributor other than the one that actually manufactured, processed, packed or distributed it). Furthermore, the distribution of counterfeit drugs inherently carries the risk of serious bodily injury, because, by definition, the origin and contents of such drugs are unknown and could be dangerous.

The Commission could ensure that both the fraudulent nature of counterfeit drugs and the risk they carry are captured by the Guidelines by creating a cross reference or application note making clear that Section 333(b)(8) offenses are to be sentenced using §2B1.1's fraud table and related enhancements. Doing so would include the enhancement under §2B1.1(b)(16)(A) for the conscious or reckless risk of death or serious bodily injury and would track Congress's intent in

raising the statutory maximum for the offense conduct described in Section 333(b)(8). That enhancement directs that if a §2B1.1 offense level is otherwise computed as lower than 14, it should be increased to level 14. *See* §2B1.1(b)(16). Directing the application of §2B1.1 for violations of Section 333(b)(8) is also desirable because it would ensure that a low-level counterfeiting offense has an appropriately serious offense level, while allowing more sophisticated counterfeiting organizations to be subject to the fraud table and other related enhancements. The Commission, through a reference or note, should make clear that §2B1.1 and the enhancement in §2B1.1(b)(16) should be applied in Section 333(b)(8) cases.

Alternatively, the Commission could add a specific offense characteristic to §2N2.1 for violations under Section 333(b)(8). As discussed above, we recommend a minimum offense level of 14, so we would recommend the addition of 8 levels for a violation of Section 333(b)(8) sentenced under §2N2.1. However, such an approach could engender some confusion since the §2N2.1 cross-reference directs the application of §2B1.1 in all FDCA offenses "involving fraud."

B. Part J—Protecting Lawful Streaming Act of 2020

In Part J, the Commission proposes amendments to implement the Protecting Lawful Streaming Act of 2020, Pub. L. 116–260 (2021), which created a new commercial streaming piracy offense at 18 U.S.C. § 2319C. The Department agrees with the Commission's proposal to amend the statutory index of the Guidelines to reference this new offense to §2B5.3. Though the base offense level is only 8, cases under Section 2319C involving large-scale commercial infringement can be addressed through enhancements provided in §2B5.3 (with some small additional changes to those enhancements recommended below). We anticipate that, as in Section 2319 cases, the primary factor affecting the offense level in Section 2319C cases will be the enhancement in §2B5.3(b)(1) based on the infringement amount, which yields higher offense levels for larger-scale infringing operations. Further, because Section 2319C offenses involve the operation of a service that provides infringing internet streaming of content, and because doing so generally requires an operator to somehow gather or assemble copyrighted works on an internet-connected server to make it available for streaming to others, the two-level enhancement in §2B5.3(b)(3) for "uploading" will likely apply to a Section 2319C offense. Because Section 2319C requires a purpose of commercial advantage or private financial gain, the two-level reduction in §2B5.3(b)(4) will not apply.

The Department recommends that the Commission further clarify how the infringement amount should be calculated in cases involving infringing public performance by means of internet streaming and amend the application notes to invite consideration of additional or alternative methods for calculating the "infringement amount" for purposes of §2B5.3(b)(1), including the consideration of the defendant's profits. Specifically, the Department recommends that Application Note 2(A) be revised to clarify that in cases involving the infringing performance or display of a copyrighted work, the "retail value of the infringed item" is the price a consumer would have paid to lawfully view the performance or display, the "number of infringing items" is the number of individual performances or displays involved in the offense; and that both the value and number of items may be estimated using any relevant information, including financial records. The Department further recommends that Note 2(A) be revised to

permit courts to consider, as an alternative method of determining the infringement amount, the amount of profit or gain a defendant received or expected to receive, as a result of the offense.

The Commission also asks whether current §2B5.3(b)(2) adequately accounts for Section 2319C's offense conduct, noting that "the new offense at 18 U.S.C. § 2319C mainly addresses the streaming (*i.e.*, offering or providing "to the public a digital transmission service") of works "being prepared for commercial public performance." The term introduced in the Protecting Lawful Streaming Act, "work being prepared for commercial public performance," is similar to the term "work being prepared for commercial distribution" already defined in Section 2319 and §2B5.3. Both are intended to describe works that are infringed either before their legitimate public release (*e.g.*, through unauthorized leaks of review copies provided to select film/music/game reviewers) or after they have been made available to the public only in limited fashion (*i.e.*, for viewing in a movie theater, but not available for purchase). Both terms are also intended to help address the heightened economic damage to the copyright owner that can result from infringement committed before, or contemporaneous with, the official release of the copyrighted content to the public. These two categories will often overlap but are distinct from one another. The term "work being prepared for commercial public performance" is slightly more expansive, in that it includes not only works that have not yet been released to the public for viewing in theaters or via legitimate streaming channels, but also includes streamed works for the first 24 hours after their official legitimate streaming release. That is, if a defendant's illicit streaming service offered works that had only been available for streaming from legitimate sources for less than 24 hours before the defendant began to stream them (such as movies or television episodes that had premiered on television or legitimate streaming services the previous night), then Section 2319C(c)(2) provides a higher maximum statutory penalty (five years versus three years).

The Department recommends that §2B5.3(b)(2) be amended to provide the same two-level enhancement for offenses (whether under § 2319C or § 2319(a)) involving "work being prepared for commercial public performance" as for those involving "work being prepared for commercial distribution." Because the two terms describe largely overlapping categories of works, a separate enhancement for each category is not necessary and would probably not be appropriate. We suggest incorporating the new term in the existing (b)(2) as follows:

> (2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution <u>or a work being prepared for commercial public performance</u>, increase by **2** levels.

C. <u>Part K—William M. (Mac) Thornberry National Defense Authorization Act</u>

The Commission proposes amendments to implement the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (2021), which created several new offenses at 31 U.S.C. §§ 5335 and 5336. The Commission proposes amending Appendix A to reference Sections 5335 and 5336 to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). Similar offenses, such as offenses

under 31 U.S.C. §§ 5313 and 5318(g)(2), are referenced to §2S1.3, and we agree that §2S1.3 is the appropriate Guidelines reference for the new offenses.

The Commission also seeks comment on whether §2B1.1 should be amended to address an enhanced penalty applicable to 31 U.S.C. §§ 5336(c)(4) and 5336(h)(2) offenses. These enhancements increase the maximum fine and the maximum incarceration term for a Section 5336 offense based upon violation of the restrictions on the disclosure and use of information submitted to FinCEN where the Section 5336 offense was committed "while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period." We agree that §2B1.1 should be amended to address the new enhanced penalties under 31 U.S.C. §§ 5336(c)(4) and 5336(h)(2), but do not recommend an adjustment to the base offense level or the addition of a specific offense characteristic. The enhancements themselves are very limited in scope as they apply only to the use and disclosure violations, and do not apply when the Section 5336 offense is based upon the obligation to submit beneficial ownership information to FinCEN.

The Department also encourages the Commission to contemporaneously remedy the drafting error in an analogous §2S1.3 enhancement (we brought this error to your attention in the Department's July 2016 letter to the Commission).[41] Similar to Section 5336(h)(2), Section 5322(b) provides for an enhancement if the pertinent reporting violation was committed "while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period." But §2S1.3(b)(2), which was added in 2002 in response to statutory amendments providing for the enhanced criminal penalty provisions under § 5322(b), omits the statutory language "while violating another law of the United States." If the Commission amends §2B1.1 to incorporate both bases of the §5336 enhancement, it should also amend §2S1.1 to also include both bases of the §5322 enhancement.

5. Career Offender

In its annual report, the Department encouraged the Commission to address the use of the "categorical approach," in the Guidelines, including as used for the career offender guideline. As the Department explained in that letter, "especially long sentences should be reserved for violent offenders and aggravated repeat offenders," but the Guidelines' current approach had led to odd and widely disparate Guidelines ranges for defendants depending on both the jurisdiction of their prior convictions and the jurisdiction in which the Guidelines are being calculated.

The Department therefore greatly appreciates and supports the Commission's efforts to address the definitions of "crime of violence" and "controlled substance offense" in the Guidelines. In particular, we support the Commission's proposals in Parts B-D (and in Part B of the proposals regarding Circuit Conflicts) to update specific aspects of those definitions. We are also grateful for the Commission's efforts to address the categorical approach. We have significant concerns, however, that the Listed Guidelines proposal—which would require courts

[41] *See,* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160725/priorities-comment.pdf#page=31.

to engage in a largely novel mode of analysis—will generate an enormous amount of litigation and disparate outcomes.

The Department has long maintained that the best way to address the categorical approach is to retain the current definitions (as amended in Parts B-D and in Part B regarding Circuit Conflicts) but permit courts to consider actual conduct. Alternatively, the Commission could retain the current definitions (again, as amended), but adopt the part of the Listed Guidelines approach that permits courts to consider both "the elements, and any means of committing such an element, that formed the basis of the defendant's conviction" and "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means." Both options would be preferable to the proposed Listed Guidelines approach. If the Commission is not inclined to adopt either option, we would encourage the Commission to postpone its decision for a year to permit publication and further consideration of the various options, including a conduct-based approach, including through hearings with testimony from judges and other stakeholders. If the Commission nonetheless proceeds with the Listed Guidelines approach, we offer some suggestions below for reducing the likely litigation burden on courts.

Finally, the Department recognizes the legitimate concerns about severity levels associated with many recidivist provisions, including in the Guidelines. As notions of fairness in federal sentencing have evolved over the last three decades, many stakeholders now recognize that some of the lengthy sentences previously called for by the Guidelines are not necessary or appropriate. The career offender guideline, in particular, has been the subject of considerable criticism for producing overly long sentences. Decades of research show that the career offender guideline produces a clear racial disparity in application.[42] District judges, recognizing that the resulting career offender guideline sentences are unjustifiably long, have routinely imposed below-guideline sentences in these cases—often at the government's request.[43] Likewise, the Sentencing Commission, as recently as 2016, urged Congress to amend the career offender directive to focus on the most dangerous and culpable defendants.[44] More recently, the Attorney General encouraged line prosecutors to recommend variances in certain career offender cases, acknowledging the increasing rate of below-guideline sentences in these cases. While the Commission's proposal today would not directly address those concerns, the Department, as it wrote in its annual report, would welcome the opportunity to work with the Commission to analyze severity levels for various recidivism provisions to determine which ought to be reformed, either by amending the Guidelines provisions directly or by recommending legislative changes to Congress.

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[42] *See*, U.S. Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 133-34 (2004).

[43] In FY 2021, fewer than 20% of all defendants designated as career offenders received a sentence within guideline. Conversely, 54.8% of career offenders received a variance, almost all of them receiving a downward variance. The government, too, has increasingly asked courts to impose sentences below the Guidelines range: The rate of government sponsored below-range sentences has increased from 5.6% in FY 2005 to 21.0% in FY 2014. *See* U.S. Sentencing Commission, *Report to Congress: Career Offender Sentencing Enhancements* 22 (2016).

[44] *Id.* at 3.

A. Part A—Categorical Approach

Part A of the proposed amendments regarding the career offender guideline aims to eliminate application of the categorical approach by defining "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an offense. The Department appreciates this effort, as it is now widely recognized that the categorical approach generates extensive litigation, consumes vast amounts of court resources, and produces disparate sentencing outcomes. The Department has concerns, however, about the Commission's proposed amendment.

1. The Department's Concerns About the Categorical Approach

The categorical approach to determining what qualifies as a prior aggravating conviction focuses on the elements of an offense rather than on the defendant's culpable conduct. To wit, courts applying the categorical approach "identify the *least* culpable conduct" criminalized by the statute and compare that conduct against the relevant statutory definition.[45] Thus, many offenders who committed prototypically violent crimes are no longer held accountable for those offenses under the career offender provision (and various guidelines that incorporate the definitions from that provision). Some of the most violent crimes—murder, carjacking, rape, and more—no longer qualify as "crimes of violence."[46]

Moreover, sentencing outcomes based on the categorical approach vary widely across jurisdictions. For instance, while robbery remains a "crime of violence" under many state statutes, it no longer does in many others.[47] Thus, two defendants who committed the same forceful robbery in different states may well be treated very differently under the Guidelines. The problem has spilled into the definition of "controlled substance offense" as well. As addressed earlier, some courts employing the categorical approach have held that state offenses involving cocaine and heroin are not "controlled substances offenses." *See supra* at 20-22.

Likewise, courts and litigants must travel an arduous road to resolve these questions. To determine whether a prior offense is a categorical match to an enumerated offense, for example, courts must first determine the generic definition, "rely[ing] on various sources, such as state and federal statutes, state and federal common law, the Model Penal Code, criminal law treatises, the United States Code of Military Justice, and dictionaries." *United States v. Hernandez-Montes*, 831 F.3d 284, 292 (5th Cir. 2016). Courts must then engage in an "exhaustive review of state law

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[45] *United States v. Harris*, 844 F.3d 1260, 1268 n.9 (10th Cir. 2017) (emphasis added); *see also United States v. Torrez*, 869 F.3d 291, 319 (4th Cir. 2017) (noting that the "categorical approach . . . focuses on the least culpable act proscribed by statute rather than the particular culpability of a defendant"); *United States v. Verwiebe*, 874 F.3d 258, 260–61 (6th Cir. 2017); United States v. Dahl, 833 F.3d 345, 350 (3d Cir. 2016); *United States v. Rodriguez-Negrete*, 772 F.3d 221, 225 (5th Cir. 2014).

[46] *See, e.g.*, *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (Washington second-degree murder); *United States v. Baldon*, 956 F.3d 1115 (9th Cir. 2020) (California carjacking); *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape).

[47] *See, e.g.*, *United States v. Bankston*, 901 F.3d 1100 (9th Cir. 2018) (California); *United States v. Fluker*, 891 F.3d 541 (4th Cir. 2018) (Georgia); *United States v. Edling*, 895 F.3d 1153, 1156-58 (9th Cir. 2018) (Nevada); *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017) (Ohio); *United States v. Peterson*, 902 F.3d 1016 (9th Cir. 2018) (Washington); *Cross v. United States*, 892 F.3d 288, 297 (7th Cir. 2018) (Wisconsin).

as courts search for a non-violent needle in a haystack or conjure up some hypothetical situation to demonstrate that the predicate state crime just might conceivably reach some presumably less culpable behavior outside the federal generic." *United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring). And if the state crime is potentially overbroad, courts must pour through state law once more to determine whether the offense is "divisible," such that the "modified categorical approach" may apply.

Judicial criticism of these corollaries of the categorical approach, for the reasons stated here, has been sharp.[48] This mode of analysis is particularly anomalous with regard to application of the Sentencing Guidelines. The constitutional concern that first animated the categorical approach—that judges cannot make factual findings that increase the applicable statutory penalties—is not present when applying the advisory Guidelines. Thus, the Guidelines have never expressly required a categorical approach, and sentencing courts are permitted—indeed, required—to make all manner of factual conclusions regarding a defendant's biographical history so long as they turn on reliable evidence.

The Department has long maintained that the best approach to identifying qualifying state predicate offenses under the Guidelines is to retain the current "crime of violence" and "controlled substance offense" definitions (with the changes listed in Parts B-D, and in Part B regarding Circuit Conflicts, addressing the definition of "controlled substance offense"), but to allow courts to consider actual conduct if necessary to understand the specific basis of the conviction.[49] Such an approach would permit courts to rely on the extensive body of caselaw already interpreting those definitions. The only analytical difference would be that courts could look to reliable evidence to determine what conduct the defendant's prior offense involved—an assessment that sentencing courts are already required to perform, as they assess the conduct and characteristics of a defendant that go well beyond the elements of the offense of conviction. This approach also has the significant advantage of making sense to courts, litigants, and the public.

Alternatively, the Commission could retain the current definitions (again, with the Part B-D and Circuit Conflicts Part B changes we support), but adopt the part of the Listed Guidelines approach that permits courts to consider both "the elements, and any means of committing such an element, that formed the basis of the defendant's conviction" and "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means." Under this approach, courts would no longer need to consider whether an offense is divisible to rely on the information about the offense in the *Shepard* documents.

Both options would be preferable to the proposed Listed Guidelines approach, as each would both dramatically reduce the burden on courts and litigants. If the Commission is not inclined to adopt either option, we would encourage the Commission to postpone its decision for a year to permit publication and further consideration of the various options.

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[48] *See, e.g.*, *Mathis v. United States*, 579 U.S. 500, 521 (2016) (Kennedy, J., concurring) ("Congress . . . could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions."); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149–50 (9th Cir. 2020) (Graber, J., concurring) ("I write separately to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach.").

[49] *See* Department of Justice Letter to the Commission (October 30, 2015); Department of Justice Letter to the Commission 2-6 (February 19, 2019).

2. The Listed Guidelines Approach for State Offenses.

While we appreciate the intention behind the Commission's Listed Guidelines, the Department has concerns that this approach to state offenses will generate significant litigation, as courts must determine whether particular state offenses are analogous to those federal crimes addressed in the specified guidelines. The Listed Guidelines proposal includes dozens of different federal guidelines, which cover conduct addressed by thousands of state criminal provisions, with significant variations among the states in addressing the same types of crimes. And the language used in the proposal—calling for comparison to the guideline "that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted"—could cause considerable confusion. District courts and courts of appeals are thus likely to disagree on the mode of analysis required by the Listed Guidelines approach, the scope of the dozens of federal guidelines, the scope of the thousands of state statutes, and the comparison of all those state statues to the federal guidelines. The result will, once again, be different treatment of similarly situated defendants across jurisdictions.

If the Commission proceeds with the Listed Guidelines approach, the Department has several suggestions to help ameliorate these problems. First, as to the mode of analysis, the Commission should expressly state—as the Department understands to be the intent—that its "most appropriate guideline" proposal calls for an assessment similar to that under §2X5.1, which requires courts to determine the "most analogous guideline" when sentencing a defendant for an offense "for which no guideline expressly has been promulgated," such as convictions under state law pursuant to the Assimilative Crimes Act. The "most analogous guideline" assessment does not require a "perfect match of elements." *United States v. Jackson*, 862 F.3d 365, 376 (3d Cir. 2017). Rather, it requires only an assessment of whether the guideline in question "covers the 'type of criminal behavior' of which the defendant was convicted." *United States v. Calbat*, 266 F.3d 358, 363 (5th Cir. 2001).

Even with such clarification, however, courts and litigants must still engage in the difficult job of comparing each and every potentially relevant state offense to the Listed Guidelines to determine which guideline is "most analogous." Courts will inevitably disagree, resulting in disparate treatment of similarly situated defendants across jurisdictions. This problem extends not only to application of the "crime of violence" provision, but to the "controlled substance offense" provision as well, as courts will be compelled to address long-settled questions about the inclusion of scores of state statutes in order to compare those provisions anew to the relevant federal guidelines.

To help address these concerns, the Commission could retain the force clause from the current Guidelines that permits courts to consider both "the elements, and any means of committing such an element, that formed the basis of the defendant's conviction" and "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means." In other words, an offense would qualify if it satisfied either the Listed Guidelines approach, or the force clause as determined by means, elements, and conduct cited in the count of conviction. Such an approach would at least permit litigants and courts to avoid relitigating the modest number of statutes that courts have

previously found to be crimes of violence under the categorical approach, or that would have been crimes of violence if the relevant statute had been deemed divisible.[50]

There are also ways to improve the process for determining whether an offense satisfies the Listed Guidelines approach—in particular, to focus on actual conduct, not statutory provisions alone, when determining whether a listed analogous guideline applies. The Commission's proposal anticipates this problem and this solution, first by providing that "[t]he fact that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the Chapter Two guidelines listed in subsection (a)(2) or (b)(2) is not determinative," and second by inviting courts to consider "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means."

While we laud these provisions, we are concerned that the body of information that courts may rely upon to determine "the offense conduct" may be too narrow to avoid the pitfalls inherent in the categorical approach. In particular, it is not necessary to limit courts to the documents identified in *Shepard v. United States*, 544 U.S. 13, 16 (2005). That case involved the application of a statutory penalty enhancement, and thus implicated constitutional concerns under current Supreme Court caselaw addressing the Sixth Amendment. *See id.* at 24-26. Those concerns are inapposite with respect to the advisory Sentencing Guidelines. Indeed, as stated above, courts routinely and necessarily resolve disputed facts at sentencing, including facts about a defendant's past conduct and history, using any reliable information. This authority should not extend to identifying career offender predicates as well.

For these reasons, the Department suggests that the Listed Guidelines approach should be based on consideration of the actual conduct underlying a prior conviction, as established by any reliable information, including judicial documents. This proposal is faithful to the purposes of sentencing to assess the individual offender before the court, and to the core goal of the Guidelines to treat similarly situated offenders alike based on their actual conduct. Most notably, allowing consideration of actual past criminal conduct is consistent with the manner in which courts assess all information about the offender's conduct and history, by consideration of "any information that has sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3. Pursuant to *Booker*, courts are permitted to determine pertinent sentencing facts by a preponderance of the evidence, and the determination of a defendant's criminal history should be treated the same as any other relevant fact about the defendant's conduct.

3. The Listed Guidelines Approach for Federal Offenses.

Although the Department continues to believe a conduct-based approach best resolves the problems associated with the categorical approach, the Listed Guidelines approach is a better fit for federal offenses than it is for state offenses. The Department believes that the best alternative to the conduct-based approach for prior conviction involving a federal crime is to simply list the federal crimes that qualify; for instance, with respect to a "crime of violence," there is no need to

[50] As noted below, the Department suggests one slight modification to the force clause, to refer to the use of force against the person "or property" of another. This modification would bring the provision in line with the clauses that appear in 18 U.S.C. § 16(a) and 18 U.S.C. § 924(c).

expend resources debating whether Hobbs Act robbery, carjacking, or a host of other obviously violent crimes qualify. This may be accomplished by listing federal statutes, and we would be pleased to provide a suggested list at the Commission's request. The Commission's current proposal, in defining "crime of violence" and "controlled substance offense" in relation to specific guideline provisions, largely accomplishes the same purpose, particularly if adopted with the alterations we suggest.

The list of "crime of violence" guidelines in the proposed version of §4B1.2(a)(2) seems largely appropriate for this task. The Department suggests adding these additional guidelines to address additional violent crimes that are not currently included:

- §2B2.2 (burglary)
- §2E2.1 (collecting an extension of credit by extortionate means)
- §2G1.1(a)(1)(a) (commercial sex acts in violation of 18 USC 1591(b)(1): sex trafficking using force)
- §2L1.1 (illegal alien smuggling, with a limitation to if a firearm was used or the offense involved the intentional risk of death or severe bodily injury)
- §2M1.1 (treason)
- §2P1.1, 2, and 3 (escape from prison—with the limitation to using force, firearm possession in prison, and inciting prison riots)

The Department agrees that the list of "controlled substance offense" guidelines in §4B1.2(b)(2) should include §§2D1.1, 2D1.9, and 2D1.11. The Commission has also proposed the option of adding to the list: §§2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Certain Individuals); 2D1.6 (Use of Communication Facility in Committing Drug Offense), if the appropriate guideline for the underlying offense is also listed in this paragraph; 2D1.8 (Renting or Managing Drug Establishments); 2D1.10 (Life Endangerment While Manufacturing Drugs); 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Items).

The Department supports adding §2D1.2, which exclusively applies to drug trafficking offenses. But the other provisions that are referenced in this possible addition—§§2D1.6, 2D1.8, 2D1.10, and 2D1.12—address offenses that fall outside the definition of "controlled substance offense" used by the Sentencing Commission for the past several decades. Thus, if the Commission proceeds—despite the Department's concerns—with the Listed Guidelines Proposal, the Department would have no objection to excluding specific references to §§2D1.6, 2D1.8, 2D1.10, and 2D1.12.

4. Recklessness.

If the Commission adopts the Listed Guidelines approach, it should not provide for a blanket exclusion of any offense that involves a finding of recklessness. Such a provision would exclude from the definition of "crime of violence" many robberies, aggravated assaults, and possibly even murders that involve bodily injury or death. Indeed, more than a third of the states permit conviction for aggravated assault based on ordinary recklessness. *See United States v. Schneider*, 905 F.3d 1088, 1094-95 (8th Cir. 2018) (citing statutes). Several states have robbery-

by-injury statutes, which prohibit robbery accomplished by the reckless causation of injury. *See e.g.*, Haw. Rev. Stat. § 708-841(c); Me. Rev. Stat. tit. 17-A, § 651(1)(A); *State v. Wright*, 608 S.W.3d 790, 796 (Mo. Ct. App. 2020). And many murder statutes permit conviction upon a finding of extreme recklessness, known as "depraved heart" murder. In order to establish that a defendant committed reckless serious bodily injury assault, the government must prove that the defendant knew that there was a risk that his actions would cause serious bodily injury, consciously disregarded that risk, and in fact caused that injury. Such a defendant has committed a crime of violence.

Moreover, excluding reckless crimes would cause anomalous results, as defendants who attempt or threaten to commit violent crimes would face longer Guidelines ranges than defendants who in fact complete those crimes. As but one example, an assault conviction in Tennessee for threatening a victim with a deadly weapon would constitute a crime of violence, *see* Tenn. Code § 39-13-101(a)(2), 39-13-102(a)(1)(B), but a conviction for recklessly causing serious bodily injury would not, *see* Tenn. Code § 39-13-101(a)(2), § 39-13-102(a)(1)(B). Likewise, an attempted assault would (presumably) still qualify as a crime of violence, as it would require a specific intent to injure or threaten, but a completed assault might not. Similarly, robbery by threat of bodily injury would be a violent felony, while robbery by causation of bodily injury would not. These distinctions defy common sense.

The inclusion of a recklessness exception also exacerbates the problems that result from limiting courts to the *Shepard* documents. As noted above, countless statutes prohibiting violent conduct include recklessness as a possible *mens rea*. Charging documents, however, often parrot the statutory language and list every possible *mens rea* element, even where the offense was in fact based on knowing or intentional conduct. In such states, the limited *Shepard* documents often will be insufficient to establish whether the defendant's assault or robbery offense qualifies. In addition, many statutory provisions require a different *mens rea* for different elements. For instance, a statute may require that the defendant act intentionally in the use of force but permit recklessness with regard to the extent of the resulting injury. The Commission's suggested language may wrongfully eliminate such violent crimes from qualifying.

If the Commission nonetheless adopts an exclusion for offenses that were committed recklessly, the Department recommends two changes. First, it should place the burden on the defense to show that the conviction was based on entirely reckless conduct. Second, it should make clear that offenses that are committed with a *mens rea* of "extreme recklessness" still qualify. In *Borden v. United States*, 141 S. Ct. 1817 (2021), the Supreme Court concluded that crimes that can be committed recklessly do not satisfy ACCA's force clause, but expressly stated that its holding did not apply to offenses involving "extreme recklessness." *Id.* at 1825 n.4. Every appellate court to address the issue agrees that such crimes still qualify as predicate offenses under ACCA.[51] Indeed, a contrary conclusion would jeopardize application of not only the majority of state aggravated assault provisions as predicates, but also most federal and state statutes addressing the most serious of crimes, murder.

[51] *See United States v. Baez-Martinez*, 950 F.3d 119, 127 (1st Cir. 2020); *United States v. Begay*, 33 F.4th 1081, 1096 (9th Cir. 2022) (en banc); *United States v. Manley*, 52 F.4th 143, 150-51 (4th Cir. 2022); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1344-45 (11th Cir. 2022).

5. Suggested Language

For all the reasons stated above, the Department continues to support retaining the current definitions (with the changes in Parts B-D below regarding the Career Offender guideline, and the changes in Part B of Circuit Conflicts regarding the definition of "controlled substance offense"), while permitting courts to consider actual conduct, or (as a less favored alternative) the elements, means, and conduct established by the *Shepard* documents. If the Commission adopts the Listed Guidelines approach, the Department suggests the revisions as discussed above. If the Commission does not agree with these suggested revisions, we request that the Commission make only the changes in Parts B-D, and in Circuit Conflicts Part B, and postpone any proposals to address the categorical approach until the next amendment cycle.

In an Issue for Comment, the Commission also asks whether the definitions of "crime of violence" and "controlled substance offense" in § 2L1.2 should be amended to mirror any new definition in §4B1.2. The Department believes that the same definitions of these terms should apply throughout the Guidelines, for ease of application and to promote consistent results.

6. Departures or Variances

Finally, regardless of the approach that it takes, we encourage the Commission to add an application note explaining when variances should be considered for the career offender guidelines. On December 16, 2022, the Attorney General issued guidance to all federal prosecutors explaining that requests for departures or variances "may be particularly justified" for "[c]ertain cases in which the career offender guidelines range does not adequately reflect the defendant's crime and culpability." In particular, the Attorney General advised prosecutors to consider supporting a downward variance for certain nonviolent, low-level drug defendants, where the defendant's status as a career offender is predicated only on the current and previous commission of nonviolent controlled substance offenses.[52] Conversely, the Attorney General stated that "if the defendant's prior convictions involved the actual or threatened use of violence, but the crimes do not qualify as career offender predicates under the 'categorical approach,' if appropriate, prosecutors may consider advocating for an upward variance, including toward the career offender range."

The Commission should consider adopting similar guidance here. The Commission added a similar note in 2016, when it removed burglary as an enumerated offense; at that time, it added the current Application Note 4, suggesting the possibility of an upward variance where a burglary involved violence. Judges have recognized the propriety of variances in this situation.[53]

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[52] Indeed, the Commission itself has documented the increasing frequency of sentencing variances below a career offender range, particularly for those whose career offender status rested on drug offenses rather than violent crimes. By fiscal year 2014, judges imposed a sentence below the career offender range in roughly 75% of drug-based career offender cases, frequently choosing a sentence close to the non-career offender drug guideline. United States Sentencing Commission, Report to the Congress: Career Offender Enhancements 35 (2016).

[53] *See United States v. Carter*, 961 F.3d 953, 954 (7th Cir. 2020) ("As the Sentencing Commission itself has recognized since the Sentencing Guidelines were first adopted, district judges may and should use their sound discretion to sentence under 18 U.S.C. § 3553(a) on the basis of reliable information about the defendant's criminal history even where strict categorical classification of a prior conviction might produce a different guideline sentencing range.").

The Commission should thus remind courts that such variances are appropriate. More broadly, and as explained in its annual report, the Department has concerns about the severity levels associated with recidivist provisions, and we believe that certain of these levels are not optimally set. The Department encourages the Commission to consider this issue in a future amendment cycle, and the Department would welcome the opportunity to assist the Commission in this work.

B. Part B: Career Offender—Robbery

Part B of the proposed Career Offender amendments would define the enumerated offense of robbery consistent with the Hobbs Act, 18 U.S.C. § 1951. This proposal would be unnecessary if the Commission adopts the Listed Guidelines approach for federal offenses, as addressed above. If the reference to "robbery" remains in §4B1.2, the Department supports the proposal in Part B.

As the Commission notes, many recent appellate decisions hold that Hobbs Act robbery—the foremost federal statute addressing a quintessential violent crime—does not qualify as a "crime of violence" under the Guidelines.[54] Before a recent amendment, courts consistently treated Hobbs Act robbery as a §4B1.2 crime of violence, as it satisfied a combination of the enumerated offenses of robbery and extortion, which itself could rest on threats of force against property. *See, e.g.*, *United States v. Becerril-Lopez*, 541 F.3d 881, 892 (9th Cir. 2008). In 2016, however, the Commission narrowed the enumerated definition of "extortion" by limiting the offense to those having an element of force or an element of fear or threats "of physical injury," as opposed to nonviolent threats such as injury to reputation. USSG, Suppl. to Appx. C, Amendment 798 (Nov. 1, 2016). Many courts, however, have determined that "physical injury" refers only to injury to a person, thus excluding from the definition of "extortion" crimes, such as Hobbs Act robbery, which may rest on force against property as well as a person. *See, e.g.*, *United States v. Scott*, 14 F.4th 190, 197 (3d Cir. 2021). It plainly was not the Commission's goal to delete Hobbs Act robbery as a "crime of violence." The government therefore supports the proposed amendment, which sensibly corrects this mistake by importing the language of the Hobbs Act into the §4B1.2 definition of "robbery."

Indeed, the Department suggests that the Commission go further to correct the unintended consequence of Amendment 798. By defining the enumerated offense of "extortion" to concern only the use of force or threats against a person, not property, the Commission may have also inadvertently eliminated nearly every extortion crime as well, as extortion has historically encompassed threats and damage to property as well as people. Indeed, federal law enforcement has long focused on extortionate threats against property as violent and dangerous crimes. Targeting extortion—defined as "the obtaining of money or property from another with his consent, induced by the wrongful use of force or fear . . . induced by oral or written threats to do an unlawful injury to the *property* of the threatened person . . ."—was a central focus of the Senate's "Copeland Committee," which proposed what became the Anti-Racketeering Act of

[54] *United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 490 (3d Cir. 2021); *United States v. Green*, 996 F.3d 176, 179-83 (4th Cir. 2021); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793, 799-802 (7th Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020).

1934. *See* Crime and Criminal Practices," Report of the Senate Committee on Commerce, S. Rep. No. 1189, 75th Cong., 1st Sess. (1937). The adoption of the Hobbs Act in 1946, ch. 537, 60 Stat. 420, left the key provisions of the Anti-Racketeering Act unaltered, continuing to target violence directed against property as well as persons. *See Scheidler v. Nat'l Org. for Women, Inc*., 547 U.S. 9, 18-20 (2006) (discussing the legislative focus on physical violence through robbery and extortion). Congress has thus long recognized, and has never wavered in its conclusion, that extortion includes violent threats to property as well as persons. We doubt that the Commission in 2016 intended to alter, *sub silentio*, the long-accepted definition and narrow the meaning of extortion. If the term "extortion" remains in §4B1.2, the Commission therefore should issue a statement that "physical injury," as it appears in the application note, refers to injury to property as well as persons.

Finally, the Commission inquires whether it should adopt the definition of the level of force required for robbery stated in *Stokeling v. United States*, 139 S. Ct. 544, 552 (2019) ("The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance."). That is a sensible proposal for purposes of completeness.

C. Part C: Career Offender—Inchoate Offenses

The Department supports Option 1 of the Part C proposal to define the terms "crime of violence" and "controlled substance offense" to include inchoate offenses in the textual definition of the terms, rather than through an application note. Option 1 would be unnecessary if the Listed Guidelines proposal in Part A were adopted; but if not, Option 1 would confirm the Commission's long-held position that the terms "crime of violence" and "controlled substance offense" include conspiracies to commit, attempts to commit, and aiding and abetting any qualifying substantive crime. In the wake of the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), some courts of appeals have disregarded the Guidelines commentary defining "crimes of violence" and "controlled substance offenses" to include inchoate offenses. The Department agrees with the courts of appeals that have followed the Guidelines' commentary, but moving the long-settled application note into the Guidelines text would resolve the matter.

Option 1 (like the Part A proposal) also appropriately provides that a conspiracy offense qualifies whether or not proof of an overt act is required. There are numerous conspiracy statutes that do not require proof of an overt act, including the principal federal drug conspiracy statute, 21 U.S.C. § 846. There is no rational basis for excluding these crimes from §4B1.2.

D. Part D: Career Offender—Offer to Sell

The Department supports Part D of the proposed amendments to the Career Offender guideline, which provides that an offense involving an "offer to sell" qualifies as a "controlled substance offense." Again, this proposed amendment is immaterial if the Commission adopts a Listed Guidelines approach in its entirety. But otherwise, the Commission should adopt this proposal. An "offer to sell" fits comfortably within the traditional definition of a drug trafficking crime. This amendment would also bring §4B1.2(b) explicitly into line with the definition of "drug trafficking offense" in the illegal reentry Guideline at § 2L1.2 cmt. n.2. There is no sensible reason that the definitions should differ.

Moreover, because of the categorical approach, many state offenses that involve actual trafficking of controlled substances do not constitute "controlled substance offenses" because they also cover an "offer to sell." *See, e.g.*, *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016); *United States v. Madkins*, 866 F.3d 1136, 1143-48 (10th Cir. 2017). This results in disparate treatment of defendants, depending on the breadth of the state statute under which they were prosecuted. These problems are eliminated by a sensible provision that a "controlled substance offense" includes an offer to sell.

6. Criminal History

A. Status Points

The Commission has proposed three options for reducing the effect of "status points" on the Guidelines criminal history score. Status points—adding two points to the criminal history score for offenses committed while under criminal justice sentence—have been part of the Guidelines since they were first issued in 1987, and over the past five years, the provision has applied to 37.5 percent of all offenders.

The Department appreciates the concerns underlying the Commission's proposal. Because we wish to further understand the Commission's analysis of status points' predictive value for recidivism to justify such a significant amendment, and because we are concerned that the proposal gives insufficient consideration to the just punishment goal of the criminal history score, we request that the Commission defer these changes at this stage.

1. The Proposed Amendment Lacks Sufficient Empirical Bases

The proposed amendment appears to be based on a June 2022 Commission study examining the relationship between status points and recidivism in which the Commission suggests that "status points add little to the overall predictive value associated with the criminal history score."[55] We request additional time to consider the methodology and conclusions of that study before the Commission makes the significant proposed changes based on it.

We note first that the data set used to conduct the study is not publicly available and there has been no independent analysis of the data. Given the study's importance for this significant policy shift, we believe some independent analysis is critical.

Second, we believe additional analysis is necessary before implementation of the proposed amendment. The synopsis for the proposed amendment notes that status points add "little to the overall predictive value" of recidivism; however, a model that predicts recidivism is methodologically very different from a model that seeks to analyze how status points causally *affect* recidivism. The latter requires experimental or quasi-experimental techniques that control for underlying differences between individuals, such as in the "doubly robust estimation"

[55] Proposed Amendment on Criminal History (citing United States Sentencing Commission, Revisiting Status Points (2022), *available at* https://www.ussc.gov/research/research-reports/revisiting-status-points).

analysis that the Commission conducted in a separate June 2022 study on the relationship between the length of incarceration and recidivism.[56] That recidivism study used propensity score matching, a widely-accepted technique that compares outcomes between similar individuals to make reliable causal inferences. By contrast, the study on status points did not use any quasi-experimental methods to identify underlying differences between those who received, and did not receive, status points. Nor does the study appear to have taken a standard recidivism approach (such as the survival analysis or time to failure model) to examine the hazards of failure or the likelihood and timing of recidivism—instead, it employs a simple binary yes/no analysis of recidivism. We believe that a more rigorous recidivism analysis which accounts for underlying differences between status and non-status offenders, and which considers the time to failure, demographic variables, offense levels, types of offenses, and other variables that may contribute to recidivism, would greatly enhance the reliability of the Commission's study and proposals.[57]

Third, we believe the recidivism rates of offenders released in 2010 warrant deeper scrutiny. *Revisiting Status Points* appears to analyze the recidivism data by individual criminal history score without further comparative analyses by total offense levels, Guidelines range, actual sentence imposed, nature of the offense, or the Criminal History Category that resulted from the application of status points.[58] Additionally, Figure 8 of the study shows that for offenders with Criminal History Scores of 1 through 4, the differences in rearrest rates between status and non-status offenders were statistically significant to some degree.[59] This group comprises a large portion of the offender pool. According to the Commission's 2021 data, 14,361 offenders had scores of 1 through 4, representing 27% of all offenders sentenced in 2021 and 40% of all offenders with at least one point.[60] In other words, the Commission's own analysis suggests that for 40% of all re-offenders, status points may have a meaningful relationship to recidivism.

For the above reasons, we recommend that the Commission conduct additional studies on how effectively the status points provision functions within §4A1.1 to advance the recidivism

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[56] United States Sentencing Commission, Length of Incarceration and Recidivism, at 16 (2022), *available at* https://www.ussc.gov/research/research-reports/length-incarceration-and-recidivism.

[57] For example, the Department of Justice's Bureau of Justice Statistics (BJS) has produced reports on recidivism of state offenders in 1983, 1994, 2005, 2008, and 2012. Also, in 2021, the BJS released ten-year (2008-2018) and five-year (2012-2017) follow-up studies of state prisoners released in 2008 and 2012. *See* Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018) (2021), *available at* https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-24-states-2008-10-year-follow-period-2008-2018; Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012–2017) (2021), *available at* https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-34-states-2012-5-year-follow-period-2012-2017. Both studies examined recidivism patterns by demographic characteristics, commitment offense, and prior criminal history. These studies have aided the public and state policy makers to understand reliably, among other things, the relationship between specific offender characteristics and recidivism. Additional evaluations of federal offenders' recidivism data in conjunction with the BJS's studies will enhance the Commission's and the public's understanding and deepen confidence in proposed policy changes.

[58] *See* Revisiting Status Points, Figure 8 and Appendix B.

[59] The differences in rearrest rates were evaluated at the 1% level of significance. Note that at the 5% level of significance differences in rearrest rates were also statistically significant between status and non-status offenders who had a criminal history score of 5. *See* Revisiting Status Points, Figure 8 & Appendix B (Table B-2).

[60] Revisiting Status Points, Figure 8.

reduction goal of sentencing. Such studies should be conducted with a rigorous methodology that investigates the causal, not just predictive, impact of status points on recidivism.

2. The Proposed Amendment Places a Disproportionate Emphasis on the Crime Control Goal of Sentencing

The Department also believes the proposal unduly minimizes other purposes of sentencing, especially the just punishment goal. Since the inaugural 1987 edition of the Guidelines Manual, the provisions in §4A1.1 shared the twin goals of recidivism reduction and just punishment for the committed crimes. In a report accompanying the 1987 Guidelines, the Commission declared, "[b]ecause the elements selected are compatible both with a just punishment and crime control approach, the conflict that otherwise might exist between these two purposes of sentencing is diminished."[61]

Any proposed amendment here should meaningfully address both goals, as an offender's continued engagement in crime is probative of the need for deterrence, protection of the public, and just punishment. Even if additional studies show that status points have little predictive value for recidivism, that conclusion should not necessarily lead to elimination or weakening of the status points provision. While further study may lend support to the Commission's proposal, the Commission should also consider whether the just punishment goal, as well as the other purposes of sentencing articulated in 18 U.S.C. § 3553(a), justifies retaining the status points provision in the Guidelines.

3. If the Commission Adopts One of the Proposed Options, the Commission Should Adopt Option 1—Retention of the Current Provision with a New Downward Departure Provision

Among the three options in the proposed amendment, the Department believes retention of the current status points provision along with a new downward departure provision in the application notes is the most appropriate. We view this option as an extension of the existing provision in §4A1.3(b) that a downward departure may be warranted after an individualized assessment of each case. If, however, the Commission adopts this proposal, we recommend that the first sentence of the proposed paragraph end with "or the likelihood that the defendant will commit other crimes," consistent with the language of the Guidelines primary criminal history downward departure provision in §4A1.3(b).

The proposed removal of status points in Option 3 stands in significant tension with the approach taken by Congress and other provisions of the Guidelines toward offenses committed while under criminal justice supervision and court order—18 U.S.C. § 3147 (offense committed while on release), §3C1.3 (commission of offense while on release), §4A1.3, cmt. n.2(A)(iv) (upward departure for offense committed while on bail or pretrial release for another serious offense), and §2B1.1(b)(9) (fraud in contravention of prior judicial order). As Application Note 8(C) to §2B1.1(b)(9) states, "[a] defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment." Indeed, § 3147, §3C1.3, §4A1.3, and §2B1.1(b)(9) embody Congress's

[61] Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (1987) at 41-42.

and the Commission's policy of heightening penalties for offenses committed while under court order and supervision and for offenses committed while under any criminal justice sentence, in disregard for judicial authority. The placement of the commission of the instant offense while under criminal justice sentence as a mere example in application notes will lessen accountability for such conduct.

At minimum, if Option 3 is adopted, the Commission should preserve status points at least for recent and violent prior offenses. The Commission's 2021 study on recidivism of federal offenders shows that nearly one-half (49.3%) were rearrested within eight years of release, and 35.4% recidivated within three years of release[62]—the typical length of time of supervised release for defendants released from prison. Thus, for specific deterrence purposes, the definition of "recent" for status points purposes should be at least three years. The 2021 recidivism study also shows that those sentenced for a federal firearms offense had the highest rearrest rate, at 70.6 percent, followed by those sentenced for robbery, 63.2%, and that those who were released following sentencing for a violent offense were more likely to be rearrested than non-violent offenders, at 59.9 percent compared to 48.2 percent.[63] [64]

B. Zero-Point Offenders

The Commission has proposed adding a new criminal history category for those offenders with no criminal history points. Since the Guidelines Manual was first issued in 1987, there have been six criminal history categories. The proposed amendment would provide for a one- or two-level reduction for offenders who fall within the new category. The Commission has proposed three options, under any of which, the number of cases affected would be significant and far-reaching. In Fiscal Year 2021, 17,491 federal offenders had zero criminal history points. This amounts to 32.6% of all federal offenders for that year. According to the Commission's own data, the proposed amendments would have affected between approximately 13,203 and 17,491 defendants, depending on the option ultimately selected. As a result, the proposed amendment is one of the most significant under consideration.

While the Department appreciates the Commission's interest in leniency for first-time offenders, the proposal would sweep in defendants who committed serious offenses, including hate-based or civil rights offenses, public corruption offenses, national security offenses, and serious economic and corporate crimes. The proposed amendment would also offset in part the Commission's proposed amendment to raise the base offense level for §2A2.3, which covers sexual abuse of a ward. As the Department has explained in previous submissions, defendants sentenced under these Guidelines—who are largely BOP employees or other federal law enforcement officers—typically do not have a prior criminal history, and the Commission's proposal targeting zero-point offenders would therefore cover them.

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[62] *Id.* at 4.

[63] *Id.* at 32.

[64] If the Commission adopts Option 3, it should make an additional conforming change to Application Note 8(C) of §2B1.1. That application note references the status points provision as follows: "This enhancement does not apply if the same conduct resulted in an enhancement pursuant to . . . a violation of probation addressed in §4A1.1 (Criminal History Category))."

District courts already can—and regularly do—vary downward for zero-point defendants, and the Department will continue to support such departures in appropriate cases. The proposed amendments would sweep too broadly and introduce unnecessary complexity and litigation. The Department therefore opposes the proposed amendment under any of the proposed options.

1. The Proposed Amendment Would Add Unnecessary Complexity and Litigation

The proposed amendment appears to be based on a concern that the Guidelines' range for offenders with limited or no criminal history is too high *and* that these offenders are being sentenced to terms of imprisonment greater than necessary. An examination of the Commission's data shows otherwise. The current Guidelines and statutory sentencing law already provide mechanisms—downward departures and variances—that sentencing courts regularly use to provide the reductions intended by the proposed amendment.

The Commission's data shows that in Fiscal Year 2021, the average low end of the Guidelines range for defendants with zero criminal history points and zero prior convictions called for 40 months of imprisonment.[65] The Commission's data also shows that the actual average sentence imposed on these same offenders is 29 months,[66] which equates to an offense level of 18. Thus, district courts are, on average, effectively already departing three levels for the zero-point offenders. This equates to an eleven-month reduction or roughly 27%. In fact, according to the Commission's data for Fiscal Year 2021, only 38% of offenders with zero prior convictions were sentenced within the recommended Guidelines range. Moreover, many of these within-Guidelines range zero-point offenders are in Zones A and B and thus are already eligible for a probationary sentence. Thus, the vast majority of the offenders targeted by the proposal are already receiving below Guidelines sentences or are already eligible for probation.

All of the options under consideration, by contrast, would add a significant layer of complexity and litigation to the sentencing process. Under all options, the Commission would adopt up to six different exclusionary criteria for the parties to debate whenever a defendant has zero criminal history points. Each would lead to litigation based on both legal issues and factual challenges. For example, one of the proposed exclusionary criteria relates to the financial hardship caused by the offense. In 2015, §2B1.1(b)(2)(A)(iii) was amended to include, for the first time, the same language: "caused substantial financial hardship." Since then—just over seven years—there have been over 400 published appellate opinions that discuss or address this language. Similarly, objections to and litigation surrounding the application of leadership role enhancements are everyday occurrences in federal courts. The same is true for use of a dangerous weapon when, for example, a firearm is present with or possessed by the offender but not fired. In short, given the other avenues courts can use—and are using—to account for offender characteristics, the costs of this proposed amendment will outweigh any sentencing benefit.

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[65] U.S. Sentencing Commission, Public Data Presentation for Proposed Criminal History Amendment, at 41, *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230112/20230120_DB_Criminal-History.pdf (document accompanying the Commission's video presentation of proposed 2023 criminal history amendments).

[66] *Id.*

2. The Proposed Amendments Will Adversely Affect Prosecution of Crimes for Which General Deterrence is a Primary Factor

An across-the-board departure for those with zero criminal history points may reduce general deterrence in certain kinds of prosecutions in which general deterrence is a primary factor, including economic crimes. The Commission has previously recognized that "the definite prospect of prison, even though the term may be short, will serve as a significant deterrent in economic crime cases, particularly when compared with pre-guidelines practice where probation, not prison, was the norm." USSG Ch. 1 Pt. A(4)(d) (Probation and Split Sentences). Courts have agreed. *See United States v. Engle*, 592 F.3d 495, 502 (4th Cir. 2010) ("Given the nature and number of tax evasion offenses as compared to the relatively infrequent prosecution of those offenses, we believe that the Commission's focus on incarceration as a means of third-party deterrence is wise.").

History shows that those convicted of economic crimes tend to have little to no criminal history. Thus, the proposed amendments will result in lower Guidelines ranges and thus potentially lower sentences for those offenders by disregarding the size or scope of the crime—thus jettisoning the Commission's decades-long determination that certain fraud crimes warrant serious treatment and its recognition that general deterrence is critical given the sheer breadth of the potential crime problem.

3. A Two-Level Reduction Conflicts with the Structure of the Guidelines.

The Commission's proposal for a two-level decrease is particularly problematic, given the structure of the Guidelines and the Sentencing Table. As currently constructed, the Sentencing Table typically equates an increase in a criminal history category (such as from Criminal History Category I to II) with a one-level increase in the Guidelines' range. For example, if an offender has a Total Offense Level of 30 and a Criminal History Category of I, the Guidelines' range is 97-121 months. With the same Total Offense Level, but a Criminal History Category of II, the Guidelines range bumps up to 108-135 months. Equally, if the Total Offense Level is increased by one level to 31, with a Criminal History Category of I, the Guidelines range is 108-135 months. In short, a one-level increase in the Total Offense Level is designed to have the same impact as a one category jump in the Criminal History Category. Providing for a two-level decrease if an offender falls within a newly created Criminal History Category 0 is inconsistent with the Sentencing Table design. A one-level decrease is the only structurally sound one if the proposed new category is adopted.

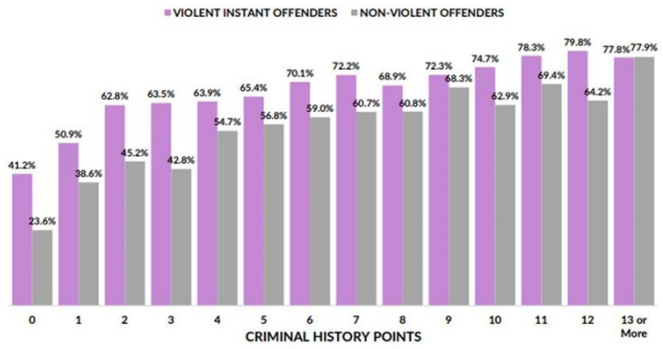
4. If a Decrease is to be Granted, it Should be Limited to "True Zeros" with an Expanded Set of Exclusionary Criteria

As the Commission's own proposal (under any option) acknowledges, and as judges across the country have shown, a departure is not warranted for every offender who has a zero criminal history score. Instead, if the Commission is to enact any of the options, it should do so for a smaller subset of offenders with zero criminal history points.

If the Commission seeks to enact the proposed amendment, the Department recommends limiting application to those who are "true zeros" in terms of criminal history scores (as proposed in Option 1) and using an expanded set of exclusionary criteria. If the Commission uses an approach that awards the reduction to anyone with zero points, regardless of the number of prior convictions, hundreds of convicted violent criminals will benefit. For example, according to the Commission's own data, in 2021, of those with zero criminal history points, there were 11 convicted murderers, 119 offenders with sexual assault convictions, 53 offenders convicted of robberies, and 454 offenders with convictions for assault. But, because of the timing of these convictions, those prior convictions did not "score" for purposes of criminal history calculations.

Similarly, the Department recommends expanding the exclusionary criteria to include those who have committed violent crimes not captured under the existing proposals—such as federal assault and civil rights offenses, which may be committed through intimidation that does not involve the use of violence or a credible threat of violence; arson, which may be committed without a dangerous weapon; and conspiracy, attempt, and solicitation of homicide and other violent crimes, which are not covered by the proposed criteria—whether as their instant offense of conviction or through prior uncounted criminal history. The Commission's chart below shows a vast disparity in recidivism rates for those who engage in violent crimes, as opposed to non-violent offenders, even for zero-point defendants. Over 41% of those with zero points who commit a violent crime are rearrested within eight years of release from custody.

Figure 28. Rearrest Rates by Criminal History Points for Violent Instant and Non-Violent Federal Offenders Released in 2010



The Department also proposes additional exclusionary criteria based on the type of offense of conviction. This includes terrorism offenses, civil rights offenses, hate offenses, and all child sex offenses, including possession of receipt of child pornography and child sexual abuse material trafficking that would not be included in the definition of "covered sex crime." This also includes economic offenses, for which general deterrence is a primary factor.

Finally, the Department urges the Commission to include, in the exclusionary criteria, cases involving vulnerable victims, as defined in §3A1.1(b), and cases involving loss amounts beyond a certain threshold, as determined under §2B1.1 or §2T4.1. There are many cases involving an egregious amount of loss that the offender caused, where the victim is the government alone (*i.e.,* health care fraud cases), meaning that the already proposed exclusionary

criteria regarding the number of victims and the substantial hardship placed upon the victims would not apply. In such cases, given the nature of the offenses—which typically occur over a substantial period of time and cause a significant loss to the U.S. taxpayer—an award of a one-or-two level reduction would be inappropriate.

Alternatively, any case where the total offense level exceeds 30 should be excluded from the reduction.

C. Incorporating 28 U.S.C. § 994(j)

The Commission has also proposed adding new commentary regarding the appropriateness of a non-incarceration sentence for certain zero-point offenders. This proposal is based on language taken from 28 U.S.C. § 994(j), which directs the Commission to "[e]nsure the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." The Department opposes this proposed amendment because the Guidelines already reflect the appropriateness of a non-incarceration sentence for non-serious offenses through the operation of the sentencing table, particularly with respect to sentencing zones and the total offense levels.

Sections 5B1.1 and 5C1.1 already make clear when a non-incarceration sentence is authorized and appropriate. This is done through reference to the zones set forth in the sentencing table (Zones A, B, C, and D). For example, §5C1.1(b) states that "if the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required." Similarly, Guidelines exist for the very purpose of determining an offense level that reflects the overall seriousness of the offense. As the Supreme Court and numerous other courts have stated "[g]uideline offense levels are designed to reflect the seriousness of the offense for which a convicted criminal is being sentenced." *United States v. Savin*, 349 F.3d 27, 37 (2d Cir. 2003); *see also Nichols v. United States*, 511 U.S. 738, 740 n.3 (1994). Higher offense levels equate with more serious offenses, while lower scores equate with less serious offenses. The total offense level, when combined with a criminal history category, provides for placement on the sentencing table within one of the zones.

The proposal also does not specify how to discern which offenses are "otherwise serious."[67] Without clearer guidance, this provision could be misconstrued as a generally applicable override of the Guidelines. Some judges may use the total offense level as a guide. Others will use their own methodology. This will increase disparity and undermine the very purposes of the Commission, as articulated in the Sentencing Reform Act.

The proposed amendment is also at odds with the Guidelines Manual's ordinary approach. The Guidelines generally do not dictate the type of sentence that should be imposed. Instead, they provide the court with the appropriate considerations and suggested parameters. One of the Commission's proposed options, however, explicitly instructs the court when a

[67] Notably, the Commission has previously recognized that certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, are and, thus should be considered, "otherwise serious offense[s] under Section 994(j)." USSG Ch. 1 Pt. A(4)(d) (Probation and Split Sentences).

sentence of non-incarceration is appropriate. We do not believe this is what § 994(j) intended. Section 994(j) instructs the Commission to "[e]nsure that the guidelines *reflect*" the appropriateness of such a sentence (emphasis added). The Commission can achieve this end through appropriate construction and application of the guidelines leading to a recommended Guidelines range.

Even if the Commission adopts the "generally appropriate" language for zero-point offenders in Zones A and B, the Department opposes the "generally appropriate" or "may be considered" language for zero-point offenders who are in Zones C and D. The Department would be happy to provide the Commission with the many examples of zero-point defendants in Zones C and D who meet the more restrictive eligibility criteria under Option 1 but have committed significant economic, public corruption, drug trafficking, racketeering, firearms, national security, and other serious offenses rendering a non-incarceration sentence inappropriate.

D. Impact of Simple Possession of Marijuana Offenses

The Department supports the proposed amendment to insert, in Application Note 3 to §4A1.3, "criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person," as an additional example when a downward departure may be warranted. The President has made clear his views that "no one should be in jail just for using or possessing marijuana," and on October 6, 2022, he issued a pardon proclamation meant to "help relieve the collateral consequences arising from these convictions."[68] The Commission's proposal would accord with that sentiment, and also account for the twenty-one states and territories that have removed legal prohibitions, including criminal and civil penalties, for the possession of small quantities of marijuana for recreational use.

The Commission has requested comments about whether it should provide more guidance on this proposed departure. To provide guidance on determining "personal use, without an intent to sell or distribute it to another person," we recommend adding the following sentence to proposed Application Note 3(A)(ii) (similar to Application Note 2(C)'s guidance for determining upward departures for tribal convictions): "In determining whether, or to what extent, a downward departure based on a possession of marihuana for personal use is appropriate, the court shall consider the factors set forth in §4A1.3(a) and, in addition, may consider relevant factors such as the following: the nature of the original charges, the facts surrounding the offense (including the quantity of marihuana possessed, the manner in which the marihuana was packaged, the presence of large quantities of cash, the presence of drug ledgers, the possession of firearms, and other evidence of drug trafficking activity), whether the defendant's conviction was the result of a plea agreement that involved the dismissal of drug trafficking charges, and whether the offense was subsequently pardoned."

[68] Statement from President Biden on Marijuana Reform (October 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/.

7. Alternatives to Incarceration Programs

The Commission published two issues for comment relating to alternatives-to-incarceration (ATI) programs. First, it invited comment on how to approach any study relating to this priority.[69] Second, it invited comment on whether the Guidelines should be amended "to address court-sponsored diversion and alternatives-to-incarceration programs."[70] Relatedly, the Commission asked whether such amendments should be considered "during this amendment cycle, or whether it should first undertake further study of court-sponsored diversion and alternatives-to-incarceration programs."[71]

The Department strongly supports the use of ATI programs, including pretrial diversion programs and problem-solving courts. Indeed, the Department has taken steps to encourage U.S. Attorneys' Offices to consider pretrial diversion programs. In his December 16, 2022, memorandum regarding charging, pleas, and sentencing, the Attorney General stated that every U.S. Attorney's Office "should develop an appropriate pretrial diversion policy."[72] And on February 10, 2023, the Department updated the Justice Manual to reflect that pretrial diversion programs "provide prosecutors with another tool – in addition to the traditional criminal justice process – to ensure accountability for criminal conduct, protect the public by reducing rates of recidivism, conserve prosecutive and judicial resources, and provide opportunities for treatment, rehabilitation, and community correction." JM 9-22.010. The Justice Manual now reflects that "[e]ach U.S. Attorney's Office shall develop and implement a policy on the use of pretrial diversion appropriate for the Office's district." *Id.*

Consistent with those directives, U.S. Attorneys' Offices are supporting and participating in specialty and diversion courts across the country. These courts vary by district in terms of their focus (for example, the types of cases and characteristics of defendants) and at what point in the criminal justice process they occur (whether before charging, after charging, or after pleading guilty). To use one example, since 2012, more than 300 defendants have successfully completed the Central District of California's Conviction and Sentence Alternatives (CASA) program—a post-guilty plea diversion program that provides intensive rehabilitative services to selected defendants who meet a set of admissions criteria. CASA is a 12- to 24-month program designed primarily for low-level, nonviolent offenders who have substance use and/or mental health disorders and relatively modest criminal histories. Successful completion of the program results either in dismissal of all charges or in a noncustodial sentence for more serious offenders.

Additionally, on November 18, 2022, the Associate Attorney General emphasized[73] the importance of these types of courts, highlighting the following examples:

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[69] U.S.Sentencing Commission, Issues for Comment: Alternatives-to-Incarceration Programs, 1, *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230112_prelim_RF.pdf.
[70] *Id.*
[71] *Id.*
[72] *General Department Policies Regarding Charging, Pleas, and Sentencing*, Memorandum of the Attorney General, 2 (Dec. 16, 2022), *available at* https://www.justice.gov/media/1265326/dl?inline.
[73] Associate Attorney General Vanita Gupta Delivers Remarks at ABA Criminal Justice Section Awards Luncheon (Nov. 18, 2022), *available at* https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-aba-criminal-justice-section.

> In the Eastern District of Pennsylvania, the Strategies that Result in Developing Emotional Stability program, known as "STRIDES," started as a pilot project over a decade ago. Now permanent, STRIDES is an alternative or "problem-solving" court designed to address the needs of individuals diagnosed with severe and persistent mental illness. The STRIDES case team is comprised of two Magistrate Judges who oversee the program, representatives from the U.S. Attorney's Office, the Federal Community Defenders, private defense counsel, U.S. Pretrial Services, and U.S. Probation. Here, again, are the partnerships necessary for equal justice—folks from different parts of the system working together towards better outcomes for individuals and ultimately, for communities.
>
> The District of Utah is home to the nation's first federal mental health court—Reentry Independence through Sustainable Efforts, or "RISE." And there too, it is stakeholders across the system that make it work, from different parts of the Justice Department, including the U.S. Attorney's Office and Bureau of Prisons, to judges, defense attorneys, and community partners who provide classes and supports to participants and their families. The District of Utah is also home to the first federal veterans court in the nation, a well-regarded drug court, and a tribal court . . . .

The Department also supports programs that are designed to address the needs of veterans, and will support a cross-site evaluation of veterans treatment courts to identify best practices, standards, and opportunities to increase the efficacy of these models across the country.[74] The Department's Office for Access to Justice participates in quarterly meetings with the Servicemembers and Veterans Initiative focused on policy and targeted outreach, such as medical-legal partnerships and diversion programs, for underserved populations of veterans.

Currently, the Department, through the Office of Justice Programs, invests in a number of state and local diversion models that connect individuals with behavioral health disorders to community-based resources and alternatives to arrest or incarceration through grants.[75] In addition to providing ongoing support for these programs, the Department is initiating support for evaluations of other models that divert individuals with mental health disorders away from the justice system and toward community-based resources, including 911 dispatch diversion models and co-responder models.[76]

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[74] U.S. Dep't of Justice, Nat'l Inst. of Justice, *NIJ Multisite Impact and Cost-Efficiency Evaluation of Veterans Treatment Courts* (Jul. 2022), *at* https://nij.ojp.gov/funding/awards/15pnij-22-gk-00035-vtcx.

[75] *See* U.S. Dep't of Justice, Bureau of Justice Assistance, *Comprehensive Opioid, Stimulant, and Substance Abuse Program (COSSAP)* (Sep. 2020), https://bja.ojp.gov/program/cossap/overview; *See* U.S. Dep't of Justice, Bureau of Justice Assistance, *Justice and Mental Health Collaboration Program (JMHCP)* (May 2022), https://bja.ojp.gov/program/justice-and-mental-health-collaboration-program-jmhcp/overview.

[76] *See, e.g.,* U.S. Dep't of Justice, Nat'l Inst. of Justice, *Evaluation of Harris Center Crisis Call Diversion Program* (Sep. 2022), *at* https://nij.ojp.gov/funding/awards/15pnij-22-gg-03575-ress; U.S. Dept' of Justice, Nat'l Inst. of Justice, *Integrated Law Enforcement and Mental Health Responses in Tucson: An Impact and Cost Benefit Analysis* (Sep. 2022), *at* https://nij.ojp.gov/funding/awards/15pnij-22-gg-03580-ress; U.S. Dept' of Justice, Nat'l Inst. of Justice, *An evaluation of the SEPTA police SAVE initiative* (Sep. 2022), at https://nij.ojp.gov/funding/awards/15pnij-21-gg-02717-ress.

We agree that further study is necessary to build on the work of the 2017 Commission report,[77] and continue to evaluate the effects of ATI programs. In the 2017 report, the Commission noted that its "study has been qualitative rather than quantitative at this juncture because of a lack of available empirical data about the programs."[78] Such a qualitative focus made sense in light of the "emerging" nature of the federal programs at the time.[79] As noted on the Sentencing Commission's webpage[80] on ATI and diversion programs (summarizing information from the Federal Judicial Center), the number of these programs has increased significantly since 2008:

> The number of federal problem-solving courts began expanding in the late 2000s. In 2008, 18 federal problem-solving courts were operating. Three years later, the number had tripled to 54 in 2011. The number more than doubled (to 110) by 2016. The largest single-year of expansion was in 2015 when 21 programs began operating . . . . In October 2022, the FJC directory reported 147 federal problem-solving courts operating in 64 federal judicial districts.

With respect to the first issue on which the Commission invited comment, we have four recommendations regarding the study of ATI programs. First, we recommend that the Commission study the characteristics, practices, and objectives of programs so as to categorize and compare the different programs that currently exist in the federal criminal justice program. Programs differ widely in their focus, selection criteria, duration, degrees of supervision, oversight, operating authority, resource commitment (including staff size and budgets), and internal measures of success. A clear and detailed identification of the nature of the existing programs will assist in the understanding of the effects of these programs and identification of the key drivers of positive outcomes that contribute toward addressing root causes of criminal conduct and reducing recidivism. As a 2019 study on federal ATI programs recommended, "more research is needed to understand what factors influence the likelihood that an individual will complete an ATI program successfully, thus providing the greatest cost-benefit."[81]

Second, we recommend a longitudinal study on the recidivism outcomes of existing programs. The 2019 study on federal ATI programs (which examined the performance of 534 participants in seven districts), as well as its follow-up 2021 study (with 1,000 participants in thirteen districts), focused on short-term outcomes only. As the 2019 study recommended:[82]

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[77] U.S. Sentencing Commission, *Federal Alternative-to-Incarceration Court Programs* (September 2017), *at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf.
[78] *Id.* at 2.
[79] *Id.*
[80] U.S. Sentencing Commission, *Alternatives to Incarceration and Diversion Programs*, *at* https://www.ussc.gov/guidelines/primers/alternatives-incarceration-and-diversion-programs (footnote omitted).
[81] Kevin T. Wolff, et al., *Pretrial Services, U.S. Courts, A Viable Alternative? Alternatives to Incarceration across Seven Federal Districts* 11 (2019), *available at* https://www.nyept.uscourts.gov/sites/nyept/files/QL%20-%20ATIStudyFullReport%282019%29.pdf; *see also* Laura Baber et al., *Expanding the Analysis: Alternatives to Incarceration across 13 Federal Districts* 4, 11-12 (2021) at https://www.uscourts.gov/sites/default/files/85_3_1_0.pdf ("[T]here remains limited evidence of long-term efficacy of federal ATI programs.").
[82] Wolff, *supra* n.82, at 59.

> More research is needed on the impact of ATI programs and its longer-term effect on recidivism, especially recidivism by those whose cases were dismissed or who served a term of incarceration, with or without supervised release. More elusive, but important to understand are the more qualitative indications of long-term positive changes in defendants' lives, such as relationships, employment, education, access to healthcare, and financial independence.

Third, we recommend that the Commission conduct in-depth studies of representative ATI programs to understand and evaluate those programs' strengths and weaknesses. In addition to any national study that may be conducted, a study of historical data and defined prospective data will help better understand the effectiveness of these programs and identify features that contribute toward successful reentry and recidivism reduction. For example, the CASA program in the Central District of California has secured a research proposal for development of a standardized database system that will enable collection and analysis of information about program participants in ways that are specific to CASA and allow for comparison with reliable control groups. The proposed database and accompanying study remain undeveloped due to funding issues. Studies using such a database may be conducted in major federal ATI programs.

Finally, we recommend a comprehensive study of the data regularly captured by the Commission on the offenders who are admitted into federal ATI programs—*e.g.*, demographic data, offense types, offense levels, criminal histories, and procedural postures. Such a study will identify key trends, areas of emphases and neglect, and any recognizable biases at work, while promoting greater procedural fairness and transparency.

As for the second issue, we believe that the Commission should defer a decision to amend the Guidelines until the results of the study contemplated in the first issue are available. Given the relatively limited information available at this stage regarding federal ATI programs, it may be premature to make changes to the Guidelines. Indeed, as the Commission's first issue illustrates, many questions remain about how to structure such a needed study. In the meantime, district courts can and should consider on a case-by-case basis the appropriate treatment of individuals who successfully complete court-sponsored diversion programs.

8. Fake Pills

Currently, §2D1.1(b)(13) provides for a four-level enhancement if "the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue." The Commission proposes to amend §2D1.1(b)(13) to add an alternative two-level enhancement for cases where the defendant 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. The Commission also published issues for comment, asking whether the proposed *mens rea* requirement is appropriate; whether the Commission should instead make §2D1.1(b)(13)(B) an offense-based enhancement (as opposed to exclusively defendant-based); whether the Commission should make the enhancement applicable to other synthetic opioids; and whether there is an alternative approach that the Commission should consider.

We thank the Commission for working with the Department, including the Drug Enforcement Administration (DEA), to address the ongoing crisis of overdose deaths due to fentanyl. In April 2018, the Commission adopted §2D1.1(b)(13) in response to the growing crisis of overdose deaths from synthetic opioids, noting that in 2015—the most recent year for which data were available—there were 9,580 deaths overdose deaths from synthetic opioids, including fentanyl.[83] The problem is significantly worse now; in the twelve months leading up to August 2022, there were 73,102 such deaths—an increase of 663 percent.[84] Indeed, in his State of the Union Address, President Biden noted that "fentanyl is killing more than 70,000 Americans a year," requested a surge to "stop pills and powder at the border," and asked for "strong penalties to crack down on fentanyl trafficking."[85]

The President specifically mentioned "pills" in his State of the Union address because of the acute threat posed by fake pills laced with fentanyl. The DEA reports that it seized more than 50 million fake pills during the 2022 fiscal year and that 6 out of 10 fentanyl-laced fake pills now contain a potentially lethal dose.[86] Nearly every government agency can and should play a role in addressing the current crisis. The Commission can help by putting traffickers on notice that they are risking increased punishment by selling fake pills.

The Department urges the Commission to alter the *mens rea* requirement applicable to these offenses, which will help better deter the distribution of fake pills likely to be deadly. Further, the Department suggests that the enhancement be applicable to all synthetic opioids, in addition to fentanyl and fentanyl analogues.

A. The Enhancement Should Adopt a Rebuttable Presumption for the *Mens Rea* Requirement

The Department believes the Commission should consider amending the *mens rea* requirement. Although most pills sold on the black market are laced with fentanyl, the current four-level enhancement applies infrequently: of 5,711 defendants who were sentenced for trafficking in fentanyl or fentanyl analogues between fiscal years 2019 and 2021, only 57

[83] USSG Appendix C, Amendment 807 ("the Centers for Disease Control and Prevention reported that there were 9,580 deaths involving synthetic opioids (a category including fentanyl) in 2015, a 72.2 percent increase from 2014").

[84] Neeraj Gandotra, M.D., Chief Medical Officer, SAMSA, testimony House Committee on Energy and Commerce Subcommittee on Health Hearing titled "Lives Worth Living, Addressing the Fentanyl Crisis," February 1, 2023 (reporting 73,102 overdose deaths attributable to fentanyl and other synthetic opioids during the 12-month period ending in August 2022). The Commission's own data also reflect these trends in cases sentenced. In July of 2022, the Commission reported that fentanyl trafficking offenders have increased by 950.0% since the 2017 Fiscal Year. Quick Facts on Fentanyl Trafficking Offenses, FY 2021.

[85] Remarks by President Biden, State of the Union Address (Feb. 7, 2023), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-by-president-biden-in-state-of-the-union-address-2/ ("So let's launch a major surge to stop fentanyl production and the sale and trafficking. With more drug detection machines, inspection cargo, stop pills and powder at the border. …Working with couriers, like FedEx, to inspect more packages for drugs. Strong penalties to crack down on fentanyl trafficking.").

[86] Statement of Anne Milgram, Administrator, DEA, Before the Senate Committee on Foreign Relations, February 15, 2023; *see also* DEA, One Pill Can Kill..

received the four-level increase at (b)(13) for misrepresenting fentanyl as another substance.[87] In our experience, subsection (b)(13) is applied so infrequently in part because the current enhancement requires the government to demonstrate actual knowledge that the substance contains fentanyl or a fentanyl analogue. *See United States v. Allen*, 2022 WL 7980905 (6th Cir. Oct. 14, 2022). Although it is common knowledge among drug traffickers that most fake pills contain fentanyl, in practice, Department prosecutors have reported that it is difficult to prove that the defendant knew that the specific pills that they trafficked contained fentanyl, as required for the enhancement, because defendants often claim that they do not know that the pills contain fentanyl, and because traffickers use vague, coded language that makes it difficult to establish that the defendant was discussing fentanyl.

To reflect that reality, the Department recommends that the *mens rea* requirement take the form of a rebuttable presumption. That is, the enhancement would apply presumptively, but a defendant would be permitted to prove that he lacked actual or constructive knowledge, with the defendant bearing the burden of such proof. Such a rebuttable presumption would properly reflect the fact that illegal drug traffickers should know that there is an extremely high probability that the black-market pills they are selling contain deadly fentanyl, and that any proof that the defendant was not (and could not have been) aware of the fact that the pill contains fentanyl lies primarily with the defendant. We thus suggest that any enhancement apply "unless the defendant establishes by a preponderance of the evidence that the defendant did not know, and had no reason to believe, that the substance contained fentanyl or a fentanyl analogue."

B. If the Commission Proceeds With a "Reason to Believe" Standard, it Should Define the Term in the Guidelines

If the Commission does adopt a "reason to believe" standard, it would be helpful to define the term. Although the phrase "[r]eason to believe" appears elsewhere in the Guidelines, for example in §2K2.1, it is not defined, and it has arguably been interpreted differently in different contexts. *See United States v. McKenzie*, 33 F.4th 343, 345 (6th Cir. 2022) (discussing meaning of phrase "reason to believe" in the context of the straw-purchaser enhancement). Thus, to avoid inconsistent interpretations, it would be helpful for the Commission to define the term.

One option would be to define the term to require specific and articulable facts, combined with reasonable and common-sense inferences from those facts, that provide an objective basis for believing that the pills are not legitimately manufactured. The Commission could articulate some specific factors that courts should consider when making this evaluation, including the facts and circumstances surrounding the transaction, the price of the pills, the quantity involved, the involvement (or not) of a physician or pharmacist in the transaction, the existence of a written prescription, standard dosage amounts, and other factors that would suggest that the pills were not actually a legitimately manufactured drug. The Commission could also make clear that "reason to believe" standard is not higher than probable cause.

[87] U.S. Dept. of Just., Criminal Division, Office of Policy and Legislation, analysis of USSC Data file.

C. Misrepresentation

The Department also recommends that the Commission consider amending the marketing requirement of both the current enhancement and the newly proposed enhancement. Both require proof related to the defendant's marketing of or representations about the drug involved in the offense. Unfortunately, this formulation does not reflect the reality of the synthetic opioid crisis. As noted above, it is "fake pills" that are driving overdose deaths in America. The market is flooded with pills that appear to be legitimate prescription drugs, either because they have markings that are extremely similar to the markings of a legitimate prescription drug, or—more commonly—because they have markings that are similar enough to legitimate markings to confuse consumers, but do not perfectly match the legitimate pills. Thus, for example, legitimate 30 milligram oxycodone pills are generally blue, with the marking "M 30"; counterfeit pills might have the same "M 30" marking but be rainbow in color. A defendant selling such rainbow-colored pills might not be considered to be "represent[ing] or market[ing]" the pills "as a legitimately manufactured drug." But consumers purchasing the rainbow-colored pills (or even pills without specific markings) might nonetheless reasonably believe that they are purchasing a relatively safe substance produced in a quality-controlled environment, when in fact they are buying fake pills that are very likely to be laced with fentanyl and may contain a lethal dose.

Moreover, as written, the enhancement might apply more regularly to a street-level dealer who dupes a customer about the identity of the drug, rather than to the high-level traffickers who distribute fake pills without making any representations about their content. In the Department's view, the higher-level traffickers who distribute these deadly pills are equally if not more culpable than the street-level dealer and should be subject to the same enhancement. Finally, a defendant convicted of possessing a large quantity of fake pills, with intent to distribute, may not be subject to any enhancement if the government cannot establish that the defendant has yet affirmatively marketed or misrepresented the drugs.

To address those concerns, we recommend that, instead of applying only when the defendant "represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue," the enhancement apply when "the offense involved a substance that would appear, to a reasonable person, to be legitimately manufactured, or that the defendant represented or marketed as legitimately manufactured, but was in fact another mixture or substance containing fentanyl or a fentanyl analogue."

D. Section 2D1.1(b)(13) Should be Broadened

Finally, the Commission asks whether (b)(13) should be broadened beyond fentanyl and fentanyl analogues to include synthetic opioids. Although the vast majority of fake pills encountered by the DEA contain fentanyl, the DEA has seen an increasing number of fake Xanax pills (3,000 in the last three years) containing Protonitazene and Metonitazene, both of which are nitazenes, a class of synthetic opioids (benzimidazole-opioids) which may be more potent than fentanyl. The DEA has encountered other synthetic opioids (besides fentanyl and fentanyl analogues) in pills, including Isotonitazene, N-Pyrrolidino Etonitazene, Tapentadol, Etodesnitazene, U-47700, and Flunitazene. The DEA has also encountered fake pills containing xylazine, a non-opioid sedative commonly used in veterinary medicine, and for which overdose

is usually fatal in humans. And the DEA regularly encounters fake pills containing methamphetamine, usually marked AD 10, for Adderall.

But the most critical data point on which the Commission should base its decision is the CDC estimate that during the 12 months ending in August of 2022, there were 73,102 fatal overdoses due to synthetic opioids.[88] To address this crisis head-on, we urge the Commission to expand (b)(13) to include all synthetic opioids. If, however, the Commission elects to focus on fentanyl and fentanyl analogues for the time being, we ask that the Commission monitor the situation during the next amendment cycle, and propose additional changes if appropriate, given updated and available scientific data on overdose deaths and synthetic opioids, and possibly other substances found in pills associated with deadly overdoses.

Below we have provided recommended Guidelines language (new language in underline) consistent with the discussion and our recommendations above. Once again, we welcome the opportunity to continue engaging with the Commission as it considers appropriate changes to the Guidelines.

> (13) If the defendant (A) knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels<u>; or (B) If the offense involved an illicitly-manufactured substance that would appear, to a reasonable person, to be legitimately manufactured, or that the defendant represented or marketed as legitimately manufactured, but was in fact a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide), a fentanyl analogue, or a synthetic opioid, increase by 2 levels, unless the defendant establishes by a preponderance of the evidence that the defendant did not know, and had no reason to believe, that the substance contained fentanyl, a fentanyl analogue, or a synthetic opioid.</u>

The commentary could also make clear that in assessing whether a mixture or substance would appear to a reasonable person to be legitimately manufactured, the court may consider any relevant evidence, including but not limited to the form of the mixture/substance (such as a tablet or capsule), the manner in which the drug was marked, labelled or packaged, or any statements or representations made by the defendant or others about the mixture or substance. The commentary could also make clear that the lack of markings or poor-quality markings would not preclude the applicability of this enhancement.

[88] SAMSA, *supra*.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together.

Sincerely,

Jonathan J. Wroblewski

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FEDERAL DEFENDER
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March 14, 2023

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

Re: Public Comment on Proposed 2023 Amendments

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide comments on the proposed 2023 amendments.[1] Enclosed are our comments on the following proposals, with previously filed witness statements attached:

Proposal 1: Amendments to §1B1.13

Witness Statement of Kelly Barrett

Proposal 2: First Step Act—Drug Offenses

Excerpted Witness Statement of Michael Caruso

Proposal 3: Firearms Offenses

Witness Statement of Michael Carter

Proposal 4(A): Acceptance of Responsibility

Excerpted Witness Statement of Michael Caruso

Proposal 4(B) & 6: Controlled Substance Offenses and Career Offender

Excerpted Witness Statement of Michael Caruso and Witness Statement of Juval O. Scott

Proposal 5: Crime Legislation

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[1] *See* 88 Fed. Reg. 7180-01, 2023 WL 1438480 (Feb. 2, 2023).

Proposal 7: Criminal History

Witness Statement of Jami Johnson

Proposal 8: Acquitted Conduct

Witness Statement of Melody Brannon

Proposal 9: Sexual Abuse Offenses

Witness Statement of Heather E. Williams

Proposal 10: Alternatives-to-Incarceration Programs

Proposal 11: Counterfeit Pills

Excerpted Witness Statement of Michael Caruso

We appreciate the Commission's consideration of our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,
/s/ Michael Caruso
Michael Caruso
Federal Public Defender
Chair, Federal Defender
Sentencing Guidelines Committee

Sentencing Resource Counsel
Federal Public and Community
Defenders

Enclosures

cc (w/encl.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Jonathan J. Wroblewski, Commissioner *Ex officio*
Kenneth P. Cohen, Staff Director
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Federal Public and Community Defenders Comment on Proposal to Amend USSG §1B1.13 (Proposal 1)

March 14, 2023

Table of Contents

At the recent hearing on reductions in sentence under 18 U.S.C. § 3582(c)(1)(A), the witness who spoke on behalf of Federal Public and Community Defenders (Kelly Barrett, First Assistant Federal Defender for the District of Connecticut) focused on the amended §1B1.13 as proposed. As Attorney Barrett said both in her written testimony (attached) and at the hearing, Defenders are generally very pleased with the proposed amendments. We have suggested changes to a few provisions, to ensure that they encompass all circumstances that may be extraordinary and compelling, and we've also explained why we think the third option for the proposed subsection (b)(6) is best. But the Commission is on the right track.

This Comment builds on Attorney Barrett's testimony by speaking to three matters that Defenders have not yet addressed. First, the Comment answers the legal questions the Commission posed in its issues for comment on §1B1.13:

- whether the proposed amendment—in particular proposed subsections (b)(5) and (b)(6)—exceeds the Commission's authority under 28 U.S.C. § 994(a) and (t), or any other provision of federal law; and

- whether the proposed amendment—in particular proposed subsections (b)(5) and (b)(6)—is in tension with the Commission's determinations regarding retroactivity of guideline amendments under §1B1.10.

In addressing these questions, we are mindful of arguments raised at the recent hearing regarding, *inter alia*, 28 U.S.C. § 2255, retroactivity doctrine, and separation of powers. After thorough consideration, we have no doubt that the Commission has the legal authority to promulgate §1B1.13 as proposed, including (b)(5) and any of the options for (b)(6).

Second, this Comment addresses a handful of issues related to the proposed enumerated categories (other than (b)(5)) that were raised at the recent hearing, in order to clarify Defenders' positions.

Third, this Comment discusses how the proposed amendments reflect sound policy. Again, we focus on concerns raised around the recent hearing: the circuit conflict over legal changes; finality and certainty in sentencing; and the burden that § 3582(c)(1)(A) motions may place on federal courts.

I. Congress granted the Sentencing Commission broad policy-making authority to describe what should be considered "extraordinary and compelling."

"Extraordinary and compelling," by its terms, is a broad, inclusive standard, which this Commission is charged with fleshing out. Some have argued that § 3582(c)(1)(A) has some very significant limitations (beyond the "rehabilitation alone" limitation), but those arguments aren't grounded in statutory text or legislative history. Instead, they are grounded in decades of federal practice and culture, which developed in the shadow of the Bureau of Prison's policy decision not to file sentence-reduction motions except in the direst medical cases. But neither the BOP's inaction in this space nor the Commission's past quiescence have limited the terms of the governing statutes or the Commission's authority.

A. As a matter of plain text, "extraordinary and compelling" is broad, adaptable, and inclusive.

The "preeminent canon of statutory interpretation" holds that "the legislature says in a statute what it means and means in a statute what it says there."[1] Section 3582(c)(1)(A)'s text uses broad, adaptable language for its threshold standard: "extraordinary and compelling reasons." It also requires that any reduction under the provision be "consistent with applicable policy statements issued by the Sentencing Commission." And elsewhere, Congress instructed the Commission to

> describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.[2]

Putting these together, the inclusive standard, "extraordinary and compelling," has no limitations other than that "rehabilitation . . . alone" cannot justify a sentence reduction. The Sentencing Commission is tasked with elaborating on this standard and guiding courts in applying it.

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[1] *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (cleaned up).

[2] 28 U.S.C. § 994(t).

As Attorney Barrett discussed at the recent hearing, this is *not* a "compassionate release" statute.[3] By its terms, § 3582(c)(1)(A) is not—and never has been—limited to medical conditions or the like. It isn't limited to circumstances that are personal to the defendant either. Section 3582(c)(1)(A) is capable of encompassing any circumstance—factual or legal—that an English-speaker would say was *extraordinary* ("beyond what is usual"; "exceptional") and *compelling* ("tending to compel"; "having a powerful and irresistible effect") in the sentence-reduction context,[4] as guided by the Commission's policy choices.

B. Legislative history supports this plain-text reading of § 3582(c)(1)(A).

The legislative history of § 3582(c)(1)(A), which was enacted as part of the Sentencing Reform Act of 1984 ("SRA"), confirms that Congress's intent was not to create a narrow mechanism akin to state compassionate-release statutes. Instead, Congress meant to create what it did in fact create: an inclusive judicial sentence-reduction mechanism. And it tasked the Commission with describing what sorts of circumstances could trigger that mechanism.

At this point, the Commission has seen several references to the main Senate Report discussing the SRA, which described § 3582(c)(1)(A) as a "safety valve" that would apply

> regardless of the length of sentence, to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner.[5]

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[3] *Compare* 18 U.S.C. § 3582(c)(1)(A) *with, e.g.,* Conn. Gen. Stat. § 54-131k ("Compassionate parole release"); Kan. Stat. § 22-3728 ("Functional incapacitation release"); Md. Code. Ann., Corr. Servs. § 7-309 ("Medical parole"); N.J. Rev. Stat. § 30:4-123.51e ("Compassionate release"). Similar statutes exist in most states, providing a mechanism for release from prison based on a very serious medical condition or advanced age.

[4] *The Random House Dictionary of the English Language* 417, 686 (2d ed. unabridged 1987).

[5] S. Rep. No. 98-225, at 121 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3304; *available at* https://www.ojp.gov/pdffiles1/Digitization/93948NCJRS.pdf.

Elsewhere in this Report, the SRA's drafters said, similarly, that § 3582(c)(1)(A) was intended to apply to "unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances," including "cases of severe illness" and also "cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence."[6]

Thus, § 3582(c)(1)(A) was specifically designed to permit sentence reductions not only for medical circumstances, but also for "other" extraordinary and compelling circumstances.[7]

And this safety valve, along with the other safety valves at § 3582(c), may have been essential to the SRA's enactment. The Senate Report, which was issued the year before passage, notes that there were those "who would retain parole on the ground that it was a valuable 'safety valve' designed to shorten lengthy sentences."[8] It describes congressional testimony explaining that parole was "really unnecessary in order to deal with that occasional case where, in a determinate sentencing scheme, an offender receives a sentence which turns out to be manifestly unfair or 'wrong,' particularly in light of post sentence developments."[9] And it explains that § 3582(c)(1)(A) would serve this purpose, as a "safety valve" within the new sentencing scheme.[10]

C. Decades of inaction by the BOP did not alter the original meaning of "extraordinary and compelling."

Nearly 40 years after Congress enacted the SRA, some legal actors are having a hard time accepting that Congress would enact an open-ended judicial sentence-modification provision as part of an act that created a determinate sentencing scheme—even in the face of both plain text and clear legislative history. This is likely because § 3582(c)(1)(A) was essentially dormant for most of those years, due to the BOP's policy decision to file

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[6] *Id.* at 55–56.

[7] *See id.*

[8] *Id.* at 46–47 n.34.

[9] *Id.* at 53–54 n.74 (citing congressional testimony presented in 1979 by Judge Harold Tyler).

[10] *See id.* at 55–56.

§ 3582(c)(1)(A) motions in only the most dire medical cases.[11] We have been living with determinate sentencing all that time, and have come to understand it as a system in which sentences are reduced on the back end for just one reason: good time credit.

This is not a rule from on high. In Wisconsin, for example, the state legislature enacted a determinate sentencing scheme in the late 1990s (known there as "truth in sentencing," or "TIS") in which not only parole but also good time credit was abolished.[12] But that state's common-law system of judicial sentence reduction, which predated TIS, never went away.[13] Indeed, rather than abolishing the common-law scheme, a year into TIS the state legislature—a legislature committed to truth in sentencing—added a second, statutory mechanism for judicial sentence reduction.[14] So, in Wisconsin, a determinate sentencing system is one in which sentences are reduced on the back end for just one reason: judicial sentence reduction.

This is not to advocate for Wisconsin law. It is to illustrate that it is federal culture and practice that cause some to treat determinate sentencing as incompatible with judicial sentence reduction. And it is federal culture and practice that's likely the origin of the notion that a plain-language interpretation of § 3582(c)(1)(A) somehow violates the SRA—although § 3582(c)(1)(A) is part of the SRA.

When Congress was drafting § 3582(c)(1)(A) in the early 1980s, in contrast to now, drafters were not operating with a backdrop of 30-plus years

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[11] *See United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020) (describing the history of BOP's inaction under § 3582(c)(1)(A)).

[12] *See* Michael B. Brennan et al., *Fully Implementing Truth-in-Sentencing*, 75-Nov. Wis. Law. 10, at 10, 15 (2002).

[13] *See* Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 Wm. & Mary L. Rev. 465, 521 (2010) ("[A]lthough [Wisconsin] abolished parole and good time credit in 1999, it never abandoned the practice of sentence modification or imposed any legislative restrictions on its use."). Under the Wisconsin system, the sentencing court may (as a matter of discretion) modify a sentence if it finds that there is a circumstance that is highly relevant to the sentence that was not known to the court at the time of original sentencing, or if the sentence is "unduly harsh or unconscionable." *State v. Harbor*, 797 N.W.2d 828, 837–38 & n.8 (Wis. 2011).

[14] *See id.*; *see also* Wis. Stat. § 973.195 ("Sentence Adjustment").

of federal practice and culture influenced by BOP inaction on sentence-reduction motions. Instead, Congress was drafting § 3582(c)(1)(A) with the backdrop of a parole system in which the sentencing court had limited control over the sentence an individual would actually serve. In most cases, a person became eligible for parole after serving one-third of the imposed sentence, with the parole decision focused on rehabilitation.[15]

Judicial sentence reduction (in just about any form) looks nothing like the parole system that the SRA abolished. Judicial sentence reduction has "deep historical roots."[16] The Supreme Court approved of it back in 1931, in rejecting a government argument that the practice invaded the executive branch's commutation power.[17] And prior to passage of the SRA, federal law had two judicial sentence-reduction provisions: the old Fed. R. Crim. P. 35 and 18 U.S.C. § 4205(g). These provisions operated differently, but each gave sentencing courts broad authority to reduce sentences—including based on legal, rather than purely factual, circumstances.[18]

Congress, of course, repealed the old Rule 35 and § 4205(g). Section 3582(c)(1)(A) is narrower: there must be "extraordinary and compelling" circumstances; any reduction must be consistent with Commission policy statements; and rehabilitation alone is insufficient. But when Congress enacted the SRA it would have understood that parole and judicial sentence reduction were very different, such that it is entirely sensible that Congress

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[15] *See* S. Rep. No. 98-225, *supra* note 5, at 38–40.

[16] Klingele, *supra* note 13, at 498.

[17] *See United States v. Benz*, 282 U.S. 304, 311 (1931).

[18] *See, e.g., United States v. Diaco*, 457 F. Supp. 371, 376 (D.N.J. 1978) (reducing a sentence under § 4205(g) based on disparities among co-defendants); *United States v. Noriega*, 40 F. Supp. 2d 1378, 1380 (S.D. Fla. 1999) (reducing a sentence under Rule 35 based on the "nature of the confinement" and "the considerable disparity between Defendant's sentence and the sentences actually served by his co-conspirators"); *United States v. Vaughn*, 598 F.2d 336, 337 (4th Cir. 1979) (referring to the district court's grant of a Rule 35 motion based on the defendant's "positive change" post-sentencing); *see also United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir. 1968) ("Rule 35 is intended to give every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim.").

would eliminate the former but retain the latter.[19] It is only decades later—decades during which the BOP thoroughly neglected § 3582(c)(1)(A)—that the various parts of the SRA now strike some as discordant.

D. Prior policy statements also did not alter the original meaning of "extraordinary and compelling."

Legal actors and courts may be influenced in their thinking on § 3582(c)(1)(A) not only by the BOP's decades of inaction, but also by the fact that §1B1.13 has never enumerated any "extraordinary and compelling" circumstances outside of the health, age, and family contexts. But the history of §1B1.13 shows that this, too, goes back to the BOP's inaction.

For well over 20 years, there was no policy statement regarding § 3582(c)(1)(A). The Commission prioritized the matter in 2006 but ultimately promulgated a policy statement that did no real work:

> A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A).[20]

This was just an "initial step," with the Commission intending to further describe the criteria for § 3582(c)(1)(A) in the next amendment cycle.[21]

For the next amendment cycle, the American Bar Association submitted a proposed §1B1.13 that had some similarities with the current

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[19] Professor Klingele has explained that judicial sentence reduction has significant advantages over parole. First, the process is more transparent: proceedings occur on the record, in the jurisdiction where the crime occurred, with both parties and any victim able to weigh in and the sentencing court required to justify the reduction. *See* Klingele, *supra* note 13, at 515–16. Second, the process promotes accountability: proceedings "invite[] the offender to revisit in a concrete way his offense and the community in which he committed it," and also enhance judicial accountability. *Id.* at 517. "Moreover, to the degree that the early release decision invites reexamination of the normative question of whether the offender has been sufficiently punished for his offense, courts—not parole boards—have traditionally been arbiters of justice with respect to the outer limits, at least, of the quantum of punishment merited in any given case." *Id.* at 535.

[20] USSG §1B1.13 comment. (n. 1(A)) (2006).

[21] *Id.* at comment. ("Background").

proposal, including that it covered certain legal changes.[22] The government, in contrast, asked the Commission essentially to cede policymaking to the BOP, which filed § 3582(c)(1)(A) motions only in the rarest medical cases. The government acknowledged in its submission to the Commission that the statute was not limited to medical circumstances.[23] But it said that if the Commission were to issue a policy statement that went beyond the sorts of cases in which the BOP would file motions, "[a]t best," that policy statement "would be a dead letter."[24] "At worst," it would incite prisoners to file lawsuits against the BOP.[25]

The government went on to discuss policy justifications for the BOP's inaction on § 3582(c)(1)(A). In the government's view, in order to promote finality and certainty in sentencing, § 3582(c)(1)(A) should be used only in cases of terminal illness with a life expectancy of one year or less or in cases of profound disability (like a vegetative state).[26] With terminal illness, the person's imprisonment would soon end anyway, at his death.[27] And with profound disability, upon release, the person would nevertheless

> carr[y] his prison in his body and mind, and will not in any event be living in freedom in any ordinary sense if released from a correctional hospital facility to be cared for in some other setting.[28]

In other words, according to the government, a sentence reduction in these circumstances was acceptable specifically because it would not afford an incarcerated individual any meaningful relief.

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[22] *See* Letter from Robert D. Evans on behalf of the ABA to the U.S. Sentencing Comm'n, attach. (July 12, 2006) (detailing proposed §1B1.13 policy statement for sentence-reduction motions under § 3582(c)(1)(A)), *available at* https://bit.ly/3ZOzOdY.

[23] *See* Letter from Michael J. Elston on behalf of the DOJ to the Sentencing Comm'n, at 2 n.1 (July 14, 2006), *available at* https://bit.ly/3mxN3RW.

[24] *Id.* at 4.

[25] *Id.*

[26] *See id.* at 3–4.

[27] *See id.* at 4.

[28] *Id.*

The Commission in 2007 ultimately promulgated a more descriptive §1B1.13, but one that was quite narrow and deferential to the BOP.[29] This did not, of course, alter the governing statute.

In 2016, Defenders advocated for amendments to §1B1.13 that might encourage the BOP to file more motions.[30] The government continued to urge the Commission to defer to the BOP, suggesting that since the BOP was the gate-keeper, §1B1.13 should simply cross-reference the BOP's "Reduction In Sentence" program statement.[31] The Commission ultimately adopted the broader §1B1.13 that currently is in effect—at least, it's in effect as applied to BOP-filed motions.[32] Again, this did not alter § 3582(c)(1)(A).

Between 2016 and now, Congress made a transformational change to § 3582(c)(1)(A): it eliminated the BOP as gatekeeper.[33]

At the recent hearing on §1B1.13, some witnesses opposing the Commission's proposed amendments emphasized that Congress intended the First Step Act's amendment to § 3582(c)(1)(A) to be procedural (allow defendant's to file motions), not substantive (alter the standard). But that is precisely the point: Nothing in the First Step Act of 2018 altered the statute's plain text or the original meaning of "extraordinary and compelling"—just like neither the BOP's inaction nor the Commission's quiescence in this space altered the standard. Section 3582(c)(1)(A)'s standard, as discussed, has always been broad and adaptable and inclusive. And now, without the BOP controlling motions under § 3582(c)(1)(A), the Sentencing Commission can finally promulgate a meaningful, effective policy statement for sentence reductions under the statute.

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[29] *See* USSG §1B1.13 (2007).

[30] *See* Statement of Marianne Mariano before the Sentencing Comm'n, at 12–15 (Feb. 17, 2016). This statement is appended to and incorporated into Defenders' Public Comment on Proposed Amendments for 2016 (March 21, 2016), *available at* https://bit.ly/41XlUIp.

[31] *See* Letter from Michelle Morales on behalf of the DOJ to the Sentencing Comm'n, at 4, 6–8 (Feb. 12, 2016)), *available at* https://bit.ly/3ZYehjf.

[32] USSG §1B1.13.

[33] *See* First Step Act of 2018, Pub. L. No. 115-391 § 603(b), 132 Stat. 5194, 5239 (2018) (hereinafter "FSA").

II. The Commission's proposed amendments to §1B1.13 are both authorized and lawful.

The Sentencing Commission's policymaking authority in this space, conferred by 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994(a) and (t), permits it to promulgate the proposed §1B1.13, including subsection (b)(5) and any of the three options for (b)(6). Moreover, no other provision of law prohibits the amendments.

A. The Commission is authorized to amend §1B1.13 as proposed. [34]

As discussed, § 3582(c)(1)(A)'s "extraordinary and compelling" standard is broad and open-ended, and § 994(t) directs the Sentencing Commission to "describe" what sorts of circumstances "should" meet that standard. With these provisions, Congress created expansive authority for judicial sentence reduction as a safety valve within the new determinate sentencing scheme, and it charged the Commission with fleshing out this authority. The Commission's proposed amendments fulfill this charge.

Congress did erect one limitation on the Commission's authority: rehabilitation alone cannot be an extraordinary and compelling reason. And the proposed amended §1B1.13 respects that limitation. There is no basis for reading any other limitation into the statute.[35]

Beyond §§ 3582(c)(1)(A) and 994(t), another section—§ 994(a)(2)(C)—directs the Commission to promulgate policy statements, including for § 3582(c)(1)(A), "that in the view of the Commission would further the purposes set forth in [18 U.S.C. §] 3553(a)(2)." This only confirms the Commission's broad authority to provide guidance with respect to what sort of "extraordinary and compelling reasons" for sentence-reduction will further the purposes of sentencing.

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[34] Defenders have suggested some changes to the Commission's proposed policy statement. To be clear, the Commission is also authorized to promulgate the amended §1B1.13 as proposed *and expanded upon by Defenders*.

[35] *See Concepcion v. United States*, 142 S. Ct. 2389, 2402 (2022) ("Drawing meaning from silence is particularly inappropriate in the sentencing context, for Congress has shown that it knows how to direct sentencing practices in express terms.") (internal quotation marks and citation omitted).

The proposed policy statement furthers the purposes set forth in § 3553(a)(2) in many ways, including these:

- *3553(a)(2)(A)*: The proposed §1B1.13 permits a sentence-reduction where what the sentencing court understood to be "just punishment" at the time of sentencing no longer holds—because, *e.g.*, the sentence has become overly punitive due to medical risk or prison assault, or changes in law reflect a different societal understanding of what punishment is just.

- *3553(a)(2)(B) & (C)*: The proposed policy statement permits courts to reduce sentences where deterrence and/or public-protection are no longer significant factors, although they may have been paramount at sentencing. This is certainly true for someone who fits within one of the medical or age categories. And the "other reasons" category would cover situations like the example Attorney Barrett raised, regarding understanding of youth brain development, where human knowledge relevant to deterrence and recidivism has advanced since sentencing.[36] The policy statement also permits courts to reduce a sentence where release would affirmatively *advance* deterrence and/or public-protection interests, as with a release for family circumstances.[37]

- *3553(a)(2)(D)*: The enumerated medical categories, along with "other reasons," permit sentence reductions where it is only in the community that an individual can access essential medical or rehabilitative services. The proposed (b)(4) also advances this sentencing factor, by permitting a sentencing court to remove a victim of sexual or physical abuse from the carceral environment where the abuse occurred, so the victim can heal.

As the government has noted, in the absence of a policy statement, some circuit courts have held that "extraordinary and compelling," as a

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[36] *See* Statement of Kelly Barrett before the Sentencing Comm'n, attached, at 13 n.25 (Feb. 23, 2023) (citing *United States v. Morris*, 2022 WL 3703201, at *8–9 (D. Conn. Aug. 26, 2022, and *United States v. Mendez-Zamora*, 2022 WL 9333452, *2 (D. Kan. Oct. 14, 2022)).

[37] *See id.* at 4 n.9 (citing Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 Fam. L. Q. 191, 196 (2006)).

matter of statutory interpretation, cannot encompass legal changes.[38] But those courts are wrong. "Extraordinary and compelling" is plainly broad enough to include not just factual but also legal circumstances—not *all* legal circumstances; just those that are "extraordinary" (unusual; exceptional) and "compelling" (having a powerful and irresistible effect). The Commission appreciates this: the proposed subsection (b)(5) encompasses a legal change only if it reveals that the individual's sentence is "inequitable."

It borders on absurd to suggest that a person would not use the terms "extraordinary" and "compelling" to describe *any* legal change—even one that reveals that an individual's sentence is inequitable by, say, eliminating the mandatory life sentence that previously applied to his offense.[39]

Finally, to the extent that there is a question, Option 3 for subsection (b)(6) complies with § 944(t)'s directive.[40] Section 1B1.13's enumerated categories "describe" *specific* circumstances that "should be considered extraordinary and compelling."[41] Option 3 of (b)(6) "describe[s]" what *additional* circumstances "should be considered extraordinary and compelling": those that the sentencing court—with its better understanding of the case and context—deems extraordinary and compelling.[42]

In sum, Defenders have no doubt that the Commission is authorized to promulgate the proposed amended §1B1.13. Indeed, unwarranted restrictions on the "extraordinary and compelling" standard would subvert congressional intent that courts be able to entertain sentence-reduction motions in a variety of circumstances, where those circumstances are extraordinary, compelling, and reflect more than rehabilitation alone.

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[38] *See* Letter from Jonathan J. Wroblewski on behalf of the DOJ to the Sentencing Comm'n, at 7 & 7 n.6 (Feb. 15, 2023) (collecting cases).

[39] *Cf. Kemp v. United States*, 142 S. Ct. 1856, 1865 (2022) (Sotomayor, J., concurring) (explaining that in the Fed. R. Civ. P. 60(b)(6) context "extraordinary circumstances" include "a change in controlling law.)

[40] Attorney Joshua Matz suggested at the hearing that the Commission might add language specifying that the "other circumstances" should be of similar "gravity" to the enumerated circumstances. We have no objection to this language, so long as it is clear that they need not be similar in kind or nature.

[41] *See* 28 U.S.C. § 994(t).

[42] *See id.*

B. The proposed §1B1.13(b)(5) and (b)(6) do not violate any other provision of law.

The proposed §1B1.13(b)(5) and at least the open-ended options for (b)(6) have garnered opposition from the Department of Justice, the Victims Advisory Group, and some in law enforcement. To the extent that the debate is over what can fit within the words "extraordinary and compelling," that is addressed above. To the extent that the debate is about policy concerns, those are addressed below.

This section is focused on dispelling any concerns that (b)(5) and an open-ended (b)(6) are illegal in some other way—that even if those subsections are authorized under 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994, promulgating them would violate some other law. Three provisions have been raised as possibly conflicting with (b)(5) and/or (b)(6): § 2255, nonretroactivity rules related to statutory changes in law, and constitutional separation-of-powers principles.

28 U.S.C. § 2255. A motion for judicial sentence modification is fundamentally different from a habeas corpus petition—or, more precisely for federal prisoners, a motion under § 2255.

As discussed, § 3582(c)(1)(A) is a discretionary "safety valve": Where "extraordinary and reasons" exist, and a sentence reduction would be consistent with this Commission's policy choices, the sentencing court has discretion (upon considering § 3553(a) factors) to release the individual from custody, reduce the sentence, or deny the motion outright. In contrast, habeas corpus fundamentally is "a means of contesting the lawfulness of restraint and securing release."[43] The Supreme Court has "often" made the point that habeas corpus is specifically a remedy for ascertaining whether a person "is rightfully in confinement or not."[44]

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[43] *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020).

[44] *Id.* (internal quotation marks omitted). The Supreme Court cited the following for the proposition that it had "often" made this point: *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("It is clear . . . from the common-law history of the writ . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody"); *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (similar); *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (similar).

Section 2255 was enacted in 1948 as a substitute for the traditional habeas remedy with respect to federal prisoners, allowing collateral attacks to be filed in the underlying criminal case rather than a separate civil action, but it covers the same substantive claims for relief, and in the same way.[45] Section 2255 contains an exclusivity provision prohibiting anyone who can file a motion under that section from filing a civil habeas corpus petition, unless the § 2255 remedy is "inadequate or ineffective to test the legality of his detention."[46] But § 2255 has never said anything about § 3582(c) or any other mechanism for sentence reduction—statutes that predated § 3582(c), executive clemency, parole, good time credit.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposed strict procedural limits on habeas corpus petitions filed by state prisoners (under 28 U.S.C. § 2254) and on § 2255 motions, in order to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases."[47] Nothing in AEDPA's text or history speaks to any form of sentence reduction—judicial or otherwise. This makes sense: AEDPA puts procedural limits on habeas filings to protect the finality of judgments, especially in capital cases arising from state courts. And § 3582(c) is an express exception to the principle of finality,[48] with § 3582(c)(1)(A) invoking discretionary powers to modify the length of a sentence rather than mandating relief from illegal judgments.

This is all to say that § 3582(c)(1)(A) and § 2255 (both before and after it was amended by AEDPA) serve fundamentally different purposes. The former is a discretionary act of mercy, reducing what is (at least as a matter

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[45] *See Hill v. United States*, 368 U.S. 424, 427 (1962).

[46] 28 U.S.C. § 2255(e). The Supreme Court is currently reviewing the contours of this provision and will soon decide under what circumstances the § 2255 remedy is inadequate or ineffective to test the legality of detention, such that a federal prisoner is permitted to file a habeas corpus petition under 28 U.S.C. § 2241. *See Jones v. Hendrix*, No. 21-857 (U.S., argued Nov. 1, 2022). We would not expect the outcome of *Jones* to be relevant to any issue before the Commission.

[47] H.R. Conf. Rep. 104-518, at 111 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 944, 944.

[48] *Concepcion*, 142 S. Ct. at 2399 n.3 (stating of § 3582(c) that "[n]o one doubts the importance of finality. Here, however, the Court interprets a statute whose very purpose is to reopen final judgments.").

of law) a valid sentence; the latter governs vindication of a right to relief from illegal detention. And thus, expanding §1B1.13's description of "extraordinary and compelling" as permitted by § 3582(c)(1)(A) does not—and cannot—usurp § 2255 any more than a presidential pardon or sentence commutation.[49]

Nonretroactivity. The proposed §1B1.13 says nothing about nonretroactive statutory amendments. But Defenders, like everyone else, read subsection (b)(5) to potentially encompass, for example, the First Step Act's dramatic amendments to sentencing law that reduced minimum penalties for some from life imprisonment or its functional equivalent, to a sentence that a person could expect to survive. Thus, (b)(5) implicates the debate over nonretroactive legal changes that has divided the circuit courts.

As discussed above, to the extent the circuit split is about whether the phrase "extraordinary and compelling" can encompass changed legal circumstances, the circuits answering that question in the negative are plainly wrong. And as discussed below, Defenders are hopeful that when the Commission adopts (b)(5), those circuits will reconsider their caselaw.

The focus here is on whether retroactivity rules, as a matter of law, preclude "extraordinary and compelling" from being interpreted (consistent with plain text) to include a legal change that renders a sentence inequitable if the change isn't retroactively applicable in all cases. And whether we are talking about general background retroactivity principles, or the specific retroactivity/applicability provisions of §§ 401 and 403 of the First Step Act of 2018, the answer to this question is: no.

There are two general background principles of retroactivity at play. The first is the federal saving statute, 1 U.S.C. § 109, which has been interpreted to provide that an ameliorative penalty statute does not abate sentences for offenses committed prior to the statute's enactment, unless the statute indicates otherwise.[50] The second is the SRA, which provides that the

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[49] This is not to say that a pro se individual might not file what in substance truly is a § 2255 motion or habeas petition, captioned as a § 3582(c)(1)(A) motion. Just the same, an individual might file something captioned under § 3582(c)(1)(A) that in substance is a § 1983 lawsuit, or a motion for bail, or just about anything else. But this sort of mislabeling is common in pro se cases, and courts are capable of addressing it on a case-by-case basis.

[50] *See Dorsey v. United States*, 567 U.S. 260, 273-75 (2012).

version of the Guidelines Manual that applies in a case is the one in effect at sentencing,[51] supporting that "in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced."[52]

Several courts of appeal have taken from these background principles that "[w]hat is 'ordinary' and routine" in federal sentencing "cannot also be extraordinary and compelling."[53] But general nonretroactivity rules mean only that an ameliorative statute does not, on its own, entitle anyone to resentencing. They do not limit § 3582(c)(1)(A), the SRA's judicial sentence-reduction mechanism. And Congress's decision in an ameliorative statute not to require resentencing of everyone sentenced under the prior regime says nothing about whether a court has discretion to find, as part of an "individualized assessment," that extraordinary sentencing disparities between the current and former regimes present extraordinary and compelling reasons for sentence reduction in a particular case.[54]

Nor do the specific applicability provisions of §§ 401 and 403 of the First Step Act impose any such limitation. Both provisions provide limited retroactivity similar to the SRA rule described above: the new lower statutory penalties apply to pending cases, so long as a sentence for the offense has not been imposed as of the date of enactment.[55] Certainly, neither provides for full retroactivity. But neither prohibits a court from acknowledging that the impact of this once-in-a-generation legislation on an individual case can be extraordinary and compelling, especially where it exposes that a sentence that is still being served (perhaps with no end in sight) is inequitable. As many courts of appeal have correctly recognized,

> there is a significant difference between automatic vacatur and resentencing of an entire class of sentences—with its avalanche of applications and inevitable

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[51] *See* 18 U.S.C. § 3553(a)(4)(A)(ii).

[52] *Dorsey*, 567 U.S. at 280 (citations omitted).

[53] *United States v. McCall*, 56 F.4th 1048, 1055 (6th Cir. 2022) (citation omitted); *see also United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (collecting cases and describing the circuit split).

[54] *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020).

[55] *See* FSA, §§ 401(c), 403(b).

> resentencings—and allowing for the provision of individual relief in the most grievous cases.[56]

Thus, there is "nothing inconsistent about Congress's paired First Step Act judgments: that not all defendants convicted under [the prior legal regime] should receive new sentences, but that the courts should be empowered to relieve some defendants of those sentences on a case-by-case basis."[57]

In the future, Congress could, of course, include with an ameliorative criminal statute a statement that the legislation cannot be considered in § 3582(c)(1)(A) proceedings. But absent such a statement, "extraordinary and compelling" may be interpreted to include inequities exposed by future legislation as well. To conclude otherwise would lead to the counterintuitive result of excluding from the district court's "extraordinary and compelling" calculus the reality that an individual may be serving decades in prison under a flawed sentencing regime that all agree is bad policy.

Separation of powers. Two circuit opinions have raised the specter of constitutional separation of powers in connection with § 3582(c)(1)(A), but those opinions should not give the Commission pause.[58]

The Seventh Circuit has suggested that permitting a sentencing court to reduce a sentence under § 3582(c)(1)(A) based largely on a concern that it is overly harsh, although the sentence was lawfully imposed under a mandatory-minimum scheme that "Congress enacted, and the President signed, into law," would "offend[] principles of separation of powers."[59] The Seventh Circuit did not cite to any authority here and no other court has picked up this thread. And there is no separation-of-powers problem:

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[56] *McCoy*, 981 F.3d at 286–87 (cleaned up); *see also United States v. Chen*, 48 F.4th 1092, 1099 (9th Cir. 2022); *United States v. Ruvalcaba*, 26 F.4th 14, 27 (1st Cir. 2022); *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021).

[57] *See McCoy*, 981 F.3d at 287 (cleaned up).

[58] The Victims Advisory Group also has argued that the proposed (b)(5) violates "separation of powers." But VAG is using that term as shorthand for the notion that a broad interpretation of § 3582(c)(1)(A) is incompatible with determinate sentencing and/or would work an "end run" around habeas proceedings, neither of which are about constitutional separation of powers. *See* Written Testimony of Mary Graw Leary on behalf of VAG, at 12–14 (Feb. 2023), *available at* https://bit.ly/3LcvJMN.

[59] *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021).

Congress enacted § 3582(c)(1)(A) and the President signed it into law. So reducing a lawful sentence—even one that was previously mandatory—as permitted by § 3582(c)(1)(A) cannot violate separation-of-powers principles any more than with Rule 35 or the former § 4205, or any other duly enacted sentence-reduction statute.

The D.C. Circuit has raised "separation of powers" in a different context, stating that "separation-of-powers considerations" counsel against courts using the "general" authority in § 3582(c)(1)(A) to cancel out a more "precise" congressional pronouncement on retroactivity: § 403(b) of the First Step Act.[60] But this is not about the constitutional doctrine of separation of powers; it's about a potential conflict between two statutes: § 3582(c)(1)(A) and § 403(b). That potential conflict is addressed above, in the nonretroactivity section.

C. Neither subsection (b)(5) nor (b)(6) of §1B1.13 creates tension with USSG §1B1.10.

The Commission's proposed amendments to §1B1.13—including (b)(5) and (b)(6)—are not in tension with § 1B1.10. The two provisions serve very different purposes and operate in different ways. Section 1B1.13 guides discretionary sentence reductions where there are extraordinary and compelling circumstances that arise, or at least come to the court's attention, after sentencing. Section 1B1.10 is a mechanism for applying retroactive guideline amendments in run-of-the-mill cases. Motions under the provisions will be filed in different circumstances, and application of the provisions is distinct. The relationship between the two is not dissimilar to the relationship of §1B1.13 to general statutory retroactivity provisions, which is discussed above.

[60] *Jenkins*, 50 F.4th at 1198.

III. Defenders object to others' suggestions that would narrow enumerated categories, place burdens on incarcerated individuals that they cannot meet, or categorically exclude some individuals from seeking a sentence reduction.

Defenders do not attempt to address in this Comment all the suggestions that others have proposed for §1B1.13. It should be clear that we object to all proposals that would eliminate, narrow, or complicate any category that the Commission has proposed. Indeed, we have suggested ways that the Commission should expand several of the enumerated categories, and we have advocated for an open-ended (b)(6) (Option 3).[61]

There are a few proposals, though, that require a response: (1) the government's redlining of §1B1.13, (2) NAAUSA's notion that incarcerated individuals must have independent medical documentation from at least two medical professionals to fit within certain categories; and (3) all proposals that would preclude individuals convicted of specified crimes from seeking relief under § 3582(c)(1)(A).

A. Most of the government's suggestions for the enumerated categories are either problematic or unnecessary.

Subsection (b)(1)(D). The government suggests three changes to the proposed (b)(1)(D): (1) adding the word "imminent" before "risk"; (2) adding the words "and extraordinary" before "outbreak"; and (3) using the phrase "due to personal medical risk factors and custodial status" to modify the subsection's reference to risk of "severe medical complications or death."[62]

As Attorney Barrett explained in her witness statement, Defenders urge the Commission to expand (b)(1)(D) so that it covers additional kinds of ongoing emergencies, if they create a risk of severe medical complications or

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[61] As noted above, in footnote 40, Attorney Joshua Matz has suggested that with Option 3 for subsection (b)(6), the Commission might want to clarify that "other reasons" should be similar in "gravity" (although not necessarily nature or subject matter) to the enumerated categories. Defenders do not object to such an amendment.

[62] Letter from Jonathan J. Wroblewski on behalf of the DOJ to the Sentencing Comm'n, at 4 (Feb. 15, 2023) (hereinafter, "Wroblewski letter"), *available at* https://bit.ly/4221ga1.

death that cannot reasonably be mitigated.[63] We hope the Commission adopts our suggested change. But regardless of whether the Commission accepts our proposal for (b)(1)(D), it should reject the government's proposals for that subsection.

The government's first proposal—"imminent"—makes the category less clear: Is it sufficient that an infectious disease is sweeping the nation? Must it already be in the state where the movant is incarcerated? In the specific prison? Must people in that prison already be dead or dying?

There can be no credible concern that courts would apply (b)(1)(D) to risks that are theoretical or distant; the proposal requires that the infectious disease or emergency be "ongoing" and that it has created a risk of death or severe medical complications that cannot be mitigated. Further, discouraging courts to act quickly where there is an ongoing emergency that has already created this sort of risk could be deadly; many incarcerated individuals died during the COVID pandemic while waiting for courts to decide § 3582(c)(1)(A) motions or after courts denied their motions because the risk was thought to be not yet sufficiently imminent.[64]

The government's second proposal for (b)(1)(D)—"and extraordinary"—is unnecessary and, again, would make the subsection *less* clear. The point of §1B1.13's enumerated categories is that the Sentencing Commission has determined that these circumstances should be considered extraordinary and compelling, such that a court is authorized to determine, as a matter of discretion, whether it would be appropriate to reduce the sentence.

The government claims that the word "extraordinary" is needed to prevent individuals from filing motions regarding, *e.g.,* seasonal flu. But the

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[63] Statement of Kelly Barrett before the Sentencing Comm'n, attached, at 8 (Feb. 23, 2023) (hereinafter, "Barrett Statement").

[64] *See* Meg Anderson, *As COVID spread in federal prisons, many at-risk inmates tried and failed to get out*, NPR (Mar. 7, 2022), https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get-; *see also* Federal Criminal Defense Clinic, Iowa College of Law, *Compassionate Release*, https://law.uiowa.edu/compassionate-release (last accessed Feb. 28, 2023) (explaining that of the 281 deaths the clinic tracked through January 31, 2022, 74 had filed a motion for compassionate release with the federal courts; three of those motions were granted, but the people were not released in time).

proposed subsection covers only risk of "severe medical complications or death," and the vast majority of people cannot credibly claim that typical, seasonal infectious diseases creates such a risk. At the same time, if there is a severe flu outbreak that places a particular individual at "increased risk of suffering severe medical complications or death," there is no sound policy reason for precluding a judge from considering evidence that the individual's circumstances warrants sentence reduction.

Our concern with the third proposal—the addition of "due to personal medical risk factors and custodial status"—is that it assumes that any future health emergency will look like COVID-19. The seriousness of risk from a disease can be personal (think: COVID risk factors) or universal (think: Ebola). If in the future there is an infectious disease or other emergency situation hitting federal prisons that creates a risk of severe medical complications or death that cannot be mitigated in the prison system, whether that risk is personal or more widespread is quite irrelevant to the men and women who would be trapped within that system.

Subsection (b)(3). For the proposed subsection regarding family circumstances, the government proposes: (1) substituting the word "establishes" for "presents"; (2) adding the phrase "when the defendant would be the only available caregiver for the individual in question" to (b)(3)(D); and (3) defining "immediate family member."[65]

Defenders are pleased that the government largely supports the proposed (b)(3), including the bracketed (b)(3)(D), which is essential to the function of this subsection. We think the government's first suggested change is simply unnecessary. Any court would interpret "presents" in this context similar to how one would interpret a doctor saying a patient "presents" with a fever and cough. In other words, it does not reference a mere *claim*. If the Commission thinks this requires clarification, though, we suggest different language. All the other subsections refer to facts as determined by the court, rather than as established by the defendant. Thus, for consistency, (b)(3)(D) could simply begin with "There exist":

> There exist circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other

[65] Wroblewski Letter at 4–5.

> immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.

With the family-circumstances category, our strongest objection is to the government's second suggestion—"only available caregiver"—as it potentially relates to minors. With minors, the goal is not simply to ensure that *some* adult can care for them. Indeed, if no family is available, the State will place a minor in foster care. A federal court must be able to recognize that a minor needs care more particularly from a parent or, as relevant to (b)(3)(D), from another specific person who has played a parental role in the minor's life—*e.g.*, grandparent, aunt, or unmarried partner of a parent.

We do not object to the government's third suggestion—its definition of "immediate family member"—so long as the Commission promulgates (b)(3)(D), so that relationships similar to that of an immediate family member can be respected by the courts. If the Commission declines to promulgate (b)(3)(D), then any definition of "immediate family member" would need to be much more expansive.

Subsection (b)(4). The government proposes four changes to the prison-assault category: (1) modify the subsection with "[w]hile in custody for the offense of conviction,"; (2) broaden the subsection to cover any assault or abuse committed "at the direction of" a BOP employee or contractor; (3) also broaden it to cover not only any "correctional officer or other employee or contractor of the Bureau of Prisons", but also "any other individual who had custody or control over the inmate"; and (4) require that the assault or abuse be "established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case."[66]

Defenders have urged the Commission to expand the proposed (b)(4) so that it covers sexual or physical abuse of an incarcerated individual by *anyone* where it causes serious bodily injury; and sexual or physical abuse by a prison employee, contractor, or volunteer, without the need for a showing of serious bodily injury.[67]

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[66] *Id.* at 5–6.

[67] *See* Barrett Statement at 8–11.

The government's second and third suggestions are good ones. With the second suggestion, we hope the Commission extends (b)(4) to abuse by *anyone* that causes serious bodily injury. But if the Commission were to reject that part of our proposal, certainly, it should at least extend (b)(4) to abuse by any person acting under the direction of a prison authority figure.

As to the third suggestion, Defenders and the government are both proposing to extend (b)(4) to cover prison authorities beyond BOP employees and contractors. We suggested "prison employee, contractor, or volunteer." But the government's suggestion—"correctional officer or other employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the inmate"—may be even better.

We object to the government's other proposals.

As for its first suggestion for (b)(4), the government has not explained why the subsection should begin with "[w]hile in custody for the offense of conviction." Is the government concerned that claims will be raised regarding abuse inflicted sometime in the past? That could be solved by starting the section with: "After sentencing."

More likely, the government does not want anyone to come within (b)(4) if they were abused after sentencing while in state custody, before transferring to federal prison. But far from limiting (b)(4) in this way, the Commission should clarify that the subsection *does* cover this sort of abuse. As discussed in Attorney Barrett's witness statement, § 3582(c)(1)(A) is not a mechanism for punishing bad government actors; it permits a court to reduce a sentence, as a matter of discretion, if new circumstances call that sentence into question.[68] And prison abuse can be such a circumstance.

The government's most troubling suggestion for (b)(4) is that it should apply only where abuse is "established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case." No question, a court considering any motion under (b)(4) would consider the existence, or lack thereof, of a criminal or administrative proceeding regarding the alleged abuse. And an individual who chooses to file a § 3582(c)(1)(A) motion before any such proceeding has concluded runs the

[68] *See id.* at 8–9.

risk of a quick denial.[69] But it would be folly to return to the BOP control over whether and when an individual can file a sentence-reduction motion. This would be true regardless of the basis for the motion, and it is doubly so where we are talking about potential BOP misconduct. Further, while we presume that federal prosecutors act in good faith in making charging decisions, there are legitimate reasons other than innocence that a prosecutor might not charge a perpetrator with a crime.

Beyond the fact that the government cannot be permitted to control the adjudication of a § 3582(c)(1)(A) motion that may be based on official conduct, the government's proposal is unworkable for at least two other reasons. First, delay: criminal cases take years to resolve, and administrative proceedings can take even longer.[70] Second, the inaccessibility of administrative and investigative materials. Defenders have a hard enough time getting medical records from the BOP on behalf of the individuals who are the subject of those records. We cannot imagine how we'd be able to access records of administrative proceedings against individuals who we do not represent, or law enforcement investigative materials.

B. NAAUSA's notion that enumerated categories based on medical circumstances must be accompanied by independent medical evaluations would undermine those categories.

The National Association of Assistant U.S. Attorneys (NAAUSA) has asked the Commission to limit and narrow §1B1.13's enumerated categories in many ways, all of which we disagree with. But NAAUSA's suggestion that §1B1.13(b)(1)(C) and (D) require incarcerated persons to provide the court

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[69] This will not always be true: an individual (perhaps a cooperator) who was hospitalized after being stabbed, or a woman who became pregnant by a correctional officer, might have no trouble at all proving their grounds for sentence reduction.

[70] *See* Statement of Heather E. Williams before the Sentencing Comm'n, at 3 (Feb. 24, 2023) ("BOP's Office of Internal Affairs, responsible for investigating staff misconduct, has an 8,000-case backlog, with some reports pending for more than five years. The process for handling reported misconduct under the Prison Rape Elimination Act (PREA) is a failure. The DOJ has, at times, assigned PREA complaint investigations to correctional staff who were themselves sexually assaulting women in their care."), *available at* https://bit.ly/401npU2.

with "independent medical documentation from at least two medical professionals"[71] is not just bad policy, it is likely *impossible*.

For an incarcerated person who is acting pro se, it would almost certainly be impossible. But even where someone is represented, it wouldn't be much better. The BOP does not permit incarcerated persons to bring their own medical professionals into prisons for independent assessments. And even a court order to permit this might not help: prisons are almost always located far from defense counsel and the medical experts they might retain.

In cases involving medical circumstances, where the basis for the motion is not plain from BOP records, Defenders typically do have a doctor review the records to opine about the medical condition. But there is no need for the Commission to require even that. If an individual does not provide the sentencing court with strong support for his or her motion, it will be denied—even in the absence of any restriction in §1B1.13. The NAAUSA's notion that a movant obtain "independent medical documentation" from not just one but two medical professionals would be laughable, if we weren't talking about our clients' lives and health.

C. Law enforcement groups' position that individuals convicted of certain crimes should be excluded from § 3582(c)(1)(A) relief is untenable.

Some in law enforcement, as well as victim advocates, have asked the Commission to preclude individuals convicted of violent crimes from seeking relief under § 3582(c)(1)(A). It could probably go without saying that this would be a terrible idea, but Defenders cannot leave it unsaid.

As a preliminary matter, the Commission lacks the authority to take this action. Section 994(t) directs the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction." Section 3582 obligates courts to "ensure that [any] reduction is consistent with the Commission's applicable policy statements." Neither statute empowers the Commission to exclude altogether a category of persons from the sentence-reduction scheme that Congress created.

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[71] Written Testimony of Steven Wasserman on behalf of the NAAUSA, at 2 (Feb. 15, 2023), *available at* http://bit.ly/422X2yZ.

Moreover, this would be terrible policy. Even determining which offenses might be excluded would be fraught; the definition of what is a "violent" crime is a perennial source of litigation in the federal courts. And however such a category might be defined in this context, it would inevitably impact some number of persons with circumstances that warrant a sentence reduction. Some of the formerly incarcerated individuals who spoke at the hearing on §1B1.13 illustrate as much.

Defenders are not insensitive to victims' concerns about notice. Most of our cases (*e.g.*, controlled-substance and firearm-possession cases) do not involve victims. But when there is a victim, we expect them to get notice and an opportunity to be heard, and we have no quarrel with that. In many courts, this is already happening with sentence-reduction motions. Indeed, it may already be required by 18 U.S.C. § 3771(a).

We are, however, concerned with the government's request that §1B1.13 state that "*the court* must provide reasonable notice to any victims" and that it do so "[b]efore *granting* any motion for compassionate release."[72] A U.S. Attorney's Office is the entity that would have a relationship with any victims, and a system for communicating with them. Courts, in contrast, are not set up for this. Also, the notion that notice would be issued only upon a court's decision to "grant" a sentence reduction seems designed to discourage grants. While Defenders do not speak for crime victims, we cannot imagine they would prefer to get notice of sentence-reduction proceedings only after the court has presumptively decided the matter. Therefore, any notice provision should require the government, not the court, to provide notice, consistent with § 3771(c).

[72] Wroblewski Letter at 9 (emphasis added).

IV. The amendments the Commission has proposed, including subsections (b)(5) and (b)(6), make the right policy call.

Defenders have suggested some revisions for the proposed §1B1.13 but, again, the Commission is on the right track. At the recent hearing, Attorney Barrett described some of the policy benefits of the proposed amendments, including that, far from exacerbating disparities, the proposed amendments will provide federal courts with a valuable tool for reducing unwarranted disparities that plague our justice system. Attorney Barrett also talked about some of the men and women who have been released under § 3582(c)(1)(A) who are thriving and enriching their communities; they illustrate that the human cost of a restrictive §1B1.13 would be too high. Here, we focus on three policy concerns that others raised at the hearing: the possibility that subsection would perpetuate the circuit split regarding legal changes; finality and certainty; and administrability.

A. The circuit split regarding legal changes is subject to change and should not dissuade the Commission from making the right policy call on §1B1.13, including by promulgating the proposed (b)(5).

The circuit split over whether legal changes can constitute an "extraordinary and compelling" reason for sentence reduction arose in the absence of a policy statement that applies to defendant-filed motions under § 3582(c)(1)(A). If and when the Commission adopts a policy statement that applies to such motions and interprets "extraordinary and compelling" to encompass a situation where "the defendant is serving a sentence that is inequitable in light of changes to the law," Defenders are confident that circuit courts will revisit their pre-amendment caselaw.

And when they do so, there is good reason to think the Commission's description of "extraordinary and compelling" will control, such that the circuit courts would resolve the split on their own. First, some courts may find that the amended policy statement does not conflict with their own precedent. The proposed (b)(5) does not cover the mere fact of a legal change; it applies only where legal changes reveal that an individual defendant's sentence is "inequitable." Further, to the extent that a circuit court finds that the Commission's interpretation of "extraordinary and compelling" does

conflict with its own precedent, as Professor Erica Zunkel has explained, the Commission's interpretation "must prevail."[73]

In the worst case scenario, some form of the present circuit split would persist and the issue would go to the Supreme Court for resolution. This possibility should not dissuade the Commission from doing the job Congress gave it to do: determining what is the best policy for § 3582(c)(1)(A). If the question whether § 3582(c)(1)(A)'s phrase "extraordinary and compelling" is capable of encompassing legal changes that renders a sentence inequitable goes to the Supreme Court, under the analyses described earlier in this brief, that Court should answer the question affirmatively.

And in the end, the human beings who would be affected by the Commission's proposed amendments are worth it. The worst-case scenario for the Commission (a policy statement that is examined by the Supreme Court) is not comparable to the worst-case scenario for the men and women who may be serving sentences—including life sentences—that are fundamentally inequitable.

B. Finality and certainty are valid policy interests, but they are of lesser weight in this context and must be balanced against other important interests.

A number of objections to the Commission's proposed, expanded §1B1.13 focus on concerns about "finality" and "certainty." Some of these evocations are in the context of arguing that a broad reading of § 3582(c)(1)(A)—that is, one that is consistent with the section's plain text—encroach upon, *e.g.*, § 2255 or nonretroactivity rules; those arguments are addressed above (Section II). Some of the evocations are free-standing, though, as if "finality" and "certainty" were *statutes* that the policy statement could *violate*.

But detached from a specific statute that protects finality or certainty in sentencing, these are just policy interests. The BOP for more than three decades elevated those particular interests above all others—even human dignity. Back in 2006, the government emphasized finality and certainty in

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[73] Statement of Erica Zunkel before the Sentencing Comm'n, at 9 (Feb. 23, 2023) (citing *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982–83 (2005)), *available at* http://bit.ly/3T7bAJI.

justifying the BOP's decision to file sentence-reduction motions only in cases of terminal illness or where a disability was so profound that, if released, the person would still "carr[y] his prison in his body and mind, and will not in any event be living in freedom in any ordinary sense."[74]

Now that the Sentencing Commission is capable of making meaningful policy for § 3582(c)(1)(A), it need not follow the BOP's lead. Indeed, it *should not*. Section 3582(c)(1)(A)'s sentence reduction for "extraordinary and compelling reasons" is an express exception to the SRA's general principle of finality for criminal sentences.[75] It was designed as a safety valve that could protect other, competing interests. The legislative history suggests two potential competing interests: compassion and fairness.[76] But ultimately it gave the task of making policy decisions in this space to this Commission.

As for certainty, the SRA codified a determinate sentencing scheme that would advance certainty and truth in sentencing *in a particular way*, which included judicial sentence reduction under § 3582(c)(1)(A). The nationwide move from parole to determinate sentencing that started in the 1980s was grounded in part on "structural deficits" in the parole system.[77] The SRA abolished parole. But it retained good-time credit and it also created a sentence-reduction mechanism at § 3582(c)(1)A) that would "keep[] the sentencing power in the judiciary where it belongs" and be subject to this Commission's policy choices.[78]

Thus, the Sentencing Commission need not, and should not, elevate policy interests in finality and certainty over the interests that animated the creation of the very statute at issue here.

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[74] Letter from Michael J. Elston, *supra* note 23, at 4.

[75] § 3582(c); *see also Concepcion*, 142 S. Ct. at 2399 n.3 ("No one doubts the importance of finality. Here, however, the Court interprets a statute whose very purpose is to reopen final judgments.").

[76] *See* S. Rep. No. 98-225, *supra* note 5, at 55–56 (referring to cases involving "severe illness" and also cases involving "unusually long sentences").

[77] Klingele, *supra* note 13, at 495: *see also id.* at 474–76 (describing these deficits in more detail).

[78] S. Rep. No. 98-225, *supra* note 5, at 121.

C. There is no reason to think that a §1B1.13 that is capable of capturing all extraordinary and compelling cases will overtax the justice system.

Some have raised concerns that the proposed amendments to §1B1.13 would create problems related to administrability. But these concerns are colored by our experiences during the recent COVID-19 pandemic.[79] There is every reason to think that post-pandemic, sentence-reduction proceedings will be entirely manageable—regardless of what policy statement the Commission promulgates.

There is no question: at the height of the COVID-19 pandemic, the volume of § 3582(c)(1)(A) motions was hard to manage—not just for courts and prosecutors, but for Defenders too. To be clear, Defenders feel honored and privileged that we were able to help many of our vulnerable clients get out of unsafe conditions in our nation's federal prisons. We wish we could have done more; we are heartbroken for the many men and women who died during this period in BOP custody, far from family or comfort.

But the volume and the urgency of § 3582(c)(1)(A) motions during the pandemic at times felt overwhelming. It did not help that, at the time, the courts were still sorting out how the newly amended § 3582(c)(1)(A) would operate; there was no applicable policy statement in most circuits; and we were also facing other unprecedented challenges in the courts and in all of our own family lives. However, as could have been anticipated, post-pandemic, § 3582(c)(1)(A) filings have plummeted.[80]

If there had not been a pandemic, there likely still would have been some sort of surge in § 3582(c)(1)(A) filings after § 603 of the First Step Act for the first time permitted defendants to file their own motions for relief.[81]

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[79] *See, e.g.,* Oral Testimony of Hon. Randolph D. Moss at the Commission's Public Hearing on Compassionate Release (Feb. 23, 2023) (explaining in his opening statement that sentence-release proceedings have consumed tremendous judicial resources, with reference to experiences during the pandemic).

[80] *See USSC Compassionate Release Data Report,* tbl. 1 (Dec. 2022), https://bit.ly/3JAexzj.

[81] Professor Klingele predicted that this sort of surge would follow new legislation in her article on judicial sentence mechanisms that was published in 2014. Klingele, *supra* note 13, at 528.

And when the Commission issues its first-ever policy statement addressed to defendant-filed § 3582(c)(1)(A) motions, there may well be another surge. But in the absence of a pandemic, any surge should be manageable and will level off. Jurisdictions with robust mechanisms for judicial sentence reduction "appear to do so efficiently and without detriment to the court's ability to manage other demands on its time."[82] Federal courts are well-equipped to adjudicate § 3582(c)(1)(A) motions, and Defenders are eager to continue to help courts in this endeavor.

What's more, there is no evidence that the "extraordinary and compelling" legal standard has a significant impact on filing. The Second and Seventh Circuits, for example, are similar in terms of the number of criminal cases filed in their district courts.[83] Yet in the Seventh Circuit, where the circuit court has read § 3582(c)(1)(A) far more restrictively than in the Second Circuit, district courts have seen more, not fewer, § 3582(c)(1)(A) motions.[84] The Eleventh Circuit has the nation's most restrictive "extraordinary and compelling" standard, but the number of filings in district courts within that circuit is greater than in the Ninth Circuit, where there is both a generous standard and more criminal cases.[85]

Now that Congress has permitted individuals to file their own motions under § 3582(c)(1)(A), there is no policy statement that could reduce the volume of sentence-reduction motions to pre-2018 levels. But in the post-pandemic future, even with a significantly broadened §1B1.13, there is no reason to think this will be unmanageable. And ultimately, the fact that the number of sentence-reduction motions going forward will be substantially higher than it was pre-First Step Act is a solution, not a problem: § 3582(c)(1)(A) is finally capable of functioning as the safety valve it was always meant to be.

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[82] *Id.*

[83] *See* USSC, *2021 Sourcebook of Federal Sentencing Statistics* tbl. 1 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table01.pdf.

[84] *USSC Compassionate Release Data Report*, *supra* note 80, at tbl. 3.

[85] *Id.* Incidentally, this data report also shows that there is considerable variation in the grant/denial rates in the Eleventh Circuit, evidencing that a narrow "extraordinary and compelling" standard does not result in uniformity. *Id.*

Before the United States Sentencing Commission
Public Hearing on Compassionate Release

Statement of Kelly Barrett, First Assistant Federal Public Defender for the District of Connecticut, on Behalf of the Federal Public and Community Defenders

February 23, 2023

Statement of Kelly Barrett, First Assistant Federal Public Defender for the District of Connecticut, on Behalf of the Federal Public and Community Defenders Before the United States Sentencing Commission Public Hearing on Compassionate Release February 23, 2023

Hon. Chair Reeves, Vice-Chairs, and Commissioners: Thank you for holding a hearing on this important topic and for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders.

My name is Kelly Barrett and I am the First Assistant to the Federal Public Defender for the District of Connecticut. Since the First Step Act of 2018 enabled individuals to seek sentence reductions under 18 U.S.C. § 3582(c)(1)(A) on their own behalf, I have spearheaded my office's efforts under that statute. I have filed numerous § 3582(c)(1)(A) motions for my own clients and also helped facilitate the work of other attorneys for their clients.[1] Many of those motions were granted, some with the government's agreement, and many others were denied. With my clients who have prevailed, we are richer for having them back home—working, caring for their families, and sharing their talents with their communities.

Indeed, my former § 3582(c)(1)(A) clients aren't just doing well; they are *thriving*. More than a dozen of those clients have successfully graduated from the District of Connecticut's rigorous reentry court, and three of those graduates now mentor others in reentry court. The day before the Commission holds this hearing, another of my clients will be graduating.

This statement goes through the Commission's proposed amendments to §1B1.13, with an eye toward Issues for Comment 2, 3, and 4. Defenders will address the legal questions about the Commission's authority and whether there is any potential tension between §1B1.13 and other laws (Issues for Comment 1 and 5) in our written comments, which are due March 14. Of course, at the hearing, I will endeavor to answer any questions that Commissioners may have regarding any of the proposed amendments.

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[1] Commissioners may note that I refer to motions for sentence reduction under § 3582(c)(1)(A), rather than "compassionate release." As the Second Circuit has explained: "It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020).

I. Introduction

My circuit—the Second Circuit Court of Appeals—was one of the first to hold that the current USSG §1B1.13 does not apply to defendant-filed motions, and courts have broad discretion to determine whether the individualized circumstances presented in a particular case constitute "extraordinary and compelling reasons" for a sentence reduction.[2] Judges in the District of Connecticut have exercised that discretion carefully and reduced sentences in many cases where "circumstances [were] so changed" that it "would be inequitable" to maintain the sentence as originally imposed.[3] These are the kinds of cases to which Congress intended § 3582(c)(1)(A) to apply; that section was meant to function as a "safety valve"—one controlled by judges, not a parole board—in the newly determinate federal sentencing scheme.[4]

Defenders commend the Commission for proposing amendments to §1B1.13 that provide guidance while also granting courts discretion to consider the entire constellation of circumstances that might warrant a sentence reduction in a particular case. With these changes, § 3582(c)(1)(A) would be able to serve as a meaningful safety valve.

The past few years have served as a laboratory for the Commission, as district judges have had great discretion in determining which circumstances present extraordinary and compelling reasons for sentence reduction. The proposed amendments show that the Commission is listening to judges: the Commission is proposing to add new enumerated categories to §1B1.13 based on circumstances that judges have found to be extraordinary and compelling—*e.g.*, serious medical needs that are not being met, prison assault, and legal changes.[5]

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[2] *See Brooker*, 976 F.3d at 236–37.

[3] S. Rep. No. 98-225, at 121 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3304. This is a quote from the Senate Report on the Sentencing Reform Act of 1984 that Defenders discussed in a recent letter to the Commission. *See* Defender Comment on the Commission's Proposed Policy Priorities, at 3 n.11 (Oct. 17, 2022).

[4] *See* S. Rep. No. 98-225, at 121 (1983).

[5] This is how the Commission is meant to work: "The statutes and the Guidelines . . . foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." *Rita v. United States*, 551 U.S. 338, 350 (2007).

Also, the Commission has proposed options for an open-ended catchall category, which reflects something we all learned from the recent pandemic: we cannot know what the future holds. It is essential that courts have discretion to recognize extraordinary and compelling circumstances that we cannot even imagine today, or that may arise only in a single case. As Defenders have said before, Congress's legal standard for § 3582(c)(1)(A)—"extraordinary and compelling reasons"—is not reduceable to a finite list.

II. The proposed amendments to §1B1.13 give clear guidance to federal courts while retaining flexibility.

Since Congress empowered individuals to file § 3582(c)(1)(A) motions on their own behalf, all the circuits that have decided the issue except one have held that the current §1B1.13 is not applicable to defense-filed motions.[6] Thus, in most of the country, there has been no Commission guidance on how to apply § 3582(c)(1)(A), which makes it unsurprising that different courts have applied the section differently. The proposed amendments to §1B1.13 will go far to reduce unwarranted disparities.[7]

The proposed §1B1.13's enumerated circumstances (sub. (b)(1)–(5)) address the Commission's obligation to provide "criteria" and also "examples" of extraordinary and compelling reasons.[8] They appropriately capture the kinds

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[6] *See United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). *But see United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021).

[7] In the past, the DOJ has raised concerns about disparities in this context. *See* DOJ Public Comment on the Proposed Priorities, at 5 (Sept. 12, 2022). It is impossible to ascertain from motion grant/denial rates whether disparities are unwarranted or are based on distinctions between individualized circumstances. It is the Defenders' experience that it is a combination of these. And the Commission should endeavor to reduce only *unwarranted* disparities. *See Gall v. United States*, 552 U.S. 38, 55 (2007) (approving of the effort to reduce not just unwarranted disparities but also "unwarranted similarities" among defendants who are not similarly situated).

[8] 28 U.S.C. § 994(t).

of circumstances that courts have found, in individual cases, may warrant a sentence reduction:

- *The proposed sub. (b)(1) appropriately expands the health-related circumstances that may warrant sentence reduction to include medical conditions that pose treatment challenges in prison and also infectious disease.* The former provides a path to complex medical care—while our clients can still benefit from it—that is removed from litigation about who is to blame for health-care failures. The latter reflects what we've all learned the hard way: infectious diseases can be difficult or impossible to manage in the prison setting.

- *Subsection (b)(3) recognizes that someone who is not an individual's minor child may require their care.* This does not only benefit our clients and their families. It benefits the public by easing communities' caretaking responsibilities and also by reducing recidivism risk.[9] It is essential that the amendment include the bracketed sub. (b)(3)(D) to capture circumstances that may be extraordinary and compelling in unusual cases. Family and kinship relationships are not one-size-fits-all. This is true generally and can also relate to varying cultural norms, which are entitled to respect.

- *The bracketed sub. (b)(4) acknowledges that sometimes imprisonment is more punitive and traumatic than the sentencing court intended or society can bear.* Prison rape and assault are real. And no judge would have intended such a violation. By acknowledging that some individuals are victimized while in custody and that this can impact the appropriateness of the sentence originally imposed, this proposed amendment promotes healing and rehabilitation.

- *The bracketed sub. (b)(5) appreciates that a sentence imposed under a legal scheme that is now understood to be overly harsh can epitomize "extraordinary" and "compelling."* It would harm the

[9] *See* Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 Fam. L. Q. 191, 196 (2006) ("The single best predictor of successful release from prison is whether the former inmate has a family relationship to which he can return. Studies have shown that prisoners who maintain family ties during imprisonment are less likely to violate parole or commit future crimes after their release than prisoners without such ties.").

credibility of our justice system to prohibit judges from recognizing this reality. By expressly endorsing the consideration of legal changes in the extraordinary-and-compelling analysis, regardless of whether a change would have retroactive application as a general matter, sub. (b)(5) will encourage circuit courts that have prohibited this practice to revisit pre-amendment caselaw, reducing disparities and protecting the credibility of the federal criminal justice system.

III. A few simple changes to the proposed enumerated circumstances would improve §1B1.13.

As discussed below, an open-ended catchall category is essential to the functioning of §1B1.13: it captures circumstances that we cannot foresee, or that would be too rare or idiosyncratic for an enumerated category. But even with a catchall, care must be taken with the enumerated circumstances. A court analyzing a circumstance that is close to, but does not quite fit within, an enumerated category may think that the Commission intended to delineate the boundaries of that category and feel compelled to deny the motion. We urge the Commission to clarify or broaden language proposed in three of the enumerated categories.

A. Subsection (b)(1)(C) should refer to medical care that is not being provided in a timely or "effective," rather than merely "adequate," manner.

Again, we commend the Commission for proposing the new sub. (b)(1)(C). Most Defenders have had clients who suffered from medical conditions that could have been managed far better, or even cured, in the community, but unfortunately they got much worse in prison.

One of my own cases, *United States v. Cruz*, 3:15-cr-96-VLB, doc. 402 (D. Conn. Dec. 19, 2022), provides an example. The motion containing the medical information in that case was filed under seal, but Ms. Cruz has given me permission to provide it to the Commission upon request. To summarize, after sentencing, Ms. Cruz was diagnosed with multiple sclerosis. Her condition was managed effectively while she served a state sentence but, once she was transferred from state to federal prison, all treatment stopped (apparently due to the need for multiple layers of BOP approval) and her health deteriorated. Thankfully, the government did not oppose our motion for

sentence reduction and the court granted it. Now Ms. Cruz is home with her family, getting treatment, and doing well. Other courts around the country have granted § 3582(c)(1)(A) motions in numerous similar cases, so that other individuals could get needed treatment.[10]

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[10] *See, e.g., United States v. English*, 2022 WL 17853361, at *7 (E.D. Mich. Dec. 22, 2022) (where Mr. English had several significant health concerns, including multiple tumors, but the BOP had no treatment plan, "BOP's gross mismanagement of English's serious health conditions, even if they are not yet life-threatening, presents an extraordinary and compelling reason for release"); Order, *United States v. Halliday*, No. 3:17-cr-267-JAM, doc. 176, at 1–2 (D. Conn. Aug. 11, 2022) ("I conclude that Halliday has shown that he suffers from a gravely serious eye disease—keratoconous—that has advanced to a great degree and imminently threatens permanent blindness unless promptly subject to sophisticated medical treatment. . . . Halliday's best hope for retaining his eyesight is to seek treatment by an eye specialist in the outside community as soon as possible."); *United States v. Verasawmi*, 2022 WL 2763518, at *10 (D.N.J. July 15, 2022) ("In these atypical circumstances, where Verasawmi suffers from a complex array of serious conditions, some of which the BOP has failed to treat diligently, the Court cannot simply wait until [life-threatening] outcomes materialize."); Order, *United States v. Green*, No. 3:16-cr-63-SLF, doc. 198, at 10–11 (D. Alaska Mar. 29, 2022) (granting § 3582(c)(1)(A) relief based on aggressive prostate cancer that appeared to have metastasized to other parts of Mr. Green's body while he waited for testing and treatment, and the BOP still did not have a treatment plan in place); *United States v. Russell*, 2022 WL 18542444, at *4 (D.N.J. Mar. 9, 2022) ("The surest and perhaps only path towards the proper treatment [Mr. Russell] urgently needs is his release from prison.") (quoting the motion); *United States v. McPeek*, 2022 WL 429249, at *9 (N.D. Iowa Feb. 11, 2022) (collecting cases where courts found that "BOP delays in treatment of serious disorders can constitute or contribute to finding extraordinary and compelling circumstances"); *United States v. Bandrow*, 473 F. Supp. 3d 778, 787 (E.D. Mich. 2020) ("Elkton's inability to provide care for Bandrow's hematuria further weighs in favor of compassionate release. Despite knowing about Bandrow's hematuria since January 2020, and being alerted that his condition was a 'serious illness/critical illness' on June 4, 2020, FCI Elkton has been unable to provide Bandrow with the CT urogram and urology consultation he needs to address this issue."); *United States v. Almontes*, 2020 WL 1812713, at *1, *6–7 (D. Conn. Apr 9, 2020) (granting relief to an individual in need of urgent spinal surgery related to a previously broken neck, where the BOP had delayed treatment for years and his health was deteriorating); *Bruno v. United States*, 472 F. Supp. 3d 279, 284 (E.D. Va. 2020) ("In addition to Petitioner's status as HIV-positive, the Court is also concerned that his mental health needs are being neglected during his term of incarceration. . . . This outcome is plainly unacceptable, as Petitioner was sentenced based in large part on his need for mental health treatment for his Bipolar Disorder.").

Defenders presume that the BOP is rarely deliberately indifferent—the Eighth Amendment standard.[11] The beauty of sub. (b)(1)(C) is that it does not attempt to assign blame or remedy harm. Instead, it permits the court to reduce a sentence *before* there is harm—or at least further harm—so that a person who urgently needs complex or specialized medical care can access it.

Our concern is with the word "adequate," as it appears in the phrase "that is not being provided in a timely or *adequate* manner." That word may discourage courts from granting § 3582(c)(1)(A) relief so that an individual can get medical care in the community (where other factors militate in favor of release) in all but the most extreme circumstances. And where circumstances are extreme, §1B1.13 may not even be needed; that's what the deliberate-indifference standard addresses. Section 3582(c)(1)(A) and §1B1.13(b)(1)(C) serve a different purpose.

In *Green*, a case in footnote 10 involving aggressive prostate cancer, the government opposed the motion on the ground that the BOP was providing "adequate" care.[12] But the court explained that nothing in § 3582 or §1B1.13 "require[d] the defendant to show that the BOP is not providing *adequate* medical care in order to be granted compassionate release."[13] Thus, the court did not have to assign a grade to the BOP's care of Mr. Green. It was enough that Mr. Green needed far more aggressive and urgent care than he was getting in BOP custody, and the § 3553(a) factors supported release.[14]

To ensure that courts have the discretion to consider sentence reductions in cases like Mr. Green's, where an individual needs access to urgent medical care in the community, Defenders recommend a stronger word than "adequate." We suggest "effective." As in: "The defendant is suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or *effective* manner." This is a small change that could make a big difference in some cases.

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[11] *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

[12] Order, *United States v. Green*, No. 3:16-cr-63-SLF, doc. 198 (D. Alaska Mar. 29, 2022) (quoting the government's motion.

[13] *Id.* at 4 (emphasis added).

[14] *See id.*

B. Subsection (b)(1)(D) should encompass *any* emergency situation that threatens the lives or health of individuals in prison that cannot be mitigated.

As currently drafted, sub. (b)(1)(D) applies only to an "infectious disease" or a "public health emergency." This is too narrow, given the reality of other emergency situations that may pose a health threat to the prison population. For example, it is easy to imagine a catastrophic weather event that prevents the BOP from protecting inmates' health and safety. And if such an event happened over a large enough area, and the aftermath extended for a long enough period, individuals could face significant health threats that the BOP would not be able to mitigate.

But if the proposed sub. (b)(1)(D) were expanded solely to include extreme weather events, that would be overly narrow, too, given other events that could occur: *e.g.*, war, geological disaster, economic collapse. Defenders hope that we never see any of these circumstances in our lifetimes, and it would not make sense for the Commission to write a doomsday provision into the §1B1.13 policy statement. But the Commission should broaden sub. (b)(1)(D) to cover *any* emergency situation that poses a health threat to imprisoned individuals that cannot be appropriately mitigated.

C. The Commission should expand sub. (b)(4) in two ways in order to reach all prison abuse that may warrant a sentence reduction.

The bracketed sub. (b)(4), regarding people who have been the victim of physical or sexual abuse in prison, would be a positive change, but it covers only abuse that was perpetrated by a BOP employee or contractor and only if it resulted in "serious bodily injury." The new subsection is well-meaning but these two limitations mean that it would not apply to circumstances that many—or even most—judges would find extraordinary and compelling.

First, there is no reasoned justification for limiting sub. (b)(4) to circumstances where the perpetrator is a BOP employee or contractor. With both sexual and physical abuse, the harm is real regardless of the identity of the perpetrator. Many Defenders have seen our clients return from prison with visible scars from injuries inflicted by other inmates and emotional scars

from violent rape. For victims of violent attacks while in prison, the fact that a BOP employee or contractor was not the perpetrator is utterly irrelevant.

Limiting sub. (b)(4) to situations where the perpetrator was a BOP employee or contractor makes the provision seem less like an illustrative example of an "extraordinary and compelling reason[]" for sentence reduction and more like compensation for harm inflicted by the government. In reality, the government can bear responsibility for inmate-on-inmate assault. But more importantly, the point of § 3582(c)(1)(A) is not to assign responsibility for harm, and it's not to reduce a sentence in order to punish the government.

The point is that a particular individual's circumstances might so change during their term of imprisonment that it would be inequitable to maintain the sentence as originally imposed. And sexual and physical abuse are life-changing no matter who the assaulter is: a federal employee or contractor,[15] a state or local correctional officer (which might arise where the individual is serving both state and federal sentences or where he is in transit to a federal facility),[16] or a fellow inmate.[17]

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[15] *See, e.g., United States v. Brice*, 2022 WL 17721031, at *4 (E.D. Pa. Dec. 15, 2022) (holding that prison guards' sexual assault of the individual was an extraordinary and compelling reason for sentence reduction).

[16] *Cf. United States v. Brocoli*, 543 F. Supp. 3d 563, 568–69 (S.D. Ohio 2021) ("[A]lthough Mr. Brocoli was investigated, charged, and sentenced in the federal system, he has nevertheless been detained in state-level institutions for a significant portion of his incarceration. During his incarceration in these state institutions, he reports having been severely abused and victimized. . . . For these reasons, the Court finds that Mr. Brocoli has demonstrated extraordinary and compelling reasons that could justify his release.").

[17] *See, e.g.,* Mot. for Compassionate Release Due to Serious Medical Condition at 3–4, *United States v. Smith*, No. 3:11-cr-194-14, doc. 2260 (M.D. Tenn. March 31, 2022) (granted by Order dated Dec. 15, 2022, doc. 2285) (explaining that the individual was (mistakenly) believed to have cooperated with the government, which resulted in him being beaten so severely that he went into a coma and likely would require permanent nursing care); *United States v. Wise*, 2020 WL 4251007, *2–3 (N.D. Ohio June 25, 2020) (granting § 3582(c)(1)(A) motion based in part on medical conditions for an individual who had been brutally attacked in prison in 2007, causing spinal fractures, a broken jaw, a broken nose, and lingering neurological problems); *cf. United States v. Pinson*, 835 F. App'x 390, 392 (10th Cir. 2020) (affirming a district court judgment where the court had apparently accepted that it could be extraordinary and compelling that the individual had been subjected to "serious violence by other inmates, including rape," but had denied the motion based on §

Second, Defenders are also concerned about the proposed sub. (b)(4)'s "serious bodily injury" requirement. The Guidelines define "serious bodily injury" as

> injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.[18]

This limitation may make sense as applied to abuse by fellow inmates. Unfortunately, low-level violence in prison is not extraordinary; it is all too common. This is among the reasons that ending mass incarceration is a moral imperative for our nation. But it means that courts are likely to think that inmate-inflicted abuse in prison is extraordinary only when it causes significant injury or involves non-consensual sexual assault.

However, the situation is different where a prison employee, contractor, or volunteer (*e.g.*, clergy member, teacher) is the perpetrator. In that situation, it is the gross imbalance of power that makes a sexual act "abusive." *See* 18 U.S.C. § 2243 (sexual abuse of a minor or ward). And it is this same imbalance of power that makes physical abuse of an imprisoned individual by a person with authority more than simple assault—it's a civil rights violation.

In this situation, there should be no need for an individual to make a showing of harm—and certainly not "serious bodily injury"—before a court can recognize that it is extraordinary and compelling.

3553(a) factors). I have also reviewed a redacted version of a § 3582(c)(1)(A) motion that was filed under seal on behalf of a transgender woman who was housed in male prisons, where she was repeatedly attacked and raped. That motion was withdrawn before the court ruled on it, after the individual's BOP sentence expired. Motion to Withdraw Document, *United States v. Gerald P.*, No. 4:04-cr-29-TRM-SKL-1, doc. 326 (E.D. Tenn. Jan. 27, 2023). As with the other sealed document discussed in this statement, if it would be helpful, the client has granted permission for me to provide the Commission with a copy of the § 3582(c)(1)(A) motion upon request.

[18] USSG §1B1.1, comment. (n. 1(M)).

Perhaps "serious bodily injury" was chosen for the proposed sub. (b)(4) because it applies anytime there has been sexual abuse as defined at 18 U.S.C. §§ 2241 or 2242, whereas the generally lower standard, "bodily injury," does not.[19] But in many sexual assault cases in which a BOP employee or contractor was the perpetrator, the offense comes within 18 U.S.C. § 2243 (sexual abuse of a minor or ward), but not necessarily §§ 2241 or 2242.[20] Thus, the limitation of sub. (b)(4) to circumstances that involve a "serious bodily injury" threatens to undermine even the core purpose of this proposed enumerated circumstance.

In order to address both of our concerns, Defenders recommend that the Commission alter sub. (b)(4) so that it reads:

> VICTIM OF ABUSE.—The defendant was a victim of sexual or physical abuse in prison, where such abuse resulted in serious bodily injury or where it was perpetrated by a prison employee, contractor, or volunteer.

IV. An open-ended catchall category is essential to §1B1.13's ability to capture unforeseeable and unique circumstances that are extraordinary and compelling.

Since the Sentencing Commission created a policy statement at §1B1.13, it has always had an open-ended catchall category. In the past, that category has turned on the BOP's discretionary judgment; that was out of necessity, since the BOP effectively controlled § 3582(c)(1)(A) motions until passage of the First Step Act of 2018.[21] Now that the BOP no longer controls these motions, the Commission need not reverse course; it should just update the entity that exercises discretion.

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[19] *Compare* USSG §1B1.1, comment. (n. 1(B)) *with* §1B1.1 comment. (n. 1(M)).

[20] In the context of the coercive relationship between a prison authority and an imprisoned person, consent is a thorny issue. That's why sexual abuse of a minor or ward is a serious felony regardless of force, threat, or consent, which are the elements that define §§ 2241 and 2242.

[21] When the BOP controlled sentence reductions under § 3582(c)(1)(A), as the Commission is aware, the BOP effectively abdicated its responsibility to seek sentence reductions. *See Brooker*, 976 F.3d at 231–32 (recounting this history).

The presence of an open-ended catchall category (like Option 3 for the proposed sub. (b)(6)) further defines the "criteria to be applied"[22] in these proceedings and is essential to the functioning of §1B1.13, and we appreciate that the Commission has proposed it as an option. Before 2020, the Commission did not think to include risks related to infectious disease in §1B1.13; now we know. But we do not know all that we still do not know.

And beyond our inability to predict the future, it would not make sense for the Commission to include every conceivable occurrence that might, in an individual case, warrant a sentence reduction. Consider a few situations that have been recognized as among the extraordinary and compelling reasons for sentence reduction in my own district in recent years:

- *BOP services halted.* Our client was at the point of his sentence where ordinarily he would be receiving transitional services and transferring to a halfway house but, because of circumstances outside of his control (the pandemic), he was receiving no transitional or supportive services.[23]

- *BOP rules increased sentence.* The parties and the sentencing court understood that the sentence would be fully concurrent to a state sentence, but the BOP deemed the federal sentence to be consecutive and thus our client was slated to serve a sentence far longer than the sentencing court had intended.[24]

- *Youth at the time of sentencing*. In the more than 20 years since our client was sentenced to life in prison for serious offenses committed

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[22] 28 U.S.C. § 994(t). The Commission acts well within its policy-making authority in this space when it decides, as a matter of policy, that the sentencing court should have broad discretion to recognize unusual extraordinary and compelling reasons when they arise.

[23] *See* Order, *United States v. Coleman*, 3:17-cr-216-AWT, doc. 92 (D. Conn. May 20, 2020); *see also* Unopposed Mot. 4–5, *United States v. Coleman*, 3:17-cr-216-AWT, doc. 91 (D. Conn. May 18, 2020). Similar situations have arisen elsewhere. *See, e.g., United States v. Fraga*, 2020 WL 5732329, at *3 (D. Mass. Sept. 24, 2020) (granting release to home confinement where, if not for the pandemic, Mr. Fraga already would have been transferred to a halfway house or residential facility).

[24] *See United States v. Castillo*, 2021 WL 1781475, at *3 (D. Conn. Feb. 22, 2021). Again, similar situations have arisen elsewhere. *See, e.g., United States v. Comer*, 2022 WL 1719404, *5 (W.D. Va. May 27, 2022).

when he was 18 years old, society's and the courts' understanding of brain development had evolved considerably, calling into question the appropriateness of the sentence.[25]

- *Sentence lengthened by civic duty*. Our client's time in the RDAP program[26] was cut short when the government transported him to testify before a grand jury. If he'd been able to complete RDAP he would have been released already, but because the government pulled him out of prison for a civic duty he was still in prison.[27]

- *Family emergency*. Our client had just 20 days left to serve on his sentence under home confinement in New Jersey, and he was doing well. His mother was in hospice care in Georgia and would die any day. Given the short time left on our client's sentence, the court found that our client's need to be with his mother was extraordinary and compelling and granted his § 3582(c)(1)(A) motion.[28]

"Extraordinary and compelling" findings arising from idiosyncratic circumstances in other districts include: saving the life of another person while in prison[29]; risk of death at a halfway house related to cooperation with the

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[25] *See United States v. Morris*, 2022 WL 3703201, at *8–9 (D. Conn. Aug. 26, 2022). Again, similar situations have arisen elsewhere. *See, e.g., United States v. Mendez-Zamora*, 2022 WL 9333452, *2 (D. Kan. Oct. 14, 2022).

[26] The BOP's Residential Drug Abuse Program (RDAP) is an intensive treatment program, where completion of the program results in a sentence reduction. *See* Federal Bureau of Prisons, *Substance Abuse Treatment*, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp; Families Against Mandatory Minimums, *Frequently Asked Questions about the Residential Drug Abuse Program (RDAP)* at 1 (May 2012), https://famm.org/wp-content/uploads/FAQ-Residential-Drug-Abuse-Program-5.3.pdf.

[27] *See United States v. Wooten*, 2020 WL 6119321, at *8 (D. Conn. April 27, 2021).

[28] *See* Unopposed Emergency Mot., *United States v. Oreckinto*, No. 3:16-CR-026 (JAM), doc. 137 (D. Conn. Feb. 13, 2021) (granted by Order, doc. 138 (Feb. 13, 2021)).

[29] *See United States v. Pimental-Quiroz*, 2021 WL 915141, at *4 (W.D. Wash. Mar. 10, 2021) (fiding that Mr. Pimental-Quiroz "put himself at risk when he assisted a female corrections officer who was being assaulted by a mentally ill inmate"); *see also United States v. Meeks*, 2021 WL 9928774, at *3 (N.D. Ill. Dec. 15, 2021) (recognizing as extraordinary and compelling that the individual saved the life of a fellow inmate who was attempting suicide).

government[30]; unwarranted disparities among co-defendants that emerged after sentencing[31]; childbirth and inability to bond with a newborn while incarcerated[32]; unwarranted reincarceration after release to CARES Act home confinement[33]; and psychological problems manifesting in a child upon separation from her incarcerated parent.[34]

These sorts of circumstances do not relate to any enumerated category that the Commission has proposed. But also, it would not make sense to create an additional category for, say, saving someone's life or being pulled out of RDAP for grand jury service. These are too idiosyncratic. However, an open-ended §1B1.13(b)(6) ensures that sentencing courts are able to identify

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[30] In the case in which this arose, all documents were filed under seal and cannot be shared. But it is no secret that halfway houses can expose vulnerable individuals to new violence. *See, e.g., 1 wounded in shooting near halfway house in New Orleans*, 4WWL (Feb. 10, 2022), https://www.wwltv.com/article/news/crime/1-wounded-in-shooting-near-halfway-house/289-e975d60a-c908-48d1-b712-06974e995000.

[31] *See United States v. Edwards*, 2021 WL 1575276, at *1–2 (D. Md. Apr. 22, 2021); *see also United States v. Conley*, 2021 WL 825669, at *4 (N.D. Ill. Mar. 4, 2021) (granting relief under § 3582(c)(1)(A) in a stash-house case in which Mr. "Conley was the next to least culpable, yet received the longest prison sentence by double based on outrageous and disreputable law enforcement tactics"). Pre-Sentencing Reform Act, at least one court in a published case reduced a sentence under a predecessor statute—18 U.S.C. § 4205, which permitted the BOP to seek a sentence reduction below an otherwise mandatory-minimum—based on disparities among co-defendants. *See United States v. Diaco*, 457 F. Supp. 371, 376 (D.N.J. 1978).

[32] *See United States v. Garcia-Zuniga*, 2020 WL 3403070, at *2–3 (S.D. Cal. June 19, 2020).

[33] *See* Mot. for Emergency Status Hearing, *United States v. Levi*, No. 8:04-cr-235-DKC, doc. 2086 (D. Md. July 2, 2021) (granted by Order, doc. 2086 (July 6, 2021)). It is my understanding that Gwen Levi will testify before the Commission, so the Commission is likely familiar with her case. But for a narrative of what occurred, *see* Kristine Phillips, *Woman who was arrested after missing officials' phone call while in computer class is headed home*, USA Today (July 7, 2021), https://www.usatoday.com/story/news/politics/2021/07/06/gwen-levi-headed-home-after-judge-approves-compassionate-release/7877359002/.

[34] *See* Order, *United States v. Ochoa*, No. 18-cr-03945-BAS-1, doc. 70 at 8 (S.D. Cal. Feb. 19, 2021) ("In light of the pandemic, the closed schools, and the serious difficulties L. has been experiencing—namely, his reported deterioration in mental health and suicidal ideation—the Court finds this showing constitutes 'extraordinary and compelling circumstances' to support reducing Ms. Ochoa's sentence to allow her to better care for her minor child.").

circumstances like these as extraordinary and compelling when they encounter them—in appropriate cases, on an individualized basis.

Of the three options the Commission has presented for the new §1B1.13(b)(6), the third option is the best. The proposed third option gives sentencing courts nothing more than the same meaningful discretion that the Commission has long afforded the BOP.[35] It does not preclude relief in circumstances that courts may reasonably find—indeed, have reasonably found—to be extraordinary and compelling reasons for sentence reduction, and its meaning is clear.

Option 1 is overly restrictive. Option 1 is limited to circumstances that are "similar in nature and consequence" to §1B1.13's enumerated circumstances. Thus, it wrongly suggests that those enumerated categories have entirely covered the kinds of circumstances that may present an extraordinary and compelling basis for sentencing relief. But none of us—including the Commission—is omniscient, nor can we see the future.

The circumstances that supported relief in the idiosyncratic cases bulleted above are not similar in nature to any of the enumerated circumstances in sub. (b)(1) through (b)(5). What's more, none of them make sense as a new enumerated category, given that they are so unusual and fact-specific.

Beyond what has arisen in actual § 3582(c)(1)(A) cases, it is not hard to imagine hypothetical fact-bound circumstances that, in a particular case, might be an extraordinary and compelling reason for sentence reduction:

- An individual co-owns a grocery store; while he is incarcerated, the other co-owner becomes incapacitated and the store is in danger of shutting down, which would negatively impact not just the defendant and his family but also the neighborhood's access to fresh, affordable food.

- An individual's spouse and children are killed in a tragic accident and no one else is able to plan memorials or ensure that the family home is not foreclosed upon, and also the sentencing court wants to encourage the individual to start rebuilding his life post-tragedy.

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[35] *See* USSG §1B1.13, comment. (n. 1(D)).

- An individual who suffers from Tourette's Syndrome has been repeatedly threatened in prison for involuntarily saying offensive things, leading to near-permanent solitary confinement.[36]

- The BOP erroneously releases an individual from prison who successfully serves his term of supervised release and then lives as a law-abiding citizen in the community for years, before the error is discovered and he is sent back to prison.

Perhaps some of these circumstances will never arise; but it is inevitable that there will be circumstances that are similarly extraordinary, compelling, and utterly distinct from any enumerated category. None of these circumstances would guarantee a sentence reduction, of course, but a court facing such a circumstance should be able to decide whether a reduction is warranted. Option 1 of the proposed options for sub. (b)(6) could be read to categorically bar relief in all these circumstances, regardless of other factors.

Option 2 of sub. (b)(6) could create uncertainty. Option 2 is not necessarily problematic. It is preferable to Option 1: it acknowledges that circumstances that are unrelated to §1B1.13's enumerated categories could warrant § 3582(c)(1)(A) relief. Also, it evokes § 3582(c)(1)(A)'s legislative history, in which a Senate Report referred to the provision as a "safety valve" that would apply whenever an individual's circumstances were "so changed" that it would be "inequitable" to maintain the original sentence.[37]

The Defenders' concern is that the phrases "changes in the defendant's circumstances" and "intervening events" do not have established meanings in this context, and so present uncharted litigation territory. Different courts could interpret the phrases differently. And given that the Commission has previously adopted the language of Option 3, there is no need to promulgate a new, untested standard.

If Option 2 is ultimately chosen, we would urge the Commission to adopt the language both outside and inside the brackets, so that courts would understand that sub. (b)(6) covers not only circumstances that are personal to

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[36] This hypothetical is based on a real situation, where a § 3582(c)(1)(A) motion may be filed in the future.

[37] *See* S. Rep. No. 98-225, at 121 (1983), *see also supra* note 3.

the individual, but also circumstances related to outside events that may impact the propriety of a particular sentence.[38] Or, even better, the Commission could simplify Option 2:

> The circumstances as understood at sentencing have so changed that it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of his or her sentence.

Also, if the Commission chooses Option 2, it should retain—either within sub. (b)(6) or elsewhere—the clarification that "the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement."[39] Indeed, it would be sensible for the Commission to retain this language regardless of sub. (b)(6). Defenders just note that it would be particularly important to retain the language if the Commission chooses Option 2 for sub. (b)(6), given uncertainties with the language. The Commission appears to have deleted this commentary as an accident of restructuring §1B1.13 so that it is no longer dependent on BOP action, not as a substantive policy choice, but some judges may assume otherwise.

Option 3 is the best, and simplest, option. Option 3 respects the courts' ability to exercise discretion under Congress's substantive standard no less than the Commission has always respected the BOP. This is consistent with one of the purposes of the Sentencing Reform Act: to keep sentencing decisions in the judiciary. And Option 3 is not overly restrictive; it is clear; and it will allow courts to transparently grant relief in cases that cry out for relief.

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[38] The drafters of the Model Penal Code's new sentence modification provision that is modeled, in part, on § 3582(c)(1)(A) have explained that while application of such provision "will usually focus on circumstances having to do with the prisoner, or the prisoner's behavior," it is meant to be "flexible enough to reach compelling changes of circumstances outside the institution." *Model Penal Code: Sentencing* § 305.7 (Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons), comment b. (Am. L. Inst., Proposed Official Draft 2017).

[39] USSG §1B1.13 comment. (n. 2).

V. Conclusion

Almost 20 years ago, Justice Kennedy gave a speech in which he criticized the legal profession for "losing all interest" after someone is judged guilty and the appeal ends.[40] "We have a greater responsibility," he said; "As a profession, and as a people, we should know what happens after the prisoner is taken away."[41]

> To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.[42]

This really speaks to § 3582(c)(1)(A). When Congress in 1984 abolished parole, it decided that under the new determinate sentencing system, there needed to be a way for courts to address changed circumstances—to find out what happened after someone was taken away to prison—where those circumstances may render the sentence inequitable as imposed. There needed to be an adaptable safety valve: § 3582(c)(1)(A).

In fulfilling its obligation to set policy for sentence reductions under § 3582(c)(1)(A), the Commission has recognized our incarcerated clients' humanity, and that they are not frozen in time at sentencing—they, their families, and larger forces change during their incarceration. The Commission has proposed a policy statement that would allow § 3582(c)(1)(A) to serve as a meaningful safety valve that can respond to these changes, as Congress intended, when they render the sentence in a particular case inequitable.

Defenders appreciate that you have given us the opportunity to suggest changes and comment on options that would improve and strengthen the Commission's proposals. At the hearing, I look forward to addressing any questions or concerns Commissioners may have.

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[40] Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.

[41] *Id.*

[42] *Id.*

Federal Public and Community Defenders Comment on First Step Act—Drug Offenses (Proposal 2)

March 14, 2023

The attached excerpt of the Statement of Michael Caruso contains Defenders' comments on Part A (Safety Valve) and Part B (Recidivist Penalties) of Proposed Amendment 2. We supplement those comments to address a question that was raised at the March 7, 2023 hearing about Part B.

Both the primary federal drug statutes, 21 U.S.C. §§ 841 and 960, contain a mechanism that enhances statutory penalties based on proof of certain prior convictions. To establish the existence of these prior convictions, a prosecutor must file and sustain an information pursuant to 21 U.S.C. § 851.

Generally, the drug guidelines do not separately account for convictions that are statutorily enhanced by sustained § 851 informations—the base offense level is determined by the type and quantity of the drug involved, and, if the calculated guideline range is less than an applicable mandatory minimum, the person's guideline range becomes that mandatory minimum.[1] However, there is one exception: if a person has a triggering prior conviction *and* if the offense resulted in death or bodily injury, the guidelines direct that either §2D1.1(a)(1) or (a)(3) apply, enhancing the base offense level.

Since the First Step Act changed the types of prior convictions that can trigger enhanced statutory penalties, the Commission has proposed to update §2D1.1(a)(1) and (a)(3). The cleanest way to account for these new definitions would be to delete §2D1.1(a)(1) and (a)(3) entirely. This would mirror the way the drug guidelines have always handled cases that have a triggering prior conviction but without death or serious bodily injury. It would ensure that the Commission does not need to continuously update §2D1.1 every time Congress revises the criteria for the triggering priors. And it would prevent the Commission from incorporating a drafting oddity from the First Step Act that produces disproportionate sentences.[2]

If the Commission chooses to retain these enhanced base offense levels, it must ensure that they are triggered only in cases where a person is subject to enhanced statutory penalties. That is, in cases where a person is convicted

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[1] *See* USSG §§ 2D1.1(a)(5); 5G1.1(b).

[2] *See* Statement of Michael Caruso on First Step Act—Drug Offenses and Counterfeit Pills 11–14 (March 7, 2023).

of an offense causing death or serious bodily injury and where an § 851 information establishing a prior conviction has been sustained. Otherwise, even though DOJ has determined as a matter of policy *not* to seek a mandatory sentence of life imprisonment under §§ 841(b)(1)(C) or 960(b)(3) based on a prior felony drug offense conviction, the applicable enhanced base offense level would nevertheless be life imprisonment.[3]

At the March 7, 2023 hearing, Vice Chair Mate asked what language the Commission could use to better clarify that §2D1.1's enhanced base offense levels should only apply if a person is subject to enhanced statutory penalties. In addition to confirming in the commentary that "offense of conviction" means "the offense conduct charged in the count of the indictment or information of which the defendant was convicted,"[4] Defenders suggest:[5]

> **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 (a) the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, and (b) the defendant is subject to an enhanced statutory penalty on the basis of a prior conviction; ~~that the defendant committed the offense after one or more prior convictions for a similar offense;~~

[3] *See id.* at 13–14 & n.53.

[4] USSG §1B1.2(a).

[5] The same suggested language would apply to §2D1.1(a)(3).

The following is excerpted from the March 7, 2023 Statement of Michael Caruso.

* * * * *

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**
>
> (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.'").

Federal Public and Community Defenders
Comment on Firearms Offenses (Proposal 3)

March 14, 2023

Table of Contents

This comment explains Defenders' position on firearms issues not addressed in prior written testimony (attached), responds to specific questions raised by the Commission at the hearing on March 7, 2023, and addresses proposals advanced by the Department of Justice (DOJ) and other stakeholders in their submissions and testimony.

As explained in our written testimony, at the hearing, and in this comment, Defenders take the following positions on each Part of the proposed Firearms Offenses amendment[1]:

- **Part A**: Defenders oppose changes proposed in Options 1 & 2 and urge the Commission to study firearms offenses carefully before increasing penalties in USSG §2K2.1. If the Commission nonetheless proceeds, Defenders favor the narrower changes proposed in Option 1. Defenders encourage the Commission to account for mitigating factors by following the language Congress provided in the BSCA directive. And, in light of racial disparities and inaccuracies in gang databases, we urge the Commission to implement the crime-affiliation enhancement cautiously.

- **Part B**: Defenders encourage the Commission to add a mens rea requirement to §2K2.1(b)(4) and oppose adding privately made firearms (PMFs) to the enhancement. In addition, the Commission should reject DOJ's request for a rebuttable presumption of mens rea in §2K2.1(b)(4).

- **Part C**: Defenders oppose any unstudied expansions to §2K2.1 and urge the Commission to carefully review each of the five issues it identifies in this part before increasing the punitiveness of the gun guideline.

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[1] The proposed Firearms Offenses amendment is a three-part proposal. Part A proffers two potential responses to the Bipartisan Safer Communities Act ("BSCA"): Option 1 would add references to new sections 932 and 933 of Title 18 and revise the firearms trafficking enhancement at §2K2.1(b)(5); Option 2 would restructure base offense level provisions across §2K2.1 for a wide range of firearms offenses. Part B seeks comment on whether a mens rea standard should be added to the strict-liability §2K2.1(b)(4) enhancement and whether privately manufactured firearms ("ghost guns") should be added to the list of characteristics that trigger the enhancement. Finally, Part C provides five additional issues for Comment. *See* 2023 Proposed Amendments, 88 Fed. Reg. 7180, 7190–98, 2023 WL 1438480 (Feb. 2, 2023) ("2023 Proposed Amendments").

I. PART A: Implementing the Bipartisan Safer Communities Act ("BSCA")

A. Answers to the Commission's questions at the recent hearing establish that it should not promulgate a reactive, across-the-board increase to the severity of the firearm guidelines.

At the March 2023 hearing on Firearms Offenses, the Commissioners identified several areas of particular interest. This section briefly addresses those questions.

1. What should the Commission study before implementing the Congressional directive?

At the hearing, there was significant discussion of the need for additional study and data relating to firearms offenses. Defenders appreciate the Commission's interest in what potential research could inform its implementation of the BSCA directive[2] and strongly recommend it undertake a careful review. That review should examine at least the following issues:

- the Commission should collect data about how the new BSCA statutes, §§ 932 and 933, are utilized. Many districts have yet to see new prosecutions under these statutes, and there is no public sentencing data yet available;
- the Commission should review relevant Commission and other data and research to understand the significant race, gender, and ethnic disparities in arrest, prosecution, and sentencing of federal firearm offenses. A special coding project could help better differentiate disparities that arise prior to and during sentencing;
- the Commission should undertake special study of straw purchasers without significant criminal histories, in order to identify the most common mitigating factors in such cases; and

[2] The Bipartisan Safer Communities Act, Pub. L. 117-159 § 12004(1)(a)(5) (2022).

- the Commission should assess how it can mitigate the well-documented problems with inaccuracies and racial profiling in gang identification tools, like databases.

Defenders understand that the Commission is obligated to respond to the directive in BSCA. But that directive does not include a timeline, affording the Commission the opportunity to tread cautiously. The Commission could use the information it obtains from its review to tailor changes to §2K2.1 to recommend sentences sufficient, but not greater than necessary to serve the statutory purposes of sentencing. Taking care to do this could avoid further entrenching the pernicious racial disparities already embedded in the firearms guideline. If such tailoring is not possible, and implementation of the directive would be inconsistent with the Commission's obligation to "carry out an effective, humane, and rational sentencing policy,"[3] the Commission could advise Congress about the need for changes to the statute.[4]

2. What does prior Commission research tell us about people who are sentenced under §2K2.1?

The Commission's past research does not provide insight into the issues listed above. Nor does it tell us about the impact of sentence length on recidivism. To date, the Commission's firearms recidivism research has been inconclusive as to the impact of sentence length on recidivism. The Commission's 2021 firearms recidivism report found that "the data did not show a clear relationship between sentence length and recidivism."[5]

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[3] 28 U.S.C. § 995(a)(20).

[4] *See id.*

[5] USSC, *Recidivism of Federal Firearms Offenders Released in 2010* 30 (2021), https://bit.ly/3ZZpGiQ. Note that "firearms offenses" includes a broader class of offenses beyond §2K2.1. While Defenders have hesitations about the methodology used in many Commission recidivism reports, *see* Tina Woehr & Allison Bruning, *Limitations of the Commission's 'Length of Incarceration and Recidivism' Report* 35 Fed. Sent'g Reporter 43–46 (Oct. 2022), https://bit.ly/3ZEBo2y, the 2021 Firearms Recidivism report found that specifically for §2K2.1 cases, the group with the *shortest* imprisonment lengths (<24 months) actually had a *lower* rearrest rate than groups with sentences between 24 to 59 months, 60 to 119 months, and 120 months or more. *Id.* at 42. This held true for both the prohibited class and prohibited weapon groups.

Similarly, in 2019, the Commission concluded that the association between sentence length and rate of recidivism among both firearms and non-firearms offenders was not clear.[6]

During the hearing, several Commissioners asked whether longer sentences would at least protect the community by taking dangerous people off the street. The answer is no. Low-level gun possessors, traffickers and straw purchasers are fungible.[7] And incapacitation has been shown to have negative public-safety consequences and criminogenic effects. Scholar and former USSC Commissioner Rachel Barkow has explained that "any incapacitation benefit that we get while someone is incarcerated has to be weighed against the likelihood that the person might be a greater danger to society when he or she comes back out because the longer that person spends in prison, the more likely it is that his or her reentry will be a bumpy one."[8] As Congress acknowledged when it passed the First Step Act, "the vast majority of federal prisoners will one day be released from BOP custody," and

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[6] USSC, *Recidivism Among Federal Firearms Offenders* 21 (2019), https://bit.ly/426q5Sr. For firearms offenses, this report found that the rearrest rate was actually lower (64%) for people sentenced to the shortest terms of imprisonment (<24 months) compared to a rearrest rate of 74% for those who were sentenced to before 24–59 months and a rearrest rate of 72% for those sentenced to between 60–119 months. For those receiving a sentence of ≥120 months, the rearrest rate did drop to 56%, but the report noted that "[l]onger sentences result in older ages at release, which may be one factor contributing to the lower recidivism rate for this group." *Id.* at 21. And as was true in 2021, the Commission found that specifically for §2K2.1 cases, for both the prohibited-class and prohibited-weapons groups, the rearrest rates appear to be the lowest for those receiving the lowest sentences (up to 24 months), and rise with sentence length, with the highest rearrest rates appearing in the group receiving the highest sentences (120 months or more). *Id*. at 32.

[7] *See* Brady United Against Gun Violence, *Comments on Consideration of Possible Amendments to § 2K2.1* 3 (Oct. 17, 2022) ("Those individuals lower down in the supply chain are often fungible, whereas the larger players (organized distribution rings, dealers, etc.) are not.") ("Brady Comment"); *see also* Carrie Johnson, *Lawmakers Rip Gun-Tracking Effort In Mexico*, NPR (June 24, 2011), https://n.pr/3LfVPyu (quoting former prosecutor's assessment that "when you're talking about straw buyers, or straw purchasers, you're talking about people who are very fungible . . . . You can arrest and charge and convict a hundred straw buyers and you're not going to have an impact on the organization, you're not going to help public safety.").

[8] Rachel Elise Barkow, Prisoners of Politics: Breaking the Cycle of Mass Incarceration 46 (2019).

it is in "the fiscal interest of the government to reduce recidivism [and] in the public safety interest as well[.]"[9] Avoiding unnecessary incarceration is a critical part of meeting this goal.

3. Does BSCA require the Commission to raise penalties across §2K2.1?

No. DOJ has advanced two arguments in favor of a global increase in penalties across §2K2.1. Neither is persuasive.

Proportionality. DOJ argues that principles of proportionality require across-the-board increases in §2K2.1. Not so.[10]

First, DOJ argues that, without a global increase, prohibited gun possessors will get lower sentences than straw purchasers.[11] This outcome is unlikely. The vast majority of prohibited-person offenses are predicated on a prior felony conviction, with over half of individuals sentenced under §2K2.1 having a criminal history category IV, V, or VI.[12] This reality, in addition to the multiple ways that the gun guideline counts criminal history, makes it unlikely that gun-possessors would be punished less harshly than straw purchasers under Option 1.

DOJ also urges the Commission to treat straw purchasers and prohibited persons alike, as it did before BSCA's enactment. But BSCA specifically rejects such an approach. Gun-safety advocates who were involved with Congress's enactment of BSCA have testified that Congress

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[9] H.R. Rep. No. 115-699, at 22 (2018).

[10] *See* Statement of Michael Carter on Proposed Firearms Amendments 24–26, https://bit.ly/42kouIO ("Statement of Michael Carter-Firearms").

[11] *See* Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sentencing Comm'n 3 (Feb. 27, 2023) ("DOJ Written Testimony for March 2023 Hearings") ("[U]nder Option 1, a felon who asks a confederate to purchase a gun on his behalf would face a lower Guidelines range than the confederate who purchased the gun.").

[12] USSC, *What Do Federal Firearms Offenses Really Look Like?* 19 (2022), https://tinyurl.com/6jsusejv ("2022 Firearms Report"). During fiscal year 2021, most people sentenced under §2K2.1 who were prohibited from possessing a firearm were prohibited because of a prior felony conviction (79.0%). *Id.* at 24.

"deliberately sought to shift federal enforcement further upstream in the illegal trafficking pipeline."[13]

For this reason, the Commission should reject DOJ's suggestion that §2K2.1(b)(5), as revised in Option 1, be further amended to apply to any prohibited person who receives weapons through a straw-purchasing or trafficking arrangement.[14] As courts have recognized and we discuss below, the nature of prohibited-possession offenses requires, in general, that the accused has participated in the illicit-firearms market.[15] DOJ's proposed amendment would contravene Congressional intent by causing §2K2.1(b)(5) to potentially apply in nearly all prohibited-person offenses.

Similarly, DOJ's argument that the Commission should increase existing base offense levels (BOLs) for 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A)—the statutory provisions used to prosecute straw purchasers before BSCA—is not persuasive. Those statutes have historically been used to prosecute low-level individuals, not the upstream firearms traffickers Congress targeted in BSCA.[16] Indeed, Congress specifically created new sections 932 and 933 to target those traffickers because it was dissatisfied with the limitations of the straw-purchasing offenses on the books.[17] BSCA does not require an increase in the BOLs applicable to §§ 922(a)(6) and 924(a)(1)(A).

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[13] Statement of Rob Wilcox, Legal Director, Everytown for Gun Safety, on behalf of the Zimroth Center/NYU Law Working Group before the U.S. Sentencing Comm'n for March 2023 Firearms Offenses Hearing 1 (Mar. 7, 2023), https://bityl.co/HazK ("Zimroth Statement").

[14] *See* DOJ Written Testimony for March 2023 Hearings, *supra* note 11, at 3–4.

[15] *See infra* at Part II(A)(3).

[16] *See* Hearing at 2:38:08–2:29:27 (Testimony of Rob Wilcox, Legal Director, Everytown for Gun Safety) (testifying that the elements of these statutes necessarily focus on individual acts, rather than organizations and upstream distributors); *see also* Comment from The Peter L. Zimroth Ctr. on the Admin. of Crim. L., *Re: Proposed Priorities for the 2022-23 Amendment Cycle* 14-15 (Oct. 17, 2022) ("Zimroth Comment"), https://tinyurl.com/yw95dthx; Federal Defenders, *Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2014* 41-42 (Jul. 15, 2013).

[17] *See* Hearing at 2:28:08–2:29:27 (Testimony of Rob Wilcox).

Directive. In its submission, DOJ leans heavily on the "sufficient to deter" language in the BSCA directive to argue in favor of global increases to §2K2.1's BOLs, including a 4-level increase to straw-purchasing penalties.

But this approach would read the "sufficient to deter" language out of context. Indeed, Senators Booker and Murphy wrote to the Commission in December to explicitly caution against interpreting the "sufficient to deter" language "more broadly than intended." They explained:

> We are aware that the Department of Justice has relied on the 'sufficient to deter' language to recommend that the Commission adopt a four-level increased base offense level for a variety of offenses. We urge the Commission to reject that approach here. Such a recommendation would be contrary to the intent of the BSCA which *seeks to hold accountable those most culpable in the firearm trafficking chain*, and it would ignore the Commission's role and process—to review data and devise evidence-based sentencing policies that 'reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.'[18]

Nevertheless, in its February 27, 2023, submission and in its testimony to the Commission, DOJ doubles down on its October recommendation, again relying heavily on an out-of-context reading of the "sufficient to deter" language to urge a four-level BOL increase for straw purchasing.[19] Such an increase, they explain, would take non-custodial sentences off the table and ensure imprisonment for all straw purchasers.

But the "sufficient to deter" language does not appear in isolation. It is included in the first clause of a sentence that also instructs the Commission to consider

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[18] Letter from Sens. Cory Booker & Christopher Murphy to Hon. Carlton W. Reeves, Chair, United States Sentencing Comm'n 1 (Dec. 5, 2022), https://tinyurl.com/n9s52veb ("Booker & Murphy Letter") (citations omitted) (emphasis added).

[19] DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 5.

> an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities *and* reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.[20]

Congress has thus directed the Commission to balance deterrence and mitigation in amending the firearms guideline. According to Congress's directive, the Commission's amendments should reflect both the need for deterrence and the general reality that many straw purchasers have significantly mitigating backgrounds. DOJ's myopic focus on the "sufficient to deter" clause would disrupt the careful balance Congress wants reflected in the BOL for straw purchasing itself, preventing the guidelines from distinguishing between the most culpable straw purchasers and the lowest-level individuals with the most fungible roles.

B. The Commission should expand the reduction for mitigating factors.

Defenders urge the Commission to refrain from amending §2K2.1 until it has completed a careful review and study. Other commentators and two lead architects of BSCA agree.[21] However, if the Commission chooses to move forward, it should broaden its proposed mitigating-factors amendment to better track the plain language of the BSCA directive.

As a general principle, and to counter the "one-way upward ratchet" of the guidelines, the Commission should prioritize giving courts the tools to decrease sentences when doing so is just.[22] Congress recognized the need to consider mitigating factors carefully in many straw purchasing cases, and included in the BSCA a directive to "reflect the intent of Congress that straw

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[20] BSCA § 12004(1)(a)(5) (emphasis added).

[21] *See* Booker & Murphy Letter, *supra* note 18 at 1; Testimony of Marlo P. Cadeddu, Fifth Circuit Representative, Practitioners' Advisory Group 3 (Mar. 7, 2023), https://bityl.co/Hazr ("PAG Testimony").

[22] Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319 (2005).

purchasers without significant criminal histories receive sentences that . . . reflect the defendant's role and culpability, and *any* coercion, domestic violence survivor history, or *other mitigating factors*."[23]

In their December letter, Senators Booker and Murphy urged the Commission to "interpret[] the instruction to consider 'other mitigating factors' broadly."[24] They warned that failure to do so could result in excessive sentences and "disproportionately impact low-income people and people of color."[25] A coalition of gun-safety researchers, policymakers, lawyers, and advocates have also urged the Commission to apply this aspect of the directive broadly, in order to address "past racial disparities in sentences and to ensure that these disparities do not persist going forward."[26]

Notwithstanding these powerful statements in support of a robust mitigating-role reduction, the Commission proposes to implement this directive narrowly, by adding a new subsection to §2K2.1 that would authorize a small one- to two-level reduction under limited circumstances. This crabbed approach would undermine Congressional intent and fail to implement the plain language of the directive.

Most problematically, the proposal omits the directive's catch-all instruction to consider "any . . . other mitigating factors" and introduces limitations that do not align with the broad categories identified in the BSCA. These harms are compounded by the Commission's proposal to make

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[23] BSCA § 12004(a)(1) (emphases added).

[24] Booker & Murphy Letter, *supra* note 18 at 2; *see also* Letter from Sen. Christopher Murphy to Hon. Merrick Garland, Att'y Gen., Regarding DOJ's Implementation of BSCA 3 (Sept. 12, 2022), https://bit.ly/3SSmnaD ("As the Department implements these new criminal provisions, it is incumbent on Department leadership to ensure that these new tools and power do not come at the expense of historically over-policed and over-prosecuted communities. The drafters of the BSCA included an explicit directive to the United States Sentencing Commission to consider mitigating factors when developing sentencing guidelines to ensure that there are less severe criminal consequences for individuals who have been coerced to participate in a gun trafficking scheme, are themselves victims of domestic abuse, or have a limited role or culpability.").

[25] Booker & Murphy Letter, *supra* note 18 at 2.

[26] Zimroth Statement, *supra* note 13 at 10.

the criteria conjunctive, to delete the lone departure provision in §2K2.1, and to limit the scope of the reduction to no more than two levels.

This approach is wrong-headed. The Commission should not omit the catch-all language from the BSCA. Nor should it hem in the mitigating-factors directive with limitations found nowhere in the statutory text. Further, the Commission should not compound the harms of its upward-ratchet response to the BSCA by deleting §2K2.1's sole departure provision.[27] Instead, it should expand that departure to ensure that it reflects Congressional intent to "broadly" incorporate consideration of mitigating factors at straw-purchaser sentencings.[28]

1. The proposed reduction should be increased.

The BSCA does not quantify the extent of reduction that a person presenting mitigating circumstances should receive, yet both proposals to amend §2K2.1 would create a specific offense characteristic for just a 1- or 2-level reduction. This proposal is much smaller than the substantial increases the Commission proposes to address aggravating factors (between two and four levels for people with certain criminal affiliations).

Defenders agree that a new specific offense characteristic is the appropriate mechanism to fulfill this directive but urge the Commission to adopt a greater reduction.[29] A 1- to 2- level reduction would be inadequate to perform the crucial function of "avoiding unnecessarily long sentences for people with less culpability or without significant criminal histories" as Congress intended.[30] And, as gun-safety advocates have explained, "the Commission should make mitigation broadly available, both to address past racial disparities in sentences and to ensure that these disparities do not persist going forward."[31]

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[27] *See* USSG, *List of Departure Provisions* (indicating that §2K2.1 cmt. n.15 is the sole downward departure in §2K2.1).

[28] Booker & Murphy Letter, *supra* note 18 at 2.

[29] *Cf.* PAG Testimony, *supra* note 21 at 4.

[30] Booker & Murphy Letter, *supra* note 18 at 2.

[31] Zimroth Statement, *supra* note 13 at 10.

2. Any mitigating-factors reduction should adopt BSCA's plain-language requirement to consider "any . . . other mitigating factors."

Consistent with Senators Booker and Murphy's explanation that Congress intended to equip courts with significant discretion to craft sentences that reflect a range of mitigating factors, BSCA requires the consideration of "any . . . other mitigating factors."[32] Yet the Commission's proposed reduction fails to reflect this language entirely. The Commission should remedy this omission by adding this language to its proposed reduction.

Additionally, we encourage the Commission to retain, but amend, Application Note 15, §2K2.1's sole departure provision.[33] Application Note 15 should be retained because it includes two offenses that do not completely overlap with those designated by the Commission as "straw purchasing" offenses—§§ 922(a)(6) and 924(a)(1)(A). These criminal provisions can encompass people who deserve consideration for a downward departure. Take, for example, a person who is threatened, and purchases a firearm for protection, but lists an outdated address on the ATF Form 4473. They could qualify for the departure in Application Note 15 as currently written. But because this individual did not commit a straw purchase or trafficking offense, they would not be eligible for the proposed reductions provided in Option 1 at subsection (b)(9) and in Option 2 at (b)(10).

Application Note 15 is also an additional vehicle for ensuring that §2K2.1 fully reflects Congressional intent to provide appropriate sentences for people who present compelling mitigation, which could complement Defenders' preferred approach of a mitigating-factors reduction. To accomplish this, the Commission should amend Application Note 15 to direct courts to consider a downward departure to a non-custodial sentence in cases where warranted by "other . . . mitigating factors." This would keep with Congressional intent to equip courts with significant discretion to respond to mitigating factors in this context.

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[32] BSCA § 12004(a)(1).

[33] *See* USSG, *List of Departure Provisions*.

3. The proposed limiting criteria should be broadened.

The language of BSCA instructs the Commission to consider a broad range of mitigating circumstances. Instead of tracking this language, however, the Commission proposes general motive-, compensation-, and culpability-based limitations on the availability of this reduction, which appear nowhere in BSCA's text. It also proposes to proscribe the reduction's applicability by making the criteria conjunctive. The Commission has asked if these limiting criteria should be changed or framed differently and if the criteria should be disjunctive. The answer to both questions is yes.

a. The Commission should adopt the language of the directive instead of unduly restricting the availability of the mitigating-factors reduction.

The Commission proposes three limiting criteria for the proposed reduction, each substantially narrower than the language in the directive to which they appear to correspond.

Motive. The BSCA directive instructs the Commission to account for straw purchasers who have endured "*any* . . . coercion" or experienced "*any* domestic violence survivor history. . . ."[34] The Commission's proposal, however, limits the availability of its reduction to people "motivated by an intimate or familial relationship or by threats or fear to commit the offense." This proposal ignores "domestic violence survivor history" entirely. And it reduces coercion to "threats or fear," when—particularly in the domestic-violence context—coercion extends more broadly to encompass other forms of structural control and manipulation. Instead of placing a restrictive gloss on BSCA's mitigating-factors directive, the Commission should revert to the statutory language.

Compensation. BSCA says nothing about limiting consideration of mitigating factors to people who receive "little or no compensation from the offense." Nonetheless, the Commission proposes to include this restriction in the new reduction. This proposal ignores the complex pathways of domestic violence and the ways in which compensation can be part and parcel of a cycle of abuse, which commonly involves the abuser "alternat[ing] between

[34] BSCA § 12004(a)(1) (emphases added).

violent, abusive and apologetic behavior."[35] Again, the Commission should simply track the BSCA's statutory directive.

"Role and Culpability." Congress directed the Commission to also consider the "defendant's role and culpability."[36] The Commission proposes implementing this directive by limiting the reduction to those who "had minimal knowledge of the scope and structure of the enterprise" or minimal knowledge "that the firearm would be used or possessed in connection with further criminal activity." These restrictions do not adequately capture the factors a court must examine to conduct the holistic examination of a person's "role and culpability" required by BSCA.

In addition, the proposal to limit eligibility to people with "minimal knowledge" that the firearm would be "used or possessed in connection with further criminal activity" could lead to absurd results. Many straw purchasing offenses (and some of the Commission's proposals) require proof that the defendant engaged in straw purchasing while "knowing or having reasonable cause to believe" that the firearm would be possessed in connection with further criminal activity.[37] If the Commission limits the mitigating-factors reduction to exclude people with "minimal knowledge . . . that the firearm would be used or possessed in connection with further criminal activity," then virtually every single person convicted of a straw-purchasing offense based on knowledge (likely the vast majority) would be excluded from the reduction—by virtue of the conviction itself. And even for those few people convicted based only on "reasonable cause to believe," the "minimal knowledge" element would overwhelmingly exclude them from the reduction. There is scant logical—and even less practical—room to say that

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[35] Zlatka Rakovec-Felser, *Domestic violence and abuse in intimate relationship from public health perspective*, 2 Health Psych. Rsch. 1821, 1821 (2014), https://bityl.co/HTdH.

[36] BSCA § 12004(a)(1).

[37] *See, e.g.*, 18 U.S.C. § 932(b) (to be guilty of straw purchasing, a person must know or have reasonable cause to believe that firearm would be possessed by a prohibited person, used in connection with a wide range of different potential offenses, or transferred to a prohibited person or someone intending to engage in criminal conduct); *see also* 18 U.S.C. §§ 933(a) (trafficking in firearms can be established through proof of reasonable cause to believe), 922(d)(10) (can be proved through reasonable cause to believe), 924(h) (same). Option 1's proposed §2K2.1(b)(5)(B)(i)(II) and (C)(i)(III) present this same issue.

someone can have "reasonable cause to believe" a firearm will be used in connection with criminal activity but lack "minimal knowledge" of that same fact.

More fundamentally, this proposal will lead to arbitrary and unjustifiable policy outcomes. A battered domestic partner who purchases a firearm for their abuser out of fear is at the core of whom Congress intended to receive the new reduction—yet the minimal-knowledge proposal would exclude that person if they knew the firearm would be used in connection with further criminal activity. The minimal knowledge proposal is simply not the right demarcation point to capture and reflect Congress's intent.

Instead of inventing hyper-technical gradations between mental states and otherwise diluting consideration of mitigating factors, the Commission should simply track BSCA's statutory text in implementing the reduction; it should not introduce new limitations.

b. A conjunctive approach would contravene Congressional intent.

The Commission seeks comment on whether the limiting factors it has proposed should be promulgated conjunctively (such that a person needs to satisfy each of them to be eligible for the mitigating-factors reduction) or disjunctively (such that as long as a person satisfies at least one factor, they would be eligible for the reduction). The factors should be promulgated disjunctively. Requiring a straw purchaser to meet each limiting criteria would be inconsistent with the language of BSCA. We agree with gun-safety advocates that "[n]othing in this directive suggests that a straw purchaser must meet all these factors before they can qualify for a reduction. In fact, bundling these exceptions together undermines Congress's clear directive."[38]

DOJ urges a conjunctive approach, arguing that the alternative would lead to absurd results because a "defendant would be eligible for a reduction, for example, if he provided a gun to a criminal gang, with full knowledge of the scope of the criminal enterprise or that the weapon would be used in connection with criminal activity, and even if he transferred the gun to obtain status in an organization, so long as he received only minimal financial

[38] Zimroth Statement, *supra* note 13 at 9.

compensation."[39] But this hypothetical does not illustrate the folly of a disjunctive approach. Instead, it shows why relying on specific criteria—like monetary compensation alone—to approximate "role and culpability" is a flawed approach. By equipping courts with the discretion to conduct the holistic, fact-based review that Congress mandated, DOJ's "absurd result" would be avoided.

C. The criminal-affiliation enhancement should be narrow.

In BSCA, Congress instructed the Commission to "review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18 . . . who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual."[40]

Because of pernicious and well-known problems associated with gang designations, the Commission should carefully study social-science research, empirical evidence, and sentencing data before adding a criminal-affiliation enhancement to §2K2.1. And, when it moves forward, the Commission should interpret Congress's directive as narrowly as possible. It should require the government to prove any such affiliation by clear and convincing evidence and also limit the potential increase to one level.

1. Gang affiliation is often based on inaccurate information and is not a reliable proxy for culpability.

The problems with law enforcement methods for documenting criminal affiliation have been widely recognized, and counsel in favor of great caution in implementing the BSCA criminal-affiliation directive.

First, these methods are unreliable. Law enforcement uses broad criteria for identifying a person as a gang member.[41] Often, these criteria amount to little more than mere "suspicion or association," as opposed to firm

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[39] DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 6.

[40] BSCA § 12004(a)(1).

[41] *See* Youth Just. Coal., *Tracked and Trapped: Youth of Color, Gang Databases, and Gang Injunctions* 5–6, 8 (2012), https://bityl.co/Hb0z.

evidence of active gang membership.[42] These criteria are poor indicators of current gang involvement.[43] The essentially unbridled discretion law enforcement has to identify individuals as gang members has caused gang databases and other designation lists to be riddled with mistakes.[44] In addition, some gang databases are poorly maintained or monitored, meaning people are added based on irrelevant evidence[45] or remain in the database past the federally regulated time for data validation.[46]

Gun-safety experts agree that records reflecting "gang membership and affiliation with a gang often rest on unreliable data,"[47] and "law enforcement's identification of gang affiliation is often significantly overinclusive."[48] There is "no universal definition of who gets counted as a

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[42] Emmanuel Felton, *Gang Databases are a Life Sentence for Black and Latino Communities*, Pac. Standard (Mar. 15, 2018), https://bityl.co/Hb10.

[43] James A. Densley & David C. Pyrooz, *The Matrix in Context: Taking Stock of Police Gang Databases in London and Beyond*, 20 Youth Just. 11, 17 (2020) ("[T]he fact that 'police and partner agencies' are listed as examples of intelligence sources for the Matrix, however, gives rise to suspicion that it is built on subjective opinion and circular logic alone—not exactly the types of procedures that inspire confidence in its validity.").

[44] *See, e.g.*, Felton, *supra* note 42 (giving an example where the same person was documented by separate police officers as a member of two rival gangs based solely on the geographic location where each officer happened to have stopped him); Maxine Bernstein, *Portland police to halt, purge all gang designations*, The Oregonian (Sept. 8, 2017), https://bit.ly/3En8Grg (noting that "gang designations" "serve[] as lifelong barriers for those who have," in actuality, "shunned the gang lifestyle").

[45] Cal. State Auditor, Rep No. 2015-130, *The CalGang criminal intelligence system* 2 (2016), https://bityl.co/Hb1A ("[A] person in CalGang [was included] for allegedly admitting during his booking into county jail that he was a gang member and for being 'arrested for an offense consistent with gang activity.' However, the supporting files revealed that this person stated during his booking interview that he was *not* a member of a gang and that he preferred to be housed in the general jail population. Further, his arrest was for resisting arrest, an offense that has no apparent connection to gang activity.").

[46] Tex. State Auditor, Rep. No. 22-039, *An Audit Report on The Department of Public Safety's Texas Gang Intelligence Database* 5 (2022), https://bityl.co/Hb1B.

[47] Zimroth Comment, *supra* note 16 at 10.

[48] Brady Comment, *supra* note 7 at 4.

'gang member' versus someone who is 'associated with' but not in a gang,"[49] and gang-designation practices can vary wildly across districts.[50] As a result, most gang databases are deeply flawed.

Second, gang databases are riddled with egregious racial bias and disparities.[51] The numbers are consistently shocking. In Boston, 90% of so-called documented gang members are Black or Latino.[52] In Los Angeles, that number recently stood at 86%.[53] In Portland, Oregon, 81% of those in the gang database "were part of a racial or ethnic minority."[54] Even when historically white gangs are reported, many of its members are people of color,[55] and typically white supremacist groups are not included in such databases.[56]

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[49] Zimroth Comment, *supra* note 16 at 10. (Noting that Immigrations and Customs Enforcement ("ICE") designates a person as a gang member if they "meet at least two criteria from a list that includes 'having gang tattoos,' 'frequenting an area notorious for gangs,' and 'wearing gang apparel.'").

[50] *Id*.

[51] Only 1.1% of NYPD's gang database is white. Nick Pinto, *NYPD added nearly 2,500 new people to its gang database in the last year*, The Intercept (June 28, 2019), https://bityl.co/Hb1O. California's gang database is nearly 20% Black people and 66% Latino. *See* Youth Just. Coal., *supra* note 41 at 8.

[52] Philip Marcelo, *Gang database made up mostly of young black, Latino men*, AP News (Jul. 30, 2019), https://bityl.co/Hb1K.

[53] Youth Just. Coal., *supra* note 41 at 8.

[54] Bernstein, *supra* note 44.

[55] UIC Policing in Chi. Rsch. Grp., *Expansive and Focused Surveillance: New Findings on Chicago's Gang Database* 1 (June 2018), https://bityl.co/Hb1b) ("Although between 11% and 27% of self-identified gang members are estimated to be White, and White gang members report levels of criminal offending equal to those of their non-White counterparts, a powerful racial stereotype associates gang membership with Latinx and especially Black boys and young men."); Marie Pryor, *et al.*, *Risky Situations: Sources of Racial Disparity in Police Behavior*, 16 Ann. Rev. L. & Soc. Sci. 343, 347 (2020).

[56] UIC Policing in Chi. Rsch. Grp., *supra* note 54 at 5 ("[O]nly 23 people [in Chicago's gang database] are listed as members of white supremist organizations."); Pinto, *supra* note 51 (the Proud Boys were not included in the NYPD gang database); *see* Zimroth Comment, *supra* note 16 at 11.

Finally, gang participation alone is "not a reliable identifier of culpability."[57] Brady United has explained that "[a]dolescents who grow up in areas with heavy gang activity often have little choice in whether they interact with gangs on a daily basis."[58] "Despite popular myths that paint every gang member with the same violent brush and assert that there is no escaping a gang, membership is remarkably porous, and most social scientists describe varied levels of involvement with gangs, with a majority of gang members quitting soon after joining a gang and others aging out of gangs."[59] In particular, researchers distinguish between "core members" and "fringe members."[60] It is not mere participation that predicts criminality—it is the *degree* of the person's participation that matters. The Commission should examine this research, hear from experts on gang involvement, and ideally report to Congress on its findings before promulgating this enhancement. If the Commission decides to move ahead with an enhancement now, at a minimum, it should very narrowly construe "affiliation" with a gang, so that it reaches only those individuals with deep ties to a gang—the sort of person who Congress would have been picturing when it enacted the BSCA.

2. The proposed criminal-affiliation enhancement improperly sweeps beyond the specifically enumerated statutes in the BSCA directive.

The BSCA directive specifies that the criminal-affiliation enhancement should apply in cases involving a "conviction under section 932 or 933 of title 18."[61] Despite this plain language, each option the Commission proposes would go significantly beyond the directive by deeming people with other convictions or specific offense characteristics eligible for the enhancement.[62]

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[57] Brady Comment, *supra* note 7 at 5.

[58] *Id.* (citation omitted).

[59] K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 St. Thomas L. Rev. 620, 644 (2011) (citations omitted).

[60] *Id.* at 647.

[61] BSCA § 12004(a)(1).

[62] Option 1 would tie eligibility for criminal-affiliation enhancement to either (1) receiving an enhancement under §2K2.1(b)(5); or (2) being convicted under 18 U.S.C. §§ 922(d), 932, or 933; or (3) being convicted under 18 U.S.C. §§ 922(a)(6) or

When Congress intended other aspects of the BSCA's directive to apply more broadly, it said so. For example, the first sentence, which instructs the Commission to increase certain penalties, refers to "persons convicted of an offense under section 932 or 933 of title 18 . . . *and other offenses applicable to the straw purchases and trafficking of firearms*."[63] The next sentence, which governs the Commission's consideration of mitigating factors, refers broadly to "straw purchasers." But the final sentence, which includes the criminal-affiliation enhancement, refers *only* to sections 932 or 933. The different language used in each part of the directive shows that Congress did not intend for this enhancement to be applied as expansively as the Commission now proposes. Therefore, the Commission should revise Subpart A to refer to only sections 932 and 933.

3. The Commission should require the government to prove criminal affiliation by clear and convincing evidence and bar reliance on gang databases alone to prove criminal affiliation.

If the Commission proceeds with the criminal-affiliation enhancement, it should include guidance that: (1) requires the government to meet a clear-and-convincing standard to establish criminal affiliation at sentencing, and (2) instructs that presence on a gang database alone is not sufficient to establish criminal affiliation.

First, the Due Process Clause of the Fifth Amendment accords the right to be sentenced on the basis of accurate information.[64] A sentencing

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924(a)(1)(A) and having committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to another person. Option 2 would tie eligibility to cases where proposed subsection (b)(9) does not apply and the person is convicted under 18 U.S.C. §§ 922(d), 924(h), 924(k), 932, or 933.

[63] BSCA § 12004(a)(1) (emphasis added).

[64] *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (person has a right under the Due Process Clause to be sentenced on the basis of accurate information about his criminal history); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (person has a right under the Due Process Clause not to be sentenced based on "misinformation" or facts that are "materially untrue") (citation omitted); *see also United States v. Juwa*, 508 F.3d 694, 700–701 (2d Cir. 2007) (recognizing "distinct limits" to a judge's discretion at sentencing, including "a defendant's due process right to be sentenced based on accurate information"); *United States v. Safirstein*, 827 F.2d 1380, 1385

court violates a person's right to due process when it makes "unfounded assumptions or groundless inferences" in imposing sentence.[65] Given the severe racial bias and inaccuracies that plague gang databases and law enforcement efforts to ascertain affiliation, the Commission should require a heightened standard of proof to ensure that individuals are sentenced using reliable and accurate information.

Second, the Commission should also recognize the widespread problems with allegations of criminal affiliation, particularly with respect to gang databases, by instructing courts that "information derived from gang databases do not have sufficient indicia of reliability to alone support imposition of the criminal-affiliation enhancement."

II. PART B: Mens Rea and Privately Manufactured Firearms

A. The Commission should add a mens rea requirement to §2K2.1(b)(4).

Section 2K1.1(b)(4) provides that if a firearm has an altered or obliterated serial number, a four-level increase applies; and if it is stolen, a two-level increase applies. Since 1993, the Guidelines have instructed judges that these are strict liability enhancements: they "appl[y] regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."[66]

The Commission seeks comment on whether it should add a mens rea to the enhancements in §2K2.1(b)(4). Defenders strongly urge the Commission to make this change. There are four reasons why a scienter requirement should be added to §2K2.1(b)(4). First, adding mens rea to §2K2.1(b)(4) would conform this provision to the "fundamental legal tradition that blameworthiness hinges upon a culpable state of mind" and further the Commission's duty to establish policies that ensure fair and certain

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(9th Cir. 1987) ("[T]he Fifth Amendment guarantee of due process protects the defendant from consideration of improper or inaccurate information" at sentencing.); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (It is procedural error for a court "to choose a sentence based on clearly erroneous facts[.]").

[65] *See Safirstein*, 827 F.2d at 1385.

[66] *See* USSG §2K2.1 cmt. n.8(B).

sentencing.[67] It would also assure punishment proportionate to the individual's culpability.[68] Second, it would restrict the application of an enhancement that has resulted in significant racial disparities.[69] Third, the strict-liability enhancement serves no legitimate purpose of punishment. And fourth, the Commission has never articulated an empirical or policy rationale to support the current (b)(4) enhancement.

1. The Importance of Mens Rea.

Last year, the Supreme Court reiterated that, as a general matter, "wrongdoing must be conscious to be criminal."[70] It is "universal and persistent in mature systems of criminal law" that a person must possess a culpable mens rea, or "scienter," to be held criminally responsible for her acts.[71] Mens rea requirements advance this principle by helping to "separate those who understand the wrongful nature of their act from those who do not."[72]

The Court has recently—since the Commission last had a quorum—clarified that the "longstanding presumption" of mens rea applies to firearms offenses, even where Congress has failed to specify any scienter requirement. In *Rehaif v. United States* (2019), the Court overturned every single Court of Appeals to conclude that the felon-in-possession statute, 18 U.S.C. § 922(g), requires the government to prove knowledge of each essential element (aside from jurisdiction).[73] In doing so, the Court explained that the presumption of mens rea applies in the vast majority of cases and should be excused only where statutory provisions are part of a "regulatory" or "public welfare"

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[67] *United States v. Handy*, 570 F. Supp. 2d 437, 440 (E.D.N.Y. 2008), *disapproved of on other grounds by United States v. Thomas*, 628 F.3d 64 (2d Cir. 2010).

[68] 18 U.S.C. § 3553(a)(2)(A).

[69] *See infra* at Part II(A)(2).

[70] *Ruan v. United States*, --- U.S. ---, 142 S. Ct. 2370, 2376 (2022) (quoting *Elonis v. United States*, 575 U.S. 723, 734 (2015)).

[71] *Id.* at 2376–77 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

[72] *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (quoting *United States v. X-Citement Video*, 513 U.S. 64, 72–73 n.3 (1994)).

[73] *See id.* at 2201 (Alito, J., dissenting) (noting that Court's decision overturned "every single Court of Appeals").

program, and "carry only minor penalties."[74] This exception does not apply here. The four- and two-level enhancements included in § 2K2.1(b)(4) are not part of a regulatory or public welfare program.[75] Nor are they minor. To the contrary, they ratchet up the already high applicable penalties at stake in firearms prosecution.

DOJ has said that it "understands the reasoning behind the proposal to add a *mens rea* requirement to the enhancement,"[76] but it inexplicably asks the Commission to shift the burden of proof to the defense. That burden, DOJ proposes, should require the convicted individual to prove that "he or she did not know, *and had no reason to believe*, that the firearm was stolen, missing a serial number, or had an altered or obliterated serial number."[77]

The Commission should reject this request. The problem with strict liability enhancements is not that they don't give defendants a theoretical possibility to rebut the enhancement's application; the problem, as the Supreme Court has repeatedly emphasized, is that they relieve the government of its burden to establish culpability—of which scienter is a crucial element. DOJ's proposal is inconsistent with the basic principle that the government bears the burden to support an enhanced punishment. Moreover, as Commissioner Gleeson highlighted in his questioning during the March 2023 hearing, placing the burden of proof on the defense could pressure individuals to waive their Fifth Amendment right to remain silent. And, if a person in this position were to testify, and their testimony were deemed incredible, it could trigger higher sentences through denial of acceptance-of-responsibility points and application of the obstruction enhancement.

For similar reasons, the Commission should also reject DOJ's suggestion to dilute the mens rea requirement by marrying its proposed rebuttable presumption with a "reason to believe" standard. As DOJ argues later in its same submission, the "reason to believe" standard is unwieldy,

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[74] *Id.* at 2197 (citing *Staples v. United States*, 511 U.S. 600, 606 (1994)).

[75] *See id.* (explaining that criminal firearms statutes "are not part of a regulatory or public welfare program").

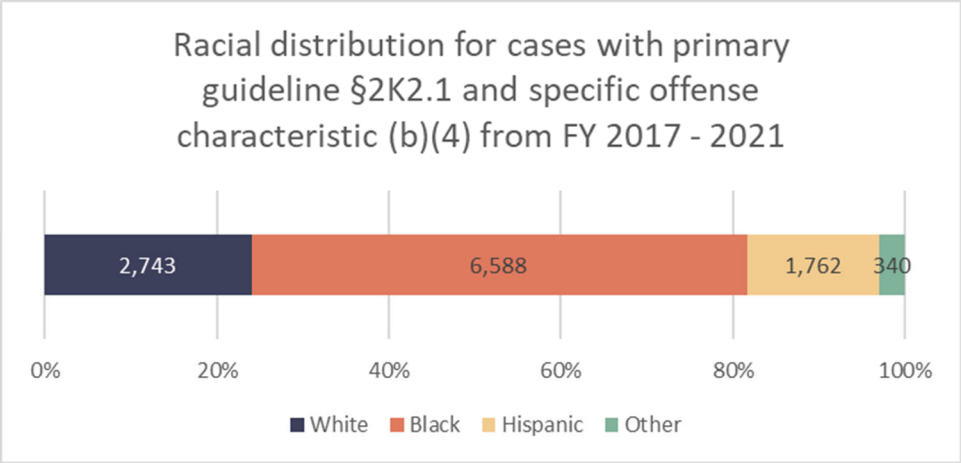
[76] DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 7 (emphasis added).

[77] *Id.*

and can result in inconsistent interpretations.[78] That standard would become even more unwieldy in the context of a rebuttable presumption. Together, the rebuttable presumption and reason-to-believe standard would become an exception to swallow the rule, erasing any potential benefit that might be gained by adding a scienter requirement to §2K2.1(b)(4).

2. The §2K2.1(b)(4) strict-liability enhancements disparately impact Black people.

In our written testimony, Defenders explained that Black people are disproportionately overrepresented in firearms prosecution and sentencing.[79] This is also true specifically with respect to the (b)(4) enhancement. And further, the data show that Black people who receive the (b)(4) enhancement are subjected to longer sentences than their white counterparts.



From fiscal years 2017 through 2021, the (b)(4) enhancement applied in roughly 32% of all §2K2.1 cases.[80] Over half of individuals who received a (b)(4) enhancement (58%) were Black, and roughly 50% of individuals who received a (b)(4)(B) enhancement for AOSNs were Black. The mean sentence length for Black individuals who received the (b)(4) enhancement was 69

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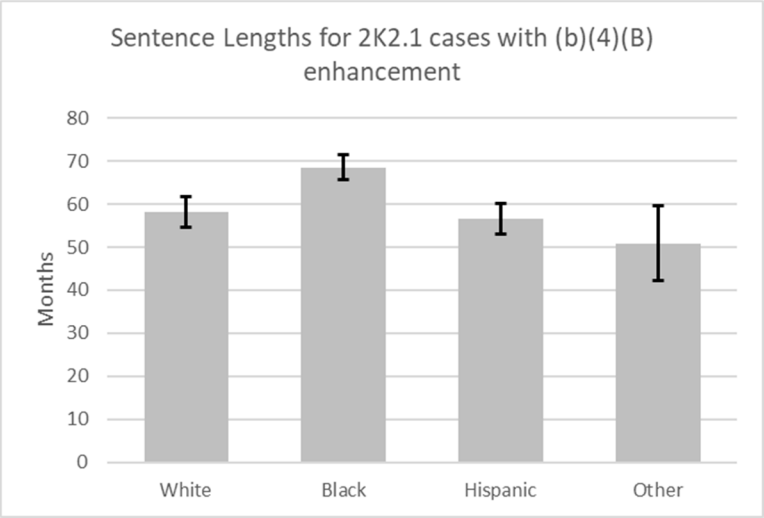
[78] *See* DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 51.

[79] Statement of Michael Carter-Firearms, *supra* note 10 at 6–12.

[80] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2017 to 2021, which are available at https://bityl.co/HBGG.

months imprisonment, compared to 58 months imprisonment for white individuals who received the enhancement.[81]



Adding a mens rea requirement would be one step towards narrowing this enhancement's general application and reducing disparities.

3. The strict-liability standard for (b)(4) does not serve a legitimate purpose of sentencing.

As it stands, §2K2.1(b)(4) cannot serve any sentencing purpose.[82] Starting first with stolen firearms: "Because this enhancement does not require the defendant to know or have reasonable cause to believe that the firearm he possessed was stolen, it does not provide deterrence since a person cannot be deterred from doing what he or she does not know is being done."[83] And because this enhancement "lacks a requirement of scienter," it cannot provide just punishment either.[84]

This same logic applies to firearms with an obliterated or altered serial number. The government asserts that the "fact that a gun has a missing,

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[81] *Id.*

[82] The government concedes that it "may not be . . . readily apparent that a gun is stolen." DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 7.

[83] *Handy*, 570 F. Supp. 2d at 480.

[84] *Id.*

altered, or obliterated serial number is generally readily apparent."[85] Not so. In fact, it is often difficult to tell that a serial number has been removed or obliterated.[86]

Not only does the §2K2.1(b)(4) strict-liability enhancement serve no purpose of punishment, it often constitutes double punishment for the same conduct—that is, the illegal possession of a gun. In *United States v. Faison*, Judge Hazel explained that for individuals convicted of being a felon in possession of a firearm, "there is no legal avenue by which that person could have purchased a firearm," and therefore "every felon in possession of a firearm has engaged in the illegal marketplace to acquire a gun. That is true whether the gun reached him through a straw purchase, an illegal transfer from a lawful owner, or by the acquisition of a stolen gun."[87]

Punishment roulette serves no purpose of sentencing. Adding a mens rea requirement would go far to meaningfully distinguish the culpability of prohibited persons who possess firearms.

4. The Commission has never provided a policy reason or rationale to justify the lack of scienter in §2K2.1(b)(4).

The Commission has never provided a well-grounded, empirical reason for dispensing with the presumption of mens rea for §2K2.1(b)(4),[88] and the history of this enhancement shows that it has lacked an empirical basis from

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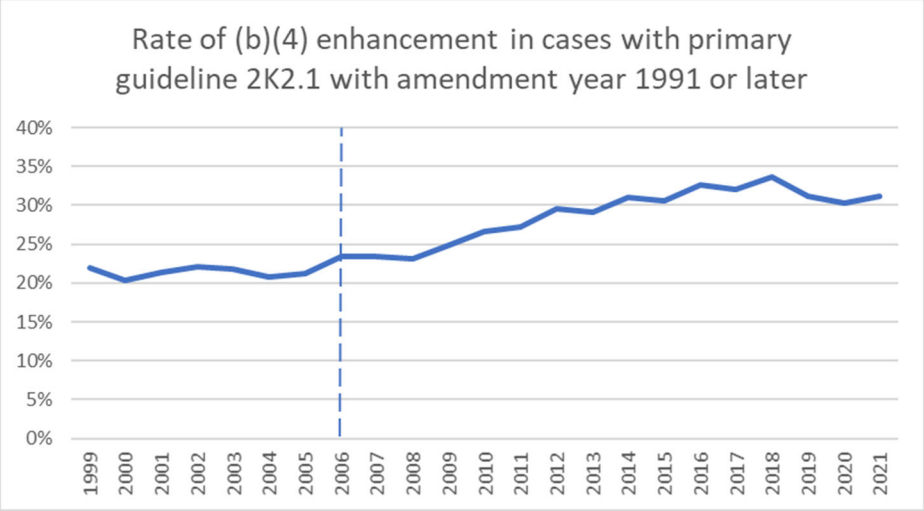
[85] DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 7.

[86] *See, e.g.*, *United States v. Frett*, 492 F. Supp. 3d. 446, 448 (D.V.I. 2020) (granting a motion for a judgment of acquittal in a 922(k) case where the government failed to prove that the accused knew the firearm was obliterated); *United States v. Johnson*, 381 F. 3d 506, 510 (5th Cir. 2004) (evidence insufficient to show knowledge of obliterated serial number where accused did not own the gun, physically possessed it for only brief intervals, and physical evidence of obliteration was limited to "silvery scratches" on the gun's action slide); *United States v. Haile*, 685 F.3d 1211, 1221 (11th Cir. 2012) (evidence insufficient to show knowledge of obliteration where government proved only constructive possession, and put forth no evidence that accused possessed the gun for any significant length of time).

[87] *United States v. Faison*, 2020 WL 815699, at *7 (D. Md. Feb. 18, 2020).

[88] *See, e.g.*, USSG App. C, Amend. 478 (Nov. 1, 1993) ("[T]his amendment clarifies that the enhancement in §2K2.1(b)(4) applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an altered or obliterated serial number.").

the start. In fact, in 1987, §2K2.1 commentary noted the lack of data sufficient to determine the effect of a stolen firearm on sentences.[89] Yet over time the enhancement continued to ratchet upward. In 1989, it increased from 1 level to 2 levels across the board.[90] In 2006, at DOJ's prompting, it doubled from 2 levels to 4 levels in any case involving a firearm with an altered or obliterated serial number.[91] While DOJ requested the serial-number increase to "provide stronger deterrence and better reflect the harm of these offenses,"[92] since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value.



[89] *See* USSG § 2K2.1, cmt. background (1989) ("Available data are not sufficient to determine the effect a stolen firearm has on the average sentence."). In 1987, the Commission appeared to believe that a stolen-firearm enhancement might serve as a proxy for firearms that are used "in the commission of crimes." *Id.* Whatever the merits of this speculation in 1987, there is no longer any need for a stolen-firearm proxy for firearms possessed in connection with the commission of another crime; §2K2.1 now directly provides an enhancement for this circumstance. *See* USSG §2K2.1(b)(6)(B).

[90] *See* USSG App C., Amend. 189, Reason for Amendment (Nov. 1, 1989) (stating the reasoning is "to better reflect the seriousness of this conduct").

[91] *See* USSG App. C., Amend. 691 (Nov. 1, 2006); DOJ's Comments on U.S. Sentencing Comm'n Proposed Priorities 3 (Aug. 15, 2005), https://bit.ly/3l3AUns ("DOJ's 2005 Comments"), https://bit.ly/3l3AUns.

[92] DOJ's 2005 Comments at 3.

DOJ also argued in 2006 that "the intentional obliteration or alteration of a serial number" is a "clear indicator of firearms trafficking or an intent to otherwise use the firearm unlawfully."[93] Yet Commission data does not seem to support this proposition either. From Fiscal Years 2017 through 2021, less than 2% of §2K2.1 cases involved the application of both the enhancements in (b)(4)(B) and (b)(6)(B), which covers use or possession "in connection with another felony offense."[94] And during the same period, less than 2% of §2K2.1 cases involved the application of both the enhancements in (b)(4) and (b)(5), which covers trafficking in firearms.[95]

Finally, sentences in cases involving application of the (b)(4) enhancement do not reflect the need for an additional increase, with the vast majority of such cases sentenced in the past five fiscal years falling either within or below the advisory guideline range.[96] Thus, the past ratcheting upward of the enhancement did not serve to deter this conduct and does not track the views of today's sentencing judges.

B. The Commission should not unreasonably elevate sentences in cases involving privately made firearms.

The Commission proposes to address cases involving privately made firearms (PMFs)[97] by amending § 2K2.1(b)(4)(B) to instruct that cases

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[93] DOJ Letter to the U.S. Sentencing Comm'n Regarding 2006 Proposed Guidelines Amendments 8 (March 28, 2006), https://bityl.co/Hdxx.

[94] From FY 2017–2021 and amendment year 2006 or later, 653 cases had enhancements for both (b)(4)(B) and (b)(6)(B), after excluding 3 cases that were coded as having (b)(4)(B) and (b)(6)(B) enhancement values of zero or negative levels. This is out of a total of 36,173 §2K2.1 cases.

[95] From FY 2017–2021 and amendment year 2006 or later, 582 cases had enhancements for both (b)(4) and (b)(5). This is out of a total of 36,173 §2K2.1 cases.

[96] USSC, Individual Offender Datafiles, *supra* note 80. 41.4%of §2K2.1 cases receiving the (b)(4)(A) enhancement were sentenced below guideline range, while 52.6% of §2K2.1 cases receiving the (b)(4)(B) enhancement were sentenced below guideline range during fiscal years 2017–2021. The Commission also reported that in fiscal year 2021, 46% of cases of prohibited persons sentenced under §2K2.1 involving the conduct at issue in (b)(4) received sentences below their advisory guideline range. *See* 2022 Firearms Report, *supra* note 12 at 27 fig. 20.

[97] The term "ghost guns" is vague, thus we use the ATF-preferred term PMF. ATF, *What is a privately made firearm (PMF)?* (July 22, 2022), https://bityl.co/Hb2s.

involving firearms that are "not otherwise marked with a serial number" warrant the 4-level enhancement.

We object to this proposed amendment and—consistent with our opposition to other increases to §2K2.1—instead recommend that the Commission gather data on these offenses before reflexively expanding the reach of (b)(4). If the Commission still chooses to act, we recommend that it add no additional enhancement to subsection (b)(4); or, at a minimum, provide for a lesser, more tailored enhancement requiring that the PMFs were manufactured "in connection with" the offense. In either event, as discussed above, a mens rea requirement should be added to (b)(4) in order to assure punishment proportionate to the individual's culpability.[98]

1. An enhancement for PMFs would not serve a legitimate purpose of sentencing.

The proposed PMF enhancement serves no legitimate sentencing purpose. Specific offense characteristics are intended to single out some aspect of a criminal offense that makes the crime more or less dangerous or the individual more or less culpable. Flawed as it is, §2K2.1(b)(4) at least tries to follow this basic precept: it singles out for extra punishment the extra layer of illegality associated with possessing a stolen firearm or a firearm with an altered or obliterated serial number.

By contrast, adding PMFs to §2K2.1(b)(4)(B) will further unmoor the enhancement from basic principles of punishment. Unlike the other forms of conduct described in §2K2.1(b)(4), there is no illegality associated with PMFs—they are federally *legal*. Nor is a PMF inherently more dangerous than other legally available firearms. It follows, therefore, that the guidelines should not treat possession of a PMF similar to the otherwise illegal conduct at issue in (b)(4), particularly without requiring a culpable mental state or nexus to the offense.

Importantly, §2K2.1 already provides for a menu of special-offense-characteristic enhancements that fully encompass any risk that a PMF might pose in a discrete case. For uniquely destructive PMFs, there are enhancements at §2K2.1(b)(1) and (b)(3). For PMFs used in connection with

[98] 18 U.S.C. § 3553(a)(2)(A).

otherwise illegal conduct, there is (b)(4), (b)(5), (b)(6), and (b)(7). The only characteristic that all PMFs share in common is that they make it difficult for the government to trace serial numbers. But the guidelines should not be in the business of inflicting retribution for conduct—legal in itself—that creates a bureaucratic difficulty.

a. PMFs are not illegal under federal law.

The proposed enhancement errs by treating possession of a PMF and possession of a firearm with an altered or obliterated serial number as equivalent conduct. The current enhancements in (b)(4) encompass conduct that (if done knowingly) could be a separate felony offense, regardless of whether the possessor is a prohibited person.[99] But PMFs are not subject to the same federal legal prohibitions. Non-prohibited, unlicensed persons can make or possess PMFs for their personal use under federal law.[100]

Indeed, PMF manufacturing by hobbyists and private citizens dates back to the founding of this country.[101] Serial numbers, on the other hand, do not. "[S]erial numbers arose only with the advent of the mass production of firearms," and the prohibition on possession of firearms with altered or obliterated serial numbers is even more recent.[102] A prohibited possessor with a PMF—who has committed one federal offense—is not similar to a prohibited person whose possession of a firearm constitutes at least two

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[99] 18 U.S.C. § 922(i), (k), (j); *id.* § 5861(g), (h), (i).

[100] Neither the new ATF final rule nor the Gun Control Act imposes a marking or recordkeeping requirement on unlicensed persons making PMFs who are not engaged in a business or activity requiring a license. *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652, 24715 (Apr. 26, 2022) ("Of course, private makers must abide by the Undetectable Firearms Act, 18 U.S.C. 922(p); NFA requirements; and any applicable State and local laws that govern privately made firearms.").

[101] *Stop Gun Violence—Ghost Guns: Hearing Before the S. Subcomm. on the Const. of the S. Comm. on the Judiciary* (May 11, 2021) (statement of Ashley Hlebinsky at 5), https://bit.ly/424czyC ("In the American colonies alone, it is estimated that around 2,500 to 3,000 gunmakers were making guns. While these gunmakers were able to make firearms from scratch (carving wood, forging barrels, engraving metal, etc.), many ordered parts to assemble the guns even back then.") ("Hlebinsky Testimony").

[102] *United States v. Price*, ---F. Supp. 3d---, 2022 WL 6968457, at *5 (S.D.W. Va. Oct. 12, 2022) (finding § 922(k) unconstitutional) (citations omitted); *see also id.* at 6.

potential federal offenses.[103] The proposed PMF enhancement thus fails to pick out uniquely culpable conduct for a proportionately harsher sanction.

b. PMFs are not inherently more dangerous than serialized firearms.

The vast majority of cases sentenced under §2K2.1 involve a prohibited person in possession of a firearm convicted under 18 U.S.C. § 922(g), which is a status offense.[104] The act of possessing the firearm by the prohibited person is the offense, full stop. The fact that the firearm lacks a serial number alone does not increase the dangerous nature of the firearm. Nor is there evidence that PMFs are inherently more destructive than commercially manufactured firearms. In fact, as the Government itself recently admitted, the commercial requirement that a serial number be placed on a firearm does not impact the use or functioning of a weapon in any way.[105] DOJ now claims that there is a "proliferation of crimes" involving PMFs. But §2K2.1 already has a separate specific offense characteristic for precisely that scenario, covering usage "in connection with another felony offense."[106] Likewise, the guideline has a specific offense characteristic to encompass trafficking. The fact that a firearm was privately made does not, on its own, make the firearm more dangerous.

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[103] 28 U.S.C. § 991(b).

[104] 2022 Firearms Report, *supra* note 12 at 4 ("The vast majority of the offenders sentenced under §2K2.1 were convicted under 18 U.S.C. § 922(g).").

[105] *Price*, 2022 WL 6968457, at *6 ("In fact, as the Government points out, the *commercial* requirement that a serial number be placed on a firearm 'does not impair the use or functioning of a weapon in any way.'"). Other courts considering Second Amendment challenges to § 922(k)'s prohibition on possession of a firearm with an obliterated serial number have noted that serialization does not change the core function of the firearm. *See United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010) (noting "the presence of a serial number does not impair the use or functioning of a weapon in any way. . . . [A] person is just as capable of defending himself with a marked firearm as with an unmarked firearm."); *United States v. Holton*, ---F. Supp. 3d ---, 2022 WL 16701935, at *4 (N.D. Tex. Nov. 3, 2022) ("[F]irearms of similar make and model are essentially fungible").

[106] USSG §2K2.1(b)(6)(B).

c. The difficulty in tracing PMFs does not implicate a legitimate purpose of sentencing.

DOJ bases its request to increase sentences for PMFs on the assertion that these firearms are "extremely difficult to trace."[107] The difficulty that the lack of serialization can create for government investigations is not a legitimate purpose of sentencing under § 3553(a)(2).

As the Practitioners' Advisory Group noted as far back as 2006, the difficulty in tracing guns without serial numbers "does not have any relationship with the federal crime of being a felon-in-possession, or federal gun-possession crimes generally, since knowing the serial number does not in any way make proving the offense more difficult or allow an offender to escape detection."[108] This is particularly true for the vast majority of §2K2.1 offenses; a prohibited person cannot possess any firearm—serialized or not.

What's more, firearms experts disagree on the value of firearms tracing.[109] As the ATF itself explains, "[f]irearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired

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[107] DOJ Letter to the U.S. Sentencing Comm'n Regarding 2023 Proposed Priorities 6 (Sept. 12, 2022), https://bityl.co/Hb3H.

[108] Practitioner's Advisory Group Comment on Omnibus Proposals for 2006 Amendment Cycle 9 (Mar. 15, 2006). As Defenders argued in 2006, DOJ now concedes that "ATF firearm examiners can sometimes still detect altered or obliterated serial numbers using chemicals and microscopic analysis." DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 6; *see also* Federal Defenders Comment on Proposed Amendments to the Firearms Guideline 16 (Mar. 9, 2006) (noting that serial numbers can frequently be "restored by a simple laboratory procedure").

[109] *See* Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 U.C.L.A. L. Rev. 1233, 1271 (2009) ("Experts have repeatedly concluded that the guns traced by ATF are not a representative sample of crime guns, and cannot provide a reliable picture of the modes of acquisition most frequently used by criminals or the paths of distribution that crime guns most often follow."); Hlebinsky Testimony, *supra* note 101 at 8 ("It is certainly easier to purchase an already made firearm that will definitely function, and file the serial number off to use in criminal activity rather than assembling a purchased parts kit . . . . Therefore, the idea that a serial number and markings are the be all to end all in tracing crime is simply not accurate and many other factors are utilized when trying to track down a criminal.").

for use in crime."[110] Moreover, a recent ATF report sheds light on the many reasons that firearms cannot be traced, and PMFs do not even appear in this table. Failure to provide complete information tops the list, and a sizeable number of "crime guns" are actually traced back to a "government entity, law enforcement agency, or military."[111]

Table OFT-05: Reasons Crime Guns are Not Traced to a Purchaser, 2017 – 2021

Trace Completion Status	Number	Percent
Incomplete / Invalid Firearm Information Provided	137,765	7.2%
FFL Acquisition and Disposition Record Missing	95,395	5.0%
Pre-1968 Firearm Manufacture / Too Old to Trace	65,945	3.4%
Obliterated Serial Number	48,601	2.5%
Traced to Government Entity, Law Enforcement Agency, or Military	25,904	1.3%
Other	66,106	3.4%
Total	**439,716**	

As ATF notes, PMFs present an "emerging issue."[112] And a recent Commission report found that 44% of individuals sentenced under §2K2.1 in fiscal year 2021 were arrested following a targeted investigation conducted by law enforcement after receiving allegations of a crime, with another 28% arrested as part of a routine police patrol.[113] Neither scenario is likely to involve a firearm trace that led to the arrest.

The Commission also states that it has "heard from commenters that the very purpose of PMFs is to avoid the tracking and tracing systems associated with a firearm's serial number."[114] This is simply untrue. The manufacture of PMFs by private citizens has been legal since the founding of

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[110] ATF, *Firearms Trace Data: Arizona—2021* (Sept. 15, 2022), https://bityl.co/Hb3Z.

[111] Percentages are out of total gun traces; ATF was able to determine the purchaser in 77% of requested crime gun traces. 2(3) ATF, *National Firearms Commerce and Trafficking Assessment: Crime Guns Recovered and Traced within the United States and its Territories* 5 (Feb. 2, 2023), https://bityl.co/Hb3a ("Law enforcement agencies recovered and submitted 37,980 suspected privately made firearms (PMFs) to ATF for tracing between 2017 and 2021. . . . In September 2020, ATF issued guidance to all eTrace users explaining how to identify and trace PMFs.").

[112] *Id.*

[113] 2022 Firearms Report, *supra* note 12 at 32–33.

[114] 2023 Proposed Amendments, 88 Fed. Reg. 7180 at 7197.

this country and predates the invention of serialization.[115] Federal law allows individuals to make PMFs for personal use and in fact prohibits a national registry of most modern firearms.[116]

2. The Commission should gather data before expanding §2K2.1(b)(4) penalties.

The Commission should not repeat mistakes of the past by ratcheting up penalties in response to headlines without carefully gathering and considering relevant data.[117] And while DOJ's comments and media coverage on PMFs invoke the specter of homemade firearms being used for crimes,[118] such a serious 4-level enhancement should not be added to the guideline without an empirical basis.[119] While the Commission notes that it has heard from commenters that PMFs "increasingly are associated with violent crime," there is no public Commission data on offenses involving PMFs. And the ATF final rule regarding PMFs, which took effect in August 2022, will result in a steep drop in sales of unserialized 80% complete firearms kits.[120] Before it

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[115] Hlebinsky Testimony, *supra* note 101 at 5–8.

[116] 18 U.S.C. § 926(a).

[117] Bowman, *supra* note 22 at 1319 ("To an ever-increasing degree, the power to make and influence sentencing rules has migrated away from the judiciary, from the U.S. Sentencing Commission, and even from local federal prosecutors, toward political actors in Congress and the central administration of the Department of Justice.").

[118] Despite the flurry of media attention to unserialized firearms, mass shootings most often involve legally obtained weapons. *See* Glen Thrush, *What Do Most Mass Shooters Have in Common? They Bought Their Guns Legally*, N.Y. Times (May 16, 2022) (77% of mass shooters from 1966 to 2019 purchased weapons used legally).

[119] Where Guidelines are not based on empirical evidence or on the Commission's research and expertise, the Guideline ranges for those crimes are a less reliable appraisal of a fair sentence. *See Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

[120] The ATF recently adopted a new final rule updating the definition of "frame and receiver," which sweeps so called 80% complete weapons kits into the definition and aims to ensure serialization and recordkeeping of firearms manufactured, imported, acquired, and disposed by federal firearms licensees. *See* 87 Fed. Reg at. 24652.

acts, the Commission should use its power to "systematically . . . collect . . . the data" on federal offenses involving PMFs.[121]

Finally, DOJ argues that ATF's recent "frame and receiver" rule amendment means that PMF "kits are now considered firearms under federal law" and the definition of "firearm" should be updated so that they trigger additional enhancements. Defenders disagree. First, for the reasons stated above, these firearms are not more inherently dangerous due to lack of serialization. Second, the ATF's regulatory decision will result in a steep drop in sales of PMF kits and also seed litigation—the Commission should not act before the impact and lawfulness of the ATF's new regulation has been adequately tested.[122] Third, we have no data on the prevalence of such kits in federal offenses. Given the new ATF regulations, the Commission should pause and gather data before making any changes to the guideline.

III. PART C: Other Changes to §2K2.1

What we've emphasized elsewhere applies equally to Part C: Defenders strenuously oppose any and all unstudied increase in the sentencing ranges called for by §2K2.1.

We elaborate further on only one aspect of Part C: Issue for Comment No. 4. During the March 2023 hearing, Commissioner Wong asked whether an expansion in the definition of "firearms" might mean that a firearm with certain aftermarket parts affixed to it could constitute two firearms instead of one.

This question raises just one of many problems with amending the definition of "firearms" in Application Note 1 of §2K2.1 to include devices which are "firearms" under § 5845(a) but not § 921. First, as Commissioner Wong's question reflects, this amendment would cause §2K2.1 to apply in bizarre and counterintuitive ways, diminishing its influence. Second, DOJ's

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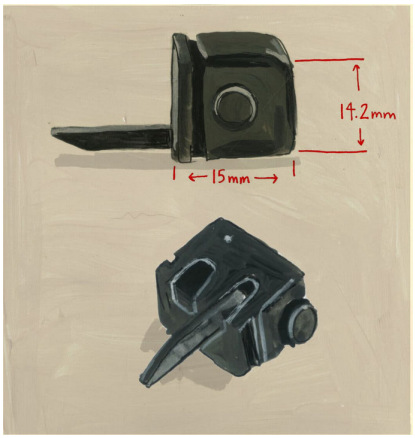
[121] 28 U.S.C. § 995(a)(13).

[122] It is not settled that such kits are considered "firearms" under federal law, given ongoing litigation and at least one partially granted preliminary injunction. *See* Order Granting Prelim. Inj., *VanDerStok v. Garland*, 4:22-cv-00691, ECF No. 89 (N.D. Tex. Oct. 1, 2022); s*ee also Cargill v. Garland*, 57 F. 4th 447, 450–51 (5th Cir. 2023) (en banc) (finding ATF lacked authority to amend regulations to include bump stocks in the definition of machinegun).

requested expansion of the "firearms" definition also lacks a sufficient empirical underpinning. Third, it would create unwarranted disparity. DOJ points to "Glock switches" which are aftermarket parts, most commonly a small block-shaped object about the length of a Lego brick:



These switches do nothing unless inserted into an actual firearm. Treating possession of an aftermarket part such as a machinegun part or silencer the same as possession of an actual "firearm" within the meaning of 18 U.S.C. § 921(a)(3) would create unwarranted disparity, and as Commissioner Wong's question at the hearing highlighted, could result in the double counting of a part and the actual firearm itself.[123] In addition, it could compound preexisting racial disparity in machinegun prosecutions; 65% of individuals sentenced from Fiscal Years 2017 to 2021 in cases with at least one count of conviction under § 922(o) were Hispanic.[124]

Instead of finding ways to add complexity to the guideline to account for outlier conduct, the Commission should focus on empirically based changes to §2K2.1 that better calibrate the guideline to § 3553(a)'s mandate.

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[123] "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm." 18 U.S.C. § 921(a)(3).

[124] USSC, Individual Offender Datafiles, *supra* note 80.

Before the United States Sentencing Commission
Public Hearing on Firearms Offenses

Statement of Michael Carter,
Federal Public Defender for the Eastern District of Michigan
on Behalf of the Federal Public and Community Defenders

March 7, 2023

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Hon. Chair Reeves, Vice-Chairs, and Commissioners: My name is Michael Carter, and I am the Federal Public Defender for the Eastern District of Michigan. I am also a member of the Federal Defender Sentencing Guideline Committee. I would like to thank the Commission for inviting me to testify on the proposed amendments to USSG §2K2.1.[1]

I. Introduction

As a federal public defender, and a lifelong resident of Michigan who was born in Detroit, I fear that the Commission's proposed changes to §2K2.1 would not make us safer,[2] and would exacerbate the unwarranted racial disparities that have long dominated federal gun-enforcement policies and sentencing.[3] In my city and in my profession, I have witnessed the devastation caused both by gun violence and by law-enforcement practices that target Black people and our communities.

Today, I urge the Commission to give any changes to §2K2.1 the careful study and deliberation they deserve. Chairman Reeves, I was grateful for your pledge, at the Commission's October 28, 2022 meeting, to "operate in a deliberative, empirically based, and inclusive manner,"[4] and to "leave an even more improved federal sentencing guideline system for the next set of Commissioners."[5] Consistent with that pledge, and the Commission's role as an independent, expert body, it should collect, study, and publish more data

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[1] *See* 2023 Proposed Amendments, 88 Fed. Reg. 7180, 7190-7198, 2023 WL 1438480 (Feb. 2, 2023) ("2023 Proposed Amendments").

[2] *See infra* at 12-16.

[3] *See infra* at 6-12.

[4] Remarks of Judge Carlton W. Reeves, Chair of the U.S. Sentencing Comm'n 4 (Oct. 28, 2022), https://tinyurl.com/567hfjsm.

[5] *Id.*

and other information about the sufficiency of current penalties for firearms offenses, before acting.[6]

Defenders understand that the Commission is obligated to respond to the directive in the Bipartisan Safer Communities Act of 2022 ("BSCA") to review and amend the guidelines.[7] But that directive does not include a timeline, and there is ample reason to tread cautiously.[8] In December 2022, two of the BSCA's principal leaders, Senators Chris Murphy and Cory Booker, wrote to the Commission to warn that: "[W]e believe that [the BSCA] can and will save lives. But to achieve that outcome, it is essential that the implementation of the law avoids the mistakes of the past."[9] They implored the Commission to "approach amending §2K2.1 with full awareness of the inequities that may result from any misguided sentencing policy" and "to give special consideration to the primary purposes of the BSCA and to the consequences which the Commission's guidelines may have for communities of color."[10] Failure to heed the Senators' warning would, as a coalition of gun violence researchers, policymakers, and lawyers have warned, risk misapplying the BSCA in a manner that would "increase the racial disparities that already exist in federal sentences for firearms offenses, and fail to measurably impact gun violence."[11]

Today, I will explain why the Commission should study the need for, and potential ramifications of, increased penalties in §2K2.1 before

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[6] *See* Defender Comment on the Commission's Proposed Policy Priorities 4-9 (Oct. 17, 2022) ("Defender October Comment").

[7] *See* Pub. L. No. 117-159 § 12004(1)(a)(5) (2022) ("BSCA").

[8] *See* Defender October Comment, *supra* note 6 at 6.

[9] Letter from Sens. Cory Booker & Christopher Murphy to Hon. Carlton W. Reeves, Chair, United States Sentencing Comm'n at 1 (Dec. 5, 2022), https://tinyurl.com/n9s52veb ("Booker & Murphy Letter"); *see also* Letter from Sen. Christopher Murphy to Att'y Gen. Merrick Garland, Sept. 12, 2022, at 3, https://tinyurl.com/4xzu29et ("As the Department implements these new criminal provisions, it is incumbent on Department leadership to ensure that these new tools and power do not come at the expense of historically over-policed and over-prosecuted communities.").

[10] Booker & Murphy Letter, *supra* note 9 at 1–2.

[11] *See* Comment from The Peter L. Zimroth Ctr. on the Admin. of Crim. L., *Re: Proposed Priorities for the 2022-23 Amendment Cycle* at 1 (Oct. 17, 2022) ("Zimroth Comment"), https://tinyurl.com/yw95dthx.

implementing the BSCA's directive.[12] Alternatively, if the Commission chooses to implement the directive this amendment cycle, it should do so as narrowly as possible. There are two reasons why. First, past practice and national experience demonstrate that enhancements to the firearms guidelines would disparately impact Black people and their communities. Second, the history of §2K2.1 reflects numerous upward ratchets lacking empirical study or basis, which the Commission should not repeat now.

II. The BSCA and the proposed amendments to §2K2.1

Less than one year ago, in the wake of a spate of mass shootings, Congress enacted the BSCA.[13] The BSCA's purpose, according to Senators Booker and Murphy, was to "end the flow of illegal guns into communities and reduce gun violence."[14] Among other things, the BSCA created new statutory provisions covering straw purchasers and gun traffickers, at 18 U.S.C. §§ 932 and 933. It increased the statutory maximum penalties for four statutes—18 U.S.C §§ 922(d), 922(g), 924(h), and 924(k)—from 10 to 15 years (which is also the statutory maximum for newly created sections 932 and 933).[15]

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[12] *See* BSCA at 136 Stat. 1328.

[13] *Id.*; *see also* Kyana Givens, Michael Carter & Laura Abelson, *Federal Time*, Inquest (Aug. 11, 2022), https://tinyurl.com/33ddcbyu ("*Federal Time*") (discussing the BSCA's enactment).

[14] Booker & Murphy letter, *supra* note 9; *see also* Zimroth Comment, *supra* note 11 at 2-4. There's good reason to question whether the BSCA's increased penalties for illegal firearms acquisition and possession will effectively reduce gun violence. Indeed, the vast majority of U.S. mass shootings involve legally purchased firearms. *See* Glenn Thrush, *What Do Most Mass Shooters Have in Common? They Bought Their Guns Legally*, NY Times (May 16, 2022), https://tinyurl.com/3a7jtdhp; Michael Sisak, *22 mass shootings. 374 dead. Here's where the guns came from*, AP (May 27, 2022), https://tinyurl.com/4ry3yvwr (Uvalde, Buffalo, and El Paso shooters legally purchased firearms); Lee Hedgepeth, *After Alabama church shooting, prosecutor names suspected gunman*, AL News (June 17, 2022), https://tinyurl.com/cw97rnev (shooter was federally licensed firearms dealer); Minyvonne Burke, et. al., *Tulsa gunman bought AR-15-style rifle hours before using it to kill his former doctor, 3 others*, NBC News (June 2, 2022), https://tinyurl.com/mwrts3ff (shooter legally purchased firearm).

[15] *See* BSCA §§ 12001, 12002, 12004, 12005.

The BSCA also directed the Commission to "review and amend" the firearms guidelines and policy statements to: (1) ensure that people convicted of offenses under the "new sections 932 and 933 of title 18 and other offenses applicable to straw purchases and trafficking of firearms, are subject to increased penalties in comparison to those currently provided"; (2) reflect the intent of Congress that a person convicted of a §§ 932 or 933 offense who is "affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual"; and (3) reflect the intent of Congress that "straw purchasers without significant criminal histories receive sentences that are sufficient to deter . . . and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history or other mitigating factors."[16] In contrast to past directives to the Commission, the BSCA did not contain a timeline for implementation,[17] and also required the Commission to *review* any amendment.[18]

Eight short months after the BSCA was enacted, the Commission has proposed sweeping changes to the firearms guideline. The proposed amendments are organized into three parts: Part A presents two options that would amend §2K2.1 to respond to each part of the BSCA directive. Part B proposes changes to address concerns about firearms that are not marked with serial numbers. And Part C provides issues for comment on possible further revisions to §2K2.1. Today, I will focus my testimony on the proposed Part A changes to §2K2.1 that would either increase penalties for straw purchasing and firearms trafficking (Option 1) *or* increase penalties more broadly across the guideline (Option 2). Defenders will address the proposed criminal affiliations and mitigating circumstances adjustments in Part A, as

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[16] *Id.*

[17] *See, e.g.*, Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. No. 112-269 § 3(d) (2013) (requiring the Commission to complete its "consideration and review" "not later than 180 days after" the Act's enactment); Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 § 401(m) (2003) (requiring implementation of directive within 180 days of enactment of the Act).

[18] *See* BSCA § 12004(a)(5) (emphasis added).

well as Parts B and C of the proposed amendment, in our written comments submitted on a later date.[19]

Option 1 adds references to the new statutes created by the BSCA into §2K2.1 and amends the 4-level firearms trafficking enhancement at §2K2.1(b)(5) to make it a tiered enhancement that applies to straw purchasing and trafficking. It provides for either a 1- or 2-level increase at subsections (b)(5)(A) and (B), and a 5- or 6-level increase at subsection (b)(5)(C). Option 2—which would apply a 1- or 2-level base offense level (BOL) increase for offenses under the two new statutes and for offenses under §§ 922(d), 922(g), 924(h), and 924(k)—appears to respond to a comment submitted by the Deputy Attorney General (DAG) on October 17, 2022. The DAG asked the Commission to "undertake a broader review of Section 2K2.1 at the same time it reviews the guideline to implement the BSCA," and proposed general increases to guideline ranges across §2K2.1.[20] Although Option 2 does not reflect all of the DAG's requested changes, it would implement changes that are more expansive and punitive than those required by the BSCA's directive, raising many §2K2.1 BOLs.

III. Past practice and national experience demonstrate that sweeping firearm guideline enhancements would disproportionately impact communities of color, with little to no improvement to public safety.

Sweeping and empirically unsupported increases to §2K2.1's penalties would not make our communities safer.[21] Instead, these changes would

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[19] As we will explain in those comments, with respect to the remainder of Part A, Defenders have concerns about the proposed criminal affiliations enhancement and we will suggest removing some of the limiting criteria from the proposed mitigated role reduction. With respect to Part B, Defenders strongly support the addition of a *mens rea* requirement to §2K2.1(b)(4) and oppose the proposed enhancement for privately made firearms in §2K2.1(b)(4)(B). With respect to Part C, we urge the Commission to reject any additional proposed amendments that would further ratchet up punishment under §2K2.1.

[20] Comment from the Office of the Deputy Att'y Gen. at 3 & App. A (Oct. 17, 2022).

[21] *See Federal Time*, *supra* note 13 (discussing severe race disparities in federal firearms prosecutions and convictions); Benjamin Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173, 2176 (2016) (applying the drug war's critical rubric to gun possession highlights similar pathologies and speaks to broader flaws in the

exacerbate the unwarranted racial disparities that have long dominated federal gun enforcement policies and sentencing.[22] Against the backdrop of these historical trends, the Commission must tread cautiously in implementing the BSCA's directive, and, consistent with its obligation to establish fair sentencing policies and practices that meet the purposes of 18 U.S.C. § 3553(a)(2),[23] it must use every tool available to redress these harms.

A. Racial Disparities

The changes Option 2 proposes to §2K2.1, much like the felon-in-possession statute, are facially race-neutral. Yet they would be certain to disproportionately impact and harm Black people.[24] There are two primary reasons why: *first*, Black people are arrested, prosecuted, and convicted of higher rates of felony offenses in comparison to white people,[25] and *second*,

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structure of the criminal legal system); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1346 (2005) ("Increasing penalties is almost always perceived as conferring political benefit. Thus, there is no governor on the gradual upward ratchet of harsher penalties made attractive by politics . . . .").

[22] *See, e.g.,* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L. J. 1011, 1021-25 (2020) (examining racial disparities in federal gun possession prosecutions arising from law enforcement practices that target communities of color). And as the DOJ itself recently argued, American disarmament laws historically targeted enslaved Black individuals as a group perceived to be "dangerous." Supp. Br. for the Appellee United States at 22-23, *U.S. v. Rahimi*, 21-11001 (5th Cir. Aug. 9, 2022) ("Several colonies (or states) also passed statutes disarming classes of people deemed to be threats, including those unwilling to take an oath of allegiance (to the crown and later the states), slaves, and native Americans.").

[23] 28 U.S.C. § 994(g).

[24] *See* Emma Luttrel Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Century-Old Methods to Disarm Black Communities*, 21 CUNY L. Rev. 143, 164 (2018) ("[S]ince the first colonists set foot on the New World, firearm and weapon control laws were enacted to suppress the enslaved and free Black populations.") (*citing* Michael Waldman, *The Second Amendment: A Biography* 8 (2014)); *see also* Cornel West, Foreword to Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* X (2010) ("In fact, the very discourse of colorblindness . . . has left America blind to the New Jim Crow.").

[25] *See* Shreefter, *supra* note 24 at 157; *see also* ACLU & The Sent'g Project, *Racial Disparities in Sentencing in the United States* 1 (July 14, 2022),

federal firearms enforcement initiatives like "Project Safe Neighborhoods" have exacerbated the generally disparate enforcement of criminal laws by disproportionately targeting and harming people of color and their communities.[26] There is ample reason to fear that the BSCA's broad expansion of firearms crimes and penalties will be used to similar effect. Although the BSCA's supporters intended it to focus on straw purchases and gun trafficking,[27] the DAG's request that the Commission ratchet up offense levels across §2K2.1 shows that it will seize the opportunity to expand prosecutions and punishment for all types of gun offenses, including simple possession by a prohibited person.[28]

Overincarceration. At the threshold, the racial disparities in federal firearms enforcement and convictions reflect centuries of unequal and racially disproportionate crime control.[29] "From arrest to sentencing, racial and ethnic disparities are a defining characteristic of our country's criminal legal system."[30] "Since 1850, when the first prison statistics were published,

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https://tinyurl.com/362tn8au (Black individuals in America are incarcerated at a rate five times higher than white individuals).

[26] *See* Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 315-17 (2007) (recognizing that federal gun enforcement initiatives like "Project Safe Neighborhoods" have historically focused efforts in predominantly Black, urban communities and collecting statistics provided in litigation showing that the vast majority of persons prosecuted in select districts under Project Safe Neighborhoods were Black); Patton, *supra* note 22 at 1021-25 (examining racial disparities); Humera Lodhi, *There's A Large Racial Disparity in Federal Gun Prosecutions in Missouri, Data Shows*, The Kansas City Star (updated July 1, 2022), https://www.kansascity.com/news/state/missouri/gun-violence-missouri/article258304878.html (reporting racial disparities in both federal gun convictions and sentence lengths and recognizing that "[l]aws focused on felons are 'racially coded language'. . . because people of color are more likely to come in contact with police, more likely to be arrested, and more likely to be labeled a felon than white people").

[27] *See* Zimroth Comment, *supra* note 11 at 2-4; Brady United Against Gun Violence, *Re: Comments on Consideration of Possible Amendments to § 2K2.1* at 1 (Oct. 17, 2022) (urging holistic view).

[28] *DAG Comment*, *supra* note 20 at 3 & App. A.

[29] *See* Shreefter, *supra* note 24 at 158-59.

[30] Mike Wessler, *Updated charts provide insights on racial disparities, correctional control, jail suicides, and more*, Prison Policy (May 19, 2022), https://tinyurl.com/2p943b9z; *see also* Alexander, *supra* note 24 (arguing that mass

it has been evident that Blacks are overrepresented in state and federal prisons."[31] This inequitable enforcement regime has shaped the American criminal justice system: In 2020, the Bureau of Justice Statistics found that Black Americans are imprisoned in state and federal prisons at a rate that is over five times the rate of white Americans.[32]

This imbalance is replicated in federal firearms sentencings, the vast majority of which involve a prohibited person in possession of a firearm conviction under 18 U.S.C. § 922(g).[33] The Commission's 2022 report on firearms offenses found that over half of the individuals convicted of offenses sentenced under §2K2.1 in fiscal year 2021 were Black.[34] And Commission data shows that for felon-in-possession offenses, in particular, 56% of the individuals sentenced that fiscal year were Black.[35]

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incarceration is a perpetuation of American's dark legacy of slavery and segregation); Elizabeth Hinton, et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Inst. of Just. at 1 (May 2018), https://tinyurl.com/3zcv58dd ("Black men comprise about 13 percent of the male population, but about 35 percent of those incarcerated.").

[31] Shreefter, *supra* note 24 at 158; *see also* Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 Tex. L. Rev. 1787, 1791–92 (2006) ("Shortly following emancipation, by 1880, the black-white disparity ratio in per capita imprisonment was nearly three to one" and in the "120 years following 1880, black-white disproportionalities in prison rates have grown steadily worse.").

[32] E. Ann Carson, U.S. Dep't of Just., Off. of Just. Programs, Bureau of Just. Stats., *Prisoners in 2019* 10 (2020), https://tinyurl.com/4sswe6xd.

[33] USSC, *What Do Federal Firearms Offenses Really Look Like?* 4 (July 2022), https://tinyurl.com/6jsusejv ("The vast majority of the offenders sentenced under §2K2.1 were convicted under 18 U.S.C. § 922(g).") (Firearms Report).

[34] *Id.* at 10 tbl.1 (reporting that in fiscal year 2021, a majority of individuals sentenced under §2K2.1 (after "excluding offenders sentenced under the career offender guideline, Armed Career Criminal Act, and offenders convicted solely of an offense under 18 U.S.C. § 924(c) and certain other cases") were Black (54.5%) and U.S. citizens (96.1%)).

[35] USSC, *Quick Facts: Felon in Possession of a Firearm Fiscal Year* 2021 (2022), https://tinyurl.com/5ykh2z5u. Studies have also found similar racial disparities in state firearms convictions. For example, a 2021 study found that over two-thirds of convictions involving a firearm in Illinois were for mere possession offenses, and that Black men, particularly in Cook County, were disproportionately convicted. David E. Olson, *et al.*, Loyola Univ. Chi., Ctr. for Crim. Just. Rsch, Pol'y, and Prac.,

Enforcement. "F[]elon-in-possession laws are embedded in a broader range of decisions about criminal law and its enforcement."[36] In particular, the failed "War on Drugs" is "deeply intertwined" with the criminal regulation of gun possession.[37] For example, "drug convictions often serve as predicates for a range of felon-in-possession gun crimes, and policing of guns and drugs are often closely tied."[38] As I have written elsewhere, the racialized policing practices that became popular during the 1980s and continue today—including stop-and-frisks and traffic stops—mean that "too often, whether you are deemed a 'prohibited person' depends on your skin color and zip code, not the threat you pose to the community."[39] Indeed, in its recent Firearms Report, the Commission studied a sample of firearms convictions and found that a significant number of the sample—27.5%—originated from "traffic stop[s] or routine patrol[s]."[40] Within that group, the Commission found astonishing racial disparities: "Black firearms offenders represented a higher share of arrests following law enforcement conducting a routine street

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Sentences Imposed on Those Convicted of Felony Illegal Possession of a Firearm in Illinois at 1-2 (July 2021), https://tinyurl.com/5n7cfhkx.

[36] Levin, *supra* note 21 at 2197.

[37] *Id*. at 2177; *see* Schreefter, *supra* note 24 at 174 ("[T]he 'War on Drugs' shaped today's reality of the disparate enforcement of federal firearm offenses by significantly increasing the number of Black people with felony convictions.").

[38] Levin, *supra* note 21 at 2177 (summarizing study findings that "for weapons offenses, the arrest rates for African Americans is five times higher than the rate for whites and three times higher than the rate for Hispanics" in New York City).

[39] *Federal Time*, *supra* note 13; *see also* B. Keith Payne & Julian M. Rucker, *Explaining the Spatial Patterning of Racial Disparities in Traffic Stops Requires a Structural Perspective: Further Reflections on Stelter et al. (2022) and Ekstrom et al.* 33(4) Psych. Sci. 666–68 *(*2022), https://tinyurl.com/uphnvder ("Recent studies have made clear that Black drivers in the United States are more likely to be stopped by police than White drivers and that the size of the disparity varies widely from one place to another."); Daniel Webster, *et al*., *Reducing Violence and Building Trust: Data to Guide Enforcement of Gun Laws in Baltimore*, Johns Hopkins Ctr. for Gun Pol'y and Rsch. at 16 (Jun. 4, 2020), https://tinyurl.com/4k8xaxfx ("BPD's gun law enforcement strategy has historically prioritized stop-and-search practices with insufficient training and oversight to prevent racial profiling.").

[40] *See What Do Federal Firearms Offenses Really Look Like?*, *supra* note 33 at 32.

patrol (73.0%) and traffic stops (66.9%) compared to the overall percentage of Black firearms offenders in the sample."[41]

Federal firearms enforcement patterns have exacerbated these disparities. Over the last two decades, federal firearms prosecutions have proliferated under charging policies and taskforces implemented by the Department of Justice (DOJ). Most prominently, Project Safe Neighborhoods, launched by President George W. Bush in 2001, increased firearm prosecutions nationwide. The federal government hired hundreds of new prosecutors and law enforcement agents to bring federal prosecutions for gun crimes—largely simple possession—that would have otherwise proceeded in state courts for the express purpose of imposing more severe prison sentences.[42]

Critics have concluded that Project Safe Neighborhoods "specifically targets communities of color for punishment above and beyond what would already be significant punishment in state court."[43] More than half of all Black individuals in the United States live in just 30 cities, all of which have been targeted as part of Project Safe Neighborhoods.[44] In those cities, the people who are prosecuted for firearms offenses are overwhelmingly Black. In 2007, Professor Bonita Gardner reported that in my district, the Eastern District of Michigan, "almost ninety percent of those prosecuted under Project Safe Neighborhoods [were] African American."[45] Many of these federal cases

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[41] *Id.* at 33.

[42] Gardner, *supra* note 26 at 312 (Throughout Project Safe Neighborhoods' existence, the overwhelming majority of its gun prosecutions have focused on felon-in-possession charges.). Federal prosecutors have focused on simple possession charges despite the existence of "twenty major federal gun crimes—including gun trafficking, corrupt gun dealers, stolen guns, selling to minors, obliterating serial numbers, and lying on the background check form." Patton, *supra* note 22 at 1022.

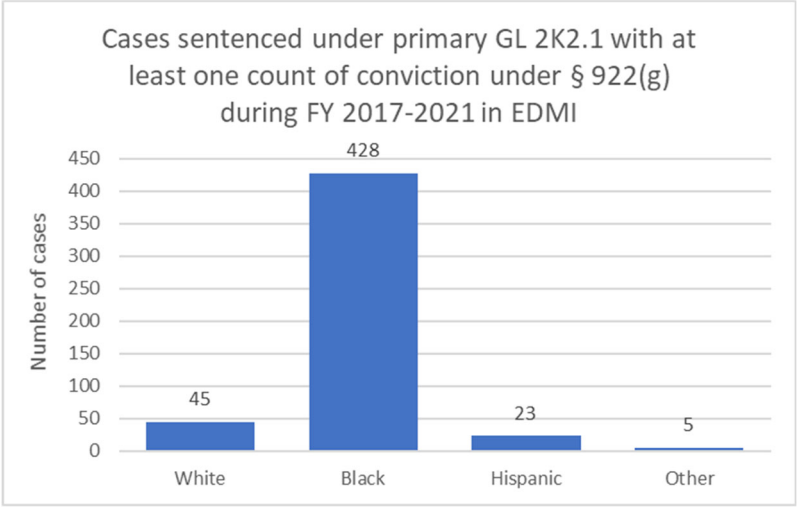
[43] Patton, *supra* note 22 at 1023.

[44] Gardner, *Separate and Unequal*, supra note 26 at 316.

[45] *Id.* at 313-17 (citing *Hubbard v. United* States, No. Crim. 04-80321, 2006 WL 1374047, at *2 (E.D. Mich. May 17, 2006)) (Of the 61 defendants prosecuted under the program represented by the local FPD, "54 were African-American, 2 were Native American, 3 were Hispanic or Latino, and 2 were Caucasian."). Likewise, in the Southern District of New York, "testimony show[ed] that more than eighty percent of defendants prosecuted under [Project Exile] were African American." And

are picked up from ongoing state prosecutions. When prosecutors choose to bring federal charges, with their longer and determinate sentences and mandatory minimums, they can coerce guilty pleas. Even the threat of federal prosecution can deter an individual in state court from exercising her constitutional right to proceed to trial.[46]

In the Eastern District of Michigan, the pattern has held steady since Dr. Gardner published her report: during the fiscal years of 2017 to 2021, 85% of people sentenced under primary guideline §2K2.1 with at least one count of conviction under § 922(g) were Black.[47] Compared to all other races, in my district, Black individuals are 5.9 times more likely to be sentenced with at least one § 922(g) conviction and under §2K2.1 than non-Black individuals.[48]



in the Southern District of Ohio, "more than ninety percent" of known cases of individuals prosecuted under the program were Black. *Id.* at 317.

[46] *See* Patton, *supra* note 22 at 1025 ("Although the vast majority of criminal cases, and therefore the vast source of mass incarceration, come from state systems, the federal prosecutions impact those systems tremendously by providing state prosecutors greater power to negotiate tougher pleas.").

[47] The data for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2017 to 2021. The Commission's "Individual Offender Datafiles" are publicly available for download on its website. USSC, *Commission Datafiles*, https://tinyurl.com/4j32hwha. By comparison, nationwide, from fiscal year 2017 to 2021, 56% of individuals sentenced under primary guideline §2K2.1 with at least one § 922(g) charge were Black. *Id.*

[48] This calculation represents relative risk.

B. Public Safety

In October, a coalition of gun violence prevention researchers, policymakers, lawyers, and advocates explained to the Commission that firearm violence in the United States is a racial justice crisis.[49] I am grateful to these groups for emphasizing this too-often ignored reality. As the coalition explained: "Gun violence does not impact Americans equally: Black people are twice as likely as White people to die from gun violence and 14 times more likely to be wounded, while Black children and teens are 14 times more likely to die from gun violence than their White counterparts."[50] These disparities "do not arise from cultural deficiencies, a greater propensity toward violence, or moral decay."[51] Rather, they reflect a preference for incarceration over intervention and for abandonment rather than aid.[52] Our approach to gun violence in Black communities—racially-targeted police enforcement—has exacerbated problems at enormous social and monetary costs.

"The impact of gun violence on the lives of [people of color] is devastating, but so too is the over-reliance on a heavily-punitive criminal legal system to address violence."[53] These strategies are predicated on the assumption that the prospect of harsh, determinate sentences will deter

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[49] Zimroth Comment, *supra* note 11 at 12.

[50] *Id*. (gathering sources).

[51] *Id*.

[52] *See* Brady United, *Gun Violence is a Racial Justice Issue*, https://tinyurl.com/yccvm7ee (last accessed Feb. 26, 2023) ("Black people are not inherently more violent. . . . White men, for instance, commit the majority of mass shootings. . . . public policy has made it so that Black people are more likely to face conditions that facilitate gun violence.").

[53] Educational Fund to Stop Gun Violence, DC Justice Lab, Cities United, March for Our lives, Community Justice Action Fund, Consortium for Risk-Based Firearm Policy, and Johns Hopkins Center for Gun Violence Prevention and Policy, *Racial Equity Framework for Gun Violence Prevention* at 4 (2022), https://tinyurl.com/4j2f44fs; *see also* Robert Weiss, *Rethinking Prison for Non-Violent Gun Possession*, 112 J. Crim. L. & Criminology 665, 668 (2022) (citing James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* 35 (2017)) (noting "[L]ow-income and Black Americans experience both criminal justice over-enforcement (mass incarceration, disparate arrest rates, police abuses) and under-enforcement (unabated gun violence, low homicide closure rates, etc.")).

conduct.[54] But years after deploying strategies based on that unproven assumption, it remains just that: an assumption. And it is an assumption that ignores the relative consensus in empirical research that enhanced penalties for simple gun-possession offenses do not effectively reduce violence.[55]

What could explain this? For one thing, it is consistent with the reality that the general deterrence benefit of "severe prison terms, specifically, is quite limited."[56] As the DOJ's National Institute of Justice has explained, "increasing the severity of punishment does little to deter crime"—"[t]he certainty of being caught is a vastly more powerful deterrent."[57] A recent Johns Hopkins University study that examined gun violence in Baltimore, Maryland, concluded that "increasing the certainty that violators experience consequences for committing gun crime is more important and cost-effective in reducing crime than increasing the length of sentences."[58]

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[54] *See* Patton, *supra* note 22 at 1018 ("The U.S. Attorney for the Eastern District of Virginia, Helen Fahey, explained the advantages of federal prosecutions: lower likelihood of bail, harsher sentences, and a federal prison system that meant serving time in a distant location (hence the name 'Exile').").

[55] *See e.g.*, Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. Pa. L. Rev. 637, 694 (Feb. 2022) ("The research is clear that imposing increasingly harsh sentences is not an effective way to reduce gun crime.") (gathering sources); *see also* Matthew Makarios & Travis C. Pratt, *The Effectiveness of Policies and Programs that Attempt to Reduce Firearm Violence: A Meta-Analysis,* 58 Crime & Delinquency 222, at 236 (2012) (finding a "weak" relationship between enhanced prison terms and gun violence); *see also* Weiss, *supra* note 53 at 686 (arguing for importance of using public health tools and discussing "substantial literature that considers gun violence a public health problem").

[56] Melissa Hamilton, *Some Facts About Life: The Law, Theory, and Practice of Life Sentences*, 20 Lewis & Clark L. Rev. 803, 821 (2016) ("The lost deterrence function in lengthening sentences is also likely due, to a significant degree, to the recognition from behavioral law and economics studies that offenders often are not rational thinkers who carefully measure the benefits of their actions against potential distant or long-term legal consequences.").

[57] U.S. Dep't of Just., Nat'l Inst. of Just., *Five Things About Deterrence* at 1 (May 2016), https://tinyurl.com/54tshyyj.

[58] Webster, *supra* note 39 at 4; *see also* Weiss, *supra* note 53 at 675 ("Evidence of a connection between putting people in prison for gun possession and increased public safety is weak.").

And to the extent that any minimal deterrent effect might exist, it comes at significant human and fiscal costs.[59] Incarceration is not only expensive, it often "does not prevent reoffending and has a criminogenic effect on those who are imprisoned."[60] That is because imprisonment severs ties to family and community, disrupts housing stability, and diminishes employment options on release.[61] As the Vera Institute has explained, "incarceration is an expensive way to achieve little public safety."[62]

Another reason that prosecutions for felon-in-possession offenses alone cannot effectively make communities safer is that a prior felony conviction is a poor proxy for dangerousness.[63] Law enforcement officers often claim that Project Safe Neighborhoods and other firearm taskforce prosecutions focus on "violent" people,[64] but there is little apparent pattern to who is prosecuted

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[59] Webster, *supra* note 39 at 24 (gathering sources).

[60] *Id.*

[61] *See generally* Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis. L. Rev. 1049, 1054-72 (cataloging eighteen criminogenic effects of incarceration); Lynne M. Vieraitis, Tomislav V. Kovandzic, & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol'y 589, 614-16 (2007); *see also* USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996) (recognizing imprisonment has criminogenic effects including: contact with more serious "offenders", disruption of legal employment, and weakening of family ties).

[62] Don Stemen, *For the Record: The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Evidence Brief at 2 (Jul. 2017), https://tinyurl.com/ycyzkurs.

[63] *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 721 (2007) (noting that "many felonies are not violent in the least, raising no particular suspicion that the convict is a threat to public safety. Perjury, securities law violations, embezzlement, obstruction of justice, and a host of other felonies do not indicate a propensity for dangerousness. . . . Yet, despite this overinclusiveness, felon possession bans are consistently, and without exception, deemed reasonable measures of promoting public safety"); *see also Kanter v. Barr*, 919 F.3d 437, 466 (7th Cir. 2019) (Barrett, J., dissenting) (explaining § 922(g)(1) "also encompasses those who have committed any nonviolent felony or qualifying state-law misdemeanor—and that is an immense and diverse category. It includes everything from Kanter's offense, mail fraud, to selling pigs without a license in Massachusetts, redeeming large quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses."), *abrogated by New York State Rifle & Pistol Association, Inc v. Bruen*, 142 S. Ct. 2111 (2022).

[64] *See* Daniel Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 Ariz. L. Rev. 369, 375, 391 (2001) (summarizing promises

federally for firearm possession, beyond racial disparities. In my experience, felony convictions (defined as "a crime[s] punishable by imprisonment for a term exceeding one year") can include minor, local offenses such as possession of drugs in small quantities, certain driving offenses, and petty theft, which may include stealing food from a grocery store. Option 2's changes to §2K2.1 would allow prosecutors to cast an even wider net and risk amplifying these existing disparities.

IV. The history of §2K2.1 reflects numerous, unstudied upward ratchets that should not be repeated for "proportionality" reasons.

In addition to Option 2's likely disproportionate and harmful impact on communities of color, the history and evolution of the firearms guideline counsels against this sweeping response to the BSCA's directive. Section 2K2.1's history reflects many hastily promulgated upward adjustments that were not preceded by careful study and review. In fact, numerous commentators have suggested that the firearms guidelines should be *decreased, not heightened*.[65]

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by Project Safe Neighborhoods initiatives to "target the most prolific violent offenders," and "crack down on violent gun criminals").

[65] *See, e.g.*, Statement of Barry J. Portman Before the U.S. Sentencing Comm'n, Washington, D.C., at 25 (Mar. 5, 1991) ("Portman 1991 Statement") ("The data indicate that, under the November 1, 1989 version of §2K2.1, courts are sentencing below or at the bottom of the guideline range in 49% of the cases (below = 6.8%; bottom =42.4%), and above or at the top of the range in 28.8% of the cases (above =5.1%; top =23.7%) – suggesting that the offense levels under the guideline are too high."); Statement of Paul D. Borman Before the U.S. Sentencing Comm'n, Washington, D.C., at 13 (Mar. 5, 1991) (Borman 1991 Statement) ("The report accompanying this guideline suggests that [the] majority of courts are sentencing toward the bottom of the guideline, so it is unclear why the Commission is proposing a complex revision of the guideline that would lead to higher offense levels. . . ."); Defenders' Annual Letter to the U.S. Sentencing Comm'n, at 3 (Mar. 9, 2006) (arguing that the Commission should eliminate the enhanced base offense levels for semiautomatic firearms capable of accepting large capacity magazines after the repeal of the assault weapons and large capacity magazine bans that prompted these heightened offense levels); Testimony of Richard A. Hertling Before the U.S. Sentencing Comm'n, Washington, D.C., at 11 (Mar. 15, 2006) ("The Department favors the upward-departure approach over the offense-level approach in light of the fact that possession of such firearms is no longer illegal *per se*."); Testimony of Kyle Welch Before the U.S. Sentencing Comm'n, Washington, D.C., at 3 (Mar. 17, 2011)

While the BSCA does not require the Commission to increase penalties for offenses other than straw purchasing and drug trafficking, the Commission seeks comment on "whether having higher penalties for straw purchasers than prohibited persons"—as Option 1 would provide—"raises proportionality concerns."[66] Linking the prohibited persons sentencing range to that of an arbitrarily inflated straw purchasing enhancement is not good sentencing policy. The Commission's greater concern should be the proportionality of punishment to the conduct being punished. Option 2's punishment enhancements are greater than necessary.

A. History of §2K2.1

The history of amendments to 2K2.1 is a story of repeat, non-evidence-based, one-way ratchets. This historic failure to adopt a deliberative process that "begins with, and builds upon, empirical data,"[67] would be greatly exacerbated by any further across-the-board upward expansions just eight short months after the BSCA was enacted.

Soon after promulgating its original guidelines, the "Commission undertook several major revisions [which] resulted in significant severity increases over historic levels."[68] Over the course of those revisions, the firearms guidelines have been amended to increase penalties in a variety of ways no less than ten times.[69] Most of these increases have been in response

("Welch 2011 Testimony") (stating that the straw purchaser enhancements being considered in 2011 were not supported by the Commission's own empirical data and arguing that "[t]hese data suggest the guideline ranges for these offenses are too high, not too low").

[66] 2023 Proposed Amendments, at 7196.

[67] *See* USSG ch. 1, pt. A, at 5.

[68] USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 66 (2004) ("*Fifteen Years of Guideline Sentencing*").

[69] *See* USSG, App. C, Amends. 189 (Nov. 1, 1989), 333 (Nov. 1, 1990), 374 (Nov. 1, 1991), 478 (Nov. 1, 1993), 522 (Nov. 1, 1995), 531 (Nov. 1, 1995), 578 (Nov. 1, 1998), 631 (Nov. 1, 2001), 691 (Nov. 1, 2006), 753 (Nov. 1, 2011).

to DOJ and federal law enforcement requests,[70] congressional directives,[71] statutory minimum and maximum penalty increases,[72] or some combination

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[70] *See, e.g.*, Letter of Stephen A. Saltzburg, Deputy Attorney General, on Behalf of the Dept. of Justice to Judge William Wilkins, Chair, U.S. Sentencing Comm'n, at 35, Washington, D.C. (Apr. 14, 1989) (requesting increased base offense levels across firearms guidelines "to at least 16 for any firearms offense subject to a 10-year maximum penalty"); USSG App. C., Amend. 631, Reason for Amendment (Nov. 1, 2001) (explaining that the increases in punishment for an offense involving three or more firearms "responds to a recommendation from the Bureau of Alcohol, Tobacco and Firearms (ATF) to increase the penalties in §2K2.1"); DOJ Comments on the Sentencing Commission's Proposed Priorities (Aug. 15, 2005) (recommending new SOC for firearms trafficking and an increase in the SOC for altered or obliterated serial numbers); Letter from Jonathon Wroblewski, DOJ Office of Policy and Legislation, to Chief Judge William K. Sessions, III, Chair, U.S. Sent'g Comm'n, at 9 (June 28, 2010) (requesting additional enhancements).

[71] The 1995 Amendments were in response to a provision in the Violent Crime Control Law Enforcement Act of 1994, Pub. L. No. 103-322 § 110501, 108 Stat. 1796 (Sept. 13, 1994), which directed the Commission to "amend its sentencing guidelines to provide an appropriate enhancement of the punishment for a crime of violence . . . or a drug trafficking crime . . . if a semiautomatic firearm is involved." In addition to adding an upward departure, the Commission increased the base offense levels for firearms capable of accepting a large capacity magazine to make them commensurate with the levels for possession of machine guns, silencers, destructive devices, and other National Firearms Act weapons. Notably, *the enhancement applied even when the firearm was not connected to a crime of violence or drug trafficking offense*. Thus, the amendment was broader than the congressional directive. *See* USSG App. C., Amends. 522, 531 (Nov. 1, 1995). The 1998 Amendment 578 was enacted in response to "a *proposed directive* contained in juvenile justice legislation approved by the Senate Judiciary Committee early in 1997." 63 Fed. Reg. 602, 1998 WL 1699 (Jan. 6, 1998) (1998 Notice of Proposed Amendments) (emphasis added); *see also United States v. Bennett*, No. 8:07CR235, 2008 WL 2276940, at *4 (D. Neb. May 30, 2008) (explaining that the "guidelines that establish the base offense levels for weapons crimes were . . . promulgated in large part pursuant to Congressional directive").

[72] For example, in 1989 the Commission raised the BOL for most conduct covered by the original 2K2.1, including 18 U.S.C. § 922(g) offenses, from 9 to 12 in response to the Anti-Drug Abuse Act of 1988, which raised the statutory maximum for conduct covered by the guideline from five to ten years. *See* USSG, App. C., Amend. 189, Reason for Amendment (Nov. 1, 1989). In 1991, the Commission implemented graduated base offense level increases across 2K2.1 based on the existence of certain qualifying prior convictions. *Compare* USSG §2K2.1 (1991) *with id.* §§2K2.1, 2K2.2, 2K2.3 (1990). These enhancements were in response to a study of the firearms guidelines by the Commission's 1990 Firearms and Explosive Materials Working Group. *See* USSC, *Firearms and Explosive Materials Working Group*

of these factors. Most did not involve extensive empirical studies and review.[73] The Commission offered little or no explanation for some of its decisions.[74] Commentators such as the Federal Defenders,[75] the National

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Report (1990) ("*Working Group Report*"). However, the working group's recommendations were largely based not on national data and experience, but on Congress's increasing of statutory maximum and mandatory minimum penalties for prohibited persons with certain types of prior convictions under 18 U.S.C. § 924(e) (Armed Career Criminal Act). *See id.* at 18-21.

[73] The one exception may be the 1991 amendments which were prompted by the working group study mentioned above. *See Working Group Report*, *id*. But, as explained *infra*, at 21-22, the working group's recommendations for reformation of the guidelines were not supported by its findings.

[74] For instance, the Commission's only explanation for the 1989 increases to offense levels (from 9 to 12 for many offenses, 8 to 12 for certain categories of straw purchasers, and 12 to 16 for certain categories of weapons) and specific offense characteristics (for trafficking in multiple firearms, and for stolen weapons or obliterated serial numbers) was "to better reflect the seriousness of this conduct" and to account for statutory increases. USSG App. C., Amend. 189, Reason for Amendment (Nov. 1, 1989). In 1990, the Commission increased the base offense levels for possession, receipt, and transport of National Firearms Act weapons from 16 to 18. *See* USSG, App. C., Amend. 333 (Nov. 1, 1990). The only reason provided was "to better reflect the seriousness of the conduct covered." *Id.*, Reason for Amendment. In 1993, the Commission amended the commentary to §2K2.1 to provide for strict liability "under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number." 57 Fed. Reg. 62832, 62838, 1992 WL 386965 (Dec. 31, 1992) ("Notice of 1993 Proposed Amendments"). The Commission's notice of proposed amendment was completely devoid of reasoning. And the Commission's "Reason for Amendment" was equally opaque, simply referring to the amendment as "clarif[ying]." USSG, App. C., Amend. 478, Reason for Amendment, (Nov. 1, 1993); *cf. United States v. Handy*, 570 F. Supp. 2d 437, 453 (E.D.N.Y. 2008) ("None of [the firearm guideline amendments] have altered the two-level enhancement for a stolen firearm, nor have they provided any indication of why the Commission believes that the enhancement is appropriate despite the lack of knowledge that the firearm involved was stolen.").

[75] *See e.g.* Comments of the Federal Defenders on the 1989 Proposed Guidelines Amendments and Other Aspects of Guideline Sentencing 30, Washington, D.C. (Apr. 7, 1989); Portman 1991 Statement, *supra* note 65 at 4-5, 21-25; Letter from Jon M. Sands on Behalf of the Federal Public and Community Defenders to the U.S. Sent'g Comm'n 3, Washington, D.C., at 3 (Mar. 9, 2006) ("Sands 2006 Letter"); Testimony of Jon Sands on Behalf of the Federal Public and Community Defenders Before the U.S. Sentencing Comm'n, Washington, D.C., at 1-2 (Mar. 18, 2009) ("Sands 2009 Testimony"); Welch 2011 Testimony, *supra* note 65 at 2-3.

Association of Criminal Defense Lawyers,[76] the American Bar Association,[77] and the Practitioner's Advisory Group[78] have criticized the Commission for proposing and implementing penalty increases without sufficient empirical review of the need for the enhancements, and offering perfunctory, generalized reasons for the enhancements.

The original 1987 firearms guidelines, which were based on the Commission's study of past practices, set lower BOLs and far fewer specific offense characteristic (SOC) enhancements than today.[79] Unlike the current version, BOLs were not increased based on certain prior convictions.[80] Nor did the Commission set out alternative BOLs based on a firearm's features, as it does today.[81] Indeed, the Commission stressed the difficulty of distinguishing levels of culpability based on a firearm's features.[82]

But in 1991, the Commission restructured the firearms guidelines completely, consolidating three different sections into one new §2K2.1.[83] The revised BOLs "[were] linked to the statute of conviction," were enhanced

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[76] Statement of Benson Weintraub, National Association of Criminal Defense Lawyers, Before the U.S. Sentencing Comm'n, Washington, D.C., at 2-3 (Mar. 15, 1990).

[77] Statement of Samuel J. Buffone, Chairperson, U.S. Sentencing Commission Committee Criminal Justice Section, Before the U.S. Sentencing Comm'n, Washington, D.C., at 3-6 (Mar. 15, 1990).

[78] Letter from Fred W. Bennett on Behalf of the Practitioners' Advisory Group (PAG) to U.S. Sentencing Comm'n, Washington, D.C., at 17 (Mar. 9, 1998); Letter from Greg Smith on Behalf of the PAG to U.S. Sentencing Comm'n, Washington, D.C., at 9-15 (March 15, 2006).

[79] *Compare* USSG §2K2.1, §2K2.2, §2K2.3 (1987) *with* §2K2.1 (2021) (In 1987, the conduct now contained solely in §2K2.1 was included in §2K2.1, §2K2.2, and §2K2.3). In 1987, the §2K2.1 BOL was 9. While there was a one-level enhancement if the firearm was stolen or had an altered or obliterated serial number in 1987, *see id.* §2K2.1(b)(1) (1987), the commentary noted the lack of data sufficient to determine the effect of a stolen firearm on pre-guidelines sentences. *See* USSG §2K2.1, comment. background (1987).

[80] *See* USSG §2K2.1, §2K2.2, §2K2.3 (1987).

[81] *See id.*

[82] *See id.* §2K2.1, comment. background (1987) ("Some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm.").

[83] *See* USSG §2K2.1 (1991).

significantly based on the existence of qualifying prior convictions, and were not based on data and national experience.[84] These changes were prompted by a report issued by the Commission's Firearms and Explosive Materials Working Group ("the Working Group"), a staff project that looked at data, case files, appellate decisions, and comments from law enforcement, including from the Bureau of Alcohol, Tobacco, and Firearms ("ATF").[85] The Working Group recommended enhancing BOLs across §2K2.1 based on the existence of qualifying priors.[86]

The Working Group studied prior firearms sentencing decisions and determined that the offense characteristics impacting sentencing length "includ[ed] actual or intended unlawful or criminal use of the firearm, possession of the firearm for personal protection, sporting or collection purposes, drug-related conduct, [and possession of] N.F.A. firearms [and] destructive devices."[87] Indeed, most upward departures occurred where the individual had recently used the weapon, or intended to use the weapon, to commit another crime.[88] Significantly, *the existence of prior convictions was not in the Working Group's list of reasons for upward departures*. In fact, the Working Group determined that sentence length "does not seem strongly correlated with the existence of prior firearms or drug-related offenses or convictions for crimes of violence."[89] Of the cases studied, convicted persons who had committed prior offenses related to firearms, drugs, or crimes of violence "were sentenced to an average of 14 (fourteen) months, slightly lower than the fifteen-month average for all cases combined."[90] And while possession of a firearm for personal protection was cited by judges as a reason

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[84] *See Fifteen Years of Guideline Sentencing*, *supra* note 68 at 66.

[85] *See Working Group Report*, *supra* note 72.

[86] *See id*. at 18-22.

[87] *Id.* at 10; *see also id.* App. D: Memorandum from Vince Ventimiglia to Commissioner Carnes, Rich Murphy, Firearms Working Group Re: Review of Case File Summaries for Firearms Guideline §2K2.1 (1989) 8-14 (Nov. 9, 1990) ("App. D").

[88] *See id.* at 11.

[89] *Id.* at 10.

[90] *Id.* at 10.

for imposing reduced sentences, the Working Group proposed no such adjustment.[91]

The Working Group's recommendation to enhance and restructure penalties across §2K2.1 was tied to legislative increases of statutory maximum and mandatory minimum penalties for prohibited persons and persons with certain types of prior convictions.[92] For example, the Working Group noted that the Armed Career Criminal Act (ACCA) provided for a fifteen-year mandatory minimum for unlawful firearm possession where the individual had three specified prior convictions;[93] it therefore recommended an increased sentence for an individual with two qualifying felonies to increase "proportionality."[94] But the fifteen-year mandatory sentence was not based on Commission expertise: Commission data reflected no need for proportionality with this draconian mandatory minimum, and the drug felonies the Commission chose to trigger the enhancements were broader than those that triggered the ACCA.[95]

Unsurprisingly, the 1991 amendments led to significant increases in prison sentences. In cases sentenced under primary guideline §2K2.1 with at least one count of conviction under § 922(g), the mean length of imprisonment leapt from 48.4 months in 1991 to 70.2 months in 1992.[96]

In 1995, the Commission again made drastic changes to §2K2.1 via Amendment 522. A year earlier, Congress had enacted the Violent Crime

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[91] *See id.* at 10.

[92] *See id.* at 19-21, 29-32. The Working Group's recommendations were predicated upon other factors unrelated to empirical research and the statutory purposes of sentencing as well. For instance, it noted the purported reluctance of federal prosecutors to expend resources on firearms offenses "in light of the relatively low penalties under the guidelines." *Id.* at 32.

[93] *See* 18 U.S.C. § 924(e).

[94] *See Working Group Report* at 18-23, App. D, *supra* note 87 at 10.

[95] *Compare* USSG §4B1.2(b) *with* 18 U.S.C. § 924(e)(2)(A).

[96] Data calculated from the annual datasets for fiscal years 1991 and 1992 available in the series created by the United States Sentencing Commission titled Monitoring of Federal Criminal Sentences, 1987-1998 (ICPSR 9317), and hosted by the Inter-university Consortium for Political and Social Research, https://tinyurl.com/53wztrdf

Control Law Enforcement Act of 1994,[97] which created several new firearms offenses (banning assault weapons and large capacity magazines).[98] The new law directed the Commission to "amend its sentencing guidelines to provide an appropriate enhancement of punishment for [a crime of violence or a drug trafficking crime] if a semiautomatic firearm is involved."[99] Aside from this directive, which applied only to crimes of violence and drug trafficking, Congress required no action relating to this new offense.

But the Commission responded more broadly than required by the directive. It increased the offense levels for possession of certain semiautomatic firearms capable of accepting large capacity magazines to make them commensurate with the offense levels for possession of machine guns and other National Firearms Act weapons (18 U.S.C. § 5845) in §2K2.1(a)(1) [level 26], (a)(3) [level 22], (a)(4) [level 20], and (a)(5) [level 18],[100] and applied the enhancements even when the firearm was not connected to a crime of violence or drug trafficking offense.[101] The Commission offered no explanation for this amendment or its decision to enhance penalties beyond the narrower dictates of the directive.[102] The assault weapon and large capacity magazine bans expired in 2004 (and have never been reinstated by Congress) but the Commission has not taken action to remove these enhancements.[103] A 1997 Urban Institute study mandated by Congress concluded that the bans had little impact on murder rates.[104] Yet even in the face of the 2004 sunset, Urban Institute report, and 2006 public comment—from both Defenders and the DOJ—urging the Commission to

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[97] Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994).

[98] *Id*., Tit. XI, Subtitle A; *see also Fifteen Years of Guidelines Sentencing*, *supra* note 68 at 66.

[99] Pub. L. No. 103-322 § 110501.

[100] See USSG §2K2.1 (1995).

[101] *See* USSG, App. C., Amend. 522 (Nov. 1, 1995).

[102] *See id.*

[103] *See* Pub. L. No. 103-322 § 110501(2) (indicating the amendments made by this subtitle are repealed effective ten years after the date of their enactment).

[104] Roth Kroper, et al., Urban Institute, *Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994*, at 2 (Mar. 13, 1997), https://tinyurl.com/jnmes9h4; *see also* Pub. L. No. 103-22, § 110104 (mandating this study).

remove the large capacity magazine BOL enhancements,[105] these enhancements remain in place (and were broadened) at §2K2.1(a)(1), (a)(3), and (a)(4).[106]

In 2011, DOJ requested, and the Commission implemented, enhancements to §2K2.1 for straw purchasers and for offenses involving firearms and ammunition transported or intended to be transported out of the United States.[107] Much like today, the 2011 proposed amendments to §2K2.1 were in reaction to highly publicized, high-profile instances of gun violence sparking political debate.[108] DOJ's testimony during that amendment cycle highlighted high-profile examples of drug cartel violence in Mexico and U.S. cities bordering Mexico.[109] Defenders pointed to the border district data, showing that the sentences for straw purchasers ("overwhelmingly first time, non-violent offenders for whom prison should be 'generally' inappropriate" under § 994(j)") should not be increased.[110] We feared that the Commission's proposals were "not narrowly tailored to carry out the purposes of sentencing and [brought] with them significant risk of

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[105] *See* Hertling 2006 Testimony, *supra* note 65 at 3; Sands 2006 Letter, *supra* note 75 at 3-10.

[106] *See* USSG §2K2.1 (Nov. 1, 2021). When the bans were repealed, the Commission replaced the statutory references to the repealed laws with the phrase "semiautomatic firearm capable of accepting a large capacity magazine." USSG App. C., Amend 691, Reason for Amendment (Nov. 1, 2006). This had the effect of broadening the reach of these enhanced BOLs beyond the magazines covered by the large capacity magazine ban when it was in effect. The Commission gave no reason for retaining and broadening the enhanced BOLs other than to point out that district courts were *increasingly not applying them* after the repeal of § 921(a)(30) (which would normally counsel toward jettisoning—not keeping—them). *See* Sands 2006 Letter, *supra* note 75 at 6-8.

[107] *See* USSG App. C. Amend. 753 (Nov. 1, 2011); *see also* Defenders' Annual Letter to the Sentencing Commission, at 43 (July 15, 2013); Letter from Jonathon Wroblewski, DOJ Office of Policy and Legislation, to Chief Judge William K. Sessions, III, Chair, U.S. Sentencing Comm'n, at 9 (June 28, 2010); Statement of Laura E. Duffy, United States Attorney for the Southern District of California, Before the U.S. Sentencing Comm'n, Washington, D.C. (Mar. 17, 2011) ("Duffy 2011 Statement").

[108] *See* Welch 2011 Testimony, *supra* note 65.

[109] *See* Duffy 2011 Statement, *supra* note 107 at 2-15.

[110] Defenders' Annual Letter to the Sentencing Commission, at 8 (Aug. 18, 2010); *see also* Welch 2011 Testimony, *supra* note 65 at 3.

incarcerating low-level, first-time offenders for a length of time that is not only greater than necessary, but detrimental to public safety."[111] Nonetheless, the Commission complied with DOJ's request once again.[112]

These examples demonstrate §2K2.1's history of unstudied one-way ratchets. They also show that §2K2.1 does not need further increases. While both options of Part A of the Commission's proposed amendment represent a problematic continuation of this trend, Option 2 is far worse because it implements more expansive and punitive reforms than required by the BSCA directive, raising many of the BOLs that have already been dramatically increased in previous years with little or no empirical support. Rather than implementing sweeping changes to §2K2.1 less than one year after the directive, the Commission should embrace its characteristic institutional role and unique expertise by treading cautiously until an exhaustive study can be completed.

B. Proportionality

Calls for "proportionality" between straw purchasers and prohibited persons do not justify increasing the base offense levels across §2K2.1 as Option 2 proposes. We have a simple response to the Commission's question of "whether having higher penalties for straw purchasers than prohibited persons raises proportionality concerns" [113]: *you don't fix something that's broken by breaking it more*. Option 2 would compound the many problems of an already flawed guideline by implementing changes that sweep beyond the BSCA directive. Calls to anchor the prohibited person calculations to a straw purchasing enhancement motivated, not by careful study and the purposes of sentencing, but by Congress, ring hollow when the anchor itself is irrational and arbitrarily inflated.

Linking sentencing guideline ranges to statutory maximum punishments is not reasoned sentencing policy. The Commission was created to independently assess the need for the sentencing ranges it establishes to meet the purposes of sentencing and avoid unwarranted disparities and

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[111] Welch 2011 Testimony, *supra* note 65 at 2.

[112] USSG §2K2.1(a)(6)(C) (Nov. 1, 2011). *Compare id.* with §2K2.1(a)(6) (Nov. 1, 2006).

[113] 2023 Proposed Amendments at 7196.

unwarranted similarities.[114] It was not created to mirror acts of Congress. Indeed, over 30 years ago the Supreme Court upheld the constitutionality of the Sentencing Commission in the face of a separation-of-powers challenge on the principle that judicial representation on the Commission would "ensure[ ] that judicial experience and expertise [would] inform the promulgation of rules for the exercise of the Judicial Branch's own business—that of passing sentence on every criminal defendant."[115] But an upward ratchet linked to statutory amendment does not reflect judicial experience and expertise—oftentimes, it reflects just the opposite. Thus, "[i]nstead of reflexively keying sentences to arbitrary statutory norms, the Commission should use its data and other expert research at its disposal to create guidelines that further the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2)."[116]

As Defenders underscored in 1991, the statutory maximum sets the most severe punishment "for the most aggravated form of the offense."[117] An increased maximum reflects a Congressional decision to treat the most aggravated form of the offense more severely, "but does not necessarily mean that Congress believes that the heartland form of the offense should be treated more severely."[118] This holds true today. And the Commission need not divine what Congress may have been signaling by raising the statutory maximums for straw purchasing and prohibited persons offenses to 15 years. In its directive to the Commission, Congress explicitly stated that it intended for straw purchasers and gun traffickers to be subject to higher penalties. If it wanted the same for prohibited persons, it would have said so.

Furthermore, pre-BSCA sentencing data show that judges do not see the need for higher penalties in most of these cases. The Commission's firearms report shows that, for cases sentenced under §2K2.1 in fiscal year 2021, sentencing judges gave within-range sentences in 50% of cases, and varied downward in 36% of cases, compared to fiscal year 2007, when 71% of such cases were sentenced within-range, and only 11% received downward

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[114] 28 U.S.C. § 991.

[115] *Mistretta v. United States*, 488 U.S. 361, 408 (1989).

[116] Sands 2009 Testimony, *supra* note 75 at 2.

[117] Portman 1991 Statement, *supra* note 65 at 4.

[118] *Id.*

variances.[119] Given the information currently available to it, the Commission should conclude that §2K2.1's current BOLs are more than adequate. For these reasons, if the Commission amends §2K2.1 in response to the BSCA now, it should implement Option 1, and should do so in the narrowest possible way to mitigate the harm of such an increase to communities of color. It should implement a 1-level enhancement in the proposed subsections (b)(5)(A) and (B), and a 5-level enhancement in the proposed subsection (b)(5)(C). These increases are less drastic than their alternative counterparts.

When the Commission increased guideline ranges for homicide and assault in 2004, Judge Sessions noted: "'[T]he Commission looks to individual enhancements that might require an increase.'"[120] But "'nobody seems to consider the big picture, or the cumulative effect of all the little decisions that the Commission makes.'"[121] "'[A]s a result, the penalties seem to continually grow based on apparently legitimate reasons. If one looks to the overall system, which is not known to be particularly lenient, it is continuously becoming more severe.'"[122] Recognizing that penalties get ratcheted up through the continual interaction of new legislation and the Commission's concern with proportionality, Judge Sessions emphasized the Commission's duty to "'make independent judgments, and that it reflect upon its ultimate goal.'"[123] The Commission has made numerous "little [and big] decisions" about the firearms guidelines over the years that have had an immense "big picture" impact on sentencing ranges. As we asked over ten years ago, we request that the Commission "resist [further] actions that seem mathematically rationale in their incremental application but have the overall impact of increasing (yet again) the overall sentencing range."[124]

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[119] *What do Federal Firearms Offenses Really Look Like?, supra* note 33 at 16 fig. 8.

[120] Sands 2009 Testimony, *supra* note 75 at 2 (quoting USSC, *Minutes of the March 19, 2004 Public Meeting*, at 5).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

V. Conclusion

The history, experiences, and data I have compiled here today counsel against any further increase to §2K2.1 during this amendment cycle, especially the across-the-board increases in Option 2. The Commission should not abandon its characteristic institutional role and expertise, and should collect, study, and publish data and other information about the sufficiency of current penalties for firearms offenses.

As Defenders have previously warned: "[e]xperience teaches us [that] high profile tragedies may lead to hastily made but long-lasting policy decisions that can have detrimental effects."[125] Today is no different. This amendment cycle could be a turning point and opportunity for change. Or it could be a repeat of past injustices that have led many to lament that the war on guns is the new war on drugs. The stakes could not be higher, and I urge the Commission to proceed deliberatively and with caution.

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[125] Welch 2011 Testimony, *supra* note 65 at 1 (noting that 18 U.S.C. § 924(c) was enacted after the shooting death of Martin Luther King, Jr. and amended after the assassination of Robert F. Kennedy, and the punitive crack penalties set forth in the Anti-Drug Abuse Act of 1986 followed the overdose death of famous basketball player, Len Bias).

Federal Public and Community Defenders Comment on Acceptance of Responsibility (Proposal 4A)

March 14, 2023

The following excerpt from the March 2023 Statement of Michael Caruso contains Defenders' comments on Part A of Proposed Amendment 4.

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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]

(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).

Federal Public and Community Defenders Comment on Circuit Conflict re: Controlled Substance Offense (Proposal 4B) and Proposals to Amend Career Offender Guideline (Proposal 6)

March 14, 2023

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I. Introduction

This Comment addresses both Proposal 4B (the circuit conflict regarding "controlled substance offense") and Proposal 6 (the career offender proposals). This is because both proposals would affect the reach of the career offender guideline and other recidivist enhancements that cross-reference USSG §4B1.2.

In their written statements (attached) Federal Public Defenders Michael Caruso and Juval Scott addressed each of the Commission's proposals. We encourage the Commission to carefully review their written submissions, and we refer back to them where appropriate.

This Comment responds to arguments raised at the hearings:

- It explains why the primary justifications offered for proposals that would expand the reach of the guideline—disparity and complexity—are not persuasive: expanding the career offender guideline would *increase* both disparity and complexity. (§ II.A.).
- It discusses data the Commission could collect to inform its work on the career offender guideline. (§ II.B.).
- It explains why the categorical approach is superior to any of the proposals discussed at the hearing. (§ III).
- It explains that our proposal to limit the definition of "controlled substance offense" to the federal felonies enumerated in the career offender directive is in full compliance with the directive. (§ IV.A.1).
- It responds to the Department of Justice ("DOJ" or "the Department") and the Probation Officers Advisory Group's ("POAG") arguments in favor of expanding the definitions of "controlled substance offense" and "crime of violence." (§ IV).

Ultimately, Defenders encourage the Commission to follow the data. The career offender guideline is overly punitive, it has no empirical or other principled basis, and it exacerbates racial disparity in federal sentencing. Thus, the Commission should take no action that would expand its reach.

II. The Commission's proposals for the career offender guideline would have a substantial negative impact and should not be adopted without further study and review.

A. By expanding the reach of the career offender guideline, every one of the Commission's proposals would increase unwarranted disparities without relieving complexity.

The Department's written testimony starts by acknowledging that the career offender guideline is deeply problematic. It recognizes "legitimate concerns about severity levels" associated with Guidelines recidivist provisions; that the career offender guideline in particular has been "the subject of considerable criticism for producing overly long sentences"; and that "[d]ecades of research show that the career offender guideline produces a clear racial disparity in application."[1] The Department acknowledges that district judges impose below-range sentences in increasing numbers of cases—often at the government's request—and that the Commission has urged Congress to narrow the career offender directive.[2]

POAG has also recognized that data suggests the guideline calls for sentences that are too high in most of the cases it reaches.[3]

But although both DOJ and POAG *know* the career offender guideline is deeply problematic, they nevertheless recommend that the Commission adopt amendments from Proposals 4B and 6 that would vastly *expand* that guideline's reach. That is, they recommend that the Commission adopt amendments that would ensure even *more* individuals would be subject to this guideline. Their reasoning boils down to two justifications: reducing disparity and increasing simplicity.

These justifications cannot support the recommendations. Individuals subject to the career offender guideline will always be subject to an unwarranted disparity when compared to those not subject to the guideline

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[1] Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent'g Comm. at 27 & n.42, 35. (Feb. 27, 2023) ("DOJ Written Testimony for March 2023 Hearings").

[2] *See id.* at 27 & nn.43, 44.

[3] *See* POAG Circuit Conflicts Testimony 4 (Feb. 27, 2023) ("POAG Written Testimony on Circuit Conflicts"); POAG Comments on Proposed Priorities 3–4 (July 31, 2017), https://tinyurl.com/y43vvanh.

because there is no empirical or other principled justification for imposing a near-maximum sentence on any category of individuals absent case-specific aggravating facts.[4] And Black individuals will disparately be subjected to this unjustified sentence because of racial inequality in the criminal legal system over space and time.

The fact that some individuals will be captured by an unwarranted recidivist provision cannot justify subjecting other individuals to that provision based on principles of fairness. The career offender guideline is fundamentally unfair; it is an unwarranted-disparity-creating machine. And whether by broadening the definition of "controlled substance offense" or "crime of violence," or by altering the methodology for identifying whether convictions fall into these categories, any expansion of the reach of the guideline will *increase* unwarranted disparity. Contraction will *reduce* unwarranted disparity.

The DOJ and POAG also emphasize simplicity. But, as Federal Defenders Michael Caruso and Juval Scott have explained, the Commission's proposals are unlikely to simplify anything; introducing new definitions and methodologies would simply multiply the approaches courts will have to master. For example:

- Controlled substances are limited to federally controlled substances for purposes of the Armed Career Criminal Act, 21 U.S.C. § 802(57), and 8 U.S.C. § 1326(d) motions; under the Guidelines, controlled substances would include any substance "otherwise controlled under applicable law."

- Hobbs Act robbery and reckless offenses are not predicates under 18 U.S.C. § 924(e) (ACCA) or 21 U.S.C. § 802(58); the opposite would be true under the Guidelines.

- The categorical approach is used for statutory-recidivism-enhancement and immigration cases; under the Guidelines there would be a new accusation-based, "listed guideline" approach. And this new approach would be performed in *many* more cases: as

[4] The career offender guideline exists solely because a statute mandates that it exist. But the existence of a congressional mandate is not an empirical justification for the guideline, and it's certainly not a justification for expanding that guideline.

discussed below, nearly half of cases fall within one of the listed guidelines.

But even if the proposed amendments would simplify the application of recidivist enhancements, simpler is not unfailingly better. After all, the simplest method would be to make *all* offenses subject to the career offender guideline. No one thinks that is appropriate. But expanding the reach of the career offender guideline moves in that direction, one step at a time.

B. Before making significant changes to the career offender guideline—changes that in our view would make a problematic guideline much worse—the Commission should undertake a robust review of relevant data and likely impact.

At the hearing, there was significant discussion of the need for additional data. Vice Chair Mate suggested that the Commission might update its *2016 Career Offender Report*, and several Commissioners asked what sort of research and data collection the Commission could engage in to inform decisions about the career offender guideline. Defenders agree that the Commission should not expand the reach of the career offender guideline without undertaking a robust review of relevant data and the likely impact of any changes. That review should incorporate at least the following components:

- the Commission should collect data to determine the characteristics of those who its proposed, amended guideline would reach, and the impact the amendments will have on those individuals;
- the Commission should articulate the justification for the career offender guideline consistent with the statutory purposes of sentencing; and
- the Commission should review relevant Commission and other data and research to determine which categories of individuals require a near-maximum sentence, to achieve the articulated goal of the enhancement.

Characteristics of impacted individuals. In light of what we already know—that judges impose below-range sentences in nearly 80% of career-offender cases; that the guideline is a poor predictor of recidivism; and that the guideline is a driver of racial disparity in federal sentencing—the Commission should not promulgate any amendment that would expand the reach of the career offender guideline without understanding who it would reach.

For example, there is reason to be very, very concerned about the "listed guideline" alternative to the categorical approach. Commission data reflect that, in the last five fiscal years, 44.4% of Guidelines sentences involved at least one of the "listed guidelines"; this is an astoundingly high percentage for a guideline that is meant to capture the worst of the worst. The Department has proposed to add *additional* guidelines to the Commission's list, which would cause this percentage to rise to a full 50%.[5]

For any proposal the Commission considers, it should collect data on how many individuals the proposal will identify as career offenders, whether they share characteristics with those for whom judges are already imposing below-range sentences, and whether the expansion will further increase racial disparity in sentencing.

Justifications for the guideline. Perhaps most fundamentally, the Commission should interrogate the penological basis for the career offender guideline, which calls for a sentence at or near the maximum for certain categories of defendants. Although Congress mandated the existence of such a guideline, through the use of definitions, the Commission has exercised significant control over who the guideline captures. Before setting out to capture more individuals, and to guide determination of which individuals the guideline *should* capture, the Commission should articulate the

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[5] As with the data cited at Statement of Juval O. Scott Before the U.S. Sentencing Comm'n, at 24 n.107 (Mar. 8, 2023) ("Statement of Juval O. Scott"), this figure was derived from USSC, Individual Datafiles FY 2017–2021. Of the 334,688 sentenced cases for which the Commission had relevant documentation, in 167,278 of the cases, one of the guidelines listed in the proposed amendment or proposed by the Department was identified as either (1) one of the statutory guidelines calculated in the case, or (2) the primary guideline where one of the statutory guidelines was §§2X1.1 or 2X2.1. Due to data limitations, these were not filtered for the additional requirements the Department proposes.

justification for basing a near-maximum sentence solely on criminal history and category of offense.

"The most common justifications for enhancements" based on criminal history "are elevated risk (crime prevention goals) and elevated culpability (retributive rationales)."[6] Although the Commission has never expressly articulated a justification for the career offender guideline, the Commission's discussion of the guideline, including in the *2016 Career Offender Report*, has focused on the former rationale: crime prevention.[7] Under a crime-prevention rationale, imposing longer sentences protects the public through specific deterrence, general deterrence, and/or incapacitation.[8]

If any or all of these are, in fact, the best justifications for the career offender guideline, then the Commission should explain that, so that data and research can focus on whether, and how, the guideline can be designed to meet these goals.

Crafting the guideline in light of its justifications. Once the Commission articulates the penological justifications for the career offender guideline, it can measure the guideline's definitions against the justifications. The Commission's overarching obligation is to promulgate guidelines that recommend a sentence for each defendant that is sufficient but not greater than necessary to serve the statutory purposes of sentencing.[9] If the Commission believes the career offender guideline is justified by a crime-prevention rationale, the Commission should conduct research that would inform the question: For which category of individuals, if any, would a near-

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[6] Richard S. Frase & Julian V. Roberts, *Paying for the Past: The Case Against Prior Record Sentence Enhancements* 207 (2019).

[7] *See, e.g.,* USSC, *Report to the Congress: Career Offender Enhancements* 43 (2016) ("*2016 Career Offender Report*"), https://tinyurl.com/3ubzdabx . As mentioned in Attorney Juval Scott's statement, even retributivist theories would not justify the sentences currently recommended by the career offender guideline. *See* Statement of Juval O. Scott at 7–8 & n.36.

[8] *See* Frase & Roberts, *supra* note 6 at 73.

[9] *See Rita v. United* States, 551 U.S. 338, 347–49 (2007) (explaining that Commission's enabling statute tells the Commission to write guidelines that will lead to sentences that comply with § 3553(a)).

maximum sentence be the least punishment necessary to achieve the guideline's crime prevention goals?

Some of this research could be performed by the Commission's Office of Research and Data. The Commission's individual data files, special coding projects, and recidivism data would be invaluable both to Commission staff and others in performing research that would inform this question. In addition to collecting its own data and conducting research, the Commission is also charged with "collect[ing] systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process."[10] So the Commission should also look outside the Commission for work that would inform this question. The Robina Institute of Criminal Law and Criminal Justice, an academic think tank devoted to sentencing guidelines systems, for example, publishes a Criminal History Enhancement Sourcebook, which examines questions regarding the justification for criminal history enhancements at sentencing, the relationship between criminal history and recidivism risk, and criminal history enhancements as a cause of minority over-representation in prisons.[11]

The data the Commission has reported reflect that more examination is needed. For example, although Defenders do not have access to the Commission's recidivism datafiles, the data the Commission has published reflect that the career offender guideline does not properly identify those at the greatest risk of recidivism even for those the Commission identify as "violent." Before digging into that data, we want to note a critical data point that is missing: The Commission's *2016 Career Offender Report* compared those assigned career offender status based on controlled substance offenses with those assigned based on crimes of violence. But, when determining whether the career offender guideline is appropriate for any category of individuals, it is essential to compare the recidivism rates of those who are assigned career offender status with those who are not.

With the data that do exist, it appears that those the Commission describes as violent offenders, like others assigned career-offender status, *also* have a recidivism rate that does not approach the Criminal History

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[10] 28 U.S.C. § 995(a)(13).

[11] *See* Richard S. Frase, et al., Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancements Sourcebook* (2015).

Category VI they are automatically assigned by the career offender guideline. That is, this is not just a problem for controlled-substance-pathway cases. To be specific, the *2016 Career Offender Report* reported a 69.4% recidivism rate for "mixed career offenders," and a 69.0% recidivism rate for "violent only career offenders."[12] The Commission's 2016 *Recidivism Among Federal Offenders: A Comprehensive Overview* reports recidivism rates of 74.7%, 77.8% and 80.1% for those placed in CHC IV, V, and VI, respectively.[13] So, Commission data reflects that for the group of individuals the Commission identifies as "violent" who were placed in CHC VI on the basis of career offender status, their recidivism rate falls below other defendants in CHC IV.

This was not a singular occurrence. As early as 2004, in its very first recidivism report, the Commission reported that counting career offenders as CHC VI made the CHC a worse predictor of recidivism.[14] And in its most recent reports, the Commission again reported that for "violent offenders" released in 2010, those placed in CHC VI as career offenders or armed career criminals, as a group, had a recidivism rate of 65.0%.[15] By comparison, "violent offenders" with CHC III, IV, V, and VI, had recidivism rates of 66.3%, 73.5%, 79.0% and 83.9%, respectively.[16] That is, for this most recent cohort, "violent offenders" placed in CHC VI based on career offender or armed career criminal status had a recidivism rate lower than other "violent offenders" in CHC III. Simply put, Commission data *already* reflects the career offender guideline cannot be justified on the basis of recidivism risk.

Further, if (as suggested above) the Commission considers crime prevention the primary goal of the career offender guideline, among the

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[12] *See 2016 Career Offender Report* at 42 fig.21 (2005 Recidivism Release Cohort Datafile). It should be noted that the *2016 Career Offender Report* identified three "pathways" that approximate, but do not match the three categories of those assigned career offender status. *See id.* at 27, 38–39.

[13] *See* USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19 fig.7A (2016), https://tinyurl.com/h5s62tym (2005 Recidivism Release Cohort Datafile).

[14] *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9, 37 (2004), https://tinyurl.com/2mpd5nbc.

[15] *See* USSC, *Recidivism of Federal Violent Offenders Released in 2010* 29 fig. 14 (2022), https://tinyurl.com/2mwju7xt (2010 Recidivism Release Cohort File).

[16] *See id.*

questions the Commission must consider are whether longer sentences prevent crime. There is a broad academic consensus that longer sentences do not serve as either a specific or a general deterrent.[17]

Ex-officio Member Wroblewski suggested at the recent hearing that incapacitation of gun offenders with prior crimes of violence should be an area of agreement. But the career offender guideline is rarely applied to firearm offenses.[18] Moreover, the recidivist enhancements in USSG §2K2.1 are *not* data driven, and data does *not* show that they are a good predictor of recidivism.[19] And, most importantly, the Commission should not assume, but rather should study, how incapacitation interacts with crime-prevention goals. Almost all incarcerated individuals will someday reenter our communities and, as Attorney Leslie Scott explained in her testimony on the firearms panel, there is evidence indicating incapacitation is actually criminogenic.[20]

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[17] *See, e.g.,* Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequence*s 154 (Jeremy Travis, et al., eds. 2014) (any deterrent effect of lengthy sentences is modest at best and diminishes, rather than increases, as sentence length increases); Daniel S. Nagin, et al*., Imprisonment and Reoffending*, 38 Crime & Just. 115, 178 (2009) ("a key finding of our review is that the great majority of studies point to a null or criminogenic effect of the prison experience on subsequent offending"); U.S. Dep't of Just., Nat'l Inst. of Just., *Five Things About Deterrence* 1 (May 2016), https://tinyurl.com/54tshyyj ("increasing the severity of punishment does little to deter crime"—"[t]he certainty of being caught is a vastly more powerful deterrent").

[18] *See 2016 Career Offender Report* at 19 (in 2014, 5.4% of those sentenced as career offenders would have been sentenced under the firearms guideline).

[19] *See* Statement of Michael Carter Before the U.S. Sentencing Comm'n on Firearms Offenses 19–21 (Mar. 7, 2023) (tracing history of recidivism enhancements in §2K2.1). The Commission has observed that base-offense levels assigned based on the number and type of prior convictions under §2K2.1 correlate with higher recidivism rates but has explained "[t]hese higher recidivism rates are likely due to the greater criminal history accrued by offenders in the higher BOLs." USSC, *Recidivism of Federal Firearms Offenders Released in 2010* 41 (2021), https://tinyurl.com/8erahmz7.

[20] *See also* Daniel Webster, et al., Johns Hopkins Ctr. for Gun Pol'y and Rsch., *Reducing Violence and Building Trust: Data to Guide Enforcement of Gun Laws in Baltimore* 24 (2020), https://tinyurl.com/4k8xaxfx (incarceration "does not prevent reoffending and often has a criminogenic effect on those who are imprisoned"); Don Stemen, Vera Institute for Justice, *The Prison Paradox: More Incarceration Will Not*

Ultimately, § 994(h) will always be a blunt instrument. Given the overarching obligation that the Guidelines recommend a sentence that is sufficient but not greater than necessary to serve the statutory purposes of sentencing, the Commission should not cast the §4B1.1 net wide with the goal of ensuring that it catches the anomalous cases that warrant more punishment than the non-career offender guideline recommends. After all, judges impose sentences above the recommended guideline range in less than 3% of cases, and below the recommended guideline range in nearly 50% of cases, annually.[21] As for within-guideline sentences, 41.7% of them fall at the guideline minimum.[22]

Instead, the Commission should build on the important work it has done in the past to determine the particular subset of individuals that is appropriate for the longest sentences that the Guidelines call for. Defenders are well aware that the Commission has to work within the confines of § 994(h). But again, the Commission has considerable discretion in defining the categories of individuals that Congress specified in § 994(h). And the Commission ultimately may find that it is compelled to ask Congress to amend § 994(h), as it did in 2016, or even to repeal that provision. This is consistent with 28 U.S.C. § 995(a)(20), which authorizes the Commission to make recommendations to Congress concerning statutory modifications "the Commission finds to be necessary to carry out an effective, humane and rational sentencing policy."

Make Us Safer (2017), https://tinyurl.com/ycyzkurs ("[i]ncarceration is an expensive way to achieve little public safety"); Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis. L. Rev. 1049, 1054–72 (cataloging eighteen criminogenic effects of incarceration); Lynne M. Vieraitis, et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol'y 589, 614–16 (2007); USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996), https://tinyurl.com/3f6bbzy9 (recognizing imprisonment has criminogenic effects including: "contact with more serious offenders, disruption of legal employment, and weakening of family ties").

[21] *See* USSC, *Interactive Data Analyzer,* Sentence Imposed Relative to Guideline Range, FY2015-2021 (above guideline range computed by adding upward departure percentage to upward variance percentage; below range computed by adding §5K1.1, §5K3.1, Downward Departure Govt Motion, Non-Govt Downward Departure, Downward Variance Govt Motion, and Non-Govt Downward Variance)

[22] *See id.,* Position of Within Guideline Range Sentences, FY2015-2021.

III. The categorical approach is a *solution* to a host of potential problems, not a problem in need of solving.

At this point, multiple alternatives have been discussed for altering the categorical approach as it is employed in the §4B1.2 context. This section first addresses the aspect of the Commission's "listed guideline" approach that is about the definitions of the predicates: replacing definitions in §4B1.2 with a list of Chapter 2 guidelines. Then it addresses methodology: how courts determine whether a particular conviction fits within the definition.

The bottom line is that the categorical approach is not a problem that needs fixing, as was suggested at the recent hearing. No doubt, some judges do not like it, although not all of them.[23] But the categorical approach is like democracy in the famous Churchill quote–the worst form of government, except for all the others. The Supreme Court had good reasons for developing the categorical approach. And the Commission cannot abolish it; it is here to stay in the ACCA context, and in the context of other statutory recidivist provisions and immigration cases.

What the Commission can do is make sure the categorical approach is workable by retaining the categories that are already the subject of considerable caselaw and by providing training and guidance so that judges and practitioners can apply the approach faithfully and efficiently. And the Commission can clarify that a variance may be appropriate in individual cases where the categorical approach results in an anomalous outcome.

A. It is for good reason that Defenders and DOJ agree that the Commission should not compare prior offenses against listed guidelines.

The Department agrees with Defenders that the proposal to substitute the tailored definitions of "crime of violence" and "controlled substance offense" with a list of Chapter 2 guidelines is overly complicated.[24]

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[23] At the hearing, Attorney Juval Scott mentioned Judge Lohier's concurrence in *United States v. Morris*, defending the categorical approach. *See* __ F.4th __, 2023 WL 2375951, at *6–7 (2d Cir. Mar. 7, 2023) (Lohier, J., concurring).

[24] The Department does not agree, however, that the list (which already includes more than half the Chapter 2 guidelines) is overly expansive. Indeed, it recommends

POAG and the Trial Issues Advisory Group ("TIAG"), by contrast, support the listed guideline approach and suggest that it will simplify application. For the reasons Attorney Juval Scott and the Department have articulated, we disagree. And, as stated, we do not believe that simplification warrants expanding the reach of the career offender guideline. But we would like to engage with the comments that have been made.

Although POAG ultimately favors the new approach, it expresses some ambivalence, noting that the new approach could either "function as designed," or if not "it could overwhelm the system for a period of time with application issues and ensuing litigation for the foreseeable future."[25] So POAG recommends that the Commission clarify that "one must refer to the specific federal guideline to determine if the offense meets the definition in the guidelines."[26] Defenders do not understand what this means; most guidelines do not have a "definition" for comparison purposes. Rather USSG §1B1.2(a) directs courts to refer to the statutory index.

POAG's testimony last week regarding which listed guidelines they may want the Commission to "consider refining/removing," as they noted in their written testimony, was revealing.[27] When Vice Chair Mate asked the POAG witness, Joshua Luria, which specific guidelines gave cause for concern, Mr. Luria suggested that there was no consensus but some POAG members were concerned that some of the listed guidelines could sweep in non-violent conduct; he gave as an example that someone was concerned that the guidelines for "threatening or harassing communications, hoaxes,

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that, if the Commission adopts the listed-guideline approach, it *add eight additional* Chapter 2 guidelines to the list. Among the additions the Department proposes is § 2B2.2 (burglary). *See* DOJ Written Testimony for March 2023 Hearings at 32. Under the listed-guideline approach, §2B2.2 would likely reach all burglaries (state and federal) as well as any felony trespassing or other "similar" offenses. *See, e.g.,* Colo. Rev. Stat. Ann. § 18-4-503(1)(a), (2)(a) (trespassing on fenced agricultural land with intent to commit felony). This, even though the Commission previously limited the enumerated offenses to "burglary of a dwelling," and in 2016 decided, based on its data and expertise, to remove even that limited offense. The Department's comments appear to have just one benchmark: expansion.

[25] POAG Career Offender Testimony 3 (Feb. 27, 2023) ("POAG Written Testimony on Career Offender").

[26] *Id.* at 2.

[27] POAG Written Testimony on Career Offender at 2.

stalking, and domestic violence,"[28] would apply to a particular harassment offense that could be either a felony or a misdemeanor. Presumably, a POAG member has experience with this particular offense and how the state applies it, and thus has reason to be concerned that that particular listed guideline is overbroad.

Defenders practice in every district, in every state. And we all know state offenses (many of which are misdemeanor/felony wobblers) that would never count as a career-offender predicate under current law, and *should not count* given how states apply them, but might count under the listed guideline approach. This is untenable: at best, it will lead to excessive litigation; at worst, it will result in additional years, even decades, of lives behind bars.

TIAG, for its part, is not concerned that the listed-guideline approach would be overly complicated based on its likening the approach to §2X5.1, which directs courts to select the "most analogous guideline" for offenses for which no guideline expressly has been promulgated.[29] TIAG states that this approach works well.[30] Doubtless, TIAG's members have significant expertise applying §2X5.1 in Major Crimes Act and Assimilated Crimes Act cases. But this is an entirely different context. We wouldn't be dealing only with offenses that are serious enough for the federal government to prosecute them in federal court. We would be dealing with thousands (or hundreds of thousands) of distinct state offenses, some of which aren't even always felonies. According to Commission data, in FY2017-2021, §2X5.1 was applied in 0.1% of sentenced cases annually.[31] Employing this type of analysis in the tens of thousands of cases that will require it yearly for §4B1.2 purposes, on both the instant offense and multiple prior convictions in each case, would overwhelm the system.

At the recent hearing, TIAG's witness Hon. Ralph Erickson explained that individuals who are charged in federal court with what would be state

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[28] United States Courts, *Public Hearing – March 8 – Day 2*, YouTube, at 2:09:09 – 2:09:55, https://tinyurl.com/bdrysj8u.

[29] *See* TIAG Written Testimony on Career Offender 1–2 (Feb. 27, 2023).

[30] *See id.*

[31] *See* USSC, *Sourcebook of Federal Sentencing Statistics,* Table 20, FY2017–2021.

offenses often complain that they would have been treated differently in state court. And he noted that in other regions, the opposite is true. This just underscores the difference in context: with the listed guideline approach, we are not talking about a state crime that was charged in federal court; we are talking about unknown, varied state crimes charged by state prosecutors in our nation's 3,000-plus counties (and county equivalents—*e.g.*, parishes) that all operate quite differently. There is no reason for optimism that this would be workable.

While the Department opposes the listed-guideline approach, it recommends that, if the Commission adopts that approach, the Commission should explain that, like §2X5.1, the approach will not require a "perfect match of elements" but "only an assessment of whether the guideline in question 'covers the type of criminal behavior' of which the defendant was convicted.'"[32] To be clear, §2X5.1 requires an elements-to-elements comparison between the elements of the instant offense and the elements of the offenses covered by the guideline, just not a perfect match.[33]

The first case the Department cites, *United States v. Jackson*, amply illustrates that the listed guideline approach will generate significant litigation, cause confusion, and generate disparities. The opinion is 51 pages long, including a lengthy dissent, on whether a district court erred in determining that there was no sufficiently analogous guideline for the assimilated crime of New Jersey child welfare endangerment.[34] The majority sets forth three potential tests that could be used, before adopting an "elements-based approach."[35] Ultimately, after engaging in an extensive analysis that included discussion of courts (and U.S. Attorney's Offices) reaching different conclusions with similar crimes, the Third Circuit concluded that the elements of New Jersey child welfare endangerment,

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[32] DOJ Written Testimony for March 2023 at 30 (quoting *United States v. Jackson*, 862 F.3d 365, 376 (3d Cir. 2017), and *United States v. Calbat*, 266 F.3d 358, 363 (5th Cir. 2001)).

[33] *See, e.g., United States v. Clark*, 981 F.3d 1154, 1162 (10th Cir. 2020); *Jackson*, 862 F.3d at 372–73; *Calbat*, 266 F.3d at 363.

[34] *See Jackson*, 862 F.3d at 371–389, 403–415.

[35] *Id.* at 372 (internal quotation marks and citation omitted).

USSG §2A2.2, and the federal offense of simple assault were "within the same proverbial 'ballpark.'"[36] That is, the district court had erred.[37]

The second case the Department cites, *United States v. Calbat,* although much shorter, does not recommend this approach, either. In *Calbat*, the Fifth Circuit affirmed a determination that the Texas offense of assault by intoxication was "most analogous" to §2A2.2 (Aggravated Assault) —where the Texas offense involved "accident or mistake," causing serious bodily injury, while intoxicated.[38] Under this analysis, and if the Commission were to accept the Department's recommendation not to exclude reckless and negligent offenses, even an offense committed by *accident or mistake* would be a career offender predicate. Notably, §2A1.4 (Involuntary Manslaughter), a guideline that the Commission has *not* listed as a career offender predicate, specifically mentions driving while intoxicated; but the Fifth Circuit rejected the argument §2A1.4 was the most analogous offense, because manslaughter requires a death.[39] That is to say, under the listed-guideline approach and the Fifth Circuit's analysis, driving while intoxicated would not be a career offender predicate if it causes death, but it would be a career offender predicate if it causes only serious bodily injury.

B. The elements-based categorical approach remains the best methodology for assessing prior convictions.

We strongly oppose the notion of using a list of guidelines as the comparator for determining whether a prior offense is a career-offender predicate. But regardless of whether the Commission decides to compare prior offenses to listed guidelines or to categories like those presently at §4B1.2, it must retain the elements-based categorical approach as the methodology for conducting that comparison. The Supreme Court developed the categorical approach for good reasons—not only (as the government has suggested) to avoid *Apprendi* problems.

The categorical approach is grounded in how criminal cases function in the real world: a person is not convicted of conduct, he or she is convicted of

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[36] *See id.* at 371–389.

[37] *See id.*

[38] *See Calbat*, 266 F.3d at 363.

[39] *See id.*

crimes, according to their *elements*. And if an accused person tells their attorney that they did not commit some conduct that doesn't go to an element of the offense charged, the defense attorney will advise them that they should not, or even cannot, raise that in court. So, when a case resolves, all we can know is what crime, with what elements, the person was convicted of.

Also, we cannot separate the question of methodology from real-life consequences. As Justice Kagan explained in *Borden*, the categorical approach is "under-inclusive by design."[40] The elements-based categorical approach avoids expanding the reach of the deeply problematic career-offender guideline. If the Commission chooses a methodology that sweeps in more convictions—and thus more individuals—the effect will be to subject more individuals to a guideline that everyone agrees is broken.

1. A methodology that relies on old court documents—or even worse, non-court documents—to discern "conduct" ignores the realities of state court practice and would be fundamentally unfair.

The Commission has proposed substituting the Supreme Court's narrow elements-based approach with one that relies on court documents' descriptions of conduct. The basic idea is that a court could use what are known as *Shepard* documents, but without any of the restrictions that *Shepard* and its progeny placed on such use.[41] Attorney Juval Scott, in her written testimony, referred to this as an "accusation-based approach."[42]

The Department goes even further, suggesting that courts should be able to look at non-elemental facts—that is, accusations—that show up not only in court documents but also in other documents, like police reports.[43]

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[40] *Borden v. United States*, 141 S. Ct. 1817, 1832 (2021).

[41] *See Mathis v. United States*, 579 U.S. 500, 505–06, 510 (2016) (discussing *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

[42] Statement of Juval O. Scott at 13–14, 18–24.

[43] At the hearing, the POAG witness suggested that courts should also be able to rely upon non-public documents about third parties—specifically mentioning a victim's medical record. We assume that the Commission would not allow this. Defense counsel would never be able to access a non-public record related to a third party like this. If the government sought to use such a record, we presume they

Defenders are pleased that the Commission has not proposed to adopt the Department's approach, although the Department has recommended it repeatedly. Even if legal, it would be terrible policy. The Department suggests that permitting judges to determine the actual conduct on which a prior conviction is based, without any real restrictions on what could be used, is akin to sentencing determinations judges currently make about current offense conduct and personal history, consistent with the rules of relevant conduct and subject to §6A1.3.[44] This is not correct.

Information about prior convictions—sometimes decades old—will be documented in a uniquely partial way that has no comparison with information about the instant offense or an individual's personal history. As Attorney Juval Scott has discussed, this is true even of court documents, which generally memorialize only accusations—most of which the defendant has no incentive, and possibly no opportunity or ability, to contest.[45] This is of particular concern for the vast majority of criminal cases where the defendant is indigent. As both Attorney Juval Scott (a former state prosecutor) and the Practitioners Advisory Group ("PAG") witness Attorney Susan Lin explained at the recent hearing, state court practice is fast-paced. And as Hon. Chair Reeves noted, state indigent defense systems are overstretched and, in some cases, unfortunately, deficient.

The situation is even worse with police reports, which are produced (in this context) to explain an arrest, with an eye toward criminal charges. As Attorney Juval Scott explained at the hearing, police reports are not always truthful. But even if we accept that a particular report is truthful, that does not mean it would contain mitigating information.

If the Commission permits courts to impose career-offender sentences based on findings made from reviewing years-old police reports, the

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would be required to share a copy with the defense, but of course they would not seek to use a third-party record that supports the defense position, rather than the government's position. So practically speaking, this kind of record could never help the defense; it could only help the government, exacerbating unfairness.

[44] *See* DOJ Written Testimony for March 2023 Hearings at 31.

[45] If our client had an actual defense—one related to an element of the charged offense—that would be memorialized. But the fact of conviction would reveal that any defense against the elements was unsuccessful. Factual disputes unrelated to the elements of the offense generally are not documented anywhere.

Commission's very legitimacy would be endangered. As then-Commissioner Rachel E. Barkow stated during the last amendment cycle, adopting a conduct-based approach would take the bad rule of relevant conduct and make it worse.[46] The Federal Guidelines stand alone in permitting courts to consider uncharged "real offense" conduct.[47] The fairness problems posed by the relevant-conduct rule would be exponentially exacerbated if the Commission were to require judges to look at "real offense" conduct for offenses commit long ago in different jurisdictions.[48]

The fact is that none of the sources discussed, including but not limited to judicial records, is "reliable" in the sense that the Department asserts. These documents might not be tampered with and may accurately reflect complaints, reports, and accusations; but they do not reliably prove conduct. That is why, under the Federal Rules of Evidence, a judgment of conviction is admissible to establish, at most, facts "essential to the judgment," and the remaining documents would be wholly inadmissible under both the Rules of Evidence and the Sixth Amendment's Confrontation Clause.[49] Indeed, Rule 803(8)(ii) specially excludes from the public-records exception to the hearsay bar matters observed by law-enforcement personnel in criminal cases.

What's more, in the unlikely event that an alternative version of events is documented—what then? Let's say a defendant at a plea hearing in

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[46] *See* Transcript of Public Meeting Before the U.S. Sentencing Comm'n, Washington, D.C., at 13 (Aug. 23, 2018) (Commissioner Rachel E. Barkow).

[47] *See* Rachel E. Barkow*, Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1628 (2012) (sentencing guidelines adopted after the federal guidelines); Phyllis J. Newton, Staff Director, U.S. Sent'g Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent'g Rep. 68, 69, 1995 WL 843512 (Sept/Oct. 1995) (sentencing guidelines adopted before and after the federal guidelines).

[48] TIAG suggests that "because a district court has the most complete understanding of a given defendant's criminal history, the sentencing judge can best ensure that prior eligible offenses 'match up' with the Guidelines set forth in the proposal." TIAG Written Testimony on Career Offender at 2. But the only understanding a district court has about an individual's criminal history that happened long ago and in other jurisdictions is from the Presentence Report, which itself is prepared based on police reports, probation reports, and court records. As stated, these documents contain the accusation, not the defense, and are not reliable as to non-elemental facts.

[49] *See* Fed. R. Evid. 802, 803(22); *Crawford v. Washington*, 541 U.S. 36 (2004).

an old case—where we are lucky enough to have a transcript—specifically says, "I am pleading to resisting/obstructing an officer but based only on the fact that I gave the officer a false name; I did not push the officer, like he claimed." And then the prosecutor says, "Noted, but that doesn't go to the elements of the offense." How does the federal sentencing court resolve this? And if the court resolves it against the individual, will the court hold it against him that he raised the objection?

Finally, the Department does not explain how non-elemental facts could ever satisfy §4B1.1's requirement that "the defendant has at least two prior *convictions* of either a crime of violence or a controlled substance offense." The same goes for USSG §2K2.1, which also cross-references the definitions at §4B1.2—it refers to convictions, not conduct. Relatedly, the Department proposes that the definition of "crime of violence" should retain an elements clause. The elements clause defines "crime of violence" as an offense that "has as an *element* the use, attempted use, or threatened use of physical force against the person of another."[50] This definition plainly requires an elements-based approach, and the government has never explained how it could be otherwise.[51]

2. A methodology that goes beyond documents, providing for true mini-trials, would come with its own problems.

The Department's written testimony indicates that the primary difference between its methodology and the proposed amendment is that the Department's methodology would not be limited by the idea of "*Shepard* documents," indicating that it would like courts to be able to rely on non-court documents. But at the hearing, the Department's witness suggested that they would not be opposed to more robust fact-finding proceedings to determine conduct related to a prior offense—that is, mini-trials.

This still runs up against the fact that §4B1.1 and §2K2.1 refer to prior "convictions," not conduct. But also, mini-trials would just create new

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[50] USSG §4B1.2(a).

[51] *See, e.g., United States v. Taylor*, 142 S. Ct. 2015, 2024 (2022) (elements clause by its terms "asks whether the government must prove, as an *element* of its case, the use, attempted us, or threatened use of force").

problems. Most obviously, it creates a problem of administration. A major impetus for seeking an alternative to the categorical approach is a desire to simplify federal sentencing; it would not make sense to replace that approach with one that is more complicated, and more resource-intensive.

The other problem is that the individuals being sentenced and their attorneys—Defenders included—will be hesitant to raise objections related to prior-offense conduct out of fear that it will result in a higher sentence. Perhaps this could resolve some administrability problems, but it would come at a high cost to both accuracy and justice. As noted above, even pointing out that old court records call the government's version of conduct into question, if the matter is resolved in the government's favor, could militate toward a longer sentence. Asking for a hearing at which the parties would present witnesses would come with much greater risk.

Day in and day out, Defenders have to explain to our clients the potential benefits and risks of objecting to factual allegations at sentencing. In circuits where objections can result in losing the acceptance-of-responsibility reduction, one risk is concrete; the Commission is considering guidance on this, which we would appreciate. But in every district, this is risky; ceding time at sentencing that could be spent on mitigation, to instead engage in a factual dispute with the prosecution about an old crime, could well result in a higher sentence. If the draconian career offender guideline is on the line, more of our clients likely would take that risk. But this Commission should not require them to make that choice.

3. Anomalous cases can be addressed through variances.

It turns out that there is no perfect solution to the problems inherent in basing sentence enhancements on whether an offense fits within a specified category. As we have explained, the categorical approach is the best solution out there; it's not perfect, and it's certainly not popular, but it avoids the profound unfairness of a court finding non-elemental facts based on court records that would not memorialize the defense's version of events that don't impact the elements, or of requiring individuals to choose between mini-trials or mitigation at sentencing. And, as even the Department's witness at the March 8, 2023, career offender hearing acknowledged, for the many issues that have already been resolved in categorical-analysis caselaw, there is ease of application.

The trade-off, of course, is that the categorical approach produces odd results in some cases. But courts can address that through individualized variances. The Department recognizes this, in suggesting that the Commission provide guidance regarding variances related to career-offender findings.[52] Defenders would not object to guidance encouraging variances.

The Commission should not expand the reach of the career offender guideline and then rely on courts to vary downward. The penalties of such an approach will fall most heavily on individuals with the least experienced counsel. The guideline range that is determined to apply to an individual is the "anchor[]"; the "benchmark"; the "framework" for sentencing.[53] The Commission should avoid raising this benchmark into the stratosphere for many more individuals; courts can simply vary upward where appropriate.

IV. Arguments in favor of expanding the definitions of "controlled substance offense" and "crime of violence" in other ways are not persuasive.

A. There is no justification for expanding the reach of the definition of "controlled substance offense" (Proposals 4B, 6C, 6D).

Three of the Commission's proposals would expand the reach of the career offender guideline to more individuals convicted of drug offenses:

- Proposal 4B, Option 2, would sweep in any prior felony for any substance a state chooses to regulate in any manner—and the Department proposes that even a state decriminalizing a substance should not matter for this analysis.
- Proposal 6C would sweep in attempts and conspiracies, plus an unknown number of unidentified and undefined inchoate offenses and accomplice theories.
- Proposal 6D would sweep in offers to sell, which need not involve any controlled substance at all.

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[52] *See* DOJ Written Testimony for March 2023 Hearings at 34.

[53] *Peugh v. United States*, 569 U.S. 530, 541–42 (2013).

Adopting Defenders' proposal to mirror 28 U.S.C. § 994(h) would moot all of these proposals, reduce unwarranted disparity, and greatly simplify application. It would also go a great distance toward removing drug-trafficking convictions from the reach of the problematic career offender guideline, which the Commission has previously advocated for.

1. The Commission should limit the definition of "controlled substance offense" to the federal felonies enumerated in 28 U.S.C. § 994(h)(2)(B).

a. This proposal is the most parsimonious and is consistent with the language of § 994(h).

As Attorney Caruso explained in his statement, the Commission should dial back the definition of "controlled substance offense" to those offenses listed in the career offender directive.[54] Mirroring § 994(h) in the definition of "controlled substance offense" would ensure that only federal felonies under the enumerated statutes would constitute a career offender predicate.

At the March 7, 2023 hearing, *ex officio* Member Wroblewski suggested that § 994(h)(2)(B)'s use of the phrase "described in" ("an offense described in section 401 of the Controlled Substances Act" etc.) requires the career offender guideline to reach state offenses. This suggestion is unfounded. To be sure, some courts have held that the Commission has the authority under either § 994(h) or its general promulgating authority to "include[e] prior state convictions as an additional basis for career offender status."[55] But in the relevant cases, the courts were considering whether §4B1.2 as promulgated was permitted by the language of § 994(h), not whether it was *required* by that language.[56]

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[54] *See* Statement of Michael Caruso Before the U.S. Sentencing Comm'n on Acceptance of Responsibility and Controlled Substance Offenses 25–28 (March 7, 2023) ("Statement of Michael Caruso-CSO").

[55] *United States v. Stewart*, 761 F.3d 993, 998–99 (9th Cir. 2014) (collecting cases).

[56] *See, e.g., United States v. Beasley,* 12 F.3d 280, 283–53 (1st Cir. 1993) ("the statutory provision authorizes the Commission to define 'career offender' as it has done, that is, to include those with prior state law convictions for offenses of the sort

Section 994(h)(2)(B) lists only federal offenses. And, reading § 994(h)(2)(B) in the context of § 994, the Sentencing Reform Act of 1984 ("SRA") as a whole, and the entire Comprehensive Crime Control Act of 1984, reflects that, when Congress intended a recidivist provision to encompass non-federal convictions, it said so expressly.

Starting with § 994(h) itself, § 994(h)(2)(B) (the enumerated offenses for prior convictions) is worded identically to § 994(h)(1)(B) (the enumerated offenses for instant convictions). It is a certainty that § 994(h)(1)(B) identifies only federal offenses, as it identifies the instant offense of conviction, which could only be a federal offense. Under the canon of consistent usage, it is generally presumed that Congress meant the same thing when it used the identical phrase twice in a single subsection of a statute.[57]

Strong evidence that Congress would have expressly listed non-federal convictions if it meant for them to be included can be found in 28 U.S.C. § 994(i), the very next subsection in the same statute. Subsection 994(i) directs the Commission to assure that the Guidelines specify a "substantial term of imprisonment"—but not "at or near the maximum"—for a person who "has a history of two or more prior Federal, state, or local felony convictions for offenses committed on separate occasions."[58] Subsection 994(i) expressly includes prior "Federal, State, or local felony convictions," while § 994(h)(1)(B) and (2)(B) do not.[59] "When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally

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defined in the listed federal statutes"); *United States v. Whyte*, 892 F.2d 1170, 1174 (3d Cir. 1989) ("We believe the entire guideline is authorized, if not required, by section 994(h)"); *United States v. Brown*, 23 F.3d 839, 841 (4th Cir. 1994) (rejecting argument that § 994(h) permits the career offender guideline only to take account of federal controlled substance convictions); *United States v. Consuegra*, 22 F.3d 788, 789–90 (8th Cir. 1994) (holding Commission's interpretation of § 994(h) was "sufficiently reasonable"); *United States v. Rivera*, 996 F.2d 993, 995 (9th Cir. 1993)("Section 994(h) of the statute is ambiguous"); *United States v. Gonsalves*, 121 F.3d 1416, 1417–10 (11th Cir. 1997) (agreeing with other circuits that Commission did not exceed it authority in § 994(h) in including state convictions).

[57] *See Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85 (2017).

[58] *Compare* 28 U.S.C. § 994(i)(1) *with* 28 U.S.C. § 994(h).

[59] In construing §4B1.2(b), the Eighth and Tenth Circuits mistakenly turned to 28 U.S.C. § 994(i) as the career offender directive. *See United States v. Henderson*, 11 F.4th 713, 717 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288, 1296 (10th Cir. 2021).

understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)."[60] To interpret § 994(h)(2)(B) to mean something different from the exact same words in § 994(h)(1)(B), and something similar to entirely different words in § 994(i) would "def[y] this traditional rule of statutory construction."[61]

Other parts of the SRA confirm that Congress expressly included non-federal convictions when that was its intention. For example, 18 U.S.C. § 3607(a), which provides for special probation for drug possessors, applies to those found guilty of "an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)," so long as they have not, among other requirements "been convicted of violating a Federal or State law relating to controlled substance."[62] That is, in another section of the SRA, Congress used the "described in" language to identify federal offenses only, and then used "Federal or State law" to identify a broader category of prior controlled substance offenses.[63] "Conspicuously, the one place in the [SRA] where the government needs [non-federal] language to appear is the one place it does not."[64] So, "the government's [] theory faces not just a single *expressio unius* challenge but two."[65]

Really, it faces three. For in the same legislation that enacted the SRA, Congress also expanded the federal drug statute's recidivist maximum

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[60] *Bittner v. United States*, 143 S. Ct. 713, 720 (2023); *see also Department of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.") (citation omitted).

[61] *Bittner*, 143 S. Ct. at 720.

[62] Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 2003 (1984) (Chapter II of Comprehensive Crime Control Act of 1984).

[63] Where Congress has used the phrase offense "described in" to reach non-federal offenses, it has said so expressly. *See, e.g.*, 18 U.S.C. § 3559(c)(2)(F)(i) ("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 applies to an offense described in this paragraph whether in violation of Federal or State law[.]"). As the Supreme Court made clear in *Torres v. Lynch*, 578 U.S. 452, 460–66 (2016), it is the coupling of "described in" with a reference to state offenses that expands a statute's reach to non-federal offenses.

[64] *Bittner*, 143 S. Ct. at 721.

[65] *Id.*

penalties to reach those who had been convicted of non-federal offenses. Prior to 1984, the federal drug statute's recidivist penalties were triggered only upon previous conviction for federal drug felonies.[66] But in Chapter V of the Comprehensive Crime Control Act of 1984 (the SRA is Chapter II), Congress amended 21 U.S.C. § 841 to provide for recidivist penalties for previous felony convictions under certain federal statutes or "other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances."[67] Surely, being in the process of amending another statute expressly to include non-federal prior convictions to increase statutory maximums, Congress would have so specified if it intended § 994(h) to direct near-maximum sentences for those same non-federal prior convictions. We cannot infer the opposite.

It makes sense that Congress would direct the Guidelines to assure near-maximum sentences only for those with federal convictions, where Congress could be certain that they reflected federal legislative and executive priorities and that federal judicial and prosecutorial standards were met. Convictions under local and state laws would vary state-to-state, and legislative, prosecutorial, and judicial policies would also vary state-to-state. Although Congress included non-federal convictions in the recidivist enhancements for § 841, at the time, those enhancements increased only the *maximum* penalties. There were no mandatory minimums. But including non-federal convictions in § 994(h) would have directed mandatory guideline ranges at or near the increased statutory maximum for these local and state convictions. If Congress had intended that, it would have said so.

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[66] *See United States v. Gates*, 807 F.2d 1075, 1081–82 (D.C. Cir. 1986) ("after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or Subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances") (citation omitted) (emphasis omitted).

[67] *See* Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, § 502, 98 Stat. 1837, 2068 (1984) (Chapter V of Comprehensive Crime Control Act of 1984).

b. This proposal would resolve most of the concerns raised this cycle with respect to the definition of "controlled substance offense."

Mirroring § 994(h) would resolve not only the circuit split raised in Proposal 4B (by limiting the definition to federal offenses, which involve only federally controlled substances), but also the circuit conflict raised in Proposal 6C (by excluding most inchoate offenses). It would also moot both parts of Proposal 6D (by rejecting "offer to sell" and adding title 46 chapter 705 offenses).

It would also resolve any concerns with respect to disparate treatment between conduct in different states posed by both Options 1 and 2 of Proposal 4B. All individuals would be treated similarly: no state convictions would be considered controlled substance offenses; only convictions for enumerated federal offenses would qualify.[68] And whereas Options 1 and 2 both admittedly involve some complexity in application, our proposal does not.

2. At minimum, the Commission should clarify that "controlled substance" has its federal definition, and it should not otherwise expand the reach of "controlled substance offense."

a. The Commission should clarify that "controlled substance" is federally defined (Proposal 4B).

DOJ and POAG have suggested that expanding "controlled substance" to include any substance controlled under applicable state law (Option 2) is faithful to the current language of §4B1.2(b). It is not.[69] But even if it were, this is irrelevant. It makes no difference what the current §4B1.2(b) covers, now that the Commission is proposing to amend it.

The statutory directive, § 994(h), clearly does not require inclusion of offenses involving substances that are not controlled federally. So, the

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[68] This treats those with state and federal priors differently, but it is a reasonable difference. As discussed, Congress could well have wished to reserve near-maximum sentences for those who had been twice previously convicted of federal drug offenses in federal court, consistent with federal legislative and executive priorities, and federal prosecutorial and judicial standards.

[69] *See* Statement of Michael Caruso-CSO at 32–34.

Commission is faced with a policy choice. Given the problems with the career offender guideline, magnified in the context of drug-trafficking offenses, the Commission should choose the narrowest definition possible. It certainly should not expand the reach of this federal sentencing enhancement to offenses not involving federally controlled substances.

DOJ and a majority of POAG also suggest that Option 2 should be selected because Option 1 would lead to some state offenses being excluded.[70] Commissioners queried Attorney Caruso about this problem. But like the categorical analysis, this is not a problem to be solved. States are permitted to choose what substances to regulate, how to define those substances, and what jurors must find to convict. Indeed, our federalist system requires that states have these choices, which permit them to make it easier for state law enforcement and prosecutors to obtain convictions. But this means that some state convictions do not trigger career offender sentences. This is already true in the context of the INA, the ACCA, and 21 U.S.C. § 841.[71]

The Department claims that Option 1 would lead to unnecessary complexities at sentencing. To this, Defenders have three responses. First, regardless of this guideline definition, the complexities the Department references will continue in the context of ACCA, § 841, and challenges to prior deportations under 8 U.S.C. § 1326(d). One of the cases Assistant United States Attorney Carmen Mitchell referred to at the March 7, 2023 hearing—the case about Iowa coca convictions, *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022)—involved the ACCA. So, nothing the Commission does with respect to the Guidelines would alter its outcome. But if Option 1 is promulgated, answers courts provide in those contexts will apply equally here, which simplifies things.

Second, as set forth in Attorney Caruso's statement, Option 2 will lead to *more* complexities and litigation.[72] The only way to avoid that would be for

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[70] *See* DOJ Written Testimony for March 23 Hearings at 21; POAG Written Testimony on Circuit Conflicts at 5.

[71] *See, e.g., Mellouli v. Lynch*, 575 U.S. 798 (2015) (INA); *United States v. Cantu*, 964 F.3d 924 (10th Cir. 2020) (ACCA); *United States v. Oliver*, 987 F.3d 794 (8th Cir. 2021) (21 U.S.C. § 841). Defenders are unaware of the government ever seeking cert or even rehearing en banc to challenge these results.

[72] *See* Statement of Michael Caruso-CSO at 34–38.

courts to conclude that literally every felony for any offense involving any random substance a state chooses to regulate in any way could be a career offender predicate. And neither Defenders nor our clients would accept that conclusion without pitched battle.

Third, simplifying application is no excuse for expanding the reach of the career offender guideline.

The Department also recommends that the Commission "clarify" that the substance at issue must have been controlled when the defendant committed the predicate offense.[73] Really, the Department's position is that the substance need *only* have been controlled at that time—that is, where a state or the federal government later decides that the substance is not appropriate for control, a conviction based on that substance is still a predicate.[74] This would not be a clarification but a substantive change, and it is not one the Commission should adopt.

The Department suggests that "[b]ecause the 'controlled substance offense' definition applies to prior convictions, a federal sentencing court should look to the applicable drug schedules in effect at the time of the prior crime to determine whether the defendant engaged in conduct involving a 'controlled substance.'"[75] But the Sentencing Reform Act explicitly provides that the Guidelines that apply are those that are in effect at the time of sentencing, not at the time of the prior conviction.[76] And this remains true when the guideline cross-references an external statutory definition. For example, although Congress has steadily expanded the definition of "aggravated felony," courts applying §2L1.2 have looked to the definition of

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[73] *See* DOJ Written Testimony for March 2023 Hearings at 22

[74] *See id.*

[75] *Id.* Although the Third and Sixth Circuits relied on *McNeill v. United States*, 563 U.S. 816, 820 (2011), to justify looking to the definition from the time of the prior state conviction to determine the scope of "controlled substance," *see United States v. Lewis*, 58 F.4th 764, 772 (3d Cir. 2023); *United States v. Clark*, 46 F.4th 404, 409 (6th Cir. 2022), the Department does *not* cite *McNeill*, likely because it recognizes it is wholly inapposite. *See, e.g., United States v. Gibson*, 55 F.4th 153, 161–62 (2d Cir. 2022); *United States v. Abdulaziz*, 998 F.3d 519, 525–27 (1st Cir. 2021); *United States v. Batista*, 989 F.3d 698, 703–04 (9th Cir. 2021).

[76] *See* 18 U.S.C. § 3553(a)(4)(A)(ii).

aggravated felony on the date of the federal immigration offense, not the date of the prior conviction.[77]

The Department provides no reason why drug offenses should be treated differently. The SRA charged the Commission with developing guidelines that not only provide certainty and fairness and avoid unwarranted sentencing disparities, but also "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[78] What should matter—and what has always mattered—for recidivist enhancements is the current assessment of the prior conviction, not an assessment under an old standard that has since been rejected.[79] To accept the Department's timing argument would be to permit low-THC marijuana offenses to trigger enhancements indefinitely, although our society's assessment of that substance has evolved. In its testimony, the Practitioner's Advisory Group provided several examples of the injustices that would result from this frozen-in-time sentencing analysis.[80]

For its part, POAG recognizes that Option 2 will cause disparity because conduct that is legal in one state could be a career offender predicate in another. But a majority concluded that this is not important because "the defendant's choice to violate these rules is the central issue that should be focused on."[81] This conflates using criminal convictions to increase criminal history category, which would be unaffected by defining "controlled substance" consistent with federal law, with using these convictions to trigger

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[77] *See, e.g., United States v. Avila-Ramirez*, 170 F.3d 277, 278 (2d Cir. 1990) (per curiam) (holding that characterization of prior conviction as "aggravated felony," for ex post facto purposes, depended on date of immigration offense); *United States v. Saenz-Forero*, 27 F.3d 1016, 1018–21 (5th Cir. 1994) (same); *United States v. Aldape-Mendoza*, 21 F. App'x 340, 341–42 (6th Cir. 2001) (same); *United States v. Estrada-Quijas*, 183 F.3d 758, 760–61 (8th Cir. 1999) (same); *United States v. Arzate-Nunez*, 18 F.3d 730, 733–35 (9th Cir. 1994) (same).

[78] 28 U.S.C. § 991(b)(1).

[79] *See Gibson*, 55 F.4th at 162; *Abdulaziz*, 998 F.3d at 528; *Bautista*, 989 F.3d at 703.

[80] *See* Testimony of Marlo P. Cadeddu on Behalf of PAG 9 (Mar. 7, 2023) ("PAG Written Testimony for March 7, 2023 Hearings").

[81] POAG Written Testimony on Circuit Conflicts at 5.

the draconian career offender penalty. It is the latter that the definition of "controlled substance" impacts.[82]

Finally, although POAG understands that Option 2 would result in more defendants qualifying as career offenders based on "controlled substance offense" predicates, a majority concluded that "this may be the cost of creating a higher continuity of application."[83] Defenders submit that the cost in human liberty is too high.

b. The Commission should exclude inchoate offenses, including "offers to sell" (Proposals 6B, 6D).

Both DOJ and POAG recommend expanding the definition of controlled substance offense (and crime of violence) to include any inchoate offense and any theory of accomplice liability a state decides to criminalize, as well as the specific inchoate offense of "offers to sell." Again, neither reconciles this position with the recognition that the career offender guideline is overly punitive, has no empirical basis, and exacerbates racial disparity.

Both DOJ and POAG suggest that expanding career offender predicates to include unidentified, undefined, and unknown theories of inchoate and accomplice liability is consistent with the Commission's long-held position stated in note 1 of the commentary. First, it is not: As Attorney Juval Scott's testimony explains, the current commentary is far more limited.[84] Second, even the offenses currently included—generic attempts and conspiracies—are too much. One way the Commission could rein the career offender guideline in is by excluding less serious inchoate offenses and less culpable forms of accessorial liability.[85]

If the Commission elects to continue to include attempts and conspiracies, it should make clear that these terms have content, such that a conviction is not for an attempt or conspiracy unless it matches the generic federal definition. Otherwise, for example, conspiracy convictions might count

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[82] *See, e.g., Abdulaziz*, 998 F.3d at 528.

[83] POAG Written Testimony on Circuit Conflicts at 4.

[84] *See* Statement of Juval O. Scott at 29–30.

[85] *See id.* at 28–30; Defender Comments on 2019 Proposed Amendments at 30–34 (Feb. 19, 2019), https://tinyurl.com/4nm3zecy.

without any agreement, and attempt convictions might count without any intent to commit the crime.[86]

POAG notes that it would be "simpler" for *all* inchoate and accessorial offenses to qualify.[87] But, as discussed, simpler is not always better, especially when the cost is years in human liberty.

B. There is also no justification for expanding the reach of the definition of "crime of violence" (Proposals 6B, 6C, 6A- recklessness, force against property).

The proposals to expand the definition of "crime of violence" pose the same problems. Two of the Commission's proposals would expand the definition of "crime of violence": Proposal 6B would extend the definition to reach offenses that require neither immediate threats nor threats to the person; Proposal 6C, discussed above, would sweep in attempts and conspiracies, as well as unidentified, undefined, and unknown inchoate offenses and accomplice theories.

Both DOJ and POAG support these proposals to expand the definition.[88] The Commission has proposed one amendment that would preserve a constraint the Supreme Court has placed on the definition of violent felonies—to exclude offenses based upon a finding of recklessness or negligence—and DOJ objects to that one.[89] Finally, DOJ recommends the Commission reverse decades of policy and expand the elements clause to include offenses that have as an element the use of force "against property."[90]

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[86] *See, e.g.*, Wash. Rev. Code §9A.28.040(2)(f) ("It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired. . .[i]s a law enforcement officer or other government agent who did not intend that a crime be committed."); *Richeson v. State*, 704 N.E.2d 1008, 1010 (Ind. 1998) (holding Indiana attempts statute does not require intent).

[87] POAG Written Testimony on Career Offender at 4.

[88] *See* DOJ Written Testimony for March 2023 Hearings at 36; POAG Written Testimony on Career Offender at 4–5.

[89] *See* DOJ Written Testimony for March 2023 Hearings at 32–33.

[90] *See id.* at 31 n. 50.

DOJ and POAG suggest there's "confusion" over whether Hobbs Act robbery qualifies as a crime of violence.[91] There is no confusion. Every circuit to address the issue has held that it does not qualify because it does not require an immediate threat of force and it does not require any force directed at a person.[92] This distinguishes Hobbs Act robbery from most definitions of robbery (under state and federal law), which require "a type of force that creates 'an immediate danger to the person.'"[93] And, although Assistant United States Attorney Robert Zauzmer suggested at the recent hearing that Hobbs Act robbery was one of the two triggers of the original ACCA, that is not correct. The type of robbery conviction that triggered the original ACCA was a conviction for "any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will *imminently* be subjected to *bodily injury*."[94] The Commission, having expended significant resources to scale down the "crime of violence" definition, should not now step-by-step expand it.

Nor should the Commission provide that crimes with a mens rea of negligence or recklessness may constitute crimes of violence. The Supreme Court recently held, in *Borden v. United States*, that the use of physical force requires more than negligent or reckless conduct.[95] The Department complains that adhering to this exclusion would exclude more than a third of the states' aggravated assault statutes and a handful of robbery statutes.[96]

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[91] POAG Written Testimony on Career Offender at 3–4; *see also* DOJ Written Testimony for March 2023 Hearings at 35–36.

[92] *See United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 190 (3d Cir. 2021); *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *United States v. Camp*. 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020).

[93] *United States v. Rabb*, 942 F.3d 1, 5–6 (1st Cir. 2019) (quoting government).

[94] Pub. L. No. 98-473, 98 Stat. 2185 (18 U.S.C. app. § 1202(c)(8) (Supp. II 1984)) (emphasis added).

[95] *See* 141 S. Ct. at 1821–22 (plurality opinion).

[96] *See* DOJ Written Testimony for March 2023 Hearings at 32–33.

That is as it should be: those statutes are currently excluded,[97] and there is no sound reason to expand the definition.

The Department complains that court documents will not always reflect which portion of a statute a conviction was based on and recommends that, should the Commission adopt an exclusion for offenses committed recklessly, it place the burden on the defendant to show that the conviction was based on reckless conduct.[98] In view of the Department's desire that courts be permitted to rely on charging documents to find non-elemental facts for the purpose of imposing draconian sentencing enhancements, it is discordant for the Department also to complain that charging documents do not reliably describe actual conduct. In any event, in a criminal case, where the government bears the burden of proof, evidentiary gaps work against the government.[99]

Finally, the Commission should not reintroduce "or property" into the elements clause. The original career offender guideline included force against property. In 1989, the Commission amended the definition, "in response to research that concluded that the definition in § 924(e) is more specific than the definition of a 'crime of violence' in 18 U.S.C. § 16, and more narrowly drawn and that linking the definitions of predicate crimes to those already approved, defined, and joined together by Congress for the heavy sanction of § 924(e) would facilitate both the acceptance of the guideline and its proper application."[100] Congress's most recent relevant enactment, the First Step Act of 2018, likewise adopts a force clause that is limited to "physical force against the person."[101] The Department's suggestion that the Commission reverse this decision made over three decades ago defies explanation.

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[97] *See, e.g., United States v. Schneider*, 905 F.3d 1088, 1095 (8th Cir. 2018) (excluding aggravated assault with element of ordinary recklessness); *United States v. Tagatac*, 36 F.4th 1000, 1004–05 (9th Cir. 2022) (including Hawaii robbery because conviction was for divisible portion of statute that required intent).

[98] *See* DOJ Written Testimony for March 2023 Hearings at 33.

[99] *See Pereida v. Wilkinson*, 141 S. Ct. 754, 766–67 (2021).

[100] *2016 Career Offender Report* at app. A-9–A-10 (cleaned up).

[101] 18 U.S.C. § 3559(c)(2)(F)(ii), *as incorporated in* 21 U.S.C. § 802(58).

V. Conclusion

In sum, Defenders suggest the Commission:

- Amend §4B1.2(b)(2) to define "controlled substance offense" as felony violations of the offenses listed in 28 U.S.C. § 994(h)(2)(B); and

- Delete from Application Note 1 to §4B1.2 the commentary that provides that "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

We urge the Commission to forgo further amendments impacting the career offender guideline until it has had an opportunity to review and study relevant data. Defenders are heartened by the Commission's and the Department's recognition that the career offender and other recidivist guideline enhancements call for sentences that are not necessary or appropriate, and we welcome the continued opportunity to work toward meaningful reform.

The following is excerpted from the March 2023 Statement of Michael Caruso.

* * * * *

I. 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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[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]

(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]

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.*

Before the United States Sentencing Commission
Public Hearing on Proposed Amendments to the Career Offender Guideline

Statement of Juval O. Scott, Federal Public Defender
for the Western District of Virginia, on Behalf
of the Federal Public and Community Defenders

March 8, 2023

Statement of Juval O. Scott, Federal Public Defender for the Western District of Virginia, on Behalf of the Federal Public and Community Defenders Before the United States Sentencing Commission Public Hearing on Proposed Amendments to the Career Offender Guideline

March 8, 2023

Hon. Chair Reeves, Vice-Chairs, and Commissioners: Thank you for holding a hearing on this important topic and for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders.

I. Introduction

My name is Juval O. Scott, and I am the Federal Public Defender for the Western District of Virginia. I have been a Federal Defender for more than seventeen years, in three different jurisdictions (Virginia-Western, Indiana-Southern, and Wisconsin-Eastern), as well as an attorney advisor in the Training Division of the Office of Defender Services. I have represented hundreds of clients and have seen the devastating impact of career offender and other recidivist guideline enhancements on their sentences, their lives, their families, and their communities.

The Commission has proposed a four-part amendment to the career offender guideline, every part of which would expand its reach.[1] This is the same guideline that has long been recognized—including by the Commission—to be overly punitive, to have no empirical basis, and to exacerbate racial disparities in guideline sentencing. Even though individuals sentenced as career offenders represent only about 3% of those sentenced in federal court, they comprise over 11% of the federal prison population.[2] Even the Department of Justice, in its comments on the Commission's proposed priorities for 2023, recognized that guideline recidivist penalties are "not optimally set."[3] As the Commission recently reported, the career offender guideline is already the least influential guideline, with judges imposing below-guideline

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[1] *See* 88 Fed. Reg. 7180, 7209- 7218 (2023) ("2023 Proposed Amendments").

[2] *See* USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 2 (2016), https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements ("*2016 Career Offender Report*").

[3] *See* DOJ Comments on the Sentencing Commission's Proposed Priorities 15 (Sept. 12, 2022).

sentences in nearly 80% of cases.[4] Extending its reach would give judges still more reasons to disregard it.

The Commission should take no action that will expand this problematic guideline. It definitely should not take the actions proposed here.

The Supreme Court's categorical approach is the best way to maintain consistency with the language of §4B1.1 and § 994(h), to ensure a reliable basis for severe sentencing enhancements, and to cabin the reach of the career offender guideline. The Commission's proposal to abandon the categorical approach would vastly and unreliably expand the reach of the guideline, without alleviating complexity. And it would give rise to new forms of unwarranted disparity and absurdity. If the Commission wishes to simplify the application of the categorical approach, it could greatly advance that goal by limiting the definition of "controlled substance offense" to those offenses enumerated in § 994(h),[5] and excluding inchoate offenses entirely.[6] But even if the Commission were to reject these particular suggestions, the problems that eliminating the categorical approach would create are too great to bear.

The Commission also should not retreat in other ways from its stated goal[7] of narrowing career offender and related enhancements by:

- expanding the definition of "robbery" to include offenses that require neither immediate threats, nor threats to the person (Part B);
- expanding the definitions of both "crime of violence" and "controlled substance offense" to include unidentified, undefined, and unknown breeds of inchoate offenses and accomplice liabilities (Part C); or

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[4] *See* USSC, *The Influence of the Guidelines on Federal Sentencing* 55-56 (2020), https://www.ussc.gov/research/research-reports/influence-guidelines-federal-sentencing ("*Influence Report*"); USSC, *Quick Facts: Career Offenders* (2022), https://www.ussc.gov/research/quick-facts/career-offenders ("*2022 Career Offenders Quick Facts*").

[5] *See* Statement of Michael Caruso on Acceptance of Responsibility and Controlled Substance Offense § II.B (March 7, 2023).

[6] *See, infra,* § III.C.

[7] *See 2016 Career Offender Report* at 55.

- expanding the definition of "controlled substance offense" to include "offers to sell," which need not involve any controlled substance at all (Part D).

Consistent with § 994(h), however, the Commission must include offenses described in Chapter 705 of title 46.

II. Given problems with the career offender guideline, the Commission should not further expand its reach.

In its *2016 Career Offender* Report, the Commission acknowledged "longstanding policy concerns" with the career offender guideline, explained steps it had taken toward its goal of targeting only the most dangerous individuals, and recommended that Congress enact legislation that would permit the Commission to further narrow the guideline's reach.[8] Judges recognize the broad overreach of this guideline and have responded by imposing below-range sentences in an ever-increasing percentage of cases, reaching nearly 80% in FY2021.[9] The Commission should heed this judicial feedback and cabin, not expand, the reach of the guideline.[10]

This is especially true given the lack of any rationale, tied to statutory sentencing purposes, for the guideline's severity. Commission data has consistently reflected that the career offender guideline does a poor job of

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[8] *See 2016 Career Offender Report* at 43-45, 52-56. In the Report, the Commission recommended to Congress only that it remove from the career offender directive those assigned career offender status based solely on drug-trafficking convictions. *Id.* at 44-45. But the Report acknowledges that the Commission's data reflect that individuals in what the Commission calls the "mixed pathway" (those who may have a prior conviction or arrest for a violent crime) resemble in many respects, including in the rate and extent of below-guideline sentences, what the Commission calls the "drug trafficking only pathway" (those with no prior conviction or arrest for a violent crime). *Id.* at 43. And, although those in the "mixed pathway" and "violent only pathway" have a higher recidivism rate than those in the "drug trafficking only pathway," as noted in detail, *infra*, at 5-7 & nn. 22-33, the recidivism rate for these groups also correlates most closely with total criminal history points, not career offender status.

[9] *See Influence Report* at 55-56; *2022 Career Offenders Quick Facts*.

[10] *See Rita v. United States*, 551 U.S. 338, 350 (2007).

identifying defendants at the greatest risk of recidivism.[11] And the Commission has never provided any other sound reason for relying solely on criminal history to set a sentence at or near the statutory maximum. At the same time, the Commission has long recognized the guideline as a source of significant and unwarranted racial disparities.[12]

Because the guideline is overly punitive, has no empirical basis, and exacerbates racial disparity, the Commission should not further expand its reach.

Overly Punitive. The Sentencing Reform Act (SRA) 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 federal drug-trafficking offenses, and who had previously been convicted of two or more felony crimes of violence or those same enumerated trafficking offenses.[13] With the SRA's abolition of parole,[14] and the increase in maximum terms for drug-trafficking offenses under the Anti-Drug Abuse Acts of 1986,[15] a sentence at or near the statutory maximum is an exceptionally long sentence.

The Commission implemented this directive by creating the career offender guideline, §4B1.1. And then it went about defining who would be subject to this guideline, §4B1.2. That is to say, while Congress directed that a discrete category of individuals must be subject to a near-maximum career

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[11] *See, e.g.,* USSC*, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004), https://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/15_Year_Study/index.cfm ("*Fifteen-Year Assessment*"); *2016 Career Offender Report* at 2-3, 38-41, 44.

[12] *See Fifteen-Year Assessment* at 132, 134.

[13] 28 U.S.C. § 994(h).

[14] Just before the SRA's passage, the average federal prisoner was released after serving less than half the sentence imposed. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Historical Corrections Statistics in the United States, 1850-1984*, Table 6-17.

[15] *Compare* 21 U.S.C. § 841(b)(1)(B) (1982) (setting five year maximum for schedule II non-narcotic controlled substance) *with* 21 U.S.C. § 841(b)(1)(C) (1986) (setting 20-year maximum for schedule II controlled substance)

offender sentence, the Commission has exercised significant control over which individuals would come within that category.[16]

Judges recognize that the guideline calls for sentences that are too high in most of the cases it captures. The Commission reported in its *2016 Career Offender Report* that, since *Booker*, the proportion of those identified as career offenders who are sentenced within the applicable guideline range decreased from 43.35% in FY2005 to 27.5% in FY 2014.[17] In FY2021, judges imposed within-range sentences in just 19.7% of those deemed career offenders.[18]

It is no wonder that, in its 2020 report on *The Influence of the Guidelines on Federal Sentencing*, the Commission identified the career offender guideline as one of the least influential guidelines.[19] Not only do judges impose a within-guideline sentence in a small and shrinking percentage of cases, but the difference between the average guideline minimum in these cases and the average sentence imposed has steadily widened.[20] Thus, unlike other guidelines, whose influence has stabilized over time, judges have diverged from the career offender guideline in more cases and to a greater extent over time.[21]

No empirical basis. The judges' instincts are not wrong. The Commission has repeatedly observed that the career offender guideline does a poor job of identifying defendants at the greatest risk of recidivism—starting from its very first recidivism report.[22] In its *Fifteen-Year Assessment,* the Commission explained that the "recidivism rates for career offenders more

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[16] *See 2016 Career Offender Report* at 12-15.

[17] *See id.* at 22.

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

[19] *See Influence Report* at 55-56.

[20] The difference between the average guideline minimum and the average sentence imposed in career offender cases widened from a difference of 45.6 months in 2005, just after *Booker*, to a difference of 66.9 months in 2017, the last year of the study period. *See id.* By FY2021, the difference had grown to 73 months. *See 2022 Career Offenders Quick Facts.*

[21] *See Influence Report* at 56.

[22] *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9, 37 (2004).

closely resembles the rates for individuals in the lower criminal history categories in which they would be placed under the normal criminal history scoring rules."[23] And the Commission repeated this observation in its *2016 Career Offender Report*: "recidivism rates are most closely correlated with total criminal history points."[24]

Commission data has consistently reflected that, as a group, those placed in Criminal History Category (CHC) VI by operation of the career offender and armed career criminal guidelines have a recidivism rate closer to those placed in CHC III based on points.[25] Even limiting the analysis to "violent offenders" placed in CHC VI by the career offender guideline, Commission data still reflects that, as a group, they have a recidivism rate[26] closer to those in CHC III[27] and lower than other "violent offenders" placed in CHC III based on points.[28] Likewise, the *2016 Career Offender Report* also reports a recidivism rate for those placed in CHC VI through its "violent only career offender" pathway as having a recidivism rate[29] closer to CHC III.[30]

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[23] *Fifteen-Year Assessment* at 134.

[24] *2016 Career Offender Report* at 43.

[25] *See, e.g.*, USSC, *Recidivism of Federal Violent Offenders Released in 2010* 29, fig.14 (2022), https://www.ussc.gov/research/research-reports/recidivism-federal-violent-offenders-released-2010 ("*2022 Recidivism Report-Violent*"); USSC, *Recidivism of Federal Drug Offenders Released in 2010* 31 fig.14 (2022), https://www.ussc.gov/research/research-reports/recidivism-federal-drug-trafficking-offenders-released-2010 ("*2022 Recidivism Report-Drugs"*); USSC, *Recidivism of Federal Offenders Released in 2010* 26, fig.13 & 29, fig.16 (2021), https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010 ("*2021 Recidivism Report*"); *2016 Career Offender Report* at 38-41, 44; USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19, figs.7A & 7B (2016), https://www.ussc.gov/research-and-publications/research-publications/2016/recidivism-among-federal-offenders-comprehensive-overview ("*2016 Recidivism Report*); *Fifteen Year Assessment* at 134.

[26] *See 2022 Recidivism Report-Violent* at 29 fig.14 (65% for ACCA/CO "violent offenders").

[27] *See 2021 Recidivism Report* at 26 fig.13 (61.9% for CHC III).

[28] *See 2022 Recidivism Report-Violent* at 29 fig.14 (65% for ACCA/CO "violent offenders," 66.3% for CHC III "violent offenders").

[29] *See 2016 Career Offender Report* at 42 fig.21 (69% for "violent only career offenders").

[30] *See 2016 Recidivism Report* at 19 fig.7A (63.3% for CHC III).

The mismatch between the career offender guideline and recidivism is even worse for the approximately 75% of people classified as career offenders based on instant drug-trafficking offenses.[31] The Commission's most recent data for those placed in CHC VI by operation of the career offender and armed career criminal guidelines based on instant controlled substance offenses show that, as a group, they have a recidivism rate[32] below those in CHC III.[33]

Further, beyond the CHC, those deemed career offenders based on an instant drug-trafficking offense also suffer some of the steepest offense level increases. The career offender offense level is tied to the statutory maximum for the offense, and the statutory maximum terms for federal drug offenses rise quickly from 20 years for some of the least serious offenses to life.[34] As a result, individuals deemed career offenders on the basis of a conviction under 21 U.S.C. § 841 receive a starting offense level no lower than 32, and are frequently placed in offense level 37, to staggering effect.[35] An individual convicted of distributing 28 grams of crack cocaine with one § 851 enhancement faces a statutory mandatory minimum of 10 years and could have a §2D1.1 guideline range significantly lower than that. If he is deemed a career offender, his starting guideline range soars to 360 months to life.

There is no empirical basis for this severe increase. Again, risk of recidivism provides no basis for any increase in either CHC or offense level. Nor has the Commission articulated any *other* principled rationale for sentencing any particular set of individuals at or near the statutory maximum term. And it would be hard to find one. Indeed, even retributivist theories—those that justify criminal history enhancements on the theory of greater offender

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[31] The percentage of those deemed career offenders based on a current drug-trafficking offense hovers above 75%. *See, e.g.*, USSC, *Quick Facts: Career Offenders* (2022) (969 out of 1246); USSC, *Quick Facts: Career Offenders* (2021) (948/1216); USSC, *Quick Facts: Career Offenders* (2020) (1305 out of 1737).

[32] *See 2022 Recidivism Report-Drugs* at 31 fig.14 (58.9% for ACCA/CO).

[33] *See 2021 Recidivism Report* at 26 fig.13 (61.9% for CHC III).

[34] *See* 21 U.S.C. § 841(b)(1)(C), (b)(1)(A).

[35] *See* USSG §4B1.1.

culpability—agree that the added penalty for the criminal history should not exceed the penalty for the offense itself.[36]

The Commission itself appears to have abandoned any effort to identify a rationale for the career offender guideline tied to sentencing purposes. In its *2016 Career Offender Report*, the Commission stated: "Despite the continued reliability of the guideline's criminal history score in predicting recidivism, and the impact an offenders' criminal history score has on increasing the offenders' range of punishment under the guidelines, the Commission continues to believe that certain recidivist offenders should be punished more severely based on the nature of their priors."[37] But the Commission's "belief" is not a rationale. The Commission notably did not purport to justify a sentence near the statutory maximum for *any* set of individuals without any case-specific aggravating offense facts. Instead, what followed in the *Report* was the Commission's plea to Congress, based on empirical evidence and national experience, to remove individuals whose career offender status was based solely on drug trafficking convictions from the reach of the directive. This recognition of one of the most obvious of the guideline's problems, while welcome, does not justify the other ways in which the guideline overreaches.

It's no surprise that neither the Commission nor anyone else has offered a principled rationale for the career offender guideline. The career offender guideline is not a product of the Commission acting within its "characteristic institutional role"[38]; it is simply the product of a congressional directive. The Commission cannot change or eliminate the directive (although it should continue to implore Congress to do so). But given the lack of any principled rationale for the career offender guideline, other than the directive, the Commission should ensure that the guideline reaches no further than the directive, § 994(h), requires.

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[36] *See* Richard S. Frase & Julian V. Roberts, *Retributivist Perspectives*, *in Paying for the Past: The Case Against Prior Record Sentence Enhancements*, 23, 35-36, 38 (2019). In practical terms, this means "offenders with the longest records should not receive penalties more than twice as severe as first offenders who commit the same offense." *Id.* at 36. And this is roughly what the normal operation of the CHC achieves, with the ranges provided in CHC VI roughly double the ranges provided in CHC I for the same offense level. *See* USSG Chapter 5, Part A (Sentencing Table).

[37] *2016 Career Offender Report* at 43.

[38] *Kimbrough v. United States*, 552 U.S. 85, 89 (2007).

Racially disparate. Finally, this singularly problematic guideline—problematic in both its severity and its lack of empirical basis—is disproportionately visited on Black individuals. As early as 2004, the Commission identified the career offender guideline—along with the since-reduced 100-to-1 quantity ratio between powder and crack cocaine—as a source of significant and unwarranted adverse impact on Black defendants.[39] In the last five years, Black individuals comprised 20.8% of those sentenced under the Guidelines, but 60.7% of those identified as career offenders.[40] Viewed from the other side, the rate at which Black individuals are assigned career offender status is almost six times the rate for non-Black individuals.[41]

Thus, the severe and empirically unjustified career offender enhancement feeds not only over-incarceration but also racial inequality in the criminal legal system. The racially disproportionate impacts of sentencing enhancements based on prior convictions, like this one, have led the Robina Institute's Sentencing Guidelines Resource Center to call on sentencing commissions to examine the racial impact of their use of prior convictions: "[I]f a particular component is found to have a strong disparate impact on nonwhite offenders, the commission should carefully evaluate the rationales for including the component to ensure that the degree of added enhancements is narrowly tailored to meet the chosen goals without unnecessary severity and disparate impact."[42]

In the case of the career offender guideline, the total absence of a real rationale ensures that its enhancement is *not* narrowly tailored to meet any chosen goal. As the Commission recognized in 2004, a "rule that serves no clear purpose would be questionable in any event, but rules that adversely affect a particular group deserve extra scrutiny."[43] For these reasons alone, the

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[39] *See Fifteen-Year Assessment* at 131-34.

[40] *See* USSC, Individual Datafiles FY 2017-2021.

[41] *Id.* (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).

[42] Richard Frase & Rhys Hester, *Criminal History Enhancements as a Cause of Minority Over-Representation*, *in Criminal History Enhancements Sourcebook* 105, 116 (Robina Institute of Criminal Law and Criminal Justice, 2022).

[43] *Fifteen-Year Assessment* at 131

Commission should take care to cabin the reach of the career offender guideline.

But there is more. A disturbing source of this disparity—especially with respect to drug prosecutions, the primary source of career offender placement—is racially disparate law enforcement practices.[44] It has long been acknowledged that law enforcement practices spawned by the War on Drugs increased arrests for low-level drug trafficking offenses, and that Black Americans were and are disparately affected.[45] Recent individualized data analyses suggest that the greater likelihood of arrest for Black individuals, in comparison with white individuals, cannot be explained by differences in either drug or non-drug offending or by differences in community context, such as greater likelihood of selling drugs to strangers, in public places, or in areas with heavy police presence.[46] After controlling for these differences, Professors Mitchell and Caudy report that the disparity in arrests for drug distribution between Black and white individuals remained "statistically significant and substantively large."[47] They conclude that these results are most consistent with racial bias.[48]

Research from across the country confirms that Black drivers and pedestrians are stopped, frisked, searched, and arrested far in excess of their portion of the population or their share of criminality. Drugs, weapons, and other contraband are found at significantly lower rates in frisks and searches of Black than of white individuals, and the bar for searching Black drivers is lower than that for searching white drivers.

For example, the Stanford Open Policing Project analyzed data from 21 state patrol agencies and 29 municipal police departments, comprising nearly

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[44] *See* Nat'l Research Council, *The Growth in Incarceration in the United States: Exploring Causes and Consequences* 97 (Jeremy Travis *et al.*, eds. 2014).

[45] *See, e.g.,* Michael Tonry, *Malign Neglect, Race, Crime, and Punishment in America* (1995).

[46] *See* Mitchell, O. and Caudy, M., *Race Differences in Drug Offending and Drug Distribution Arrests*, 63(2) Crime & Delinquency 91, 108 (2017).

[47] *Id.*

[48] *See id.*

100 million traffic stops.[49] It found significant racial disparities in policing and, in some cases, evidence that bias plays a role. Specifically, the Project found that Black drivers were less likely to be stopped after sunset, when their race would not be apparent.[50] It also found that the bar for searching Black and Hispanic drivers once stopped was lower than that for searching white drivers.[51] Similar results have been found in studies of specific cities[52] as well as whole states.[53] Because police can find contraband only where they look for it, Black individuals are arrested and convicted in disproportionate numbers relative to similarly situated white individuals.[54]

We could go on. But the point is this: sentencing enhancements based on prior convictions replicate this racial inequality in the criminal legal system over time and space. Put differently, even if all of today's investigation, prosecution, and sentencing within the federal system were somehow to shed all racial inequality (an obvious impossibility), increasing federal sentencing ranges based on prior convictions would continue to "bake in" the inequalities of the past.[55]

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[49] *See* Findings, Stanford Open Policing Project, https://openpolicing.stanford.edu/findings/ (last visited Feb. 8, 2023).

[50] *See* Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States,* 4 Nature Human Behavior 736, 742-43 (2020).

[51] *See id.*at 743.

[52] *See, e.g.*, Office of the San Francisco Dist. Att'y, *Report of the Blue Ribbon Panel on Transparency, Accountability, & Fairness in Law Enforcement* (2016), http://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf; *Floyd v. City of New York,* 959 F. Supp.2d 540, 559-60 (S.D.N.Y. 2013) (summarizing reports of Jeffrey Fagan, Ph.D.); Ian Ayres & Jonathan Borowsky*, A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 5-6 (2008), *https://www.aclusocal.org/sites/default/files/wp -content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf*.

[53] *See, e.g.*, Frank R. Baumgartner *et al., Targeting Young Men of Color for Search and Arrest during Traffic Stops: Evidence from North Carolina, 2002-2013*, Politics, Groups, & Identities (2016); Matthew B. Ross et al., Inst. for Mun. & Reg'l Policy, Cent. Conn. State Univ., *State of Connecticut: Traffic Stop Data Analysis and Findings* (2016).

[54] *See* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 297, 301-02 (1999).

[55] Rhys Hester, *Prior Record and Recidivism Risk,* 44 American Journal of Criminal Justice 353, 354 (2019); *see also, generally,* Richard Frase & Rhys Hester,

We were pleased that the Commission took steps in 2016 to address these concerns. Recognizing that § 994(h)'s mandate is out of sync with the statutory purposes of sentencing and the Commission's data, the Commission recommended to Congress that it remove from § 994(h) those who qualify as career offenders based solely on controlled substance offenses.[56] That same year, the Commission amended the "crime of violence" definition consistent with its goal of focusing on the most dangerous individuals,[57] and recommended that Congress adopt the resulting definition as a uniform definition for "crime of violence."[58]

Yet, every part of the Commission's proposed career offender amendment moves in the opposite direction. Each would have the effect of expanding—in the case of Parts A and C, drastically—the reach of this draconian guideline, identifying many more individuals as subject to near-maximum sentences, and visiting these overly severe sentences disparately on Black individuals. We oppose each part.

Criminal History Enhancements as a Cause of Minority Over-Representation, *in Criminal History Enhancements Sourcebook* (Robina Institute of Criminal Law and Criminal Justice, 2022); Rhys Hester et al., *Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences*, 47 Crime & Justice 209, 238 (2018).

Similar concerns are at play in USSG §2K2.1, which contains enhanced base offense levels that were promulgated not based on data or national experience, but a desire to achieve "proportionality" with statutory mandatory minimum sentences. *See* Statement of Michael Carter on Firearms Offenses at 21 (March 7, 2023). Like the career offender guideline, these severe enhancements disparately impact Black individuals. For example, according to data obtained from the USSC FY2017-2021, Individual Datafiles, Black individuals comprised 20.8% of all individuals sentenced under the Guidelines, 53.3% of those for whom §2K2.1 was the primary guideline, and 72.5% of those who were assigned base offense level §2K2.1(a)(2), based on two qualifying prior convictions.

[56] *See 2016 Career Offender Report* at 43-45.

[57] *See* USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016).

[58] *See 2016 Career Offender Report* at 48-55.

III. Every part of the four-part proposal would expand the reach of the career offender guideline.

A. The Commission should not replace the Supreme Court's narrow elements-based categorical approach with a broad, unworkable accusation-based approach.

Although imperfect, the Supreme Court's categorical approach is "under-inclusive by design."[59] By contrast, the proposal in Part A to substitute the elements-based categorical approach with an accusation-based examination of court documents, coupled with new definitions of "crime of violence" and "controlled substance offense" requiring identification of the most appropriate federal guideline even for state offenses, appears to be *over*-inclusive by design. It would not solve the problems it targets—complexity, unwarranted disparity, perceived arbitrariness. It would only swap them out for new problems of the same ilk. This is not a trade the Commission should make.

The Commission's proposal to abandon the Supreme Court's categorical approach consists of two components. First, the Commission proposes to replace the uniform definitions for "controlled substance offense" and "crime of violence" with a long list of federal guidelines: federal offenses for which these guidelines are the applicable guideline, and state offenses for which these guidelines would be the "most appropriate" guideline if the state offense had been sentenced under the Guidelines in federal court, would constitute career offender predicates. Second, the Commission proposes to replace the Supreme Court's elements-based categorical approach with what functions as an accusation-based approach: federal judges examine court documents to determine what conduct the conviction was based on.[60]

While the Commission has not released data on the impact of this proposal, there can be no doubt it would vastly increase the number of people subject to the career offender guideline and other recidivist enhancements, further increase the federal prison population, and exacerbate racial disparity. The proposal would also worsen, not alleviate, complexity, and thus

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[59] *Borden v. United States*, 141 S. Ct. 1817, 1832 (2021).

[60] *See* 2023 Proposed Amendments at 7209-14.

significantly increase litigation and decrease judicial efficiency. And it would give rise to new disparities and arbitrary results.

1. The listed-guideline approach is overly expansive and complicated.

In its *2016 Career Offender Report*, the Commission described its "overall goal of focusing the career offender and related enhancements on the most dangerous offenders."[61] Contrary to this goal, the Commission's current proposal replaces the tailored definitions of "crime of violence" and "controlled substance offense" with a list of more than half of the Chapter 2 guidelines in the book.[62] And it provides that prior state convictions will constitute career offender predicates if one of the listed guidelines would be "the most appropriate guideline . . . had the defendant been sentenced" for the state offense "under the guidelines in federal court."[63]

No doubt, most of the listed guidelines cover *some* offenses that involve the purposeful use of violent force.[64] But most—perhaps all—also include some offenses that do not. Adopting this approach would sweep in many offenses that fit no one's understanding of a "crime of violence" or "controlled substance offense."

For example, the proposal lists §§2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations), and 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise), as crimes of violence. But these are the applicable guidelines for the offenses of participating in hundreds of types of racketeering and specified unlawful activities, including gambling, sports bribery, counterfeiting, theft from interstate shipments, trafficking in counterfeit labels for computer programs, and contraband cigarettes.[65] Under the Commission's proposal, participating in the affairs of an enterprise that engages in, or conspiring to travel in

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[61] *2016 Career Offender Report* at 55.

[62] *See* 2023 Proposed Amendments at 7210-11.

[63] *Id.* at 7211.

[64] *See Borden*, 141 S. Ct. at 1828 (holding use means purposeful or knowing use); *Johnson v. United States*, 559 U.S. 133, 140 (2010) (holding physical force means violent force).

[65] *See* USSG §§2E1.1, 2E1.2; 18 U.S.C. §§ 1952(b); 1961.

furtherance of, any of these activities would be crimes of violence. And, if a court thought that §§2E1.1 or 2E1.2 would be "the most appropriate guideline" for state racketeering offenses, then racketeering in forgery, counterfeiting, gambling, and lottery enterprises;[66] or participating in grand larceny, failure to pay withheld child support, or unlawful sublease of motor vehicles corrupt organizations[67] would be crimes of violence also.

So, too, would offenses like obstructing an officer. This is because the Commission included §2A2.4 (Obstructing or Impeding Officers) in its list of crimes of violence. Many of the federal offenses indexed to §2A2.4 could never be career offender predicates because they are misdemeanors.[68] But some are felonies: for example, a person in charge of a vessel of the United States commits the federal felony of failing to heave to, if he fails to obey an order by an authorized Federal law enforcement officer to adjust the vessel's course to facilitate law enforcement boarding.[69] And in many states, simple obstruction offenses are punishable by imprisonment for a term exceeding one year.[70] If a court were to determine §2A2.4 was the "most appropriate guideline" for these state obstruction felonies, they could all be career offender predicates.

Indeed, even determining which guideline to consult would be no easy task. Consider for just three paragraphs how maddeningly complicated it would be to determine the applicable guideline for one common category of offenses: assault. Sections 2A2.2 (Aggravated Assault) and 2A2.4 (Obstructing and Impeding an Officer) are listed guidelines for "crime of violence," but §2A2.3 (Assault) is not. Even federal offenses do not fit neatly into these guidelines, much less do state offenses. Take 18 U.S.C. § 111, which prohibits assaulting, resisting, or impeding certain federal officers or employees. It

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[66] *See* Miss. Code Ann. § 97-43-1, *et seq.*

[67] *See* Va. Code Ann. § 18.2-512, *et seq.*

[68] *See, e.g.*, 18 U.S.C. §§ 111(a), 1501, 1502, 3056(d).

[69] *See* 18 U.S.C. § 2337(a)(1).

[70] *See* Md. Code Ann., Crim. Law § 9-408 (interfering with an individual who the person has reason to know is a police officer who is making or attempting to make a lawful arrest or detention of another person); Mass. Gen. Laws Ann. Ch. 268, § 32A (willfully interfering with a firefighter in the lawful performance of his duty); 30 Pa. Stat. and Cons. Stat. Ann. § 904; 18 Pa. Stat. and Cons. Stat. Ann. § 5104.3 (resisting inspection by a waterways conservation officer); Wis. Stat. Ann. §§ 946.41, 939.62 (obstructing an officer as a "repeater").

covers misdemeanor assaults and resisting, which are elevated to felonies if the acts involve physical contact with the victim or the intent to commit any other felony.[71] The Guidelines' Statutory Index (Appendix A) specifies §§2A2.2 and §2A2.3 as the applicable guidelines for § 111. Because both are among the listed guidelines for crimes of violence, one might conclude that all violations of § 111, and all state offenses that are "most similar" to § 111, are "crimes of violence."

But it's not nearly so simple. After all, § 111(a) includes assaults that are *misdemeanors* under federal law and thus can never be career offender predicates. And, although Appendix A does not index § 111 to §2A2.3 (Assault), a federal sentencing judge could well conclude that the "most appropriate" guideline for a state offense that resembled the misdemeanor violation or other non-aggravated versions of § 111, is §2A2.3. And, as noted above, §2A2.3 is not listed as a "crime of violence."

If the court were persuaded to ignore Appendix A, it might be tempted to draw a distinction between aggravated assault and simple assault and conclude that the former are career offender predicates, whereas the latter are not. After all, the *background* to §2A2.3 (Assault) explains that "[t]his section applies to misdemeanor assault and battery and to any felonious assault not covered by §2A2.2 (Aggravated Assault)." And the *commentary* to §2A2.2 purports to define "aggravated assault" as "a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.,* not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony."[72] But it is unclear why the commentary defines "aggravated assault," since the guideline text does not use the phrase "aggravated assault." Moreover, that definition could not define the contours of which assaults constitute "crimes of violence" because the definition specifies no *mens rea* requirement. The Commission's proposal excludes from the "crime of violence" definition convictions under federal or state law based upon a finding of recklessness or negligence, and some "aggravated assaults" can be committed with a reckless

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[71] *See* 18 U.S.C. § 111.

[72] USSG §2A2.2, comment. (n. 1).

state of mind.[73] In short, under the Commission's listed guideline approach, determining whether assault—under federal or state law—is a crime of violence would be complicated.

Indeed, every guideline the Commission has identified as a "crime of violence" raises complexities. Even §2A1.1 (First Degree Murder) would not be entirely straightforward. Section 2A1.1 is the applicable guideline for federal felony murder.[74] The guideline itself notes that there may be cases where the defendant did not cause the death intentionally or even knowingly and that a downward departure might in those cases be warranted.[75] Does this acknowledge that not every federal felony murder should be a career offender predicate? And, what about state felony murder convictions? Would §2A1.1 always be the "most appropriate guideline . . . had the defendant been sentenced [for the state felony murder] under the guidelines in federal court"?

Consider Missouri, where James Colenburg was convicted of felony murder after he killed a child who suddenly ran into the middle of the street in front of the car Mr. Colenburg was driving, which he knew had been stolen seven months earlier.[76] Or Illinois, where Allison Jenkins was convicted of felony murder after an officer chased him, erroneously suspecting he had drugs. When Mr. Jenkins elbowed the officer to shake free, the officer's gun went off, killing his partner.[77] Federal felony murder encompasses neither a death caused in the course of driving a car without permission, nor a killing committed by a police officer in attempting to effect an arrest. Is the guideline that covers the type of conduct "most similar" to these offenses the listed guideline §2A1.1 (First Degree Murder) or the unlisted guideline § 2A1.4 (Involuntary Manslaughter)?

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[73] *See, e.g.,* 18 U.S.C. § 113(a)(6); Ariz. Rev. Stat Ann. §§ 13–1203, 1204; Me. Rev. Stat. tit. 17-A, § 208; Tenn. Code Ann. § 39-13-102(a)(1)(B); Tex. Penal Code Ann. § 22.02.

[74] *See* USSG §2A1.1; 18 U.S.C. § 1111(a).

[75] *See* USSG §2A1.1, comment. (n. 2(B))

[76] *See State v. Colenburg*, 773 S.W.2d 184, 185, 187-89 (Mo. Ct. App. 1989).

[77] *See People v. Jenkins*, 545 N.E.2d 986, 990-91 (Ill. App. Ct. 1989).

2. The non-elemental approach is unreliable, overly inclusive, and impossibly complicated.

The second component of the Commission's proposal to eliminate the categorical approach—to require courts, for each prior conviction, to determine from court records what *conduct* the conviction was based on—may be even more problematic. The categorical approach, for better or worse, at least has a clear basis: A prior conviction is not for a specified offense unless the conviction establishes the elements of the specified offense because otherwise the individual has not been convicted of the specified offense.[78]

The Commission's proposal eschews this elements-based approach and proposes to substitute in its place an approach with nothing clear about it:

- It would direct federal courts to determine what the "most appropriate guideline" for the state offense would have been if the defendant had been sentenced for the state offense in federal court, by determining which guideline "covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted."[79]

- It would direct that "[t]he court shall make this determination based on: (1) the elements, and means of committing such an element, that formed the basis of the defendant's conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any element or means."[80]

- It would identify, in commentary, a variety of documents, including "the charging document" and "any comparable judicial record," that the court may consult in making this determination.[81]

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[78] *See Taylor v. United States*, 495 U.S. 575, 602 (1990). Defenders set forth a detailed rationale for the categorical approach at pages 6-18 of our Comments on the Sentencing Commission's 2019 Proposals (Feb. 19, 2019).

[79] 2023 Proposed Amendments at 7211-12.

[80] *Id.* at 7212.

[81] *Id.*

- Finally, it would instruct, also in commentary, that the "[f]act that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the [listed guidelines] is not determinative."[82]

Every step of these directions decreases the reliability of the court's assessment, expands the pool of eligible convictions, and exacerbates the complexity of the proposed approach.

Start with reliability. The reason the Supreme Court forbids application of a recidivist sentencing enhancement without first determining the *elements* of the prior offense of conviction is that the only "conduct" a prior conviction proves is the conduct that was necessary to sustain the conviction—that is, the elements of the offense.[83] As the Supreme Court explained in *Descamps*, any other fact a court purports to divine from records "may be downright wrong."[84] A defendant "has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to."[85] At trial, the court may well prohibit extraneous facts and arguments that may confuse the question of guilt for the jury.[86]

The Court reiterated this in *Mathis*: "Statements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary."[87] When a defendant does not contest (or even is precluded from contesting) what does not matter under the law, "a prosecutor's or judge's mistake as to means, reflected in the records, is likely to go uncorrected."[88] By directing courts to discern non-elemental facts from court documents, the Commission's proposal requires courts to engage in unreliable factfinding.

And to be clear, the non-elemental facts upon which the proposal directs federal sentencing courts to rely are *the prosecution's accusations*. The

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[82] *Id.*

[83] *See Descamps v. United States*, 570 U.S. 254, 269-70 (2013).

[84] *Id.* at 270.

[85] *Id.*

[86] *See id.*

[87] *Mathis v. United States*, 579 U.S. 500, 512 (2016)

[88] *Id.*

first two items on the Commission's list of permissible sources of information are the judgment of conviction and the charging document. It is the charging document that will usually contain the most information about conduct, but that's nothing more than allegations—sometimes prepared by the prosecution, sometimes by a police officer, sometimes even by a civilian complainant.[89] Even a grand jury indictment is not proof; it's a finding of sufficient evidence to charge.[90] And just as a jury is required to be unanimous only about the elements of an offense, so when a defendant pleads guilty, he is required to admit only the elements.[91] Indeed, most states permit a plea without admitting *any* of the facts in the charging document.[92] Directing courts to find facts from charging documents would replace the Supreme Court's narrow elements-based approach with a broad accusation-based approach.[93]

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[89] *See, e.g., State ex rel. Kalal v. Circuit County for Dane* County, 681 N.W.2d 110, 117 (Wis. 2004) (discussing private criminal complaints under Wisc. Stat. Ann. § 968.02(3)); *State v. Smith*, 505 A.2d 511 (Md. 1986) (describing statement of charges of civilian complaint sworn before judicial officer under Md. R. 4-211(b)(1)).

[90] *See, e.g., Wright v. Commonwealth*, 667 S.E.2d 787, 701 (Va. Ct. App. 2008).

[91] *See, e.g., Schad v. Arizona*, 501 U.S. 624, 637 (1991), *abrogation on other grounds recognized by Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (trial); *State v. Derango*, 613 N.W. 2d 833, 838-841 (Wis. 2000) (trial); *Davison v. Commonwealth*, 819 S.E.2d 440, 445-446 (Va. 2018) (trial); *Descamps*, 570 U.S. at 269-70 (plea); *State v. Thomas*, 605 N.W.2d 836, 843-45 (Wis. 2000) (plea); *Stott v. State*, 486 N.E.2d 995, 997 (Ind. 1985) (plea).

[92] *See, e.g., North Carolina v. Alford*, 400 U.S. 25 (1970); *In re Barr*, 684 P.2d 712, 715 (Wash. 1984); *People v. Martin*, 374 N.E.2d 1012, 1015 (Ill. App. Ct. 1978); *People v. Clairborne*, 39 A.D.2d 587, 588, (N.Y. App. Div. 1972); *People v. Johnson*, 181 N.W.2d 425, 429 (Mich. Ct. App. 1970), *abrogated on other grounds by People v. Smith-Anthony*, 837 N.W.2d 415 (Mich. 2013).

[93]Moving to a pure conduct-based approach, as the Department of Justice has suggested in the past, would not resolve these concerns. In addition to inviting a mini-trial at every single sentencing involving recidivism enhancements under the Guidelines, the defendant would be placed at an insurmountable disadvantage. For the same reasons that "[s]tatements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary," *Mathis*, 579 U.S. at 512, court and especially law-enforcement records will rarely record exculpatory facts that would not constitute a defense to the crime. That evidence is not likely to be preserved anywhere. As a result, a so-called conduct-based approach could easily devolve into a routine reading of police reports as if they were an objective representation of the facts in the case. Recent events have laid bare that there can be no presumption of reliability for such reports simply because they were

By permitting courts to identify convictions as eligible based on prosecutorial accusations, the Commission's proposal would vastly increase the pool of newly-eligible convictions—and of newly-minted career offenders.

What's more, the proposal would not simplify federal sentencing. To be clear, Defenders do not think that it is justifiable to wrongly identify whole new groups of individuals as subject to harsher penalties for the purpose of simplifying Article III judges' jobs. But, even if it were, the Commission's proposal will create more, not less, work.

***First*,** a federal judge cannot escape the categorical approach. Regardless of the Guidelines, the categorical approach will continue to apply to standards under the Bail Reform Act,[94] firearm prosecutions under §§ 922(g)(9) and 924(c),[95] and challenges to prior deportations under 8 U.S.C. § 1326(d),[96] as well as all statutory sentencing enhancements.[97] In firearm and drug-trafficking prosecutions with statutory enhancements, the court would have to first perform an elements-based categorical analysis to determine whether prior convictions triggered an enhanced statutory range, and then perform a second accusation-based analysis—sometimes for the same conviction—to determine whether the recidivist guideline enhancement applied.

***Second*,** at least in the early years, a threshold question in every case would be whether the proposed amendments to the guideline setting forth *definitions* for terms used in the career offender guideline, §4B1.2, conflicts with the *substantive* guideline, §4B1.1, and the career offender directive, § 994(h), itself. The directive and the substantive guideline both require "convictions" as the basis for the enhancement. And the Supreme Court has

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prepared by law enforcement officers. Jaglois, et al*., Initial Police Report on Tyre Nichols Arrest is Contradicted by Videos*, N.Y. Times, January 30, 2023, https://www.nytimes.com/2023/01/30/us/tyre-nichols-arrest-videos.html.

[94] *See United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999).

[95] *See United States v. Castleman*, 572 U.S. 157, 169 (2014) (§ 922(g)); *United States v. Taylor*, 142 S. Ct. 2014, 2020 (2022) (§ 924(c)).

[96] *See Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017).

[97] *See Borden*, 141 S. Ct. at 1822 (2021) (ACCA); *United States v. Thompson*, 961 F.3d 545, 549 (2d Cir, 2020) (§ 851 enhancement); *United States v. Schopp*, 938 F.3d 1053, 1059 (9th Cir. 2019) (§ 2251(e)); *United States v. Leaverton,* 895 F.3d 1251, 1253 (10th Cir. 2018) (§ 3559(c)).

consistently held that the term "conviction" requires an elements-based analysis because being "convicted" of a certain type of offenses is not the same thing as "committing" a certain type of conduct.[98] In each case implicating the Commission's new approach, courts would first need to address whether the Commission can, through §4B1.2, convert the elements-based approach required by §4B1.1 and § 994(h) into an accusation, or even conduct-based one. Is this even within the Commission's statutory authority?[99] How will courts reconcile §4B1.1 with §4B1.2?

The executive branch's attempt to change what it means to be "convicted of . . . a crime involving moral turpitude," as summarized in *Matter of Silva-Trevino III*, offers a cautionary tale.[100] Immigrants convicted of a "crime involving moral turpitude" are ineligible for discretionary relief from deportation.[101] In 2008, the Attorney General attempted to eliminate the use of the categorical approach for this determination in the exercise of his authority to issue controlling determinations with respect to questions of law in immigration courts.[102] He issued an opinion establishing a three-step framework: the first step resembled a categorical inquiry; the second permitted resort to the modified categorical approach in every case in which there was not a categorical match; and the third permitted the adjudicator to look beyond the record of conviction.[103]

What followed was six years of litigation, leading to a circuit conflict over the propriety of the Attorney General's opinion, with five circuits rejecting the Attorney General's interpretation as contrary to the statute's use of

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[98] *See, e.g., Taylor* 495 U.S. at 600 (interpreting "conviction" and applying the categorical approach to enumerated offense clause of 18 U.S.C. § 924(e)); *Moncrieffe v. Holder,* 569 U.S. 184, 200 (2013) (holding that "convicted of" requires categorical approach to 8 U.S.C. § 1227(a)(2)(A)(iii)); *Castleman*, 572 U.S. at 168 (applying categorical approach to determine whether defendant had been "convicted" of a misdemeanor crime of domestic violence as required under 18 U.S.C.§ 922(g)(9)); *Johnson v. United States*, 576 U.S. 591, 604-05 (2015) (residual clause of 18 U.S.C. § 924(e)).

[99] *See United States v. LaBonte*, 520 U.S. 751, 762 (1997).

[100] *See Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 826, Interim Decision 3875 (BIA 2016) ("*Matter of Silva Trevino III*").

[101] *See* 8 U.S.C. § 1182(a)(2).

[102] *See Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 688, Interim Decision 3631 (U.S. Atty Gen. 2008) ("*Matter of Silva-Trevino I*") (invoking 8 U.S.C. § 1103(a)(1)).

[103] *See id.* at 689-90.

the term "convicted," and two according deference to the construction.[104] In 2015, the Attorney General decided this was untenable and vacated the 2008 opinion in its entirety and directed the Board of Immigration Appeals to develop a uniform national framework.[105] In 2016, the Board of Immigration Appeals adopted the categorical and modified categorical approaches as defined by recent Supreme Court precedent, including the threshold divisibility analysis.[106]

Should the Commission pursue its proposed course of attempting to define what it means to be "convicted" of or to have "convictions for" triggering offenses by directing an examination of non-elemental facts in prior court records, it would invite similar litigation with respect to the propriety of that attempt.

***Third*,** even if the amendment survived a frontal challenge, every word and phrase will require interpretation. For example:

- Must the court choose the guideline for conduct *most similar* to the offense, even if there is no guideline that is actually similar?
- Does it suffice for the guideline to cover the type of conduct most similar to the *offense charged* in the count on which the defendant was convicted, irrespective of what the conviction was based on?
- Must the court make its determination based on the elements *and* means *and* conduct, or is one of these bases sufficient?
- May a court use the *charging document* as a source of information in all cases, irrespective of the reliability of the information in the charging document?

Fourth, to the extent the proposal seeks to promote judicial efficiency, it is far more time-consuming than the categorical approach. Under the categorical approach, once it is determined that an offense categorically is, or is not, a triggering offense, the inquiry is over for that offense; the same answer

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[104] *See Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 552 & nn.1, 2, Interim Decision 3833 (U.S. Atty Gen. 2015) ("*Matter of Silva-Trevino II*").

[105] *Id.* at 552-54.

[106] *See Matter of Silva-Trevino III* at 831-33 & n. 8.

would adhere in every case involving that offense. Under the Commission's proposal, if a statute is overbroad, the court would need to review documents in every case to determine non-elemental facts. And there will be no answering the question once and for all, because every conviction will have different non-elemental facts.

This more time-consuming analysis would also need to occur in more cases. In FY2017-2021, 44.4% of cases sentenced under the Guidelines involved at least one of the guidelines listed in the Commission's proposal.[107] In every one of these cases—nearly half of all sentenced cases—if the individual also had two prior felony convictions of any sort, the Probation Office would need to obtain court records to determine whether the conduct that establishes any element or means of the offense was most similar to the conduct covered by one of the listed guidelines. The added workload would be enormous.

3. The Commission's proposal would result in unwarranted disparities and arbitrary results.

Finally, the Commission's proposal would result in additional unwarranted disparities and new types of arbitrary results. As set forth above, recidivist penalties already visit overly severe sentences on Black individuals in a disparate manner. Expanding their reach would exacerbate that disparity.

The proposal would also exacerbate unwarranted disparities based on the differing recordkeeping and responsiveness to record requests of different states, counties, and courthouses. Courts would need to look at the

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[107] This figure was derived from USSC, Individual Datafiles FY 2017-2021. Of the 334,688 sentenced cases for which the Commission had relevant documentation, in 148,471 of the cases one of the guidelines listed in proposed §§4B1.2(a)(2) or (b)(2) was identified as either (1) one of the statutory guidelines calculated in the case, or (2) the primary guideline where one of the statutory guidelines was §§2X1.1 or 2X2.1. Section 2A6.1 was not limited to offenses involving a threat to injure a person or property because a court would need to make this determination in each instance. Section 2K2.1 was not limited to offenses involving possession of a firearm described in 26 U.S.C. § 5845(a) for the same reason. In addition, the proposed amendments would also impact all cases for which §2K2.1 was one of the statutory guidelines or the primary guideline because the proposed conforming amendment would also impact the definitions of "crime of violence" and "controlled substance offense" in §2K2.1.

documents in many more cases, but as the Probation Officers Advisory Group explains in its comments, "the documentation necessary to apply the modified categorical approach is often lacking the required detail or not available."[108] And as Defenders explained in our 2019 comments, the availability of documents differs even within a single jurisdiction.[109] Convictions for the same offense would be treated differently based on document availability.

Even the same exact conviction would be treated differently by different judges. Surely, some judges would recognize that a three-time participant in contraband cigarette or unlawful vehicle sublease rackets has not been convicted of three crimes of violence; but others, literally following the language of the proposal, might disagree. Likewise, some judges would be reluctant to conclude that an individual is a career offender because of two prior felony disorderly conduct convictions, where the facts in the complaint could also make out obstructing an officer. But others might disagree.

It is true, as the Commission notes, that some judges have "criticized the categorical approach as a 'legal fiction' in which an offense that a defendant commits violently is deemed non-violent because other defendants at other times could have been convicted of violating the same statute without violence, often leading to 'odd' and 'arbitrary' results."[110] But the proposal casts the net so wide that it would deem violent far more offenses that did not involve violence—arbitrarily subjecting more individuals to extremely harsh penalties.

Again, the categorical approach the Commission seeks to eliminate is "under-inclusive by design."[111] By disallowing the use of convictions unless the least serious conduct they cover satisfies the requirements of a uniform definition, the Supreme Court's categorical approach "*expects* that some violent acts, because charged under a law applying to non-violent conduct, will not trigger enhanced sentences."[112] The Commission's proposal, by contrast,

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[108] POAG's Comments on the Sentencing Commission's Proposed Priorities 8 (Oct. 17, 2022).

[109] *See* Defender Comments on the Sentencing Commission's Proposed Amendments 20 (Feb. 19, 2019) ("Defender Comments on 2019 Proposed Amendments").

[110] 2023 Proposed Amendments at 7210.

[111] *Borden*, 144 S. Ct. at 1832.

[112] *See id.*

appears over-inclusive by design. Erring on the side of sweeping in more offenses—and thus more individuals—is no way to go about fixing any problem.

B. The Commission should not expand the definition of robbery.

Part B of the Commission's proposal is to amend USSG §4B1.2 to add a definition of "robbery" that mirrors the Hobbs Act robbery definition at 18 U.S.C. § 1951(b)(1):

> "Robbery'" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.[113]

As explained in our 2019 Comments on a similar proposal, the Commission has provided no justification for expanding the already over-inclusive career offender guideline to reach offenses involving *future* threats of force against *property*.[114]

In its *2016 Career Offender Report*, the Commission described the considerable resources it had devoted to formulating a "crime of violence" definition that advanced the goals of judicial efficiency, just punishment, and targeting recidivism risk, and it recommended that Congress adopt the same framework for other recidivist enhancements.[115] It should not now, at the request of the Department of Justice, start expanding that definition again.

The Commission proposes the new robbery amendment to address the "concern" that Hobbs Act robbery is not a crime of violence under its 2016

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[113] 2023 Proposed Amendments at 7214-15.

[114] *See* Defender Comments on 2019 Proposed Amendments at 27-30; Defender Reply Comment on Sentencing Commission's Proposed Amendments 6-7 (Mar. 15, 2019)

[115] *See 2016 Career Offender Report* at 53.

definition.[116] But this is not concerning. Unlike other modern robbery offenses—including other federal robbery offenses—Hobbs Act robbery may be committed without an immediate threat of force, and without a threat of force against the person.[117] For this reason, federal law often distinguishes between generic robbery and Hobbs Act robbery.

Notably, the term "serious violent felony"—for the federal three-strikes law and, as incorporated in the First Step Act of 2018, for an enhancement to federal drug offenses—includes "robbery (as described in sections 2111, 2113, or 2118)," but not Hobbs Act robbery.[118] Indeed, the original Armed Career Criminal Act, which was triggered only by prior convictions for burglaries and robberies, defined robbery as "any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will *imminently* be subjected to *bodily injury*."[119] Given longstanding federal distinctions between Hobbs Act robbery and generic robbery, the Commission should not mirror Hobbs Act robbery in its "crime of violence" definition.

In addition, defining robbery to mirror Hobbs Act robbery will import additional complexity into the analysis. The Commission has taken care to exclude non-violent threats from its extortion definition,[120] but Hobbs Act robbery, too, can be committed by non-violent threats. Juries are routinely instructed that, for Hobbs Act robbery, the use or threat of force or violence might be aimed at causing *economic* rather than physical injury,"[121] and that fear of injury "exists if a victim experiences anxiety, concern, or worry over expected *personal harm or business loss, or over financial or job security*."[122]

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[116] 2023 Proposed Amendments at 7214.

[117] *Compare* 18 U.S.C. § 1591 *with* 18 U.S.C. §§ 2111, 2113, 2118.

[118] *See* 18 U.S.C. § 3559(c)(1)(F)(i); 21 U.S.C. § 802(58).

[119] *See* 18 U.S.C. App. 1202(c)(8) (Supp. II 1984).

[120] *See* USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016).

[121] 3 Leonard B. Sand, *Modern Federal Jury Instructions-Crimina*l ¶ 50.01, Instruction 50-5 (emphasis added).

[122] *Id.*, Instruction 50-6 (emphasis added); *see also* Tenth Circuit Pattern Criminal Jury Instructions. 2.70 (" 'Fear' means an apprehension, concern, or anxiety about physical violence or harm *or economic loss* or harm that is reasonable under the circumstances") (updated January 2023) (emphasis added); Eleventh Circuit Pattern Jury Instructions, Criminal Cases (last revised March 2022) (""Fear' means

The Commission's use of § 1951's definition would communicate that *all* Hobbs Act robberies are crimes of violence, regardless of this broad reach, and it would reopen the possibility that non-violent state extortion convictions could be considered crimes of violence under this new definition.

C. The Commission should exclude inchoate offenses.

Part C of the Commission's proposal involves two options, both of which would expand the definitions of both "crime of violence" and "controlled substance" to include:

> the offense of aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or "controlled substance offense."[123]

Option One would further instruct judges not to use the generic definitions of the relevant inchoate offense or offense arising from accomplice liability:

> To determine whether any offense described above qualifies as a "crime of violence" or "controlled substance offense," the court shall only determine whether the underlying substantive offense is a "crime of violence" or a "controlled substance offense," and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.[124]

In its Issues for Comment, the Commission asks whether it should instead exclude these offenses altogether as predicate offenses.

As explained in our Comments on a similar 2019 Proposal, the Commission should exclude these offenses altogether.[125] Inchoate offenses are not

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a state of anxious concern, alarm, or anticipation of harm. It includes the *fear of financial loss* as well as fear of physical violence").

[123] 2023 Proposed Amendments at 7217.

[124] *Id.*

[125] Defender Comments on 2019 Proposed Amendments at 30-34.

equivalent in seriousness to completed offenses.[126] Excluding them would be a significant step toward the Commission's goal of focusing the career offender and related enhancements on the most dangerous individuals.[127] It would also be consistent with § 994(h), which does not broadly include inchoate offenses.[128] And it would be consistent with force-clause jurisprudence: The Supreme Court recently held that the inclusion of "attempted use of force" in the force clause of the crime of violence definition does not include every attempted crime of violence, but only those offenses that actually require the attempted use of force.[129]

As for accomplice liability, "aiding and abetting" is already included so there is no need for the Commission to specify "aiding and abetting" for it to be included. Every jurisdiction has expressly abrogated the distinction between principals and aiders and abettors.[130] The Commission should also not add any other forms of accomplice liability, as they are far less serious than principal liability. Accessory after the fact, for example, is punishable under federal law by half the term of the principal[131]; misprision by no more than three years.[132] (Notably, the Commission has not proposed to add accessory after the fact or misprision of a felony under its listed-guideline proposal.)

Much less should the Commission add "any other inchoate offense or offense arising from accomplice liability." This would expand the career offender predicates beyond even the current commentary at Application Note 1 to any unidentified, undefined, and unknown inchoate offense or offense arising from any sort of accomplice liability. It would do so in at least three ways:

- It would add "any other inchoate offense or offense arising from accomplice liability," which would extend, without limit, the reach of

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[126] *Id.* at 31-32.

[127] *2016 Career Offender Report* at 55.

[128] *See* 28 U.S.C. § 994(h) (omitting conspiracy and attempt, except for 46 U.S.C. § 70506(b)).

[129] *Taylor*, 142 S. Ct. at 2021-22.

[130] *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189-90 (2007).

[131] *See* 18 U.S.C. § 3.

[132] *See* 18 U.S.C. § 4.

these federal enhancements to any theories that any state has now or may devise in the future.

- It would move from a requirement that the offense be an attempt or conspiracy to commit the substantive offense to one that covers any inchoate offense or offense arising from accomplice liability "involving" the substantive offenses, which could be interpreted to broadly reach offenses that "relate to or connect with" the substantive offenses.[133]

- It would eliminate the requirement of a match between the elements of the inchoate offenses and the offenses arising out of accomplice liability, which would treat even the furthest outlier theories of liability as equivalent to the completed substantive offenses.[134]

As with the Commission's proposal to define "controlled substance" to include any substance "controlled under applicable state law," this open-ended proposal would cede entirely to the states the ability to invent new forms of liability that trigger severe federal sentencing penalties.

If the Commission insists on including inchoate offenses and offenses arising out of accomplice liability, it should do no more than move the definition from the commentary into the text as written: "'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[135] And it should define these terms in the generic sense.[136] But, given that the career offender guideline already reaches too far, even this expansion is not warranted.

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[133] *See, e.g., United States v. Fields*, 53 F.4th 1027, 1045 (6th Cir. 2022) (discussing varying interpretations of the term "involving").

[134] *See, e.g.*, *Richeson v. State*, 704 N.E.2d 1008, 1010 (Ind. 1998) (holding that Indiana attempt law does not require state to prove defendant had intent to commit substantive crime).

[135] USSG §4B1.2, comment. (n. 1).

[136] For example, most state conspiracies require an overt act. 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b) n.52 (3d ed. Oct. 2022 update).

D. The Commission should not expand the controlled substance offense definition to include offers to sell.

Part D of the Commission's proposal is to add "offers to sell" and title 46 offenses to the definition of "controlled substance offense."[137] The Commission should not expand the definition to include "offers to sell." Section 2L1.2's inclusion of "offers to sell" a controlled substance is an anomaly. It was added by the Commission in 2008 only to §2L1.2, and no reason was given for its addition.[138] Offer to sell is not included in § 994(h), there is no such federal offense, and the states that criminalize it permit convictions without any possession of, or intent or ability to sell, a controlled substance.[139] A conviction can be sustained for selling baking soda, coffee, and sugar.[140] If anything, §2L1.2 should be amended to *delete* offers to sell. Expanding the definition of "controlled substance offense" would unjustifiably extend the reach of a guideline that undisputedly reaches too far already.

The Commission must, however, consistent with § 994(h), include offenses described in chapter 705 of title 46. As Defenders recommend in our Statement regarding the "controlled substance offense" circuit conflict, the Commission should limit the definition of "controlled substance offense" to the offenses enumerated in § 994(h), while continuing to press Congress to eliminate the career offender status of those convicted solely of controlled substance offenses.[141]

IV. Conclusion

Both the courts and the Commission have long recognized that the career offender guideline calls for sentences that are too high in most of the cases it captures. This leads to both over-incarceration and racial inequality in sentencing. Although the Commission cannot ignore or eliminate the career offender directive on its own, it can take steps to ensure that its guideline applies to no one to whom the directive itself does not apply.

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[137] 2023 Proposed Amendments at 7217-18.

[138] USSG App. C, Amend. 723, Reason for Amendment (Nov 1, 2008).

[139] Defender Comments on 2019 Proposed Amendments at 35 & nn.168, 169.

[140] *Id.* at 35 n.169.

[141] *See* Statement of Michael Caruso on Acceptance of Responsibility and Controlled Substance Offense § II.B (March 7, 2023).

The Defenders urge the Commission to reject all parts of the proposed amendment.

Federal Public and Community Defenders Comment on Crime Legislation (Proposal 5)

March 14, 2023

The Commission seeks comment on its proposed eleven-part crime legislation amendment, which recommends a wide range of amendments to the Guidelines to respond to recently enacted legislation. Defenders encourage the Commission to index all new criminal statutes to USSG §2X5.1 in the first instance. If the Commission elects to index these statutes to specific subject-matter guidelines, Defenders urge the Commission not to make any further amendments to those guidelines at this time.

I. The Commission should index all new criminal statutes to USSG §2X5.1.

At the outset, the Commission should allow district courts to determine the most analogous guideline in the first instance by indexing all new crimes to USSG §2X5.1. By design, the Guidelines are an "evolutionary" system.[1] "[T]he Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time."[2] This principle applies not just to revising the Guidelines, but also to extending particular guidelines to cover new offenses. "[I]n creating categories and determining sentence lengths, the Commission, by and large, follow[s] typical past practice."[3]

For this system to work as intended, the Commission needs to give sentencing courts time and space to exercise their sentencing discretion in cases involving new criminal statutes, thereby generating the feedback needed to properly develop guidelines that adequately reflect the statutory purposes of sentencing. The Commission should not immediately index new criminal statutes to existing substantive guidelines because the anchoring function of those substantive guidelines will—in effect—corrupt the data the Commission needs to do its job in an empirically informed way.[4] Once enough new offenses have been prosecuted and sentenced, the Commission will have the data it needs to evaluate which substantive guidelines the new crime

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[1] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988).

[2] *Id.*

[3] *Id.* at 7.

[4] *See generally* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489 (2014).

legislation should be indexed to and whether any adjustments to those guidelines need to be made.

II. The Commission should not use the proposed crime legislation amendment to make substantive amendments to any guidelines.

In the event the Commission decides to index the new crimes to substantive guidelines, Defenders urge the Commission not to also substantively amend those guidelines, as proposed in the crime legislation amendment[5] and by the Department of Justice.[6] The substantive proposals implicate a range of hard questions that warrant careful study. Yet none of these relatively new statutes has received focused review by the courts or stakeholders. An omnibus crime legislation amendment—which seeks to update the Guidelines to cover the extensive legislative activity that occurred while the Commission lacked a quorum—is not the right vehicle for substantive amendments to particular guidelines.

III. Conclusion

The Commission should index all new criminal statutes to §2X5.1 to permit the evolutionary process of Guidelines development to unfold properly. If the Commission elects to index the new criminal statutes to discrete substantive guidelines, it should take no further action with respect to these statutes. Particularly given this highly expedited amendment cycle and the lack of a public hearing on the crime legislation proposals, no substantive amendments to any specific guidelines should be promulgated through this omnibus crime legislation amendment.

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[5] Specifically, the Commission proposes expanding §2G1.1(b)(1) and adding a new specific offense characteristic at §2G1.3(b)(4)(B). There is no empirical or other stated basis for these four-level proposed increases, and Defenders oppose them.

[6] *See* Letter from Jonathan J. Wroblewski on behalf of the DOJ to the Sentencing Comm'n at 23–26 (Feb. 27, 2023).

Federal Public and Community Defenders
Comment on Criminal History (Proposal 7)

March 14, 2023

I. Parts A and B: Status Points and Criminal History Zero.

Defenders are pleased to support the Commission's proposed amendments to eliminate status points and to provide increased sentencing options for persons with zero criminal history points. We urge the Commission to adopt Option 3 of Part A of the proposed amendment (eliminating status points) and adopt Option 2 of Part B of the proposed amendment (defining "first offender" as a person with no countable criminal history points). We encourage the Commission to amend §5C1.1 Application Note 4 to adopt the proposed downward departure for persons in Zones A and B. And the Commission should extend the same invited departure to persons in Zones C and D.

The attached March 8, 2023 Statement of Jami Johnson contains our comments on Parts A and B of Proposed Amendment 7.

II. Part C: Impact of Simple Possession of Marijuana.

Defenders join the Department of Justice (DOJ) and the Practitioners Advisory Group (PAG) in commending the Commission for its proposed amendment to address the impact of convictions for the simple possession of marijuana. As the legal landscape of marijuana changes, so too should the guidelines to reflect the advancement in knowledge and changing perception of marijuana possession.

Defenders encourage the Commission to amend §4A1.2(c)(2) to exclude any sentence for the simple possession of marijuana from the criminal history score. Excluding prior convictions for the simple possession of marijuana would further the Commission's duties for three reasons. *First*, the criminalization of the simple possession of marijuana has been categorically unjust since its inception. It has resulted in high arrest and conviction rates as well as longer sentences for Black and Latino individuals that are inconsistent with the Commission's goal of avoiding unwarranted disparities. *Second*, excluding prior convictions for the simple possession of marijuana would be empirically based and would reflect the shift in the legal status of marijuana possession in many jurisdictions nationwide. *Third*, the simple possession of marijuana is similar to other excludable offenses enumerated in §4A1.2(c)(2). Adding simple marijuana possession offenses to §4A1.2(c)(2) would promote certainty, uniformity, and fairness by ensuring that all simple possession of marijuana offenses are treated similarly.

A. Categorically excluding prior offenses for the simple possession of marijuana from the criminal history score would reduce unwarranted racial disparities.

Excluding simple possession of marijuana from the criminal history calculation is a crucial step toward reducing racial disparities in federal sentencing. As the ACLU recently recognized, "marijuana enforcement remains as racialized as ever."[1] In 2018, marijuana offenses still accounted for approximately 43% of all drug arrests.[2] Of those, approximately 90% of marijuana-related offenses were for the simple possession of marijuana.[3] Notably, the vast majority of those arrested for the simple possession of marijuana were Black. "On average, a Black person is 3.64 times more likely to be arrested for marijuana possession than a white person, even though Black and white people use marijuana at similar rates."[4] The Commission's own data highlights how these racial disparities are perpetuated in federal sentencing. White people account for only "about one-fifth" of federally sentenced individuals with marijuana-possession priors.[5] By contrast, "[a]lmost half of those with a marijuana prior were Black (47.0%) and nearly one-third were Hispanic (31.1%)."[6] And the numbers are even more alarming when analyzing the impact on criminal history categories: over 80% of persons "whose criminal history category was impacted by a prior marijuana possession sentence" were either Black or Hispanic.[7]

Excluding these offenses under §4A1.2(c)(2) would go a long way towards preventing this deep-seated injustice from continuing to lengthen federal sentences.

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[1] ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* 37 (2020), https://bityl.co/HSuO.

[2] *See id.* at 5. In 2010, marijuana arrests made up "just over 50 percent of drug arrests." *Id.* at 7.

[3] *See id.*

[4] *See id.* at 5.

[5] *See* USSC, *Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System* 16 (2023) (hereinafter "2023 Simple Possession Report").

[6] *Id.*

[7] *See id.* at 3.

B. Public perception of marijuana use supports a categorical exclusion of marijuana-possession offenses.

The guidelines should reflect the general consensus of the American public on marijuana, including state and federal lawmakers. As of last year, 44 states permitted some use of marijuana, a notable increase from the 28 states that permitted some use of marijuana in 2011.[8] These legal changes are largely the byproduct of "popularly-approved state initiatives and propositions . . . ," suggesting society's judgment that Americans are no longer willing to disenfranchise, stigmatize, and punish those who simply possess marijuana.[9]

The federal government is starting to follow suit. In October 2022, President Biden declared that "no one should be in jail just for using or possessing marijuana,"[10] and issued pardons for people with federal convictions for simple possession.[11] Last year, the House of Representatives passed the MORE Act, which would have removed marijuana from the list of scheduled substances under the Controlled Substances Act and eliminated criminal penalties for manufacturing, distributing and possessing marijuana.[12] In 2021, United States Senator Cory Booker introduced legislation to not only legalize marijuana federally, but to reinvest in the communities most harmed by the War on Drugs through job-readiness trainings, equitable marijuana industry policies, and expungement of criminal records.[13] And DOJ has pledged not to prioritize simple possession of

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[8] *See* USSC, *Public Data Briefing Presentation for Proposed Criminal History Amendment* Slide 61 (2023).

[9] Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. Crim. L. & Criminology 379, 401 (2020).

[10] The White House, *Statement from President Biden on Marijuana Reform*, (October 6, 2022) (pardoning citizens and lawful permanent residents who had been previously convicted of the federal offense of simple possession of marijuana) (hereinafter "Biden Marijuana Reform Statement"); *see also* 2023 Simple Possession Report, *supra* note 5 at 28 ("Over the last several decades, the legal status of marijuana has been changing in many states and territories.").

[11] Biden Marijuana Reform Statement, *supra* note 10.

[12] *See* H.R. Rep. No. 3617, 117th Cong. (2022).

[13] *See* S. 4591, 117th Cong. §§ 101, 306 (2022).

marijuana prosecutions.[14] Currently, no one remains in federal custody for simple possession alone.[15]

Despite this ideological shift, in Fiscal Year 2021, 4,405 individuals received criminal history points for prior marijuana possession sentences.[16] And for over 40% of these individuals, their prior marijuana possession sentences resulted in a higher criminal history category.[17] This should not be.[18] Using marijuana does not predict recidivism.[19] And penalizing simple possession of marijuana does not promote public safety.[20] Indeed, enhancing punishment for such widely decriminalized and destigmatized activity promotes "not respect, but derision, of the law. . . ."[21]

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[14] *See* Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sentencing Comm'n at 45 (Feb. 27, 2023).

[15] *See* 2023 Simple Possession Report, *supra* note 5, at 2.

[16] *See id.* at 3.

[17] *See id.*

[18] Particularly because individuals charged with marijuana possession offenses may not be afforded counsel if the charges do not carry terms of imprisonment. *See* Jordan Cunnings, *Nonserious Marijuana Offenses and Noncitizens*, 62 UCLA L. Rev. 510 (2015); *see also United States v. Boots*, 314 F.Supp.2d 141 (2004); *United States v. Jenkins*, 989 F.2d 979 (1993); *United States v. Falesbork*, 5 F.3d 715 (1993).

[19] *See, e.g.*, Ojmarrh Mitchell, *Drug Use Disorders before, during, and after Imprisonment*, 51 Crime & Just. 307, 324 (2022) ("[U]se of marijuana . . . by [itself] d[oes] not predict recidivism. . . .").

[20] *See, e.g.*, Mary K. Stohr, et al., *Effects of Marijuana Legalization on Law Enforcement and Crime: Final Report* 7 (2020), https://bityl.co/HT01 ("[L]egalization [of marijuana use] appears to have coincided with an increase in crime clearance rates in several areas of offending and an overall null effect on rates of serious crime.").

[21] *Gall v. United States*, 552 U.S. 38, 54 (2007). This is particularly true when publicly traded U.S. corporations have made billions of dollars selling marijuana. *See* Wayne Duggan, *9 Best Cannabis Stocks of 2023*, Forbes (Mar. 2, 2023), https://www.forbes.com/advisor/investing/best-cannabis-stocks/ (legal U.S. cannabis sales "increased 35% in 2021, to a total of $24.6 billion").

C. Adding simple possession of marijuana to the excluded offenses in §4A1.2(c)(2) would promote certainty, uniformity, and fairness.

Excluding simple possession of marijuana priors from the criminal history computation would promote certainty, uniformity, and fairness. In many states, simple possession of marijuana is treated with more leniency than the offenses currently excluded from the criminal history calculation. Consider public intoxication. In California, public intoxication is a misdemeanor with a maximum penalty of 6 months and a maximum fine of $1,000.[22] Possession of more than 28.5 grams of marijuana for personal use in California can result in up to 6 months in jail (like public intoxication), $500 in fines, or both.[23] In Virginia, there is no penalty for possessing less than one ounce of marijuana.[24] Possession of 1 to 4 ounces of marijuana in public is punishable as a civil violation with a maximum fine of $25.[25] Public intoxication, on the other hand, is a class 4 misdemeanor, and is punishable with a maximum fine of $250.[26]

Further, excluding simple possession of marijuana ensures marijuana possession priors are not used to enhance the guideline range and that similarly situated individuals are treated similarly regardless of state and local practices. A discretionary downward departure—an alternative the Commission proposes, and DOJ supports—would not provide the same level of certainty, uniformity, and fairness since judges would be free to ignore the departure provision. An invited downward departure would leave individuals with marijuana possession priors in an uncertain position at sentencing. And Defenders are concerned that some judges would be hesitant to depart below the guidelines where the departure request is not sponsored by the government.[27] A departure-based approach to prior marijuana possession

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[22] *See* Cal. Penal Code §§ 19, 647(f).

[23] *See* Cal. Health & Safety Code § 11357(b)(2).

[24] *See* Va. Code Ann. § 4.1-1100.

[25] *See id.*

[26] *See* Va. Code Ann. §§ 18.2-11, 18.2-388.

[27] *See* USSC, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics* 84 (2021), https://bityl.co/HT0Q (noting that non-government-sponsored downward departures were granted in only 2.6% of all federal sentencings in FY 2021).

offenses does not fully promote the policy rationale underlying this proposal, which is properly focused on this entire, problematic class of convictions—not an undefined, random subset.[28]

Full exclusion of these prior convictions would promote fairness and uniformity in other ways as well. DOJ's proposal to permit courts to consider extraneous, non-elemental, and accusatory facts, including "the nature of the original charges, the facts surrounding the offense. . ., whether the defendant's conviction was the result of a plea agreement that involved the dismissal of drug trafficking charges, and whether the offense was subsequently pardoned," when deciding whether or to what extent to depart, would complicate the analysis and lead to unjust results.[29] As we know from the categorical approach, "[s]tatements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary."[30] "At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law . . . ."[31] Indeed, a person "'may have good reason not to'—or even be precluded from doing so by the court."[32] In such instances, a factual error "reflected in the record, is likely to go uncorrected."[33] This is particularly true for uncounseled individuals.[34] Uncorrected and inaccurate facts not reflected in a person's

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[28] 28 U.S.C. § 994(f) and 28 U.S.C. § 991(b)(B) direct the Commission to avoid unwarranted sentencing disparities. Specifically, § 991(b)(B) directs the Commission "to provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences. . . ." Excluding prior convictions for simple possession of marijuana from increasing a person's guideline range fulfills the Commission's duties under § 991(b)(B).

[29] *See* Letter from Jonathan Wroblewski, *supra* note 14, at 45.

[30] *Mathis v. United States*, 579 U.S. 500, 512 (2016) (quoting *Decamps v. United States*, 570, U.S. 254, 270 (2013)) (noting that factual "inaccuracies should not come back to haunt the defendant many years down the road….").

[31] *Id.*

[32] *Id.* (quoting *Decamps*, 570 U.S. at 270).

[33] *Id.*

[34] *See* Cunnings, *supra* note 18.

conviction for the simple possession of marijuana "should not come back to haunt" them "down the road."[35]

For all these reasons, we urge the Commission to add simple possession of marijuana to the list of excluded offenses in §4A1.2(c)(2).

[35] *Mathis*, 579 U.S. at 512.

Before the United States Sentencing Commission
Public Hearing on Criminal History

Statement of Jami Johnson, Appellate Attorney
Federal Defenders of San Diego, Inc.
on Behalf of the Federal Public and Community Defenders

March 8, 2023

Statement of Jami Johnson
Appellate Attorney for the
Federal Defenders of San Diego, Inc.
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
Public Hearing on Criminal History
March 8, 2023

My name is Jami Johnson, and I am an appellate attorney at the Federal Defenders of San Diego, Inc., the Federal Community Defender Organization for the Southern District of California. Thank you for inviting me to testify on behalf of the Federal Public and Community Defenders in support of the Commission's proposed amendments on criminal history.

Aside from offense level, an individual's criminal history score is the single most powerful factor in determining their guideline range. Congress did not mandate this structure; the Commission selected it.[1] There are good reasons why criminal history should not play such a prominent role in the sentencing process. The criminal history rules are numerous and complex. They often lead to unjust, unnecessarily long sentences that exacerbate racial disparities. And research confirms that increasing sentences based on prior criminal convictions is often not justified by any commonly recognized goal of sentencing.[2] Defenders hope to continue to work alongside the Commission to consider ways to reduce the outsized effect criminal history has on guidelines calculations.

We appreciate the Commission's efforts to make Chapter 4 fairer and to better encourage alternatives to incarceration. In my decade as a criminal

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[1] *See* 28 U.S.C. § 994(d)(10) (directing the Commission to consider, to the extent relevant, criminal history when establishing the guidelines and policy statements); *id*. § 994(h) (directing the Commission to assure the guidelines recommend a sentence "at or near" the statutory maximum for individuals convicted of certain felonies who sustained at least two prior convictions for certain felonies); *id*. § 994(j) (directing the Commission to assure the guidelines "reflect the general appropriateness" of a sentence other than imprisonment for a "first offender" who has not been convicted of a "crime of violence or otherwise serious offense").

[2] *See* Rhys Hester et al., *Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences* 47 Crime & Just. 209, 242 (2018) ("The high cost and adverse effects of prior record sentencing enhancements might be tolerable if they served important punishment purposes, but all of the potential justifications for these enhancements are weak."); *see also* Christopher Lewis, *The Paradox of Recidivism*, 70 Emory L.J. 1209, 1270 (2021).

defense attorney, I have seen firsthand the outsized impact criminal history plays in federal sentencing. Moreover, while the guidelines consider numerous aspects of a person's criminal history to *increase* the guideline range, there are few rules that recommend a decrease in sentence based on the nature or extent of a person's criminal history. While this year's proposed criminal history amendments retain the guidelines' undue emphasis on a defendant's criminal history score, we recognize that each proposal would go a long way towards implementing the Commission's statutory duties under 28 U.S.C. §§ 991(b)(1), 994(g), and 994(j).[3] For these reasons, Defenders are pleased to support them.

I address Part B (persons with zero criminal history points) and Part A (status points) of the proposed criminal history amendments below. Defenders will address Part C (impact of simple possession of marijuana offenses) in our comment letter submitted on a later date.

I. Persons with Zero Criminal History Points

Defenders commend the Commission's efforts to change to the way the guidelines treat persons with zero criminal history points. Amendments that encourage more frequent use of non-prison sentences are consistent with the Commission's duties under 28 U.S.C. §§ 994(j) and (g), further the purposes of sentencing, and are reinforced by the Commission's research.

When Congress enacted the Sentencing Reform Act in 1984, it believed there was "too much reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty that results from imprisonment."[4] Through the

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[3] *See* 28 U.S.C. §§ 991(b)(1)(C) (requiring the Commission to establish sentencing policies that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process"); 944(g) (requiring the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons"); 994(j) (requiring the Commission to ensure that "first offenders" who commit non-serious offenses generally receive non-custodial sentences).

[4] S. Rep. No. 98-225, at 59 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3242. *See also id.* at 50 (finding that the law "is not particularly flexible in providing the sentencing judge with a range of options," such that "a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available" or "a longer term than would ordinarily be appropriate simply because

SRA, Congress sought to "assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case,"[5] including probation with meaningful conditions, and alternatives to all or part of a prison term such as fines, community service, and intermittent confinement.[6]

As Defenders, however, we have seen first-hand the under-utilization of alternatives to incarceration, particularly for clients whose offenses fall within Zone C or Zone D of the guidelines.[7] District court judges take seriously, as they should, the guidance of the Commission in fashioning sentences. We have observed that judges are often reluctant to award the kind of variances that would be necessary to impose a non-custodial sentence in cases that fall within these zones, even when other relevant sentencing factors suggest that a sentence other than imprisonment would be appropriate.

I've had many clients over the years that would benefit from the Commission's proposals regarding first-time offenders, but three in particular come to mind.

I represented Julio when I was an Assistant Federal Public Defender in the District of Arizona.[8] Julio was a 19-year-old U.S. citizen who was born in Yuma, Arizona to Mexican citizen parents. His parents returned to Mexico shortly after his birth, and apart from spending a few months in Arizona at the age of 10, he grew up entirely outside of the United States. When he began school in Mexico, he was diagnosed with an intellectual disability and enrolled in a program for students with special needs. Despite seven years of full-time education, Julio never learned to read or write very well. He had difficulty learning and retaining new material, repeated multiple grades, and

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there were no available alternatives that served the purposes he sought to achieve with a long sentence.").

[5] *Id.* at 39.

[6] *See id.* at 50, 59.

[7] *Cf.* USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5, 8 (2015), https://tinyurl.com/yck3j8rp (recognizing statutory and citizenship limits on some types of alternative sentences).

[8] I am referring to "Julio" by an alias to respect his privacy with regard to certain medical and mental health information.

failed to make significant academic progress despite receiving services both at school and at home.

As is unfortunately common for individuals with intellectual disabilities, Julio experienced bullying at school and had difficulties finding friends among his same-age peers. He spent his social time playing with his younger siblings and with the much-younger grade school children in his neighborhood. Even as a teenager, his mother reported that he was "childlike" and had few, if any, friends his own age.

When Julio was 10, his parents separated, and his father died by suicide shortly thereafter. His father's suicide was traumatic for Julio and further limited both his academic and social progress. He ultimately left school at the age of 13 because he found even the modified curriculum too challenging, and he was unable to keep up.

When he was 15 or 16, Julio began crossing the border into the United States to pick lettuce and watermelon on the farms in Southern Arizona. Because he did not know how to read a map, ask for or follow directions, or find his way to unfamiliar places without assistance, Julio never crossed the border by himself. Other workers looked out for him and made sure he made it home safe every night.

Finally, when he was 19 years old, Julio was approached in Mexico by someone who lived on his block and asked if he would like to make some extra money by carrying drugs into the United States. Julio initially said he would be interested, but after he had time to think about it, he decided he did not want to do it after all. Having changed his mind, Julio had no intention of carrying drugs into the United States, but one morning, a person he had never seen before showed up at his house and told him that he was going to carry drugs that day. Julio didn't know what to do, so he got into the man's car, and the man drove him to a place near the border, where other unknown individuals taped methamphetamine to him. He was then led to the San Luis port of entry by the unknown man.

At the port of entry, Julio was quickly referred to secondary inspection. When asked if he had anything attached to his body, Julio immediately volunteered that he had "ice" strapped to his thighs. He made this admission before agents patted him down or called a narcotics dog. He was arrested and

charged with attempted importation of methamphetamine and possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 960(b)(3) and 841(b)(1)(C).

During his post-arrest interview, Julio told the agents everything he knew. Julio's intellectual disabilities were apparent throughout the interview. He declined the written *Miranda* advisory, explaining he could not read. He was unable to supply the agents with basic biographical information about himself, such as his height or weight, or to provide reasonable guesses of the same. He didn't know his own phone number, or the phone numbers of any family members. When asked, he was unable to tell the agents that he was attempting to enter the state of Arizona, but rather knew only that he was entering the "United States."

Julio had no criminal history whatsoever. But knowing no one in the United States and having nowhere to live, he remained in pretrial detention during the pendency of his case. A neuropsychological exam performed while he was in custody confirmed that Julio was "severely impaired" in the areas of learning, recognition, and working memory and in executive function, which measures individuals' ability to plan, strategize, and make decisions. The examiner opined that these characteristics made him unusually susceptible to exploitation and likely contributed to his becoming involved in the offense.

The same characteristics that made Julio vulnerable to exploitation by unscrupulous elements within his community also made him vulnerable in jail. While in pretrial detention, Julio was repeatedly exposed to negative influences. Having never been in a fight in his life, he was told by other prisoners that if one of them got into a fight, he had to "help," or he would be beaten up.

Julio ultimately pleaded guilty to one count of possessing methamphetamine with the intent to distribute. At sentencing, he faced guidelines of 33 to 41 months. Notwithstanding these guidelines, I asked the court to sentence Julio to time served. What Julio needed most desperately was access to services, in particular services for adults with special needs. He also needed to stay as far away as possible from influences of the sort he was virtually certain to be exposed to in jail. The probation office and the

government both agreed that a variance was appropriate, though they disagreed about the amount, and recommended a sentence of 24 months.

The Court ultimately sentenced Julio to 21 months in prison. In imposing sentence, the district judge agreed that Julio's age and his developmental issues were factors that warranted a variance. Nevertheless, the district court cited "the judgement of Congress and the Sentencing Commission" that such offenses should be dealt with "harshly" in explaining why it declined to vary further.

If the guidelines contained a departure which invited a sentence other than imprisonment, Julio might not have been sentenced to prison at all. Julio's track record on supervision demonstrated his amenability and ability to perform well while supervised outside a custodial setting. He began a three-year term of supervised release in November 2017 and completed it in November 2020 without violation.

Another client who illustrates the need for special consideration for "first offenders" is Vania Alvarado. When I met Ms. Alvarado in 2018, she was a 27-year-old United States citizen with no criminal history and no prior contacts with law enforcement. She was born in the United States and grew up in both the United States and Mexico, moving back and forth between the two countries with her permanent resident parents and three U.S.-citizen siblings.

When Ms. Alvarado was in high school, she met and entered into a relationship with a man who was several years her senior. She became pregnant, and they married. The marriage was not happy. Her husband was physically abusive, controlling, and addicted to drugs. He introduced her to drugs and used drugs to control her.

Ms. Alvarado, very young, addicted to meth, and with a small child, lacked the strength to leave the relationship until 2013, when her second child was born. Her child tested positive for methamphetamine upon its birth, and as a result, the state of Arizona took custody of both of her children and placed them with relatives of her husband.

The intervention of the state motivated Ms. Alvarado to change her life and regain custody of her children. Ms. Alvarado tried to get herself into drug treatment but was unable to secure a residential treatment placement

because of backlogs caused by lack of state funding. With an open family court case and the threat of losing her children over her head, Ms. Alvarado nevertheless persisted in her determination to stop using drugs and, against the odds, managed to get sober all on her own. She also divorced her husband when his own attempts at sobriety proved less successful than hers.

Sadly, in 2016, despite three years of sobriety and three years of diligent compliance with the family court requirements, the family court terminated Ms. Alvarado's parental rights. The termination of Ms. Alvarado's parental rights sent Ms. Alvarado into a self-destructive downward spiral. She relapsed on drugs, using much more than she ever had before. She also began intentionally to engage in reckless and self-destructive behaviors.

In the midst of this binge of self-destructive behavior, Ms. Alvarado impulsively agreed to drive a load of drugs across the border. She was arrested at the San Luis port of entry with drugs in her car and charged with attempted importation and possession with intent to distribute methamphetamine. She was granted pretrial release on condition that she reside at a residential drug rehabilitation center. This was the first organized drug treatment program she'd ever been offered. She spent four months living at Crossroads for Women in Phoenix, a residential drug treatment facility, where she thrived.

Particularly helpful to Ms. Alvarado was the mother's group at Crossroads. Many of the women in the group were older than Ms. Alvarado. Some even had grown children. One day, one of the women pointed out to Ms. Alvarado that while she couldn't control what had happened in the past, she could control what her children would find if and when they ever came looking for her. They could either find a drug-addicted woman who made them grateful that their adoptive parents had taken them away, or they could find a sober, healthy woman with whom they wanted to build a relationship. She realized that because she had no control over when or if that day might ever arrive, she had to stay sober every day for the rest of her life.

Ms. Alvarado ultimately pleaded guilty to possession with intent to distribute 50 grams or more of methamphetamine. She faced guidelines of 41 to 51 months. I argued for a significant downward variance because of her lack of criminal history and post-offense rehabilitation. At sentencing, the

judge commended Ms. Alvarado for her efforts on pretrial release. He expressed sympathy for her losses and expressed confidence that in light of the changes she had made that he would not see her in his courtroom again. Nevertheless, in imposing sentence, the judge deferred to the guidelines and imposed a 41-month sentence—the bottom of the recommended range.

This sentence shows the seriousness with which judges take the guidelines and their recommendations. The district judge expressed confidence that Ms. Alvarado was on the right path and would not recidivate. But despite his confidence, he ultimately imposed the sentence recommended by the guidelines.

Like Julio, Ms. Alvarado's performance on supervised release continues to demonstrate that she was a good candidate for supervision and services instead of incarceration. She was released from custody in April 2021 and has remained out of custody on supervision without incident for the last two years.

A third client who exemplifies why "first offenders" should be treated differently is Mario Chavez. Mr. Chavez is a United States citizen who was born in Chandler, Arizona. His parents divorced when he was very young, and his mother moved to Mexico to be near her family and took Mr. Chavez with her. His father remained in Chandler.

Mr. Chavez had a good childhood. Both his parents were active in his upbringing and worked hard to provide him with the basic necessities. He was able to travel frequently to Chandler to spend time with his U.S.-based family. Because he lived in Mexico he was not, however, eligible to attend school in the United States and thus never learned English. Even with supportive parents, at 15 he started making poor choices. He started going to parties and clubs in Mexico, where he drank alcohol and occasionally experimented with cocaine.

Mr. Chavez was not yet 18 when he met a man in one of these clubs who offered him money to transport drugs into the United States. He was arrested transporting these drugs in November 2019—less than 3 months after his 18th birthday.

Mr. Chavez was released to the custody of his father. He pleaded guilty quickly to one count of possession with intent to distribute

methamphetamine in February 2020, a few weeks before the then-emerging COVID-19 pandemic brought courts to a standstill. The district court sua sponte reset his sentencing four times through April 2021. By the time his sentencing date arrived, Mr. Chavez had been on pretrial release for almost 16 months.

During his 16 months of pretrial release, Mr. Chavez grew up. His father found him a job at the construction company where he worked. He received a promotion and a raise, and received glowing reviews from his supervisor, who told the probation office that he was welcome to return to work at the company at any time.

The structure of living with his father and going to work every day also helped Mr. Chavez make better choices about how to spend his free time. He didn't drink or use drugs while on pretrial release. He saved his money and paid cash to buy his first car. He got his driver's license. He also learned English. At the time of his arrest, Mr. Chavez spoke almost no English, knowing only what he had picked up through casual interactions with his U.S.-based family. By sentencing, Mr. Chavez's English improved to a point that he required only minimal assistance from an interpreter.

In light of Mr. Chavez's age and his exceptional performance on pretrial release that demonstrated his amenability to community supervision, I requested that he not receive any additional time in custody, even though his guidelines were 41 to 51 months. The district judge was also impressed with Mr. Chavez's turnaround—so impressed that he gave Mr. Chavez what he reported was the lowest sentence he believed he'd ever imposed in a drug courier case: 6 months.

The district judge clearly viewed the variance he gave Mr. Chavez as exceptional. It was the largest one he'd ever given in a case of this sort. But notwithstanding the exceptional nature of this case, the district judge nevertheless felt obligated to impose a custodial sentence. Had the guidelines made clear that the district judge was authorized or encouraged to consider alternatives to incarceration, Mr. Chavez might have received a different sentence.

These cases demonstrate the importance of reform, in particular for "first offenders." In enacting the SRA, Congress tasked judges and the

Commission with assuring that the full range of sentencing options, not merely incarceration, were available. Judges were instructed to consider "the kinds of sentences available" prior to imposing a sentence sufficient but not greater than necessary to serve the purposes of sentencing.[9] And the Commission was instructed to ensure "that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[10]

Unfortunately, the use of probation and other alternatives to prison dramatically decreased after the SRA. When the SRA was enacted "almost 50 [percent] of federal sentences were sentenced to straight probation."[11] Under the initial guidelines, approximately 15 percent of sentences were to straight probation.[12] Last year, straight probation was imposed in only 6.2 percent of cases.[13] And no matter the sentencing zone, alternative sentences other than probation are exceedingly rare.[14]

We recognize the modest steps the Commission has taken so far to increase sentencing options and encourage alternatives to incarceration.[15]

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[9] 18 U.S.C. § 3553(a)(3).

[10] 28 U.S.C. § 994(j).

[11] Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers* 56 Stan. L. Rev. 1211, 1222 (2004).

[12] See *id.* at 1222.

[13] *See* USSC, *2021 Sourcebook of Federal Sentencing Statistics* fig. 6 & tbl. 14 (2022), https://bit.ly/3TL44UL ("FY 2021 Sourcebook") (excluding non-U.S. citizens, probation only sentences were imposed 8.1 percent of the time); *see also* Cecelia Kingele, *What's Missing? The Absence of Probation in Federal Sentencing Reform* 34 Fed. Sent'g Rep. 322, 324 (2022) (recognizing that while for some offenses, probation is prohibited by statute, judges are still imposing imprisonment in many cases where probation is available).

[14] *See* FY 2021 Sourcebook, at tbl. 14; *see also* USSC, *Public Data Presentation for Proposed Criminal History Amendment*, slide 58 (2023), https://tinyurl.com/2p9989vf ("CH Data Briefing") (reporting that people sentenced last year who would have been eligible for the proposed §5C1.1 application note 4 departure received prison-only sentences 79.3 percent of the time).

[15] *See*, *e.g.*, USSG App. C, Amend. 811 (Nov. 1, 2018) (adding cmt. n.4 to §5C1.1 defining "first offender" and recommending "the court should consider imposing a sentence other than a sentence of imprisonment"); *id.*, Amend. 738 (Nov. 1, 2010) (expanding Zone B and Zone C of the Sentencing Table by one level each); *id.*,

But, as the Commission's data and research reflect, more can be done.[16] To better capture the purpose and spirit of § 994(j) and better encourage sentences that are no greater than necessary to serve the purposes of 18 U.S.C. § 3553(a), the Commission should adopt Option 2 of the proposed amendment with the narrowest set of exclusions. The Commission should also make clear that a sentence other than imprisonment is generally appropriate for persons who qualify as "zero-point offenders" under Option 2 of the proposed amendment, regardless of their zone on the sentencing table.

A. The Commission should adopt Option 2 of the proposed amendment, which defines "first offender" as a person with zero criminal history points.

The Commission has proposed two alternative definitions of a "first offender." Option 1 would define a "first offender" as a person with "no prior convictions or other comparable judicial dispositions of any kind," including juvenile adjudications or diversionary or deferred dispositions.[17] Option 2 would define a "first offender" as someone with zero countable criminal history points.[18] Option 2 is the superior policy choice for several reasons.

Fairness. Option 2 is the fairer option. Excluding persons with non-countable convictions from the "first offender" status—no matter the nature or type of the disposition—would raise significant fairness concerns and perpetuate unwarranted disparities.

Option 1 would exclude far too many people with prior contacts with law enforcement, the outcomes of which are not worthy of confidence. It would exclude, for example, many residents of Ferguson, Missouri, where a 2015 report by the Department of Justice Civil Rights Division found that the municipal court system, which "handle[d] most charges brought by [the

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Amend. 462 (Nov. 1, 1992) (expanding the number of cells of the Sentencing Table in which straight probation is permissible).

[16] *See* USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5 (2015), https://tinyurl.com/yck3j8rp ("Alternative Sentencing") (finding that the "low rate" of alternative sentences "primarily is due to the predominance of offenders whose sentencing ranges were in Zone D of the Sentencing Table").

[17] Proposed Amendments, 88 Fed. Reg. 7180, 7221 (proposed Feb. 2, 2023) ("2023 Proposed Amendment").

[18] *See id.*

Ferguson Police Department]" did so "not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue."[19] The DOJ report found that the municipal court system imposed harsh financial penalties for minor code violations and harsher penalties if a defendant was unable to pay.[20] The DOJ ultimately concluded "[t]he impact that revenue concerns have on court operations undermines the court's role as a fair and impartial judicial body" and that these unlawful practices had a disproportionate effect on the African-American residents of Ferguson.[21]

Problems with municipal court systems are not isolated to Ferguson. Arizona, for example, operates a city court system not unlike the one used in Ferguson, Missouri. A 2017 report by the Goldwater Institute, a conservative and libertarian think tank, laid bare the problems with the Arizona courts.[22] As in Ferguson, city court judges in Arizona are appointed by the city council and the mayor and are not elected by the people.[23] They are therefore beholden not to the electorate but to the city officials who are responsible for raising revenue. Municipal judges are not required by Arizona law to be lawyers.[24] As in Ferguson, municipal courts in Arizona often boast of the revenue they raise for the city.[25]

City courts in Arizona have jurisdiction over violations of city code, which are frequently classified as criminal misdemeanors. Charges can include such violations as "having excessively tall weeds in your yard, littering, failing to return a library book, and violating city smoking ordinances, all of which are considered criminal infractions in some

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[19] U.S. Dep't of Just. Civ. Rts. Div., *Investigation of the Ferguson Police Department* 42 (2015), https://tinyurl.com/5av262ja.

[20] *See id.*

[21] *Id.* at 42 & 4–5.

[22] *See* Goldwater Inst., *City Court: Money, Pressure and Politics Make It Tough to Beat the Rap* 2–4 (2017), https://tinyurl.com/mrxddfvn ("Goldwater Inst. Rep.") (summarizing the financial pressures on courts).

[23] *Id.* at 4.

[24] *Id.* at 6.

[25] *Id.* at 7–8.

municipal codes across Arizona."[26] Municipal judges can impose sentences of up to six months in jail and $2,500 in fines for criminal misdemeanors, though as a practical matter, few of these offenses result in jail time.[27] Instead, individuals who find themselves in city court are often offered diversion and fees in order to avoid a conviction. Many accept simply to avoid the costs or hassle of litigating a minor charge, or the risk of ending up with a criminal record.

Also as in Ferguson, municipal courts in Arizona disproportionately affect communities of color. In 2013, the Arizona District Court found that Maricopa County Sheriff Joe Arpaio was engaging in discriminatory practices under Title VI of the Civil Rights Act of 1964 by targeting Latino residents of Phoenix and the surrounding area for selective enforcement.[28] Notwithstanding a permanent injunction, the unlawful racial profiling continued, and in October 2016, the DOJ filed criminal contempt charges against Arpaio for continued violation of the injunction.[29] Arpaio was ultimately found guilty of criminal contempt for repeated disregard of the order to stop discriminating.[30]

Municipal courts play an outsized role in the state system. More than half of all cases in Arizona are heard in a city court.[31] As a defender in Arizona, I saw first-hand the way that municipal courts handling minor charges operated to disadvantage poor people and people of color. During my time in Arizona, I routinely saw clients with no countable criminal history who had received one or more convictions or diversionary sentences for minor charges in municipal court.

The Commission does not have the power to end the injustices and racial inequities frequently present in municipal court systems. It can and should, however, prevent those injustices from being perpetuated within the federal system. Under the current guidelines, many of the kinds of cases

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[26] *Id.* at 6.

[27] Goldwater Inst. Rep., *supra* note 22, at 6.

[28] *Ortega-Melendres v. Arpaio*, 989 F. Supp. 2d 822, 910–11 (D. Ariz. 2013).

[29] *United States v. Arpaio*, No. 2:16-cr-01012-SRB, doc. 1 (D. Ariz.) (order concerning criminal contempt).

[30] *See id.* doc. 210 at 14 (order finding Arpaio willfully violated court order).

[31] *See* Goldwater Inst. Rep., *supra* note 22, at 5.

routinely handled in municipal courts are appropriately excluded from consideration under §4A1.2(c). Permitting them to be used to deny "first offender" status in federal court would only exacerbate racial disparities and disadvantage poorer communities.[32]

Option 1's definition would also appear to exclude people with tribal convictions from "first offender" relief.[33] Tribal courts play an important role in our federal system. But many convictions in tribal courts do not include the same procedural safeguards as those in federal or state courts. Tribal courts are chronically under-resourced. They also frequently employ methods of dispute resolution that are culturally dissimilar from those used in state and federal court and consider factors federal courts would not deem relevant in a criminal case. Many people who are convicted in tribal courts lack effective counsel. Many tribal courts, for example, permit "lay advocates" to represent the accused—meaning counsel may not have graduated from law school, or even from high school. Some courts lack counsel entirely.[34]

Option 1 would also include all offenses committed before age 18 and all juvenile adjudications. Research continuously shows that juveniles are less culpable than adults. Juveniles are more impulsive and more vulnerable to peer pressure because "adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[35] Similar to tribal

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[32] *See* Statement of Miriam Conrad Before the U.S. Sentencing Comm'n, Washington, D.C., at 3 (Mar. 14, 2018); Defenders' Comments to the Commission's Proposed 2017 Amendments 8 (Feb. 20, 2017) ("Defenders' 2017 Comments") (collecting authorities).

[33] *See* USSG §4A1.2(i). Excludable expunged, military, foreign, and juvenile diversionary dispositions also would appear to potentially qualify as "convictions" under Option 1. *See id.* §4A1.2(f), (g), (h), (j).

[34] *See, e.g.*, Brief of Amici Curiae of the National Association of Criminal Defense Lawyers and Experienced Tribal Court Criminal Litigators in Support of Respondent, at 16, *United States v. Bryant*, 579 U.S. 140 (2016) (No. 15-420), 2016 WL 1055618, at *16 (describing difficulties in accessing effective counsel in tribal courts); *see also* Samuel Macomber, *Disparate Defense in Tribal Courts: The Unequal Right to Counsel as a Barrier to the Expansion of Tribal Court Jurisdiction*, 106 Cornell L. Rev. 275, 279 (2020) (same).

[35] *Miller v. Alabama*, 567 U.S. 460, 472 & n. 5 (2012) (quoting Brief for American Psychological Association et al. as Amici Curiae); *see also* Amber Venturelli, *Young Adults and Criminal Culpability* 23 U. Pa. J. Const. L. 1142,

courts, juvenile adjudication practices vary widely among jurisdictions—including on issues of counsel, age limits, competency, diversion, and release.[36] And because it is well-recognized that young persons of color are overrepresented at every stage of the juvenile justice system, adopting a rule that would prevent people with juvenile adjudications from qualifying for "first offender" relief would adversely impact minorities.[37] Further, permitting any juvenile adjudication to disqualify a person from "first offender" status, no matter how old that person would be at sentencing, is inconsistent with the Commission's research that a person's recidivism risk drops as they age.[38]

Admittedly, Option 2 does not prevent these problems. It would still include offenses committed before age 18 and juvenile adjudications if those prior convictions were assessed criminal history points.[39] For the reasons just

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1161–69 (2021) (collecting research); *Miller*, 567 U.S. at 472 (recognizing blameworthiness is "not as strong with a minor as with an adult") (citation omitted).

[36] *See, e.g.,* Juvenile Justice: Geography, Policy, Practice & Statistics (JJGPS), http://www.jjgps.org/ (last visited Feb. 26, 2023) (identifying various standards for age boundaries, waivers to adult court, competency, waiver and timing of counsel, diversion, and release decisions).

[37] *See, e.g.*, Richard A. Mendel, The Sentencing Project, *Diversion: A Hidden Key to Combating Racial and Ethnic Disparities in Juvenile Justice* 1–2 (2022), https://tinyurl.com/2p8fhn35 (reporting that youths of color are more likely to be arrested and less likely to be diverted than white peers); U.S. Dep't of Justice, *OJJDP Statistical Briefing Book* (rev. June 2022), https://bit.ly/3cYqO35 (reporting Black juveniles were arrested more than twice as often as white peers in 2020); Lindsey E. Smith et al., Juvenile Law Center, *Reimagining Restitution: New Approaches to Support Youth and Communities* 16–7 (2022), https://bit.ly/3x3t0gC (discussing racial disparities at various stages in juvenile justice system); Eli Hager, *Racial Inequality in US Youth Detention Wider Than Ever, Experts Say*, The Guardian (Mar. 8, 2021), https://bit.ly/3Rpak39 (discussing racial gap in detention in and release rates from juvenile detention facilities).

[38] *See, e.g.*, USSC, *Recidivism of Federal Offenders Released in 2010* 6 (2021), https://tinyurl.com/2p922sns ("2021 Recidivism Report") (finding lower rearrest rates for older individuals); USSC, *The Effects of Aging on Recidivism Among Federal Offenders* 3 (2017), https://tinyurl.com/2zvcaptk (finding "[o]lder offenders were substantially less likely than younger offenders to recidivate"); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 23, fig. 11 (2016) https://tinyurl.com/3aeybdsp ("2016 Recidivism Report") (showing lower rearrest rates for recidivism for older individuals).

[39] *See* 2023 Proposed Amendments, at 7219.

stated, we strongly encourage the Commission to exclude all juvenile adjudications from the "first offender" analysis. Short of that, Option 2, which would exclude juvenile adjudications that are not assessed criminal history points, is preferable.

Simplicity. Option 2 is the simplest option. As the Commission alludes to in its issues for comment, Option 1 would pose numerous practical challenges.[40] Option 1 would inject further complexity into Chapter 4 because it would require courts to use one set of rules to calculate a person's criminal history category under Chapter 4A, and then use another set of rules to assess whether a person qualifies as a "first offender" under the proposed §4C1.1. Option 1 would also increase complexity and litigation at sentencing. Indeed, it is challenging enough to obtain documentation to prove or refute prior convictions that are counted under Chapter 4A.[41] But Option 1 would require parties to dig up case documents from potentially decades ago and from a variety of different tribunals. Records of convictions—particularly if they are too old or minor to count for criminal history points—may be lost, incomplete, or unavailable. Indeed, the "incomplete nature of disposition data" is a reason cited by the Commission for using rearrest as the measurement for its own recidivism studies.[42] Because our clients have the right to be sentenced on accurate sentencing information,[43] Defenders would

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[40] *See* 2023 Proposed Amendments, at 7223.

[41] *See Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) ("The Guidelines are complex").

[42] 2021 Recidivism Report, *supra* note 38, at 6; *see also* USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* 2 (2017), https://tinyurl.com/5n8hn77f ("Past Predicts the Future") ("While states have improved the completeness of criminal history records, a recent federal study found significant gaps in reporting of dispositions following an arrest.").

[43] *See* USSG §6A1.3 ("When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor . . . provided that the information has sufficient indicia of reliability to support its probable accuracy."); *see also Molina-Martinez,* 578 U.S. at 198 (holding that when a person is sentenced under an incorrect guidelines range, that error will often be "sufficient to show a reasonable probability of a different outcome absent the error"); *United States v. Juwa*, 508 F.3d 694, 700–01 (2d Cir. 2007) (recognizing a due process right to be sentenced on accurate information).

seek to refute incomplete or inaccurate disposition records at sentencing if those records were being used to exclude a client from §4C1.1 relief.[44]

Evidence-Based. Option 2 is supported by research. The Commission has repeatedly recognized that its criminal history rules—including the rules that exclude certain prior convictions from the point-calculation—do a strong job of predicting future rearrests.[45] It has also recognized that persons with zero criminal history points have a significantly lower rate of rearrest than other groups, meaning Option 2 would pose little risk to public safety.[46]

Research from outside the Commission supports Option 2 as well. For example, one study assessing whether more severe types of sanctions decreased recidivism rates for "first-time felons" found that probation is more effective than prison in reducing reoffending.[47] Other reports similarly conclude that prison alternatives are often the superior sentencing option.[48]

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[44] *See, e.g.*, *United States v. Pless*, 982 F.2d 1118, 1127–28 (7th Cir. 1996) ("Due process entitles defendants to fair sentencing procedures, especially a right to be sentenced on the basis of accurate information. If a defendant raises the possibility of reliance on misinformation in the PSI, the court must provide an opportunity to rebut the report. That may take a number of forms: by allowing defendant and defense counsel to comment on the report or to submit affidavits, or other documents or by holding an evidentiary hearing.") (internal citations omitted).

[45] *See, e.g.*, Past Predicts Future, *supra*, note 42, at 6 ("Criminal history score and Criminal History Category (CHC) are strong predictors of recidivism.").

[46] *See, e.g.*, 2021 Recidivism Report, *supra* note 38, at 24; Past Predicts Future, *supra* note 42, at 7, fig. 1; 2016 Recidivism Report, *supra* note 38, at 18, fig. 6; *see also* CH Data Briefing, *supra* note 14, at slide 36 (reporting that the vast majority of eligible persons under Option 2 who had a prior conviction committed non-violent prior convictions and that the most common prior conviction by far was public order offenses).

[47] *See* Daniel Mears & Joshua Cochran, *Progressively Tougher Sanctioning and Recidivism: Assessing the Effects of Different Types of Sanctions*, 55 J. Res. Crime & Delinq. 194, 207–217 (2018).

[48] *See, e.g.,* Damon M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 Crime & Just. 353, 357 (2021) ("[C]ustodial sanctions have a null or criminogenic effect on reoffending when compared with noncustodial sanctions such as probation."); *see also* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 28–29 (Apr. 18, 2017) (Faye Taxman, Ph.D.); Rebecca Umbach et al., *Cognitive Decline as a Result of Incarceration and the Effects of a CBT/MT Intervention*, 45 Crim. Just. & Behav. 31 (2018) (finding that incarceration worsens cognitive functioning—"a known risk factor for crime").

In implementing Option 2, the Commission should provide at least a two-level decrease for persons who qualify under the proposed §4C1.1. As the Commission's recent research confirms,[49] a two-level decrease would move the average guideline minimum closer to the sentences that courts "actually impose" in these types of cases.[50] Providing at least a two-level decrease would best reflect the Commission's "ongoing" and "continuous evolution helped by the sentencing courts."[51]

B. §4C1.1's remaining exclusionary criteria should be narrow.

Defenders recognize that § 994(j) provides a presumption of non-imprisonment for persons who have not been convicted of a "crime of violence" or an "otherwise serious offense." However, we fear that some of the Commission's proposed exclusions in §4C1.1(a) sweep too broadly and may prevent persons with no criminal history points who were convicted of sufficiently non-serious offenses from getting relief. We encourage the Commission to adopt a narrow ineligibility criteria and permit courts to ascertain whether to depart or vary from the §4C1.1 adjustment in outlier cases.

For example, the Commission proposes to exclude anyone who "possess[ed] a firearm or other dangerous weapon (or induce[d] another participant to do so) in connection with the offense[.]"[52] While we appreciate this exclusion is narrowed to "the defendant's own conduct,"[53] it is still substantially broader than § 994(j) requires. The SRA directs that a "first offender who has not been convicted of a crime of violence or an otherwise

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[49] *See* CH Data Briefing, *supra* note 14, at slide 43.

[50] *See* 28 U.S.C. § 995(a)(15).

[51] *Rita v. United States*, 551 U.S. 338, 350 (2007); *see also* 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.").

[52] 2023 Proposed Amendments, at 7222.

[53] *Id.* ("Consistent with §1B1.3 (Relevant Conduct), the term 'defendant' limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.").

serious offense," should receive a sentence other than imprisonment.[54] But it only singled out "a person convicted of a crime of violence that results in serious bodily injury" for a prison sentence.[55] Therefore, nothing in the statute precludes the Commission from encouraging non-incarceration sentences for "first offenders" not "convicted of a crime of violence that results in serious bodily injury."

Defenders recognize that the proposed §4C1.1(a)(2) exclusion is identical to 18 U.S.C. § 3553(f)(2).[56] But adopting the (f)(2) exclusion here could pose serious problems. First, this rule could exacerbate racial disparities because Black individuals are disproportionately targeted and sentenced for firearms possession offenses.[57] This rule could also prompt unwarranted disparities, preventing deserving individuals from obtaining §4C1.1 relief. As Defenders explained in 2018, adopting (f)(2)'s exclusion in this context would compound a circuit split on whether constructive possession is sufficient to constitute "possess[ing] a firearm or other dangerous weapon . . . in connection with the offense."[58] There is also a split of authority on whether a person possesses a weapon in connection with the offense if they receive an enhancement under §2D1.1(b)(1).[59] Further, this

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[54] 28 U.S.C. § 994(j).

[55] *Id.*

[56] *Compare* 18 U.S.C. § 3553(f)(2), *with* 2023 Proposed Amendments, at 7222.

[57] *See* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L. J. 1011, 1021–25 (2020) (examining racial disparities in federal gun possession prosecutions arising from law enforcement practices that target communities of color); *see also* Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 315–17 (2007); Statement of Michael Carter before the U.S. Sentencing Comm'n, Washington, D.C., (Mar. 7, 2023).

[58] 2023 Proposed Amendment at 7222. *See* Defenders' 2017 Comments, *supra* note 32, at 10 (attached to Statement of Miriam Conrad, *supra*, note 32). *See also United States v. Carillo-Ayala*, 713 F.3d 82, 97 n. 13 (11th Cir. 2013) (summarizing circuit conflict).

[59] *Compare, e.g.*, *Carillo-Ayala*, 713 F.3d at 89-91 (holding that not all defendants who receive the enhancement under §2D1.1(b)(1) are precluded from safety valve relief), *with United States v. Ruiz*, 621 F.3d 390, 397 (5th Cir. 2010) (actual and constructive possession of a weapon under §2D1.1(b)(1) excludes safety valve relief).

exclusion is inconsistent with the Commission's guidance in §4B1.2 which excludes most firearms possession offenses from the "crime of violence" definition.[60]

We encourage the Commission to replace the exclusion proposed at §4C1.1(a)(2) with the "crime of violence" definition articulated in 18 U.S.C. § 16. This definition was recently recognized by Congress in the amended safety valve statute as an appropriate definition for a "violent offense"[61] and, along with the additional exclusions in §4C1.1, would fully comply with §994(j)'s mandate.

The Commission should also revise proposed §4C1.1(a)(3) ("the offense did not result in death or serious bodily injury") so that it is limited to the conduct of the individual being sentenced. Because "the offense" includes "the offense of conviction and all relevant conduct under §1B1.3"[62] —including the conduct of others—Defenders are concerned that persons deserving of §4C1.1 relief who played a minor and non-violent role in an offense may be excluded because of co-conspirator conduct. This can be easily remedied by revising §4C1.1(a)(3) to state: "the defendant did not cause death or serious bodily injury." At a minimum, the exclusion should be limited to "the offense of conviction."[63]

Defenders similarly urge the Commission to adopt the narrowest eligibility alternatives proposed in §4C1.1(a)(4) and (6).[64]

C. An invited downward departure should be added to Option 2.

The Commission proposes to include an invited upward departure in Option 2 for cases in which a §4C1.1 adjustment "substantially

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[60] *See* USSG §4B1.2(a)(2).

[61] 18 U.S.C. §3553(f)(1)(C) & (g).

[62] USSG §1B1.1 cmt. n.1(I).

[63] *See* USSG §1B1.2(a) (defining "offense of conviction" as "the offense conduct charged in the count of the indictment or information of which the defendant was convicted").

[64] 2023 Proposed Amendments, at 7222 (excluding persons whose acts or omissions resulted in substantial financial hardship to 25 or more victims and persons who were subject to §4B1.5).

underrepresents the seriousness of the defendant's criminal history."[65] It proposes that an upward departure may be warranted if an individual "has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence."[66] We encourage the Commission to include a downward departure as well. The representation of a person's criminal history swings both ways[67]—and a downward departure may be particularly warranted in circumstances where someone does not qualify as a "first offender" under Option 2 solely because of a juvenile adjudication or other minor offense.

D. Section 5C1.1's downward departure for Zones C and D should match the downward departure proposed for Zones A and B.

We are pleased the Commission has proposed to replace Application Note 4 in §5C1.1 and provide an invited downward departure for all persons who would qualify as "first offenders" under §4C1.1.[68] However, we urge the Commission to provide the same invited departure for persons in Zones C and D as it proposes for Zones A and B.

The Commission proposes that for persons who qualify as "first offenders" in Zones A and B, "a sentence other than a sentence of imprisonment. . .is generally appropriate."[69] But for persons who qualify as "first offenders" in Zones C and D, the Commission proposes that "a sentence of imprisonment [may be appropriate] [is generally appropriate]" only if the "instant offense of conviction is not an otherwise serious offense."[70] The Commission should provide the same presumption of non-imprisonment that it proposes for persons in Zones A and B to all persons who receive the §4C1.1 adjustment for several reasons.

First, asking courts to assess whether "the defendant's instant offense of conviction is not an otherwise serious offense" is unnecessary and

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[65] *Id.*

[66] 2023 Proposed Amendments, at 7222.

[67] *See* USSG §4A1.3.

[68] 2023 Proposed Amendments, at 7222–23.

[69] *Id.* at 7222.

[70] *Id.* at 7222–23.

duplicative of the §4C1.1 analysis. By the time a court would assess whether a §5C1.1 downward departure is warranted, the court would have already determined not only that the person being sentenced has zero criminal history points but also that the instant offense did not meet any of §4C1.1's exclusionary criteria. Since everyone eligible for §4C1.1 would be in Criminal History Category I, and "[t]here is no correlation between recidivism and guidelines' offense level,"[71] adding an extra layer of analysis is unwarranted. Similarly, because anyone eligible for the §5C1.1 downward departure would have been convicted of an offense that did not meet §4C1.1's exclusionary criteria, additional guidance on what constitutes "an otherwise serious offense"[72] is not necessary.[73]

Second, there are strong reasons to not punish persons who qualify as "first offenders" simply because of their sentencing zone. Because all "first offenders" would necessarily be in Criminal History Category I, their zone would be driven exclusively by offense level. But as Defenders have often noted, a person's offense level often provides little indication of the seriousness of the offense. Offense levels are frequently driven by things like drug quantity, drug type, and loss amount—factors bearing little relationship to culpability.[74] Leaving the departure for Zones C and D as proposed may make judges less inclined to consider a sentence other than imprisonment for people like Julio, Vania Alvarado, and Mario Chavez.

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[71] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 15 (2004), https://tinyurl.com/2p9xrrf9 ("Measuring Recidivism") ("Whether an offender has a low or high guideline offense level, recidivism rates are similar.").

[72] 2023 Proposed Amendments, at 7223.

[73] Because §4C1.1 would provide an analysis to determine whether an instant offense is "otherwise non-serious," so as to warrant "first offender" relief, the Commission should delete the confusing and arguably conflicting portion of Policy Statement 4(d) in Chapter 1, Part A. USSG Ch. 1, Pt. A, cmt. 4(d) ("Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'"). *See also* 2023 Proposed Amendments, at 7223 (seeking comment on conforming changes).

[74] *See*, *e.g.*, Defenders' Annual Letter to the U.S. Sentencing Comm'n 13–17 & n. 88 (Sept. 14, 2022).

II. Status Points

Defenders are excited to see the Commission's proposed changes to the status points rule, USSG §4A1.1(d). Under the current §4A1.1(d), two points are added to a person's criminal history score if they committed the instant offense while under a criminal justice sentence, including parole, probation, supervised release, imprisonment, work release, or escape status. A "criminal justice sentence" is any "sentence countable under §4A1.2" which has "a custodial or supervisory component, although active supervision is not required."[75] Because status points lack an empirical basis, do not serve the purposes of sentencing, and fail to further the Commission's purpose, Defenders strongly believe the Commission should implement Option 3 and eliminate status points from the criminal history calculation.

A. The Commission should adopt Option 3 of the proposed amendment and eliminate status points from the criminal history calculation.

The Commission has proposed three options for amending §4A1.1(d).[76] Each option would de-emphasize, in different ways and to varying degrees, the importance of person's "status" (i.e., being "under a criminal justice sentence") in determining their sentence.

Option One. Option 1 would add a downward departure to Application Note 4 of the Commentary to §4A1.1 for cases where status points are applied. It would read: "There may be cases in which adding points under §4A1.1(d) results in a Criminal History Category that substantially overrepresents the seriousness of the defendant's criminal history. In such a case, a departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History)."

Option Two. Option 2 would decrease the number of points added under §4A1.1 from two to one. It would also add a departure provision to the Commentary of §4A1.1 to provide for an upward or downward departure, depending on the circumstances. It would read: "There may be cases in which adding a point under §4A1.1(d) results in a Criminal History Category that

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[75] USSG §4A1.1, cmt. n.4.

[76] 2023 Proposed Amendments, at 7221.

substantially overrepresents or underrepresents the seriousness of the defendant's criminal history. In such a case, a departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History Category)."

Option Three. Option 3 would eliminate the status points altogether. It would also amend the Commentary to §4A1.3 to provide an example of an instance in which an upward departure may be warranted. It would read: "An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances: *** (v) The defendant committed the instant offense (i.e., any relevant conduct to the instant offense under §1B1.3 (Relevant Conduct)) while under any criminal justice sentence having a custodial or supervisory component (including probation, parole, supervised release, imprisonment, work release, or escape status)."

The Commission should adopt Option 3.

1. The History of Status Points.

Status points and the other Chapter 4 criminal history rules were designed to reflect both culpability (*i.e.*, just punishment) and risk of recidivism (*i.e.*, the likelihood of rearrest).[77] The factors used to measure culpability and recidivism were meant to be "consistent with the extant empirical research," and to incorporate "additional data insofar as they become available in the future."[78] However, because of time and resource constraints, the original Commission did not use its own empirical data and research to develop the criminal history rules.[79] Instead, it reviewed four prediction measures being used in the mid-1980s and ultimately incorporated aspects of two: the Parole Commission's Salient Factor Score (SFS) and the Proposed INSLAW scale.[80] Status points emanated from the SFS Item E, which used criminal justice sentence status as a predictor of greater

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[77] *See* Measuring Recidivism, *supra* note 71, at 1–2.

[78] USSG Ch. 4, Pt. A, introductory cmt.

[79] *See* Measuring Recidivism, *supra* note 71, at 1.

[80] *See* USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 3–4 (2005), https://tinyurl.com/5fw3ezpw, ("Salient Factor Score").

recidivism risk.[81] But, as discussed below, more recent Commission data reveal that "status" is a poor predictor of recidivism risk.

Status points were justified on similar grounds as the related (former) "recency points" rule and should be eliminated for the same reasons that recency points were eliminated from the criminal history computation in 2010. Under the original guidelines, one or two points were added to a person's criminal history score if the convicted person committed the instant offense less than two years after release from prior imprisonment.[82] Both status and recency points were considered measures of the "recency" of prior criminal conduct and were predicated on the now disproven assumption that more recent criminal activity was a reliable predictor of future criminal conduct.[83] However, the Commission eliminated recency points from the criminal history calculation in 2010, stating that "[r]ecent research isolating the effect of §4A1.1(e) on the predictive ability of the criminal history score indicated that consideration of recency only minimally improves the predictive ability."[84] Additionally, it received public testimony that "recency does not necessarily reflect culpability."[85] As further explained below, the same is true for status points. Indeed, when Defenders urged the Commission to eliminate recency points in 2010, we also urged it to eliminate status points because neither measure accurately predicts recidivism nor effectively distinguishes individuals who are more culpable than others.[86]

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[81] *See id.* at 7.

[82] *See* USSG §4A1.1(e) (Nov. 1, 1987).

[83] *See* Salient Factor Score at 7 (stating that status points "capture[ ] the higher recidivism likelihood when the instant offense is committed while the offender is still meeting a sentence obligation for an earlier offense" and recency points "[identified] as more likely to recidivate an offender" who committed the instant offense "less than *two* years after release from an imposed imprisonment sentence of 60 days or longer.").

[84] USSG App. C., Amend. 742, Reason for Amendment (Nov. 1, 2010).

[85] *Id.*

[86] *See* Statement of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, Washington, D.C., at 90 (Mar. 17, 2010) ("Meyers and Mariano 2010 Statement").

2. Impact, Recidivism Prediction, and Culpability.

Status points increase the time our clients spend in prison and lead to higher federal incarceration rates but have low recidivism prediction value and are a poor measure of culpability. In the last five years §4A1.1(d) applied in 37.5 percent of cases and increased a person's criminal history in 61.5 percent of cases in which it was applied.[87] Status points are also connected with higher sentences. "The average prison sentence imposed for [a person assessed status points] was 66 months, which is 21 months longer than the average for [people who were not assessed status points] (45 months)."[88] By increasing the length of sentences imposed, the status points rule contributes to prison overcrowding. The Bureau of Prisons ended Fiscal Year 2021 with 264 more inmates than the prior year and BOP continues to "experience substantial crowding in high, and medium security facilities."[89]

While §4A1.1(d) exacerbates imprisonment lengths and rates, the Commission's own data shows that the rule lacks an empirical basis. As far back as 2005, Commission research established that recency and status points *combined* did not significantly increase the criminal history score's ability to predict recidivism risk.[90] "The [2005] study found that the full criminal history score, with all components included, successfully predicted rearrest 69.9 percent of the time."[91] Yet, when "both status points and recency points were removed, the score still would successfully predict rearrest 69.8 percent of the time."[92] Thus, "status points and recency points together improved prediction of rearrest by only 0.1 percent."[93]

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[87] *See* USSC, *Revisiting Status Points* 2 (2022), https://bit.ly/3RXl3lf ("Revisiting Status Points").

[88] *See id.* at 12, fig. 5.

[89] Federal Bureau of Prisons, Program Fact Sheet (Dec. 31, 2021) (noting the "first increase in inmate population after 6 years of decreases"); Federal Bureau of Prisons, Program Fact Sheet (Feb. 2, 2023).

[90] *See* Meyers and Mariano 2010 Statement at 92 (citing Salient Factor Score, at 13 & Ex. 5).

[91] Revisiting Status Points, *supra* note 87, at 5.

[92] *Id.*

[93] *Id.*

Last summer, the Commission updated its research with respect to status points by examining people who were released from prison or began a term of probation in 2010.[94] The Commission determined that "[people] who received status points were rearrested at similar rates to those without status points who had the same criminal history score."[95] Similarly, it found that "the inclusion of status points in the criminal history score improved successful prediction of rearrest by less than 0.2 percent."[96] These figures are comparable to those found by the 2005 study.[97] Therefore, "[d]espite the sentencing impacts resulting from the application of status points, the status points provision only minimally improves the overall recidivism predictivity of the criminal history score."[98]

While the Commission admits that status points lack an empirical basis, it notes that these points "may address culpability and other statutory purposes of sentencing."[99] The Commission therefore asks for comment on whether the §4A1.1(d) rule should still apply in specific instances, such as if a person was under a criminal justice sentence for "certain categories of prior offenses" or if a person was "recently placed under a criminal justice sentence involving a custodial or supervisory component."[100] Because §4A1.1(d) is not needed to further any purpose of sentencing, the rule should be eliminated in all circumstances, and an upward departure should not be adopted.

The guidelines and relevant statutes already account for the scenarios such as those that the Commission identifies and increase penalties accordingly. For example, if a person was "under a criminal justice sentence resulting from a violent offense,"[101] he would likely be subject to a violation of his supervision, probation, or parole in addition to facing the new criminal

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[94] *See id.* at 14.

[95] *Id.* at 3.

[96] *See* Revisiting Status Points, *supra* note 87, at 17. To phrase it differently, "status points improve the criminal history score's successful prediction of rearrest for only 15 out of 10,000 offenders." *Id.* at 18.

[97] *See id.*

[98] *Id.* at 18.

[99] *Id.*

[100] 2023 Proposed Amendments, at 7221.

[101] *Id.*

charge. If found guilty of the violation, his sentence on that violation may be imposed consecutive to his sentence for the instance offense.[102] The prior violent offense would also count towards his criminal history score.[103] And, if the offense was sufficiently violent to constitute a "crime of violence" or to trigger application of a recidivism statute, the prior violent offense may further increase his guideline range or subject him to enhanced mandatory penalties.[104]

Guidelines and statutes also already account for committing a crime while under a criminal justice sentence with a custodial component.[105] If a person commits a federal crime while in custody, his prior offense would count towards his criminal history score.[106] The guidelines further provide numerous offense level increases, adjustments, and departures to account for offenses occurring in custody and, if applicable, the status of the victim.[107] And the guidelines direct that for any offense committed while a person "was serving a term of imprisonment (including work release, furlough, or escape status). . . the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment."[108] Compounding these existing penalties with criminal history points that lack an empirical basis is unwarranted.

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[102] *See* USSG §7B1.3(f) ("Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation.").

[103] *See* USSG §§4A1.1, 4A1.2. Unless the offense otherwise constituted relevant conduct, in which case the prior violent offense would increase the individual's offense level for the instant offense. *See* USSG §4A1.2 cmt. n. 1.

[104] *See, e.g.*, USSG §§4B1.1, 4B1.2, 2K2.1(a), 2L1.2(b); 18 U.S.C. § 924(e); 21 U.S.C. § 841(b)(1)(A) & (b)(1)(B).

[105] *See* 2023 Proposed Amendments, at 7221.

[106] *See* USSG §4A1.2(e).

[107] *See, e.g.*, USSG §§2A3.1(b)(3); 2D1.1(b)(4); 2D2.1(b)(1); 2P1.1; 2P1.2; 2P1.3; 3A1.2(c)(2); *see also generally id.* §§4A1.3(a); 5K2.7.

[108] USSG §5G1.3(a).

3. Unwarranted Disparities and Adverse Impact.

Far from furthering other purposes of sentencing, status points create disparities and have an adverse impact.

Section 4A1.1(d) perpetuates unwarranted disparities in two ways—both by treating dissimilar circumstances alike, and by treating similar circumstances differently.[109] Because §4A1.1(d) applies to any "criminal justice sentence"—whether actively supervised, or not; custodial or non-custodial—§4A1.1(d) treats dissimilar types of criminal justices sentences the same. And because community-based supervision practices vary from state to state, §4A1.1 treats similar circumstances differently.

I have seen unjustified disparities caused by status points firsthand. From 1998 to 2016, the state of Arizona operated a program colloquially known as "half-term to deport," under which non-citizens convicted of certain crimes who were subject to an order of removal could be released to the custody of ICE after serving half of the state sentence imposed.[110] If, however, the person ever returned to the United States without permission, the Arizona Department of Corrections would revoke the person's release and require them to serve the remaining half of the sentence.[111]

Individuals granted early release were not under any form of supervision or subject to any conditions other than the condition that they not return to the United States, but they were considered to be "under a criminal justice sentence" under §4A1.1(d). Individuals who returned to the country and faced federal charges, often for illegal reentry, were therefore assessed "status points." And because service of the remaining half of the DOC sentence "refreshed" the age of the state conviction under §4A1.2(e), it was not uncommon to see defendants who were assessed five criminal history

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[109] *See* 18 U.S.C. § 3553(a)(6); *Gall v. United States*, 552 U.S. 38, 55– 56 (2007) (recognizing that avoiding "unwarranted similarities among [individuals] not similarly situated" is relevant to the disparity analysis); USSC, *Fifteen Years of Guideline Sentencing* 113 (2004), https://bit.ly/2BZj3XB ("Fifteen Year Report") (recognizing disparities occur from both unwarranted different and unwarranted similar treatment).

[110] Ariz. Rev. Stat. § 41-1604.14 (repealed Aug. 6, 2016).

[111] Ariz. Rev. Stat. § 41-1604.14(B).

points for state convictions that were quite dated, placing them immediately in criminal history category III.

Arizona is far from the only state where such idiosyncrasies exist. My office represents a man who is receiving status points for an offense so old that it no longer scores for purposes of his criminal history. In 2006, Mr. Morales pleaded no contest to a misdemeanor offense for which he received 3 years of probation in Yolo County Superior Court in Woodland, California. A bench warrant issued in 2007 following a failure to appear, but Yolo County has failed to either execute or quash the warrant despite multiple opportunities to do so. The presence of the warrant means Mr. Morales remains "under a criminal justice sentence" and continues to receive status points even though the underlying offense has not counted for purposed of his criminal history since 2016.

Section 4A1.1(d) also has a disparate impact on Black people. Data from the Commission's report confirms that Black people are 1.4 times more likely to get status points than other groups combined.[112] This disparate impact is unsurprising. Research shows that Black people are far more likely than whites to be targeted by law enforcement for stops, searches, arrests, and criminal prosecutions,[113] even in the face of evidence that Black and

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[112] *See id.* at 6-7 (comparing 47.5 percent of Blacks given status points with the 37.5 percent given status points across all individuals. The 47.5 percent is calculated from Table 1 where 32.7 percent of the 76,337 individuals with status points were Black and 21.7 percent of the 127,162 individuals without status points were Black).

[113] *See, e.g.*, Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases*, 65 Clev. State L. Rev. 491, 500–01 (2017) (reviewing statistics on crime and arrest rates by race and concluding that the overrepresentation of people of color in the criminal justice system results from "racial disparity in law enforcement practices" rather than "a problem of crime within the black community alone"); Jessica Eaglin & Danyelle Solomon, Brennan Center for Justice, *Reducing Racial Disparities in Jails: Recommendations for Local Practice* 17 (2015) ("Evidence demonstrates that once stopped by a police officer, African Americans are arrested at a higher rate than other racial groups. A recent study of 3,528 police departments found that blacks are more likely to be arrested in almost every city for almost every type of crime. . . . African Americans are almost four times more likely to be arrested for selling drugs and more than twice as likely to be arrested for possessing drugs, even though whites are more likely to sell drugs and equally likely to consume them. African Americans constitute 30% of arrests for drug violation offenses even though they make up only 13% of the total population."); Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a*

white people commit certain offenses at similar rates.[114] Black people are more likely to be on supervision and to be subject to longer terms of supervision than whites,[115] which underscores the uneven impact of the status point rule on minority groups.

While retaining status points would frustrate the Commission's mission to provide guidelines that promote sentences not greater than necessary, eliminating them would help the Commission fulfill its obligations. The Commission would act in its characteristic institutional role to "base its determinations on empirical data and national experience."[116] By adopting Option 3, the Commission would improve the accuracy and reliability of the guidelines. It would make the guidelines more certain and fairer in fulfilling the goals of sentencing. It would reduce unwarranted

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Response to Racial Injustice, 20 Stan. L. & Pol'y Rev. 463, 477 (2009) ("The war on drugs, and particularly the special intensity with which it has been waged against open-air drug dealing and crack cocaine, has fueled a massive and demographically disproportionate increase in the number of black males held in the nation's prisons."); William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1893 (2000) (describing "anti-vice crusades that target racial or ethnic minorities who live in urban poverty"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 957 (1999) ("Recent studies support what advocates and scholars have been saying for years: The police target people of color, particularly African Americans, for stops and frisks."); *cf. Jamison v. McClendon*, 476 F. Supp. 3d 386, 414–15 (S.D. Miss. 2020) (Order Granting Qualified Immunity) ("Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike. United States Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as 'the world's greatest deliberative body.' The 'vast majority' of the stops were the result of 'nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial.'" (citations omitted)).

[114] *See* Eaglin & Solomon, *supra* note 113, at 17.

[115] *See* Kendra Bradner & Vincent Schiraldi, *Racial Inequities in New York Parole Supervision* 3, Columbia University Justice Lab (2020), https://bit.ly/3Dkiyp1 (collecting research on national racial inequities in parole and reporting that "Black people are 4.15 times more likely to be under parole supervision than white people," that Black people "remain on probation and parole longer than similarly situated white people," and that research suggests that disparities exist in parole violation charges and outcomes); *see also* Alex Roth et al., *The Perils of Probation: How Supervision Contributes to Jail Populations* 8, Vera Institute of Justice (2021), https://bit.ly/3QxNrZX.

[116] *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

disparities and better reflect the advancement of human knowledge.[117] And it would further the Commission's statutory obligation to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons[.]"[118] For all these reasons, we urge the Commission to adopt Option 3 of the proposed amendment.

[117] 28 U.S.C. § 991(b)(1)(A)–(C).

[118] 28 U.S.C. § 994(g).

Federal Public and Community Defenders Comment on Acquitted Conduct Sentencing (Proposal 8)

March 14, 2023

The attached Statement of Melody Brannon contains Defenders' comments on Proposed Amendment 8.[1] We supplement those comments below to further respond to some of the issues raised at the February 2023 public hearing and by the Department of Justice (DOJ) in its written statement.[2]

At the public hearing, the Commission asked two hypothetical questions related to how the Defender's proposal to remove the limitation language at proposed USSG §1B1.3(c)(1) would impact "overlapping conduct" between acquitted and convicted counts.[3] First, Vice Chair Murray asked if, under the Defenders' proposal, the officers who assaulted Rodney King could have been prosecuted and sentenced in federal court for violating Mr. King's civil rights, even though they were acquitted in state court for assault and use of excessive force.[4] The answer to that question is yes. The Double Jeopardy Clause does not prevent the states and federal government from prosecuting the same course of conduct because the states are separate sovereigns from the federal government and each state's power to prosecute is derived from its inherent sovereignty.[5] Defenders' rule would not prevent these types of state-federal prosecutions, nor would it prevent the federal government from waiting for the state to prosecute conduct first and, based on what happens in state court, determining whether to prosecute federally.

The federal case prosecuting Rodney King's assaulters did not involve the use of acquitted conduct at sentencing. In *United States v. Koon*, the Court sentenced Officers Stacey Koon and Laurence Powell for violating Rodney King's *federal constitutional rights*, under 18 U.S.C. § 242, after they

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[1] *See* Statement of Melody Brannon on Proposed Acquitted Conduct Amendment (Feb. 24, 2023) ("Statement of Melody Brannon-Acquitted Conduct").

[2] *See* Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent'g Comm. (Feb. 15, 2023) ("DOJ Written Testimony for February 2023 Hearings").

[3] *See* 88 Fed. Reg. 7180, 7225, 2023 WL 1438480 (2023) ("2023 Proposed Amendments").

[4] *See* USSC, *Public Hearing on Proposed Amendment on Acquitted Conduct*, U.S. Sent'g Comm'n (Feb. 24, 2023, 2:32:45–2:37:06), https://tinyurl.com/mneaea37 ("*Feb. 2023 Public Hearing*") (hypothetical question posed by Vice Chair Murray and Ms. Brannon's response); *see also United States v. Koon*, 833 F. Supp. 769, 774–76 (C.D. Cal. 1993) (discussing the details of the arrest and assault on Rodney King by four police officers, the subsequent federal trial for deprivation of rights, and the jury's verdict), *vacated in part by Koon v. United States*, 518 U.S. 81 (1996).

[5] *See Heath v. Alabama*, 474 U.S. 82, 87–89 (1985).

were convicted by a jury.[6] Even though the federal convictions resulted from facts similar to those underlying the state acquittals, the officers were not sentenced for assault and excessive force—the state charges for which they were acquitted. To the extent the facts underlying a federal conviction "overlap" with those underlying a state court acquittal, it should be clear to federal courts that they can and must sentence the individual for violating federal law—not the state law that was the subject of a separate prosecution—if the elements of the federal violation are proven beyond a reasonable doubt.[7]

Next, *ex officio* Commissioner Wroblewski asked whether, under the Defenders' proposal, the guideline range would be "zero" for someone convicted of arson but acquitted of conspiracy to commit an arson hate crime, because the jury concluded the arson was not motivated by racial animus.[8] A general prohibition on the use of acquitted conduct at sentencing does not complicate this fact pattern or result in a guideline range of zero. Federal arson, 18 U.S.C. § 844(i), is sentenced under USSG §2K1.4 and provides varying base offense levels, specific offense characteristics, and a cross-reference that may apply depending on the facts of the case, but none are triggered by hate motivation.[9] However, there is a victim-related adjustment at USSG §3A1.1 that provides for a three-level increase if the crime was

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[6] *See Koon*, 833 F. Supp. at 774.

[7] Defenders would object, however, if the federal court used conduct underlying a state court acquittal that was not *separately proven at the federal trial* to enhance the individual's sentence on the federal conviction under the federal guidelines. This was not at issue in *Koon*, but occurred recently in *United States v. Bullock*, 35 F.4th 666 (8th Cir. 2022). DeShaun Bullock pled guilty in federal court to possession of a firearm by an unlawful drug user. *Id.* at 669. At sentencing, the district court granted the government's motion for an upward departure under USSG §4A1.3 for underrepresented criminal history relying on a state charge for reckless use of a firearm resulting in serious injury for which Mr. Bullock had been acquitted in state court several years prior. *See id.* at 669—70. The court calculated a guideline range of 46–57 months, but sentenced Mr. Bullock to 63 months after applying the upward departure. *Id.* at 670. The Eighth Circuit affirmed, relying on the differing burdens of proof at trial and at sentencing. *See id.* at 671. Mr. Bullock's certiorari petition on this issue is currently pending before the Supreme Court. *See* Petition for Writ of Certiorari, *Bullock v. United States*, ___ U.S. ___ (No. 22-5828).

[8] *See Feb. 2023 Public Hearing*, *supra* note 4, at 2:45:04—2:45:54.

[9] The hate crime version of the offense is penalized under different statutes, 18 U.S.C. § 249 and 42 U.S.C. § 3631, and is sentenced under USSG §2H1.1.

motivated by hate. This enhancement must be proven to the finder of fact at trial (or in the case of a guilty or no contest plea, to the court at sentencing) beyond a reasonable doubt.[10] Thus, under this fact pattern, the court would apply the rules at §2K1.4 to derive a guideline range for the offense of conviction (arson, count two), but would be precluded from applying the three-level increase at §3A1.1 because the accused was acquitted of the hate crime (count one). The court would not be sentencing based on an overlapping acquittal because the jury did not acquit the individual of the arson, but rather, concluded that the arson was motivated by something other than racial animus. Thus, the sentence is for the arson (conviction) but not for the hate crime (acquittal).

Commissioner Wroblewski also asked Ms. Brannon what she meant in her witness statement by: "In most cases, the preclusive effect of the jury's verdict will be clear."[11] This means that in most cases, a jury's split verdict will be both rational and consistent. Given the length and detail of jury instructions, the jury's ability to ask questions during deliberations, and the availability of special verdict forms where appropriate, irrational and inconsistent verdicts involving overlapping conduct are unlikely to occur frequently. Courts will generally be able to determine from the jury's verdict how to sentence in the face of a general prohibition on acquitted conduct sentencing. For instance, "if the defendant is convicted on one count of selling five grams of crack and acquitted on two other counts, the weight of the drugs

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[10] *See* USSG §3A1.1(a) & comment. (n. 1).

[11] *See Feb. 2023 Public Hearing*, *supra* note 4, at 2:44:05—2:44:15; *see also* Statement of Melody Brannon-Acquitted Conduct, *supra* note 1, at 14. In a 1996 law review article, scholar Barry L. Johnson argued in favor of abolishing the use of acquitted conduct at sentencing but acknowledged that doing so might lead to some limited "litigation over the preclusive scope of acquittals." Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 201 (1996). But uncertainties and litigation about the scope of the jury's verdict—for instance in the case of inconsistencies and overlapping conduct—are an "insufficiently weighty" objection to ending acquitted conduct sentencing to carry the day. *Id.* Mr. Johnson noted there would be few cases in which acquitted conduct would be at issue and in most of those cases, "the preclusive effect of the jury's result will be clear." *Id.* Further, there are several mechanisms by which both the Commission and the courts could further reduce the likelihood of inconsistent verdicts including, for example, "the use of supplemental special verdict forms in cases where such confusion may arise." *Id.* at 202.

alleged to have been sold in the two acquittal counts is not considered for relevant conduct purposes. This is straightforward."[12]

Take, as another example, the *McClinton* case, discussed at the hearing. Dayonta McClinton was tried on charges of robbery, brandishing a firearm, and murdering a co-defendant.[13] The jury acquitted Mr. McClinton of murder, but convicted him of robbery and brandishing.[14] Despite this acquittal, the sentencing court applied the homicide cross-reference to enhance Mr. McClinton's offense level from 23 to 43, and his sentencing range from 57–71 months to 324 months–life, before varying downward and sentencing Mr. McClinton to 228 months.[15] If acquitted conduct sentencing was prohibited, use of the murder cross-reference, with its 20-level base offense increase, would have been precluded by the jury's "not guilty" verdict on the murder charge.[16]

It is difficult, if not impossible, to craft rational sentencing policy around the unlikely specter of irrational jury verdicts. Courts will encounter and deal with anomalies on a limited, case-by-case basis. And in these circumstances, courts will undoubtedly understand the need to sentence individuals for their crimes of conviction. To the extent there's ambiguity about the applicability of a certain enhancement or cross-reference, the parties will argue their positions based on the evidence presented at trial and the most logical explanation for the verdict. Courts, after sitting through the

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[12] Johnson, *supra* note 11, at 201.

[13] *See* Petition for Writ of Certiorari at 6, *McClinton v. United States*, ___ U.S. ___ (No. 21-1557).

[14] *See id.* at 7.

[15] *See id.* at 8–9.

[16] At the hearing, Commissioner Wroblewski also asked if Defenders were "okay" with a judge considering acquitted conduct "just in an unguided way under 3553(a)." *See Feb. 2023 Public Hearing*, *supra* note 4, at 2:44:15—2:44:47. Defenders do not believe that a judge should consider acquitted conduct at sentencing when applying the guidelines or when applying 18 U.S.C. § 3553(a). However, the Commission's authority to control sentencing outcomes is limited to application of the guidelines. Section 3553(a) vests significant discretion in sentencing courts to vary below and above the guidelines based on a variety of factors. While varying above the guidelines under § 3553(a) to account for acquitted conduct raises significant constitutional concerns, those concerns are for the Supreme Court to resolve.

trial and hearing the parties' arguments, will be in the best position to confront these issues as they arise, in an individualized way. For these reasons, a simple approach is the best approach. Defenders urge a bright-line prohibition on the use of acquitted conduct to apply the guidelines, and removal of the proposed limitation language at §1B1.3(c)(1).[17] This approach would be the clearest for courts to apply in most cases and—as all guidelines do—permit the courts to deal with ambiguities resulting from inconsistent verdicts on a case-by-case basis.

DOJ's proposed alternative elements-based definition of acquitted conduct does not offer better workability, nor would it better address inconsistent verdicts.[18] And we fear it may lead to unintended consequences. For instance, it is unclear how the DOJ's approach would apply to affirmative defense acquittals—acquittals which are generally not based on the government's failure to prove an element of the offense.

Defenders respectfully urge the Commission to: (1) prohibit the use of acquitted conduct to calculate the guideline range and remove the proposed limitation language; (2) prohibit horizontal and vertical departures and within-guideline sentences based on acquitted conduct; and (3) reject DOJ's narrow definition of acquitted conduct, including its proposed exception for acquittals unrelated to the individual's conduct and maintain the definition at proposed USSG §1B1.3(c)(2).

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[17] In the alternative, if the Commission believes more guidance to courts is necessary to account for anomalies such as overlapping conduct and inconsistent verdicts, we suggest that the Commission: (1) move the limitation language to an application note so as not to unnecessarily complicate and muddle the general prohibition; and (2) clarify the meaning of and purpose for the limitation, perhaps by providing examples, so as to avoid unintended consequences that undermine the ameliorative function of the new rule.

[18] *See* DOJ Written Testimony for February 2023 Hearings, *supra* note 2, at 16. Indeed, at the public hearing on the acquitted conduct amendment, Probation Officer Jill Bushaw testified that when she first read DOJ's proposed narrow definition of acquitted conduct she was thinking, "I don't know if we have all the information to determine the type of acquitted conduct they were recommending." She expressed concerns that DOJ's proposal was not clearly defined and would lead to a "very complicated sentencing process." *See Feb. 2023 Public Hearing*, *supra* note 4, at 3:16:52–3:17:22.

Before the United States Sentencing Commission
Public Hearing on Acquitted Conduct

Statement of Melody Brannon,
Federal Public Defender for the District of Kansas
on Behalf of the Federal Public and Community Defenders

February 24, 2023

Statement of Melody Brannon
Federal Public Defender for the District of Kansas
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
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Hon. Chair Reeves, Vice-Chairs, and Commissioners: My name is Melody Brannon, and I am the Federal Public Defender for the District of Kansas. I am also a member of the Federal Defender Sentencing Guidelines Committee. I would like to thank the Commission for holding this important hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders on the use of acquitted conduct to enhance sentences ("acquitted conduct sentencing").

Defenders wholeheartedly support eliminating the use of acquitted conduct—whether the acquittal is by a jury or a judge—to enhance sentences. As shown by Jessie Ailsworth's experience, which I discuss below, punishing a person based on allegations rejected by the jury undermines the role of the jury and has a powerful and chilling impact on the decision to go to trial. Mr. Ailsworth's 30-year prison sentence was driven by the court's wholesale reliance on acquitted conduct. But the reach of this pernicious practice extends well beyond the people in Jessie Ailsworth's position. The reverberations of that injustice affected district-wide practices in Kansas for years to follow.

While Defenders are excited by this proposal, we have concerns about the proposed limitations in §1B1.3(c)(1) that are apparently designed to account for so-called "overlapping conduct" or other anomalous scenarios. A simple, bright-line rule that prohibits the use of acquitted conduct when applying the guidelines will best safeguard sacred jury trial and due process rights and will further the purposes of sentencing. The limitations outlined in proposed §1B1.3(c)(1) are unclear, unnecessary, and undermine the policy reasons for prohibiting acquitted conduct sentencing in the first place.

Similarly, because acquitted conduct sentencing frustrates the Commission's obligations to advance the purposes of sentencing, promote certainty and fairness in punishment, and avoid unwarranted disparities, we oppose the suggested revisions to §6A1.3 that invite courts to consider

acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guideline range is warranted.[1]

Finally, the limitation on the use of acquitted conduct at sentencing should not be narrowed to exclude acquittals "unrelated to the substantive evidence" if it is to have the effect of truly protecting acquittals. Such a rule would be too complicated and invites unwarranted disparity. Also, it would invade the province of the jury to parse the basis for the acquittal to search for the jury's reasoning. For example, the defense may present more than one theory of defense, even if those defenses are inconsistent.[2] And a jury may acquit on a completely different basis, without the need to explain or justify its verdict. We explain below.

I. Using acquitted conduct to enhance sentences is unsound sentencing policy.

Acquitted conduct sentencing is bad sentencing policy. The Supreme Court has described the jury as "the central foundation of our justice system and our democracy," "a necessary check on governmental power," "a fundamental safeguard of individual liberty," and "a tangible implementation of the principle that the law comes from the people."[3] The jury system "over

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[1] While I focus my statement on the acquitted conduct proposal, we also continue to urge the Commission to eliminate from the application of the guidelines the use of uncharged and dismissed conduct, or significantly limit its reach. *See generally* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 208-20 (1991) (identifying "serious due process issues" with the relevant conduct guideline).

[2] *See Mathews v. United States,* 485 U.S. 58, 63 (1988).

[3] *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017); *see also United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (describing the "impressive [historical] pedigree" of the jury trial right, which was "designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" (quoting 2 J. Story, Commentaries on the Laws of England 343, 540-41 (1769))); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."); *cf. United States v. Brown*, 892 F.3d 385, 409 (D.C. Cir. 2018) (Millett, J., concurring) ("The genius of the Constitution's protections for criminal defendants was to prevent tyranny [by] ensuring that an individual's liberty could only be stripped away by a jury of his peers upon proof of a crime

the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence."[4]

A prison sentence predicated on the very allegations that a unanimous jury of 12 rejected subverts that jury's esteemed and deep-rooted institutional role.[5] Acquitted conduct sentencing relegates the jury's "not guilty" verdict—which cannot be appealed by the government and carries the constitutional protection against double jeopardy—to advisory opinion status, rather than a fundamental safeguard against oppression and ultimate declaration of a person's guilt or innocence.[6]

Numerous judges and commentators have condemned acquitted conduct sentencing as constitutionally dubious, unsound sentencing policy, or both.[7]

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beyond a reasonable doubt."); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 241-42 (2009) ("Juries provide several benefits: they serve as a check on the government, the judiciary, and the law, and they reinforce democratic norms. The diversity, group dynamics, and neutrality of juries offer benefits in fact-finding over that of a single judge.").

[4] *Pena-Rodriguez*, 580 U.S. at 210.

[5] *See* Ngov, *supra* note 3, at 242 ("Consideration of acquitted conduct by a judge after a jury has already deliberated sends a message that the work of the jury was unnecessary and, in turn, threatens to undermine the role the jury serves and advantages it provides over judicial fact-finding."); *United States v. Ibanga*, 454 F. Supp. 2d 532, 541 (E.D. Va. 2006) (Kelley, J.) ("A sentence that repudiates the jury's verdict undermines the juror's role as both a pupil and participant in civic affairs. The juror learns that the law does not value the results of his or her participation in the judicial process and may reject it at will.").

[6] *See* Brief of Professor Douglas Berman as Amicus Curiae Supporting Petitioner at 7, *McClinton v. United States*, No. 21-1557, 2022 WL 2704759 (U.S. July 8, 2022) ("Acquittals, in these cases, are mere formal matters; acquittals in name only with no meaningful consequence or limit on the state's effort to punish based on the very allegation the jury unanimously rejected.").

[7] *See, e.g.*, See *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millet, J., concurring in the denial of rehearing en banc) (acquitted conduct sentencing reduces the "liberty-protecting bulwark" of the jury system to "little more than a speed bump at sentencing"); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("Permitting a judge to impose a sentence that reflects conduct the jury expressly disavowed . . . trivializes [the jury's] principal fact-finding function. But no less significant, this judicial fact-finding deprives a defendant of adequate notice as to his or her possible sentence. This state of affairs is unfair, unjust and I believe plain unconstitutional."); *United States v. White*, 551 F.3d 381,

Indeed, over three decades ago, the Ninth Circuit recognized that enhancing a sentence on a convicted count for allegations rejected by the jury effectively punishes for the acquitted conduct.[8] It lamented that such punishment "pervert[s] our system of justice" and "circumvent[s] . . . statutory directive" prescribing proportional sentencing.[9] Yet, 32 years later, this perverse affront to proportionality persists. D.C. Circuit Judge Patricia Millett recently observed, "Allowing the government to lock people up for a discrete and identifiable term of imprisonment for criminal charges rejected by a jury is a dagger pointed at the heart of the jury system and limited government."[10] Other judges have implored the Sentencing Commission to outlaw this pernicious practice.[11]

(6th Cir. 2008) (Merritt, J., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("I strongly believe [that] sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) ("Although it makes no difference in this case, we believe that a defendant's Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him. Moreover, we believe the Guidelines' apparent requirement that courts sentence for acquitted conduct utterly lacks the appearance of justice."); *see also* Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 25-27 (2016); Lucius T. Outlaw III, *Giving An Acquittal Its Due: Why a Quartet of Sixth Amendment Cases Means the End of United States v. Watts and Acquitted Conduct Sentencing*, 5 U. Denv. Crim. L. Rev. 173, 188-91 (2015); Ngov, *supra* note 3, at 263-308; Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523, 551 (1993); Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rep. 355, 356 (1992).

[8] *See United States v. Brady*, 928 F.2d 844 (9th Cir. 1991), *abrogated by United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

[9] *Id. at* 851.

[10] *Brown*, 892 F.3d at 408 (Millett, J., concurring).

[11] *See, e.g,* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, New York, N.Y., at 42-43 (July 9, 2009) (Judge Kavanaugh); *cf. United States v. Watts*, 519 U.S. at 158 (Breyer, J. concurring) ("I join the Court's per curiam opinion

Some district judges already reject the use of acquitted conduct to enhance sentences on policy grounds.[12] Several state high courts have held acquitted conduct sentencing runs afoul of state or federal constitutional provisions, or both.[13] And the American Law Institute's Model Penal Code (MPC) expressly rejects the use of acquitted conduct to formulate sentencing guidelines.[14] While the MPC drafters noted their concern about the lack of constitutional safeguards at sentencing,[15] they recognized that even without constitutional infirmity, acquitted conduct sentencing is "an anomaly with grave impacts upon fairness and process regularity" that is especially malevolent "when the penalty consequences attending a finding of 'guilt' at sentencing are identical to those that would have resulted from a formal conviction at trial."[16]

Congress enacted the Sentencing Reform Act (SRA) in 1984 with an eye toward assuring "that sentences are fair both to the [individual being sentenced] and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all federal cases."[17] It created the Sentencing Commission and set forth one of its primary purposes: to establish sentencing policies and practices that "provide certainty and fairness in meeting the purposes of sentencing" and "avoid[ ] unwarranted

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while noting that it poses no obstacle to the Sentencing Commission itself deciding whether or not to enhance a sentence on the basis of conduct that a sentencing judge concludes did take place, but in respect to which a jury acquitted the defendant.").

[12] *See, e.g.*, *United States v. Safavian*, 461 F. Supp. 2d 76, 83 (D.D.C. 2006) (Friedman, J.); *United States v. Coleman*, 370 F. Supp. 2d 661, 671, 673 (S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152-53, 155 (D. Mass. 2005) (Gertner, J.).

[13] *See State v. Melvin*, 258 A.3d 1075 (N.J. 2021); *People v. Beck*, 939 N.W.2d 213, 216 (Mich. 2019); *Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997); *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987).

[14] *See* Model Penal Code: Sentencing § 9.05(2)(b) (Am. Law. Inst., Approved 2017).

[15] *See* Model Penal Code: Sentencing § 6B.06 (Comment) (Am. Law. Inst., Proposed Official Draft 2017).

[16] *Id.*

[17] S. Rep. 98-225, 98th Con., 2d Sess. at 39 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 3182, 3222.

sentencing disparities."[18] As Defenders explained to the Commission in our September 2022 Annual Letter, acquitted conduct sentencing frustrates this purpose.[19]

Sentencing hearings lack the evidentiary, procedural, and constitutional protections of trials. The rules of evidence (especially the rule against hearsay), the right to confront witnesses, the exclusionary rule, unanimous multiple factfinders, and the proof "beyond a reasonable doubt" standard—none of these protections apply at federal sentencing hearings, which often devolve into brief, informal proceedings by proffer and pronouncement.[20] The use of acquitted conduct to enhance sentences in these circumstances is antithetical to basic notions of certainty and fairness to the sentenced individual and undermines public respect for the sentencing process and the federal judicial system.[21] It also leads to unwarranted disparities because

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[18] 28 U.S.C. § 991(b)(1)(B). The guidelines the Commission promulgates must similarly give "particular attention" to these requirements. *See* 28 U.S.C. § 994(f).

[19] *See* Defenders' Annual Letter to the Sentencing Commission 6-8 (Sept. 14, 2022).

[20] *See* Outlaw, *supra* note 7, at 179-80; Ngov, *supra* note 3, at 239; Reitz, *supra* note 7, at 548-49.

[21] *See United States v. Mateo-Medina*, 845 F.3d 546, 554 (3d Cir. 2017) ("[C]alculating a person's sentence based on crimes for which he or she was not convicted undoubtedly undermines the fairness, integrity, and public reputation of judicial proceedings."); *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996) ("[A]s a matter of public perception and acceptance, [acquitted conduct sentencing] can often invite disrespect for the sentencing process."); *Coleman*, 370 F. Supp. 2d at 671 n. 14 ("[C]onsideration of acquitted conduct has a deleterious effect on the public's view of the criminal justice system. A layperson would undoubtedly be revolted by the idea that, for example, a 'person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct for which he has been acquitted.'" (quoting *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring))); *cf. Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law [is] not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."); Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth*, 39 Ga. L. Rev. 895, 945 (2005) ("Because juries are generally perceived to be neutral and because social science research shows that even losing disputants will accept the outcome if they believe the process was fair, juries help guarantee acceptability for the parties, as well as for the community.").

some judges accept, and others reject, acquitted conduct sentencing.[22] For those who accept it, unwarranted disparities manifest in treating individuals convicted of the same offense dissimilarly, and unwarranted similarities manifest in treating individuals acquitted of an offense similarly to those convicted of the same offense.[23]

In addition to providing certain and fair sentencing policies and guarding against unwarranted disparities, the Commission is statutorily required to "independently develop a sentencing range that is consistent with the purposes of sentencing" outlined in 18 U.S.C. § 3553(a).[24] Yet, acquitted conduct sentencing conflicts with this obligation, too.[25] It "risks creating a society that does not respect the law," is an ineffective deterrent because most people are unaware that sentences can be increased for acquitted conduct, and is unlikely to significantly enhance public safety.[26] And while the policy may be facially neutral, in practice it disproportionately impacts racial and ethnic minorities.[27] "[M]ore [B]lack and ethnic minority defendants have acquitted conduct used against them under the broad relevant conduct provisions of the Guidelines than white defendants; as a result, the acquitted conduct may be used as an unintended proxy for racial disparagement."[28] This undermines the Commission's obligation to ensure that the sentencing guidelines and policy statements are racially neutral.[29]

Acquitted conduct sentencing also dangerously elevates prosecutorial power. The specter of acquitted conduct sentencing encourages prosecutors to overcharge, knowing if they can get a conviction on one count, they will be granted a "second-bite at the apple of punishment" at sentencing "under

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[22] *See* Defenders' Letter *supra* note 19, at 8; *see also* Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415, 1462 (2011); Outlaw, *supra* note 7, at 180.

[23] *See* Defenders' Letter, *supra* note 19, at 7-8.

[24] *See* 28 U.S.C. § 994(m).

[25] *See* Ngov, *supra* note 3, at 295-308*;* Orhun Hakan Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?* 54 Santa Clara L. Rev. 675, 706-09 (2014).

[26] *See* Ngov, *supra* note 3, at 296-304.

[27] *See* Yalincak, *supra* note 25, at 709-10.

[28] *Id.*

[29] *See* 28 U.S.C. § 994(d).

circumstances that substantially disfavor the defendant."[30] Thus, it tips the scales of an already imbalanced legal system even further in favor of the prosecution. It is impossible to quantify the coercive effect of acquitted conduct sentencing on an individual's decision whether to exercise their constitutionally protected right to a jury trial.[31] My personal experience, practicing for 25 years in the district of Kansas after Jessie Ailsworth was sentenced, confirms this reality.

The chorus of criticism against this policy and the Commission's three previous proposals to eliminate acquitted conduct sentencing make clear that this amendment is long overdue.[32] As the lambasting has grown louder over the years, the Commission is obligated under the SRA to set new sentencing policy that reflects this "advancement in knowledge . . . relate[d] to the criminal justice process."[33] Prohibiting acquitted conduct sentencing would carry out that statutory duty, while bringing greater legitimacy,

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[30] Outlaw, *supra* note 7, at 179; *see also* Reitz, *supra* note 7, at 521 ("[T]he relitigation of acquittal counts at sentencing adds a substantial burden on defendants convicted of some charges and acquitted of others. Acquittal charges must be defended twice, and the defense must be more vigorous the second time around because the available procedures are more spare.").

[31] *See Bell*, 808 F.3d at 929 (Millet, J., concurring in the denial of rehearing en banc) ("[F]actoring acquitted conduct into sentencing decisions imposes almost insurmountable pressure on defendants to forgo their constitutional right to a trial by jury. Defendants will face all the risks of conviction, with no practical upside to acquittal unless they run the board and are absolved of *all* charges."); *see also* Brief for the National Ass'n of Federal Defenders & Families Against Mandatory Minimums as Amici Curiae Supporting Petitioner at 9, *McClinton v. United States*, No. 21-1557, 2022 WL 2704759 (U.S. July 8, 2022) ("A defendant's typical incentive for rejecting a plea offer is the prospect that she will obtain a more favorable result if she prevails at trial. But punishing acquitted conduct means defendants often cannot reap the benefits of acquittal. In fact, as a practical matter, it threatens *harsher* outcomes for defendants who secure partial acquittals: They are sentenced as if they admitted guilt on every count, but with none of the sentencing breaks that attend a guilty plea." (citation omitted)).

[32] *See* 62 Fed. Reg. 15201 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992).

[33] 28 U.S.C. § 991(b)(1)(C); *see also* 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.").

transparency, respect, and fairness to the federal system. Below, we highlight three stories of persons impacted by acquitted conduct sentencing.

II. Using acquitted conduct to enhance sentences leads to unjust results.

The cases of Erick Osby and Christian Nieves highlight the unwarranted and unfair disparities caused by acquitted conduct sentencing. On May 31, 2019, a jury acquitted Erick Osby, a Black man in his mid-twenties, of five of seven drug and weapon counts.[34] At sentencing on the two counts of conviction, the court disregarded the jury's acquittals and used that alleged conduct to calculate the guideline range.[35] The sentencing court felt compelled to "follow the law. . . and allow acquitted conduct to be at least considered."[36] This "consideration" increased Erick's guideline range from 24 to 30 months, based solely on the counts of conviction, to 87 to 108 months based on the whole of the government's allegations at trial.[37] Erick was sentenced to 87 months in prison. Erick has now exhausted the appellate process. His petition for a *writ of certiorari* was denied in October 2021.[38] Erick is 28 years old and remains confined at FCI Beckley.[39] Had the court honored the jury's verdict, Erick would likely be a free man today.

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[34] Counts one through four of the indictment stemmed from a police search of a hotel room on September 18, 2018, that allegedly uncovered drugs, money, and a firearm. Counts five through seven stemmed from a traffic stop and car search, on September 27, 2018, that allegedly uncovered another gun, more money, and more drugs. *See United States v. Osby*, No. 4:19-cr-9, ECF No. 1. Erick was acquitted of both gun charges (possession of a firearm in furtherance of drug trafficking) and acquitted of the possession with intent to distribute charges related to the hotel search. *See id.,* ECF No. 58 (verdict form). He was convicted only of possession with intent to distribute the drugs found in the car on September 27, 2018. *See id.*

[35] *See United States v. Osby*, No. 4:19-cr-9, ECF No. 84 (transcript of sentencing hearing).

[36] *Id.*, ECF No. 84, at 17.

[37] *See id.*, ECF No. 84, at 59.

[38] *See id.*, ECF No. 96 (text entry).

[39] *See* BOP Inmate Locator Service, available at https://www.bop.gov/inmateloc/ (search by Register No. 93119-083) (last checked February 9, 2023); s*ee also United States v. Basher*, 629 F.3d 1161, 1165 n.2 (9th Cir. 2011) (taking judicial notice of publicly available BOP Inmate Locator data).

Christian Nieves, in contrast, benefited from a sentencing judge who recognized that acquitted conduct sentencing is bad policy.[40] On April 23, 2021, a jury found Christian, a Latino man, not guilty of conspiracy to commit witness tampering (count four), but guilty of witness retaliation (count one).[41] At sentencing, the government asked the court to increase Christian's guideline range based on the witness tampering allegation rejected by the jury at trial.[42] Refusing to substitute its judgement for the jury's, the court denied the government's request, sentencing Christian to 36 months in prison.[43]

Erick and Christian's cases not only exemplify the unwarranted sentencing disparities that result from permitting acquitted conduct sentencing when applying the guidelines,[44] they display the direct and harmful impact of acquitted conduct sentencing on Erick Osby and others who exercise their constitutional right to a jury trial.

Acquitted conduct sentencing also has an indirect, chilling effect on the exercise of the sacred right to be tried by a jury that extends far beyond any one case. Take, for instance, what happened in my district after Jessie Ailsworth was sentenced to 30 years in prison for an expansive crack cocaine conspiracy despite the jury's determination that he played a very minor role.

In 1994, Jessie Ailsworth was charged with a far-ranging conspiracy to distribute crack cocaine spanning 13 months and involving six other people, in violation of 21 U.S.C. § 846. He was also charged with dozens of other drug- and gun-related crimes.[45] Jessie chose to have a jury trial.[46] His jury was thoughtful and deliberate in their verdict. Jury deliberations lasted

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[40] We reviewed a copy of the sentencing transcript where the judge rejected, as a policy matter, the use of acquitted conduct to enhance Mr. Nieves's guideline range.

[41] *See United States v. Nieves*, No. 1:19-cr-354, ECF No. 107 (verdict form).

[42] *See id.*, ECF No. 134, at 3-6 (transcript of sentencing).

[43] *See id.* at 36. Christian's conviction was recently overturned on appeal for errors during the *voir dire* process. *See United States v. Nieves*, 58 F.4th 623 (2d Cir. 2023).

[44] *Cf.* 28 U.S.C. §§ 991(b)(1)(B); 994(f).

[45] *See United States v. Ailsworth*, No. 5:94-cr-40017, ECF No. 287 (second superseding indictment).

[46] *See id.*, ECF No. 719 (minute sheet of jury trial).

several days during which the jury submitted numerous questions to the court. Finally, the jury returned a partial verdict that exonerated Jessie of 28 of the 37 counts.[47] And although the jury ultimately convicted on the top conspiracy count, [48] they wrote a note on the bottom of the verdict form limiting Jessie's involvement to the sale of 33.81 grams of crack cocaine in exchange for food stamps.[49]

At sentencing on December 12, 1996, the presentence investigation report (PSR) calculated a guideline range that included the acquitted conduct and the government advocated for a life sentence, which was within the enhanced range.[50] In other words, without presenting additional testimony or evidence, the government asked the sentencing court to substitute its fact-finding judgement for that of Jessie's impartial and unanimous jury acquittal.[51] The sentencing court overruled Jessie's objections to the acquitted conduct drug weight and sentenced Jessie to 30 years in prison, assessing a guideline range of 360 months to life in prison based on facts rejected by the jury.[52] This was 25 years longer than any of his co-defendants, who opted to plead guilty, cooperate with the government against Jessie, or both.[53]

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[47] *See id.,* ECF No. 797 (sentencing transcript on file with author).

[48] Jessie was found guilty of conspiracy to distribute crack cocaine in count 1. That count specifically alleged 1,947.58 grams of crack cocaine. At sentencing, all parties understood that the jury's finding limited the scope of Jessie's participation in the conspiracy to the date November 19, 1993 (the conduct alleged in counts 26 through 28) because the jury wrote on the verdict form, "as related to counts # 26, 27, and 28 on 11/19/93 only." The jury hung on counts three and twelve. The jury convicted him of one other drug count (count 6) and two food stamp counts (counts 7 and 9). At sentencing all parties referred to the conduct alleged in the remaining counts that would have made up the remainder of the 1947.58 grams as acquitted conduct. The verdict form was, in some respects, treated like a special verdict form. The fact that the jury returned a verdict of guilty to count one, limiting the scope of Jessie's participation to approximately 33.81 grams, was not in dispute at the time of sentencing.

[49] *See id.*, ECF No. 985, at 3 (motion to reduce sentence).

[50] I reviewed the PSR and sentencing transcript when preparing these comments.

[51] *See Ailsworth*, *supra* note 45, at ECF No. 797

[52] *See id;* USSG §2D1.1(c)(6) (1994).

[53] *See Ailsworth*, *supra* note 45, at ECF No. 797.

Jessie's case is not simply a tale of injustice for one man.[54] His case is an example of the daunting effect of acquitted conduct sentencing on those who wish to exercise their constitutional right to trial. I knew Jessie's story long before I became the Federal Defender and before our office represented him in First Step Act litigation in 2019. For years, Jessie's success at trial and concomitant loss at sentencing was the lesson that federal court was no place for a jury trial. Jessie's case was the example drilled into my head as a new Assistant Federal Public Defender that trial in federal court was an all-or-nothing game. It was the example we repeatedly, and to my great shame and regret today, used to convince clients to plead guilty rather than risk a trial, regardless of the strength of their defense.[55] I can only conclude that his 30-year sentence, after the jury gutted the prosecution's case, emboldened prosecutors to aggressively and indiscriminately overcharge, knowing they only needed to secure a conviction on one count to request a sentence based on every allegation.

While we are able to talk about the identifiable harm or threat of harm acquitted conduct sentencing posed in these three cases, it is impossible to capture or calculate the damage done to so many clients who should have and could have gone to trial—in our system that was conceived and based on jury

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[54] Although, indeed, Jessie's case involved multiple layers of personal injustice. In addition to being sentenced for acquitted conduct, Jessie was punished for crack cocaine distribution during the era of the now universally repudiated 100:1 crack to powder cocaine quantity ratio. Beginning in 1995, the Commission urged Congress to abandon the sentencing structure that treated the two forms of cocaine differently and resulted in disproportionately severe sentences for people of color for over two decades. In 1995, the Commission issued a special report to Congress stating it "firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress." USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy, Executive Summary* xii-xv & 192 (1995). The ratio has since been reduced to 18:1. Today, a drug offense involving approximately 34 grams of crack would receive a base offense level (BOL) of 24. In 1996, when Jessie was sentenced, a drug offense involving 34 grams of crack would have received a BOL of 28. *See* USSG §2D1.1 (Nov. 1, 1995). However, because the court used acquitted conduct, Jessie's BOL was 38.

[55] Obviously, this does not apply in single-count indictments. But in federal court, as least in our district, those are mostly felon-in-possession or immigration cases. Our bread-and-butter drug-weapon-conspiracy cases are almost always multiple count indictments. Most white-collar and child pornography cases are also multi-count indictments that carry the same risk of acquitted conduct sentencing.

trials—but did not, because of the risks writ large, exemplified by Jessie Ailsworth's experience, and the experiences of people like him in other districts.

Jessie served 25 years before he was released under the First Step Act.[56] In June 2022, the district court granted Jessie's unopposed motion for early termination of his supervised release term.[57] Today, Jessie has been out of custody for 4 years, and is still adjusting to life since his release. He has his commercial driver's license and drives a truck for a living. He lost his only brother while he was in prison. He missed watching his nephews and other family members grow up. More importantly, during those 25 years when I was building my career as a Federal Defender and raising my own two children, Jessie lost the chance to have children of his own. There is not enough room or time to talk about everything that Jessie lost during those 25 years he served in prison for the very crimes he didn't commit, according to the unanimous jury of 12 who heard and rejected the government's accusation.

III. The Commission should eliminate, rather than limit, the use of acquitted conduct to determine the guideline range.

The Commission should eliminate, rather than limit, the use of acquitted conduct to calculate the sentencing guideline range. Section 1B1.3(c)(1) of the proposal potentially allows acquitted conduct to be used to determine the guideline range under two unusual circumstances. Namely, "acquitted conduct" must not be used to calculate the sentencing range "unless such conduct (A) was admitted by the defendant during a guilty plea colloquy; or (B) was found by the trier of fact beyond a reasonable doubt . . . ."[58] These two limitations are unnecessary, opaque, and may lead to unintended consequences. A clearer rule would state: "Acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range." This language and the definition of acquitted conduct at

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[56] *See Ailsworth*, *supra* note 45, at ECF Nos. 985 and 986.

[57] *See id.* at 994.

[58] *See* 88 Fed. Reg. 7180, 7225 (2023) ("2023 Proposed Amendments").

proposed §1B1.3(c)(2) provide sufficient guidance to courts to apply the guideline.

The Commission raises concerns about the scope of a jury's acquittal where there is "overlapping conduct" among the counts of conviction and acquittal. These scenarios are likely to be so rare as to be anomalous. And policy should not be built on anomalies. For instance, courts and parties attempt to guard against inconsistent verdicts through arguments and instructions to the jury. In most cases, the preclusive effect of the jury's verdict will be clear. If anomalies occur, courts are in the best position to decipher the parameters of the jury's "guilty" and "not guilty" verdict, after hearing arguments from both sides, and to sentence accordingly under § 3553(a). Creating special rules in anticipation of anomalies dilutes and muddles the guideline in the face of strong policy reasons for a general prohibition. Moreover, the Commission can revisit the rule, if necessary, once it has been in place for some time and after receiving feedback from courts and commentators about its workability. This is how the guideline amendment process was intended to work.[59]

IV. The policy reasons to eliminate acquitted conduct from the guideline calculation apply equally to within-guideline and vertical and horizontal departure sentences.

In addition to the changes proposed at USSG §1B1.3 that define and limit acquitted conduct sentencing, the Commission proposes to amend the policy statement at §6A1.3 (Resolution of Disputed Factors). The proposal reads:

> Acquitted conduct, however, generally should not be considered relevant conduct for purposes of determining the guideline range. *See* subsection (c) of §1B1.3 (Relevant Conduct). *Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a

[59] *See Rita v. United States*, 551 U.S. 338, 350 (2007) ("The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.").

Point Within the Guideline Range or Departing from the Guidelines)).[60]

The Commission should prohibit the consideration of acquitted conduct when calculating the guidelines—both when determining the initial range, and when determining whether any departures apply. The many policy reasons against using acquitted conduct to increase the offense level apply to *all* sentencing determinations, including *all* applications of the guidelines. There is no reason for the Commission to invite courts to depart upward or sentence at the top of the range to account for acquitted conduct that is excluded from calculating the offense level. The proposed italicized language creates an unnecessary exception to the Commission's laudable new rule and charts a potential end-run around the salutary effect of the relevant conduct amendment.

United States v. Brady, 928 F.2d 844 (9th Cir. 1991) is a prime example of the injustice of using acquitted conduct to vertically depart (along the offense level axis) from the guideline range. Leon Brady was charged with first degree murder and assault with intent to commit murder.[61] At trial, he was acquitted of the greater offenses and convicted of voluntary manslaughter and assault with a dangerous weapon.[62] The sentencing judge departed above the 51 to 63-month guideline range and sentenced Mr. Brady to 180 months, in part because the court believed Mr. Brady was guilty of the greater offenses.[63] The Ninth Circuit reversed. It held, in relevant part, that the *upward departure* to account for acquitted conduct was improper because it effectively overruled the jury's verdict, bringing it outside the bounds of the relevant conduct guideline.[64]

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[60] *See* 2023 Proposed Amendments, at 7225.

[61] *See Brady*, 928 F.2d at 845.

[62] *See id.* at 845-46.

[63] *See id.* at 846.

[64] *See id.* at 851-52; *see also United States v. Brown,* 892 F.3d at 409 (Millett, J., concurring) ("[U]sing [acquitted] conduct to single a defendant out for distinctively severe punishment—*an above-Guidelines sentence*—renders the jury a sideshow. Without so much as a nod to the niceties of constitutional process, the government plows ahead incarcerating its citizens for lengthy terms of imprisonment without the inconvenience of having to convince jurors of facts beyond a reasonable doubt." (emphasis added)); *Bell*, 808 F.3d at 931 (Millet, J., concurring in the denial of

United States v. Fonner, 920 F.2d 1330 (7th Cir. 1991), provides a compelling example of the injustice of using acquitted conduct to horizontally depart (along the criminal history axis) from the guideline range. Barron Fonner was acquitted of murder in 1972 when the jury concluded unanimously that he acted in self-defense.[65] More than 15 years later, Mr. Fonner was convicted in federal court of mailing threats, under 18 U.S.C. § 876.[66] Although his federal sentencing range for the threats conviction was only 30 to 37 months, the district judge departed to the statutory maximum of 10 years, in part because he believed Mr. Fonner's criminal history score underrepresented his record, under USSG §4A1.3, because the 1972 *acquittal* was not scored as criminal history.[67] The Seventh Circuit remanded for resentencing because the district court did not adequately justify the extent of the departure.[68] But it endorsed the district court's use of Mr. Fonner's jury acquittal to depart above his range based on the different burdens of proof at trial and sentencing, and existing circuit precedent.[69]

18 U.S.C. § 3661 does not compel the Commission to carve departures out of an acquitted conduct prohibition. Section § 3661 provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[70] But the "no limitation" language should not be read

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rehearing en banc) (explaining that recent Supreme Court decisions "cast substantial doubt on the continuing vitality" of imposing "dramatic *departures* from the Sentencing Guidelines range based on acquitted conduct" (emphasis added)).

[65] *See Fonner*, 920 F.2d at1331.

[66] *See id.*

[67] *See id.* Courts may depart upward "[i]f reliable information indicates that the defendant's criminal history category substantially underrepresents the likelihood that the defendant will commit other crimes." USSG §4A1.3(a). "Prior similar adult criminal conduct not resulting in a criminal conviction" is given as an example of the information that may form the basis of the departure. *Id.* §4A1.3(2)(E).

[68] *See id.* at 1332.

[69] *See id.* at 1333.

[70] 18 U.S.C. § 3661.

expansively. Otherwise, it "negates the entire Guidelines enterprise"[71] and conflicts with other portions of the SRA.[72]

A primary purpose of the SRA was to "cabin the discretion of all [sentencing] judges" to remedy what Congress viewed as "'an unjustifiably wide range of sentences.'"[73] In line with this purpose, the guidelines and SRA limit information judges consider at sentencing related to the convicted person's "background, character, and conduct" in numerous ways.[74] For instance, §5K1.1 and the SRA require a government motion before a court can depart based on substantial assistance to authorities.[75] The guidelines list various "specific offender characteristics"—such as educational/vocational skills, drug/alcohol/gambling addiction, family responsibilities, and lack of guidance as a youth—that courts must generally disregard in deciding whether to *depart*.[76] Prior convictions deemed minor or too remote in time are excluded from the criminal history calculation.[77] Likewise, a prior arrest record, alone, is not grounds for upward departure based on inadequate Criminal History Category.[78] More generally, the guidelines limit the weight courts accord specific factors through its mathematical system of adding and subtracting points and levels. Read literally, § 3661 would even seem to invalidate the well-recognized "preponderance of the evidence" evidentiary burden at sentencing—a limitation on the court's ability to base sentencing

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[71] Johnson, *supra* note 7, at 37.

[72] Courts have argued that instead of *effectuating* statutory goals and requirements, acquitted conduct sentencing *frustrates* them. *See White*, 551 F.3d at 395 (Merritt, J., dissenting) (the plain language of the Sentencing Reform Act requires a defendant to be "convicted" of the conduct that forms the basis for the sentence); *Ibanga*, 454 F. Supp. 2d at 539 (punishing for acquitted conduct contravenes 18 U.S.C. § 3553(a)(2)(A)'s requirement that the sentence promote respect for the law and results in just punishment for the offense of conviction).

[73] *United States v. Watts*, 519 U.S. at 161 (Stevens, J., dissenting) (quoting S. Rep. No. 98-225, p. 38 (1983)).

[74] 18 U.S.C. § 3661.

[75] *See* USSG §5K1.1; 18 U.S.C. § 3553(e).

[76] *See* USSG ch. 5, pt. H. We note that while the guidelines discourage or prohibit consideration of these factors as grounds to *depart*, courts can (and often do) consider these factors as reasons to *vary* below the guidelines. *See* 18 U.S.C. § 3553(a).

[77] *See* USSG §4A1.2.

[78] *See* USSG §4A1.3(a)(3).

decisions on unreliable evidence. Thus, § 3661 "pose[s] no threat to the Commission's authority to determine the content of the Guidelines, including whether sentencing courts [can] use acquitted conduct." [79]

Finally, an uneven rule that treats guideline calculations and departures/within-guideline determinations differently does not fully rectify the unwarranted disparities problem. [80] While the proposed §1B1.3 amendment mitigates this risk, some judges may still be inclined to consider acquitted conduct when applying the guidelines, even if it is not part of the offense level calculation, either by imposing a sentence at the high end of the range or by way of upward departure.

Although the Supreme Court has yet to invalidate acquitted conduct sentencing altogether, and courts may still consider acquitted conduct when imposing a final sentence under § 3553(a), the Commission should not encourage this practice. Thus, we urge the Commission to delete the proposed statement that "*Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted.*" We further urge the Commission to amend §§1B1.4, 4A1.3 (which the district court applied to Mr. Fonner's case), and 5K2.0 (which the district court applied to Mr. Brady's case) to make clear that acquitted conduct may not be considered at any point when applying the guidelines.

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[79] Johnson, *supra* note 7, at 41. The House Report on the predecessor version of § 3661 cites the Supreme Court's decision in *Williams v. New York*, 337 U.S. 241 (1949) to explain its enactment. *See United States v. Grayson*, 438 U.S. 41, 50 n. 10 (1978) (citing H.R. Rep. No. 91-1549, at 63 (1970)). Thus, § 3661 can be understood to codify the holding in *Williams* that due process does not mandate application of the rules of evidence and confrontation clause at sentencing. *See Williams*, 337 U.S. at 250-51; *see also Watts*, 519 U.S. at 160 (Stevens, J., dissenting) ("In 1970, during the era of individualized sentencing, Congress enacted the statute now codified as 18 U.S.C. § 3661 *to make it clear that otherwise inadmissible evidence could be considered* by judges in the exercise of their sentencing discretion." (Emphasis added)).

[80] *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f) (describing one mission of the Commission as establishing policies that avoid unwarranted disparities in sentencing similarly situated individuals).

V. The limitation on the use of acquitted conduct at sentencing should not be narrowed based on the nature of the acquittal.

Finally, the Commission seeks comment on whether the limitation on the use of acquitted conduct is too narrow or too broad. As an example, the Commission asks whether it should "account for acquittals for reasons such as jurisdiction, venue, or statute of limitations, that are otherwise unrelated to the substantive evidence?" [81]

Again, the Commission should not narrow the rule to account for outlier scenarios. "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." [82] It is "a legal certification [that] an accused person is not guilty of the charged offense." [83] In our justice system, an acquittal is both "final, the last word on a criminal charge" [84] and "unassailable." [85] Creating entire categories of acquittals exempt from the amendment diminishes the force and finality of the verdict, erodes the safeguards of the Fifth and Sixth Amendments, and undermines the ameliorative function of the proposed rule by sanctioning punishment for an acquitted offense in certain circumstances.

Any attempt to define exempt categories of acquittals "otherwise unrelated to the substantive evidence" risks over-complicating the guideline calculation. Courts would need to attempt to ascertain the basis for the jury's

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[81] *See* 2023 Proposed Amendments, at 7225.

[82] *Yeager v. United States*, 557 U.S. 110, 122 (2009).

[83] Black's Law Dictionary 30 (11th ed. 2019).

[84] *Bravo-Fernandez v. United States*, 580 U.S. 5, 9 (2016) (citation and quotation marks omitted).

[85] *Yeager*, 557 U.S. at 123.

verdict[86] and whether it implicates "substantive evidence".[87] It potentially opens the door to consideration of acquittals based on affirmative defenses, such as duress or entrapment. It would be further complicated if multiple or even inconsistent defenses were presented. Disagreement among judges on these questions, or whether the carve-out was a proper policy choice to begin with,[88] can lead to disparities in sentencing similarly situated individuals. A simple, clear, inclusive prohibition best promotes the policies for the rule, promotes more uniformity, and is easiest to apply.

VI. Conclusion

Defenders commend the Commission for its salient work on this amendment. We encourage the Commission to: (1) eliminate, rather than just limit, the use of acquitted conduct to calculate the guideline range; and (2) prohibit horizontal and vertical departures and within-guideline sentences based on acquitted conduct. We also urge against any narrowing of the limitation on the use of acquitted conduct to account for acquittals "unrelated to the substantive evidence." If the Commission is going to end acquitted conduct-based sentencing, it should do so fully and unequivocally. The pursuit of both the reality and appearance of justice demands no less.

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[86] This task is not always easy. Jury deliberations have been described as a "black box" where "the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review." *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008). With limited exceptions, *see* Fed. R. Evid. 606(b)(2); *Pena-Rodriguez*, 580 U.S. at 225-26, the Rules of Evidence forbid courts from inquiring into juror decision-making once a verdict is rendered. *See* Fed. R. Evid. 606(b)(1).

[87] The "substantive" nature of the acquittal may also be the subject of dispute among judges. *Cf.*, *United States v. Johnson*, 323 U.S. 273, 276 (1944) ("Questions of venue in criminal cases . . . are not merely matters of formal legal procedure."); *United States v. Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J. concurring in part) (observing that the constitutional venue provisions "were adopted to achieve important substantive ends"), *rev'd on other grounds*, *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

[88] Judges can vary below the guidelines based on policy disagreements with the Commission. *See Spears v. United States*, 555 U.S. 261, 264 (2009); *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

Federal Public and Community Defenders Comment on Sexual Abuse Offenses Amendments (Proposal 9)

March 14, 2023

Federal Public and Community Defenders, along with our CJA colleagues, represent 80 to 90 percent of all individuals prosecuted in federal court. We are deeply concerned about the safety and wellbeing of our clients (and others) in federal custody. And we appreciate that the Commission seeks to address the epidemic of sexual misconduct in BOP and other custodial settings. Our testimony laid out the reasons that the Commission should stay its hand instead of drastically increasing the §2A3.3 BOL.[1] In this comment, we address matters that were raised at the February 2023 hearing on this topic.

We note that this is not the first time DOJ's mismanagement of its staff has prompted it to seek an increase in punishment. Despite previous upward ratchets to the §2A3.3 guideline and § 2243(b) statutory penalties over the years, the well-documented sex abuse problem in BOP has persisted for decades. The DOJ OIG issued a report in 2005 on the sex abuse problem within BOP.[2] In 2007, DOJ requested an additional increase to §2A3.3's BOL; the Commission then raised §2A3.3's BOL from 12 to 14.[3] Sixteen years later,

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[1] We incorporate by reference the written testimony of Heather E. Williams, submitted for the recent hearing. ("Williams Test.") It is attached to this Comment.

[2] *See* U.S. Dep't of Just., Off. of the Inspector Gen., *Deterring Staff Sexual Abuse of Federal Inmates* 3 (2005), https://bityl.co/H97T ("The OIG has investigated hundreds of allegations of sexual abuse of inmates by BOP staff."). This report followed the 1999 GAO report that also documented sexual misconduct in BOP. *See* Gov't Accountability Office, *Women in Prison: Sexual Misconduct by Correctional Staff* 2 (1999), ("1999 GAO Report"), https://bityl.co/HAFo.

[3] Section 401 of the PROTECT Act directed, among other things, that the "Commission shall amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses under sections 2243(b)." Pub. L. No. 108-21, § 401(g), 117 Stat. 650 (Apr. 30, 2003). In 2004, DOJ urged a two-level increase in the §2A3.3 BOL, arguing, without an empirical basis, that "the 2A3 guidelines should be increased to maintain proportionality with the increases in the 2G guidelines," and recommended raising the BOL from 9 to 12. Deborah Rhodes, DOJ Comments Regarding 2004 Proposed Amendments at 13 (Mar. 1, 2004), https://bit.ly/3ZYDVEh. The Commission accordingly raised the §2A3.3 BOL from 9 to 12 in 2004, citing to the PROTECT Act. *See* USSG App. C, Amend 664 (Nov. 1, 2004), https://bit.ly/3mCyZXk. In 2007, DOJ requested that the Commission raise the BOL to 20. *See* Benton Campbell, DOJ Comments Regarding 2007 at 6 (March 30, 2007), https://bit.ly/3l7UOxM. Instead, the Commission raised the BOL to 14, noting that "section 207 of the Adam Walsh Act increased the statutory maximum term of imprisonment under 18 U.S.C. § 2243(b) from 5 years to 15 years for the sexual abuse of a person in official detention or under custodial authority." USSG app. C, Amend. 701 (Nov. 1, 2007), https://bit.ly/3YG641W.

DOJ and BOP have still not meaningfully addressed the ongoing misconduct within their own facilities,[4] yet DOJ asks again for an increase in severity of punishment, without adequately explaining why this time it will be different.

The Commission asked genuinely good questions at the hearing. And certain misstatements by DOJ's witness at the hearing underscore the importance of pausing to gather data and accurate information.

I. DOJ and BOP have the power to prevent this conduct.

Despite the significant body of literature to the contrary, at the February 24, 2023 hearing, the DOJ witness speculated that the well-accepted research on deterrence might not apply in the specific context of §2A3.3 cases because prison employees are a discrete community to whom DOJ could broadcast a guideline increase through "supervisory channels."[5]

Although this argument is contradicted by the well-established body of general deterrence literature,[6] DOJ's emphasis on the "special context" of employee-driven sexual assaults does contain one kernel of insight: it highlights that DOJ and BOP are in a unique position to prevent this conduct from occurring in the first place.

DOJ cannot implement surveillance and management policies in every public space in the nation to prevent unknown future crimes such as robbery. By contrast, it could utilize the "supervisory channels" in its own facilities to curb the epidemic of abuse and culture of impunity that pervade them.

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[4] This problem requires BOP to make sweeping systemic policy and culture changes—changes they claim to be working to implement. *See* Williams Test. *supra* note 1 at 3; *see also* Staff Rep. S. Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs., *Sexual Abuse of Female Inmates in Federal Prisons*, at 1 (2022), https://bityl.co/H9sF ("Senate Sexual Abuse Report"); U.S. Dep't of Just., *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* at 6 (2022), https://bityl.co/GxJW ("DOJ Sexual Abuse Report").

[5] *See* Oral Testimony of Principal Associate Deputy Attorney General Marshall Miller (Feb. 24, 2023), https://bit.ly/3Jz23bt ("Miller Test.").

[6] *See* Daniel S. Nagin, Deterrence, *Reforming Criminal Justice Vol 4: Punishment, Incarceration, and Release*, Vol. 4 20 (2017), https://bit.ly/3LhOxdj.

Yet even though BOP already has the ability to closely monitor its employees, thoroughly surveil the premises, and implement systems to prevent this epidemic of abuse, it has failed to do so for decades.[7] Both Congress and the DOJ Working Group have recently emphasized that BOP still has far to go to effectively implement those systems.[8] DOJ should focus on implementing these systemic controls using their supervisory channels to keep victims safe, not on pursuing enhancements to the sentencing guidelines which have yet to deter misconduct.[9] DOJ's unsupported deterrence argument serves only to illustrate the troubling institutional focus on punishment instead of front-end prevention to keep our clients safe in custody.[10]

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[7] *See* 1999 GAO Report at 2 (recommending that BOP "develop systems and procedures for monitoring, analyzing, and reporting allegations of staff-on-inmate sexual misconduct in federal prisons.").

[8] *See* Williams Test., *supra* note 1 at 8–10 (summarizing recommended institutional reforms in BOP). *See also* Michael Balsamo & Michael R. Sisak, *AP investigation: Women's prison fostered culture of abuse*, AP (Feb. 6, 2022), https://bityl.co/GxJ2.

[9] *See id*. DOJ's witness also relayed an anecdote about the former FCI Dublin chaplain prosecuted in *United States v. Highhouse*, who told his victim that he would face only a "slap on the wrist." According to DOJ's witness, this comment showed "awareness in the population that there are light penalties applicable here." But DOJ's own sentencing memorandum in *Highhouse* does not support this argument; that memorandum shows that the chaplain was referring to employment consequences, not criminal penalties. Gov't Sent. Memo., *United States v. Highhouse*, 4:22-cr-00016 ECF 23 at 5 (N.D. Cal. Aug. 24, 2022); *See also* Miller Test., *supra* note 5. Indeed, the *Highhouse* sentencing memo underscores our basic point: employees at FCI Dublin were immersed in a culture of impunity because—in an institution where the PREA compliance officer was himself a sexual abuser—there was no *certainty* or *speed* in detection and consequences. Impunity at Dublin, and elsewhere in federal corrections, flows from culture, not any defect in §2A3.3.

[10] It also wholly ignores the nearly one-third of §2A3.3 cases sentenced in the past 10 years that did not happen in BOP prisons. This analysis was performed in part using data extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2012 to 2021, combined with publicly available information in charging documents obtained via PACER. The Commission's "Individual Offender Datafiles" are publicly available for download on its website. *See* USSC, Commission Datafiles, https://bityl.co/HBGG. Of the 65 cases sentenced nationwide under primary guideline §2A3.3 between fiscal years 2012 and 2021, charging documents indicate that roughly one-third involved conduct that occurred in a non-BOP facility

The DOJ's highest priority should be a commitment to protecting our clients, and of course all of BOP's charges, from sexually abusive corrections employees and law enforcement officers, but its statements to the Commission during the February 24, 2023 hearing, belie that commitment. The Commission could, for example, ensure that victims of sexual misconduct are able to get speedy sentence reductions via § 3582(c)(1)(A). But the DOJ remains focused on criminal prosecution, instead of quickly removing our clients out of harm's way.[11] As addressed in our testimony, a reactive punishment increase should not be the first response.

Prior to making any changes to §2A3.3's BOL, we urge the Commission to pause and let DOJ and BOP implement the changes they have promised. DOJ has also pledged to prioritize prosecutions, which could increase the certainty of apprehension and result in more data. In the meantime, the Commission can take other actions outside of drastically raising the BOL.[12]

II. There is a need for additional, accurate data collection.

We have asked the Commission to engage in additional data collection and analysis instead of imposing a dramatic, unstudied increase to §2A3.3's

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such as DOJ or DHS-contracted private jails, immigration detention facilities, tribal jails, or military facilities. *See* USSC, Commission Datafiles, https://bityl.co/HBGG.

[11] DOJ's request comes despite significant problems in how BOP handles complaints of sexual abuse. At the hearing, the DOJ witness and chair of the Working Group tasked with addressing this type of misconduct within BOP, could not answer Vice Chair Murray's question regarding the timeline for administrative complaints. *See* Miller Test., *supra* note 5. But, the recent Senate Report found that the BOP Office of Internal affairs, which investigates staff misconduct, found has an 8,000-case backlog, with some reports pending for more than five years. *See* Senate Sexual Abuse Report, *supra* note at 3.

[12] *See* Williams Test.*, supra* note 1 at 6 ("the only effective way to protect individuals from future abuse and neglect in prison is to responsibly reduce our federal prison population—moving everyone we possibly can out of harm's way") (citing Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, 35(1) Fed. Sent'g Rep. 12 (2022), https://bityl.co/GzMJ).

base offense level.[13] And certain incorrect statements by DOJ's witness at the hearing showed why accurate data collection is critical.

First, at the February 24, 2023 hearing, the DOJ witness stated twice, incorrectly, that "upward departures have been occurring at an unusually high rate with respect to this guideline, over the last 5 years" and that "over the last five years 25% of [2A3.3] cases have involved upward departures."[14] This claim—like the broader impression the DOJ tried to convey that most judges generally find §2A3.3 too lenient—is not factually supported:

- Of the 22 cases sentenced under primary guideline §2A3.3 in the past five fiscal years, 18% involved upward departures, not 25%.[15]

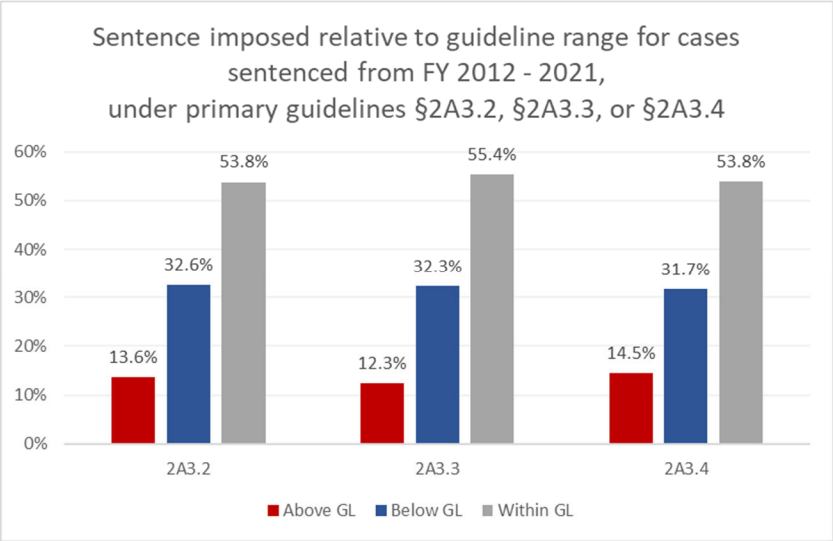
- Although DOJ pointed to the elevated upward departure rate compared to the pool of all federal offenses, over the past ten fiscal years, the distribution of sentences in §2A3.3 cases are not outliers compared to similar sex abuse guidelines, as the following figure illustrates:[16]

[13] For an individual in Criminal History Category I, increasing §2A3.3's base offense level from 14 to 22 would result in a jump of advisory guideline range from 15–21 months to 41–51 months; in other words, it would increase the low end by 173% and the high end by 143%.

[14] Miller Test., *supra* note 5.

[15] It is possible there was confusion between cases with a count of conviction under § 2243(b), as opposed to cases sentenced under primary guideline §2A3.3. This analysis was performed using data extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2017 to 2021. The Commission's "Individual Offender Datafiles" are publicly available for download on its website. USSC, Commission Datafiles, https://bityl.co/HBGG. And a slightly greater percentage of §2A3.3-as-primary-guideline cases received a within-guidelines sentence (55%) than the percentage of within guidelines sentence (49%) across all cases sentenced nationwide from FY2017 to FY2021. *Id*.

[16] *See* USSC, Commission Datafiles. This figure shows the distribution of sentence placement relative over the past 10 fiscal years, compared to its neighbors in the Manual, §2A3.2. (Sexual Abuse of a Minor) and §2A3.4. (Abusive Sexual Contact).



The Defenders also agree with the Practitioners Advisory Group ("PAG"), whose Chair noted that the §2A3.3 guideline encompasses a broad range of conduct and statutes of conviction. In fact, out of the 65 cases sentenced under primary guideline §2A3.3 cases over the past ten fiscal years, eight cases involved a sole substantive count of conviction under 18 U.S.C. § 1001, without a recorded conviction under § 2243(b).[17] The cases also encompassed a wide range of statutes beyond § 2243(b).[18]

Likewise, the DOJ witness was confused as to where these offenses originate, stating that "almost all of these cases" involved BOP employees. But a review of the facts alleged in those 65 cases reveals that although nearly two-thirds of the cases arose out of BOP facilities, the rest originated in other facilities, including private contract jails and immigration detention centers.[19] And the new subsection, § 2243(c), will encompass a broad range of potential offense conduct, settings, and actors.

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[17] *See* USSC, Commission Datafiles.

[18] The 65 cases also included convictions under 18 USC § 1001 (falsification or false statement), 18 USC § 1153 (Major Crimes Act offenses), 18 USC § 1791 (contraband in prison), 18 USC § 2244(a)(4) (knowingly engaging in sexual contact without permission in certain prisons or custodial facilities if doing so would violate § 2243(b)), 18 USC § 2244(b) (knowingly engaging in sexual contact without permission in certain prisons or custodial facilities). And, as PAG points out, §2A3.3 is also indexed to 18 USC § 113(a)(2) in Appendix A of the Manual.

[19] *See supra* note 10.

Second, the Commission should also gather more information on the interplay between the current guideline and the other proposed amendments. At the hearing, questions were also raised regarding proportionality between this guideline and its neighbor, §2A3.2 (Sex abuse of a minor). While it is a complex issue, we agree with the PAG: §2A3.3 covers a wide variety of conduct, much of which is simply different in kind from sexual abuse of a minor. This is reflected in the wide range of sentences under §2A3.3, and more study is needed to determine the proper calibration for the range of offense conduct that falls within §2A3.3.

Third, we know nothing about the offenses sentenced under § 2243(c), the new subsection indexed to §2A3.3.[20] The Commission should wait for the forthcoming GAO report. It should also undertake a careful analysis of sentencing for these new offenses. In addition, the DOJ witness promised to "come back with data across the board" which could also assist the Commission in its study.

In sum, Defenders urge the Commission to gather and closely evaluate the data on these offenses, as well as how §2A3.3 interacts with other relevant guidelines. Defenders urge an approach that pauses the reactive ratchet, focuses on empirical evidence, and acknowledges the importance of prevention over after-the-fact punishment.

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[20] The subsection is so new that not only does the Commission public dataset have no information, but also an attempt to perform a PACER reports search by citation of any criminal cases brought under the new § 2243(c) subsection in 12 of the busiest districts in the country (S.D. Tex;; W.D. Tex.; D. Ariz.; S.D. Cal.; D.N.M.; C.D. Cal.; S.D.N.Y.; E.D.N.Y.; D.D.C.; S.D.Fl.; and D.P.R.) on March 4, 2023, could not be completed because there was no search by citation drop-down menu option for § 2243(c) offenses, unlike the older § 2243(a) and (b) subsections.

Before the United States Sentencing Commission
Public Hearing on the Sexual Abuse Offenses Amendments

Statement of Heather E. Williams,
Federal Public Defender for the Eastern District of California,
on Behalf of the Federal Public and Community Defenders

February 24, 2023

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Honorable Chair Reeves, Vice Chairs and Distinguished Commissioners:

I. Introduction

In January, I got an email from one of my District's CJA Panel lawyers. He had a female client facing sentencing and, given she's from Sacramento, he meant to ask the sentencing judge for a recommended prison designation of FCI Dublin, the nearest federal Bureau of Prisons (BOP) women's facility. The email, entitled "*Dublin Prison also called 'Rape Club',*" originated from his out-of-custody client who was highly concerned for her own safety if sentenced to prison. The email included several links to articles describing reported abuses by prison employees and one link to a Department of Justice (DOJ) press release describing the December 2022 guilty verdicts against a former FCI Dublin prison warden for sexual abuse of women held in custody.[1]

Defenders are in a unique position in responding to this horrific issue. It easily could have been one of my clients asking the heartbreaking question: will I be safe in prison? Defenders frequently represent people who have been—or will be—victimized by prison guards, jail staff, or law enforcement, and we bear firsthand witness to the devastation and trauma wrought by these experiences. No person sentenced to federal prison should be punished

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[1] *See* Chandra Bozelko, *When a prison is known as the 'rape club,' our justice system has a credibility problem*, USA Today (Dec. 17, 2022), https://bityl.co/H5GO; Bob Egelko, *Advocates, employees say abuses at Dublin prison will continue without 'real changes'*, S.F. Chron. (Dec. 12, 2022), https://bityl.co/H5GT; Lisa Fernandez, *Dozens of women detail rape and retaliation at Dublin prison, real reform is questioned*, KTVU FOX 2 (updated Sept. 25, 2022), https://bityl.co/H5GY; Press Release, U.S. Dep't of Just., *Jury Convicts Former Federal Prison Warden for Sexual Abuse of Three Female Inmates* (Dec. 8, 2022), https://bityl.co/H5Ge; Ray J. Garcia, *Former warden at female prison known as 'rape club' guilty of sexually abusing women behind bars*, L.A. Times (Dec. 8, 2022), https://bityl.co/H5Gm.

with a regime of terror and abuse. People should never emerge from prison more broken than when they entered.

But what we know from representing both victims and those accused of crimes is that the best way to protect people—like the woman whose email landed in my inbox—from being preyed on while in prison is to change the institutional culture of the federal correctional system. Ratcheting up penalties does not advance that goal.

II. The DOJ has abdicated its duty to protect the safety and health of those in its custody and care.

There is an epidemic of federal correctional officers sexually abusing and sexually terrorizing people in their custody. This represents the DOJ's moral failure to protect those in its care.[2] Over the past three years, the scope and severity of this misconduct has emerged in horrifying detail. These reports eventually prompted government oversight action, including the

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[2] My remarks focus primarily on the well-documented abuse and neglect within the BOP. But the culture of carceral cruelty and abuse in government-run and contracted facilities extends well beyond the BOP. *See, e.g.*, Seth Freed Wessler, *The Justice Department Will End All Federal Private Prisons, Following a 'Nation' Investigation*, The Nation (Aug. 18, 2016), https://bityl.co/GzLQ (describing investigation documenting "more than two dozen questionable deaths and widespread medical negligence" in private federally contracted prisons); Southern Poverty Law Center, et al., *Shadow Prisons: Immigrant Detention in the South* at 4 (2016), https://bityl.co/GzKt (describing how the "immigrant detention system is . . . rife with civil rights violations and poor conditions. . . ."); Eillen Martinez, et al., *'They Treat Us Like Dogs': ICE's Medical Negligence & Abuse*, MedPage Today (Feb. 27, 2022), https://bityl.co/GzL3 (documenting pervasive abuse in immigration detention); American Civil Liberties Union, *Sexual Abuse in Immigration Detention*, https://bityl.co/GzL8 (interactive map of sexual abuse complaints unearthed through ACLU's FOIA requests); University of Washington, Ctr. for Hum. Rts., *Conditions at the NWDC: Background, Methodology, and Human Rights Standards*, https://bityl.co/H9r0 (documenting "key areas where conditions . . . at [Northwest Detention Center] diverge from . . . international human rights standards"); U.S. Dep't of Just., Off. of the Inspector Gen., *Audit of the U.S. Department of Justice's Oversight of Non-Federal Detention Facility Inspections* at 4, 6 (2013), https://bityl.co/H1ma (finding U.S. Marshal Service (USMS) failed to provide adequate oversight to "ensure a safe, secure, and humane environment for federal detainees housed in non-federal facilities"); Seth Freed Wessler, *Inside the US Marshals' Secretive, Deadly Detention Empire*, Mother Jones (Nov.-Dec. 2019), https://bityl.co/H1vm (noting former DOJ official's report that the USMS operates with "an attitude of indifference," leaving local "jails to do what they will").

United States Senate Permanent Subcommittee on Investigations' December 2022 report, which found that "BOP employees sexually abused female prisoners in at least *two-thirds* . . . of federal prisons that have held women over the past decade."[3] The accounts from FCI Dublin reveal the ingrained culture of sexual exploitation and abuse of people in federal custody.

Federal corrections is septic with a problem that has been known and documented for decades.[4] The problem is fundamentally cultural; late last year, a Deputy Attorney General working group, convened to investigate sexual misconduct within the federal correctional system, concluded that the federal correctional system is plagued by a "culture of permissiveness toward staff misconduct and retaliation against victims who report abuse."[5]

Disturbing institutional facts bear this out. BOP's Office of Internal Affairs, responsible for investigating staff misconduct, has an 8,000-case backlog, with some reports pending for more than five years.[6] The process for handling reported misconduct under the Prison Rape Elimination Act (PREA) is a failure. The DOJ has, at times, assigned PREA complaint investigations to correctional staff who were themselves sexually assaulting women in their care.[7]

Victims brave enough to speak out do so at a cost. At FCI Dublin, officials retaliated against women who reported sexual assault by placing

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[3] *See* Staff Rep. S. Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs., *Sexual Abuse of Female Inmates in Federal Prisons* at 1 & Ex. 1 (2022) (emphasis added), https://bityl.co/H9sF (hereinafter *Senate Sexual Abuse Report*).

[4] *See* U.S. Dep't of Just., Off. of the Inspector Gen., *Deterring Staff Sexual Abuse of Federal Inmates* at 3 (2005), https://bityl.co/H97T ("The OIG has investigated hundreds of allegations of sexual abuse of inmates by BOP staff.").

[5] U.S. Dep't of Just., *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* at 6 (2022), https://bityl.co/GxJW (hereinafter *DOJ Sexual Abuse Report*). Congress agrees. *See* Senate Sexual Abuse Report at 3; *see also* Press Release, Sen. Dick Durbin, Statement on Resignation of Director Carvajal from Federal Bureau of Prisons (Jan. 5, 2022), https://bityl.co/GxPO ("For years, the Bureau of Prisons has been plagued by corruption, chronic understaffing, and mismanagement.").

[6] Senate Sexual Abuse Report at 3.

[7] Michael Balsamo & Michael R. Sisak, *AP investigation: Women's prison fostered culture of abuse*, Associated Press (Feb. 6, 2022), https://bityl.co/GxJ2.

them in solitary confinement.[8] At FMC Carswell, women who reported sexual abuse were placed in solitary confinement or received "diesel therapy"—where they were placed on transports and relocated from Carswell to a another facility, potentially hundreds of miles away from their families.[9] Time and again, the media has unearthed evidence of federal correctional employees pressuring incarcerated people not to report sexual abuse.[10] These problems stem from failures of investigation, procedure, and integrity, not a failure of the sentencing guidelines to adequately punish.

Discovery of this sexual abuse epidemic has occurred amidst other significant institutional failures. A series of reports issued by the DOJ's Office of Inspector General (OIG) paint a damning picture of neglect and mismanagement in federal corrections:

- Numerous OIG reports describe how the federal prison system catastrophically failed to protect individuals in its care from the ravages of Covid-19;[11]

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[8] *Id.* (describing how woman reporting her prison sexual assault was "punished with three months in solitary confinement and a transfer to a federal prison in Alabama").

[9] Kaley Johnson, *Exclusive: Fort Worth Carswell women's prison plagued by sexual abuse, cover-ups*, Fort Worth Star-Telegram (Sept. 2, 2022), https://bityl.co/GxNf.

[10] Balsamo & Sisak, *supra* note 7.

[11] *See, e.g.*, U.S. Dep't of Just., Off. of the Inspector Gen.*, Remote Inspection of Federal Correctional Complex Butner* at ii (2021), https://bityl.co/H25Z (describing numerous violations of BOP and Centers for Disease Control and Prevention (CDC) guidance concerning social distancing, quarantining, personal protective equipment (PPE) use, and use of home confinement authority); U.S. Dep't of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Institution Milan* at ii (2021), https://bityl.co/H25j (describing failures of social distancing and appropriate PPE use); U.S. Dep't of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Complex Coleman* at ii-iii (2021), https://bityl.co/H25p (describing numerous deficiencies including failures to provide basic sanitation products to incarcerated individuals and refusing to allow staff to wear face coverings until three months into the pandemic); U.S. Dep't of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Institution Terminal Island* (2021), https://bityl.co/H25z (documenting numerous failures to follow CDC and BOP guidance, resulting in catastrophic Covid-19 outbreak within FCI Terminal Island);

- A 2018 OIG report documents systemic failure to provide appropriate therapeutic care to women with histories of trauma;[12] and

- A 2017 OIG report reflects systematic abuse and neglect of people held in custody who struggle with mental illness. According to this report, these individuals are often warehoused in restrictive housing units for months—or even years. Only "3 percent of the BOP's sentenced inmate population" receive regular mental health treatment, despite the fact that "45 percent of federal inmates ha[ve] symptoms or a recent history of mental illness."[13]

Nor does the federal correctional system respond to outside auditors or oversight. In 2019, the OIG placed BOP under an "ongoing policy development review" because of what it termed "*significant delays* in the

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U.S. Dep't of Justice, Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Complexes Oakdale and Pollock* at ii (2020), https://bityl.co/H26D (identifying "numerous failures in Oakdale officials' response to the COVID-19 outbreak"); *see generally* Meg Anderson & Huo Jingnan, *As COVID spread in federal prisons, many at-risk inmates tried and failed to get out*, NPR (Mar. 7, 2022), https://bityl.co/H26H (documenting BOP's deficient Covid-19 response and the resulting pain, suffering, and death).

[12] As the OIG again found, even though "[r]esearch . . . recommends that female inmates undergo trauma treatment early during incarceration," the federal correctional system elected to "assign[] only one staff member at each institution to offer" trauma treatment, meaning it "may not be able to provide its trauma treatment program to all eligible female inmates until late in their incarceration, or ever." U.S. Dep't of Just., Off. of the Inspector Gen., *Review of the Federal Bureau of Prisons' Management of Its Female Inmate Population* at i (2018), https://bityl.co/GxND (hereinafter *OIG Report on Incarcerated Women*).

[13] U.S. Dep't of Just., Off. of the Inspector Gen., *Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness* at ii (2017), https://bityl.co/GxN9 (hereinafter *OIG Report on Mental Illness*). This report goes on to explain that the BOP cannot even "accurately determine the number of inmates who have mental illness" because of widespread reporting failures: "institution staff do not always document mental disorders." *Id.* And overreliance on restrictive housing continues unabated. Indeed, it has gotten even worse over time. *See* U.S. Dep't of Just., *Department of Justice Efforts to Ensure that Restrictive Housing in Federal Detention Facilities is Used Rarely, Applied Fairly, and Subject to Reasonable Constraints, and to Implement Other Legal Requirements and Policy Recommendations* at 6 (2022), https://bit.ly/3S99999 (finding that "restrictive housing placements have increased by 29% since . . . 2016. . . .").

resolution of *multiple* OIG recommendations related to revising or creating BOP policies concerning various correctional and safety issues."[14]

The simple reality, as Senator Jon Ossoff put it, is the federal correctional system is "horrifically dysfunctional."[15] Only by implementing substantial institutional reforms, believing reported abuse when those held in custody are the reporters, and thoroughly and timely investigating claims of misconduct can the DOJ redress these failures and begin to meet the minimum standard of care for our clients and others in its custody. Meanwhile, the only effective way to protect individuals from future abuse and neglect in prison is to responsibly reduce our federal prison population—moving everyone we possibly can out of harm's way.[16]

III. The Sexual Abuse Offenses amendments

The proposed Sexual Abuse Offenses amendments emerge from this backdrop of correctional and law enforcement dysfunction. The Commission proposes three changes:

1) update the guidelines to incorporate two new criminal statutes—18 U.S.C. § 250 (referenced to §2H1.1 and addressing *Offenses Involving Individual Rights*) and § 2243(c) (referenced to §2A3.3 and addressing *Criminal Sexual Abuse of an Individual in Federal Custody*);

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[14] U.S. Dep't of Justice, Off. of the Inspector Gen., *Impact of the Failure to Conduct Formal Policy Negotiations on the Federal Bureau of Prisons' Implementation of the FIRST STEP Act and Closure of Office of the Inspector General Recommendations* at 1 (2021) (emphases added), https://bityl.co/GxNt.

[15] Chloe Folmar, *Senate group to examine federal prison system after corruption, abuse allegations*, The Hill (Feb. 17, 2022), https://bityl.co/GxPk.

[16] *See generally* Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, 35(1) Fed. Sent'g Rep. 12 (2022), https://bityl.co/GzMJ.

2) add a blanket 8-level increase to §2A3.3's base offense level (BOL) from 14 to 22, more than doubling the recommended advisory guideline range;[17] and

3) add a cross reference from §2A3.3 to §2A3.1 (*Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse*) "[i]f the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242)."

We object to the proposed 8-level increase to §2A3.3's BOL.[18] The grotesque rate of sexual abuse against people in custody indicts the ingrained culture of abuse and neglect in federal detention. But reflexively increasing penalties will not deliver what is most desperately needed: swift and immediate intervention to move victims to a place of safety and to provide care, followed by a timely and thorough investigation. There is no reliable, objective study or evidence that these guideline changes would protect people in prison from further abuses. To the contrary, our country's historic instinct to address every crisis by ratcheting up criminal penalties gives the United States the ignominious distinction of having the highest incarceration rate per capita in the world, without commensurate public safety gains.[19]

The proposed BOL increase is no solution to federal corrections' systemic cultural dysfunction. This amendment may distract from measures the federal correctional system needs to undertake. It is unlikely to deter

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[17] Under the current §2A3.3, the recommended advisory guideline range for an individual in Criminal History category I is 15-21 months. *See* USSG, Ch. 5, Part A. Under the proposed amendment, that range will leap to 41-51 months, meaning the advisory range will call for sentences approximately 250% longer than it does now.

[18] This increase has its origins in the DOJ's most recent annual letter to the Commission. *See* DOJ Annual Letter to the U.S. Sentencing Commission at 21-22 (Sept. 12, 2022).

[19] *See* Wendy Sawyer & Peter Wagner, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2022* (Mar. 14, 2022), https://bityl.co/H24g ("The U.S. locks up more people per capita than any other nation, at the staggering rate of 573 per 100,000 residents."); *see also* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005) (describing institutional dynamics making "the guidelines a one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules").

future abuse. And it is inconsistent with this Commission's duty to fashion evidence-based, deliberative responses to "carry out an effective, humane, and rational sentencing policy."[20]

A. Addressing the sexual violence epidemic within DOJ institutions requires systemic institutional reform.

As both the DOJ and Congress have repeatedly recognized, federal corrections need to be overhauled.[21] To address the overlapping crises within federal corrections, the DOJ must undertake systemic institutional reform by:

1) recruiting, properly training, and supervising rehabilitation-focused staff;[22]

2) fixing the federal correctional system's dilapidated and unsafe infrastructure;[23]

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[20] 28 U.S.C. § 995(a)(20).

[21] *See, e.g.*, Majority Staff, H. Subcomm. on Nat'l Security of the Comm. on Oversight & Accountability, Mem. on Independent Investigations and Employee Discipline at the Bureau of Prisons 1 (Jan. 2, 2019), https://bityl.co/GxJK (describing "ample opportunity for misconduct to be glossed over and retaliation and intimidation to prevail"); Senate Sexual Abuse Report at 3; DOJ Sexual Abuse Report at 2 (recommending the BOP "chang[e] the culture and environment in BOP facilities" to prevent sexual abuse); *see also* OIG Report on Incarcerated Women at i-ii (finding systematic failures to provide appropriate programming, including trauma care, to incarcerated women); OIG Report on Mental Illness at i-ii (finding systematic failures to appropriately care for people with mental illness).

[22] *See Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 7 (2022) (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), https://bityl.co/HAFL (acknowledging as inadequate the mere five weeks of formal training for new federal correctional officers); *Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the S. Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs.*, 117th Cong. 3 (2022) (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), https://bityl.co/HAF7 (explaining that ending epidemic of sexual violence within federal corrections "begins with changing the culture and environment in Bureau facilities").

[23] *See* DOJ Sexual Abuse Report at 9 (federal correctional system needs significant technological upgrades and to overhaul their video monitoring and retention system to keep incarcerated people safe); *Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. On the Judiciary*, 117th Cong. 7 (statement

3) implementing policies that empower people in prison to assert their rights and get help from their attorneys;[24] and

4) reducing our prison population.

Doubling down on punishment through a sweeping, dramatic enhancement to §2A3.3's BOL won't do anything to accomplish these critical cultural and policy changes. Instead, consistent with its statutory obligations,[25] the Commission should recommend specific changes to our federal correctional system's nature and capacity, including:

- Increased community-based corrections use;
- Increased sentence reduction eligibility and availability under the Residential Drug Abuse Program (RDAP) by allowing individuals with detainers to participate, maximizing the length of sentence reductions, increasing community corrections participation in RDAP, and

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of Colette S. Peters, Dir., Fed. Bureau of Prisons), *supra* note 22, https://bityl.co/GxNz ("Infrastructure within many [BOP] facilities is rapidly deteriorating and in need of extensive work and repairs to maintain safe, secure, and functioning correctional institutions.").

[24] The DOJ must empower the people it imprisons to report staff misconduct, and the federal correctional system needs to listen to and believe those people when they do so. The Deputy Attorney General has recently recognized BOP "should adopt an early-intervention approach that identifies warning signals and enables and rewards reporting." DOJ Sexual Abuse Report at 6. Nor is this recommendation new. In fact, over twenty years ago, the Government Accountability Office (GAO) made similar recommendations to BOP. Government Accountability Office, *Women in Prison: Sexual Misconduct by Correctional Staff* 2 (1999), https://bityl.co/HAFo ("We are making a recommendation to the Director, BOP, to develop systems and procedures for monitoring, analyzing, and reporting allegations of staff-on-inmate sexual misconduct in federal prisons."). But more is needed. The DOJ also needs to facilitate confidential and easily accessible communication lines between people in prison and their attorneys, who can bring abuse and neglect to the DOJ's attention. Too often, attorney/incarcerated client communication difficulties result because facilities lack private phone, mail, or email options for such privileged and sensitive communications.

[25] *See* 28 U.S.C. § 994(g) (The Commission "shall make recommendations concerning any change or expansion in the nature or capacity of [penal, correctional, and other] facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.").

eliminating mere firearm possession as disqualification for RDAP sentence reductions;[26]

- Eliminating sentence computation rules that create longer sentences based on:

  1) refusals to provide pretrial custody credit for time spent in immigration detention;

  2) failures to award pretrial custody credit for state concurrent sentences; and

  3) failures to award good time credits for time in state custody on partially concurrent sentences;[27] and

- Maximizing the First Step Act's Earned Time Credit program implementation.

Overcrowded prisons create conditions for abuse, neglect, and impunity.[28] To keep people safe, the Commission should prioritize measures to ensure that nobody remains in prison longer than absolutely necessary.

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[26] The firearm- and detainer-based disqualifications appear nowhere in the statute and are simply BOP policy decisions. *See Jacks v. Crabtree*, 114 F.3d 983, 985 n.2 (9th Cir. 1997) (DOJ's concession that individuals serving time for firearm possession "are eligible under section 3621(e)(2)(B)" for the RDAP reduction); BOP Program Statement 5331.02, Early Release Procedures Under 18 U.S.C. § 3621(e) at 5 (March 16, 2009), https://bityl.co/HBEE (precluding individuals with detainers from obtaining early release through RDAP).

[27] *See* Sady, *supra* note 16, at 17 (describing the federal correctional system's sentence computation rules that—in a manner "inconsistent with the relevant statutes"—serve to "increase[] sentences by failing to count time in official detention, by creating de facto consecutive sentences, and by failing to provide good time credits for the concurrent portion of federal sentences served in state custody").

[28] *See* Morag MacDonald, *Overcrowding and its impact on prison conditions and health*, 14(2) Int'l J. of Prisoner Health 65, 65 (2018), https://bityl.co/GxOS ("Overcrowded prisons can lead to insanitary, violent conditions that are harmful to the physical and mental well-being of prisoners."); Stephanie Baggio, et al., *Do overcrowding and turnover cause violence in prison?,* 10 Frontiers in Psychiatry 1, 3 (Jan. 2020), https://bityl.co/GxOR ("Reduction of prison overcrowding and turnover appear critical to reduce prisoners' vulnerability. . . ."); *see also Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. On the Judiciary*, 117th Cong. 6 (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), *supra* note 22

B. The proposed 8-level increase to §2A3.3's base offense level will not deter sexual assault.

In contrast to the systemic interventions described above, the proposed 8-level increase to §2A3.3's BOL will not effectively deter future abuse. The general deterrence benefit of "severe prison terms, specifically, is quite limited."[29] As the DOJ's National Institute of Justice has explained, "increasing the severity of punishment does little to deter crime"—"[t]he certainty of being caught is a vastly more powerful deterrent."[30]

This applies with special emphasis to sexual assault perpetrated by correctional or law enforcement personnel, for whom the consequences from detection and prosecution are already severe. As a class, law enforcement and correctional employees who commit sexual assault already face catastrophic punishment once their conduct is discovered:

1) losing their profession,
2) the lifelong collateral consequences of a federal felony conviction, and
3) potentially, an even more ruinous status transformation from correctional officer to sex offender.[31]

Instead, law enforcement and correctional officers commit sexual abuse crimes because the culture of corrections doesn't take those offenses seriously, and because they know—based on institutional failures to investigate these crimes—that it is highly unlikely they will be caught. To prevent sexual abuse of people in prison, the focus must be on increasing "the

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(anticipating "capacity deficits of 3,054 for medium security male facilities and 1,743 for low security male facilities" as of September 29, 2022).

[29] Melissa Hamilton, *Some Facts About Life: The Law, Theory, and Practice of Life Sentences*, 20 Lewis & Clark L. Rev. 803, 821 (2016) ("The lost deterrence function in lengthening sentences is also likely due, to a significant degree, to the recognition from behavioral law and economics studies that offenders often are not rational thinkers who carefully measure the benefits of their actions against potential distant or long-term legal consequences.").

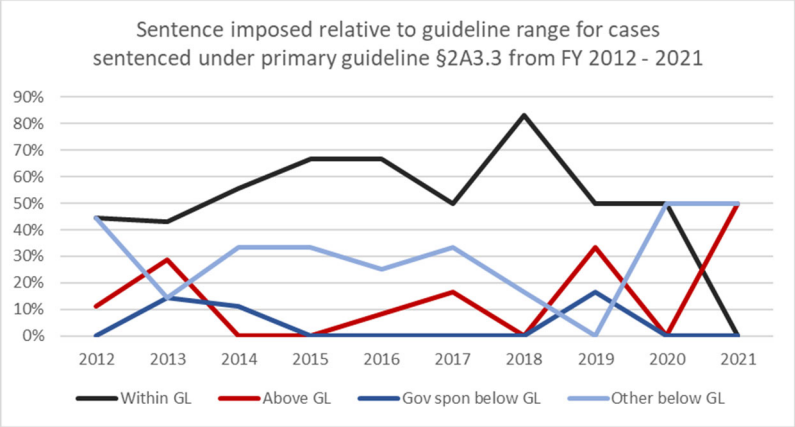
[30] U.S. Dep't of Just., Nat'l Inst. of Just., *Five Things About Deterrence* at 1 (May 2016), https://bityl.co/GxO2.

[31] *See United States v. Fuentes*, 856 F. App'x 533, 534 (5th Cir. Aug. 18, 2021) ("[A]n offense under § 2243(b) is a 'sex offense' under SORNA.").

certainty of being caught," not "the severity of punishment."[32] Further enhancing the guidelines punishment—over and above the current sentencing range and the other profoundly life-altering consequences that flow from a § 2243 conviction—is unnecessary.

C. The proposed increase fails to discharge the Commission's obligation to devise a rational sentencing system through a deliberative, evidence-based approach.

Finally, the Commission should not adopt the proposed amendment to §2A3.3's BOL because it does not represent a careful, evidence-based, deliberative approach to this guideline. Historically, §2A3.3—which covers an enormous range of conduct—has been infrequently applied.[33] As such, sentences under §2A3.3 vary substantially. From FY2012 through FY2021, roughly 55% of cases sentenced under primary guideline §2A3.3 received a within-guidelines sentence, 32% received a below-guidelines sentence, and 12% of cases received an above-guidelines sentence.[34]



These data do not support categorically increasing §2A3.3's BOL by 8 levels. Instead, they suggest differing conduct that can result in radically different sentences. Before amending §2A3.3, the Commission must conduct a

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[32] *See Five Things About Deterrence*, *supra* note 30.

[33] According to data extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2012 to 2021, only 65 cases were sentenced under primary guideline §2A3.3. The Commission's "Individual Offender Datafiles" are publicly available for download on its website. USSC, Commission Datafiles, https://bityl.co/HBGG.

[34] *See id.*

more searching, prospective study of the cases to which §2A3.3 applies and the sentences imposed under it.

This is particularly true given the enormous Congressional-, Executive-, and Commission-driven changes coming to §2A3.3.

Congress recently enacted two new criminal statutes—18 U.S.C. §§ 250 and 2243(c). Limited sentencing information exists for prosecutions under either of these statutes. But that will change: Congress, in enacting these new offenses, required the Attorney General to document the "number of reports made, during the previous year, to Federal law enforcement agencies regarding persons engaging in a sexual act while acting under color of law," and the GAO to provide "a report on any violations of section 2243(c) of title 18." Both reports are due March 15, 2023. These reports will provide important information that the Commission should carefully consider before increasing §2A3.3's BOL.

The Executive, too, promises significant action in this arena. The DOJ recently indicated it plans to prioritize prosecutions of correctional and law enforcement personnel who perpetrate sexual abuse, meaning the Commission should soon have significantly more sentencing data on sentences imposed under §2A3.3.[35] As of August 2022, BOP has a new director, Collette Peters, who has promised to prioritize cultural change.[36] Instead of intervening to try to redress federal correctional dysfunction through a likely ineffectual change to §2A3.3's BOL, the Commission should hold back and ensure that accountability remains squarely on those who are truly responsible for fixing this problem: the DOJ and the federal correctional system itself.

Finally, the Commission has proposed indexing § 2243(c) to §2A3.3 and expanding §2A3.3's title to expressly cover *Criminal Sexual Abuse of an*

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[35] DOJ Sexual Abuse Report at 2-3.

[36] *See Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the S. Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs.*, 117th Cong. 3, *supra* note 22 (committing to "changing the culture and environment in Bureau facilities").

Individual in Federal Custody.[37] If implemented, this expansion of §2A3.3 has the potential to significantly change the pattern of cases sentenced directly under it.

Given the enormous variety in sentences imposed under §2A3.3 so far (i.e., before adding § 2243(c) convictions) and the significant changes to §2A3.3's underlying statutory, enforcement, and guideline regimes either already enacted or in the works, this is not the time to adopt a blanket, 8-level increase to §2A3.3's BOL. Instead, the Commission should forebear from increasing §2A3.3's BOL until it has thoroughly examined these changes' impact on §2A3.3 sentencings, so it can ensure any amendment to §2A3.3 is careful, deliberative, and evidence based.[38]

III. Conclusion

The only realistic way to keep people safe from the enormous perils of federal incarceration—including the intolerable risk of sexual assault by correctional officers—is to decrease the criminal legal system's reflexive reliance on lengthy incarceration and to change the institutional culture of federal corrections.

We therefore welcome this cycle's amendments recognizing the wrongheadedness of imprisoning people by default instead of as a last resort. And we oppose any proposed amendments that will further our country's position as world leader of mass incarceration.

As to §2A3.3's proposed BOL 8-level increase from 14 to 22, we encourage the Commission to defer any decision until more information is available. Thank you for inviting me to testify before you again.

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[37] 18 U.S.C. § 2243(c)—which criminalizes sexual abuse "of an individual in federal custody"—provides that "[w]hoever, while acting in their capacity as a Federal law enforcement officer, knowingly engages in a sexual act with an individual who is under arrest, under supervision, in detention, or in Federal custody, shall be fined under this title, imprisoned not more than 15 years, or both."

[38] *See Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) ("[T]he Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'") (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

Federal Public and Community Defenders Comment on Alternatives-to-Incarceration Programs (Proposal 10)

March 14, 2023

The Commission seeks comment on whether (and, if so, how) it should study court-sponsored, community-based correctional programs, such as diversion and other alternatives-to-incarceration programs. It also invites comment on whether participation in such programs should be a basis for a departure.[1] Defenders appreciate the opportunity to comment.

First, Defenders strongly endorse a departure to a non-custodial sanction for people who have demonstrated presentence rehabilitation, including (but not limited to) people who have successfully participated in diversion or alternatives-to-incarceration programs—whether court-sponsored or otherwise. Such a departure would bring the Guidelines into conformity with evidence-based sentencing practices and 18 U.S.C. § 3553(a).

Second, if the Commission undertakes any study of court-sponsored diversion or alternatives-to-incarceration programs, we strongly encourage it to include Defenders in the development and study process. Doing so would be consistent with the fundamental approach of these programs, in which courts, probation officers, pretrial services officers, treatment providers, prosecutors, and defenders work collaboratively.

I. The Commission should amend the Guidelines to include a departure to a non-custodial sanction for people who demonstrate presentence rehabilitation.

A. The Commission should drive a significant shift toward the use of community-based corrections in the federal criminal legal system.

Defenders strongly support increased use of community-based corrections in lieu of prison. Community-based corrections should be a centerpiece of any parsimonious sentencing scheme.[2] "The case for use of community punishments in a rational society is a no-brainer."[3] Community-based corrections are more effective than prison at rehabilitating people.[4]

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[1] Proposed Amendments, 88 Fed. Reg. 7180, 7227 (Feb. 2, 2023).

[2] *See* 18 U.S.C. § 3553(a) (requiring courts to impose sentences "not greater than necessary" to accomplish federal sentencing purposes).

[3] Michael Tonry, *Community Punishments*, in 4 *Reforming Criminal Justice: Punishment, Incarceration, and Release* 187 (2017), https://bityl.co/HTae.

[4] *See id.* at 189-190 (collecting studies showing that "people sentenced to imprisonment are more, not less, likely to reoffend than are comparable people sentenced to community punishments"); Marsha Weissman, *Aspiring to the*

They are also more effective at reducing recidivism because they avoid the criminogenic effects of removing people from their family, community, and livelihood, and placing them into an environment that inculcates "maladaptive [and] dysfunctional" traits.[5] They avoid the catastrophic collateral consequences that prison inflicts on incarcerated people's families—consequences that generate and intensify a cycle of poverty and crime, and which disproportionately harm communities of color.[6] Indeed, until the unconstitutional mandatory-guideline regime distorted federal sentencing

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Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration, 33 N.Y.U. Rev. L. & Soc. Change 235, 243 (2009) ("[Alternatives-to-incarceration] participants and probationers were significantly less likely to be rearrested than people who received jail sentences—forty-one percent of ATI participants and forty-two percent of probationers were rearrested, compared to fifty-three percent of people released from jail."); Just. Pol'y Inst., *Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety* 16 (2009), https://bityl.co/HSBM ("Community-based alternatives, which do not necessarily include probation or parole, are a cost-effective means of redirecting people away from prison while protecting public safety and maintaining accountability."); *see also* Damon M. Petrich, et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 Crime & Just. 353, 357 (2021) ("[C]ustodial sanctions have a null or criminogenic effect on reoffending when compared with noncustodial sanctions such as probation.").

[5] *See* Nat'l Rsch. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 194 (2014), https://bityl.co/HS4X; *see also* The Charles Colson Task Force on Fed. Corrs., *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* 20 (2016), https://bityl.co/HRyj ("Incarceration is a highly punitive, costly, and potentially harmful intervention that should be used sparingly and judiciously.").

[6] *See* Nat'l Rsch. Council, *The Growth of Incarceration in the United States: Issue Brief* (Sept. 2014), https://bityl.co/HS4l ("Incarceration is strongly correlated with negative social and economic consequences for prisoners' families."); Hedwig Lee, et al., *Assessing mass incarceration's effects on families* 374 Science 227–281 (2021), https://bityl.co/HS51; Exec. Office of the President of the U.S., *Economic Perspectives on Incarceration and the Criminal Justice System* 5 (2016), https://bityl.co/HSBN ("Parental incarceration is a strong risk factor for a number of adverse outcomes, including antisocial and violent behavior, mental health problems, school dropout, and unemployment."); *see also* Michelle Alexander, *The New Jim Crow* 7 (rev. ed. 2012) ("The racial dimension of mass incarceration is its most striking feature.").

practice, community-based corrections were widely understood to be the just sentence in nearly half of all federal criminal cases.[7]

While community-based corrections are generally preferable to prison, they also need to be implemented carefully. The United States doesn't just have a mass incarceration problem, it also has a mass supervision problem.[8] In designing community-based sentencing regimes, therefore, we must be careful to ensure that the community-based sentence represents the most cost-effective and proven intervention that promotes public safety while involving the lightest and shortest possible intrusion onto a person's liberty, privacy, and dignity.

B. The Guidelines should be amended to strongly encourage the use of community-based corrections in lieu of prison.

Courts should be encouraged to depart from prison to community-based corrections for people who have demonstrated presentence rehabilitation, such as by maintaining exemplary compliance with pretrial release conditions or through other strides toward rehabilitation. The Guidelines should, for example, call for such a departure for people who successfully complete—or make sustained progress in—a diversionary or alternative-to-incarceration program. But they should also go further and encourage judges to depart from any otherwise applicable guideline range to a community-based sentence (such as probation) for anyone who has

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[7] Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 Stan. L. Rev. 1211, 1222 (2004) (Until the Guidelines were enacted, "almost 50 [percent] of federal sentences were to straight probation.").

[8] *See* Evangeline Lopoo, et al., *How Little Supervision Can We Have?*, 6 Ann. Rev. Criminology 23, 29 (2023) (finding that "mass supervision" has "expand[ed] . . . even as crime rates fluctuate"); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J. Crim. L. 180, 216–17 (2013) (noting that even though "supervising low-risk individuals can sometimes be a mistake" supervised release is virtually always imposed in federal criminal cases); Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 1015 (2013), ("The broad application of supervised release has meant that indeterminacy has taken a firm hold of the federal sentencing system."); *see also* Kate Weisburd, *Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System* 6 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930296 ("Monitoring and its attendant rules significantly burden basic rights, liberty and dignity").

demonstrated presentence rehabilitation, regardless of their participation in a diversionary or alternative-to-incarceration program.

As they currently stand, the Guidelines fail to adequately account for what the Supreme Court has called a "critical" factor in sentencing: post-conviction rehabilitation.[9] The Guidelines currently "discourage" rehabilitation-based departures,[10] a position that is out of step with considered judicial practice, which views postconviction rehabilitation as an enormously important factor.[11] This stark divergence between sentencing practice and the Guidelines has contributed to the growth in the rate of downward variances over time.[12] Guideline ranges continue to have a strong anchoring effect at sentencing, though, so this divergence has also driven sentences artificially higher, causing people who are fit candidates for community sentences to be placed in prison, which helps to drive mass incarceration in the United States.[13]

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[9] *Pepper v. United States*, 562 U.S. 476, 492 (2011).

[10] *Koon v. United States*, 518 U.S. 81, 95–96 (1996).

[11] *See Pepper*, 562 U.S. at 492; *see also* Carolin E. Guentert & Ryan H. Gerber, *A Judge's Attempt at Sentencing Consistency After Booker: Judge Jack B. Weinstein's Guidelines for Sentencing*, 41 Cardozo L. Rev. 1, 77–78 (2019) ("A judge taking account of *all* the § 3553(a) factors may often reach a different result than the one recommended by the Guidelines, because the Guideline ranges do not account for the many factors in a person's history and their capacity for rehabilitation." (citing Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 19–20 (1998)). Notwithstanding the Guidelines' approach to rehabilitation, circuit courts of appeals have even reversed district courts for not considering remarkable rehabilitation. *See, e.g., United States v. Robertson*, 662 F.3d 871, 878 (7th Cir. 2011) (reversing low-end-guideline sentences because the district court failed to adequately consider "strong evidence of rehabilitation in imposing its sentence"); *United States v. Preacely*, 628 F.3d 72, 81 (2d Cir. 2010) (reversing a below-guideline sentence in face of "compelling evidence that Preacely embarked on a three-year course of rehabilitation").

[12] *See* U.S. Sentencing Comm'n, *The Influence of the Guidelines on Federal Sentencing* 22 (2020), https://bityl.co/HSBm (noting that rate of downward variances grew from 13.4 percent in 2008 to 24.3 percent in 2014, before narrowing to 21.9 percent in 2017).

[13] *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 491 (2014) (explaining how the "anchoring effect" of the Guidelines "impact[s] the length of sentences . . . impose[d] by

To remedy these problems, the Guidelines should be amended to include a departure to a community-based sentence for anyone who has demonstrated presentence rehabilitation. This departure should apply to people who have successfully completed a diversionary or alternative-to-incarceration program—or who, in the judgment of the sentencing court, otherwise deserve credit for participation in similar programming. And it should equally apply to people who demonstrate compliance with pretrial release conditions or other rehabilitative efforts. Regardless of participation in a court-sponsored diversion or alternatives-to-incarceration program, a person who does well on pretrial release—or otherwise shows rehabilitation—should presumptively receive a community-based sentence unless strong reasons exist to believe that such punishment is insufficient and that greater punishment is necessary.

C. Defenders should be full partners in any study of court-sponsored diversion or alternatives-to-incarceration programs that the Commission undertakes.

Defenders strongly encourage the Commission to act now to amend the Guidelines to provide for a departure to non-custodial sanctions for individuals who demonstrate presentence rehabilitation. If the Commission also elects to study court-sponsored diversion and alternatives-to-incarceration programs, Defenders stand ready to partner in the construction and implementation of that study; the analysis of its results; and the development of recommendations, policy statements, or guidelines.[14]

Defenders would bring an invaluable perspective to this project. Court-sponsored diversion and alternatives-to-incarceration programs are necessarily designed to be partnerships between the court, probation officers, pretrial services officers, treatment providers, defenders, and prosecutors.[15]

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subconsciously influencing judges to give greater weight to the now-advisory Federal Sentencing Guidelines than to other important sentencing factors.").

[14] Defenders also urge the Commission to include the perspectives of people who have moved through the criminal legal system and who have participated in court-sponsored diversion and alternatives-to-incarceration programs. These individuals have invaluable perspectives to share about how these programs should be designed.

[15] *See, e.g.*, Vanita Gupta, Assoc. Att'y Gen., *Remarks at the American Bar Association Criminal Justice Section Awards Luncheon* (Nov. 18, 2022), https://bityl.co/HRv8 (explaining that with diversionary and alternatives-to-

Defenders have a unique perspective and would be able to highlight important obstacles to successful diversionary and alternatives-to-incarceration programs that—absent our participation—would otherwise risk being overlooked or deemphasized. Defenders' perspectives could inform:

- How to ensure that people who participate in these programs nonetheless receive zealous representation from defense counsel—and how to design the programs to reduce ethical dilemmas for defenders;[16]

- How to mitigate the risk that these programs "unnecessarily expand[] criminal surveillance, diminish[] procedural protections, and potentially even increas[e] incarceration";[17]

- How to promote equity by ensuring that access to diversionary and alternative-to-incarceration programs is controlled by fair, evidence-based, and objective criteria;[18] and

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incarceration programs, partnerships among courts, prosecutors, and defenders are "necessary for equal justice"); *see also* 2 Nat'l Ass'n. of Drug Ct. Profs., *Adult Drug Court: Best Practice Standards* 38 (2015), https://bit.ly/3YEuc4Z (best practices for diversionary or alternative-to-incarceration program to be staffed by a "multidisciplinary team" of "partner agencies" which includes defenders and others). Additionally, Defenders play a critical role in advising clients whether to participate in these programs; for these programs to work, they need to satisfy fairness, ethical, and evidentiary standards such that Defenders can in good faith counsel our clients to enroll.

[16] *See generally* Tamar M. Meekins, *Risky Business: Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 Berkeley J. Crim. L. 75 (2007); *see also* Nat'l Drug Ct. Inst., *Critical Issues for Defense Attorneys in Drug Court* 1 (2003), https://bit.ly/420r5Hw ("Defense attorneys sometime walk a delicate, ethical tightrope, if they are to advance the therapeutic ideal that informs drug court, without doing damage to their obligations as zealous advocates for their client.").

[17] Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 Geo. L.J. 1587, 1591 (2012); *see* Am. Bar Ass'n Criminal Justice Standards Nos. 1.2(h), 5.3(a) (2022), https://bityl.co/HXUe ("Jurisdictions should exercise special care to avoid a program's net-widening potential"—i.e., its potential to "cause[] criminal legal system interventions to increase in number and intensity [more] than would have occurred in the absence of the program").

[18] *See* Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 Berkeley J. Crim. L. 47, 81–82 (2017) (describing the need for evidence-based criteria to ensure equal access to diversionary and alternatives-to-incarceration programs); *see also* Leah Wang, Prison Pol'y Initiative,

- How to design court-sponsored diversionary and alternatives-to-incarceration programs to recognize that setbacks and struggles are a natural part of recovery and, more generally, to mitigate the risks that attend any program that merges treatment and punishment.

Diversionary and alternatives-to-incarceration programs have proliferated at the same time as pretrial-detention rates have skyrocketed,[19] judges—influenced by the Guidelines—have continued defaulting to prison sentences,[20] and federal prosecutors have offered diversion less and less often.[21] Any Commission study must examine these structural issues, and Defenders are well-positioned to provide input and expertise on them.

Court-sponsored diversion and alternatives-to-incarceration programs cannot work properly unless they are fair, evidence-based, and objective. Defenders are necessary partners in these programs when they are up and running; they must also be partners in their study and design.

II. Conclusion

The Commission should amend the Guidelines to provide for a departure to a community-based sentence for anybody who demonstrates presentence rehabilitation. If the Commission elects to study court-sponsored diversion and alternatives-to-incarceration programs, it should include Defenders as equal partners in design, implementation, and analysis of that study, to ensure that the unique perspective of those who represent the accused is properly accounted for.

Racial disparities in diversion: A research roundup (Mar. 7, 2023), https://bityl.co/HXUo (collecting studies "suggest[ing] diversion is routinely denied to people of color, sending them deeper into the criminal legal system").

[19] *See* Alison Siegler, et al., *Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis* 16 (2022), https://bityl.co/HRwc ("Federal pretrial jailing rates have been skyrocketing for decades."); *see also* Fed. Jud. Ctr., *The Bail Reform Act of 1984: Fourth Edition* ix (2022), https://bit.ly/3Zf9rOu (noting the "growing concern that the pretrial detention rate is too high").

[20] *See, e.g.*, Courtney R. Semisch, U.S. Sentencing Comm'n, *Alternative Sentencing in the Federal Criminal Justice System* 1 (2015), https://bityl.co/HRwn (noting the "continued decreasing trend in the imposition of alternative sentences" due in significant part to the Guidelines).

[21] *See* Scott-Hayward, *supra* note 18 at 66 fig. 1 (showing a steady decrease in number of pretrial diversion cases activated between 2001 and 2015).

Federal Public and Community Defenders Comment on Counterfeit Pills (Proposal 11)

March 14, 2023

The following excerpt from the March 2023 Statement of Michael Caruso contains Defenders' comments on Proposed Amendment 11.

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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.

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

March 14, 2023

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Proposed Amendments to the Sentencing Guidelines, January 2023

Dear Judge Reeves:

As a supplement to our previous submissions and testimony, the Practitioners Advisory Group ("PAG") provides the following comments in response to the Commission's Proposed Amendments to the Sentencing Guidelines.

I. The First Step Act – Sentence Reductions Under 18 U.S.C. § 3582(c)(1)(A)

The Commission proposes amending §1B1.13 in response to the First Step Act of 2018, Pub. L. 115-391 (Dec. 21, 2018). For purposes of the guidelines, the First Step Act modified 18 U.S.C. § 3582(c)(1)(A) to permit a defendant to file a motion for sentence reduction, and clarified and expanded the circumstances that are extraordinary and compelling for purposes of sentence reductions. Consistent with the PAG's testimony at the Commission's February 23, 2023 public hearing on this proposal and its written testimony, the PAG welcomes and supports these amendments.

While today we appear to be far removed from the worst days of the COVID-19 pandemic, it is important to learn from that experience to shape guidance and policy that can respond to future, unknown events. Just days before the Commission's public hearing on this amendment, the New York Times reported that "[d]eaths in state and federal prisons across America rose nearly 50

percent during the first year of the pandemic."[1] This reporting is a reminder of the importance of having a plan in place to allow courts and facilities to respond quickly in the wake of a sudden catastrophic event in order to protect and save lives.

The PAG endorses the Commission's proposal to allow individual defendants to file motions for sentence reductions directly with the district courts. This is consistent with the First Step Act and reflects Congress's intent to broaden the ability of individual defendants to file motions for sentence reductions. The PAG also agrees that the list of extraordinary and compelling reasons be moved from the commentary into the text of the guideline itself. And the PAG supports all the Commission's proposed categories for inclusion as "extraordinary and compelling reasons" that may warrant relief under this provision: medical circumstances of the defendant, including health risks to a defendant; family circumstances of a defendant; victims of assault; changes in the law; and the "catch-all" provision for other circumstances.

Below, we focus on the proposals regarding victims of assault; changes in the law; the catch-all provision; the question for comment regarding the interaction between §1B1.13 and §1B1.10; and proposals regarding notifying victims in connection with compassionate release motions.

A. Victims of Assault

The PAG recommends that the Commission adopt the category for victims of sexual assault or physical abuse, as proposed in §1B1.13(b)(4), and consider expanding it in two ways.

First, the PAG suggests that the guideline include serious psychological injury, in addition to serious bodily injury, as a basis for relief. In PAG members' experience, our clients who are sexual assault survivors experience profound psychological injury that can be longer lasting and have more damaging impacts than even the serious physical trauma addressed by the current proposed amendment.

Second, the PAG recommends that the Commission not limit relief to assaults committed by Bureau of Prisons personnel but include sexual and physical assaults committed by other inmates. While the perpetrators of these assaults may differ, the effects on an institutionalized individual are no less traumatizing or deserving of relief. Given that BOP and other institutions are responsible for the custody, safety and care of our clients, the PAG sees no principled distinction to limit relief based on the identity of the perpetrator. Instead, the PAG urges the Commission to consider a victim-centered approach that underscores the injury suffered as much as the identity of the perpetrator.

[1] Jennifer Valentino-DeVries and Allie Pitchon, *As the Pandemic Swept America, Deaths in Prisons Rose Nearly 50 Percent*, The New York Times (February 19, 2023) (reviewing first comprehensive data on COVID in prisons and noting "how quickly the virus rampaged through crowded facilities and how an aging inmate population, a correctional staffing shortage and ill-equipped medical personnel combined to make prisoners especially vulnerable during the [pandemic]."), available at As the Pandemic Swept America, Deaths in Prisons Rose Nearly 50 Percent - The New York Times (nytimes.com).

The government also supports this proposal but recommends requiring a criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case as a prerequisite.[2] As discussed during the public hearing on this topic, however, such proceedings may take too long, exacerbate the suffering of an assaulted inmate, and frustrate the very purpose of compassionate release. Professor Erica Zunkel, another panelist at the Commission's hearing on this amendment, described her client's experience seeking compassionate release after the client was groped and forced to disrobe by male employees of BOP. Even though the employees were charged with sexual abuse and, privately, officials "do not dispute" these allegations,[3] BOP denied the client's request for compassionate release because of insufficient documentation.

This case illustrates two concerns that the PAG has with making relief for assault victims dependent on the completion of other proceedings for purposes of fact-finding. First, it is unnecessary. There is no reason that a district court cannot determine whether an inmate has been sexually or physically assaulted. District courts across the country perform this type of evidentiary fact-finding every day, in all kinds of cases. Our district court judges are well-equipped and have ample experience examining video footage, reviewing medical records, and taking witness testimony to make factual findings. The district courts have been entrusted with making factual findings in compassionate release cases based on medical necessity and family circumstances, and they can surely make such findings based on whether a person has been abused or assaulted.

Second, it risks unfair delay. For years, BOP failed to file motions for compassionate release even where a defendant was fully deserving and eligible for relief.[4] There is no reason to believe that BOP will act any more swiftly to conduct administrative proceedings involving sexual assaults by its own employees. The fact that, privately, BOP officials do not dispute the horrific allegations made by Professor Zunkel's client, but publicly take the position that her allegations are insufficiently documented raises concerns that this will not be a fair process for others as well.

For these reasons, the PAG strenuously opposes the government's suggestion that a compassionate release motion brought on behalf of a sexually or physically abused inmate

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[2] *See* Department of Justice ("DOJ") Submission to the Commission (Feb. 15, 2023) ("DOJ Feb. 15, 2023 Submission") at 6, available at Public Hearing Testimony (ussc.gov).

[3] Glenn Thrush, *Justice Dept. Struggles to Carry Out Early Release Program for Abused Inmates*, The New York Times (Feb 22, 2023), available at Justice Dept. Struggles to Carry Out Early Release Program for Abused Inmates - The New York Times (nytimes.com).

[4] *See United States v. Brooker*, 976 F.3d 228, 231-232 (2d Cir. 2020) (explaining that prior to the First Step Act, "on average, only 24 incarcerated people per year were released on BOP motion" because BOP "did not properly manage the compassionate release program," and its failure was "not without consequence. Of the 208 people whose release requests were approved by both a warden and a BOP Regional Director, 13% died awaiting a final decision by the BOP Director."); PAG, Public Comment on Proposed Amendments at 16 (March 18, 2014) (BOP "has been unwilling to file the motion necessary to trigger the court's jurisdiction unless a prisoner is terminally ill and within months of death, or severely and permanently incapacitated"), available at Public Comment from the Practitioners Advisory Group on Proposed Amendments to the Federal Sentencing Guidelines (ussc.gov)

should be contingent upon a criminal conviction or findings or admissions in an administrative or civil proceeding.

B. Changes in the Law

The PAG believes that changes in the law, including non-retroactive changes, should be grounds for a sentence reduction, and we support the proposed §1B1.13(b)(5). An example of a change in the law that might warrant relief is contained in the First Step Act itself, which drastically reduces sentences where a defendant is convicted of multiple counts of 18 U.S.C. §924(c). Prior to the First Step Act, a defendant convicted of six 18 U.S.C. § 924(c) charges was sentenced to a mandatory minimum 130-year sentence, five years on the first count, and five 25-year sentences on the remaining counts, imposed consecutively. Under the First Step Act, this defendant's sentence would be lowered by 100 years to 30 years; he would receive six 5-year sentences, imposed consecutively.[5]

This type of dramatic difference in a sentence, based on a change in the law, is an extraordinary and compelling reason that supports a sentence reduction. The Supreme Court has explained that the First Step Act does not limit the information that a district court may consider when deciding whether to modify a defendant's sentence, including non-retroactive changes in the law.[6] Further, several appellate courts have recognized that there is a significant difference between an automatic resentencing of a large number of defendants when a change in the law is retroactive, and the ability of an individual defendant to have his or her sentence re-evaluated in light of non-retroactive changes in the law, along with other factors that may support a sentence reduction.[7] Moreover, given the body of law that has developed since enactment of the First Step Act and in the absence of an amended guideline, excluding changes in the law from consideration for a reduction permits disparities in the application of the law throughout the country for otherwise similarly situated individuals.

C. Other Circumstances

The PAG supports Option 3 for the proposed "catch-all" provision in proposed §1B1.13(b)(6). This provision would allow district courts to consider any other reason that, taken alone or in combination with the enumerated reasons, supports relief based on extraordinary and compelling circumstances. This option, the broadest of the three options, is consistent with the "wide latitude" that district courts have and should have in sentencing.[8] As the pandemic

[5] *See U.S. v. Rubalcava*, 26 F.4th 14, 29 (1st Cir. 2022) (J. Barron, concurring).

[6] *See Concepcion v. United States*, ___U.S.___, 142 S. Ct. 2389, 2396 (2022).

[7] *See, e.g., United States v. McCoy*, 981 F.3d 271, 285-86 (4th Cir. 2020) (affirming grant of compassionate release where defendants were serving sentences that were subsequently lowered under the First Step Act, explaining that "[w]e think courts legitimately may consider, under the 'extraordinary and compelling reasons' inquiry, that defendants are serving sentences that Congress itself views as dramatically longer than necessary or fair.").

[8] *See, e.g., Brooker*, 976 F.3d at 238 (internal citation omitted).

demonstrated, such a catch-all provision is necessary to give courts the discretion they need to consider unpredictable circumstances that may give rise to an "extraordinary and compelling" reason supporting a sentence reduction in a given case. Moreover, it permits courts to address unique and individualized circumstances that affect a tiny population or a single individual in unique, uncategorizable circumstances that nonetheless warrant relief.

The PAG further recommends that the Commission include language, either in the guideline or in the commentary, expressly stating that the enumerated list of "extraordinary and compelling reasons" is not exhaustive or exclusive. Experience with the COVID-19 pandemic underscores the inability of practitioners and courts to forecast what might result in extraordinary and compelling circumstances in the future. This clarification provides appropriate guidance without limiting courts' discretion to act quickly in an evolving crisis, whether individually or on a broader scale.

D. The Interaction of §1B1.13 with §1B1.10

The Commission has requested comment on whether there is any tension between §1B1.10, on the application of guidelines determined to be retroactive by the Commission, and proposed amendments to §1B1.13, particularly §1B1.13(b)(5) and §1B1.13(b)(6). The PAG believes that any tension is minimal and can be easily addressed.

The proposed amendments to §1B1.13(b)(5) and (b)(6) serve a different purpose than retroactive guideline amendments under §1B1.10. For example, proposed §1B1.13(b)(5) allows a court to consider changing values and norms as expressed by Congress, state legislatures and the judiciary in changes in the law. Such changes could include the outright decriminalization of certain offenses, such as marijuana possession, or the clarification of statutory language, as Congress did in the First Step Act with the treatment of multiple mandatory minimum sentences under 18 U.S.C. § 924(c). Because we cannot always predict how our norms and values will adjust over time, proposed §1B.13(b)(5) is necessarily focused on the equities, or inequities, that may result from such changes. Similarly, in the future, courts may find a basis for an extraordinary and compelling reason warranting relief that we cannot anticipate today, and the "other circumstances" provision in §1B1.13(b)(6) allows courts to consider that information in determining whether relief is warranted.

Guideline §1B1.10, on the other hand, is strictly limited to guideline amendments that the Commission deems to be retroactive. To address any potential confusion, the Commission could include an application note with §1B1.13 clarifying that retroactive amendments to the guidelines should generally be considered under §1B1.10 (and a motion under 18 U.S.C. §3582(c)(2)) rather than §1B1.13, unless some additional extraordinary or compelling circumstance warrants reduction. This would alleviate any possible tension between §1B1.10 and §1B1.13.

E. Victim Notification

The PAG responds as follows to the recommendation of the government and the Victims Advisory Group (among others) that §1B1.13 contain a requirement that victims be notified as part of a proceeding to consider a motion for sentence reduction under this provision.

First, the PAG notes that both parties to an application under §1B1.13 – the defendant and the government – have been and are able to notify individuals to obtain feedback either in support of or opposition to these motions. In the PAG's experience, these motions are resolved during evidentiary hearings and typically, the government is in the best position to reach out to witnesses, including victims, for their input regarding a particular motion. As between the defendant and the government, only the government can reach out to a victim.

Second, the PAG does not believe that these motions require renewed input of victims because these motions are adjudicated most often by the original sentencing judge. Presumably, victims were heard at the original sentencing. And nothing prohibits the government from seeking victims' input in the course of a motion for sentence reduction under §1B1.13. Adding a requirement of victim notice and opportunity to be heard places an affirmative and potentially significant burden on the system to identify and locate such parties long after the original sentencing. This will undeniably delay the speed at which many cases are resolved.

The pandemic statistics speak volumes about the cost of delay in adjudicating these claims, particularly claims related to personal or public health crises. Rather than add new administrative hurdles to requests for sentence reduction, the PAG asks the Commission to consider that in a typical sentence reduction case, defendants and the government are represented by counsel and, as in any sentencing proceeding, there is no limit on the information that the court may – indeed, must – consider under 18 U.S.C. § 3553(a). That includes victims' viewpoints. In the PAG's experience, the process already allows victims ample opportunity to provide information and testimony at these and other related hearings without imposing rigid notification requirements.

II. The First Step Act – Drug Offenses

A. §5C1.2, Safety-Valve

The PAG supports the Commission's proposal to amend §5C1.2 to reflect the provisions contained in the First Step Act, including the proposed amendments to the commentary and conforming changes to §4A1.3.[9] Previously, the PAG suggested that the Commission consider amending the commentary to §5C1.2 to provide that the disqualifying criminal history criteria for safety-valve eligibility be read conjunctively. Considering the Supreme Court's recent grant

[9] These criteria are contained in proposed amended §5C1.2, which in turn reflects the provisions of the First Step Act: (1) the defendant does not have (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; and (C) a prior 2-point violent offense, as determined under the sentencing guidelines. *See* U.S.S.G. §5C1.2(a)(1)(A)-(C).

of certiorari in *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022), to address the question of whether the criminal history portion of the safety valve, 18 U.S.C. § 3553(f)(1), sets forth conjunctive or disjunctive requirements, the PAG defers to the Supreme Court's determination.

B. §2D1.1(b)(18) and §2D1.11(b)(6)

The Commission also proposes amending §2D1.1(b)(18) and §2D1.11(b)(6) in light of the First Step Act. The PAG endorses option 1, which incorporates the language of §5C1.2 and the First Step Act. In this context, however, the PAG further recommends that the Commission provide guidance in the commentary to clarify that the disqualifying criminal history criteria be read conjunctively, rather than disjunctively. Unlike the safety-valve, the two-level reductions in §2D1.1(b)(18) and §2D1.11(b)(6) are available in narcotics prosecutions whether or not the defendant is subject to a statutory mandatory minimum and is safety valve-eligible. There is good reason to reduce the offense level for defendants who did not play leadership roles, did not use violence, were not involved in a crime that resulted in death or serious bodily injury, and provided the government with truthful information, even if the information was not deemed sufficiently useful to give rise to a substantial assistance motion. Each of these factors, especially the last, is a sign of lesser culpability. Only defendants who have significantly serious criminal history, such as those who satisfy all three criminal history disqualifiers conjunctively, should be excluded from this recognition of reduced culpability.

In particular, the guidelines should recognize the importance of earnest attempts at cooperation made by defendants in large drug conspiracies for whom the government declines to file a substantial assistance motion. Too often, a defendant truthfully provides all he or she knows about the offense, yet no substantial assistance motion is filed because the defendant does not know enough, or the government is not interested in pursuing the information provided. Regardless of whether the defendant was too low-ranking or tangential to the larger conspiracy to provide new "useful" information, these attempts at cooperation demonstrate rehabilitation and remorse. And defendants who "unsuccessfully" proffer are subject to the same risk of harassment or harm should their cooperation become known. By interpreting the criminal history disqualifiers conjunctively under §2D1.1(b)(18) and §2D1.11(b)(6), the guidelines can credit these efforts and recognize the reduced culpability of these defendants. Because the two-level reductions under these guidelines serve a slightly different purpose than safety-valve relief, the PAG believes that they should apply as broadly as possible.

In addition, should the Commission amend §§2D1.1(b)(18), 2D1.11(b)(6), and 5C1.2 to include the proposed language, the PAG believes that the Commission should explain what it means by these terms, just as it proposes to define "violent offense" in §5C1.2, Application note 1(A). Specifically, the Commission should clarify that "1-point," "2-point" or "3-point" offenses are to be determined under §4A1.1 and its commentary. This guidance will help to provide uniformity in the application of this guideline provision across the country.

C. Recidivist Penalties for Drug Offenders

The PAG does not oppose this amendment conforming §2D1.1 to the relevant First Step Act statutory provisions.

III. Firearms Offenses

The Commission has proposed amendments to §2K2.1 to address new straw purchasing and firearms trafficking offenses, along with increased penalties for several offenses contained in the Bipartisan Safer Communities Act ("BSCA"). In addition, the Commission proposes an amendment to address the issue of ghost guns and provides several issues for comment about additional revisions to this guideline.

For the reasons discussed below, the PAG believes that the current §2K2.1 guideline sufficiently accounts for the penalties contained in the new legislation and, for that reason, does not recommend adopting either of the Commission's proposed options. Should the Commission reject this recommendation, as between the two options, Option 1 is preferable with adjustments. With respect to that option, the Commission should also consider modifying its proposal regarding the mitigating factors available to certain defendants convicted of straw purchasing offenses. As to the other proposed amendments, the PAG does not support the Commission's proposed 4-level enhancement if an offense involved a ghost gun. The PAG also addresses several of the Commission's issues for comment, and two hypotheticals that Ex Officio Commissioner Wroblewski posed at the Commission's March 7, 2023 public hearing on this proposal.

A. Bipartisan Safer Communities Act Amendments

1. *Increased Penalties Are Not Supported by the Commission's Data*

Congress directed the Commission to "review and amend its policy statements" to ensure increased penalties for certain categories of defendants: persons convicted of violating 18 U.S.C. §§ 932 & 933; straw purchasers and firearms traffickers; and individuals convicted under these statutes who are affiliated with gangs, cartels, organized crime rings, or similar enterprises.[10] Congress also directed the Commission to provide for mitigating factors for straw purchasers.[11] Congress, however, provided no timetable for the Commission's review, and the PAG believes that further study is needed first for the following reasons.

The Commission's July 2022 report on firearms offenses reflects that a growing number of defendants convicted of firearms offenses are sentenced below the already high sentencing ranges recommended by the guidelines. Between fiscal years 2007 and 2021, the rate of within guidelines sentences for all firearms defendants decreased from 70.8% to 49.6%, and the rate of

[10] Bipartisan Safer Communities Act, Pub. L. 117-159, 136 Stat. 1313, 1328 (June 25, 2022)

[11] *Id*.

downward variances increased from 10.6% to 36.3%.[12] In other words, fewer than half of all firearms defendants are sentenced within the guidelines range. Defendants who were prohibited persons[13] and defendants convicted of straw purchases or false statements were sentenced below the guideline range in 40.5% and 58.3% of these cases, respectively.[14] The average guideline minimum for a non-prohibited defendant convicted of a firearms offense was 30 months, and the average sentence was 21 months. In contrast, the average guideline minimum for a prohibited person convicted of a straw purchase was 51 months, and the average sentence was 37 months.[15]

The statistics for firearms trafficking offenses follow the same trend. Prohibited persons convicted of offenses involving firearms trafficking were sentenced below the guideline range in 52.7% of cases. For this group of defendants, the average minimum guideline was 75 months, and the average sentence was 62 months. Non-prohibited defendants convicted of firearms offenses had an average guideline minimum of 30 months, and an average sentence of 21 months.[16]

Given the large percentage of below guidelines sentences for prohibited defendants convicted of straw purchases and firearms trafficking, and still lower sentences for non-prohibited defendants convicted of straw purchases and firearms trafficking, it appears that the current structure of this guideline can well account for the increases contemplated by Congress in the BSCA. Before adopting any amendments, the PAG asks the Commission to study cases involving the new straw purchasing and trafficking offenses and the offenses with increased statutory penalties. Comparing offense characteristics and the sentences imposed before and after enactment of the BSCA will allow the Commission to use its expertise in identifying what (if any) adjustments are necessary. In contrast, without this experiential guidance and in the absence of further study, the Commission would be in the position of blindly recommending increases that may well be unnecessary and unjustified.

The Commission's request for comment on the issue of proportionality between straw purchasers and prohibited persons is a question that reflects, in the PAG's opinion, the need to review

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[12] U.S.S.C., *What Do Federal Firearms Offenses Really Look Like?* at 16 (July 2022) ("Firearms Report"), available at What Do Federal Firearms Offenses Really Look Like? (ussc.gov).

[13] In fiscal year 2021, 90% of defendants convicted of federal firearms offenses were prohibited from owning firearms for the following reasons: a prior felony conviction (79%); being a drug user (5.3%); being an illegal alien (2.9%); a prior misdemeanor crime of violence (1.8%); being under felony indictment (1.2%); being subject to a restraining order (.5%); or being mentally incompetent or a fugitive (.2% & .1%, respectively). Nine percent of these defendants were prohibited for an unspecified reason. *See* Firearms Report at 24.

[14] *Id.* at 27.

[15] *Id*. at 28, 26.

[16] *Id*. at 26–28.

sentences under the new legislation before amending the guidelines. As shown in the Commission's data, prohibited persons are currently sentenced more severely than non-prohibited straw purchasers and firearms traffickers. Without studying cases that arise under the BSCA, it is impossible to determine what, if any, adjustments need to be made to §2K2.1 to reflect differences in culpability.

The Commission should proceed carefully and studiously before amending this guideline for yet another reason as well – to avoid further exacerbating the racially disparate impact of §2K2.1. As widely acknowledged by many commenters, this guideline disproportionately applies to defendants of color. The Commission's data for fiscal year 2021 shows that black defendants made up 54.5% of §2K2.1 defendants but only 16.9% of defendants in all other offenses.[17] The written statement of the Federal Public and Community Defenders offers an extensive overview of how this guideline operates to increase systemic racial disparities, and the PAG references that information in support of the need for careful study before blindly raising sentences under this guideline.[18] Again, studying new cases arising under the BSCA can help the Commission tailor any needed adjustments in a way that minimizes exacerbating the already significant systemic racial effect of this guideline.[19]

2. *In the Alternative, the PAG Recommends Option 1*

Should the Commission reject PAG's recommendation on this issue and choose to amend the guideline now, Option 1 is preferable. That option would set base offense levels for violations of 18 U.S.C. §§ 932 and 933 at either level 20 under §2K2.1(a)(4)(B)(ii) or level 14 under §2K2.1(a)(6)(B). It would then add tiered enhancements based on specific offense characteristics for straw purchasers and firearms traffickers at §2K2.1(b)(5)(A)-(C); and a proposed 2-4 level enhancement only for a limited category of defendants (those affiliated with

[17] *See* Firearms Report at 10.

[18] *See* Statement of Michael Carter, Federal Public Defender for the Eastern District of Michigan on Behalf of the Federal Public and Community Defenders at 6-15 (Mar. 7, 2023), available at Public Hearing on Proposed Amendments (ussc.gov).

[19] The PAG encourages a broader study into other troubling aspects of the firearm guidelines as well. One persistent issue with §2K2.1's structure is the fact that prior convictions are often "triple counted." A defendant convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) necessarily has "previously been convicted of a crime punishable by more than one year" – the conviction that led to the defendant being prohibited from possessing a firearm. If this defendant's prior conviction is for a "crime of violence or controlled substance offense," under §2K2.1, the base offense level is increased. So, the conviction that forms the basis for the defendant's offense under 18 U.S.C. § 922(g)(1) is counted for a second time in establishing the base offense level for the offense. The prior conviction is then counted a third time in calculating the defendant's criminal history. The PAG asks the Commission to consider whether such triple counting contributes to overly severe sentence recommendations.

gangs or cartels) at §2K2.1(b)(8)(A)-(C).[20] Option 1 also provides for a 1-2 level decrease in offense level if a defendant meets certain mitigating criteria, §2K2.1(b)(9) and Application Note 13(B), and makes other amendments to the commentary in Application Notes 13(C) and 15. In contrast, Option 2 increases almost all base offense levels, while also containing the same adjustments for specific offense characteristics as the proposed §§2K2.1(b)(8) & (b)(9).

Of the two, Option 1 with a 1-level increase in §§2K2.1(b)(5)(A) and (B) is preferable. The PAG asks the Commission to consider much less than a 5-level increase for the enhancement under §2K2.1(b)(5)(C); indeed, it is unclear how the Commission arrived at its proposed 5-6-level increase for this enhancement. With respect to the new enhancement based on criminal affiliation in proposed §2K2.1(b)(8), the PAG recommends that the increase be limited to no more than 2 levels.[21]

The PAG also asks the Commission to consider modifying the provision related to mitigating criteria under proposed §2K2.1(b)(9) because the proposal is not fully consistent with the BSCA's directive. The BSCA requires that mitigating factors be reflected for defendants who are "straw purchasers without significant criminal histories."[22] Congress did not define what constitutes "significant criminal histories" for purposes of restricting access to mitigation under the guidelines, yet the relief proposed under §2K2.1(b)(9) is limited to a defendant who does not have more than 1 criminal history point. The PAG contends that defendants "without significant criminal histories" easily include defendants with more than 1 criminal history point, including but not limited to defendants who have prior convictions for minor offenses that are counted under §4A1.2 and §4A1.3. The sentencing judge should have discretion to assess the significance of a defendant's criminal history in the first instance before access to mitigation is closed off as a matter of guideline policy. Thus, the PAG suggests that §2K2.1(b)(9)(B) mirror the BSCA and apply to "straw purchasers without significant criminal histories," and that the Commission study judicial determinations in this area to see what further guidance, if any, is necessary.

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[20] This specific increase will almost certainly have a racially disparate effect, again highlighting the need for careful review before implementing any of the proposed Options.

[21] Option 1 would also amend the commentary in two ways. First, Option 1 would add language reflecting Congress's directive that an enhancement under §2K2.1(b)(5)(C)(i) should not be applied to defendants with a misdemeanor domestic violence conviction who do not have certain types of prior convictions. *See* proposed §2K2.1, Application Note 13(B). The language tracks the language of 18 U.S.C. § 921(a)(33)(C), and the PAG does not oppose this change. Second, Option 1 would allow for an upward departure in certain cases involving substantially more than 25 firearms or, potentially, an unusually large amount of ammunition. *See* proposed §2K2.1, Application Note 13(C). Here, the PAG suggests that the Commission conduct further study to see whether such language is necessary and advisable.

[22] Bipartisan Safer Communities Act, 136 Stat. at 1328.

In addition, under the BSCA, the guideline should "reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors."[23] Again, proposed §2K2.1(b)(9)(C) is more restrictive than the BSCA. Rather than considering "any coercion [and] domestic violence survivor history," the proposal provides a list of criteria that limits eligibility to those defendants motivated by "an intimate or familial relationship or by threats or fear;" defendants who "received little or no compensation;" and defendants who "had minimal knowledge" regarding the offense. The proposed §2K2.1(b)(9)(C) also does not include the BSCA's catch-all of "other mitigating factors." The proposal allows for the possibility of reading this list of criteria conjunctively, which would further limit the availability of relief. And the proposal would limit any reduction to 1 or 2 levels, even though the BSCA does not quantify the extent of the reduction that a defendant should receive.

Taken as a whole, this proposal does not reflect the BSCA's language, or Congress's intent that less culpable straw purchasers receive reductions in their offense levels based on mitigating factors. The Commission's data reflects that straw purchaser defendants, and others like them, typically receive lower sentences than other firearms defendants. As a practical matter, in PAG members' experience, straw purchasers are the girlfriends, friends and family members of the prohibited person seeking the firearm. With the proposed increases in §2K2.1 generally and without providing for a significant reduction for these defendants, the proposed amendment may well end up punishing this substantially less-culpable category of defendants – who are frequently victims themselves – more severely than the prohibited person.

Based on these concerns, the PAG proposes that §2K2.1 (b)(9) be modified as follows:

> (b)(9) If the defendant –
>
> (A) is convicted under 18 U.S.C. §§ 922 (a)(6), 922(d), 924 (a)(1)(A), 932 or 933;
>
> (B) does not have a significant criminal history; and
>
> (C) any mitigating circumstances exist, including, but not limited to, consideration of factors such as the defendant's role and culpability in the offense, the defendant's domestic violence survivor history, or whether the offense was the result of coercion,
>
> decrease by 1-4 levels.

The guideline commentary should also be amended to allow for a downward departure of more than 4 offense levels when warranted by specific circumstances, and the downward departure provision in §2K2.1, Application Note 15, should remain available for additional defendants who do not have a significant criminal history.

[23] *Id.*

At the Commission's March 7, 2023 public hearing on these proposed amendments, Ex Officio Commissioner Wroblewski asked the PAG to consider two hypotheticals, both related to the reductions based on mitigating factors for straw purchasers under §2K2.1(b)(9).

In the first hypothetical, a friend asks the defendant to buy a gun. The friend says, "I am going to use that gun to rob a bank and I'm not going to pay you anything." Under the framework proposed by the PAG and others (*i.e.,* that a defendant could get a mitigating adjustment for meeting any of the factors and needn't meet them all), the question was whether that person would receive a mitigating role adjustment. In the PAG's proposed §2K2.1(b)(9), above, one of the factors for consideration – taken from the language of the BSCA – is consideration of "the defendant's role and culpability in the offense." A court could consider a straw purchaser's knowledge that the firearm would be used in connection with a bank robbery and exercise its discretion to preclude application of the adjustment in this scenario depending on the specific facts and circumstances at issue.

The second hypothetical concerns the interplay between the proposed reduction in guideline level for those with zero criminal history points and the safety valve provision, which precludes a reduction if a person possesses a weapon in connection with a drug offense. The question is, for straw purchasers who lie on ATF form 4473 but do not possess a firearm, would that person be eligible for the safety valve? In a scenario where the defendant is convicted of a drug offense and being a straw purchaser, the defendant can be eligible for safety valve relief so long as s/he did not possess the firearm. In fact, in the PAG's experience, a low-level defendant in a drug trafficking conspiracy who is also a straw purchaser would be a good candidate for safety valve relief. These defendants are often targeted to be a straw purchaser due to their lack of a criminal record under circumstances that both mitigate their culpability and do not involve possession of a type that necessarily disqualifies them from safety valve relief.

B. Ghost Guns

The Commission also proposes to amend §2K2.1(b)(4)(B) to provide for a 4-level enhancement where a firearm is not marked with a serial number (a "ghost gun"). Currently, §2K2.1(b)(4) contains a 2-level enhancement if a firearm was stolen, and a 4-level enhancement if a firearm had an altered or obliterated serial number. These provisions are "offense-driven" and have no *mens rea* component. In connection with the proposed amendment to add "ghost guns," the Commission seeks comment about whether this provision should include a *mens rea* requirement.

The PAG does not support adding another enhancement to §2K2.1(b) absent further study and urges that a *mens rea* component be included in §2K2.1(b)(4), thereby shifting this enhancement from being offense-based to defendant-based. That would better reflect the increased culpability of a defendant who knew that a firearm was stolen or had an altered or obliterated serial number or no serial number, compared to a defendant who does not know those facts.

The PAG notes that in fiscal year 2021, the 4-level enhancement for an altered or obliterated serial number was applied in only 5.4% of cases.[24] It would be helpful to have data regarding the number of cases where this enhancement was applied where the defendant (a) knew and intended that the firearm had an altered or obliterated serial number and (b) did not have such knowledge or intent. In both cases, it would also be helpful to know whether other aggravating factors were present, such as whether the firearm was used in connection with another offense. From the PAG's perspective, a defendant who does not knowingly or intentionally possess a stolen firearm or a firearm with a non-existent, altered or obliterated serial number should not receive the same enhancement as a defendant who acts knowingly or intentionally.

Finally, the PAG opposes the government's proposal to create a rebuttable presumption *mens rea* that a defendant would have to disprove by a preponderance of the evidence. Like all other guideline sentencing enhancements, the government bears the burden of proof to establish evidence in support of a sentence increase. Burden-shifting in the context of sentencing raises constitutional concerns, runs counter to the procedure underlying the federal sentencing guidelines, and is particularly inappropriate here given that sentencing data indicates this guideline recommends sentence ranges that are already generally too high.

C. Issues for Comment on Further Revisions

The Commission asked for comment on: (1) whether there should be a new enhancement for offenses involving burglary and robbery of federal firearms licensees (FFLs); (2) whether additional offenses should be considered recidivist predicates for purposes of determining the base offense level; (3) whether the definition of firearm should be modified for consistency throughout this guideline; and (4) whether there should be increased penalties for a defendant who transfers a firearm to a minor.

Except for conforming the definition of firearm across §2K2.1, the PAG believes that §2K2.1 sufficiently addresses these concerns.

1. *Thefts from FFLs*

The government has represented that burglaries and robberies of FFLs are particularly dangerous, and often involve multiple firearms that enter the illegal market and are used in later crimes.[25] Whether or not that is so, the PAG contends that the current guideline scheme already adequately addresses these circumstances. As the government acknowledges, the base offense level for §2K2.1(a)(7), which applies in cases of thefts from FFLs, already accounts for the fact that firearms were stolen. And while this increased base offense level properly precludes adding another 2-level enhancement for stolen firearms under §2K2.1(b)(4)(A), many other specific

[24] Firearms Report at 12.

[25] *See* Department of Justice ("DOJ") Submission to the Commission (Feb. 27, 2023) ("DOJ Feb. 27, 2023 Submission") at 7-8, available at Public Hearing on Proposed Amendments (ussc.gov).

offense characteristics still apply that address the identified potential harms purportedly associated with FFL thefts.

Taking the government's specific example of a theft of 32 firearms from an FFL in Memphis, Tennessee,[26] under §2K2.1(b)(1)(C), a 6-level enhancement for the number of firearms would apply, in addition to a 4-level enhancement for possessing a firearm in connection with another felony offense under §2K2.1(b)(6)(B), in addition to the enhanced base offense level. In other words, there is no need to add yet another 6-level enhancement for FFL thefts based on potential harms involving the number of guns and other crimes because those harms are already specifically addressed in cases where they exist, not only by the higher base offense level, but also by an increase of 10 additional levels for those precise offence characteristics. Any additional proposed enhancements would thus be cumulative and lead to a ***16***-level enhancement under a guideline that is already generally considered too severe. Again, the PAG believes that the current guideline sufficiently accounts for the seriousness of the conduct that this proposal targets.

2. *Expanding Predicate Offenses*

The PAG does not support expanding the types of convictions that may be used to establish recidivist predicates for §2K2.1. First, this would only compound the issues that have been identified in the context of the career offender guideline. If the Commission is considering relying on prior misdemeanor domestic violence convictions, the vast majority of these offenses are prosecuted under state law. As discussed at the Commission's public hearing on March 8, 2023 and further addressed in Part V in connection with the proposed career offender amendments, using predicate state convictions as a proxy for enhanced punishment easily results in overly severe guideline recommendations, in large part because the guidelines ignore state-specific legal and procedural distinctions that either reflect reduced culpability in the eyes of the convicting jurisdiction, or do not reliably indicate heightened culpability supporting enhanced punishment. As a practical matter, it introduces uncertainty and litigation because state court records may not be clear due to the age of the conviction, for example, or idiosyncrasies of local record keeping. And because defendants typically do not contest non-material facts in plea negotiations, any such "facts" used to enhance punishment under the guidelines are inherently unreliable.

Second, this appears to be contrary to the BSCA. As noted above, the BSCA, and in turn the Commission's proposal, exclude certain defendants with prior misdemeanor domestic violence convictions from the enhancements provided in §2K2.1, Application Note (13)(B), for defendants who transfer firearms to certain individuals. Using prior misdemeanor domestic violence convictions to nonetheless trigger an increased base offense level is inconsistent with how Congress viewed them in the BCSA.

Finally, the Commission should not use non-violent prior firearms offenses as predicate offenses for purposes of calculating the base offense level in §2K2.1. Prior non-violent firearms

[26] *See id*. at 8, n.6.

convictions are already used to calculate the defendant's criminal history, which adequately accounts for the seriousness of the defendant's current conduct.

3. *Transferring Firearms to Minors*

Finally, the PAG does not support increased penalties for transferring a firearm to a minor.

Increasing sentencing penalties where a defendant transfers a firearm to a minor potentially could encompass a wide range of conduct that is not indicative of dangerousness or criminality. The PAG does not support the government's suggestion that a 2-level enhancement be applied when a defendant transfers a firearm to a minor, except where the transfer was solely for lawful sporting purposes or collection,[27] even if it was not illegal for a minor to possess that firearm in the state where the transfer took place, and even if no firearm was used in connection with a crime or for an illegal purpose. To the extent that the government's proposed enhancement is to punish conduct where a minor is involved in a defendant's firearms offense, the guidelines already provide for an enhancement under those circumstances in §3B1.4.

The PAG opposes increased penalties for transferring a firearm to a minor if it is otherwise legal for the minor to have that firearm. There is simply no empirical justification to add yet another enhancement to §2K2.1 for circumstances that are not directly associated with a higher level of culpability or harm.

IV. Circuit Conflicts

The Commission offers proposals to resolve circuit conflicts regarding: (1) the third point for acceptance of responsibility under §3E1.1(b); and (2) the definition of controlled substance under §4B1.2.

A. §3E1.1(b), Acceptance of Responsibility

The Commission proposes to clarify the circumstances when the government may withhold a motion under §3E1.1(b) by defining the term "preparing for trial." The PAG endorses this amendment for the following reasons and suggests two minor modifications.

The PAG's experience with this issue varies widely. In some districts, the government rarely, if ever, withholds the §3E1.1(b) motion. In other districts, defendants who file a motion to suppress or raise a sentencing objection are regularly penalized by the government through the loss of the third point for acceptance of responsibility. Requiring defendants to forego non-frivolous legal challenges or lose the third point for acceptance insulates law enforcement misconduct and other forms of legal errors from judicial oversight, and perverts the notion that a guilty plea should be based on legally cognizable charges. The proposed amendment thus serves

[27] *See* DOJ Feb. 27, 2023 Submission at 12.

the salutary purpose of promoting not just consistency, but also the integrity and reliability of the criminal justice system.[28]

Similarly, requiring defendants to forego sentencing objections undermines the defendant's due process right to, and the systemic interest in, an accurate, fair, and just sentencing process. As but one example, a defendant in the Central District of Illinois confessed at the outset of the case and entered an early, blind guilty plea to all counts of an indictment charging heroin trafficking. The government's "offense conduct" submission for the PSR claimed that the defendant was responsible for at least four overdose deaths, an allegation not charged in the indictment or admitted in the defendant's plea. The defendant objected to those claims, and after several days of evidentiary hearings, the court sustained the defendant's objections. On a government motion for reconsideration, the court changed its ruling as to one objection, but sustained all others. Despite that, the government refused to file the third point motion under §3E1.1(b). As a result, the defendant's applicable guidelines range was approximately one year longer than it would have been with credit for the third point under §3E1.1(b). *See United States v. Henigan,* No. 21-2649 (7th Cir. 2022) (pending); *see also United States v. Orana,* Case No. 21-1734 (7th Cir. 2022) (pending) (government refused to file §3E1.1 motion even after defendant withdrew objections well before sentencing hearing).

The Commission's current proposal to clarify when such refusals are appropriate is consistent with congressional intent. In 2003, when Congress directed that §3E1.1(b) be amended to require a government motion, it also clarified its purpose: "[b]ecause 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* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g)(2)(B), 117 Stat. 671-672 (emphasis added); *see also* U.S.S.G. §3E1.1 n.6. If this purpose extended to time spent responding to pretrial matters or sentencing objections, Congress' wording in the PROTECT Act would have reflected that. Instead, the PROTECT Act specifically spoke only to trial preparation.[29]

Accordingly, the PAG welcomes the Commission's clarification of the scope of the government's discretion by defining the term "preparing for trial." The PAG suggests that this definition be slightly modified by replacing the term "drafting" in the second sentence with "filing:"

> For purposes of this guideline, the term "***preparing for trial***" means 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.

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[28] American Bar Association, Criminal Justice Section, *2023 Plea Bargain Task Force Report,* at 15, 25 (defendants "should not be punished for exercising their pretrial rights" because "public pre-trial hearings on police and government conduct promote[] the integrity of the criminal justice system").

[29] For these reasons, the PAG does not believe that using the alternative framework from *Wade v. United States*, 504 U.S. 181 (1992) is appropriate. When Congress gave the government the discretion to file a motion under §3E1.1(b), it made clear that it was doing so because the government was in the best position to determine if it had avoided preparing for trial. Congress clearly provided a limiting factor that should not be read out of §3E1.1(b).

> "Preparing for trial" is ordinarily indicated by actions taken close to trial, such as **filing** in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. 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. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

The PAG believes that this minor modification will help limit litigation about whether an action is in fact trial preparation, and it will facilitate courts' assessments of the government's decision to withhold the motion.

In addition, rather than eliminate the last sentence of Application Note 6, paragraph 2, the PAG recommends that the Commission modify that sentence to read:

> The government should not withhold the motion for the third point based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal, **moves to suppress evidence, files sentencing challenges, or takes similar actions unrelated to the government's trial preparation.**

This change will further clarify the reach of the government's §3E1.1(b) discretion.

Finally, the PAG urges the Commission not to defer to the advisory nature of the guidelines to avoid this issue, as suggested by the government. The district court is statutorily required to correctly calculate and consider the applicable guideline range as a part of its sentencing decision and, in many instances, courts closely adhere to the advisory guidelines range. Section 3E1.1(b) is a part of that mandated calculation, and the one-level decrease can make a dramatic difference to a defendant's advisory guideline range, particularly at higher offense levels where it can change the ranges by years or be the difference between a guideline range of life and one of a term of years. It is appropriate and proper for the Commission to weigh in on this issue.

B. §4B1.2, Definition of Controlled Substance Offense

The Commission has also proposed two options for defining "controlled substance offense" in §4B1.2 to resolve a circuit conflict. Option 1 defines "controlled substance offense" to include only offenses involving substances that are listed in the Controlled Substances Act, 21 U.S.C. § 801 *et seq*. (CSA). Option 2 would include offenses involving substances that are controlled under state law.

The PAG supports the first option. This definition provides a straightforward framework for determining whether a defendant's prior conviction is a "controlled substance offense" for career offender and other guideline purposes. It will also conform the guideline recidivist enhancements with statutory recidivist enhancements, such as the Armed Career Criminal Act and the 21 U.S.C. § 841(b) recidivist penalty enhancements, which rely on the same CSA definition. And it will promote uniformity by minimizing litigation over varying state definitions used to categorize offenses, and narrowing somewhat the harsh consequences of the career offender guideline as applied to controlled substance offenses.

In contrast, Option 2's use of inconsistent state law definitions will result in continued unfair and unwarranted results that subject defendants to vastly different guidelines recommendations depending on where they live. This result is particularly troubling when the conduct underlying the prior conviction has never been a federal crime and is no longer a crime even in the convicting jurisdiction. For example, cannabidiol (CBD) has been legal in Wisconsin since 2014 and is not controlled under the CSA. Yet under Option 2, a defendant's pre-2014 CBD distribution conviction could serve as a career offender predicate, even though CBD is not controlled under federal law and has not been controlled in Wisconsin for nearly eight years. As more fully discussed in PAG's response to the proposed career offender predicates in Part V, *infra.*, drug offenders are empirically the least deserving of career offender enhancements yet make up the bulk of the defendants to whom it applies.[30] While Option 1 does not go far enough to remedy the myriad problems arising from the guideline's overbreadth, it goes farther than Option 2 and is therefore preferable.

V. Career Offender

The Commission proposes to amend the career offender guideline in four ways, each of which would expand the guideline's application.

Part A proposes to deviate from the categorical and modified categorical analyses developed by the Supreme Court and used for career offender determinations under §4B1.2 in favor of a new approach that looks to individual offense conduct. Under the proposed amendment, §4B1.2 would direct courts to determine whether a person qualifies as a career offender by (1) determining the Chapter Two guideline that was applied to a person's prior offenses or would have applied had the person been sentenced in federal court based on the elements of the statute of conviction, "any means of committing such an element," and the conduct found to have been involved in the offense; and (2) checking whether the guideline is included in §4B1.2 as one of many Chapter Two guidelines that purportedly cover – but are not exclusive to – "crimes of violence" or "controlled substance offenses." In the course of determining the conduct involved in prior offenses, courts would be advised to "expand the use of additional sources of information . . . when necessary to make the career offender determination." Part A also proposes to extend this new approach to every other guideline that requires a determination of whether an offense constitutes a "crime of violence" or "controlled substance offense," including §§2K1.3, 2K2.1, 2S1.1, 4A1.1, 4A1.2, 4B1.4, 5K2.17, and 7B1.1.

Part B would expand the definition of "robbery" to "mirror[] the Hobbs Act robbery definition" – a change that is contrary to the view of every circuit court of appeals that has considered the issue and concluded that the Hobbs Act definition of robbery is too broad to reliably be considered a crime of violence. Part B also would define actual or threatened force as "force sufficient to overcome a victim's resistance" without further explication. Part B would make these same changes to §2L1.2.

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[30] *See* U.S.S.C., *Report to the Congress: Career Offender Sentencing Enhancements* (August 2016) ("*Career Offender Report*") at 2-3, available at Report to the Congress: Career Offender Enhancements (ussc.gov).

Part C would expand the definitions of "crime of violence" and "controlled substance offense" to include the inchoate offenses of aiding and abetting, conspiracy, and attempt.

Part D would expand the definition of "controlled substance offense" to include offers to sell, as well as offenses described in 46 U.S.C. §§ 70503(a) and 70506(b).

As explained in our testimony before the Commission and further set forth below, the PAG cannot support these proposed amendments because they are not supported by the Commission's research, undermine established precedent, and exacerbate the career offender guideline's well-documented unreliability and overbreadth. The myriad societal harms flowing from the career offender guideline include unduly severe sentencing recommendations – to such a degree that those recommended ranges are rejected by the Department of Justice and/or courts in the vast majority of cases.[31] The guideline's overbreadth has resulted in expensive over-incarceration without a demonstrated, data-driven purpose, and contributed to stark systemic racial disparities that undermine the legitimacy of the federal criminal system. And the types of convictions that trigger career offender status are most likely to be drug offenses, which are the offenses least deserving of enhanced imprisonment from an empirical and policy perspective.[32] Given the well-documented failure of the career offender guideline to recommend rational sentences in nearly 4 out of 5 cases,[33] no amendment that would *expand* that guideline's reach should be adopted without significant study and demonstrated empirical need.

A. Proposed Part A Is Contrary to the Commission's Empirical Research, Undermines Established Precedent, and Will Exacerbate the Guideline's Already Marked Overbreadth

The career offender guideline is not based on empirical data or sentencing experience; it was created in response to 28 U.S.C. § 994(h), which directed that the guidelines "specify a sentence to a term of imprisonment at or near the statutory term authorized for categories of defendants" that satisfy the following criteria:

- The defendant is eighteen years old or older and "has been convicted of a felony" that is a "crime of violence" or "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

[31] The Federal Public & Community Defenders have reviewed the Commission's sentencing data for the career offender guideline and determined that the Department of Justice and/or courts find the recommended guideline range too high in nearly 80% of cases. *See* Statement of Juval O. Scott, Federal Public Defender for the W.D.Va. (March 8, 2023) ("Defender Career Offender Statement") at 1-2, available at Public Hearing on Proposed Amendments (ussc.gov).

[32] *Career Offender Report* at 2-3.

[33] U.S.S.C., *The Influence of the Guidelines on Federal Sentencing* (December 2020) at 55-56, available at The Influence of the Guidelines on Federal Sentencing (ussc.gov); Defender Career Offender Statement at 1-2.

- The defendant "has previously been convicted of two or more prior felonies" that satisfy these same criteria.[34]

Because this guideline was not the product of empirical data and sentencing experience, it frequently recommends sentence ranges that are unduly severe. The Department of Justice acknowledges that the guideline "has been the subject of considerable criticism for producing overly long sentences."[35] The Federal Defenders have written that the career offender guideline "has long been recognized—including by the Commission—to be overly punitive, to have no empirical basis, and to exacerbate racial disparities in guideline sentencing."[36] These comments mirror the PAG's experience.

They are also supported by sentencing data. In its most recent study of this guideline, the Commission reported that "[c]areer offenders are increasingly receiving sentences below the guideline range, often at the request of the government,"[37] and that some of the "most significant sentencing impacts" of the guideline are felt by "those offenders who had the least extensive criminal history scores" before application of §§4B1.1 and 4B1.2.[38] Based on this multi-year study, the Commission concluded that "the career offender directive is best focused on those offenders who have committed at least one crime of violence" and recommended that Congress amend 28 U.S.C. § 994(h) to "no longer includ[e] those who currently qualify as career offenders based solely on drug trafficking offenses."[39] Commission studies also have long recognized that

[34] 28 U.S.C. § 994(h); *Career Offender Report* at 6, 13-15.

[35] *See* Department of Justice Letter to Sentencing Commission (February 27, 2023) ("DOJ Career Offender Statement") at 27, available at Public Hearing on Proposed Amendments (ussc.gov).

[36] *See* Defender Career Offender Statement at 1.

[37] *Career Offender Report* at 18. For years, the Department of Justice has recommended a sentence below the recommended range nearly half of the time, and increasingly for reasons other than substantial assistance. *Id.* at 22.

[38] *Id.* at 21. The Commission found that 76.6% of the people who would have been placed in criminal history categories II or III absent a career offender designation had a recommended average increase of more than ***seven years*** in prison due to application of the career offender guideline. *Id.*

[39] *Id.* at 3.

the career offender guideline exacerbates racial disparities in sentencing,[40] and is a poor predictor of recidivism.[41] Nothing has changed in the data or the PAG's experience since any of these studies was published.

For years, PAG and other stakeholders have identified various ways in which the guideline's overbreadth can be mitigated without congressional action. These suggestions have included, among others: (1) amending the definition of "felony" to include only those offenses classified as a "felony" by the jurisdiction of conviction, as opposed to offenses "punishable by" a term of imprisonment of at least one year, which captures misdemeanor convictions in a number of states; (2) narrowing applicable prior felonies to those that actually resulted in a term of imprisonment of at least one year, thereby excluding cases in which a sentence of probation or custody of less than 12 months was determined to be appropriate by the convicting jurisdiction; and (3) hewing to the specific categories of "controlled substance offenses" set forth in 28 U.S.C. § 994(h), which the current version of the guideline fails to do. [42]

Rather than exploring these and other options for narrowing the guideline's application, this year's proposals would expand its reach. Part A's proposal to deviate from the categorical and modified categorical approach in these cases exemplifies this flawed approach. For more than thirty years, the Supreme Court and federal courts have employed the categorical approach to

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[40] U.S.S.C., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133-34 ("Although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline.") (2004), available at Fifteen Years of Guidelines Sentencing - November 2004 (ussc.gov). This report went on to ask, "The question for policymakers is whether the career offender guideline, especially as it applies to repeat drug traffickers, clearly promotes an important purpose of sentencing," and concluding both that "[i]ncapacitating a low-level drug seller prevents little, if any, drug selling," and that the career offender guideline "makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses." *Id.*

[41] U.S.S.C., *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 9, 37 ("[I]t appears that assigning offenders to criminal history category VI under the career criminal or armed career criminal guidelines is for reasons other than their recidivism risk.") (2004), available at Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines - May 2004 (ussc.gov).

[42] *See, e.g.,* Comments of Federal Public & Community Defenders (Nov. 15, 2015) at 2-3 (urging the Commission to "define felony to include only those offenses where the defendant was actually incarcerated for more than 13 months" and "classified as felonies by the convicting jurisdictions"), available at Public Comment on Proposed Amendment to the Federal Sentencing Guidelines Regarding "Crimes of Violence" (ussc.gov); Public Comment on Proposed Amendments 2007 at 25 (summarizing PAG position that including state misdemeanor offenses as predicate offenses "aggravates" the career offender guideline's failure to achieve proportional treatment of defendants) & 28-30 (summarizing similar position advocated by FPCD), available at 0007.pdf (ussc.gov).

determine recidivist enhancements.[43] Courts have done so both because "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions,"[44] and because "allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns."[45] Indeed, the plain language of § 994(h) requires convictions – not conduct – to justify career offender penalties.[46] The categorical approach serves that congressional directive by requiring "a focus on the elements, rather than the facts, of a crime."[47] In contrast, Part A's proposal to diverge from the categorical approach to a more fact-based review runs afoul of it.

Simply put, however well intentioned, Part A's proposal seriously risks increasing the constitutional and application difficulties of the career offender guideline, as other stakeholders have noted.[48] While the PAG supports the interest in guideline simplification, that interest does not and should never take precedence over the need for sentencing policies that are rational, reliable, data-driven, and fair. By design, the categorical approach avoids requiring a "sentencing court to engage in an elaborate factfinding process regarding the defendant's prior offenses,"[49] in part because of the "practical difficulties and potential unfairness" that a conduct-based analysis entails.[50] Switching to conduct-driven considerations of predicate offenses will inherently "introduce inconsistency and arbitrariness,"[51] the inevitable result of which will be

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[43] The categorical approach in criminal cases began in *Taylor* but has been used in other contexts far longer. As the Supreme Court recognized, the categorical approach has a "long pedigree in our Nation's immigration law," tracing back to 1913. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

[44] *Taylor v. United States*, 495 U.S. 575, 600 (1990).

[45] *Mathis v. United States*, 579 U.S. 500, 511 (2016).

[46] *See* 28 U.S.C. § 994(h) (calling for longer sentences if a defendant "has been ***convicted*** of a felony" crime of violence or enumerated controlled substance offense, and "has previously been ***convicted*** of two or more" such offenses) (emphases added).

[47] *See Descamps v. United States*, 570 U.S. 254, 263 (2013).

[48] *See* Probation Officers Advisory Group Testimony (February 27, 2023) at 3, available at Public Hearing on Proposed Amendments (ussc.gov) (describing potential ex post facto issues and cautioning that if "the listed offense process does not function as designed, it could overwhelm the system for a period of time with application issues and ensuing litigation for the foreseeable future"); DOJ Career Offender Statement at 26-27 (noting "significant concerns" that "the Listed Guidelines proposal—which would require courts to engage in a largely novel mode of analysis—will generate an enormous amount of litigation and disparate outcomes"); Defender Career Offender Statement at 13 (warning that Part A's proposed approach "would not solve the problems it targets—complexity, unwarranted disparity, perceived arbitrariness. It would only swap them out for new problems of the same ilk.").

[49] *Taylor*, 495 U.S. at 601.

[50] *Id*.

[51] *Mathis*, 579 U.S. at 520.

more unpredictability and unwarranted disparities under §4B1.2, and even less transparency and reliability. Instructing courts to consider the manner in which an offense was committed – which is often not clear from the documents that are available for the court's review – will create even more uncertainty in the way this guideline is applied. And in any event, the purported goal of simplification underlying Part A is illusory because courts will still be required to apply the categorical approach in the context of armed career criminals.

Part A's proposal to expand the use of acceptable documents to determine career offender predicates compounds the problem. The resulting career offender analysis would continue to be affected "by idiosyncrasies of record-keeping" in particular states[52] and on top of that would require collateral trials to sort out what happened in prior proceedings. The categorical approach by design minimizes these types of difficulties and, in the process, increases the uniformity and reliability of the resulting determination.

Part A does the opposite and substantially increases the risk that a sentencing court will misunderstand the significance of prior proceedings.[53] As explained by the PAG during its testimony on this issue, plea negotiations rarely focus on facts that do not directly affect the elements of an offense, and particularly not in cases where the "facts" at issue carry zero negative impact as a matter of state law. The Commission has seen many iterations of the problems caused by turning a blind eye to state law processes. Many career offenders have been sentenced on the basis of prior guilty pleas to state misdemeanors, not felonies,[54] or admissions that do not constitute convictions under state law but are treated as such for career offender purposes.[55] Part A threatens to open up yet another area in which the guidelines ignore the realities of state court criminal practice, resulting in shockingly harsh sentence recommendations.

In sum, Part A's proposal will cause the very mischief the Commission seeks to avoid: confusion, uncertainty, unreliability, and unwarranted disparity among defendants. Only seven years ago, the Commission called on Congress to make the career offender statutory directive more

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[52] *See Shepard v. United States*, 544 U.S. 13, 22 (2005).

[53] *Descamps*, 570 U.S. at 271 (rejecting process that "would allow a later sentencing court to rewrite the parties' [plea] bargain" by looking to "legally extraneous statements found in" charging or other record documents before the defendant "surrenders his right to a trial in exchange for the government's agreement that he plead guilty to a less serious crime").

[54] *See, e.g., United States v. Carter*, 961 F.3d 953, 957 n.1 (7th Cir. 2020); *United States v. Coleman*, 635 F.3d 380, 381-82 (8th Cir. 2011); *United States v. Almenas*, 553 F.3d 27, 31-32 (1st Cir. 2009) ("Neither the fact that Massachusetts law categorizes resisting arrest as a misdemeanor, nor the fact that Almenas was not actually imprisoned for a term exceeding one year affects our analysis") (citing USSG §4B1.2, n.1).

[55] *United States v. Reyes*, 386 F.3d 332, 334-35 (1st Cir. 2004) (Massachusetts disposition of "continuance without a finding" of guilt is a "conviction" under guidelines).

equitable.[56] The PAG opposes the Commission's proposal to eliminate the categorical approach as it will exacerbate rather than eliminate any of the well-documented and troubling shortcomings of the career offender guideline.

B. The Commission Should Not Adopt Proposed Part B For the Same Reasons

For the same reasons set forth above, the Commission should not add a definition of "robbery" that mirrors Hobbs Act robbery or provide a new definition of "actual or threatened force" as "force sufficient to overcome a victim's resistance." As the Commission notes, the proposal is contrary to the view of every circuit court of appeals that has considered it. The PAG agrees with these analyses, and there is no reason for the Commission to reject them. As with Part A, Part B's proposals run counter to the Commission's 2016 report and would expand the reach of the career offender guideline – thereby exacerbating the guideline's multiple failings – without a sound data-driven or public policy reason.

1. *Definition of Robbery*

Defining a "crime of violence" through use of the same language used at 18 U.S.C. §1951(b)(1) to define Hobbs Act robbery, as Part B proposes, is not appropriate for several reasons. The elements of committing a Hobbs Act robbery go far beyond the elements for generic robbery and far beyond the narrow category of predicate offenses contemplated in 28 U.S.C. § 994(h). Hobbs Act robbery can be committed by a threat against the property of another; it does not require violence or threats of violence against a person, in contrast to generic robbery, which only includes force against a person.[57] Additionally, "Hobbs Act robbery encompasses conduct involving force that is 'immediate or future,' while generic robbery encompasses only 'immediate' danger to the victim."[58] Expanding §4B1.2's definition of robbery to incorporate the Hobbs Act standard would lead to patently unjustifiable results. For example, a defendant who throws his roommate's belongings out the window in an effort to get the roommate to pay rent, or keys an ex-partner's car in order to get the ex-partner to pay child support, would be deemed to have committed a crime of violence under the career offender guideline. There is no rational reason to amend the career offender guideline in a way that would lead to such patently absurd results.

As the Commission is aware, Part B's proposal also goes against circuit uniformity with respect to this issue. Every court of appeals to have addressed this issue has held that Hobbs Act Robbery does not fit the definition of "crime of violence," including the Second, Third, Fourth,

[56] *Career Offender Report* at 6.

[57] 18 U.S.C. § 1951(b)(1).

[58] *United States v. Chappelle*, 41 F.4th 102, 110 (2d Cir. 2022) (citing 18 U.S.C. § 1951(b)(1)).

Sixth, Seventh, Ninth, Tenth and Eleventh Circuits.[59] There is no policy reason to reject this uniform determination that the career offender guideline does not (and should not) extend so far as to encompass Hobbs Act robberies that go beyond the generic definition of robbery. Nor are there any empirical arguments or policy considerations that might otherwise support expanding §4B1.2's definition to reach Hobbs Act robbery. To the contrary, expanding the career offender guideline to this larger – and far less justifiable – category of offenses will only further diminish the guideline's credibility and relevance.

2. *Proposed Definition of Actual or Threatened Force*

The PAG also opposes Part B's proposal to define "actual or threatened force" to mean "force that is sufficient to overcome a victim's resistance," as set forth in *Stokeling v. United States*.[60] The proposed definition is far too vague and subjective to provide clear guidance and will result in extensive litigation for no apparent purpose. The problem with the career offender guideline is that it applies too broadly to serve legitimate sentencing purposes, as demonstrated by both sentencing experience and the Commission's own studies. The Commission should avoid guideline tweaks that threaten to exacerbate that problem – as Part B's proposed definition clearly does – absent careful study and a demonstrated data-driven need.

C. The Commission Should Not Adopt Proposed Parts C or D For the Same Reasons

Part C of the proposed amendments would – again – expand the reach of the career offender guideline, this time to reach inchoate offenses. Again, the PAG opposes this proposal. As explained during our testimony, the proposal is not required by or consistent with 28 U.S.C. § 994(h), which specifically includes only inchoate offenses under the Drug Trafficking Vessel Interdiction Act.[61] Inchoate offenses indicate a lower level of harm than the related substantive offense.[62] Convictions for conspiracy or attempt do not inherently involve actual violence or drug trafficking; to the contrary, conspiracies are frequently charged because the substantive

[59] *Id.*; *United States v. Scott*, 14 F.4th 190 (3d Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018); *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017).

[60] *Stokeling v. United States*, __ U.S. __, 139 S. Ct. 544, 548 (2019).

[61] *See* 28 U.S.C. § 994(h); 46 U.S.C. § 70506(b).

[62] *United States v. Robinson*, 547 F.3d 632, 638-39 (6th Cir. 2008) ("conspiracy is an inchoate offense that needs no substantive offense for its completion" and culpability for conspiracy must be distinguished "from culpability for the substantive offenses of co-conspirators"); *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003) ("An attempt to commit a crime . . . is recognized as a crime distinct from the crime intended by the attempt"); *United States v. Trevino*, 720 F.2d 395, 399 (5th Cir. 1983) ("culpability [for an inchoate offense] is based on a defendant's intent rather than on the consummation of the underlying offense").

offense was never consummated. In fact, under the common law, all conspiracy offenses were treated as misdemeanors in recognition of the fact that an agreement to commit an offense is fundamentally different than committing the offense itself.[63]

The proposed amendment also (again) ignores state law and practice. North Carolina, for example, is a jurisdiction that employs a structured sentencing scheme where offenses are "classified into letter classes (from Class A through Class I) depending on their seriousness."[64] Recognizing that inchoate offenses should be treated more leniently than substantive offenses, the North Carolina General Assembly directs that attempts and conspiracies are to be punished "one class lower than the felony [the offender] conspired [or attempted] to commit."[65] A defendant who solicits another to commit a felony or serves as an accessory after the fact to such a felony is punished two classes lower than one who commits the corresponding substantive felony.[66] The Commission should avoid expanding the career offender guideline in ways that ignore or conflict with the reasoned judgment of the convicting jurisdiction.

In the hearing before the Commission on this proposed amendment, a suggestion was made that the government does not charge inchoate offenses in which actual violence was not employed or actual drugs were not possessed. That is not so. As but one example, for many years, the government has prosecuted fake drug stash house robberies in which undercover agents set up defendants to rob alleged drug stash houses which do not actually exist. In those cases, there are no actual drugs to be stolen and no actual drug dealers to be robbed, and no violence ever takes place.[67] The charges in these cases consist of conspiracies and attempts to commit various types of offenses, including but not limited to Hobbs Act robberies and drug trafficking.[68] And most importantly, courts have repeatedly recognized that these types of cases involve a high risk of ***sentencing entrapment*** because "not only is the government free to set the amount of drugs in a fictional stash house at an arbitrarily high level, it can also minimize the obstacles that a

[63] *See* Wayne R. LaFave, 2 Subst. Crim. L., Ch. 12, § 12.4(d) (3d Ed. 2017).

[64] *See* North Carolina Sentencing and Policy Advisory Commission, *A Citizen's Guide to Structured Sentencing* (Revised 2022), available at https://www.nccourts.gov/assets/documents/publications/SPAC-Citizen-Guide-to-Structured-Sentencing-2022.pdf?VersionId=UMAg6EzKdEGY.DAME3fKNloPPzTFR1lv.

[65] N.C.G.S. §§ 14-2.4(a) and 14-2.5.

[66] *See* §§ 14-2.6 and 14-7.

[67] *See, e.g., United States v. McLean*, 702 Fed. App'x 81, 84 (3d Cir. 2017); *United States v. Dennis*, 826 F.3d 683, 686 (3d Cir. 2016); *United States v. Briggs*, 623 F.3d 724, 726-27 (9th Cir. 2010); *United States v. Williams*, 547 F.3d 1187, 1193 (9th Cir. 2008).

[68] *Id.*

defendant must overcome to obtain the drugs."[69] These cases epitomize why the Commission should not treat inchoate offenses the same as substantive offenses for sentencing purposes – and *must* not for career offender sentences, which are already deemed unacceptably severe in most cases.

Part D of the proposed amendments would expand the guideline to include offers to sell a controlled substance. As with inchoate offenses, offers to sell are not equivalent to selling a controlled substance and reflect a lower level of seriousness and harm. Absent a clear empirical and policy need, any proposal to expand the career offender guideline to reach new categories of drug offenses should be rejected in light of the Commission's own study and findings.[70]

VI. Criminal History

The Commission proposes amendments to three different criminal history provisions: (1) the assignment of status points under §4A1.1(d); (2) consideration for defendants with zero criminal history points; and (3) convictions for simple possession of marijuana.

A. §4A1.1, Status Points

In its proposed amendment to §4A1.1(d), the Commission has raised three options. The first option leaves the two-point enhancement for status points under §4A1.1(d) and adds a downward departure in Application Note 4. The second option reduces the enhancement to one-point and adds a downward or upward departure in Application Note 4. The third option removes the enhancement and adds commentary in §4A1.3, Application Note 2(A)(v), providing for an upward departure if the defendant committed the federal offense while under any criminal justice sentence having a custodial or supervisory component.

The PAG supports the third option, based on the Commission's recent report on the impact that status points have on sentencing and their predictive value for recidivism.[71] This report studied 334,688 defendants sentenced between fiscal years 2017 and 2021. From this population, 76,337 had status points added, placing 61.5% of these defendants into higher criminal history categories. On average, this led to a 21-month longer sentence when compared to those defendants without status points.[72]

The report found that status points are not a good predictor of future criminal behavior. The assignment of status points improved the prediction of rearrest for only 15 out of 10,000

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[69] *Briggs*, 623 F.3d at 729-30; *see also United States v. Yuman–Hernandez*, 712 F.3d 471, 474 (9th Cir. 2013); *United States v. Caban*, 173 F.3d 89, 93 (2d Cir.1999); Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. Rev. 1401 (2013).

[70] *Career Offender Report* at 43-44.

[71] U.S.S.C., *Revisiting Status Points* (June 27, 2022), available at Revisiting Status Points (ussc.gov).

[72] *See id.* at 6, 12.

offenders. Thus, the predictive value of status points was "not statistically significant" and only minimally improved "the overall recidivism predictivity of the criminal history score."[73] The assignment of status points simply punishes a defendant twice, by increasing the defendant's advisory guidelines range, in addition to the punishment a defendant will receive for the probation or parole violation.

In addition, the PAG believes that it is not necessary to identify convictions that might merit the scoring of status points. As the Commission's report shows, the assessment of status points noticeably lengthens a prison sentence but does not impact the prediction of rearrest, and does not otherwise advance the sentencing factors under 18 U.S.C. § 3553(a). The PAG also believes that that the Commission's data does not support scoring status points for violent crimes. The only identified violent crime to which status points were regularly applied was robbery, which accounted for only 3.8% of the cases where §4A1.1(d) was applied.[74] This statistically small number of defendants does not support assigning status points generally when these points are not otherwise predictive of recidivism.

Finally, the PAG recommends that the Commission not include language encouraging the assessment of status points for defendants "recently placed under a criminal justice sentence" when their federal offense was committed. It would be difficult to define what "recently placed under a criminal justice sentence" means for the purpose of providing guidance to sentencing courts. Instead, the departure basis that the Commission proposes in §4A1.3, Application Note 2(A)(v) would allow courts to address a defendant's status at the time the federal crime was committed if the court finds that this is an aggravating factor in the case.

B. §4C1.1, Zero Point Offenders

1. *Part A*

The Commission proposes adding a new section in Chapter Four for defendants with zero criminal history points. Option 1 provides for a 1 or 2 level decrease if a defendant has zero criminal history points as a result of having no prior convictions. Option 2 offers a 1 or 2 level decrease for a defendant with no criminal history points as a result of having no countable convictions.

The PAG recommends that the Commission adopt a version of the proposed §4C1.1 for defendants with no prior convictions. As reflected in the Commission's recidivism studies, this approach is supported by these defendants' statistically lower likelihood of recidivism compared to defendants with prior contact with the criminal justice system. Further, the PAG recommends that the Commission consider adopting a version of §4C1.1 that it proposed in 2016 for "true first offenders."

The Commission's recidivism reports consistently demonstrate that defendants without any criminal history have a demonstrably lower risk of recidivism. The Commission's 2017 study

[73] *See id*. at 17-18.

[74] *See id*. at 8.

showed a "22.1 percentage point difference in rearrest rates between offenders with no criminal history and one-point offenders."[75] Four years later, this data remained relatively unchanged: zero-point offenders with no criminal history were 15.5% less likely to be rearrested than defendants with one criminal history point.[76] For these reasons, the PAG believes that the new adjustment should apply to defendants with zero criminal history points, and no prior criminal history.

After settling on a definition for zero-point defendants, the PAG asks the Commission to consider adopting the second option found in the body of its 2016 proposed amendment. There, the reduction for zero-point defendants was tiered to their corresponding offense levels after the computations in Chapters Two and Three of the Guidelines Manual were completed, similar to the Commission's treatment of acceptance of responsibility in §3E1.1. Thus, the 2016 proposal provided as follows:

> (a) A defendant is a first offender if [(1) the defendant did not receive any criminal history points from Chapter Four, Part A, and (2)] the defendant has no prior convictions of any kind.
>
> [Option 1:
> (b) If the defendant is determined to be a first offender under subsection (a) decrease the offense level determined under Chapters Two and Three by [1] level.]
>
> [Option 2:
> (b) If the defendant is determined to be a first offender under subsection (a) decrease the offense level as follows:
> (1) If the offense level determined under Chapters Two and Three is less than level [16], decrease by [2] levels; or
> (2) if the offense level determined under Chapters Two and Three is level [16] or greater, decrease by [1] level.][77]

The PAG supports the 2016 proposal based on the Commission's data which shows a decrease in recidivism for those defendants who are true first-time offenders, as well as those defendants who had zero criminal history points due to prior convictions that were not scored. The Commission's data did not appear to distinguish between zero-point offenders with prior convictions that were unscored due to the age of the convictions and zero-point offenders with prior convictions that were not scored under §4A1.2(c), which governs certain misdemeanor and petty offenses. The PAG asks the Commission to study whether these two groups of zero-point

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[75] U.S.S.C., *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* at 14 (May 9, 2017), available at The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders (ussc.gov).

[76] U.S.S.C., *Recidivism of Federal Offenders Released in 2010* at 26 (September 2021), available at Recidivism of Federal Offenders Released in 2010 (ussc.gov).

[77] *See* 81 FR 92005 (Dec. 19. 2016).

offenders – those with lapsed convictions and those with petty convictions – have significantly different recidivism rates. If zero-point offenders with prior petty offenses have similar recidivism rates as zero-point offenders with no criminal history, then these two groups should be treated similarly, and both should be eligible for a reduced offense level.

In the current proposed §4C1.1, the Commission has added five criteria for zero-point defendants to satisfy to qualify for a reduction. These are: (1) violence, threats of violence and weapons were not connected to the offense; (2) death or serious bodily injury did not occur; (3) the defendant's acts or omissions did not result in a substantial financial hardship to a victim; (4) the defendant did not play an aggravated role in the offense and did not engage in a continuing criminal enterprise; and (5) the offense was not a covered sex crime and the defendant was not a repeat or dangerous sex offender.

The PAG recommends eliminating these five criteria. First, if any of the first four of these aggravating factors is present, that will be accounted for in other guideline applications that elevate the defendant's offense level. Second, the presence of any of these five criteria would not diminish the fact that zero-point defendants recidivate at a much lower rate than any other defendant punished in the federal system. The PAG prefers the Commission's 2016 proposal, which does not include these five criteria, because it is a simpler and more direct way to reflect the recidivism data from the Commission's studies.

2. *Part B*

The Commission proposes modifying the commentary to §5C1.1 to provide direction regarding the use of alternatives to incarceration. For zero-point defendants in Zones A and B of the Sentencing Table, the Commission comments that non-incarcerative sentences "are generally appropriate." For zero-point defendants in Zones C and D, the Commission limits the availability of non-incarcerative sentences to require that the instant offense of conviction not be "an otherwise serious offense."

Congress directed the Commission to:

> insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

28 U.S.C. § 994(j). The PAG believes that this provision embodies Congress's judgment that individuals convicted of non-violent offenses present a low risk of recidivism and should be sentenced to alternatives to incarceration. Data demonstrates that zero-point defendants do not pose a risk of danger to the public; home confinement with location monitoring is an effective

method of punishment; and home confinement with location monitoring is more cost-effective than incarcerating those who do not present a danger to the public.[78]

The PAG recommends eliminating the limitation on the use of alternatives to incarceration for zero-point defendants in Zones C and D. The qualifier would virtually eliminate consideration of alternatives to incarceration for these defendants. Under 18 U.S.C. § 3553(a)(2)(A), sentencing courts are required to impose a sentence "to reflect the seriousness of the offense." Most offenses that are sentenced are felonies. In PAG members' experience, sentencing judges consider virtually every felony offense "serious."

Instead, the PAG recommends the following language for Zone C and D defendants for the proposed Application Note 4(B) under §5C1.1:

> If the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone C or D of the Sentencing Table, a departure to a sentence other than a sentence of imprisonment may be appropriate.

C. §4A1.3, Simple Possession of Marijuana Offenses

The Commission proposes amending the commentary to §4A1.3 to allow courts to consider a downward departure if the defendant received criminal history points from a sentence for possession of marijuana for personal use. The PAG welcomes the Commission's proposal but believes that treating this issue as a departure will lead to inconsistent treatment of prior marijuana possession offenses.

The community perception of simple possession of marijuana has evolved over the past half century. In the 1970s, simple possession of marijuana was often treated as a felony, whereas today, in most jurisdictions, possessing marijuana is either legal or punishable with a fine. The Commission's recent study of simple marijuana possession convictions examined the impact of these convictions on a defendant's criminal history score. In fiscal year 2021, more than 4,405 defendants received criminal history points for marijuana possession convictions. 10.2% of these defendants had no other criminal history points. And more than 40% of those receiving criminal history points for these convictions were moved into a higher criminal history category after they were scored.[79]

In light of this data, the PAG urges the Commission not to treat this issue as a departure. Instead, the PAG asks the Commission to consider adding simple possession of marijuana convictions to

[78] In its amendment to §5F1.2, Application Note 1 (Amendment 811), the Commission noted that "[e]lectronic monitoring is an appropriate means of surveillance for home detention." The Commission explained: "[T]he goal of this change is to increase the use of probation with home detention as an alternative to incarceration." U.S.S.C., App'x C, Amend. 811.

[79] U.S.S.C., *Weighing the Impact of Simple Possession of Marijuana* at 11 (January 10, 2023), available at Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System (ussc.gov).

the 13 convictions enumerated in §4A1.2(c)(1). Then, simple possession of marijuana convictions would be scorable only if a jail sentence of more than 30 days, or a term of probation of more than one year, was imposed.

VII. Acquitted Conduct

The Commission proposes amending the relevant conduct guideline, §1B1.3, to add a new subsection (c) that states that acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range, unless the conduct was admitted by the defendant in a plea colloquy or found by the trier of fact beyond a reasonable doubt. The PAG supports this amendment because it reflects the constitutional principles that are a bedrock of our criminal justice system. Importantly, this amendment also reflects the public's – and our clients' – understanding of what the "justice" in criminal justice means.

As attorneys who represent individuals and organizations charged with federal criminal offenses, PAG members meet with our clients to review and explain the impact of the guidelines on their cases. Whether our clients have higher degrees or an eighth-grade education, struggle with addiction or mental health issues, or are non-native English speakers, the guidelines are not easy to grasp. The guidelines are complex and technical, and even highly skilled lawyers, judges and probation officers can differ in their views of how a particular guideline might apply in any given case. While explaining the guidelines is difficult enough, trying to explain the ramifications of split jury verdicts on multiple counts causes near incomprehension, because the current practice is contrary to how the criminal justice system is widely understood to function. If there is one thing the public understands about the criminal justice system, it is that a person is innocent until proven guilty, and that guilt must be found by a unanimous jury beyond a reasonable doubt. And if a jury votes to acquit, that person is innocent, and that is the end of the story. Except in the world of federal sentencing, it is not.

Every day, PAG members are faced with the heavy burden of explaining the reality of acquitted conduct sentencing to our clients and their families. We must look our clients in the eye and tell them that they can be sentenced for charges of which they have been acquitted. Clients from all walks of life have difficulty fully appreciating an attorney's explanation of the nuanced differences in burdens of proof that underpin the legal permissibility of acquitted conduct sentencing. We explain to a client that if she or he takes a case to trial and is acquitted of some counts – particularly counts that charge more serious offenses and carry higher penalties – at sentencing, the judge may consider the acquitted conduct in determining the guideline range, and ultimately, the sentence. This is universally perceived as unfair. In our experience, when our clients believe that they are being treated fairly, they can accept the results and consequences of a criminal proceeding. But if they feel that they are being treated unfairly, it undermines their confidence in the entire system. Acquitted conduct sentencing makes the criminal justice system seem "rigged" against our clients and their constitutional right to challenge the government's evidence through the rigors of trial.

It is not just our clients facing federal criminal charges who perceive acquitted conduct sentencing as fundamentally unfair. The importance of the jury trial right is so baked into the American political consciousness that laypeople react with shock and incomprehension upon learning that criminal defendants in American courts may be – and indeed routinely are – sentenced for crimes of which they were acquitted. As the Commission is undoubtedly aware,

confidence in the American criminal justice system has reached unprecedented lows in recent years, dropping from a mere 24% of Americans reporting "a great deal" or "quite a lot" of confidence in the criminal justice system in 2019 to 20% in 2021.[80] In Gallup's 2021 Confidence in Institutions poll, a full 39% of Americans polled reported "very little" confidence in the criminal justice system.[81] There can be little doubt that acquitted conduct sentencing feeds the unfortunate public perception that the criminal justice system is unjust.

As but one example, a PAG member represented a businesswoman owner of a chain of smoke shops who was charged in an eleven-count indictment with multiple drug conspiracies; conspiracy to defraud by introducing a misbranded drug into interstate commerce; conspiracy to commit mail and wire fraud; maintaining a drug involved premise; importing a controlled substance analogue; engaging in a continuing criminal enterprise; and conspiracy to commit money laundering. The mail and wire fraud conspiracy count was dismissed pre-trial, and the jury acquitted the defendant of all but a count of conspiracy to misbrand.

In the Presentence Report (PSR), Probation held the defendant accountable for all of the offense conduct of which she had been acquitted and calculated a total offense level of 43. With a criminal history category of I, the defendant's guideline imprisonment range was life, but because the single count of conviction carried a statutory maximum sentence of five years, the guideline range became 60 months. With respect to the eight acquittals on all of the most serious counts, the PSR noted that "the jury rendered its verdict of guilty on Count 1 of the third superseding indictment and not guilty as to Counts 3 through 11" and never mentioned the acquittals again. At sentencing, the government argued for the maximum 60-month sentence, contending that it had proven the acquitted conduct by a preponderance of the evidence.

The sentencing judge declined to consider acquitted conduct in sentencing this defendant for misbranding and departed to a below guidelines sentence of 36 months. This case illustrates the Kafkaesque position in which a defendant may find herself – a jury resoundingly rejects some or most of the government's case, but at sentencing, it is as if there never was a jury verdict. This defendant was fortunate that her sentencing judge declined to sentence her on acquitted conduct. Other judges in the same district and in many districts around the country may take a different view.

Another good example of how courts' reliance upon acquitted conduct can result in unjust sentences is reflected in a petition for writ of certiorari now pending before the Supreme Court. In *McClinton v. United States*,[82] the defendant was charged with robbery of a drugstore, as well as robbery of a codefendant and use of a firearm during the robbery of the codefendant, causing death. At trial, he was found guilty of the robbery of the drugstore but acquitted of robbing and causing the death of the codefendant. The advisory guideline for the robbery was 5 years, but the guideline for murder was life. Despite the defendant's acquittal on the causing death charge, the government sought a 30-year sentence. The court found by a preponderance of the evidence

[80] https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx.

[81] *Id.*

[82] Case No. 21-1557.

that the defendant had committed murder and imposed a sentence of 20 years, four times longer than the applicable guideline sentence for robbery.

These cases also demonstrate the disparities that can result from the use of acquitted conduct in sentencing. Because the use of acquitted conduct is discretionary, defendants in different courts, or before different judges in the same district, may receive widely different sentences based on the practice of the sentencing judge. As the PAG has commented elsewhere, our clients' sentences should not be the result of an accident of geography or the luck of the draw with a particular sentencing judge. Acquitted conduct sentencing, as currently practiced, creates disparities for similarly situated defendants because some judges refuse to consider acquitted conduct while others do.

Amending the relevant conduct guideline to preclude the use of acquitted conduct in determining the advisory guideline range would be a significant step toward the goal of preventing unjust sentences. The PAG further requests that the Commission not include its proposed language in the commentary to §6A1.3 that "[a]cquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted." The PAG believes that permitting the use of acquitted conduct in these circumstances undermines the purpose of adopting this amendment, and allowing a court to depart upward on the basis of acquitted conduct would render the Commission's proposed revision meaningless.

Similarly, acquittals on grounds of jurisdiction, venue, or statutes of limitations are permitted in our system of jurisprudence because these due process protections ensure the fairness of the proceedings. Permitting a sentencing court to consider acquitted conduct that is based upon these "non-substantive" issues signals that these principles of fairness do not matter.

With regard to whether courts ought to be permitted to consider "overlapping conduct" at sentencing, as a practical matter, this seems like an unworkable task for a sentencing court to undertake. The PAG's position is that a bright-line rule precluding the use of acquitted or uncharged conduct in determining a defendant's sentence will address this concern and eliminate the need for time-consuming mini-trials at sentencing to determine the significance, if any, of "overlapping" conduct. During the Commission's February 24, 2023 public hearing on acquitted conduct, Ex Officio Commissioner Jonathan Wroblewski posed two hypotheticals relating to "overlapping conduct."

In the first hypothetical, a defendant is charged in one count with a civil rights conspiracy to burn down the house of a woman based on her race, and charged in a second count of arson, for burning down the house. At trial, the jury acquits the defendant of the civil rights conspiracy in the first count but convicts the defendant of the second count of arson. Can the Court consider any of the evidence presented on the first count in its sentencing determination on the second count?

The PAG's position is given the jury acquittal on the first count, the Court should not be permitted to rely on elements of the offense in the first count – such as the race of the victim whose home was burned down – in determining the guidelines. This is particularly true here, where the Court cannot go "behind" the jury's verdict to determine what elements of the civil rights conspiracy were found by the jury to have been proven and what elements were lacking.

As a result, the Court's reliance on any of the evidence related to the first count would be a guess at what the jury relied upon in reaching its verdict. This is exactly why the PAG proposes a bright-line rule that precludes the use of acquitted conduct at sentencing.

In the second hypothetical, a defendant is tried for a gun charge. After trial, the Court grants a motion for acquittal under Federal Rule of Criminal Procedure 29 because the government did not prove the interstate commerce element of the offense. At sentencing on other counts, can the Court take into account evidence that the gun may have been used in connection with another offense, for example?

The PAG's position is that an acquittal is an acquittal. Where the government failed to prove one of the essential elements of the offense, the sentencing court should not be permitted to rely on any part of the offense in determining the defendant's guideline range because the defendant was acquitted of it. Another way to think about this is if the defendant was charged with only the gun count, and the Rule 29 motion for acquittal was granted, then there would be no sentencing proceeding at all, so none of the other elements of the offense would be considered.

The PAG understands that the Commission's proposed amendment is limited in application to the exclusion of acquitted conduct from consideration at sentencing, but takes this opportunity to raise its concerns about the inconsistencies and unfairness that can result from the use of uncharged conduct at sentencing. We hope that the Commission will consider this issue in a future amendment cycle, and we will provide more detailed comments about this concern in a future submission concerning priorities for the Commission's consideration.

Revising the relevant conduct guideline as the Commission proposes is an important first step, and it is consistent with parallel efforts to preclude the use of acquitted conduct in sentencing more broadly. In addition to possible Supreme Court review, Congress has proposed legislation to do the same.[83] These efforts reflect a growing movement of jurists, practitioners and legislators who have seen first-hand the inequitable impact of acquitted conduct sentencing. In a functioning democracy, it is essential that both the stakeholders in the criminal justice system and the public have confidence in the fairness of the process. Successful reform efforts to exclude the use of acquitted conduct at sentencing will increase the confidence of the public and of our clients in the fairness of our judicial system.

VIII. Sexual Abuse Offenses

The PAG supports the revisions under Part A of the Commission's proposed amendment to §2A3.3 as these appear to be technical changes to bring the guidelines in line with recently enacted legislation.

With respect to Part B of the proposed amendment, the PAG acknowledges the "troubling incidents of horrific sexual abuse [of federal detainees] by BOP staff,"[84] and agrees that BOP staff sexually assaulting detainees in BOP or other facilities is unacceptable and deserves

[83] *See, e.g.*, Prohibiting Punishment of Acquitted Conduct Act of 2021, 117 S.601.

[84] Letter to Commissioner C. Reeves from Deputy Attorney General L. Monaco at 2 (Oct. 17, 2022), available at Public Comment on Proposed Priorities (ussc.gov).

punishment. But the Commission's current proposal sweeps too broadly. As a result, the PAG cannot support it.

The proposed amendment would increase the base offense level by 8 levels, from 14 to 22, for all offenses where §2A3.3 is applied. The reason for the proposed change is to account for, and appropriately punish, the harms caused to those who are sexually assaulted by law enforcement officers and correctional personnel while in their custody. Congress enacted new legislation that targets this conduct at 18 U.S.C. § 2243(c).

The proposed amendment, however, is not narrowly tailored to address crimes committed by law enforcement officers and correctional personal who sexually assault persons in their custody. In addition to applying to law enforcement officers and correctional personnel, this proposed guideline, if adopted, will apply to defendants convicted of crimes defined by 18 U.S.C. § 2243(b) (commission of a sexual act by a guardian on an officially detained ward) and 18 U.S.C. § 113(a)(2) (assault with intent to commit another felony). These offenses also are indexed to §2A3.3.

The impact of this amendment is dramatic. For individuals in criminal history category I, the bottom of the guideline range would increase from 15 months (base offense level 14) to 41 months (base offense level 22). This is a 173% increase in the lowest term of incarceration. Thus, under the proposed amendment, defendants who are not law enforcement officers or correctional personnel will face substantially increased sentences. This appears to be particularly inappropriate for cases involving violations of 18 U.S.C. § 113(a)(2). This problem could be addressed by making the increase in offense level a specific offense characteristic instead of a blanket increase in base offense level for all offenders sentenced under §2A3.3. The PAG therefore suggests that the Commission consider a narrower approach that addresses the specific conduct at issue, for example, creating a specific offense characteristic that provides an enhancement for those defendants convicted under the new statute, 18 U.S.C. § 2243(c).

Part B of the proposed amendment proposes a cross-reference in §2A3.3 to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). The impact of the proposed amendment would be substantial. A defendant's base offense level would increase from 14 to a minimum of 30. In criminal history category I, that would alter the lower end of the guideline range from 15 months to 97 months, a greater than six-fold increase.

The basis for this proposed change is to bring §2A3.3 in line with §2A3.2, which already contains this cross-reference. Superficially, it appears to make sense to have both §2A3.3 and §2A3.2 cross-reference §2A3.1 if there are facts establishing that criminal sexual abuse as defined in 18 U.S.C. § 2241 or § 2242 occurred. There are, however, qualitative differences between crimes against minors under the age of 16, the harm that §2A3.2 targets, and crimes against wards (who may be adults), the harm targeted by §2A3.3. Crimes against children are qualitatively more serious in almost all circumstances than those involving adult victims. The Commission already recognizes these differences – the base offense level for crimes sentenced under §2A3.2 is 4 points higher (18) than those sentenced under the current version of §2A3.3 (14). Further, there is the issue of coercion. Arguably, all sexual acts between a guardian and a ward could be considered coercive. If so, then the cross-reference could conceivably apply in

every instance. Instead of applying the cross-reference in those exceptional cases where certain aggravating factors are present, it potentially could be applied in every case. The PAG believes that additional guidance would be necessary if §2A3.3 is amended to include a cross-reference to §2A3.1. As currently designed, the PAG cannot support either part of the proposed amendment.

IX. Alternatives-to-Incarceration Programs

The PAG supports further study by the Commission of court-sponsored diversion programs and alternative-to-incarceration programs. Such programs are fully consonant with the mandate of 18 U.S.C. § 3553(a) to consider the unique history and characteristics of each defendant and to impose a sentence that is "sufficient, but not greater than necessary," to comply with the purposes of sentencing.

One of the purposes of sentencing is, of course, "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment" and to do so "in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). The premise of each of the programs cited by the Commission in its Proposed Amendments – the Pretrial Opportunity Program, the Conviction And Sentence Alternatives (CASA) Program, and the Special Options Services (SOS) Program – is that the most effective way to provide services and treatment to offenders suffering from substance abuse disorders and mental health disorders, and to youthful offenders, is in a non-custodial setting, and that the remaining goals of 18 U.S.C. § 3553(a)(2) are best-served by incentivizing participation in these programs with sentencing consideration. The PAG agrees with that premise and supports further study of all programs that have the potential to serve the purposes set forth in 18 U.S.C. § 3553(a) by diverting defendants from incarceration to alternative treatment or sanctions.

In preparing this Comment, PAG members searched for an authoritative list of all current federal diversion and alternative-to-incarceration programs. It appears that no such list presently exists. In 2016, then-Judge, now-Commissioner Gleeson compiled a list of existing federal programs,[85] noting that the number of such programs had grown from seven in 2013 to twenty-two by 2016. The types of alternative courts then available included drug courts, veterans courts, youth courts, and programs for high risk defendants.[86] Since 2016, alternative-to-incarceration programs have continued to proliferate. Federal programs introduced since Judge Gleeson compiled his 2016 list include: (1) the Northern District of Illinois' Sentencing Options that Achieve Results Court (the SOAR program);[87] (2) the Northern District of Georgia's Accountability, Treatment, and

[85] *United States v. Dokmeci*, Nos. 13-CR-455 & 13-CR-565 (E.D.N.Y. Mar. 9, 2016), 2016 WL 915185 at *7, Table 3; *see also* U.S.S.C., "Federal Alternative-to-Incarceration Court Programs" at 93, available at Federal Alternative-to-Incarceration Court Programs (ussc.gov) .

[86] *Id.*

[87] Program statement, available at https://iln.fd.org/en/soar-court.

Leadership (ATL) Court;[88] and (3) the District of Utah's Utah Alternatives to Conviction Track (UACT),[89] among others. Indeed, in response to a recent PAG inquiry, the alternative court coordinator for the Northern District of California estimated that at present, "[i]n the federal system, there are 150 problem-solving courts operating in 61 districts. These programs comprise both pretrial and post-conviction models and include drug, mental health, veterans, young adult, and other court types."[90]

In the absence of a comprehensive list, the PAG suggests as a starting point for its study that the Commission survey each of the federal districts and compile a list of all extant court-sponsored diversion programs and alternative-to-incarceration programs, along with a summary of the requirements for and benefits of participation. In addition, the Commission should gather and study outcomes data for each of these programs.

In its 2017 Report, "Federal Alternative-to-Incarceration Court Programs," the Commission identified certain "Social Science Questions" that future research could address.[91] In connection with that or any other research the Commission intends to conduct, PAG suggests the following for the Commission's consideration.

The PAG is concerned about how recidivism is to be defined and measured in the Commission's studies. In the past, the Commission has defined recidivism broadly to include arrests that do not result in a conviction.[92] Obviously, an arrest does not establish that a person committed a criminal act, and defining "recidivism" to include arrests threatens to skew the perception of the efficacy of alternative programs, particularly for black and brown defendants.[93] The PAG encourages the Commission to ensure that recidivism is defined not as mere re-arrest, but as conviction.

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[88] Program statement, available at https://www.gand.uscourts.gov/accountability-treatment-and-leadership-atl-court.

[89] Program statement, available at https://www.utd.uscourts.gov/utah-alternatives-conviction-track-u-act.

[90] Statement of Wyatt Lim-Tepper, President and Founder of A Curiae.

[91] U.S.S.C., Federal Alternative-to-Incarceration Court Programs (Sept. 2017), available at Federal Alternative-to-Incarceration Court Programs (ussc.gov), at 45-54.

[92] *See, e.g.,* U.S.S.C., *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* (May 9, 2017), available at The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders (ussc.gov); *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing* (2004), available at Fifteen Years of Guidelines Sentencing - November 2004 (ussc.gov); U.S.S.C., *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004), available at Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines - May 2004 (ussc.gov).

[93] *See, e.g.,* Defender Career Offender Statement at 10-11 (citing studies showing that black people are arrested in disproportionate numbers relative to similarly situated white people).

The PAG also encourages the Commission to ensure that even when a defendant is deemed to have recidivated, the nature and seriousness of the new offense is considered. For example, it should not be considered a program failure when a drug-addicted, formerly drug-dealing graduate of a diversion program is later arrested for writing a bad check.

In addition, although the PAG is wary of cost-benefit analyses in the context of human lives, should the Commission seek to engage in cost-benefit analysis of alternative-to-incarceration programs, the PAG urges the Commission to consider not just the cost of incarceration but also the opportunity cost to society of incarcerating a potentially productive person and the social costs to those people who depend upon the incarcerated person, including but not limited to aged parents, children, spouses, and employers.

Given the widely varying availability of court-sponsored programs and the length of time that may be required for the Commission to complete its empirical study of the issue, the PAG also supports the amendment of Chapter Five, Part K, Subpart 2 to include a new policy statement that expressly authorizes departures for a defendant's participation in a pre-sentencing treatment program. The PAG advocates that the Commission not limit the amendment solely to existing court-sponsored programs or require successful completion for sentencing consideration. Rather, the PAG supports an amendment that would authorize a departure for a defendant's good faith participation in any pre-sentencing treatment program that, in the judgment of the Court, serves any of the purposes of sentencing set forth in 18 U.S.C. 3553(a). A broadly applicable policy statement such as that proposed by PAG is consistent with social science research and would serve the purpose of reducing the unwarranted sentencing disparities that would inhere if the policy statement were to apply only to currently existing programs in the specific districts where such programs are in use.

X. Fake Pills

The Commission proposes modifying §2D1.1(b)(13) to add a 2-level enhancement where a defendant represented or marketed as a legitimate drug a mixture containing fentanyl or a fentanyl analogue, with reason to believe that the mixture or substance was not legitimately manufactured. This amendment responds to the Drug Enforcement Agency's concern with the proliferation of "fake pills" containing fentanyl or a fentanyl analogue, and the sharp increase in opioid overdose deaths. While the PAG understands the Commission's and the government's concern for the rise in the presence of fentanyl and fentanyl analogues and the corresponding increase in overdoses and overdose-related deaths related to these drugs, the PAG cannot support this proposal.

The Commission's 2021 report on fentanyl and fentanyl analogues found that nearly all fentanyl and fentanyl analogues trafficked in fiscal year 2019 were illicitly manufactured,[94] and that trafficking of diverted prescriptions is rare. Indeed, no defendants convicted of trafficking

[94] *See* U.S.S.C., *Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns* at 20 (Jan. 2021), available at Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns (ussc.gov).

fentanyl analogues diverted prescription medications.[95] The report also found that of all the functions in a drug trafficking conspiracy, the vast majority of defendants are street-level dealers who distribute retail quantities of drugs directly to drug users: 39.6% of defendants convicted of trafficking fentanyl, and 45.5% of defendants convicted of trafficking fentanyl analogues.[96]

In light of this data, the Commission's proposal sweeps far too broadly. The proposed 2-level enhancement would apply in any case where a defendant provided pills that were not directly obtained from a pharmacy. Where nearly all fentanyl and fentanyl analogues are illicitly manufactured –not obtained from a pharmacy or other legitimate source – and with a reduced *mens rea* of "reason to believe," this enhancement would apply in every fentanyl and fentanyl analogue trafficking case. Notably, the proposed amendment does not require the defendant to have "reason to believe" that the pill contains fentanyl, but merely has to have reason to believe that the pill is not a legitimately manufactured drug.

The PAG contends that the concerns motivating this enhancement are already addressed by the existing guideline, which applies a 4-level enhancement if the defendant knowingly misrepresented or marketed as another substance a substance or mixture containing fentanyl or a fentanyl analogue. This is precisely the conduct that this proposed amendment targets. The individual who knows a pill contains fentanyl or a fentanyl analogue but misrepresents it as another substance should receive this enhancement. Buyers down the chain from that individual are not in the same position to know what exact substance the pill contains. And again, based on the Commission's study, the majority of defendants involved in the distribution of these drugs are street level-dealers. If the "reason to believe" *mens rea* standard applies, this enhancement would easily apply to all of these defendants, and many more.

A good example was discussed at the Commission's March 7, 2023 public hearing on this proposal: students who obtain pills from one person, then pass pills along to others. The proposed increase could be applied to any of the students, no matter where they are along the chain. In effect, the proposed amendment serves to increase the penalty for all individuals who sell pills across the board because it relies on a characteristic that is, practically speaking, part and parcel of the commission of the offense, similar to the guideline enhancement for use of a computer in a child pornography case.

The PAG also is concerned that this enhancement will lead to numerous factual disputes at sentencing. For example, does the application of the guideline depend on how legitimate a fake pill looks? Would the parties need to present expert testimony as to how realistic the fake pill looks as compared to a legitimately manufactured pill? Would the government need to establish that a defendant had prior requisite knowledge of the look of a legitimately manufactured pill versus the illegitimate one? These are just a few of the factual questions that might need to be resolved in order to determine whether a defendant had "reason to believe" that a pill containing fentanyl or a fentanyl analogue was not the legitimately manufactured drug.

[95] *See id*. at 29.

[96] *See id*. at 28.

Finally, with respect to the government's proposed "rebuttable presumption" *mens rea* for imposing this enhancement, it is always the government's burden of proof to establish a sentencing enhancement. The government seeks to shift the burden to the defendant to prove that she or he did not have reason to believe that a drug was legitimately manufactured. This type of burden-shifting for purposes of proving an enhancement is contrary to every principle of guidelines sentencing. If the Commission considers adopting this two-level enhancement, the PAG urges the Commission to employ a "knowing" *mens rea* with no rebuttable presumption.

XI. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding the Commission's proposed amendments. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

March 13, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
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Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) met in Washington, D.C., on February 1 and 2, 2023, to discuss and formulate recommendations to the United States Sentencing Commission regarding the Proposed Amendments to the Sentencing Guidelines published on January 12, 2023. POAG appreciates the opportunity to provide ongoing feedback to the Commission in support of its long-term priorities.

First Step Act – Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(A)

POAG appreciates the opportunity to respond to the proposed amendment to USSG §1B1.13 and to provide comment regarding the proposed revised list of "extraordinary and compelling reasons." This guideline is unique in that it is not a matter of scoring a specific offense characteristic or determining a criminal history calculation. It is a guideline that was developed based upon the directives under 28 U.S.C. § 994(t) that recognized the importance of empathy for the infirm who are suffering from dire health issues and life circumstances. For those who were not given a life sentence, but their health issues have unfortunately given them an end-of-life trajectory, the sentence imposed effectively becomes a life sentence unless their case is reassessed using the criteria set forth under USSG §1B1.13. In that spirit, POAG unanimously supports the expansion of this guideline to allow defendants to directly request relief from the Court, thus reducing the steps necessary to obtain relief, which is especially relevant given the need for expedience is often a factor.

POAG recognizes that USSG §1B1.13 bears a heavy burden as it seeks to provide direction and consistent application, yet allow for sufficient, expeditious discretion to address cases that present with unique factors or a combination thereof, including the previously unforeseen issues related to the Covid-19 pandemic. With the amendment to 18 U.S.C. § 3582(c)(1)(A), these types of heartfelt

issues have become and will remain an issue the Court will be tasked to address with increased frequency moving forward. For these reasons, POAG favors amending USSG §1B1.13 given its renewed significance in our system of sentencing.

With regard to subsection (b)(1)(C) pertaining to medical issues that require specialized or long-term care, POAG believes that language appropriately broadens the type of medical conditions that would qualify as extraordinary and compelling beyond the already existing medical criteria now set forth under subsection (b)(1)(A). POAG believes this proposed amendment expands the Court's discretion to give due consideration to the vast type of unique and unforeseen medical issues that did not previously meet the criteria set forth under now section (b)(1)(A). The proposed language is written in such a way that it recognizes individuals suffering from certain medical conditions experience symptoms with varied severity and at different stages of the disease.

With regard to subsection (b)(1)(D) pertaining to infectious diseases, POAG also believes such an amendment fully captures the heart of the issue presented by the ongoing concerns with Covid-19. While POAG discussed some concerns that this may result in regional disparity, POAG unanimously believes that such an amendment would put the Bureau of Prisons in a better position to address any future medical emergencies and fulfill their responsibility to protect those who are in their custody.

With regard to subsection (b)(3) pertaining to family circumstances, POAG did not have a strong opinion on that listed criterion beyond recognizing that the family circumstances presented within that subsection are often issues that are present at the time of sentencing. As such, this amendment could potentially cast a wider net than was intended by this guideline and would potentially present difficulty in determining which case warrants a reduction when the circumstances are not uncommon. POAG discussed other factors that may be relevant, including the type of relationship the inmate had with their child before imprisonment, whether the inmate emotionally or financially supported their child, and whether the family circumstances remain unchanged and were known to the Court at the time of sentencing. POAG also believes the offense of conviction should be included as a factor, especially if the instant offense involved a sexual abuse offense. However, POAG also entrusts the Court will consider such factors in the event they serve as a basis for compassionate release.

With regard to subsection (b)(4) pertaining to a new category of "extraordinary and compelling reasons" for inmates who are victims of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody, POAG expressed concern with this well-intended attempt to remedy a tragic situation by way of a sentencing amendment. This proposed amendment is unique in that it requires the Court to essentially find that another crime has been committed. POAG questioned if an allegation would be sufficient or what documentation would be required to address this issue in order to preclude any concerns with exploitation or false allegations. POAG also discussed concern that this amendment gives the appearance that sexual and physical assaults of inmates by correctional officers will be a fact of incarceration such that there needs to be an amendment to USSG §1B1.13 in order to account for that harm. Ideally, this issue can be better addressed within our correctional system to mitigate the need for such an amendment, including the deterrent effect of the newly enacted statute under 18 U.S.C. § 2243(c).

However, if this proposed criterion is adopted, POAG recommends that the term "sexual assault" be defined in order to ascertain whether any sexual act would qualify, such as "sexual act" as defined in 18 U.S.C. § 2246, or if the conduct would need to meet a certain statutory definition, such as aggravated sexual abuse as defined in 21 U.S.C. § 2241 or sexual abuse as defined in 21 U.S.C. § 2242. POAG also recommends clarifying language be included regarding the use of force or coercion given that correctional officers are in a position of authority. Further, POAG inquires if the reference to "serious bodily injury" is inclusive and pertains to both instances of sexual assault and physical abuse, or if it is intended to only apply to instances of physical abuse. According to USSG §1B1.1, comment. (n.1(m)), "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. §§ 2241 or 2242. If the reference to "serious bodily injury" does pertain to sexual assault offenses, then it would be then clear that the sexual assault would need to meet the criteria under 18 U.S.C. §§ 2241 or 2242. POAG also foresees the argument that pregnancy should be considered "serious bodily injury" and suggests the Commission provide guidance on their intent with regard to how inmate pregnancy should be considered. Additionally, POAG was unanimously opposed to extending the proposed (b)(4) provision to inmate-on-inmate sexual or physical assaults. As noted above, POAG has concerns about collusion and false allegations when this is an issue that can be better addressed within our correctional system with the goal of mitigating such victimization of inmates by other inmates.

And finally, POAG unanimously opposes the provisions pertaining to changes in the law set forth in the proposed subsection (b)(5) be adopted. POAG believes there should be a clear line between the statutes and guidelines intended to address matters of compassionate release related to defendant's personal characteristics and life circumstances and the statutes and guidelines intended to address changes in the law and retroactive sentencing provisions. Implicit in retroactive sentencing reductions and other changes to the law is the concept that some attribute of the law resulted in an unjust outcome. There are already mechanisms within our system to address retroactive sentencing issues and such an amendment would essentially function to allow unlimited discretionary retroactivity based on inequity resulting from changes in the law. The terminology used appears extremely broad, such that any inmate impacted by any change in the law, in any jurisdiction, could directly seek judicial relief. The current structures in place for such reductions under 18 U.S.C. § 3582 and 28 U.S.C. § 2255(f) and (h) have triggering mechanisms, timeframes, and request limitations in place. The intended structure and provisions of these statutes prevent an influx of repeated requests emanating from the most nuanced changes in the law. No such limitations are included under the proposed (b)(5) language. Under the proposed (b)(5) language, if that relief were not granted, the defendant could renew their request upon another nuanced change in the law, regardless of the spuriousness of the claim. Given the speed at which the law changes and the disparities of interpretation amongst the many circuits, the amendment of (b)(5) into this section would undoubtedly overwhelm the judicial process with a significant number of requests, that once denied, could be renewed time after time based on new guidelines, case law, or statutory adjustments, creating an environment of perpetual requests for discretionary retroactivity. The Commission noted in the First Step Act – Drug Offenses that 1,987 defendants in fiscal year 2021 could have received guideline safety valve under the disjunctive approach to the proposed amendment to the criteria of USSG §5C1.2(a) and an additional 4,111 under a conjunctive approach to the same guideline. That is one change, on one issue, in one year, wherein the change is foreseeable. With each and every change, every inmate potentially impacted, as well as those not impacted but seeking a review of their sentence, would be eligible and encouraged to file subsequent compassionate release motions.

There is no finality to the sentence with this proposed process. Further, a genuine assessment of the impact of any of the aforementioned changes to the law would require litigation by the parties to determine if and to what extent the sentence was truly impacted. When one considers the numbers of defendants and the various changes in the law that occur regularly, it quickly becomes apparent that retroactivity of this nature would be overwhelming to the judicial system.

Additionally, the Commission expressed concern that the retroactive powers expressed under USSG §1B1.10 could be placed in tension by the (b)(5) language of §1B1.13, and the Commission inquired how to balance these. POAG shares the Commission's concern and does not think a balance between the powers under USSG §1B1.10 and the proposed language at (b)(5), as written, can be established. POAG recommends keeping that retroactivity exclusively under USSG §1B1.10, so as to reduce confusion, avoid disparity, and prevent the prospect of overwhelming the system.

As for the three options related to subsection (b)(6), POAG favors Option 3, primarily because it tracks the language in the current criteria set forth in USSG §1B1.13, comment. (n. 1(D)), which applies in cases in which "The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through (3)." In the alternative, Option 1 with a similar (1) through (3) restriction would provide a clearer directive of the types of factors that could be considered, yet broadens the criteria to circumstances that are similar in nature to the established criteria. POAG was also in favor of the Commission providing examples of circumstances that constitute "extraordinary and compelling reasons" in a non-exhaustive list, including circumstances that would not qualify. For instance, in the event the Commission determines changes in the law are not an allowable basis under USSG §1B1.13, POAG recommends it explicitly be noted that such is the case, especially because 18 U.S.C. § 3553(a) is an all-encompassing part of the equation and includes factors such as the need for the sentence imposed to provide just punishment for the offense and the need to avoid unwarranted sentencing disparities. As a matter of general comment, POAG notes that the position taken within this testimony is based upon POAG's understanding that compassionate release, up to the point of the current amendment cycle, was geared toward the health and family circumstances of the defendant. Therefore, POAG remains focused on the long-standing intent of this guideline. With these recommended amendments, POAG believes USSG §1B1.13 would be structured in such a way that it provides established eligibility parameters, yet entrusts our Courts with the necessary discretion as they continue their work in making an individualized assessment of each compassionate release motion.

First Step Act – Drug Offenses

Part A: Safety Valve

POAG members were unanimous that USSG §5C1.2 should conform with Section 402 of the First Step Act which expanded the safety valve provision at 18 U.S.C. § 3553(f). POAG discussed the proposed changes to §5C1.2 (Limitation of Applicability of Statutory Minimum Sentences in Certain Cases) and its corresponding commentary to implement the First Step Act of 2018, Pub. L. 115-391 (Dec. 21, 2018).

POAG is in favor of Option 2 of the proposed amendment. POAG recognizes the two conflicting viewpoints presented in the circuit split on the conjunctive versus disjunctive "and" in 18 U.S.C. § 3553(f)(1). This option would impact USSG §2D1.1(b)(18) and §2D1.11(b)(6), which base the two-level reduction on the criteria in §5C1.2(a)(1)-(5), but set forth the criminal history criteria with a more clearly disjunctive "or." Those in favor of the amendment cited that this option would move the guidelines towards a more restrictive structure, in line with the other criteria, by giving relief only to those who have a reduced criminal culpability. POAG observed how, in the circuits that had interpreted 18 U.S.C. § 3553(f)(1) conjunctively, results that are counterintuitive to the purposes of the safety-valve provision started to occur immediately. In one case, a person who had 30 criminal history points was now statutory safety valve eligible. A person who was subject to enhanced penalties under 21 U.S.C. § 851 also received statutory safety valve relief. A person who was subject to a career offender enhancement received statutory safety valve relief. While Option 2 prevents these outcomes within the guidelines, POAG understands that this would not limit eligibility for relief from mandatory minimum sentences in circuits applying the first criminal history criterion as conjunctive.

Those opposed to bifurcating the two-level reduction from the statutory construct under USSG §5C1.2 cited that, historically, the specific offense characteristics at USSG §2D1.1(b)(18) and §2D1.11(b)(6) track the statute at 18 U.S.C. § 3553(f), which is incorporated through §5C1.2. Some members of POAG expressed concern that, procedurally, this may become very complicated to have two different analyses. In practice, the Courts in the jurisdictions adopting the conjunctive interpretation of 18 U.S.C. § 3553(f)(1) may apply a variance under 18 U.S.C. § 3553(a) equivalent to a two-level reduction. In those limited cases, this amendment would not result in perfectly resolving disparity amongst the circuits.

Additionally, POAG unanimously favored that the Commission provide guidance on what constitutes a "1-point," "2-point," or "3-point" offense, "as determined under the sentencing guidelines," for purposes of §5C1.2. POAG unanimously favored that the Commission include the proposed language in Option 2 of §2D1.1(b)(18)(B) which states "as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category)." In *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (en banc), the majority opinion seems to require the Court to assess points for prior convictions regardless of whether the offense actually garnered criminal history points under the guidelines. Under the guidelines, prior offenses of a certain age, prior offenses treated as part of a single sentence, and certain prior offenses are unscored. This framework is consistent with §4A1.1 and §4A1.2, which operate in tandem.

Looking solely at §4A1.1 of the guidelines would disregard the directives at §4A1.2, which govern the computation of criminal history points. This may result in unintended disparities which preclude a defendant from receiving relief under the safety-valve for a conviction that would not have otherwise received criminal history points under the current framework at §4A1.1 and §4A1.2. For instance, a defendant who has a Criminal History Category I and has zero or one criminal history point may have several prior offenses that did not garner points under the guidelines because of the age of the conviction. See USSG §4A1.2(e). The clarifying language may settle the issue such that the two different standards, guideline safety valve and statutory safety valve, do not further deviate

from each other. There is a risk in having two different standards, and POAG favors the Commission acting to provide clarity to aid in interpretation.

Regarding the minimum offense level at §5C1.2(b), POAG unanimously favored keeping the minimum offense level of 17 rather than providing an advisory custodial range. Given the expanded criminal history criteria in the First Step Act, there are defendants who would qualify for safety valve relief that are in higher criminal history categories than Criminal History Category I. By continuing to refer to a specific offense level, in this case offense level of 17, the defendant would still fall within their designated advisory guideline range and also allow for their criminal history category to still be meaningful.

Part B: Recidivist Penalties for Drug Offenders

As to Part B, POAG concurs with the proposed amendments pertaining to the definitions of "serious drug felony," "felony drug offense," and "serious violent felony." POAG agreed that the adjustment to USSG §2D1.1(a)(1) and (3) well clarifies the intent of the Commission and will resolve misunderstandings about what was meant by "similar offense."

Firearms Offenses

Part A: Bipartisan Safer Communities Act

An overwhelming majority of POAG is in favor of Option 1, which adds references to 18 U.S.C. §§ 932 and 933 in USSG §2K2.1 at subsections (a)(4)(B)(ii)(II) and (a)(6)(B). The consensus focused on the ease of application by having most of the considerations occurring in the same section of the guideline. POAG observed that, by having all the considerations happening in one location, it resolved any concerns that it gave the appearance of double counting. However, POAG is in favor of some changes to Option 1. POAG suggests collapsing (b)(5)(A) and (b)(5)(B) into a single subsection. POAG also suggests some adjustments to the language in (b)(8) to allow for the guideline to have wider applicability.

POAG proposes that subsections (b)(5)(A) and (b)(5)(B) be combined and a two-level specific offense characteristic increase be applied for those who qualify under the new combined subsection (b)(5)(A). The combination of these two adds to the ease of application. The conduct involved in a conviction under 18 U.S.C. §§ 933(a)(2) or (a)(3) is often closely associated or similar to that described in the proposed (b)(5)(B). Additionally, POAG supports a five-level specific offense characteristic increase for those who qualify under proposed subsection (b)(5)(C). The reduced level increase at the proposed (b)(5)(C) (our proposed (b)(5)(B)) would also balance well with the language changes suggested at (b)(8) that would allow (b)(8) to be more widely applicable. Subsection (b)(5)(C) would be changed to subsection (b)(5)(B) as a result of combining the previous two subsections into a new (b)(5)(A). POAG's suggested subsection (b)(5) would read as follows:

(5) (Apply the Greatest) If the defendant—

> (A) (i) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3); (ii) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (iii) attempted or conspired to commit the conduct described in clause (ii), increase by **2** levels; or
>
> (B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i), increase by **5** levels.

As noted previously, for subsection (b)(8), POAG proposes several adjustments to the language in this section. POAG proposes the pre-subsection language to be broadened, support for the "subsection (b)(5)" option under (b)(8)(A), adjustments to the (b)(8)(B) language, and a removal of the (b)(8)(C) subsection.

POAG respectfully recommends using the language "If the offense involved-" rather than "If the defendant-," as it would make more sense for the increase to be based on the offense conduct rather than the specific actions of the defendant. This nuanced adjustment would allow for the straw purchaser to have the same aggravating factors reflected in his guidelines as the person who has solicited the straw purchaser's assistance. Along these lines, POAG appreciates the language that the Department of Justice in their written testimony on this issue offered in expanding (b)(5) to those who receive firearms from straw purchasers. They have both acted to circumvent the legal protections put in place to prevent convicted felons from purchasing firearms. By making this pre-subsection language offense-based, all participants in a straw purchasing conspiracy could receive the enhancement. This is especially important when the issue of criminal organizations is considered. While a straw purchaser may be solicited by a gang member to purchase a firearm, that gang member may be engaged in further distribution of the firearms throughout the criminal organization.

Additionally, for subsection (b)(8)(A), POAG supports the use of the language "receives an enhancement under subsection (b)(5)," as this would facilitate the inclusion of 922(g) offenses and "false statement" cases in which the defendant transferred weapons to a prohibited person. POAG supports this option in both the (b)(8)(A) and the (b)(9)(A) proposed amendments.

In subsection (b)(8)(B), POAG proposes the use of the language "affiliated with" rather than "participated," and the removal of the "five or more persons" language, as this language is considered too restrictive. The use of the word "participated" seems to create the need to show the defendant had a high degree of engagement with the criminal organization. POAG believes "affiliation" is a more appropriate standard for this enhancement because often times gangs have regimented structure related to identifying members, but there can be many criminal affiliates to a criminal organization. Additionally, a straw purchaser's role may only be to arm these gang

members and "participated" suggests that they may have had to have a more significant role in the group, club, or organization. POAG also supported the removal of the "five or more persons" component, as that may also prove very limiting. A straw purchaser often works with a specific individual contact without expansive interaction or knowledge of the criminal organization's membership and structure.

Also, POAG supports the removal of the language in subsection (b)(8)(C) entirely, as the *mens rea* component would make subsection (b)(8)(C) extremely restrictive in its application. One of the POAG members had recently reviewed a couple cases in which defendants had acted as straw purchasers of large caliber semi-automatic firearms. These firearms were purchased for cartel members and transferred across the country. Even within these cases, applying the proposed (b)(8) enhancement would have been difficult, if not impossible, because there would have to be direct evidence that the transfer of these firearms to the cartel was intended to promote or further the felonious activities or done with the intent to maintain or increase a person's stature therein. As long as the straw purchaser was paid, it is too easy to argue that they did it for money rather than the promotion of the felonious activity or intent to raise personal stature within a group. Removing the proposed (b)(8)(C) language provides that defendants who are engaged in this more egregious conduct are subject to an enhanced sentence. Often times the evidentiary burden on *mens rea* based enhancements is extremely difficult to obtain. We would need the defendants to not only articulate their rationale for committing the offense, but that articulation needs to be both clearly within the language of the guideline and in a format that could be captured or documented. POAG unanimously supports a two-level specific offense characteristic increase for those who qualify under subsection (b)(8). POAG's suggested subsection (b)(8) would read as follows:

(8) If the offense involved—

> (A) conduct that resulted in an enhancement under subsection (b)(5); and
>
> (B) affiliation, at the time of the offense, with a group, club, organization, or association that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity;
>
> increase by **2** levels.

Third, as stated previously, for subsection (b)(9)(A), POAG supports the use of the language "receives an enhancement under subsection (b)(5)." For subsection (b)(9)(C), POAG is in favor of using "and" not "or" in both of the bracketed locations at the ends of subsections (i) and (ii). POAG also favors using the language "*had no reason to believe* that the firearm would be used or possessed in connection with further criminal activity" (not "*had minimal knowledge*") under subsection (iii). POAG unanimously supports a one-level specific offense characteristic decrease for those who qualify under subsection (b)(9). POAG suggests subsection (b)(9) would read as follows:

(9) If the defendant—

> (A) receives an enhancement under subsection (b)(5);
>
> (B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing

Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; and (ii) received little or no compensation from the offense; and (iii) had no reason to believe that the firearm would be used or possessed in connection with further criminal activity;

decrease by **1** level.

Finally, for Proposed Amendment #3, Part A, under the Commentary section, Application Note 13, Part (C), POAG recommends that a definition be provided for "an unusually large amount of ammunition."

Part B: Firearms Not Marked with Serial Number ("Ghost Guns")

POAG unanimously supports the revision to USSG §2K2.1(b)(4)(B) to account for a four-level enhancement for any firearm not otherwise marked with a serial number [i.e., ghost guns]. Nonetheless, POAG proposes expanding USSG §2K2.1(b)(4) and the subsequent Application Note 8(A) and (B), to read:

(4) If any firearm (A) was stolen, increase by **2** levels; or (B)(i) had an altered or obliterated serial number; or (ii) was not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(16) or a firearm manufactured prior to the Gun Control Act of 1968), increase by **4** levels.

"…not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16) or a firearm manufactured prior to the Gun Control Act of 1968*),* apply subsection (b)(4)(B)(i) or (ii).

"…not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16) or a firearm manufactured prior to the Gun Control Act of 1968), apply subsection (b)(4)(A) or (B)(ii).

"…not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16) or a firearm manufactured prior to the Gun Control Act of 1968).

In addition, similar to the response to Part A, Bipartisan Safer Communities Act, POAG believes revision of the enhancement at USSG §2K2.1(b)(4) to include a mental state (*mens rea*) requirement would allow for limited liability, thereby reducing the applicability of the enhancement.

Part C: Issues for Comment on Further Revisions to §2K2.1

An overwhelming majority of POAG is in agreement that the conduct involved in burglary of a firearm licensee is already being well accounted for under USSG §2K2.1. When defendants commit these types of offenses, their aggravating conduct is already captured in a myriad of ways (proximity to high-capacity magazines, number of firearms, stolen firearms, and the "in connection with" enhancements).

POAG supports increases in the guidelines to account for prior Felon in Possession of a Firearm or Ammunition convictions (state or federal), but not for previous convictions for misdemeanor

crimes of domestic violence. We propose that prior convictions for Felon in Possession of Firearms or Ammunition offenses be treated the same as prior convictions for "crimes of violence" and "controlled substance offenses," as the basis for applying base offense levels. This would appropriately capture the seriousness of these offense and danger represented by individuals who repeatedly engage in these types of offenses.

An overwhelming majority of POAG is in agreement regarding amending the definition of "firearms" in Application Note 1 of §2K2.1 to include devices which are "firearms" under 26 U.S.C. § 5845(a) but not 18 U.S.C. § 921, for purposes of clarity. POAG supported this alteration because it is agreed it would bring a higher degree of clarity to the definition.

Finally, POAG understands the reasoning behind increasing penalties for defendants who transfer firearms to minors. However, POAG is in favor of accounting for these increased penalties through departures or variances. This is due mostly to the perceived rarity of these cases. No one on POAG could recall ever having seen one.

Circuit Conflicts

Part A: Acceptance of Responsibility

The Commission is seeking comment regarding the circuit conflicts related to acceptance of responsibility, with one issue occurring at the pretrial stage in relation to suppression motions and the other occurring at the post-conviction stage in relation to objections at the sentencing hearing. While each pertain to different stages in the process, both relate to defendants seeking to use the due process procedures available to them as they proceed through the federal court system.

The probation office becomes involved with a case after the plea or verdict and, therefore, acknowledges that motion to suppress proceedings are generally outside of our purview. However, comparing the case law addressing this matter reveals that, in cases where acceptance of responsibility has been denied on this basis, the crux of the argument is that the amount of work preparing for a suppression hearing is akin to that of preparing for trial, calling into question whether a defendant has actually accepted responsibility and saved resources. POAG favors the case law rationale that there are marked differences between the amount of resources expended for a suppression hearing and the amount of resources expended to conduct an entire trial. POAG also stresses the importance of recognizing that, at the core of this issue, is whether the defendant has accepted responsibility for his or her conduct, even if they choose to avail themselves of some of their due process protections.

Further, POAG believes defendants should not be penalized for exercising their due process right to file a motion to suppress. Motion to suppress hearings are part of the process and assists both parties in identifying the evidence that will lawfully be considered as they determine whether to proceed to trial. If acceptance of responsibility was automatically denied in cases where defendants exercise their right to file a motion to suppress, there would be no further incentive to plead guilty. Therefore, POAG supports the proposed amendment to USSG §3E1.1(b) to clarify that litigation related to a charging document, early discovery motions, and early suppression motions ordinarily are not considered "preparing for trial" under this subsection. POAG does note there could be varying interpretations of the term "early" and court calendar processes are impacted by other

factors, as well as variations of the use of term "ordinarily." Therefore, in order to ensure this amendment has the intended impact, POAG would recommend these terms not be included in the final amendment.

POAG further believes such an amendment would be a comparable instruction to that set forth under USSG §3E1.1, comment. (n.6), which directs that "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal." POAG's position on this matter is consistent with the majority of the circuits that have concluded that a motion to suppress does not preclude the defendant from being eligible for the additional one-level reduction for acceptance of responsibility.

In relation to this issue, POAG notes that the Court's discretion remains relevant in light of the fact that the Court also engages in trial preparation. According to USSG §3E1.1(b), the defendant's plea notification allows the government to avoid preparing for trial and permitting the government and *the court* to allocate their resources efficiently. Consider, for example, a plea agreement stipulation that the government would move for the additional one-level reduction, even if the government did engage in some trial preparation, regardless of the fact that the Court had already contributed resources in preparing for trial. POAG notes this point due to case law discussions on whether USSG §3E1.1(b) is discretionary after the listed criteria have been met, but the Court's discretion remains relevant as it is a listed factor. Meaning, a prosecutor could move for the additional reduction under USSG §3E1.1(b), but the court could decline to accept the motion based on their own assessment of expended resources related to trial preparations.

With regard to the second proposed amendment pertaining to objections at sentencing, POAG notes that the Commission heard testimony on this issue in 2018. At that time, the amendment was in relation to the two-level decrease under USSG §3E1.1(a) addressing circumstances in which the defendant files objections to relevant conduct, but there is overlap with the current proposed amendment to USSG §3E1.1(b), which notes "Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered 'preparing for trial.'" The fact that the issue of sentencing objections continues its relevance suggests it may need further revision.

The proposed amendment seeks to resolve the circuit conflict regarding whether the government may withhold a motion for the additional one-level reduction under USSG §3E1.1(b) in cases where defendants exercise their due process right to raise a sentencing challenge. However, POAG notes this amendment does not in any way preclude the government from taking the position that the defendant's conduct in filing objections constitutes a false denial or a frivolous contestation of relevant conduct, thus making defendants ineligible for the two-level decrease under USSG §3E1.1(a). Therefore, POAG questions whether the issue of instances where defendants raise sentencing challenges is better addressed in relation to USSG §3E1.1(a), rather than USSG §3E1.1(b). Under subsection (a), objections to the defendant receiving a two-level decrease ordinarily pertain to an allegation that the defendant has falsely denied or frivolously contested relevant conduct. Alternatively, the defendant's same sentencing challenges could also be used as a basis for the government to decline to move for the additional one-level reduction, or for the Court to deny the reduction, under subsection (b). Subsection (a) historically has focused on accepting responsibility for the instant federal offense and subsection (b) has historically focused on doing so in a timely manner. The issue for comment for this proposed amendment cited *United*

States v. Jordan, 877 F.3d 391 (8th Cir. 2017). The concurring opinion in *Jordan* very succinctly summarized this very issue as follows:

> But a defendant who has not accepted responsibility for the offense of conviction, or who has falsely denied or frivolously contested relevant conduct, has likely not earned the two-level reduction under § 3E1.1(a) in the first instance. See USSG § 3E1.1 cmt. n.1. The government is free to refuse a third-level reduction motion pursuant to any interest contained in § 3E1.1, but as acceptance of responsibility under § 3E1.1(a) is an absolute prerequisite to eligibility for a third-level reduction, the government's interest in acceptance of responsibility has already been satisfied by the time the third-level reduction comes into the picture. Nothing in the plain language of subsection (b) suggests consideration of the degree to which a defendant has accepted responsibility for the offense of conviction or some other relevant conduct. *Id.* at 397.

POAG acknowledges the concurring opinion's analysis in *Jordan* and questions if addressing the objections to sentencing challenges under subsection (b) would further confuse the ongoing application principles for acceptance of responsibility. Though, POAG considers the prospect of addressing the issue in both USSG §3E1.1(a) and (b) may better effectuate the Commission's intentions.

On February 24, 2023, POAG provided testimony before the Commission in relation to the proposed amendment regarding acquitted conduct, advocating that acquitted conduct, like dismissed and uncharged conduct, were equally reliable at the time of sentencing because the due process in relation to each was the same. In each instance, defendants would have the right to object, the right to confront witnesses, and the right to a hearing on the matter, and the Court would make a finding based upon a preponderance of the evidence. However, while preparing for the instant testimony, POAG reviewed several case law examples similar to the finding in *United States v. Burns*, 781 F.3d 688 (4th Cir. 2015), wherein defendants who exercised that right were deemed ineligible for an acceptance of responsibility reduction. POAG notes the interplay of these two pending amendments for the Commission's consideration, especially because defendants would likely object to the use of acquitted conduct at sentencing and would then potentially be subject to a government motion advocating that the defendant should not receive an acceptance of responsibility reduction. POAG maintains that acquitted conduct remains relevant at sentencing and, in the event it is deemed that it conflicts with the acceptance of responsibility provisions, POAG would recommend that the acceptance of responsibility provisions be amended to address the defendant's ability to object to relevant conduct without jeopardizing their ability to receive an acceptance of responsibility reduction under USSG §3E1.1(a) and (b). The feedback POAG received suggested that, while there was some disparity with regard to the application of acceptance of responsibility, a majority of the districts liberally apply the acceptance of responsibility adjustment, even in cases where defendants object to relevant conduct. Therefore, POAG believes such an amendment would resolve those due process concerns and would follow the already existing practice in most districts.

Part B: Definition of Controlled Substance

Part B of the proposed amendment amends USSG §4B1.2 to address a circuit conflict regarding whether the definition of a "controlled substance offense" in USSG §4B1.2(b) only covers offenses involving substances controlled by the federal Controlled Substances Act pursuant to 21 U.S.C. § 801, or whether the definition also applies to offenses involving substances controlled by applicable state law. Resolution of this issue is significant, given that the definition in USSG §4B1.2(b) applies to the career offender guideline at §4B1.1, as well as several other guidelines that incorporate this definition by reference and rely on prior convictions for a "controlled substance offense" to determine the offense level.

Option 1 and Option 2 each define "controlled substance" as an offense under the Controlled Substances Act pursuant to 21 U.S.C. § 801, however, Option 2 has the added language "or otherwise controlled under applicable state law."

POAG further observed that Option 2 is clearly broader than Option 1, meaning more convictions would qualify as a controlled substance offense. During July 2017, POAG submitted a response to the proposed priority in light of the Commission's 2016 Report to the Congress: Career Offender Sentencing Enhancements, including its recommendations to revise the career offender directive at 28 U.S.C. § 944(h) to focus on offenders who have committed at least one "crime of violence." At that time, POAG recognized the Commission's research that revealed defendants who qualify as a career offender received lower sentences, including variances below the guideline range, in cases where defendants qualify as a career offender as a result of "controlled substance offenses." POAG members at that time indicated that courts were varying downward from the career offender range in these circumstances as a way to differentiate between defendants who qualify as a career offender based upon "controlled substance offenses" from defendants who qualify based upon at least one "crime of violence." The Commission's 2016 Report to the Congress also indicated that defendants who qualified as a career offender due to at least one "crime of violence" recidivate at a slightly higher rate than those who qualified based solely on "controlled substance offense" predicates. As such, Option 2 will result in more defendants qualifying as a career offender based upon "controlled substance offense" predicates and potentially lead to a higher variance rate under USSG §4B1.1, though this may be the cost of creating a higher continuity of application.

Potential disparity concerns regarding the applicable state law within Option 2 were discussed as well. The controlled substance schedules and their corresponding quantity thresholds vary from state to state. Meaning a defendant with a prior conviction from one state will qualify as a career offender, but a defendant in the neighboring state who trafficked the same substance would not qualify as a career offender because the substance trafficked was not a controlled substance offense in that state or the same quantity received different treatment state-to-state. Though often times these substances are not the mainstream types of drugs involved in the drug trade, when relying on state law to determine a guideline provision, such as career offender, it does invite some disparity into the process. These concerns notwithstanding, when one looks at it from the perspective of the defendant and accepts that the core conduct involves the defendant knowingly selling an illicit substance, the various differences in the schedules or quantities becomes less important. Certainly, one jurisdiction may select a specific substance to criminalize for the betterment of their respective citizenry, but the defendant's choice to violate those rules is the central issue that should be focused upon. It then matters less whether one state criminalizes an

obscure substance when the neighboring state does not. The core of the offense is the knowing violation of prohibition on the sale or distribution of a specific substance.

When discussing this proposed amendment, POAG reviewed the Second Circuit's interpretation of the guidelines on this issue as it pertains to New York State's criminalization of the sale of Human Chorionic Gonadotropin (HCG), a drug that is not listed under the Controlled Substance Act. The circuit court found that HCG was not a "controlled substance" under the guideline definition. See *United States v. Townsend*, 897 F.3d 66 (2nd Cir. 2018). The Second Circuit also has a similar case dealing with naloxegol, which is substance that was removed from the federal controlled substances schedules promulgated under the Controlled Substances Act, but was a controlled substance as it pertains to New York's controlled substance schedule. See *United States v. Gibson*, 55 F.4th 153 (2nd Cir. 2022). These two examples from the second circuit highlight the disparity that can occur, which is a large factor for why POAG supports Option 2.

POAG discussed each option thoroughly before determining the majority ultimately favored Option 2, consistent with the majority of the circuits that have addressed this issue. This option provides clarity, but it does not substantively change the characterization of controlled substance offense that has been the long-standing definition prior to recent varied interpretation.

POAG is likewise in favor of the Commission amending USSG §2L1.2, comment. (n.2), to include the same definitions of "controlled substance" for the purposes of the "drug trafficking offense" definition, regardless of whether the Commission chooses Option 1 or 2. POAG believes it is important to have internal consistency within the guidelines.

Crime Legislation

Allow States and Victims to Fight Online Sex Trafficking Act of 2017

The Allow States and Victims to Fight Online Sex Trafficking Act of 2017 created two new criminal offenses codified at 18 U.S.C. § 2421A and 18 U.S.C. § 2421A(b), the second of which is an aggravated form of the first. It provides an enhanced statutory maximum penalty for anyone who commits the first offense and either "(1) promotes or facilitates the prostitution of 5 or more persons" or "(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of [18 U.S.C. §] 1591(a)." Section 1591(a) criminalizes sex trafficking of a minor or sex trafficking of anyone by force, threats of force, fraud, or coercion.

With regard to Part A of the proposed amendment, POAG is in favor of referencing 18 U.S.C. § 2421A to USSG §2G1.1 in instances where the offense of conviction involved an adult victim and to USSG §2G1.3 in instances where the offense of conviction involved a minor victim. Because this is a new statutory provision, POAG inquires how the charge will be formatted. For instance, will the charge involve one instance involving one victim per count or will the charge involve several instances involving multiple victims within one count. The applicable guideline may be unclear if the charge involves more than one victim and includes both minor and adult victims.

POAG notes that neither USSG §2G1.1 nor USSG §2G1.3 (subject to the pending miscellaneous amendment) are groupable offenses under USSG §3D1.2 and, therefore, are not subject to expanded relevant conduct. Regarding whether the Commission should make other changes to these guidelines, POAG believes examples that address relevant conduct would be helpful, as there is often confusion over the definition of "the offense involved" as it pertains to crimes that are

covered by these guidelines. For instance, it would be beneficial if the Commission could clarify if "the offense involved" is referring to the offense of conviction or relevant conduct, especially because it is POAG's understanding that "the offense involved" in relation to this guideline is limited to victims charged in the offense of conviction.

If the offense did not involve a minor, §2G1.1 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(2) would apply, and the defendant's base offense level would be level 14. POAG favors Part B of the proposed amendment that would amend §2G1.1(b)(1) so that the four-level increase in the defendant's offense level provided by that specific offense characteristic would also apply if subsection (a)(2) applies and "the offense of conviction is" 18 U.S.C. § 2421A(b)(2).

If the offense involved a minor, §2G1.3 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(4) would apply, and the defendant's base offense level would be level 24. POAG favors Part B of the proposed amendment that would amend §2G1.3(b)(4) to renumber the existing specific offense characteristic as §2G1.3(b)(4)(A) and to add a new §2G1.3(b)(4)(B), which provides for a four-level increase in the defendant's offense level if (i) subsection (a)(4) applies; and (ii) "the offense of conviction is" 18 U.S.C. § 2421A(b)(2).

Regarding the base offense level under each guideline, POAG believes the offense levels for these convictions should be the same as those already contained in USSG §2G1.1 and §2G1.3, given that certain aggravating factors will be captured, if applicable, by the existing cross reference set forth under subsection (c).

With respect to Part C of the proposed amendment, POAG suggests offenses charged under 18 U.S.C. § 2421A *not* be excluded from the definitions of "covered sex crime" and "sex offense" for purposes of USSG §4B1.5 and §5D1.2, due to the wide range of conduct these statutes could entail, some of which clearly fits these definitions, and the risk those who engage in sex trafficking pose to the public upon their release.

Career Offender

Part A: Listed Guideline Approach

POAG appreciates the Commission's efforts in providing an alternative method to the categorical approach and modified categorical approach. The categorical approach has created ever-increasing difficulties when determining whether an offense is a "crime of violence" or a "controlled substance offense." The application of the current §4B1.2 definitions has created considerable consternation as practitioners work to keep up with the changes in interpretation and the pending litigation. The various interpretations around the country also have resulted in significant disparity across the various circuits. Further, the fact that the issue is heavily litigated makes it more difficult for defendants to fully understand, at the time of their plea, the full impact their prior convictions will have on their final sentence until the sentencing hearing or subsequent appeal. Most importantly, the guideline definition no longer functions as it was originally designed.

POAG is in favor of eliminating the categorical approach by defining a "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an

offense. This is a comparable approach and within the spirit of POAG's August 2018 position paper in response to the proposed priorities to adjust the enumerated crimes clause to create a *per se* list of offenses for which a conviction is to be considered a "crime of violence." POAG further supports changes to the guidelines where the use of the terms "crime of violence" and "controlled substance offense" are present and define these terms by making specific reference to §4B1.2. By replacing the categorical, modified categorical, and enumerated clauses, the career offender guideline becomes more simplified and less likely to produce illogical outcomes. Under the current guidelines, in Florida, if a defendant had previously run towards a law enforcement officer, kicking, punching, and chocking that officer, their conduct may have resulted in a conviction for Battery on a Law Enforcement Officer, under F.S. §784.07(2)(b). However, the conviction for Battery on a Law Enforcement Officer has as an element, "touch or strike." Because of that *de minimus* component of "touch," the categorical approach would result in that conviction not being considered a "crime of violence" under the definition at USSG §4B1.2. See *United States v. Williams*, 609 F.3d 1168 (11th Cir. 2010), referencing *United States v. Johnson*, 599 U.S. 133 (2010). In the alternative, if that same defendant had instead shoved the law enforcement officer away from them as they fled from the officer, their conduct may have resulted in a conviction for Resisting Arrest with Violence, under F.S. §843.01. Under the categorical approach, that conviction is always a "crime of violence" because there is not a *de minimus* component to that statute. See *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012). While the conduct in both could be argued to be violent, it would be unreasonable to argue that the defendant who runs towards the law enforcement officer to do him or her violence is somehow less violent than the defendant who pushes away from the same officer to escape a physical confrontation. This example can be further compounded when a defendant has been charged with Battery on a Law Enforcement officer, but is allowed to plea to an alternative offense of Resisting Arrest with Violence. While that may have been an advantageous choice at the state level, the defendant has now pleaded himself into a predicate conviction when standing before a federal judge. The federal system is riddled with these types of illogical results. One may be hard pressed to find a jurisdiction in which the current categorical/modified categorical approach does not produce similar results in some facete or corner of the law. POAG has yet to see a proposed amendment that could address these types of results until now. Under the proposed amendment, these offenses would both likely qualify as predicates because the probation officer, parties, and court would have the ability to look at the conduct in a limited way and because the offense is being compared to a class of offenses as described by the enumerated guidelines.

Under the proposed amendment to remove the categorical and enumerated clauses, probation officers, the parties, and the Court would no longer have to make divisibility determinations based on the elements and means. Additionally, because the federal guideline approach allows for use of the *Shepard* documents to consider the type of conduct involved in the offense, the new approach will allow Judges to more adequately determine whether a defendant's criminal conduct was a "crime of violence" or was a "controlled substance offense." One of the components of the jurisprudence surrounding the categorical and modified categorical approach that has created a lot of disparity and problems has been that the methodology requires the judiciary to close an eye to the conduct involved and focus solely on the conduct as described by the statute. The proposed amendment returns conduct into the consideration, allowing the judiciary a less restricted view of the predicates being considered. With that additional observational ability, POAG anticipates that there will be less disparity in outcome and less risk that the method produces an illogical result.

While POAG is in favor of the Commission's approach in redefining "crime of violence" and "controlled substance offense" based upon a list of federal guidelines, POAG does have some concerns about the execution of this new approach, and respectfully requests that the Commission consider refining/removing some of these listed guidelines, adding commentary to instruct the reader to refer to the specific federal guideline during the assessment process, and/or adding a possible departure provision. We believe that some may look to certain listed guidelines and revert to using generic definitions when analyzing certain offenses. Therefore, POAG recommends that further assessment should be conducted as to whether some of the listed offenses should be included, and/or an application note should be added to clarify that, upon determining whether an offense meets the definition of a "crime of violence" and "controlled substance offense," one must refer to the specific federal guideline to determine if the offense meets the definition in the guideline. POAG also discussed the possibility of a departure being considered to address any extraordinary cases.

POAG also supports the change in the guidelines to insert the sources expressly approved in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) in determining whether a conviction is a "crime of violence" or a "controlled substance offense." We believe that the listed sources in the proposed amendments should remain as-is, and no other changes are needed in this area.

POAG is in favor of the Commission also amending the Commentary in §2L1.2 to mirror the proposed approach for §4B1.2, for added consistency and ease of applicability.

In conclusion, POAG discussed that the process of determining a predicate offense largely functioned as designed until the *Descamps* divisibility analysis became incorporated into the guideline process in 2013 and the *Mathis* means and elements analysis became incorporated into the guideline analysis in 2016. The amendment to USSG §4B1.1, comment. (n.2), resolves the *Descamps* and *Mathis* inspired issues in relation to guideline application by allowing *Shepard* documents to be reviewed without statutory prerequisites, thereby removing the categorical and modified categorical approach from the analysis. Further, the amendments discussed below resolve issues with inchoate offenses, robbery, and "controlled substance offenses," including the involvement of an offer to sell. The listed offense approach is an entirely new process, rather than an amendment to the existing process. Therefore, *ex post facto* issues will need to be considered for a period of time. If the listed offense process functions as designed, the arbitrary results produced by the categorical approach will finally be replaced by a workable solution. If the listed offense process does not function as designed, it could overwhelm the system for a period of time with application issues and ensuing litigation for the foreseeable future, pending the development of a new body of case law. As such, POAG discussed whether the listed offenses approach should be delayed to see if the other amendments set forth in this section resolve the ongoing issues and allow for further vetting of the listed guidelines process prior to implementation. However, after analyzing the potential benefits and consequences, POAG still overwhelmingly favors the listed offense approach and looks forward to the possibilities this new approach brings and the concerns it resolves.

Part B: Meaning of Robbery

As previously discussed, POAG is in favor of the Commission adopting the listed guidelines approach to potentially eliminate the categorical approach from the guidelines. However, in the

alternative, POAG is in favor of the proposed amendment relating to the meaning of Robbery. First, the proposed amendment would move the clarifying definitions of certain enumerated offenses and the phrase "prior felony conviction" from the commentary to a new subsection in USSG §4B1.2. POAG believes the proposed amendment would reduce potential issues where courts have found that the commentary is not authoritative because it is inconsistent with the plain text of the guideline itself. See *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459 (3rd Cir. 2021) (en banc); *United States v. Hovis*, 927 F.3d 382 (6th Cir. 2019) (en banc); and *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018).

Second, the proposed amendment would provide a definition of Robbery for purposes of USSG §4B1.2 and §2L1.2 that mirrors the Hobbs Act definition of Robbery at 18 U.S.C. § 1951(b)(1). POAG believes the proposed definition as listed is appropriate. Some circuits have held that Hobbs Act Robbery is overly broad and no longer constitutes a "crime of violence" under USSG §4B1.2 because there is no categorical match between Hobbs Act Robbery and the enumerated offense of Robbery. See *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); and *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017). POAG believes that defining Robbery using the Hobbs Act Robbery definition would eliminate any confusion over whether the offense qualifies as a "crime of violence."

With regard to the issues for comment, POAG is in favor of the Commission defining the phrase "actual or threatened force" for purposes of the proposed "Robbery" definition based on the Supreme Court's holding in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019).

Part C: Inchoate Offenses

As previously discussed, POAG is in favor of the Commission adopting the listed guidelines approach to potentially eliminate the categorical approach from the guidelines. However, in the alternative, POAG is in favor of the proposed amendments to USSG §4B1.2 relating to inchoate offenses and offenses arising from accomplice liability. Of the two options presented, POAG unanimously agreed that Option 1 is more favorable with modification.

Option 1 provides a simpler approach that eliminates (1) any question as to whether inchoate offenses qualify as a "crime of violence" or a "controlled substance offense," and (2) the need for the two-step analysis which some courts have employed to determine whether inchoate offenses qualify under the career offender guideline as a "crime of violence" or a "controlled substance offense." POAG believes that a two-step analysis is time-consuming, complicated, and unnecessary. When applying Option 1, courts will only need to look to the underlying substantive offense to determine whether that offense qualifies as a "crime of violence" or a "controlled substance offense." POAG further believes that any inchoate conspiracy crime should receive consideration regardless of whether overt acts occurred or what overt act is required by the state law or statute in question. Therefore, POAG would suggest the first bracketed language as noted in Option 2 be included with Option 1.

POAG believes that Option 1 with the above-noted modification will promote consistency in application of the guideline, address the Commission's original intent (as currently noted in §4B1.2,

comment. (n.1)) that "crime of violence" and "controlled substance offense" should include inchoate offenses and resolve circuit splits and state-to-state disparities. The proposed amendment would address issues in some circuits where it has been held that inchoate offenses are not included in the definition of a "controlled substance offense" because the commentary is inconsistent with the plain text of the guideline itself and is, therefore, not authoritative. See *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459 (3rd Cir. 2021) (en banc); *United States v. Hovis*, 927 F.3d 382 (6th Cir. 2019) (en banc); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018); and *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc). However, other circuits have held that an inchoate crime does qualify as a "controlled substance offense" under USSG §4B1.2(b), thus finding that the commentary is authoritative. See *United States v. Smith*, 989 F.3d 575, 583-85 (7th Cir. 2021); *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020); *United States v. Richardson*, 958 F.3d 151 (2nd Cir. 2020); *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019); and *United States v. Lange*, 862 F.3d 1290 (11th Cir. 2017).

The complications presently involved in analyzing inchoate offenses are illustrated well in the Fourth Circuit, where, in *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018), the Court determined that generic conspiracy for purposes of the §4B1.2 analysis requires an overt act. As a result of *McCollum*, probation officers must first research the specific state conspiracy offense at issue to determine if an overt act is necessary to prove the conspiracy offense under state law, and then must determine whether the substantive offense underlying the particular conspiracy meets the definition of a "crime of violence" or "controlled substance offense."

Furthermore, some states require an overt act to be proven as an element of a conspiracy offense while others do not. For example, states such as Virginia and North Carolina that follow common law do not require an overt act. See *State v. Gibbs*, 436 S.E.2d 321 (N.C. 1993). However, states such as Tennessee and Nebraska require an overt act as an element of the conspiracy offense. See *United States v. Pascacio-Rodriguez*, 749 F.3d 353 (5th Cir. 2014). Based on the *McCollum* analysis, a conspiracy offense from a state requiring an overt act would qualify as a predicate "crime of violence" or a "controlled substance offense," while a conspiracy offense from a state not requiring an overt act would not qualify as a predicate "crime of violence" or a "controlled substance offense." Notably, in *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019), the Fourth Circuit extended the *McCollum* generic conspiracy/overt act holding to a federal drug conspiracy under 21 U.S.C. § 846. The Tenth Circuit has also held that a federal drug conspiracy does not qualify as a "controlled substance offense" under USSG §4B1.2 because an overt act is not necessary to prove the offense. See *United States v. Crooks*, 997 F.3d 1273 (10th Cir. 2021) and *United States v. Martinez-Cruz*, 836 F.3d 1305 (10th Cir. 2016). As a result, at least in the Fourth and Tenth Circuits, a federal controlled substance conspiracy offense no longer qualifies as a "controlled substance offense" under USSG §4B1.2. This line of cases has resulted in confusion, disparate application, and disparate sentencing, all which would be ameliorated by the proposed amendment.

Part D: Definition of "Controlled Substance Offense"

As previously discussed, POAG is in favor of the Commission adopting the listed guidelines approach to potentially eliminate the categorical approach from the guidelines. However, in the alternative, POAG favors the proposed amendment that would amend the definition of "controlled substance offense" at USSG §4B1.2(b) to include offenses involving an "offer to sell" a controlled

substance and offenses described in 46 U.S.C. §§ 70503(a) or 70506(b). The proposed amendment would eliminate any questions as to whether the offenses qualify as a "controlled substance offense." Regarding the "offer to sell" offense, the current definition precludes state statutes containing the broader language from qualifying as a predicate offense under the career offender guideline. For example, the Fifth Circuit held that a Texas conviction for Possession with Intent to Deliver a Controlled Substance, under Texas Controlled Substance Act §§ 481.002(8) and 481.112 *et seq.*, does not qualify as a "controlled substance offense" because the Texas drug statute includes an "offer to sell" as an alternate means of committing the offense. See *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017). The current definition does not capture a vast number of defendants because of these jurisdictional differences, despite them being engage in similar conduct. POAG believes adding this language would correct the current disparities among repeat drug traffickers.

Apart from the "offer to sell" issue identified by the Commission, POAG believes there are likely numerous state statutes that prohibit additional drug-related activities similar in kind to those types of activities already included in the guideline definition of a "controlled substance offense." One such example is the "transport" of a controlled substance, as prohibited in North Carolina G.S. 90-95(h).

Further, POAG recommends the Commission revise the definition of "controlled substance offense" at USSG §2L1.2 to conform to the revised definition suggested in USSG §4B1.2(b), in order to provide consistency within the guidelines.

Criminal History

Part A: Status Points Under USSG §4A1.1

POAG did not reach a consensus with respect to Part A of the proposed amendment pertaining to "status" points provided in subsection (d) of §4A1.1 (Criminal History Category). A slight plurality of POAG supported Option 3, eliminating "status" points, based on the statistics related to the risk of recidivism, including from a recent study completed by the Commission (Revisiting Status Points, June 2022), which found that "status" points only minimally improve the criminal history score's prediction of re-arrest – by .2 percent. Those supporting elimination of "status" points also cited the fact that the underlying conviction for which the defendant was under a criminal justice sentence would score criminal history points under USSG §4A1.1(a) through (c). In the event that a criminal justice sentence was revoked prior to sentencing for the instant federal offense, the term imposed upon revocation would also contribute to the number of points assessed under USSG §4A1.1(a) through (c). Further, there are instances where the criminal justice sentence is revoked and the sentence imposed exceeded 13 months. In those instances, defendants receive three criminal history points under USSG §4A1.1(a) for the underlying offense, as well as two criminal history points for being under a criminal justice sentence under USSG §4A1.1(d), for a total of five criminal history points and a Criminal History Category of III based upon just one conviction.

Those in favor of Option 3 also noted that this option functioned to streamline the guidelines where possible and reasonable. They articulated that, in some jurisdictions, determining whether someone is, in fact "under a criminal justice sentence" proves challenging, based on the variety of sentences that must be considered (e.g., deferred adjudication, conditional discharge, a prison sentence that has

been stayed, unsupervised probation).

The POAG members that were in favor of Option 1 or Option 2 shared a common concern that, while recidivism considerations are important, that is not the only reason for "status" based increases to criminal history. POAG observed that, if a defendant committed the instant offense while under a criminal justice sentence, judges consider the defendant's actions in terms of seriousness of the offense and as a metric for that defendant's respect for the law. The inclusion of "status" points or a "status" point creates some structure of inclusion of these considerations within the guidelines rather than leaving it to a within guideline range consideration, departure, or variance.

As noted, a significant contingency of POAG supported Option 2, which would reduce, but not eliminate, "status" points, recognizing the minimal impact on prediction of re-arrest, but also noting that, of the offenders who received "status" points over the last five years, 61.5 percent had a higher Criminal History Category as a result of those points. The POAG members who supported Option 2 did not think that the "status" points need to have as much weight as they currently have in order to appropriately reflect the other sentencing factors.

Another contingency supported Option 1, which would leave USSG §4A1.1(d) as written but add a downward departure provision in Application Note 4 of the Commentary to §4A1.1 for cases in which "status" points are applied. This contingency expressed that the current structure is working well to effectively capture the seriousness of the offense and the need to promote respect for the law.

Also, with respect to Options 1, while POAG supported adding departure language in the commentary, POAG did agree that the addition was likely unnecessary, as existing language in USSG §4A1.3 provides an applicable departure structure for criminal history overrepresentations.
With respect to the additional issues for comment, POAG did not support predicating the elimination or reduction of "status" points on the nature of the underlying prior offense, noting the significant difficulties presented with trying to compare and reconcile a myriad of state offenses, difficulties the system has already encountered in defining what offenses amount to "crimes of violence." Similarly, given the varied nature of state court dispositions, it would be challenging to delineate points based on what type of "criminal justice sentence" a defendant is under. Additionally, the type of "criminal justice sentence" the defendant is under does not really diminish the concerns of seriousness of an offense committed while under a judicial sentence or the lack of respect for the law associated with such conduct.

Part B: Zero Point Offenders

While the idea of conferring a benefit to those offenders who pose the lowest risk of recidivism was generally agreed upon, POAG was unable to reach a consensus with respect to this determination given the complexity of this two-pronged amendment, application concerns, the need to simplify guideline applications, and the potential disparate benefit of this reduction to a narrow class of offenders.
This proposed amendment requires a two-step analysis before eligibility for the one or two-point reduction could be accurately assessed. For example, if Option 1 was adopted, the first step would be to compute the criminal history to determine if the defendant had zero criminal history points, the scoring of which are determined first by the timeframe and the parameters of relevant conduct. If

that criterion was met, the second step would be to determine if the offense of conviction and applicable guideline computations meet the stated criteria. Essentially, it operates to first seek to define "zero-point offender" and then narrow that pool of eligible defendants.

POAG did discuss the fact that either Option 1 or Option 2 would tie one's criminal history to the offense level calculation in such a way as to make determination of one's offense level reliant upon calculation of criminal history in every case, whereas the current structure only has reliance like that on limited circumstance such as drug, firearm, and immigration cases. Practically speaking, it would mean that neither part of the presentence investigation report could be completed independently of the other, making the process of preparing and revising the presentence reports more complicated. Further, because this proposed amendment intertwines Chapters Two, Three, and Four, a court finding in one area at the time of sentencing will impact "zero-point offender" eligibility.

One concern raised by POAG about either of the proposed options was that offenders who fall into these categories may have numerous pending charges, which might suggest that they are, in fact, at higher risk of recidivism than reflected by their criminal history score or lack of prior convictions, and that those offenders may not be the type of offender contemplated by the amendment. Another complication discussed was whether litigation would ensue regarding various types of juvenile adjudications and if they would be considered "convictions."

Of further significant concern was that, for certain types of serious offenses, such as certain sex offenses and significant financial schemes, lack of prior criminal history may not merit "zero-point offender" consideration given that their status gave them access or ability to commit the instant federal offense. Further, if USSG §4C1.1(b)(4) related to victims suffering substantial financial hardship was intended to limit eligibility for defendants who commits financial schemes for that reason, its limited function would not be significant as serious financial crimes are committed in instances where the financial hardship criterion is not applied. It actually measures the impact on the victim or victims rather than the severity of the offense. As another example, the Commission is looking to amend the guidelines in relation to the new legislation set forth under 18 U.S.C. § 2243(c) for Sexual Abuse of an Individual in Federal Custody, and POAG noted that the vast majority of the defendant's committing those offenses will have had no prior convictions based on the background checks required to obtain those position3s, though those individuals could potentially receive a benefit from this structure of guideline reduction (unless this conviction is ultimately included as a covered sex crime and that option also included in the §4C1.1 criteria). Sex offenses and financial schemes also ordinarily have identifiable victims. This amendment primarily focuses on recidivism, but the sentencing options of deterrence, retribution, and rehabilitation are also relevant considerations.

Alternatively, POAG was unanimously in favor of expanding Zone A (or merging Zones A and B) to provide alternatives to incarceration/non-custodial guideline sentences for more low-risk offenders, rather than creating a new guideline structure for "zero-point offenders." Further, POAG notes that the Commission is seeking comment on Alternatives to Incarceration Programs. POAG believes alternatives to incarceration could potentially be the vehicle used to address the types of offenders the "zero-point offender" amendment is intending to capture without the numerous application issues and litigation concerns.

Nonetheless, in the event this proposed amendment is adopted, the majority of POAG preferred Option 1, with one suggested expansion of the criteria. Most of POAG believed that an offender who has no convictions, aside from convictions for very minor offenses (those that do not receive criminal history points, under USSG §4A1.2(c)), should be deemed a "zero-point offender." With respect to an expanded Option 1, it was noted that the consequences for certain minor offenses, including Driving with a Suspended License, vary greatly by state and can involve either criminal or civil punishments. As such, under Option 1, a defendant's punishment for these minor offenses in some jurisdictions may result in a "conviction," such that the defendant would be precluded from the adjustment. This is an outcome that POAG thought should be avoided. POAG observes that the guidelines already have a mechanism under USSG §4A1.2(c) for identifying these minor infractions or misdemeanors, and the reference to that section provides an easy path to excluding them from "conviction" consideration. POAG also recognized that defendants of lower socioeconomic status and/or minority populations are often subject to more police presence in their neighborhoods, which increases the likelihood of sustaining convictions for minor offenses and resulting in them being precluded from the adjustment.

POAG also observed that many of the criteria involved in the proposed USSG §4C1.1, specifically, reduced criminal history, no firearm or violence, and no aggravating role, are similar to those involved in guideline safety valve considerations. For those cases that benefit from guideline safety valve, they could further benefit from this reduction for much of the same criteria.

With respect to Option 1, POAG members did believe that the proposed USSG §4C1.1(a)(2)-(6) should be tied to other guideline determinations where possible. For instance, for USSG §4C1.1(a)(4), replace "the defendant's acts or omissions did not result in substantial financial hardship…" with "the defendant did not receive an adjustment under USSG §2B1.1(b)(2)(A)(iii), (b)(2)(B), or (b)(2)(C)."

Along those same lines, POAG recommends the reference to USSG §4C1.1(a)(5) regarding "the defendant was not an organizer, leader, manager..." be replaced with "the defendant did not receive an aggravating role adjustment under USSG §3B1.1." This would result in less duplication throughout the presentence investigation report, in terms of justification and analysis.

POAG was not in favor of Option 2, which would make the adjustment applicable to all offenders who had no countable convictions, noting that many such persons may have lengthy criminal records and/or may have had serious prior offenses that are simply "stale," distinguishing them from the archetypal "first offender."

Also, with respect to Options 1 and 2, POAG supported adding departure language in the commentary and recommends that the addition should be made with the language "may be appropriate."

With respect to additional issues for comment, POAG was reluctant to support any amendment that would require analysis of what amounts to "not an otherwise serious offense," given the significant challenges the system has faced with the similar analysis of what makes an offense a "crime of violence."

Part C: Impact of Simple Possession of Marihuana Offenses

POAG does not believe guidance is necessary for determining whether a downward departure is appropriate for defendants who receive criminal history points for simple marijuana possession offenses. POAG noted that the possession of marijuana has not been legalized federally and that state laws pertaining to marijuana vary greatly and are continually evolving, such that these measures may create greater sentencing disparities. Additionally, judges can already accomplish this through a departure under USSG §4A1.3. Therefore, POAG does not recommend the adoption of the proposed amendment or the adoption of alternative language on this issue.

Acquitted Conduct

POAG is unanimously opposed to the adoption of the proposed amendment to create an acquitted conduct exception to relevant conduct. While POAG is incredibly empathetic to the concerns of the various interested parties and stakeholders about the appearance of unfairness in considering acquitted conduct, POAG's position on this issue may best be described as emanating from an abiding trust in the judiciaries' ability to balance the evidentiary issues presented. Acquitted conduct has a special distinction, when compared to other types of relevant conduct, of having already met a preponderance of the evidence threshold when the charge was filed. During the sentencing process, Judges, who have been present and attentive throughout the trial, are in the best position to ascribe the appropriate weight of the evidence of the defendant's conduct. The Court *may* rely on acquitted conduct, *if* the Court finds that the government has proven such conduct based upon a preponderance of the evidence. POAG advocates that the Commission continue to entrust Judges with the discretion they retain regarding all other sentencing matters and will act appropriately with the information available, which is subject to appellate review.

Much as a Judge must, POAG believes it is important to distinguish the process of conviction from the process of sentencing. The very first explanatory commentary under USSG §1B1.3 provides that the principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. It further directs that, under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator. This distinction is the core issue – acquitted conduct pertains to statutory considerations, while sentencing liability pertains to information that can be used to determine the advisory guideline imprisonment range within the statutory limits for the offense of conviction. This dichotomy is already a criminal justice mental structure that sentencing Judges are familiar with and operate within.

POAG believes precluding the use of acquitted conduct would present ongoing and significant application issues that would need further consideration before such an amendment could be adopted. POAG's concerns about adoption of the proposed amendment are based on issues of workability, the impact on victims, concerns of unintentionally incentivizing defendants to go to trial, and the likelihood exclusions of acquitted conduct will lead to further exclusions from relevant conduct consideration.

In considering this amendment, POAG discussed likely hypothetical cases that created difficulty with "overlapping" conduct. One such example was if a defendant, in a multiple count Indictment, was found guilty of a Conspiracy to Distribute a Controlled Substance charge but acquitted of the substantive Distribution of a Controlled Substance charges. How would the overlapping conduct be tabulated and what further rules would be available to resolve the inquiry? An additional likely hypothetical case involved an Indictment with multiple defendants in which one of them pleads guilty to various shared counts, but another defendant takes the same conduct to trial and is acquitted of some of the shared counts. POAG was unclear as to how a probation officer or Court could go about fairly assessing the culpability of the two defendants, who were involved in the intertwined illicit conduct, but for whom one of the guidelines explicitly directs that some conduct is not to be considered. With this proposed amendment, if Defendant A is acquitted of a certain count, the conduct underlying that count could not be used to determine Defendant A's advisory guideline imprisonment range, but could Defendant A's acquitted conduct be used to determine the advisory guideline imprisonment range for Defendant B under USSG §1B1.3(a)(1)(B) because it was within the scope of their jointly undertaken criminal activity?

The effect of this proposed guideline may also have further consequences. If a defendant, convicted of a qualifying sex offense, has been previously charged by the state with sexual abuse of a minor in an unrelated case, but the case resulted in acquittal, that prior conduct would no longer be considered as a predicate under USSG §4B1.5(b). As such, a defendant, who would otherwise be deemed a repeat and dangerous sex offender, would not be. Had such conduct never been charged or been charged and then dismissed, the defendant would be considered a repeat and dangerous sex offender. This outcome under this proposed amendment is not reflective of the previous harm the defendant caused or the specific risk of the defendant's recidivism and the inherent risk that represents to the community.

POAG's concerns mounted during our consideration of the impact this amendment could have on victims. Victim considerations are often at the heart of criminal justice initiatives and efforts at creating a fair result. Here is another likely hypothetical situation: A defendant who unlawfully possessed a firearm that he used to murder a victim. The defendant was charged in state court with the murder and acquitted. Law enforcement later furthered their investigation, gathered additional evidence, and obtained additional witness testimony. The defendant was then charged in federal court with unlawfully possessing a firearm. However, after hearing evidence and testimony at a contested sentencing hearing, the Court makes a finding based upon a preponderance of the evidence that the defendant had committed the murder and applied the cross reference under USSG §2K2.1(c) to USSG §2A1.1 (First Degree Murder), resulting in a guideline range at the statutory maximum for the firearms offense of 180-months. In this hypothetical, the recommended guideline sentence would be more reflective of the sentencing factors, such as the seriousness of the offense and the need to protect the public from further criminal conduct by the defendant. The adversarial process would remain intact, allowing the defendant due process, and the government attorney, who was not involved with the state case, an opportunity to present evidence of the aggravating circumstances of the instant federal offense. Additionally, the victim's family could get a sense of justice for the harm their family suffered as a result of the murder of their loved one.

There are other less extreme hypotheticals, one involves a defendant who may be held accountable for Conspiracy to Commit Wire Fraud, but they are acquitted of several substantive counts that involve some of the transactions with some of the victims. It seems equally unfair to tell a victim of an offense that the impact of the offense, as to them, will have no consideration or reduced

consideration at sentencing because of an acquittal, when had that conduct not been included in the charging instrument in the first place, it would have garnered full consideration as relevant conduct under the guidelines by the Judge at sentencing. As such, POAG observed that the proposed amendment could impact defendants' decisions to go to trial and prosecutorial decisions would necessarily shift to address this approach.

POAG is also concerned that this proposed amendment will lead to further areas where conduct is removed from relevant conduct consideration. The public comment provided to the Commission largely advocated for abolishing the practice of allowing the Court to consider whether acquitted conduct qualifies as relevant conduct. Some of the letters submitted for public comment were written by federal inmates who have already raised the issue that this amendment should be extended to relevant conduct, uncharged conduct, and dismissed conduct. To them, acquitted conduct and the principle of relevant conduct are a distinction without a difference. In fact, one very astute inmate made the relevant point that, when it comes to uncharged conduct being used as relevant conduct, defendants do not even have the opportunity to ask for a jury trial because the charge was never filed. Yet, uncharged conduct is used to determine relevant conduct. Another inmate pointed out that the drug quantity he was held accountable for under relevant conduct, which significantly increased his sentence, was "worse that [sic] acquitted conduct because acquitted conduct has at least been presented to a grand jury and or charged." POAG concurs and notes that acquitted conduct has actually been subject to a higher level of scrutiny than other types of relevant conduct, yet these types of conduct are used to determine the guideline range. POAG recognizes the narrow nature of this proposed amendment is geared specifically toward acquitted conduct, but there are already arguments that, if acquitted conduct should not be used, it is arguably just as valid to not rely on uncharged conduct and dismissed conduct. Once this first step is taken, the logic of the next steps becomes hard to advocate against. Making an exception for acquitted conduct has broad implications and cannot be considered without also analyzing the entire process and information used to determine the advisory guideline imprisonment range.

As previously noted, Judges are in a central position to hear and observe evidence on acquitted conduct and ascribe the appropriate weight to give that evidence when fashioning a sentence. The guidelines already empower them to do so, thus POAG does not recommend the adoption of the amendment. However, should the Commission adopt this proposed amendment, POAG believes additional application instructions are essential given the manner in which such an amendment alters the long-standing foundational concept of relevant conduct. For instance, the new provision would define "acquitted conduct" as conduct underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction. POAG envisions the argument that this provision should be extended to situations in which a charge has been dismissed due to insufficient evidence, contending that such a dismissal is the functional equivalent of an acquittal. Court records vary in their amount of detail, so if this argument prevails, it will only benefit cases where defendants are fortunate enough to have been charged in a jurisdiction that customarily provides sufficient detail within the court record. Further, if such was the underlying intent of this amendment and that argument prevails, in each case where a state charge has been dismissed, it would necessitate the actual court records be obtained in every case to determine if the basis for the dismissal was insufficient evidence. POAG would note that relevant conduct regularly involves conduct underlying a dismissed state charge.

One of the other issues for comment related to this proposed amendment was whether the Commission should account for acquittals for reasons such as jurisdiction, venue, or statute of limitations, that are otherwise unrelated to the substantive evidence. POAG notes there could be other reasons for acquittal and inquired if any additional investigation into the offense after the acquittal would be permitted for the court's consideration. Therefore, POAG believes additional scenarios, like the many other illustrative examples included in USSG §1B1.3, would be instrumental in determining relevant conduct in instances where acquitted conduct was an issue, including if acquitted conduct can be used as reasonably foreseeable relevant conduct for another defendant in a multi-defendant case. Especially because, to date, as required under USSG §1B1.3, relevant conduct relies on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained. POAG would also seek examples dealing with convictions under 18 U.S.C. § 924(c), wherein a defendant is convicted of a drug offense under Title 21, but the defendant is acquitted of the count charging a violation of 18 U.S.C. § 924(c) for possessing a firearm in connection with a federal drug trafficking offense. Would an acquittal in this instance suggest that the defendant did not possess a firearm, or would the acquittal suggest that the firearm was present but not possessed in furtherance of the drug trafficking offense, or does the acquittal disavow each and every element from relevant conduct consideration? Consequently, this issue, as well as several other issues raised within this testimony, have already been thoroughly addressed by the Supreme Court in *United States v. Watts*, 519 U.S. 148 (1997). However, if the amendment to use acquitted conduct is adopted, POAG recommends the Commission address these types of acquittals as well, so as to relieve the application difficulties placed upon the probation office to sort this issue out before they could commence preparing the presentence report.

In closing, POAG would note that the synopsis of this proposed amendment provides that, in fiscal year 2021, 157 offenders (0.3% of all offenders) were acquitted of at least one offense. POAG observes that this statistic pertains to only federal offenses involving both convicted and acquitted counts, but it does not include circumstances where an acquitted state offense qualifies as relevant conduct for a federal offense. Therefore, this issue is more prevalent than this statistic suggests, but it is still rather rare to rely on acquitted conduct at the time of sentencing. Presently, both types of acquitted conduct may be used to determine the advisory guideline imprisonment range, such as application of a specific offense characteristic. However, with this amendment, acquitted conduct remains a factor at sentencing under USSG §1B1.4 in determining the sentence to impose within the guideline range or whether a departure from the guidelines is warranted, neither of which are subject to the same level of application criteria and appellate review that is present when applying a specific offense characteristic. With this proposed amendment, the use of acquitted conduct wouldn't impact the determination of the advisory guideline imprisonment range, but it would remain a factor in determining the final sentence. As such, POAG respectfully suggests that any such amendment to this process would function more as a symbolic gesture than a substantive change.

Sexual Abuse Offenses

Part A: Violence Against Women Act Reauthorization Act of 2022

POAG acknowledges the complexity involved in determining which guideline will best capture the conduct that new legislation is intended to address and fully account for the varied ways in

which such an offense could be committed. Regarding Part A of this proposed amendment, POAG concurs with the proposed amendment to refer convictions under the newly enacted statute at 18 U.S.C. § 250 to USSG §2H1.1, particularly because the manner in which the base offense level underlying that guideline is structured. Specifically, under USSG §2H1.1, the base offense level provides an option to apply the offense level from the offense guideline applicable to any underlying offense. POAG notes that USSG §2H1.1 is specifically excluded from the grouping provisions under USSG §3D1.2 and is not subject to the expanded relevant conduct provisions pursuant to USSG §1B1.3(a)(2), which simplifies the determination of the applicable underlying offense to the conduct associated with the count of conviction. The penalty provisions under 18 U.S.C. § 250(b)(1) refer to conduct defined in 18 U.S.C. §§ 2241 and 2242, each of which correspond to USSG §2A3.1. The penalty provisions under 18 U.S.C. §§ 250(b)(2), (b)(4), (b)(5), and (b)(6) refer to conduct defined in 18 U.S.C. § 2244, each of which correspond to USSG §2A3.4. Application of either USSG §2A3.1 or USSG §2A3.4 provides specific offense characteristics that accomplish the goal of capturing the varied offense conduct pertaining to violations of 18 U.S.C. § 250.

However, the penalty provision under 18 U.S.C. § 250(b)(3) refers to conduct in which the offense involves a sexual act, as defined in 18 U.S.C. § 2246, without the other person's permission and does not amount to sexual abuse or aggravated sexual abuse. A violation of 18 U.S.C. § 250(b)(3) is distinct from the other penalty provisions of that statute because it does not allege a specific underlying statutory offense given that 18 U.S.C. § 2246 is a definitions statute. As such, POAG believes that determining the applicable guideline for this penalty provision may not be as straight forward as it seems. POAG believes the underlying offense applicable to this subsection most closely aligns with conduct addressed under USSG §2A3.4. Therefore, POAG recommends commentary to include the applicable guideline when the penalty provision under 18 U.S.C. § 250(b)(3) applies. With this suggested commentary, when there is a conviction under 18 U.S.C. § 250, either USSG §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) or USSG §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) will, therefore, apply. POAG believes the structure of the base offense level under USSG §2H1.1 allows the application of the guideline that is commensurate with the underlying offense. The flexibility of this approach is essential when the applicable statute criminalizes such a wide variety of conduct with a broad range of statutory penalties.

Part B: Sexual Abuse Offenses Committed by Law Enforcement and Correctional Personnel

With regard to the newly enacted statutory penalty under 18 U.S.C. § 2243(c), which involves incidents in which a federal law enforcement officer knowingly engages in a sexual act with an individual under arrest, under supervision, in detention, or in Federal custody, POAG concurs that the applicable guideline for this offense should be USSG §2A3.3. POAG bases this recommendation on the fact that the offense conduct is comparable to the statutory provisions of 18 U.S.C. § 2243(b), which also references to USSG §2A3.3.

As currently written, USSG §2A3.3 results in a guideline range that would recommend a sentence of a few years of incarceration. This is in part because those who commit these types of offenses would need to have relatively minimal criminal histories in order to be hired into the positions that allowed them to commit the offense. POAG observed that a sentence of a few years did not

adequately capture the seriousness of a sex offense that carries a statutory maximum penalty of 15 years imprisonment. Therefore, POAG believes amending the base offense level is necessary to account for the types of harm associated with these offenses. In cases where the conviction is under 18 U.S.C. § 2243(a) and involves a minor, the applicable guideline is USSG §2A3.2, which has a base offense level of 18 and a potential four-level increase pursuant to USSG §2A3.2(b)(1) if the victim was in the custody of the defendant. In cases where the conviction is under 18 U.S.C. § 2243(b) and the victim is an inmate or ward, the applicable guideline is USSG §2A3.3, which is also the recommended guideline for a violation of 18 U.S.C. § 2243(c). Presently, the base offense level under USSG §2A3.3 is 14. Ordinarily, punishments associated with child victims carry a higher penalty. These victims are vulnerable due to their age and the harms at such a developmental stage in their life have an ongoing ripple effect. However, POAG does not seek to distinguish the comparable severity of sexual acts with victims who are in custody, as they are similarly vulnerable given their custody status and the correctional officials assume a significant position of authority in relation to the inmate. The power differentials are similar and there is a comparable harm in the erosion of public faith in the justice system. Therefore, the majority of POAG recommends that a base offense level of 18 under USSG §2A3.3 be adopted, which is comparable to the base offense level under USSG §2A3.2, with the understanding that relevant conduct will then account for any applicable mitigating or aggravating factors, depending on the facts and circumstances of the case.

The Commission solicited feedback on how to account for aggravating factors and whether the Commission should add specific offense characteristics to address aggravating factors. During POAG's discussion of this topic, we expressed concern about whether restraints were used, whether the victim was transported outside of the facility in which they were being housed, whether threats or coercive statements were made or a weapon used, and whether any degree of injury or pregnancy resulted. Some or all of these aggravating factors could be address by way of the cross reference and the applicable specific characteristics. POAG also discussed if Chapter Three enhancements would apply, including Vulnerable Victim under USSG §3A1.1, Restraint of Victim under USSG §3A1.3, and Abuse of Position of Trust under USSG §3B1.3, depending on the facts and circumstances of each case.

POAG also concurs that providing an option for a cross reference to USSG §2A3.1 if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, including aggravating circumstances in which 18 U.S.C. § 2241(a) or (b) applies, whether the victim was in custody, and it also accounts for cases in which the victim suffered bodily injury. POAG notes that, in cases such as this, defendants could be charged and convicted of 18 U.S.C. § 2243(c), which carries a statutory maximum of up to 15 years, but could be held accountable by way of the cross reference to USSG §2A3.1 based upon relevant conduct for more serious conduct, such as that associated with violations of 18 U.S.C. § 2241. However, this type of scenario has also operated to benefit defendants in situations where the parties agree the defendant will plead to the lesser penalty under 18 U.S.C. § 2243(c), but agree they will be held accountable for the aggravating conduct under relevant conduct by way of the cross reference to USSG §2A3.1. In such instances, the guideline range can end up being capped at the lower statutory maximum.

Further, with regard to the proposed language regarding the cross reference at USSG §2A3.3(c), POAG notes that the narrative indicates "If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the 'consent' of the victim." POAG recommends addressing whether the

same standard should apply for inmates who are in custody and subject to correctional authority in order to prevent anticipated litigation, but such a cross reference directive would result in categorical application of USSG §2A3.1 for offenses under 18 U.S.C. § 2243.

Alternatives to Incarceration Programs

While those charged in federal court who may be appropriate for a formal diversion program will be minimal, those are the cases that are sometimes the most difficult to sentence. POAG believes that providing the Court with another option at the time of sentencing is worth further research, especially if it addresses the goals of sentencing while potentially reducing the incarceration rate. Therefore, POAG favors the Commission reviewing the unifying principles of existing diversion programs as part of their research to further develop the diversion options within the federal system. As noted in POAG's testimony on the proposed amendment for USSG §4C1.1, Zero-Point Offenders, POAG believes that formal diversion programs could be utilized to effectively impact the types of defendants least likely to recidivate. Many of the studies and metrics included in the Zero-Point Offenders could be utilized to guide federal courts towards the types of defendants that the Commission believes will present the lowest levels of recidivism. POAG believes these metrics could provide good guidance while still empowering judges to use their discretion to achieve just outcomes. POAG supports the creation of a new policy statement permitting a downward departure if the defendant successfully completes or meaningfully engages in an alternative-to-incarceration court program.

Fake Pills

POAG unanimously favored the proposed amendment to USSG §2D1.1(b)(13) to add an alternative two-level enhancement for drugs that are represented or marketed as a legitimately manufactured drug when in fact they are mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenlethyl)-4-piperindinyl] propanamide) ("fentanyl") or a fentanyl analogue which was not the legitimately manufactured drug. District representatives reported that they have seen an increase in cases related to fentanyl and fentanyl analogue related overdoses and deaths and recognized that there is a serious fentanyl epidemic. This alternative enhancement would provide an adjustment not already captured by the guidelines and account for the increased danger of counterfeit pills containing fentanyl or a fentanyl analogue.

After a lengthy discussion, POAG also unanimously opposed including a *mens rea* requirement for the new provision. These drugs are not obtained from a legitimate source, such as from a prescription where the drug is recirculated. These counterfeit pills are usually manufactured through a clandestine pill press operation and without any regulatory or safety oversight. Not knowing how much fentanyl or a fentanyl analogue exists in a particular illicit pill poses a significant danger, particularly considering that the counterfeit pills may contain lethal doses of fentanyl or a fentanyl analogue. The circumstances are further exacerbated by the appearance of safety and legitimacy a pressed pill might present to an unwary user. Given the elevated level of danger these counterfeit drugs represent, the mere possession for distribution and/or distribution of the counterfeit drugs containing fentanyl or a fentanyl analogue should be sufficient to trigger the enhancement. POAG further unanimously recommend that this should be an offense-based

enhancement as opposed to exclusively defendant-based. The support for this offense-based approach deals not only with the danger these pills represent, but also the amount of people involved in pill pressing suggests that all those involved in a conspiracy related to these pills should have the liability. The old Roman adage "caveat emptor" or "may the buyer beware," in this instance should be flipped. If a defendant is engaged in selling pills, they should be strictly liable for the contents of those pills because it could very well be the death of the person to whom they are selling. POAG respectfully recommends the following language:

> (13)(A) If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenlethyl)-4-piperindinyl] propanamide) or a fentanyl analogue, increase by 4 levels; or (B) if the offense involved a representation or marketing as a legitimate manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenlethyl)-4-piperindinyl] propanamide) or a fentanyl analogue, increase by **2** levels. For purposes of subsection (b)(13)(B), the term "drug" has the meaning given that term in 21 U.S.C. § 321(g)(1).

POAG believes this structure would prevent the defendant, who works to press the pills and then hands them off for distribution, from escaping accountability for that conduct.

At this time, POAG did not identify additional synthetic opioids to include in the new provision but discussed that additional synthetic opioids may need to be included in the future.

POAG also seeks clarification as to the terms "represented" and "marketed" because these terms may have a variety of meanings and, in practice, may be difficult to apply. Therefore, the enhancement may not adequately capture the conduct the enhancement was intended to capture.

Miscellaneous

Part A:

POAG supports the inclusion of USSG § 2G1.3 in the list of offenses which are not grouped under USSG §3D1.2(d), similar to how the operation of similar guidelines, such as USSG §2G1.1, are applied.

Part B:

In the absence of deleting this section, POAG is in favor of the revision to USSG §5F1.7 (Shock Incarceration), to reflect that the Bureau of Prisons (BOP) no longer operates this program.

Technical

POAG submits no comment regarding the proposed technical amendments beyond general support for the use of the Oxford comma.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on the proposed amendments.

Respectfully,

Probation Officers Advisory Group

March 2023

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

March 12, 2023

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Victims Advisory Group Response to the Proposed Amendments to the Sentencing Guidelines

Dear Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide a written response to the Commission on the 2023 proposed amendments to the Sentencing Guideline. Pursuant to its duties outlined in §1 of the VAG's Charter, the VAG has reviewed the proposals and consulted with its membership regarding the impact of these proposals on crime victims. The VAG offers comment on some of the proposals that it feels particularly affect victim survivors of crime. It urges the Commission to consider the specific concerns addressed below especially regarding the impact on victims.

1. FIRST STEP ACT—REDUCTION IN TERM OF IMPRISONMENT UNDER 18 U.S.C. §3582(c)(1)(A)

The proposed amendments to this section are complex and address many aspects of extraordinary and compelling release.[1] While the VAG will address each of them individually,

[1] 18 U.S.C. § 3582(c)(1)(A) is often referred to as "compassionate release" despite the fact that this phrase is not used in the text of the code. This contributes to some of the current confusion and misapplication surrounding the proper use of § 3582(c)(1)(A) because such a label blurs the purpose of this section. Rather, this provision will be referred to as it is in the text and intent of the statute: the "extraordinary and compelling" provision, unless quoting others.

taken as a whole, the package of proposals is extremely concerning to the VAG because, if passed, they will have the effect of reversing two concepts which form the bedrock of the federal sentencing system. Concepts that are essential to victims of crime: finality and uniformity of sentences.

As a package these provisions create a broad pathway for offenders to obtain release from their sentences, given to them in open court – this is in essence a new parole system. However, what makes this extremely concerning is that this is more than just a return to a form of parole not authorized by Congress – it is a form of informal parole with no system in place to regulate it. Congress previously determined that the parole system failed at a time when it had clearer rules, standards, and procedures in place, such as scheduled parole hearings and notification obligations for victims, survivors, and family members. These proposals taken in their entirety have the effect of reinstating a parole-like pathway to indeterminate sentencing without any of the procedures and guardrails in place under the former parole system. While it is clear that Congress did not authorize a re-instatement of parole, it certainly did not authorize a resurrection of an informal parole system with less structure than the former parole system.

The Commission doing so is particularly problematic legally because, among other reasons, it risks violating the separation of powers doctrine, as the following pages discuss. But as a threshold matter, the proposed amendments are specifically concerning to many crime victims and their families on a more personal and practical level. These are the people who will be harmed again by a system that is changing over their objection with no provisions for their participation despite clear Congressional intent and federal court recognition that victims are now supposed to be independent participants in the system.[2] Victim survivors often experience trauma as a result of the initial criminal act. They then can also suffer secondary trauma by experiencing a criminal justice system with few provisions that protect them. This proposal fails to fully implement even those.

Since the mid-eighties, victims and their families fortunate enough to have their cases prosecuted, have been told at sentencing that the sentence reflects "truth in sentencing" and, with some very narrow exceptions, the sentence that they observe handed down by the judge is the

[2] In the twelve pages of this proposed amendment the word "victim" is never used except in relation to the offender being a victim.

sentence on which they can rely. The firmness of this representation is often the first solid and reliable outcome of the criminal justice system victim survivors receive. Our members report that for many victims or family members, it represents a key step to healing – the assurance of the finality of that sentence and their ability to plan their future steps around that information. Finality of sentences is "essential to the operation of criminal justice systems."[3]

Yet, the trauma of so broadly circumventing the current law regarding release cannot be understated. Our members report countless examples of the suffering experienced by victims or families contacted about a motion for early release or simply discovering such has occurred. Such events re-open the wounds of chapters they thought were long closed, cause extreme anxiety if they are fortunate enough to have some notice of a potential release, and instill unimaginable fear when they learn of an offender's unexpected release. While we turn to the legal issues surrounding these proposals, the VAG felt it essential to share with the Commission a mere fraction of the human toll such a disruption to finality and uniformity of sentencing causes.

Pursuing this broad course of action is also legally flawed. It is in direct contradiction to the general purposes of the Sentencing Reform Act of 1984, the concept of the extraordinary and compelling release provision, the First Step Act ("FSA") as it relates to § 3582(c)(1)(A), and the Crime Victims Rights Act. As such, these provisions raise some threshold separation of powers issues generally, and some of the specific provisions have very acute separation of powers violations embedded within them.

This memorandum will address the general issues first and then the specific provisions *seriatim*.

A. <u>The Proposed Amendments as a Whole Effectively Reinstate Parole Without Any of the Safeguards of the Parole System and Contradict the Main Purposes of the Sentencing Reform Act</u>

In enacting the Sentencing Reform Act of 1984, Congress made the intentional decision to transform the criminal justice system from an indeterminate to a determinate sentencing system. In so doing it eliminated the use of parole.[4] Congress took this step to eliminate

[3] *E.g.*, Teague v. Lane, 489 U.S. 288, 309 (1989).
[4] United States v. Jenkins, 50 F.4th 1185, 1192 (D.C. Cir. 2022).

significant problems in the sentencing system: unpredictable outcomes, a lack of certainty in sentencing, and the release of dangerous individuals.[5] "Nearly all federal prisoners throughout most of the twentieth century received sentences that included parole eligibility after serving just one third of the prison term imposed by the federal judges and served just one half of the sentence that the federal judges imposed."[6] Furthermore, there were wide discrepancies in sentencing and this "fundamental and widespread dissatisfaction with uncertainties and the disparities continued to be expressed."[7]

> [The Senate Report] observed that the indeterminate-sentencing system had two "unjustifi[ed]" and "shameful" consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an evenhanded and effective operation of the criminal justice system.[8]

Although the parole system has largely been considered unsuccessful in decreasing crime and plagued with inconsistency and uncertainty, it was a system with procedures and rules. The rights of victims were part of a system and outlined in hearing procedures.[9] Indeed, the Parole Commission has an entire system of scheduling, notification, witness testimony, and services. "Hearings conducted by the Parole Commission rely greatly on the testimony of victims, witnesses and law enforcement."[10] These structures are important to victim survivors because they follow an expected schedule, they provide notice to victims and their families, and they enable victim witnesses to travel to participate in the hearings.[11]

Yet, these proposed amendments will likely have the effect of reinstating a form of informal parole and indeterminate sentencing which is in contradiction to the main purposes of the Sentencing Reform Act. In that Act Congress explicitly rejected the release of prisoners

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[5] S.Rep. No. 98-225 (1983); United States v. McCall, 56 F.4th 1048, 1052 (6th Cir. 2022).
[6] Douglas Berman, Reflecting on Parole's Abolition in the Federal Sentencing System, Federal Probation, Vol. 81, No.2 at 19 (Sept. 2017) (citing Department of Justice Bureau of Justice Statistics, Historical Correctional Statistics in the United States (1850-1984 (Dec. 1986)).
[7] Mistretta v. United States, 488 U.S. 361, 365 (1989); McCall, 56 F.4th at 1052.
[8] Mistretta, 488 U.S. at 366 (emphasis added) (internal citation omitted).
[9] *Victim Witness Program*, U.S. PAROLE COMM'N (Sept. 29, 2022), https://www.justice.gov/uspc/victim-witness-program#:~:text=The%20reasonable%20right%20to%20confer,the%20victim's%20dignity%20and%20privacy (last visited Feb. 10, 2023) (providing the Rights of a Victim or Witness in a U.S. Parole Commission Hearing).
[10] *Id.*
[11] The Department of Justice requires that victims or victims' next of kin "will receive notification . . . the victim has the opportunity to provide input to the Commission on this decision." *Id.*

based on rehabilitation, requiring punishment serve retributive, educational, deterrent, and incapacitation goals.[12] The Act explicitly intended to make all sentences determinate. "A prisoner is to be released at the completion of its sentence reduced only by any credit earned by good behavior while in custody."[13]

Notwithstanding this recognition and abandonment of the parole system, some defendants abused extraordinary and compelling relief distorting it into a type of informal parole. "Courts have been skeptical of expanding the compassionate release system into essentially a discretionary parole system."[14] This "discretionary parole" effort is one without standard procedures. Although, the "compassionate release statute is not [supposed to be] a freewheeling opportunity for resentencing based on prospective changes in the sentencing policy or philosophy,"[15] these provisions transform them into one.

These wide-ranging proposed amendments contradict the goals of the Sentencing Reform Act. The effort to include changes in the law, or vague catch all provisions, reintroduces inconsistent sentencing to the criminal justice system. To use extraordinary and compelling relief for this purpose would undermine the finality of sentencing. "We doubt that the Sentencing Reform Act – which effected a profound shift from indeterminate to determinate sentencing – contained the seed of its own destruction."[16]

B. <u>The Proposed Amendments Taken As a Whole Contravene the Very Purpose of Extraordinary and Compelling Release</u>

As the name implies, Congress created extraordinary and compelling release for a very specific and narrow purpose - to provide a pathway to early release for offenders who were in extreme medical or familial need. "Congress created compassionate release as a way to free certain inmates, such as the terminally ill, when it became inequitable to keep them in prison any longer."[17] In 2016, the Commission established some guidance on the circumstances, consistent

[12] Mistretta, 488 U.S. at 367.
[13] *Id.* (citing 18 U.S.C. § 3624(a)–(b)).
[14] United States v. Crandall, 25 F. 4th 582, 584 (8th Cir. 2021) (noting that some courts found it "'paradoxical' and contrary to the intent of Congress to find extraordinary and compelling reasons based on a change in the law that Congress intentionally made inapplicable to a defendant.").
[15] *Id.* at 586.
[16] United States v. Jenkins, 50 F.4th 1185, 1201 (D.C. Cir. 2022).
[17] Christie Thompson, *Old, Sick, and Dying in Shackles*, THE MARSHALL PROJECT (Mar. 7, 2018), https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles (last visited Feb. 10, 2023).

with Congressional intent, behind extraordinary and compelling release: extreme medical cases such as a terminal illness, advanced age impacting the ability to self-care, or extraordinary family circumstances in which an offender's child was left without a caretaker due to the death of the other parent. The process that eventually developed was one in which the Bureau of Prisons ("BOP") was tasked with determining if an inmate met these criteria and, if so, should file the motion for release. A court would then consider the motion along with the relevant sentencing factors of 18 U.S.C. § 3553 to determine if the offender is a risk to the public. Extraordinary and compelling release, therefore, is not a prison population reduction effort. As former Attorney General Holder noted it is "not an appropriate vehicle for a broad reduction in the prison population."[18]

The reality, however, was that the BOP failed to do its duty and rarely filed the appropriate motion.[19] The BOP only filed on average twenty-four motions a year under this statute.[20] In a four-year period it approved only six percent of requests, while 266 inmates died in jail awaiting a decision.[21]

The VAG agrees that the BOP seems to have abdicated its duty to very ill inmates. However, reinstating a form of unstructured parole is not an appropriate vehicle to address BOP errors. Indeed, the extraordinary and compelling release statute was never intended to be an alternative wide door to terminate a criminal sentence early. Its development was not a contradiction to the Sentencing Reform Act's intentional end of parole. Rather, it was designed for the narrow purpose of providing a small pathway from a lengthy incarceration for a person experiencing an extraordinary medical or familial crisis. To utilize it to provide alternative avenues of accessing indeterminate sentencing is misplaced and contrary to the intent behind this provision.

C. The Proposed Amendments Taken As a Whole Contravene the Very Purpose of The Relevant Component of the First Step Act

Although the First Step Act generally did address many aspects of incarceration, the provision implicating § 3582(c)(1)(A) was not an effort to decrease prison populations. The

[18] *Id.*
[19] *E.g.*, United States v. Thacker, 4 F. 4th 569, 521 (7th Cir. 2021); Thompson, *supra* note 17.
[20] United States v. Elias, 984 F.3d 516, 518 (6th Cir. 2021).
[21] U.S. Dep't of Just., Evaluations & Inspections Div., The Federal Bureau of Prisons' Compassionate Release Program (Apr. 2013), at 41.

amendment was strictly *procedural* in nature, not substantive.[22] The amendment was in response to the failure of BOP to file motions for release in appropriate cases. Consequently, the amendment simply allowed a defendant to file a motion on his own behalf, thus relieving the bottleneck for the petitions.

In the wake of the failure of the BOP to file appropriate motions regarding the terminally ill, Congress passed this very narrow amendment.[23] In 2013, the Inspector General found that the "existing Bureau of Prison compassionate release program has been poorly managed and implemented inconsistently" and specifically referenced the death of terminally ill inmates before their cases were decided.[24] Consequently, cases with merit were not being reached and Congress endeavored a *procedural* change to allow defendants to apply directly themselves under the same narrow substantive standard.

There can be little doubt that this amendment was procedural and not substantive. "The First Step Act added the procedure for prisoner-initiated motions while leaving the rest of the compassionate release framework unchanged."[25] As the Seventh Circuit recently noted, "[t]he First Step Act did not create or modify extraordinary and compelling release's threshold for eligibility, it just added prisoners to the list of persons who may file motions."[26]

Yet, in the wake of the COVID-19 pandemic, many defendants filed claims exceeding the parameters of the statute. These proposed amendments suggest that the Commission has accepted these claims' suggestion that the FSA made a substantive change to extraordinary and compelling release. However, "the policy problem that the FSA aimed to solve was not the courts' inability to identify new grounds for relief; rather, the problem was that the BOP was not filing reduction motions for defendants who qualified under the already existing grounds for

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[22] United States v. McCall, 56 F.4th 1048, 1053 (6th Cir. 2022) (citing United States v. King, 40 F.4th 594, 596 (7th Cir. 2022)) ("The amendment focused on process not substance.").
[23] Thompson, *supra* note 17.
[24] U.S. Dep't of Just., Evaluations & Inspections Div., The Federal Bureau of Prisons' Compassionate Release Program (Apr. 2013), at i, 11.
[25] *E.g.*, United States v. Andrews, 12 F.4th 255, 258 (3d. Cir. 2021); United States v. Jenkins, 50 F.4th 1185, 1196 (D.C. Cir. 2022) ("The Act's sole change to this section was to create this new procedural avenue for release. It did not undermine the Commission's interpretation of that standard."); McCall, 56 F.4th at 1052 (The First Step Act "modified only one aspect of the compassionate release statute.").
[26] King, 40 F. 4th at 596.

relief…"[27] The Commission should reject those efforts to circumvent Congress and distort a procedural mechanism to reach other ends.

Not only are these proposed amendments contrary to the FSA's procedural goal of relieving the bottleneck for those with legitimate extraordinary and compelling claims, but they will also exacerbate the problem. This artificial expansion of extraordinary and compelling release will lead to a massive increase in applications, many of which are inappropriate efforts to circumvent current laws in place for direct appeal of sentences.[28] "Nothing in the 30 odd year history of compassionate release 'hints that the sort of legal developments routinely addressed by direct or collateral appellate review could qualify a person for compassionate release. And nothing in the First Step Act of 2018 suggests Congress intended to change the substantive status quo with a process-oriented amendment."[29] Consequently, these claims will overwhelm an already inefficient system, causing a backlog and once again preventing the hearing of legitimate extraordinary and compelling release claims, in turn injuring the very people the FSA was attempting to assist.

D. The Proposed Amendments Taken As a Whole Contravene the Very Purpose of the Crime Victims Protection Act

In the most fundamental manner, the amendments are in contravention to what courts have told victims for decades at sentencing hearings, and fail to consider victim survivors and their rights under federal law. Such a major shift in release of defendants prior to the completion of their sentence threatens a return to a criminal justice system that was once described as "appallingly out of balance," in which "victims of crime have been transformed into a group oppressed and burdened by a system designed to protect them."[30]

Crime victim rights are affected by each and every motion for a modification of imposed term of imprisonment filed pursuant to 18 U.S.C. § 3582(c), including motions for extraordinary and compelling release, pursuant to 18 U.S.C. § 3582(c)(1)(A). Extraordinary and compelling release motions challenge crime victim rights in three significant ways: (1) the finality of the court process because a sentence imposed is now removed; (2) the ability of the victim survivor

[27] United States v. Bryant, 996 F.3d 1243, 1264 (11th Cir.), cert. denied, 142 S. Ct. 583 (2021).
[28] *See, infra* Section I.F.
[29] McCall, 56 F.4th at 1052 (internal citations omitted).
[30] President's Task Force on Victims of Crime, v-vi, 114 (1982) (Task Force Report).

to participate because of the length of time between sentencing and the filing of an extraordinary and compelling release motion may detrimentally affect the ability of Crime Victims to participate; and (3) the volume and breadth of extraordinary and compelling release motions is greatly increased by the FSA. The proposed amendments taken as a whole violate the Crime Victims Rights Act in significant ways. Opening up extraordinary and compelling release this broadly, and providing no provisions for victims to turn to, violates the most fundamental of victim rights - the right to be "treated with fairness and with respect for the victim's dignity and privacy."[31]

Whether or not the Commission adopts any of the proposed amendments, the VAG asks the Commission to include language in its modification of § 1B1.13 that assures that crime victims are provided notice of, and an opportunity to be heard on all motions for extraordinary and compelling release pursuant to 18 U.S.C. § 3582(c)(1)(A), and that no defendant is released without a hearing.

Reasonable notice of, and the right to be heard at, federal court proceedings relating to release and sentencing are crime victim rights.[32] An extraordinary and compelling release

[31] 18 U.S.C. § 3771(a) reads:

> (a) RIGHTS OF CRIME VICTIMS.--A crime victim has the following rights:
> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
> (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
> (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

[32] "In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims." U.S.S.G. § 6A1.5, Crime Victims' Rights (Policy Statement).

motion to reduce a sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) plainly involves the release or sentencing of a defendant.

Extraordinary and compelling release motions affect crime victims in three fundamental ways. First, one of the purposes of sentencing reform, and of the Guidelines themselves, was the finality and the uniformity of sentences. A motion to reduce a sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) dispenses with finality and undercuts uniformity by inviting a subjective inquiry into the personal health or life status of the offender after he/she is imprisoned. A federal criminal offense traumatizes a crime victim and marks the beginning of a series of events over which the crime victim has little control. The lack of control that a crime victim has over the proceedings, continuances, and limitations of trial contributes to the re-traumatizing of crime victims through the criminal court process. The legal right to address the court at sentencing, and the knowledge that upon sentencing the case is at an end, is extremely important to crime victims and their recovery. Even when the case does not end due to a subsequent filing of a motion to reduce a sentence, such as extraordinary and compelling release, the crime victim's right to address the Court maintains a significant importance.[33]

Second, as with finality, notice is a legal principle essential to all stakeholders in the criminal court process, and especially so for crime victims. Even when a final sentence is to be modified, including for extraordinary and compelling release, a crime victim's 18 U. S. C. § 3771(a) rights apply, and the crime victim must be given reasonable and timely notice of the court proceeding and the right to be heard. VAG members and their victim assistance professional colleagues report that receiving notice of an extraordinary and compelling release motion is often shocking and traumatizing for crime victims not expecting another criminal court process many years after sentencing. This is particularly true for the tens of thousands of victims that sentencing courts remind of the "truth in sentencing" and the permanence of the sentences. Furthermore, although this reconnection causes trauma, it bears noting that, unlike when they are engaged in an active criminal case, these victim survivors often no longer have access to the services, protections, and the scaffolding of support present during the original case. They find themselves re-traumatized and in danger, but often lack access to now needed psychological and

[33] As an example of crime victims exercising their right to address the Court at a motion to reduce sentence thirty years after the offense, *see,* Paul Duggan, *As a Rapist Seeks Freedom, a Victim's Plea Moves a D.C. Judge to Tears*, WASH. POST (Feb. 3, 2023), https://www.washingtonpost.com/dc-md-va/2023/02/02/rapist-sentence-reduction-dc-judge/ (last accessed Feb. 13, 2023).

financial assistance to move or take steps to ensure their safety, and other tools to make other necessary adjustments to their lives.

Furthermore, keeping track of crime victims may also be difficult for the United States Attorney many years after the original sentencing date. Broadening the scope of this extraordinary and compelling release motion will put extreme pressures on already significantly taxed victim witness coordinators to locate victim survivors, pulling them from attending to the needs of current victims survivors in active cases. Yet that effort must be undertaken to provide reasonable notice to crime victims of an extraordinary and compelling release motion.[34]

Third, the 2018 amendment to 18 U.S.C. § 3582(c)(1)(A) extended the legal authority to file motions for extraordinary and compelling release from solely the Director of the BOP to include offenders; consequently, the number of motions filed greatly increased.[35] While the Commission's December 2022 Report includes the spike in filings due to the COVID-19 pandemic, each of the filings asked the court for extraordinary and compelling release. The average sentence reduction for extraordinary and compelling release motions granted was nearly five years for FY 2020.[36] With the number of extraordinary and compelling release motions increasing, and the length of incarcerated time reduced for granted motions, it is integral to the court process that crime victims receive reasonable notice of these motions, as well as an opportunity to be heard.

The VAG members and other victim service professionals report not only the procedural but the practical effect that the lack of notice has in court. They describe court hearings in which offenders – with the assistance of their attorneys- are able to not only file motions but to coordinate family members, letters, and documents at a courtroom for a hearing. By contrast, victim survivors often cannot be located and, if located, are frequently re-traumatized when they receive such radically unexpected notification to appear in court. Victim survivors at this stage rarely have lawyers or even advocates to assist them in preparing for the hearing, let alone help them coordinate the support of family members and others. Victim professionals report that the

[34] The United State District Court for the Southern District of Illinois specifically recognized the Crime Victim right to notice in Compassionate Release proceedings. *In re* Compassionate Release Provision of First Step Act of 2018, Admin. Ord. No. 265 (Aug. 14, 2020).
[35] U.S. Sentencing Comm'n Compassionate Release Data Report FY 2020-2022 (December 2022), Table 1, Figure 1.
[36] U.S. Sentencing Comm'n, Compassionate Release the Impact of the First Step Act and COVID-19 Pandemic, (March 2022), 5, 38.

resulting asymmetry in court is palatable and often a victim's absence is interpreted by a court as acquiescence, when in fact there is no such indication of that position but instead may reflect self-preservation efforts undertaken by the victim survivor. For example, a victim of child pornography is involved in often hundreds of cases in which her images have been distributed. With these amendments she will be physically unable to actualize her rights and this will always create an imbalance in courtroom.

The insight a victim survivor brings to the release decision is invaluable. A recent example of this was published in the Washington Post. A convicted rapist kidnapped and raped two college students in 1992 when he was sixteen. At age forty-seven he sought release under the District of Columbia's Incarceration Reduction Amendment Act. The victim survivors not only described in detail the horrors of the abductions, beatings, rape, and being forced to dig their own graves, but they also provided information regarding the lifelong effects of their victimization. This critical information was obviously not available even to them at the time of the original sentencing. One survivor stated "I am depressed, I am sad! I have never married! I have no kids! I live alone! . . . I have tried to the best of my ability to live life. But I am empty….the young women that we would have been is gone….where is our resentencing? Who will speak for us?"[37] Victim survivors have the right to present this information to courts entertaining such motions. Moreover, judges can only benefit from the fullest picture of the effects of release to determine if the offender has met his burden of establishing extraordinary and compelling circumstances.

Such information is also essential for a court to assess the dangerousness of the defendant. Often the victim survivor has the keenest sense of the level of danger the defendant poses. Without the victim survivor in the courtroom the judge is certainly not presented such evidence from the offender. This can have tragic consequences. In another case reported in the media, a defendant sentenced to twenty-four years' incarceration for domestic violence convinced a judge to release him on extraordinary and compelling release grounds due to COVID, an eye injury, his age, and the promise to never contact his victim. The U.S. Attorney's Office stated that they opposed the motion and could not locate the victim. The victim was not present at the hearing and was later found murdered, with the offender next to her body. He was

[37] Duggan, *supra* note 32.

indicted for murder, and her family never knew he had been released.[38] Judges should not make this type of release decision without hearing from the victim survivors and their families in order to have this information in making their decisions. No victim survivors should be robbed of their rights to be kept safe from the offenders.[39]

The VAG asks the Commission to require a hearing before granting any motion for extraordinary and compelling release.[40] This would improve uniformity in the United States District Courts regarding crime victims' legal rights, pursuant to 18 U.S.C. § 3771(a), and this Commission's policy directive of U.S.S.G. § 6A1.5, as applied to proceedings pursuant to 18 U.S.C. § 3582(c)(1)). Furthermore, the Commission must include provisions addressing victim notification and rights at the hearing. To that end, the VAG suggests the Commission include Paragraph (d) which will include language such as the following:

(d) Victim Notice and Right to be Heard.—Consistent with the provisions of U.S.S.G. § 6A1.5:

(1) If the victim is not present at a proceeding on a motion filed pursuant to 18 U.S.C. § 3582(c)(1)(A) the United States Attorney shall state on the record that proceeding without the appearance of the victim is justified because:

(i) the victim, or victim's attorney, was provided reasonable notice by the United States Attorney and waived the right to attend the hearing; or

(ii) efforts were made to reasonably notify the victim, or victim's attorney, which efforts shall be specified, and, to the best knowledge and belief of United States Attorney, the victim, or victim's attorney, cannot be located.

(2) If the Court is not satisfied by the statement that proceeding without the appearance of the victim is justified, or, if no statement is made, the court shall postpone the hearing.

[38] Nathan Baca and Becca Knier, *'Failed by the System' I The Life and Death of DC Stalking Victim, Sylvia Matthews*, WUSA9 (Feb. 28, 2022), https://www.wusa9.com/article/news/investigations/sylvia-matthews-michael-garrett-stalking-murder-investigation/65-8342ecc3-84cb-43a5-af72-79dee8129e65 (last accessed Feb. 13, 2023) (documenting the murder of a stalking victim after the early release of her murderer originally sentenced to several years in prison).

[39] 18 U.S.C. § 3771(a)(1).

[40]

(3) If the Court proceeds without the presence of the victim, the Court may consider all prior victim impact statements that are part of the court record and may not infer that the absence of the victim indicates acquiescence.

With this requested addition to §1B1.13, the Commission will both clarify that its U.S.S.G. § 6A1.5 Crime Victims' Rights (Policy Statement) is properly applied to extraordinary and compelling release motions filed pursuant to 18 U.S.C. § 3582(c)(1)(A) and will increase the likelihood for crime victims to be treated with fairness and respect, pursuant to 18 U.S.C. § 3771(a)(8).

E. All of These Conflicts With Prior Laws Raise Significant Separation of Powers Issues.

Congress alone has the power to set the sentences for violation of federal crimes and the scope of judicial discretion is subject to Congressional control.[41] The development of a system that strays from Congress's explicit preference for determinate sentencing and an end to parole by so expanding a currently narrow provision to reintroduce indeterminate sentencing and a parole-like system risks violating the separation of powers. In *Mistretta v. United States*, the Supreme Court upheld the Sentencing Reform Act and the Commission's charge because Congress articulated in a legislative act – the Sentencing Reform Act – intelligible principles to which the Commission was directed to conform.[42] Through the Sentencing Reform Act, Congress "clearly delineated the general policy, the public agency which is to apply it, and the boundaries of that authority."[43]

Mistretta found that the Commission acted within the policies articulated by Congress because Congress charged the Commission with providing "*certainty and fairness . . .* in sentencing and to *avoi[d]. . . disparities.*"[44] It further outlined Congress's principles around sentencing by stating that the purpose of sentencing was to reflect the seriousness of the offense,

[41] Mistretta v. United States, 488 U.S. 361, 364 (1989); Gore v. United States, 357 U.S. 386, 393 (1958) (Questions regarding severity of punishment "are peculiarly questions of legislative policy.").
[42] *Id.* at 372 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)).
[43] *Id.* at 372-373 (quoting American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).
[44] *Id.* at 374 (emphasis added).

promote respect for the law, provide adequate deterrence, provide a just punishment, protect the public from offenders, and provide defendants with needed treatment.[45]

These amendments run afoul of the boundaries of this delegated authority. It would be an absurd result to suggest that Congress delegated the authority to develop sentencing policies that are opposed to Congress's stated sentencing goals. Reinstituting pathways to indeterminate sentencing does just that. For example, "considering the length of a statutorily mandated sentence as a reason for modifying a sentence infringes on Congress's authority to set penalties.[46] In short, offenders cannot use extraordinary and compelling release provisions to act as an "end-run" around Congress's sentencing decisions.[47]

Similarly, these provisions also raise separation of powers questions as they also act as an "end-run" around habeas proceedings.[48] The interpretation of § 3182(c)(1)(A) to confer the discretion to change a sentence that was lawful at the time it was announced "would allow the compassionate release statute to operate in a way that creates tension with the principal path and conditions Congress established for federal prisoners to challenge their sentence. That path is embodied in the specific statutory scheme authorizing post-conviction relief in 28 U.S.C. § 2255 and accompanying provisions."[49] Consequently, by allowing extraordinary and compelling release provisions to be altered to allow for release based on changes in the law or catchall reasons, avoids the system already in place for defendants to challenge their incarceration: 28 U.S.C. § 2255. Congress consciously created narrow rules around revisiting sentences. These "do not raise doubts about the finality of determinate sentencing that the Sentencing Reform Act 'attempted to resolve.' But using compassionate release to correct sentence[es] . . . would blow open these carefully crafted limits."[50]

Habeas is the appropriate avenue to challenge the lawfulness of a sentence and extraordinary and compelling release cannot be used to create an end-run around those rules. To do so is to exceed the principles outlined in *Mistretta*.

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[45] *Id*; 18 U.S.C. § 3553(a)(2).
[46] Andrews, 12 F.4th at 261.
[47] *E.g.*, McCall, 56 F.4th at 1059 (citing United States v. Tomes, 990 F.3d 500, 505 (6th Cir. 2021)).
[48] *E.g.*, McCall, 56 F.4th at 1059.
[49] *E.g.*, Jenkins, 50 F.4th at 1200-1201.
[50] *Id*. at 1201-1202.

F. Specific Proposed Provisions

In addition to the aforementioned general concerns, the VAG has additional comments on the specific proposed amendments.

1. Proposed § 1B1.13(b)(1)(C)

The VAG opposes this language as too vague and broad. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[51] Language such as "specialized medical care" or "risk of deterioration in health" is vague and risks abuse and disparate application. A prisoner suffering from obesity, skin conditions, anxiety, diabetes, or hypertension could file a motion for release under such a provision. This language could cover situations that are neither extraordinary nor compelling, allowing for the improper release of an offender based on a claim not narrowly tailored to the purpose of extraordinary or compelling release.[52]

2. Proposed § 1B1.13(b)(1)(D)

The VAG opposes this language as too vague and broad. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[53] The VAG recognizes the threat the COVID-19 pandemic posed to all people, and that those incarcerated were particularly at risk of infection. The VAG further agrees that it is the duty of the BOP to respond to the unique needs of those incarcerated to protect them by the provision of appropriate protocols, vaccinations, and other measures incumbent upon a prison system responsible for the safety of its inmates.

However, extraordinary and compelling release is not the mechanism to address needed responses to prison shortfalls. Those serious flaws must be addressed as a basic requirement of operating a prison system. The solution to systemic management problems is not the manipulation of a narrow provision to inappropriately release offenders in violation of victim

[51] 28 U.S.C. § 994(t).
[52] *C.f.*, Thacker, 4 F.4th at 572.
[53] 28 U.S.C. § 994(t).

rights, but rather to address the actual problem of which they complain.[54] Furthermore, language such as being "at risk of being affected by an ongoing outbreak of an infectious disease" is far too broad.[55] Such language is not limited to those infected, but those "at risk" and encompasses every person in a congregant living situation. Similarly, being at "increased risk" of a severe medical complication also could be interpreted to encompass everyone exposed to pneumonia, COVID, or influenza.[56] People with chronic conditions such as asthma, obesity, depression would always meet this standard so the breadth of this language fails to fit within the narrow scope of extraordinary and compelling release.

3. Proposed § 1B1.13(b)(3)(A) and (C)

The VAG has no objection to this provision when the parent is actually incapacitated and there is no other caretaker.[57]

4. Proposed § 1B1.13(b)(3)(D)

The VAG opposes this language as too vague and broad. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[58] This section fails to do so. The VAG recognizes that families can be dynamic structures in a contemporary world. However, allowing release from incarceration for conditions regarding

[54] *E.g.*, Pub.L. No 116-136, § 12003(b)(2), 134 Stat. 281, 516 (allowing the BOP to lengthen the maximum amount of time prisoners are placed on home confinement if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau).

[55] *See*, United States v. Nelson, No. 1:08-CR-068, 2023 WL 171145 (S.D. Ohio Jan 12, 2023)(the difficult conditions faced by many, if not all prisoners do not constitute an extraordinary and compelling reason for release); United States v. Lischewski, No. 18-CR-00203-EMC-1, 2020 WL 6562311 (N.D. Cal. Nov. 9, 2020) (the basis for a motion must be extraordinary and compelling, which is reasonable given that the relief requested is release or at least a reduction of sentence. Conditions of confinement that are not extraordinary and compelling do not warrant § 3582(c) relief, particularly as there are, *e.g.*, civil remedies available to a defendant (*e.g.*, a *Bivens* suit).") (citing *United States v. Stevens*, 459 F.Supp.3d 478, 487 (W.D.N.Y. 2020) (finding that conditions of confinement alleged – including lack of visitation, threats, and the unavailability of a proper diabetic diet – do not constitute extraordinary or compelling reasons for a sentence reduction, "nor is a motion for reduction the proper avenue to challenge those alleged conditions")).

[56] The CDC estimates that flu has resulted in 9 million – 41 million illnesses, 140,000 – 710,000 hospitalizations and 12,000 – 52,000 deaths annually between 2010 and 2020." Over 100,000 people died of salmonella and pneumonia in 2019. Burden of the Flu, *Centers for Disease Control and Prevention*, https://www.cdc.gov/flu/about/burden/index.html (last visited Feb. 10, 2023).

[57] The VAG notes that such a situation is distinct from having aging or ill parents as courts have noted "[m]any if not all inmates, have aging and sick parents." United States v. Ingraham, No. 2:14-cr-40, 2019 WL 3162305, at *2 (S.D. Ohio July 16, 2019).

[58] 28 U.S.C. § 994(t).

"any other immediate family member" or in a relationship "similar in kind to that of an immediate family member" is far too vague. To allow a convicted person to be released from incarceration because a friend or relative of any kind is in need of care simply is inapposite to the desire for determinate and consistent sentencing with deterrence as a reason for punishment. Furthermore, the burden on the court to verify such a vague relations claim is extreme. Such a broad provision is an exception swallowing a rule.

5. Proposed § 1B1.13(b)(4)

The VAG recognizes the complete trauma of sexual assault – a harm that is further compounded when a victim survivor is vulnerable due to an imbalance of power. The VAG additionally believes that such victim survivors have the right under the law to protection from harm, prosecution of offenders and all those who facilitate abuse or fail to protect them from abuse, and the full scaffolding of support needed for victim survivors of such crimes. Such measures can include immediate transfer, medical and psychiatric care, immediate appointment of a representative, mandatory notice to counsel, and confidential whistleblower provisions, among others. However, subsequent victimization after criminal activity does not change the impact of the original crime the offender committed on their victim, the lifelong suffering, or the promise of truth in sentencing at the time of sentencing of the defendant. That original victim does not lose their rights to protection, to be informed, to restitution, and to be treated fairly because their offender has also suffered harm.

§ 3582(c)(1)(A) is a very narrowly tailored mechanism to address a specific need. It is not the vehicle to address problems caused by the Bureau of Prisons. Congress should fund the prison system with the necessary funds to be able to function in a manner which serves the purposes outlined in the Sentencing Reform Act. These challenges are systemic problems which must receive systemic solutions. To respond to these challenges through extraordinary and compelling release actually diverts attention away from a more comprehensive and systemic solution that prevents harm and, when prevention fails, provides accountability for problems inherent in institutional punishment.

6. Proposed § 1B1.13(b)(5)

The VAG opposes this language as too vague and one that risks raising separation of powers issues. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[59] This section fails to do so. To allow a court to change a previous sentence based on a change in the law – especially when Congress has indicated the change is not retroactive - clearly impinges upon Congressional power. To allow a court to do so grounded only in the label that the court feels "it is inequitable" offers no guidelines at all and invites the inconsistent indeterminate sentences the federal system has ended. Such an about face in sentencing will be extremely damaging to victim survivors who will now have no guarantees of truth in sentencing and no guidance as to the risk of continued litigation.

In addition to the lack of moorings to this proposal, this risks violating *Mistretta*. Such broad language is not only inconsistent with finality and uniformity of sentences, it is in affront to it. Since offenders have been able to file for release, applications have dramatically increased and been granted at a remarkable rate, based on grounds often not before used.[60] To adopt such broad language will only invite significantly more claims based far afield of what is extraordinary and compelling.

Generally, Congress does not give administrative agencies authority to create rules with retroactive effect.[61] Similarly, much jurisprudence in this area does not favor retroactivity.[62] The ordinary practice in federal sentencing is to apply new sentencing penalties to defendants who have not yet been sentenced and withhold the changes from defendants already sentenced.[63] Such a policy is even more clear when Congress explicitly makes a change in penalty not retroactive. Yet, this proposed language suggests that a judge can engage in such a practice. Clearly *Mistretta* does not stand for the idea that an agency can receive delegated powers from Congress to use that authority to do the opposite of what Congress states in legislation to do. Such an action would fall outside of *Mistretta*'s guidelines and much closer to Justice Scalia's

[59] 28 U.S.C. § 994(t).
[60] *E.g.*, U.S. Sentencing Comm'n, Compassionate Release the Impact of the First Step Act and COVID-19 Pandemic (March 2022), at 16 ("The number of offenders granted compassionate release substantially increased compared to previous years, as a direct result of the COVID-19 pandemic and aided by the First Step Act's changes to Section 3582(c)(1)(A)); Id. at 31.
[61] *See* Patterson v. McLean Credit Union, 784 F.Supp. 268, 274 (M.D.N.C. 1992).
[62] *See*, *e.g.*, Criger v. Becton, 902 F.2d 1348 (8th Cir. 1990).
[63] *See* Dorsey v. United States, 567 U.S. 260, 280 (2012).

concerns outlined in his dissent that the Commission is engaged in making law – a power reserved for Congress.[64]

When Congress explicitly states a change in the law is not retroactive, it is a violation of the separation of powers to allow a court to apply that law retroactively. This proposal risks just that, allowing an end-run around Congress.

> These distinctions matter, and they are ones reserved for Congress to make. [Doing otherwise] would unwind and disregard Congress's clear direction that an amendment apply prospectively…to conclude otherwise would allow a federal prisoner to invoke a more general § 3582(c) to upend the clear and precise limitation Congress imposed on the effective date of the Fair Sentencing Act's amendment to § 924(c).[65]

It would "usurp these quintessentially legislative judgements if [courts] used compassionate release as a vehicle for applying the amendment retroactively, to previously sentenced defendants who would not otherwise qualify under compassionate release."[66]

Additionally, changes in the law are not "extraordinary and compelling" as required by the language of the statute. "Extraordinary" has been understood as "most unusual; far from common; and having little or no precedent."[67] Many courts have noted that "there is nothing extraordinary about new statutes or case law; these are the ordinary course of business of the legal system and their consequences should be addressed by direct appeal or review under 28 U.S.C. § 2255."[68] A court imposing a sentence that was both permissible and statutorily required at the time of trial "is neither an extraordinary or compelling reason to now decrease a sentence."[69]

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[64] Mistretta, 488 U.S. at 422 (Scalia, J. dissenting); Id. at 427 (describing the Commission as a junior varsity Congress).

[65] Thacker, 4 F.4th at 573 (describing the attempt to allow extraordinary and compelling release for an explicitly prospective amendment as an "end-run around Congress's decision in the Fair Sentencing Act to give only prospective effect to its amendment of § 924(c)'s sentencing scheme").

[66] Jenkins, 50 F.4th at 1199; *see also* McCall, 56 F.4th at 1054 (citing United States v. McKinnie, 24 F.4th 583, 586 (6th Cir. 2022)).

[67] Jenkins, 50 F.4th at 1197 (citing United States v. Hunter, 12 F.4th 555, 562 (6th Cir. 2021) and United States v. Canalas Ramos, 19 F.4th 561, 567 (1st Cir. at 2021)).

[68] Jenkins, 50 F.4th at 1201 (citing King, 40 F.4th at 595); Thacker, 4 F.4th at 574 ("there is nothing extraordinary about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for specific violations of a statute").

[69] Jenkins, 50 F.4th at 1198 ("there is nothing remotely extraordinary about statutes applying prospectively. In fact, there is a strong presumption against statutory retroactivity which is deeply rooted in our jurisprudence and embodies a legal doctrine older than our Republic") (quoting Langraf v. USI Film Prods., 511 U.S. 244, 265 (1994)); *see also* McCall, 56 F.4th at 1056 ("we find little compelling about the duration of a lawfully imposed

7. Proposed § 1B1.13(b)(6)

The VAG opposes this language as too vague and at risk of violating the separation of powers doctrine. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[70] This language not only fails to do so, but is so broad it is almost limitless in its application, creating an affront to *Mistretta*'s principles as well as the Sentencing Reform Act, the purpose of extraordinary and compelling release, and importantly, the crime victims' right to finality and truth in sentencing.

The VAG recognizes that the current language of § 1B1.13's application notes provides for the BOP to file such a motion for "an extraordinary or compelling reason other than, or in combination with the reasons described in subdivisions (A) through (C)."[71] That language provided the needed flexibility the Commission presumably sought to allow for appropriate ***BOP*** motions. However, by limiting them to the BOP they were limited to one central office uniformly applying the language, thus less threatening to concepts of finality and uniformity of sentences. To then allow such a broad catchall for use by thousands of federal prisoners, will open the floodgates and continue the wildly inconsistent outcomes of extraordinary and compelling reasons to seek relief. Given the amount of new litigation since the procedural amendment allowing defendants to file their own motions that has emerged without this extremely general catchall language, there can be no question the litigation will increase exponentially and likely continue with claims that are neither extraordinary nor compelling – but available.

All of the options proposed are extremely vague and unworkable. Option 1's "any other circumstance similar in nature" has almost no limiting principle. Option 2's term "changes in the defendant's circumstances" is even worse. It simply invites a new unofficial parole system. Option 3 has no qualifying language in it other than "extraordinary and compelling" which has been the source of litigation as to its meaning. Such a system is without a process, guidelines, rules, and uniformity that at least existed in the formerly utilized parole system. The VAG

sentence. This is because such a sentence represents 'the exact penalt[y] that Congress prescribed and that a district court imposed for [a] particular violation [ ] of a statute'") (quoting Thacker, 4 F.4th at 547).

[70] 28 U.S.C. § 994(t).

[71] United States Sentencing Commission, *Guidelines Manual*, § 1B1.13, App. n.1D (2021).

strongly states these provisions are all extremely unwise and will retraumatize victims and their families with no notice or Congressional authorization to do so.

As stated during the hearings, the VAG appreciates the desire of many of the witnesses to be released from their sentences early. However, such a radical systemic change to the criminal justice system is for Congress to do, and the vehicle to do so is not the small procedural change to the law that Congress made for the narrow provision of extraordinary and compelling release.

2. FIRST STEP ACT—DRUG OFFENSES

The VAG has no objection to the proposed amendment to § 5C1.2 that mirrors the statutory changes to 18 USC 3553(f). However, the VAG does object to the proposed amendment to 5C1.2(b) that would replace the offense level of 17 with "range shall not be less than 24 to 30 months of imprisonment." Such an amendment would provide a defendant with a significant criminal history the same floor sentence as a defendant with a lesser criminal history. This is in opposition to a bedrock guideline principle that a fair and just sentence appropriately considers the "history and characteristics" of the offender,[72] distinguishing among offenders with more culpability.[73] Furthermore, where the prior or current offenses represent crimes which impact victims, this proposal fails to adequately account for the offender's history of victimizing others. Therefore, the VAG objects.

3. FIREARMS OFFENSES

The VAG has no comment on the proposed amendments.

4. CIRCUIT CONFLICTS

A. Conflicts Concerning 3E1.1(b)

The VAG understands the Commission's effort to address a circuit split regarding the permissible bases to withhold a motion for a one level reduction under §3E1.1(b).[74] However, the VAG opposes this approach to address the circuit court split for three reasons. First, this proposed amendment does not achieve its stated purpose. Furthermore, its language is so broad it categorically precludes appropriate withholding of the §3E1.1(b) reduction, which is a decision

[72] 18 USC § 3553(a)(1).

[73] Additionally, the philosophy of this proposed amendment seems in direct contradiction to the philosophy of the zero-point offender under Criminal History Proposal.

[74] Longoria v. United States, 141 S.Ct. 978, 979 (2021) (Sotomayor, J., dissenting) ("The Sentencing Commission should have the opportunity to address this issue in the first instance, once it regains a quorum of voting members.")

best left to a case by case analysis. Finally, this breadth fails to consider the victim experience of several pretrial motions and risks harm to victim interests.

The Commission's goal with this proposed amendment is to "set forth a definition of the term 'preparing for trial' that provides more clarity on what actions typically constitute preparing for trial *for the purposes of §3E1.1(b)*."[75] This proposal fails to meet these goals. The purpose of §3E1.1(b) is to allow the *government* the discretion to move for a one level reduction if a defendant has (1) been timely; (2) permitted the *government* to avoid preparing for trial; and (3) permitted the *government* and the court to allocate resources efficiently.[76] The amount of work necessary for trial or motion preparation varies from case to case, and only the prosecution knows if the work completed has avoided extensive efforts to prepare for trial. Some cases have such complex fact patterns, lengthy lists of witnesses, and traumatized victims in need of gentle preparation or other characteristics, that preparation for certain pretrial motions requires months of labor. For example, organized crime, terrorism, multiple victim or witness cases, multiple state sex trafficking prosecutions all require significant preparation for pretrial discovery, venue, dismiss, and suppression motions. These resources can include multiple witness interviews, obtaining experts, study of technical evidence prior to motions, securing witnesses, and a myriad of other efforts to prepare for trial. Their extent turns on the facts, charges, and issues in a case.

The proposed amendment replaces this fact specific inquiry with a categorical rule that fails to appreciate the individuality in each case and utilizes the metric of *when* a motion is litigated, rather than the type of motion litigated and the facts of the case. By using phrases such as "actions taken close to trial" and "early pretrial proceedings," the proposed amendment has chosen a temporal measure for determining whether a pretrial motion demands similar resource expenditure to preparing for trial. This is simply not an accurate measure. As noted above, some substantive motions determinative of the case can occur "early" in the process. Such motions may require significant amounts of preparation and work with witnesses and experts to survive a motion to dismiss, to suppress evidence, or provide discovery of highly sensitive information. A court cannot know the quantity of work that went into such preparation, what the negotiations

[75] Proposed Amendment: Circuit Conflicts, at 60 (February 2, 2023)(emphasis added).
[76] U.S.S.G §3E1.1(b); United States v. Collins, 683 F.3d 697, 707 (2012)(noting both government interests in avoiding trial preparation, in efficient allocation of government resources and "legitimate government interests which justify withholding of a §3E1.1(b)").

occurred between the prosecutor and defense counsel, or the extent of work occurring among witnesses, advocates, and prosecutors in preparation for and/or participation in such motions.

The circuit courts that have concluded otherwise have suggested that preparation for trial is determined through only what *documents* have been drafted, not what resources have been utilized.[77] However, strong trial preparation includes investigation and witness engagements to present a case to a judge or jury.[78] Such work can demand many more resources than drafting voir dire motions and jury instructions.[79] Each case is distinct and in some cases, much less preparation is needed for such pretrial motions than for others. That is the basis for Congress's amendment to §3E1.1(b) affording the government the discretion to file the motion for the reduction.[80] Congress asserted that the "[g]overnment is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial."[81]

Secondly, the proposed amendment is also far too broad to achieve its objective of clarity.[82] The proposed amendment states "preparing for trial" means "substantive preparation" and is ordinarily indicated by actions "taken close to trial." The terms "substantive preparation" and "close to trial" are not only flawed because of their temporal reliance, but are also ambiguous. All trained attorneys likely believe their motion and trial preparations are all "substantive preparation." In the context of §3E1.1(b), the amount of substantive preparation will turn on the amount and type of work completed. Similarly, "close to trial" is ambiguous and very fact specific. Actions taken several months prior to trial – such as locating and interviewing witnesses in a complex gang prosecution with significant amounts of challenges finding victims or witnesses can be considered "close to trial." Similarly, preparing detailed timelines and

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[77] Some courts have also concluded that allowing the government to deny a reduction based on a defendant's filing a motion to suppress evidence is improper because it amounts to punishing a defendant for asserting his constitutional rights. Such is an insufficient constitutional claim. While a defendant may disagree with the government's reasoning, it must establish the government's decision was motivated by unconstitutional reasons to prevail. United States v. Drennon, 516 F.3d 160, 163 (3d Cir. 2009).

[78] *E.g.*, *Id.* at 161. (Defendant denied an adjustment under§3E1.1(b) after evidentiary hearing during which government called three witnesses).

[79] United States v. Delaurier, 237 Fed. Appx 996, 998 (5th Cir 2007)(holding that district court did not err in denying motion for one point reduction when the government had to spend considerable time and effort, defending the motion to suppress, and the defendant had not demonstrated an improper motive behind that decision.)

[80] 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, 671–72 (2003).

[81] U.S.S.G. §3E1.1, app. note 6; Drennan, 516 F.3d at 161-162.

[82] Proposed Amendments to §3E1.1, 60 (2023)("It would set forth a definition of the term 'preparing for trial' that provides more clarity….").

exhibits to organize evidence for complex motions well before trial could be "close to trial" in once sense. Whereas, in a less complex case, "close to trial" could be understood as a more narrow time frame. The phrases vary from case to case, are subjective, and do not provide clarity.

Finally, the proposed amendment fails to consider the victim experience. While many pretrial motions require limited input from victims, others require extensive work with victims. This demands resources of the prosecutors, investigators, and advocates to build a relationship of trust, prepare and inform victims, and litigate necessary protections for victim and witness potential testimony. Not only does that increase the resource expenditure from the government, it also may burden the victims emotionally and financially, further causing trauma. When motions require much from victims or witnesses, the prosecution should, and indeed was entrusted by Congress to, determine that the additional point reduction is unwarranted.

The reality experienced by many of the victims the VAG members serve is that the use of pretrial motions negatively affects victims. In many cases – particularly crimes of violence where the defendants know the victims or witnesses - the facts are not in dispute and a defense tactic becomes one of attrition wherein the defense seeks to convey to the victim or witness that it is not worth the emotional trauma to continue to participate in the trial. Such efforts can include motions where a victim might have to testify such as motions to suppress identification, various pretrial motions regarding child sexual abuse, sexual assault, domestic violence, human trafficking, etc.[83] They can also include motions where a victim need not testify but the motion threatens to expose such personal information that they require substantial work with a victim. Even if a victim need not testify, defendants sometimes use discovery motions to intimidate a victim by seeking private information.[84]

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[83] E.g., Drennon, 576 F.3d at161 (3d Cir. 2008)(Defendant denied a §3E1.1(b) reduction after an evidentiary hearing during which government called three witness/victims.").

[84] Responding to Stalking: A Prosecutor's Guide to Stalking, Stalking Prevention, Awareness, and Resource Center, at 21 ("An increasingly popular defense tactic is to make demands for discovery of private information about the victim—often, information that is not in the possession or control of the prosecution. These demands for discovery, or subpoenas *duces tecum*, … amount to a fishing expedition in the hopes of learning something that can be used to undermine the victim's credibility. Such unwarranted demands for private victim information serve to discourage victims from reporting crimes and from continuing to participate in the criminal justice process…."); Witness Intimidation: Meeting the Challenge, Aequitas, at 14 (2013)(Noting that a common defense tactic includes filing motions to invade "the privacy of a victim by seeking personal or confidential information that has no possible relevance to the proceedings, or seeking unwarranted psychiatric or physical examinations of the victim may cause

The current language of the proposed amendment would exclude such motions from the category of preparation for trial. Such exclusions could harm victims in that they risk being subjected to motions that are designed to re-traumatize and/or intimidate them or require substantial preparation. When such occurs, it should remain in the discretion of the prosecutor to decide whether such efforts were the type of efforts that caused an inefficient expenditure of resources.

The proposed definition is not the appropriate one to address this complex issue. The VAG believes it is unworkable to create a definition of what is or is not substantive trial preparation. No blunt instrument can categorically be utilized for an inquiry that is by its very nature a case-by-case inquiry. Furthermore, it is an inquiry that can only be done by the prosecutor engaged in the actual preparation who is aware of the relevant witnesses, a necessary burden to respond to the motions, the effect of the motions on victim survivors, and the merit of the motions.

During the Commission's public hearing the Commission inquired about an alternative method to exclude from its proposal motions with victim impact. The VAG greatly appreciates the Commission's inquiry and interest in recognizing pre-trial motions have victim impact. However, after consultation, the VAG was unable to propose alternative language primarily because of the nature of the pre-trial process which can involve victim and witness participation early in the process to assist the government in preparing for the case. Because the VAG encourages early involvement of victims in case preparation, case preparation is so fact specific, and some work with victims is confidential, the VAG agrees with the explicit language of Congress that "the Government is in the best position to determine whether the defendant has assisted authorities …."[85] However, the VAG does note the standard outlined by *Wade v. United States*, 504 U.S. 181, 185-186 (1992) can provide additional guidelines to courts, as the Commission suggests in its issues for comment.

The relevant assessment is not the timing of the motion. Rather it is the resources needed to respond and the emotional toll on the witnesses and survivors. That toll requires resources from

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that victim to cease all cooperation with the proceedings or even to go into hiding to avoid the intrusiveness of the defense investigation."); Prosecuting Alcohol Facilitated Sexual Assault, American Prosecutors Research Center, at 25 (2003)(noting a common defense tactic is to file motions intended "to harass and intimidate the victim" including motions requesting a psychological examination of the victim, access to a victim's counseling records, or attempts to pierce the rape shield laws.)

[85] 3E1.1, app. Note 6.

the government to sustain victims through the criminal litigation process. As such, the VAG opposes this proposed amendment.

B. Circuit Conflict Concerning § 4B1.2(b)

The VAG supports option 2 of the proposed amendment. The option follows a majority of circuits and reflects the most logical reading of the purpose of § 4B1.1. Moreover, the VAG is increasingly concerned about the significant harm to victims from drug trafficking, and repeat offenders should be sentenced consistently with the logical interpretation §§ 4B1.1 and 4B1.2.

5. CRIME LEGISLATION

The VAG has no comment to the proposed Crime Legislation Amendments.

6. CAREER OFFENDER

Listed Guidelines Approach

The VAG supports a rejection of the categorical approach to determine whether a prior conviction is a crime of violence or controlled substance offense for purpose of applying the career offender guideline under § 4B1.1. The VAG supports a conduct-based approach. The VAG does not support the Listed Guidelines approach as said list is under inclusive of violent offenders, such as burglary (§ 2B2.2) and sex trafficking (§ 2G1.1), among others.

The VAG, however, strongly opposes the exclusion of offenses that involve a finding of recklessness. Crimes of violence undoubtedly occur with a mens rea of reckless. "Reckless" involves situations in which a defendant sees the risk to others and consciously disregards that risk to achieve his criminal ends. This can be a risk to human life or bodily injury.[86] Such a defendant engages in violence when perhaps his conscious outcome is not death, but his behavior is so extreme a disregard for human life that it is a serious crime of violence.

[86] See e.g., KST 21-5403 (second degree murder includes homicide committed recklessly under extreme risk to human life).

7. CRIMINAL HISTORY

A. Status Points under §4A1.1

The Commission recognizes that a defendant's criminal history is a significant factor for the court to consider when imposing a sentence. The Commission's Introductory Commentary to Sentencing Guidelines Chapter 4 addresses the significance of a defendant's criminal history on culpability, deterrence of criminal conduct, societal messaging, punishment, recidivism, and rehabilitation. It notes that a "defendants record of past criminal conduct is directly relevant to [§ 3553's] purposes." This seems particularly relevant when a defendant is not only a recidivist, but has committed the instant offense while serving a sentence and a two point addition is appropriate.

The Commission's recent report on recidivism notes that the recidivism rates of offenders released in 2005 and 2010 are unchanged: 49.3% (nearly half of offenders released in these years were rearrested within eight years of release).[87] The Commission's 2022 report on the use of status points concluded that status points may address the defendant's culpability and other statutory purposes of sentencing but had minimal effect on the predictive value for recidivism.[88] The Commission did not reference any additional research in its proposed amendments addressing the effect of status points on culpability, criminal deterrence, societal messaging, or other indicators for successful rehabilitation. Without such research, removing status points altogether based on one sentencing factor seems unwarranted. A defendant under a court order status stands in different position than one who is without that status and that has implications for punishment, social messaging, and deterrence. Similarly, without this information the changes suggested in Options 2 and 3 are unwarranted.

The VAG believes that, if the Commission finds an amendment to §4A1.1 necessary at this time, Option 1 provides the most useful application commentary to courts in determining on a case-by-case basis whether the addition of a particular defendant's status points "substantially

[87] U.S. SENT'G COMM'N, RECIDIVISM OF OFFENDERS RELEASED IN 2010 (2021), p. 4.

[88] "While the inclusion of status points in the criminal history score may address culpability and other statutory purposes of sentencing, status points do not significantly improve the score's prediction of rearrest." U.S. SENT'G COMM'N, REVISITING STATUS POINTS (2022), p. 18.

over represents the seriousness of the defendant's criminal history." Providing courts with a Commentary on the use of that defined discretion may assist in determining a fair and just sentence, which is what crime victims desire.

The VAG asks the Commission to reject proposed Options 2 and 3 as not supported by the Commission's available research. Option 2 reduces applicable status points, without a fully researched basis for doing so, and then provides Commentary to the courts allowing upward or downward departures. Option 2's status point reduction combined with the Commentary allowing broader court discretion may lead to a lack of uniformity amongst the courts in status point application, which will adversely affect crime victims and their sense of fairness. Option 3 eliminates status points altogether, which option is currently unjustified and contrary to crime victims' interests.

B. §4C1.1 ADJUSTMENT FOR CERTAIN ZERO POINT OFFENDERS

From the VAG's review of the Commission's proposed amendment to the Sentencing Guidelines Chapter 4, by adding a new Part C—Adjustment for Certain Zero-Point Offenders, the VAG concludes that the amendment's effect is to reward a convicted criminal defendant for doing (prior to their offense) what is expected of every citizen—obey the law. If a convicted defendant has no criminal history, that is already calculated into the convicted defendant's applicable sentencing range. This proposed amendment is not only rewarding baseline behavior but doing so multiple times in the sentencing calculation. Granting extra credit to a convicted defendant for having no criminal history seems opposite to the purposes of sentencing for a committed offense and contrary to crime victims' interests. From this perspective, the VAG is opposed to both Option 1 and Option 2.

The VAG also has concerns about who will receive this benefit. Many offenders obtain a position with access to vulnerable victims precisely because of this status. They then exploit that status to victimize vulnerable people and use that status to deny allegations against them and discredit their accusers. Law enforcement, prison guards, professionals with access to children, economic criminals, CSAM offenders all severely victimize others in part because of their status

and would now be rewarded a second time by exploiting this status beyond what is appropriate at sentencing.[89]

While the VAG is opposed to Options 1 and 2, the VAG reads the Commission's proposal as expressing concern that its research leads it to believe that the Sentencing Guidelines unfairly categorize convicted defendants that *have no prior convictions* with other convicted defendants *who have prior convictions* but whose convictions are not counted because of current Guideline language.[90] However, this group of offenders still has a recidivism rate of 26.8%. Furthermore, as the Department of Justice noted in its testimony, more than 41% of violent offenders with zero points were re-arrested within 8 years. These statistics do not merit this proposal. If the Commission is committed to making an amendment for the sole purpose of addressing the fairness of how convicted defendants with no prior convictions are treated, the VAG urges the Commission to adopt Option 1, with further detail explained below.

Option 1 focuses solely on convicted defendants with no prior convictions. Option 2 includes convicted defendants with prior convictions which are uncountable under the Guidelines. If fairness to those without prior convictions is the issue, then only Option 1 addresses that issue and only Option 1 should be considered by the Commission.

Notwithstanding this fallback position, the VAG wants to draw particular attention to this proposed amendment lack of appreciation of the harm CSAM inflicts on children victims. Proposed § 4C1.1(a)(6) would exclude from this benefit potentially offenders whose crime of conviction "is not a covered sex crime." However, the definition of "covered sex crime" excludes CSAM possessors, traffickers, and recipients. This is extremely alarming to the VAG as it represents a reversal from 35 years of Supreme Court jurisprudence regarding children in the images of CSAM. Since *New York v. Ferber* and as recently as *Paroline v. United States*, the Court has acknowledged CSAM crimes are not victimless crimes. In *Ferber*, the Court noted,

[89] The proposal also raises significant questions about the demographics of who will receive this benefit. For example, 76.5% of CSAM offenders have little or no prior criminal history. 99.3% of these offenders are also male, 83.3% are white. Quick Facts – Child Pornography Offenders, U.S. Sentencing. Comm'n, at 1 (2018). Using this as an example, such a change to §4C1.1 could benefit some groups disproportionally as compared to other groups.
[90] The Commission's Proposed Amendment summary also states that in FY 2021, of the approximately 17,500 offenders with zero criminal history points, approximately 13,200 had no prior convictions. Proposed Amendment, Criminal History, (B) Zero Point Offenders, at 2.

> Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.[91]

More recently the Court in Paroline closed the door once and for all on the suggestion that CSAM is a victimless crime by stating, "It is common ground that the victim suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals have viewed and will in the future view images of the sexual abuse she endured." [92] The Court recognized that "every viewing of child pornography is a repetition of the victim's abuse…. [Possessors'] conduct produces concrete and devastating harms for real, identifiable victims."[93] The Court specifically rejected the idea that these offenses of possession do not directly harm victims. "It would be inconsistent …to apply the statute in a way that leaves offenders with the mistaken impression that child-pornography possession (at least where the images are in wide circulation) is a victimless crime…[T]heir [possessor's] acts are not victimless."[94]

While the VAG opposes this proposed amendment in total, it very strongly opposes its application to this class of CSAM possessors and traffickers.

During the hearing, the Commission asked the VAG for some proposed language. Regarding this specific issue of CSAM, the simplest approach is to strike their proposed language that excludes certain offenders from the definition of "covered sex crimes" in proposed paragraph (a)(6)'s second proposed option, and reject the first proposed option. Therefore, it would read:

> *(6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and the instant offense of conviction is not a covered sex crime];*

And then VAG asks the Commission to strike the proposed language in (b)(5) so it reads

[(5) "Covered sex crime" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18or (iii) 18 U.S.C. § 1591; or (B)

[91] New York v. Ferber, 458 U.S. 747, 758, n. 9(1982).
[92] Paroline v. U.S., 572 U.S. 434, 457 (2014)
[93] Id.
[94] Id. at 458.

an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this definition.]

For the foregoing reasons, the VAG asks the Commission to reject Options 1 and 2. If the Commission deems the proposed amendment for Adjustment for Certain Zero-Point Offenders necessary, the VAG asks the Commission to adopt Option 1, with the included sub-options noted above.

8. ACQUITTED CONDUCT

It is axiomatic that a core aspect of sentencing is individualized sentencing which allows courts to consider the full context of the offense, the defendant, and the impact of the crime to craft an appropriate sentence. It is equally as clear that when a defendant is found not guilty of some offenses and convicted of others, those offenses for which he was found not guilty should not be treated as though the defendant was convicted of them. The proposed amendments regarding acquitted conduct would, however, deprive the court from considering - with appropriate weight and in the context of the offense - such conduct, forcing the sentencing court into artificially craft a sentence based on a fictional framing.

During federal prosecutions, a crime victim has a right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[95] Currently, 18 U.S.C. § 3661 provides: "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[96] The consideration of acquitted conduct fits within this and is not without a safeguard for the accused. The Supreme Court has previously considered the issue, holding that acquitted conduct may be considered so long as it has been proven by the preponderance of the evidence standard.[97] "Highly relevant—if not essential to [the judge's] selection of an appropriate sentence

[95] 18 U.S.C. § 3771(a)(4).
[96] 18 U.S.C. § 3661.
[97] *See*, United States v. Watts, 519 U.S. 148 (1997).

is the possession of the fullest information possible concerning the defendant's life and characteristics."[98]

In considering whether the Guidelines should be amended to prohibit the consideration of acquitted conduct in determining the appropriate guideline range, the VAG requests the Commission consider the impact on the victim and victim advocacy. The VAG members, many of whom represent and otherwise advocate for victims of crime, agree that most victims would oppose a prohibition on considering acquitted conduct especially when the information related to that conduct is relevant. If the Guidelines are amended to preclude consideration of acquitted conduct in determining the appropriate range, the right of the victim to be reasonably heard at sentencing may be severely limited. A victim who has standing to assert the right to be reasonably heard at sentencing, may have information related to the emotional, physical, and financial harm they have endured because of the criminal conduct. Such a proposal could deny the ability to include this information in their Victim Impact Statement (VIS). These statements are important to all participants in the criminal justice system. VIS's "provide information to the sentencing judge or jury about the true harm of the crime-information that the sentencer can use to craft an appropriate penalty."[99] They "may have therapeutic aspects, helping crime victims recover from crimes committed against them."[100] VIS's "help to educate the defendant about the full consequences of their crime, perhaps leading to greater acceptance of responsibility and rehabilitation…"[101] and "create a perception of fairness at sentencing, by ensuring that all relevant parties-the state, the defendant, and the victim-are heard."[102] Consequently, excluding references to such conduct if established by the preponderance of the evidence is unfair to victim survivors.

Additionally, the VAG notes the juxtaposition between the implications of this proposal and that regarding extraordinary and compelling release. In the former, the Commission assumes, to the benefit of offenders, the sentencing court cannot give the appropriate weight to acquitted conduct, and thus considers it necessary to remove that conduct entirely from consideration.

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[98] *Id.* at 152 (quoting Williams v. New York, 337 U.S. 241, 247 (1949) (upholding a sentence, the court relied on 30 burglaries of which defendant had not been convicted)).

[99] Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).
[100] *Id.*
[101] *Id.*
[102] *Id.*

However, the proposed amendments for extraordinary and compelling release arguably take the opposite position which in turn benefits offenders – not victim survivors. It provides broad and nearly unbridled discretion with very little guidance or specific examples to courts to properly weigh any situation brought before it for early release without the benefit of the victim survivor's perspective. The sentencing system must be consistent. When judges have sufficient guidance, as they do through the *Watts* case, the law presumes they are able to follow the law, especially where, as here, there is Supreme Court precedent on this issue allowing courts to properly weigh acquitted conduct where relevant. This proposal is inconsistent with that law and with the purpose of sentencing to comprehensively sentence offenders fairly and accurately.

Because a prohibition on acquitted conduct may infringe on a victim's right to be heard at sentencing and limit what can be said in a VIS, possibly hindering emotional recovery, the VAG opposes this proposed change.

9. SEXUAL ABUSE OFFENSES

A. Sexual Abuse Offenses While Committing Civil Rights Offenses

Sexual violence is among some of the most egregious forms of victimization – causing physical, psychological and emotion harms for both victim survivors and their families. Often sexual offenders seek vulnerable victims as targets of their criminal activity. The American criminal justice system recognizes that crimes in general and sexual crimes in particular vary in their form and severity, treating crimes committed against the vulnerable more egregiously. Although these offenders seek out victims wherever they can be found, whether that is in their own home or in their work environment, some target the uniquely vulnerable such as children, subordinates, those dependent on the offender for shelter or food, and those under government care, custody or control. These crimes have increased in severity and the law provides for increased punishment to be proportional to the harm caused.

The new statute addressing sexual abuse in the context of civil rights violations has a vast range of punishment with an inadequate penalty at its lowest end given the gravity of sexually contacting a person incapable of consent and completely vulnerable to the offender. A base offense level that reflects the seriousness of such an offense is appropriate, and should be similar to those base offense levels in other types of offenses addressing the sexual abuse of those unable

to legally consent. Those in the custody or control of law enforcement are entitled to the highest level of care.

If 18 U.S.C. § 250 is the offense of conviction, § 2H1.1 should be amended to reflect a higher base offense level, in order to reflect that crimes involving sexual abuse will be treated with the understanding that those who prey on uniquely vulnerable victims should pay a higher penalty than those who do not. The VAG recommends a base offense level increase of at least 7 levels, from a 12 to a 19, in order to address these concerns. Additional offense characteristics and enhancements should include higher penalties for serious bodily injury and the threat of force.

B. Criminal Sexual Abuse of a Ward or Person In Custody

Addressing sexual violence must be a priority in any criminal justice system. Victims of sexual violence often suffer ill effects like increased suicidal ideation, drug and alcohol abuse, difficulty in forming emotional attachments, and many other mental health issues. Vindicating victims' rights after they suffer such crimes is paramount. Those in the care, custody and control of the government are analogous to child victims in that they have no ability or capacity to meaningfully consent to sexual activity, and are uniquely vulnerable to the offenders of those who would abuse them. The VAG agrees with the Department of Justice that the statutory penalty for 18 U.S.C. § 2243(c) is quite severe but is not reflected appropriately in the Guidelines. The Guidelines in § 2A3.3 currently call for a base offense level that equals barely a year in custody, while the statutory maximum is a 15-year custodial sentence. The Commission should consider raising the base offense level to reflect the seriousness sexual violence requires. Widening this gap, there are also no enhancements for especially egregious cases, effectively conveying to courts there is virtually no reason to sentence offenders to long custodial sentences regardless of the level of violence or injury that accompanied the offense. Additionally, the lack of enhancements completely fails to account for the circumstances of each victim of this crime. The government has a duty of care to those in its custody, regardless of the circumstance that brought about that custodial situation.

In contrast, other federal sexual abuse crimes have far higher base offense levels. 18 U.S.C. § 2241 ("Aggravated sexual abuse") and 18 U.S.C. § 2242 ("'Sexual abuse"), have base offense levels of 30 and 32, respectively, if the victim is in custody. While those offenses have

an element of coercion, it is clear that anyone already a ward or in custody of the government is in a far inferior power position and thus, consent of any kind cannot be legally recognized because the coercion is already present in the systemic situation which provides the locus for the sexual abuse. Sexual abuse and violence cannot ever be tolerated, and Congress has now seen fit to criminalize "knowingly engage(ing) in a sexual act with an individual who is under arrest, under supervision, in detention, or in Federal custody," essentially expanding the prohibition on sexual abuse of a ward to all federal law enforcement, and not just inside federal facilities.[103] This change is recognition that society will not, and should not, tolerate sexual abuse of any kind by anyone within federal jurisdiction. Therefore, a base offense of 25 is far more appropriate than 14. The Commission should also consider an abuse of trust enhancement for § 2A3.3. This will ensure that courts properly evaluate the power differential between offender and victim in a meaningful way. Additionally, rather than applying cross references, adding enhancements for actions involving serious injury and/or threat of force would address those particularly egregious cases of sexual abuse inside the same Guideline, which promotes a less complex sentencing scheme.

10. ALTERNATIVES-TO-INCARCERATION PROGRAMS

The VAG takes no position on this proposed amendment due to its limited impact on victims.

11. FAKE PILLS

The VAG supports the proposed amendment as it is responsive to the concerns of the Drug Enforcement Agency regarding the epidemic of death due to synthetic drugs.

12. MISCELLANEOUS

The VAG takes no position on this proposed amendment.

13. TECHNICAL

The VAG takes no position on this proposed amendment.

[103] 18 U.S.C. § 2243(c).

The VAG appreciates the opportunity to comment upon the victim related issues regarding the Commission's proposed amendments. We hope that our collective views will assist the Commission in its deliberations on these important matters of public policy.

Should you have any further questions or require any clarification regarding the suggestions, the VAG welcomes such an invitation to dialog further on these matters.

As always, we remain,

Respectfully,

Mary Graw Leary
Chair
Victims Advisory Group

cc: Advisory Group Members

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March 14, 2023

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Proposed Amendments

Re: Comments Regarding Proposed Amendments to the
U.S. Sentencing Guidelines for Compassionate Release

To the Commission:

I submit these comments on behalf of the Aleph Institute ("Aleph") and the Center for Justice and Human Dignity ("CJHD") regarding (1) the proposed amendments to the U.S. Sentencing Guidelines policy statement 1B1.13, relating to what is commonly referred to as compassionate release, and (2) alternatives-to-incarceration programs. I represent both organizations on a *pro bono* basis and am a member of CJHD's Board of Directors.

As the Commission is aware, on October 16, 2022 Aleph and CJHD submitted comments on the Commission's proposed priorities for the 2022-23 amendment cycle, including comments relating to 1B1.13 and alternatives-to-incarceration programs. In addition, I submitted written testimony on February 15, 2023 and testified before the Commission on February 23, 2023, on behalf of Aleph and CJHD, concerning the proposed amendments to 1B1.13. All of those statements are incorporated herein and I will endeavor not to repeat them. Instead, the purpose of this letter is to address certain comments made and questions raised during the written and live testimony of other witnesses.

Compassionate Release

None of the comments addressed below, or any others, has changed our views about the proposed amendments to 1B1.13. Our enthusiastic support of those amendments remains as strong as ever.

1. Changes-in-Law Provision (1B1.13(b)(5)). Arguments that the changes-in-law provision will "open the floodgates" to an inordinate number of 3582(c)(1) motions do not provide a sound reason not to adopt this provision. In any event, the Commission can take steps when promulgating this amendment to ameliorate any such concern.

Data since the First Step Act of 2018 authorized defendants to file 3582(c)(1) motions on their own behalf strongly suggests that this concern may be exaggerated. From 2020 to 2022, approximately 23,000 such motions were filed – but many of them (more than 8,500) were based (in whole or in part) on the COVID-19 pandemic, a circumstance that hopefully is highly unlikely to reoccur in the foreseeable future. Moreover, the total BOP prison population during that time consisted of nearly 237,000 different defendants. In other words, the number of *non*-COVID-related 3582(c)(1) motions filed during that period constituted only a small fraction of the total prison population (with some prisoners filing more than one). And 3582(c)(1) motions based on changes-in-law claims constitute just a small percentage of these non-COVID-related motions. To be clear, many defendants in the current prison population *already* have advanced the changes-in-law argument, even in the absence of a Commission policy statement defining it as a permissible ground.

Moreover, to the extent that this amendment will precipitate further 3582(c)(1) motions based on changes in the law, presumably this will result in some number of *meritorious* claims of "extraordinary and compelling reasons" for a potential sentence reduction. Indeed, from 2019 to 2022, courts granted 317 motions based at least in part on this ground – grants that required the court to find not only that "extraordinary and compelling reasons" warranted a sentence reduction, but also that such a reduction was consistent with the sentencing factors in 18 U.S.C. §3553(a) and would not endanger the community. This trend is a *good* thing, which the Commission ought to embrace and encourage. As illustrated by the countless examples provided to the Commission during the written and live testimony, there are many defendants who have been incarcerated for lengthy periods of time who present extraordinary and compelling reasons, based in part on changes in law, why they ought not be incarcerated any longer – or, at least not as long as their original sentences would require. For these individuals, judges have determined that sentence reduction or release will not endanger the community and is consistent with the statutory purposes of sentencing in 18 U.S.C. §3553(a). The release of these and other similarly deserving defendants can bring incalculable benefits not only to them, but also to their families and their communities – improving if not saving countless lives. Any incremental burden on the criminal justice system in considering these motions is an appropriate cost to potentially rectify the imposition of lengthy sentences that, with changes in the law and all other circumstances, have proven to be demonstrably unjust. Indeed, such motions are likely to ultimately *save* government resources by reducing unnecessary prison costs.

The Commission also can mitigate any concerns about the volume of changes-in-law motions by explicitly stating its intentions and expectations regarding application of the changes-in-law amendment. For example, the Commission should consider including commentary making clear that the granting of a 3582(c)(1) motion based on a change in law that renders the defendant's sentence inequitable should not be considered automatic or even routine; put differently, not every change in law that would result in a lower sentence should be considered "extraordinary and compelling." Relatedly, the Commission can make clear that the granting of a 3582(c)(1) motion on this ground must be based on individualized assessment of the totality, or entire constellation, of circumstances surrounding a defendant's situation – consistent with how each of the four circuit courts of appeal that have endorsed reliance on this factor have ruled. This standard is consistent with the proposed amendment's requirement not only of a change in the law, but one that renders the sentence "inequitable." In all these ways, the Commission can help ensure that only those

defendants for whom changes in law and other circumstances create genuinely extraordinary and compelling reasons for sentencing relief will be eligible to receive it.

The Commission can adopt other guardrails to prevent excessive use or application of this provision. For example, the Commission could make clear that a 3582(c)(1) motion is not a vehicle for raising challenges to a conviction or sentence cognizable on direct appeal or in a collateral attack (for example, challenging the voluntariness of a plea, or ineffective assistance of counsel). The Commission could further provide that changes in law that do not arise from statutory enactments or court decisions that directly affect the sentence applicable to a defendant's offense of conviction at the time of their motion – for example, a change in an evidentiary rule that could have altered the outcome of the defendant's trial – are ineligible for relief under the provision.

We understand, as some opponents have stated, that allowing motions on this ground may be in tension with the goal of finality. But modifying a prison sentence does not undermine the finality of a *conviction*, and Congress has appropriately enacted several provisions for adjusting *sentences* – including, for example, lowering a sentence based on post-sentence substantial assistance to the government, and modifying probation and supervised release terms and conditions. Indeed, the enactment of 3582(c)(1) itself reflects Congress' recognition that extraordinary and compelling reasons can justify revising a sentence, despite the interest in finality; the First Step Act of 2018 reflects this even more strongly, to the extent it allows defendants (not just the Bureau of Prisons) to seek this relief directly. By promulgating this particular amendment, the Commission will simply be carrying out its statutory obligation to provide a meritorious example of the unusual circumstances that may qualify a defendant for modification of a prison term under 3582(c)(1).

2. Sexual Assault/Physical Abuse Victims (1B1.13(b)(4)). None of the concerns raised about this proposed amendment justifies any modification of or retrenchment from it. Any risk of collusion between inmates should be absent with respect to an assault committed by correctional staff. The suggestion that releasing such victims would undermine public safety is not only speculative – the victims could have a history that presents little or no such risk – but also is addressed by the statutory and policy statement requirements that the defendant not present a danger to the community and also satisfy the 3553(a) factors, including ones taking into account the defendant's criminal history, the nature of the offense, and the need to protect the public. And while we agree that concerted efforts at prevention of staff assaults on inmates ought be pursued with vigor, the fact remains that such assaults may nevertheless occur and, if they do, victims ought to have a prospect of relief if they can meet all of the 1B1.13 standards.

We also believe that special proof requirements – such as a conviction, civil liability determination, or administrative finding – are not only unnecessary but potentially unfair to the victims. Such a finding could take a long time – years, even – to occur; the victim ought not face the prospect of sentencing relief being delayed that long (or even losing entirely any prospect of such relief). In any event, judges are well-equipped to determine the credibility, reliability and strength of an incarcerated person's account – be it of sexual assault or physical abuse – and then decide whether the requisite standards have been satisfied. Indeed, judges routinely rely on traditional fact-finding methods, together with their own experience and judgment, to determine a wide variety of sentencing adjustments (loss amount and drug quantity, for example) with

potentially far greater impact on a defendant's term of imprisonment than a 3582(c)(1) motion. While any prior administrative or judicial finding could certainly be taken into account by the court in deciding the motion, such a finding should not be a special predicate requirement, imposed only on victims of sexual assault or physical abuse by BOP personnel.

3. Medical Conditions (1B1.13(b)(1 and 2)). It has been suggested that, in order for defendants to qualify for compassionate release under the proposed amendments relating to medical conditions and pandemics, they must provide supporting documentation from two independent medical professionals. This is an unwarranted requirement. As a practical matter, it is unrealistic to expect that incarcerated individuals will have the means (financially or otherwise) to procure such opinions. And it is not apparent why *two* such opinions would be required, and what would render them "independent." Presumably, an opinion obtained by an incarcerated person is no more (or less) independent than one procured by the BOP – and if neither is independent, then from whom would an independent opinion be obtained (and who would pay for it)? More fundamentally, however – and as with the proposed amendment addressing sexual assault and physical abuse victims – there is simply no good reason why this particular claim cannot be adjudicated by a judge in the same way that other claims are – by a careful assessment of the credibility, reliability and strength of the evidence.

Courts are unquestionably competent to do this. Judges are called upon from time to time to assess medical evidence – for example, in the context of civil actions alleging medical malpractice by government doctors or medical facilities, or a defendant seeking a downward departure under 5H1.4 based on a physical condition. There is no reason why courts would be any less equipped to assess similar types of evidence in the context of a 3582(c)(1) motion. Indeed, courts already do so under the current version of 1B1.13, which often requires an assessment of a defendant's medical condition.

4. "Other" Extraordinary and Compelling Circumstances (1B1.13(b)(6)). We recognize the tension between ensuring that unanticipated circumstances that rise to the level of extraordinary and compelling reasons for relief can be addressed, and having a potentially open-ended standard for other circumstances that may qualify for compassionate release. We submit that the former approach is essential to fully effectuate the text and intent of 3582(c)(1), and the latter can be addressed by the Commission when promulgating this provision.

The "other circumstances" provision is supported by 3582(c)(1)'s legislative history and text. The Senate Report concerning this statute states explicitly that the reason for the provision was that "there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances," including "cases of severe illness" and "cases in which ***other*** extraordinary and compelling circumstances justify a reduction of an unusually long sentence…"[1] And the statute itself directs the Commission to provide "examples" of such circumstances, not an exhaustive, all-inclusive list.[2] Fulfilling the statute's directive to supply examples is precisely what the Commission has done, and proposes to do, under 1B1.13.

[1] *Id.* at 55 (emphasis added).

[2] 28 U.S.C. §994(t).

In addition, the Commission can make clear – either in the body of the policy statement or in the commentary to it – that the "other circumstances" provision is not intended to be a "catch-all" for general sentencing leniency or second chances, and (as with the changes-in-law provision) is not a vehicle for raising challenges to a conviction or sentence cognizable on direct appeal or in a collateral attack. The Commission can state that the specific grounds delineated in 1B1.13 are intended to cover the majority of cases that would qualify as "extraordinary and compelling" and that the "other circumstances" provision is intended to cover those rare cases in which an unspecified ground may nevertheless qualify for potential relief.

Precedent for this approach is in the Guidelines themselves. As stated in my February 15, 2023 written testimony (at p.7 and notes 12-13), Chapter 5 provides both specific examples of circumstances in which an upward or downward departure would be permissible, as well as authority for courts to depart in other, unspecified circumstances. And we are unaware of evidence that this "catch-all" departure provision has led to an unacceptable volume of either departure motions or unwarranted departures.

Limiting this provision to grounds "similar to" the specified grounds (Option 1) is unwarranted and unnecessary. It is unwarranted because it flies in the face of a core justification for the "other circumstances" provision: to allow courts to address unanticipated circumstances – even ones different from the specified ones – that nevertheless meet the exacting "extraordinary and compelling reasons" standard. COVID-19 is one example (which the Commission has appropriately proposed to address), but there certainly could be others. Moreover, engrafting this additional requirement onto the provision will inevitably spawn satellite litigation over whether particular circumstances are, or are not, "similar" to the specified ones – when judicial resources ought to be focused instead on whether the proffered reasons are actually "extraordinary and compelling" and thus eligible for a potential reduction in sentence or release. And limiting the provision as contemplated under Option 1 is unnecessary because, as demonstrated above, the Commission can take steps to ensure that the provision is invoked and applied only when it should be.

5. Defendants Convicted of Violent Crimes. We recognize that certain crime victim advocates oppose application of the proposed amendments (if not compassionate release entirely) to defendants convicted of violent crimes. While it is understandable that they feel that way, no such categorical limitation is warranted. Nothing in the statute supports such an exception; nothing in the legislative history supports it, either. Any defendant, regardless of the type of crime they committed, could in theory present extraordinary and compelling reasons for a reduced sentence or for release. Moreover, both the statute and policy statement have conditions specifically designed to prevent the release of defendants who would present a danger to the community or whose early release would be inconsistent with the 3553(a) factors, including the need for just punishment and to protect the public – and Commission data proves that judges have routinely exercised their discretion to deny 3582(c)(1) motions on these grounds. And the Commission has already been provided with many examples of defendants who were convicted of a violent crime but who nevertheless were correctly determined by courts to be deserving of reductions in their sentences, consistent with public safety.

6. Congressional Intent. To the extent that questions have been raised about whether or the extent to which the proposed amendments are consistent with Congressional intent, the record is clear and strong that they are.

The legislative history underlying 3582(c)(1)'s enactment reflects Congress' desire to provide a "safety valve" for cases in which "the defendant's circumstances are so changed" that it would be "inequitable to continue the confinement of the prisoner."[3] Congress understood that "there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances," including "cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence…"[4] The proposed amendments are consistent with this legislative intent.

The statute's text compels the same conclusion. Congress did not merely *authorize* the Commission to promulgate a policy statement addressing the appropriate use of 3582(c)'s sentence modification provision – it explicitly *directed* the Commission to do so.[5] This reflects Congress' recognition that the Commission would have the institutional knowledge and experience to best reflect the unusual circumstances in which a defendant may be entitled to a sentence reduction. And Congress further recognized the Commission's responsibility in this respect would continue over time; it directed the Commission to "periodically review and revise" the Guidelines based on comments and data, and authorized it to promulgate amendments to the Guidelines not later than May 1 of any given year.[6] This is precisely what the Commission is doing now, with respect to the compassionate release policy statement. And if the Commission over time learns that too many meritless motions are being brought based on one claimed factor or another, it can amend 1B1.13 to address that situation.

In this respect, the question of whether the First Step Act of 2018 was intended to expand the grounds for compassionate release, or was merely a "procedural" amendment, is to some extent beside the point – though the stronger case can be made for the former, given the circumstances leading to its passage and the name of the compassionate release provision itself ("increasing the use and transparency of compassionate release"). Because the Commission lacked a quorum for nearly four years after the Act's passage, courts addressing 3582(c)(1) motions developed a robust collection of precedents for when such motions should or should not be granted – precedents that presumably have informed the Commission's decisions on what amendments to propose (or not propose). By promulgating the currently proposed amendments, the Commission is carrying out its core, statutorily mandated responsibility for this particular subject: providing standards for what circumstances may qualify as "extraordinary and compelling" by way of amendments to the pre-existing policy statement, based on recent data. And by so doing, the Commission will be giving much-desired guidance to courts throughout the country on which circumstances qualify under 1B1.13 for potential relief.

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[3] *See* S. Rep. 98-225, at 121 (1984)

[4] *Id.* at 55 (emphasis added).

[5] 28 U.S.C. § 994(a)(2)(c).

[6] 28 U.S.C. § 994(o), (p).

Alternatives-to-Incarceration Programs

We fully support the Commission's further study of alternatives-to-incarceration programs and its promulgation of a downward departure under the Guidelines for defendants who successfully complete such programs. We commented on these topics in our October 16, 2022 letter to the Commission regarding its proposed priorities for the 2022-23 amendment cycle (at pp. 7-9), and refer you to that letter for our views on these matters.

Conclusion

I appreciate the opportunity to submit these comments to the Commission.

Respectfully,

/s/ *Alan Vinegrad*

Alan Vinegrad

cc: Kathleen Cooper Grilli, Esq.
General Counsel

March 14, 2023

Chair Judge Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002

Dear Chair Judge Carlton W. Reeves, Vice Chairs, and Commissioners:

We are the Dublin Prison Solidarity Coalition—a coalition comprised of six legal and non-legal groups, including the ACLU of Northern California, the California Coalition for Women Prisoners, the California Collaborative for Immigrant Justice, Centro Legal de la Raza, Dolores Street Community Services, and Rights Behind Bars. We formed in 2021 as a partnership of people currently and formerly at Federal Correctional Institute Dublin (FCI Dublin) and their supporters. We have been calling for action in the form of compassionate release from prison and release from immigration detention, as well as systemic remedies to FCI Dublin that would curb the ongoing staff sexual abuse and retaliation in the facility.

We write **in support** of including a new category providing eligibility for compassionate release to survivors of sexual violence in prison in the proposed amendments to the U.S. Sentencing Guidelines. Expanding eligibility to include survivors of sexual abuse will allow especially vulnerable survivors to find safety from continued abuse. We offer a few recommendations to make this category as clear and inclusive as possible.

We'd like to express our thanks to the Commission for recognizing the harm of sexual violence in prison by including a category for eligibility for compassionate release for such survivors in the proposed amendments. But we feel that the current proposed amendment is underinclusive and difficult for survivors to meet. The amendment fails to consider that while most incarcerated survivors of sexual violence do not experience what might be classified as criminal "sexual acts" or "serious bodily injury," their abuse is nonetheless pernicious and devastating.

1. **Defining "Sexual Assault"**

In the proposed amendment, the Commission has included the following category as an extraordinary and compelling reason warranting the reduction of a term of imprisonment: "VICTIM OF ASSAULT.—The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody." USSG § 1B1.13(b)(4).

The proposed amendment does not comment on how to define "sexual assault," nor does it make clear whether "serious bodily injury" applies to sexual assault. We assume for the sake of this comment that "serious bodily injury" applies to the "sexual assault" part of this category, and that "sexual assault" means "sexual abuse" as defined at 18 U.S.C. § 2242.

In another part of the current U.S. Sentencing Guidelines, serious bodily injury is defined as:

> injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

USSG § 1B1.1, commentary note 1(M). This definition references the aggravated sexual abuse and sexual abuse statues of the criminal code. Under the sexual abuse statute, a person in a federal prison who knowingly causes another to engage in a sexual act by threatening that person or "placing that other person in fear"; or who engages in a sexual act with a person who is incapable of understanding the nature of the conduct or is physically incapable of declining to engage in the conduct; or who engages in a sexual act without the other person's consent, including through coercion, is criminally liable. 18 U.S.C. § 2242. The aggravated sexual abuse statute applies when a person in a federal prison uses force, threat or fear of death, serious bodily injury, kidnapping, or drugs or intoxicants to cause another person to engage in a sexual act—or renders a person unconscious and then engages in a sexual act. *Id.* § 2241.

In turn, "sexual act" is defined as:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person....

18 U.S.C. § 2246(2).

The comment filed by Rights Behind Bars discusses these definitions further and proposes alternative terms to make survivors eligible for compassionate release. Specifically, Rights Behind Bars proposes using the definitions of sexual abuse and sexual harassment in the Prison Rape Elimination Act (PREA), 28 C.F.R. § 115.6. While we do not discuss those definitions here, we share in that recommendation. Our experience with survivors has shown us why the definitions of "sexual act," "sexual abuse," and "aggravated sexual abuse" in the U.S. Code does not cover enough of the behaviors that survivors experience that should qualify for compassionate release.

As a group of advocates connected to hundreds of survivors incarcerated in federal prisons, we have heard especially horrific stories of staff sexual abuse and harrassment. This abuse, while shocking and appalling, often falls outside the contours of the sexual abuse definitions under the

federal criminal code, 18 U.S.C. §§ 2241 & 2242, which limit conduct to "sexual act[s]" involving penetrative sexual contact or oral sex, or touching underneath clothing. Yet, these survivors remain in a setting of imminent risk of continued sexual abuse or harrassment and have no means of recourse or protection in prison contexts, where the culture of sexual abuse often runs rampant among officers and their supervisors. In this environment, the only way to ensure survivors are protected is through compassionate release. The following are only a few examples of the abuse survivors have experienced who fall into this category:

- One survivor was forced by an officer to exchange sexual favors including forcing her to perform oral sex on another prisoner while this officer watched. On another occasion this same officer forced her to strip and dance naked while he watched. He pulled another officer to watch her together, and then he forced her to masturbate while they both watched.

- Another survivor faced repeated explicit sexual harassment by one officer. He eventually took her to an office in the facility and instructed her to pull down her underwear, pull up her clothes, and bend over. He hit her buttocks while making vulgar comments about her buttocks and genitals and explained how he wanted to have sex with her. On other occasions, he also rubbed his penis against her hands through his pants while she was trying to perform her prison job.

- Another woman was drugged and sexually fondled by medical officers. She was forcibly drugged with a substance that made her less than lucid during a medical check. While she was drugged and incapacitated, the officer fondled her breasts. This survivor heard that this officer committed the same abuse to other women in the same prison.

- Another survivor woke up in the Special Housing Unit (SHU) after being beaten by guards. When she woke up, she was naked with officers standing over her taking photos and videos of her. While she was detained in the SHU, another officer told her how he wanted to have violative sex with her. Not long after, another officer touched her breasts and genitals over her pants.

- One officer sent letters to one particular survivor on a daily basis. He kissed her countless times and touched her breasts and genitals over her clothes. He also touched her twice under her clothes. Even after this officer quit his job at the prison, he attempted to stalk her and communicate with her.

- Another officer often gave one particular woman a time frame in which he expected her to do what he instructed when he came by her cell. He often requested her to be topless while she rubbed lotion on herself. He also instructed her to show him her breasts and genitals. When this officer was put on administrative leave for sexually assaulting other women in the facility, another officer simply picked up where he left off and continued to instruct this survivor to strip for him while he made vulgar comments about her body.

These acts, though egregious, might not be sufficient for prosecution under the sexual abuse statute, 18 U.S.C. § 2242. Yet the survivors and others like them experienced intense physical embodiments of emotional distress–extreme anxiety and depression, nightmares, and fear when

moving around the facility–due to the abuse they faced. The Commission would better serve such survivors by using the most expansive terms and definitions possible when discussing sexual abuse so as to leave no ambiguity that these types of misconduct ought to render survivors eligible for compassionate release. We believe the definitions of sexual abuse and sexual harassment under PREA are some of the best existing language in federal law for this purpose.

2. "Serious Bodily Injury"

We are also concerned with the "serious bodily injury" standard because this creates an overly restrictive definition of the effects that sexual abuse and harrassment may cause. Although recognizing physical harms is important, most of the long-term harm of sexual violence is mental and emotional. Many survivors of abuse who did not receive serious bodily injuries have detailed the deep emotional wounds they now must carry throughout their lives. For example:

- Many individuals who have been abused and harrassed in prison have a history of extensive sexual abuse in childhood. The abuse that they experienced in prison viscerally triggers those painful experiences and compounds the effects of their trauma. While their abuse may not have caused bodily injury or serious bodily injury, the ramifications of the abuse or harassment is long lasting. For example, one woman experienced so much repeated sexual abuse as a child. A prison officer at FCI Dublin began repeatedly coming into her cell and undressing her in the middle of night but, because she had this history of sexual trauma, she would not wake up until the officer had already partially taken off her clothes. Though she was usually able to fight off the officer before it advanced, this caused illustrative flashbacks about her childhood abuse and severely affected her mental health, making her feel powerless and trapped like she did when she was young.

- Many survivors who face abuse in prison have also had histories in violent or abusive relationships prior to incarceration. Officers often manipulate especially vulnerable people with this history to sexually abuse them, which causes traumas to resurface all over again. For example, one survivor had experienced both sexual abuse in childhood and an extensively abusive marriage. When she was incarcerated, one officer manipulated her into a sexual relationship, promising he could help her once she was released. As she engaged with this officer, she felt worthless but felt like she had no way out because of his position and authority in the facility, as well as the promises he made to help her. Though it is unclear if she may have a "serious bodily injury," she now can't sleep, has nightmares, and consistently struggles with extreme anxiety. She feels like her ability to trust relationships is now hindered and she sometimes feels like her life does not matter.

- Although many survivors may have not experienced any serious bodily injury, they experience other long term effects from their sexual assault including: being diagnosed with new medical conditions or worsening existing conditions including Post Traumatic Stress Disorder (PTSD), depression, or anxiety; refusing to leave their cell because of fear of abuse; nighmares; loss of hair; loss of sleep; being unable to perform basic tasks such as taking a shower for fear of abuse; loss of appetite; and frequent black outs.

These examples lead us to recommend that the Commission remove the "serious bodily injury" requirement from the proposed amendment.

3. Accessing Mental Health Services

It's deeply troubling that the people who have been sexually abused at FCI Dublin do not have access to mental health counselors. BOP has little to no internal psychological or mental health services. We have heard that survivors of abuse often are extremely psychologically affected and seek psychological support but when they ask for this support, they are refused these services or are told "We just don't have enough people." Also many survivors we are in contact with are monolingual Spanish speakers and there are no psychologists who speak Spanish who can give them care. As a result, they are ultimately left without options of services at all.

External psychological services mandated under PREA regulations are also nearly impossible to access. Individuals have reported to us that in order to access services from the counseling service contracted by BOP at FCI Dublin (which is mandatory under PREA regulations), people must request a call or a visit through an FCI Dublin staff person. We have spoken with many people who would like to receive services from this counseling group, but do not feel comfortable requesting services through a staff person, given the climate of retaliation in the facility. We have also spoken with multiple people who have requested calls with this contracted agency, but never received them. We have heard particular clients have requested mental health services for months and never received them. There is limited access to visit people in FCI Dublin to provide any services at all. In one particularly egregious example, a survivor was ordered a court appointed victim witness advocate but FCI Dublin blocked access to this advocate for nearly two months, ultimately requiring an in-person escort from the Department of Justice for the advocate to be able to visit her. As these stories show, survivors of abuse remain in an environment that retraumatizes them daily.

4. Conviction of Abuser

Lastly, a finding of extraordinary and compelling circumstances should not depend on the conviction of the perpetrator. The vast majority of people who perpetrate violence against incarcerated people are not held accountable. The harm that survivors have faced should be enough, without the conviction of the wrongdoer, to find that they have a basis for compassionate release.

Conclusion

We hope you will take these serious concerns to heart and consider 1) using "abuse and sexual harassment" instead of "assault" in USSG § 1B1.13(b)(4) and utilizing the definitions of "sexual abuse and sexual harassment" in the Prison Rape Elimination Act or otherwise defining the terms to be as broadly inclusive as possible; 2) omitting the "serious bodily injury" standard; 3) underscoring the need for survivors to have access to mental healthcare; and 4) including a possibility for survivors to have access to compassionate release regardless of whether or not their abuser has been convicted.

Sincerely,

The Dublin Prison Solidarity Coalition–
The California Coalition for Women Prisoners,
The California Collaborative for Immigrant Justice,
Centro Legal de la Raza,
Dolores Street Community Services,
ACLU of Northern California, and
Rights Behind Bars

Submitted electronically

March 14, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle NE
Suite 2-500
Washington, DC 20002-8002
Attn: Public Affairs—Proposed Amendments

Re: Proposed Amendments to the Career Offender and Criminal History Guidelines

Dear Judge Reeves:

FAMM, the American Civil Liberties Union, Bend the Arc: Jewish Action, Equal Justice USA, the Japanese American Citizens League, Juvenile Law Center, The Leadership Conference on Civil and Human Rights, NAACP Legal Defense and Educational Fund, Inc., the National Association of Criminal Defense Lawyers, the National Center for Transgender Equality, the National Council of Churches, and The Sentencing Project appreciate the opportunity to comment on the United States Sentencing Commission's proposed amendments to the career offender and criminal history guidelines.[1] Commenters include organizations dedicated to civil rights and racial equity, attorneys who represent people impacted by the proposed amendments, and non-profit organizations who serve them.

Commenters commend the Commission for its comprehensive and thoughtful approach to a variety of issues addressed in the proposed amendments. In particular, Commenters applaud the serious, data-driven approach that has led the Commission to propose eliminating status points when calculating defendants' criminal history. This proposed amendment represents the Commission at its best: following the data to create sensible policies that reduce racial sentencing disparities in the service of justice.[2] We urge the Commission to adopt this recommendation.

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[1] U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* (Feb. 2, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf ("Proposed Amendments").

[2] *See* U.S. Sentencing Commission, *About the Commission*, https://www.ussc.gov/ (last visited March 8, 2023) ("The U.S. Sentencing Commission . . . was created by Congress in 1984 to reduce sentencing disparities and promote transparency and proportionality in sentencing.").

Commenters encourage the Commission, however, to reconsider its proposed career offender guidelines, which run contrary to these goals. Commenters share significant concerns that the proposed career offender guidelines would greatly expand the application of the career offender sentencing enhancement, exacerbating the very problems of over-incarceration and racial inequity the Commission is charged with preventing. The proposed amendments would also create significant administrative difficulties in implementation, including by making mini trials necessary in many cases, and thus prove unworkable in practice. Put simply, the proposal does not solve any of the perceived problems with the current career offender guideline; rather, it would multiply them. For the reasons set forth below, and for the reasons provided by the Federal Defenders in their comments and testimony, Commenters urge the Commission to reconsider its proposed career offender guidelines.

I. The Proposed Career Offender Guidelines Would Exacerbate, Rather than Reduce, the Significant Racial Inequities in Federal Sentencing.

Commenters urge the Commission to reconsider its proposed changes to the career offender guidelines. The Commission states that the proposed amendments are intended to make the career offender guidelines easier to administer and fairer. But these changes, if implemented, would exacerbate, rather than reduce, racial disparities in federal sentencing.

The career offender guidelines provide for a significant sentencing enhancement for defendants who have "at least two prior felony convictions of either a crime of violence or a controlled substance offense," and are being sentenced for a third.[3] Once a defendant is designated a career offender, he generally (with some exceptions) will be placed in criminal history category VI, and receive a higher base offense level, which is intended to ensure that he will receive a guidelines range "at or near the maximum term authorized."[4] The terms "crime of violence" and "controlled substance offense" are, in turn, defined in Section 4B1.2, which currently includes both certain enumerated offenses and an elements-based approach to capture offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another."[5] Under the current law, courts apply a "categorical approach" to determine whether a prior conviction "necessarily" entailed a finding of guilt as to the required elements. *Taylor* v. *United States*, 495 U.S. 575, 599 (1990).

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[3] U.S. Sentencing Guidelines Manual §4B1.1(a).

[4] *Id.* §4B1.1(b) & Background Note (quoting 28 U.S.C. § 994(h)).

[5] *Id.* §4B1.2(a), (b).

The proposed amendments would drastically alter Section 4B1.2 by eliminating the categorical approach and instead defining "crime of violence" and "controlled substance offense" by reference to a list of federal sentencing guidelines, rather than by offenses or the elements thereof.[6] The proposed amendments would also specifically broaden the definitions of "robbery" and "controlled substance offense," and expand the guideline's application to inchoate offenses.[7] Taken together, these expansions of the career offender guideline are likely to significantly increase the length of incarceration faced by federal defendants—and this burden will fall disproportionately on Black people.

A. The current career offender guidelines already drive overincarceration and inequity in federal sentencing without any evidence that they enhance public safety.

It is well established that Black people sentenced in federal court receive inexplicably longer sentences than white people.[8] Indeed, data suggests that between 8,000 and 11,000 Black men are in federal prison at any given time due to this unexplained disparity.[9]

Black people are also disproportionately likely to be sentenced under the career offender guideline. The Sentencing Commission's own data consistently shows that, although only one-fifth to one-quarter of federal defendants are Black, they constitute more than half of defendants designated as career offenders.[10] And

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[6] Proposed Amendments, *supra* n.1, at 144.

[7] *Id.*

[8] M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320, 1321 (2014). For example, during 2008 and 2009, the average federal court sentence was 90 months for Black men, compared to 55 for white men. *Id.* One regression analysis concluded that, while some of this discrepancy may be related to factors such as the arrest offense and criminal history, even after controlling for these and other characteristics, "an unexplained black-white sentence disparity of approximately 9 percent remains," a disparity that rises to 13% in a broader sample that includes drug cases. *Id.* at 1323.

[9] *Id.*

[10] *See, e.g.*, Paul J. Hofer et al., U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [hereinafter, *Fifteen Years*] (showing that, in fiscal year 2000, Black people constituted 26% of defendants sentenced under the federal guidelines, but 58% of

defendants sentenced under the career offender guidelines—again, the majority of whom are Black—also make up a disproportionate percentage of people incarcerated in federal prison.[11]

These disparities are unsurprising, given that the career offender guideline effectively bakes in systemic inequities that resulted in those prior convictions, particularly at the state level. Commenters are all too familiar with the ways that Black communities and other communities of color face systematic and ongoing discrimination at every level. For example, Black people are more likely to have

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those subject to the career offender guideline); *compare* U.S. Sentencing Commission, *Quick Facts: Career Offenders* 1 (2012), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf [hereinafter, *Quick Facts* 2012] (showing that, in fiscal year 2012, Black people constituted 61.9% of those subject to the career offender guideline), *with* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Tbl. 4 (2013), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table04.pdf (showing that, in fiscal year 2013, only 20.6% of federal defendants were Black); *compare* U.S. Sentencing Commission, *Quick Facts: Career Offenders* 1 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf [hereinafter, *Quick Facts* 2021] (showing that, in fiscal year 2021, Black people constituted 58.2% of those subject to the career offender guideline), *with* U.S. Sentencing Commission, *Interactive Data Analyzer*, https://ida.ussc.gov/analytics/saw.dll?Dashboard (choose "2021" from the 'Fiscal Year" dropdown; then select "Black" from the "Race" dropdown in the "Demographics" category) (showing that in fiscal year 2021, only 22.8% of federal defendants were Black).

[11] U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements* 2 (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (noting that people sentenced under the career offender guidelines were "sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months)"). "As a result of these lengthy sentences, career offenders [at the time of the report] account[ed] for more than 11 percent of the total BOP population," *id.*, even though people sentenced under the career offender guideline "have consistently accounted for about three percent of the total federal offender population sentenced each year," *id.* at 18 fig. 1; *see also id.* at 24. Due in part to these lengthy sentences, Black people constitute 38.5% of people incarcerated in federal prison right now. Federal Bureau of Prisons, *Inmate Race*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated March 4, 2023).

prior qualifying convictions in part because of overpolicing in their communities: "Police officers are more likely to stop [B]lack and Hispanic drivers for investigative reasons," and "[o]nce pulled over, people of color are more likely than whites to be searched, and blacks are more likely than whites to be arrested."[12] In some jurisdictions, like Ferguson, Missouri, "these patterns hold even though police have a higher 'contraband hit rate' when searching white versus black drivers."[13]

One recent example of overpolicing: in 2019, Madison County, Mississippi entered into a (still ongoing) consent decree following allegations that its Sheriff's Department "methodically targeted Black individuals for unlawful searches and seizures, which were often accompanied by unjustified and excessive force."[14] During the course of the litigation, plaintiffs had submitted evidence that 77% of all arrests in Madison County between 2012 and 2017 were associated with Black individuals, although only 38.4% of the Madison County population was Black as of 2016.[15] Plaintiffs likewise submitted evidence that the Sheriff's Department used roadblocks to target Black communities: "the number of roadblocks per [1,000 people] in the census tracts with a substantially larger Black percentage of the population was twice the number of roadblocks per 1,000 residents in census tracts with a relatively low Black percentage of the population"—even controlling for differences in traffic-related arrest rates, traffic behavior, and socioeconomic factors.[16] As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.[17]

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[12] *See, e.g.* Nazgol Ghandnoosh, The Sentencing Project, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* 4 (2015), https://www.sentencingproject.org/app/uploads/2022/08/Black-Lives-Matter.pdf; *see also Fifteen Years*, *supra* n.10, at 134.

[13] *Black Lives Matter*, *supra* n.12, at 4.

[14] Amended Order Granting Motion for Entry of Consent Decree, Dkt. No. 374, at 1, *Brown* v. *Madison County*, Case No. 17-CV-347 (S.D. Miss. Oct. 11, 2019) (Reeves, J.).

[15] *See* Summary Declaration of Rahul Guha, Ph.D., Dkt. No. 231-2, at 3–5, *Brown* v. *Madison County*, Case No. 17-CV-347 (S.D. Miss. Mar. 14, 2018).

[16] *See* Report of Bryan Ricchetti, Ph.D., Dkt. No. 231-1, at 4–5, 27, *Brown* v. *Madison County*, Case No. 17-CV-347 (S.D. Miss. Mar. 14, 2018).

[17] In 2005, Black people "represented 14 percent of current drug users, yet they constituted 33.9 percent of persons arrested for a drug offense and 53 percent of persons sentenced to prison for a drug offense." Marc Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, American Bar Ass'n (Oct. 1, 2010),

Moreover, Black and poor people are more likely to have pleaded guilty to a prior charge because of the coercive aspects of many state-level bail systems, and the difficulties in securing competent counsel in states with significantly overburdened public defender systems. These two features of many state-court systems reinforce one another.

For example, in Louisiana, a study found that 1,769 full-time public defenders were needed to provide reasonably effective assistance of counsel—but as of 2016, Louisiana employed approximately 363.[18] And in Mississippi, although around 85% of criminal defendants rely on public defenders,[19] Mississippi public defenders likewise "carry excessive caseloads that prevent the rendering of effective representation" and, as a result, almost "never hire investigators and have no time to investigate cases themselves."[20] Public defenders face similar challenges in far too many jurisdictions across the country and, even where they are comparatively well resourced, frequently have significantly fewer resources than private counsel.

Black people bear the disproportionate brunt of a system that leaves defendants locked up pre-trial for extended periods due to both inadequate public defense resources and the often insurmountable burden of paying even small amounts of bail. As the United States Commission on Civil Rights reported, 96% of all felony defendants who are held pretrial would be released if they had the means to post

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https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/justice_for_all_challenging_racial_disparities_criminal_justice_system/. This discrepancy is particularly salient to the career offender context, as the overwhelming majority—77.8% in fiscal year 2021—of defendants receiving the guideline enhancement are being sentenced for drug trafficking offenses. U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Tbl. 26 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table26.pdf.

[18] Postlethwaite & Netterville, APAC & American Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *The Louisiana Project: A Study of the Louisiana Defender System and Attorney Workload Standards* 2 (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf.

[19] Univ. of Mississippi School of Law, *Thousands Stuck in Mississippi Jails with High Bail and No Lawyer* (Jan. 12, 2022), https://law.olemiss.edu/thousands-stuck-in-mississippi-jails-with-high-bail-and-no-lawyer/.

[20] Sixth Amendment Center, *The Right to Counsel in Mississippi: Evaluation of Adult Felony Trial Level Indigent Defense Services* 87, 92 (2018), https://courts.ms.gov/research/reports/6AC_mississippi_report_2018.pdf.

monetary bail—but 90% were unable to post it.[21] The Commission further explained: "Research consistently shows Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants."[22] One study has concluded that "pretrial detention resulted in a 40 percent difference in the Black-white sentencing gap and 28 percent in the Latinx-white sentencing gap,"[23] perhaps due in part to the fact that "similar felony pretrial detainees were more likely to plead guilty by 10 percentage points."[24] According to a study from the Roderick and Solange MacArthur Justice Center at the University of Mississippi School of Law, as of January 2022, there were more than 5,800 people incarcerated in Mississippi county jails—and 2,716 (or 46.8%) of them had been in jail longer than ninety days. More than 1,000 (or 17.2%) had be incarcerated for more than nine months; and 731 (or 12.6%) had been incarcerated for more than one year.[25] Although the study does not plot the racial demographics against length of time incarcerated, there is no reason to believe that these national trends do not hold true in Mississippi.[26]

During these long periods of pre-trial incarceration, defendants may face several collateral consequences, including the loss of a job, loss of housing, or loss of custody of their children. [27] In such circumstances, a defendant may plead guilty to an offense pursuant to a deal that would let them out with time served—not realizing that even though they did not serve an additional sentence, the offense itself could

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[21] U.S. Commission on Civil Rights, *The Civil Rights Implications of Cash Bail* 3 (Jan. 2022), https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf.

[22] *Id.* at 33–34.

[23] *Id.* at 52.

[24] *Id.* at 51.

[25] *Thousands Stuck in Mississippi Jails*, supra n.19.

[26] Although only 39% of Mississippi residents are Black, Black people constitute 57% of Mississippi's jail population; the incarceration rate of Black people in Mississippi jails has increased 85% since 1990, and as of 2015, Black people in Mississippi were incarcerated at 2.2 times the rate of white people. Vera Institute of Justice, *Incarceration Trends in Mississippi* 1–2 (2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-mississippi.pdf.

[27] *See, e.g.*, Nick Pinto, *The Bail Trap*, N.Y. Times (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html; Emily Yoffe, *Innocence is Irrelevant*, The Atlantic (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/; *see also* U.S. Commission on Civil Rights, *supra* n.21, at 53–54.

have imposed a punishment of more than a year, and thus qualify as a predicate felony conviction later on.

Because these inequities become baked into the career offender guideline, the result is significant overincarceration that in turn falls most heavily on Black defendants. As of fiscal year 2012, nearly 63% of career offenders would have had a criminal history category below VI had the career offender provision not applied[28]; as of fiscal year 2021, that is still true for more than 56%.[29] Moreover, "[s]ome of the most significant sentencing impacts apply to those offenders who had the least extensive criminal history scores."[30] Among defendants who would have been placed in criminal history categories II or III absent their career offender designation, the average guideline minimum was increased by 84 months after the career offender provisions were applied.[31]

The long-standing pattern[32] of federal judges choosing to sentence defendants with career offender sentencing enhancements below the guidelines range demonstrates the wide-spread recognition that the augmented penalties are too severe. In its December 2020 report, the Commission noted a "steady increase in the difference between the average guideline minimum and the average sentence imposed in career offender cases," which "demonstrates a continuing decline in the guideline's

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[28] *Quick Facts* 2012, *supra* n.10, at 1.

[29] *Quick Facts* 2021, *supra* n.10, at 1. In fiscal year 2014, the application of the career offender enhancement had an impact on the guidelines range for 91.3%—nearly all—of the people sentenced under that guideline; indeed, 46.3% saw an increase in *both* their criminal history category and final offense level. *Report to the Congress*, *supra* n.11, at 21.

[30] *Report to the Congress*, *supra* n.11, at 21.

[31] *Id.* One study that worked to quantify the degree of overincarceration resulting from the career offender guideline analyzed cases in which defendants who had been sentenced under the residual clause of the career offender guidelines were resentenced after the court of appeals governing their jurisdiction held (or assumed) that the guideline's residual clause was invalid. A review of eight defendants (across eight different circuits) showed their sentences were collectively reduced by 288 months (or more than twenty-four years)—an average of three fewer years imprisonment for each. *See* Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in* Beckles *v.* United States, 165 U. Pa. L. Rev. Online 33, 35, 38 (2016).

[32] *See, e.g.*, *Quick Facts* 2012, *supra* n.10, at 2 (chart); *Quick Facts* 2021, at 2 (chart); *see also Report to the Congress*, *supra* n.11, at 23 ("[T]he anchoring effect of the guidelines for career offenders appears to be diminishing.").

influence."[33] Section 4B1.1 therefore "has among the lowest within-guideline rates each year."[34] And the gap between the guidelines range and the sentence imposed is also ever-widening.[35] Indeed, as of 2016, the Commission was well aware of "concerns that the career offender directive fails to meaningfully distinguish among career offenders with different types of criminal records and has resulted in overly severe penalties for some offenders."[36] The Commission has previously expressed its view that consistent downward variances reflect sentencing courts' perception that the guidelines are too high, and that the guidelines should be lowered, where possible, to reflect court practice.[37] Expanding the reach of the career offender guideline, as Commenters believe the proposed amendment will do, is likely to result in the opposite outcome—and lead only to increased variances from the guidelines.

Although racial inequities and over-incarceration would be sufficient cause for concern, the issues with the career offender enhancement are compounded by the enhancement's lack of impact on public safety. Since the 1980s our prison population has grown exponentially, with much of this growth attributed to the increase in the number of people sentenced due to drug crimes and the increase in length of drug sentencing.[38] Despite the massive growth in incarceration, there is

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[33] U.S. Sentencing Commission, *The Influence of the Guidelines on Federal Sentencing: Federal Sentencing Outcomes, 2005- 2017*, at 54 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf. For example, "the proportion of career offenders receiving a sentence within the applicable guideline range decreased from 43.3 percent in 2005 to 27.5 percent in 2014." *Id.* at 55.

[34] *Id.* at 55.

[35] *Id.* at 56 (showing the gap between the average guideline minimum and the sentence imposed to grow from 45.6 months in fiscal year 2005 to 66.9 months in fiscal year 2017). When the data was limited to "those cases in which judicial discretion can be meaningfully assessed," the difference between the average guideline minimum and average sentence imposed was slightly less than for Section 4B1.1 cases considered generally. *Id.* at 58. But that percentage difference has continued to increase "and, contrary to the [methodology accounting for all Section 4B1.1 cases], does not appear to be slowing." *Id.*

[36] *See Report to the Congress*, *supra* n.11, at 2.

[37] *Id.* at 8.

[38] *See, e.g.*, Nathan James, *The Federal Prison Population Buildup: Options for Congress* 1, 18, Congressional Research Service (May 20, 2016), https://crsreports.congress.gov/product/pdf/R/R42937; Charles Colson Task Force on Federal Corrections, Urban Institute, *Drivers of Growth in the Federal*

no indication that significantly longer sentences—like those imposed by the career offender enhancement—deter crime, protect public safety, or decrease drug use or trafficking. Increasing the severity of punishment has little impact on crime deterrence, and studies of federal drug laws show no significant relationship between drug imprisonment rates and drug use or recidivism[39]; instead, incarceration can actually increase the chances an individual may recidivate.[40] Excessive punishment and mass incarceration have thus produced lasting harm on individuals, families, and communities across the country while having little effect on actual drug use or crime.

The Sentencing Commission's data also confirms that there is no public safety reason to impose these career offender enhancements. One analysis, for instance, found that a model predicting days until recidivism showed a statistically significant difference between each criminal history category to which the defendants would have been assigned, absent the career offender enhancement.[41] The Commission therefore concluded that "assigning offenders to criminal history category VI, under the career criminal or armed career criminal guidelines, is for reasons other than their recidivism risk."[42]

The disconnect between the career offender enhancement and recidivism risk is particularly pronounced for people whose prior qualifying convictions were for controlled substance offenses. In one Commission study, a "preliminary analysis of

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Prison Population 1–2 (March 2015), https://www.urban.org/sites/default/files/publication/43681/2000141-Drivers-of-Growth-in-the-Federal-Prison-Population.pdf.

[39] *See, e.g.*, Erik Luna, *Mandatory Minimums*, *in* 4 Reforming Criminal Justice: Punishment, Incarceration, and Release 117, 127–130 (Erik Luna, ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/7_Criminal_Justice_Reform_Vol_4_Mandatory-Minimums.pdf; National Institute of Justice, U.S. Dep't of Justice, *Five Things About Deterrence* (May 2016), https://www.ojp.gov/pdffiles1/nij/247350.pdf; Pew Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return (*Aug. 27, 2015), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return.

[40] *See, e.g.*, Damon M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review,* 50 Crime & Justice 353, 357 (2021).

[41] U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

[42] *Id.*

the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI": indeed, the Commission concluded, "[t]he recidivism rate for career offenders [based on prior drug offenses] more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules."[43]

The Commission has therefore previously recommended that Congress amend its directive to "no longer includ[e] those who currently qualify as career offenders based solely on drug trafficking offenses,"[44] recognizing that the "normal operation of Chapter Four's criminal history provisions adequately accounts for likelihood of recidivism and future criminal behavior of those [defendants] who are currently deemed to be career offenders, but who have not committed an instant or prior offense that is a 'crime of violence.'"[45]

Commenters are deeply concerned that the Commission now seeks to expand, rather than narrow, the scope of the career offender guideline—even though the data underlying its previous recommendation remains materially unchanged. The racial disparities detailed above, taken together with the lack of evidence that the imposition of the guideline reduces recidivism or improves public safety, strongly caution against any action that would expand their reach.

B. The proposed amendments would likely exacerbate these inequities.

The proposed amendments to the career offender guideline would not address any of the disparities outlined above. Instead, the amendments are likely to deepen the harm to communities of color.

The proposal recommends moving from the current, elements-based approach of determining whether a prior conviction qualifies as a "crime of violence" or a "controlled substance offense" to an accusation-based approach: that is, in determining whether a prior conviction qualifies as a predicate for the enhancement, courts will look to "the Chapter Two guideline that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted."[46] This determination will be "based on: (1) the elements, and any means of committing such an element, that formed the basis of the defendant's

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[43] *Fifteen Years*, *supra* n.10, at 134 (emphasis in original).

[44] *Report to the Congress*, *supra* n.11, at 3.

[45] *Id.* at 44.

[46] Proposed Amendments, *supra* n.1, at 151.

conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means."[47] The commentary notes emphasize that "[t]he fact that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the Chapter Two guidelines . . . is not determinative."[48]

The Commission also proposes permitting sentencing courts to look to additional documents from the prior case to determine whether that prior conviction qualifies.[49] These may include the judgment of conviction, the charging document, the jury instructions, the judge's formal rulings of law or findings of fact, a plea agreement or transcript of plea colloquy, any explicit factual finding by the trial judge to which the defendant had assented, and "[a]ny comparable judicial record of the sources described."[50] By contrast, under the current categorical approach, courts are permitted to look to these sorts of documents (known as *Shepard* documents) only when the statute of conviction is divisible, in order to prevent unfairness. *See Descamps* v. *United States*, 570 U.S. 254, 258, 267 (2013). But under the proposed amendments, they would always be available to the sentencing court.

In short, rather than looking to an objective test to determine whether the elements of the prior offense "necessarily" involved a crime of violence or a controlled substance offense, courts will look to a subjective test to determine whether, based on a variety of documents from the prior offense, "any means" of committing a qualifying offense had been established. Commenters expect that moving to such an approach will both expand the number of defendants who are sentenced under the career offender guidelines (thus exacerbating the inequities already present in that system) and introduce additional inequities by permitting courts to rely more frequently on documents from prior convictions that may not accurately convey what had occurred years prior. In other words: rather than addressing the inequities detailed above, the proposed expansion of the career offender guideline will make each of them worse.

Commenters are concerned that an "actual conduct" approach to prior convictions does not always result in a finding of the facts that truly occurred, but rather reflects the outcome of a process already weighted down by systemic inequities. As described above, Black and poor people are disproportionately likely to be represented by overburdened public defenders in state court, where their counsel

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[47] *Id.*

[48] *Id.* at 153.

[49] *Id.* at 153–54, 161.

[50] *Id.* at 153.

may not have the resources to fully advise their clients about the future consequences of pleading guilty or to carefully negotiate a plea agreement that accepts guilt under the statute that was charged but denies the factual allegations in the charging document (even where the defendant may dispute some of those factual allegations). Based on Commenters' experience, expanding sentencing courts' ability to rely on *Shepard* documents even where the statute of conviction is indivisible is therefore flawed and likely to exacerbate the inequities detailed above.

Under an accusation-based system—and where witnesses to the actual prior conduct are unavailable or unreliable due to the passage of time and geography—courts are likely to expand their reliance on charging documents when determining at sentencing whether or not prior convictions qualify as predicates for a career offender enhancement. Although such documents are likely to set forth the most detailed account of the supposed "facts" of the prior conviction, they are typically based on a one-sided narrative, often drawn from police reports (or the testimony of police officers before a grand jury).[51] Such documents are therefore likely to bake in any bias or inaccuracies contained in those police reports. For example, recent—and tragic—news reports revealed that "[a] police report written hours after officers beat Tyre Nichols was starkly at odds with what videos have since revealed."[52] The police report stated that Mr. Nichols was "an irate suspect who had 'started to fight' with Memphis police officers, even reaching for one of their guns"—even though the videos "showed nothing of the sort."[53] The police report also failed to mention "the powerful kicks and punches unleashed on Mr. Nichols," who died several days later from those injuries.[54] The videos, however, "captured police officers yanking Mr. Nichols from a car, threatening to hurt him and then—after he ran away—catching up with him and inflicting the deadly beating."[55] Based on Commenters' experience, even despite the availability of video evidence, a charging document

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[51] The Department of Justice goes one step further: in the March 7, 2023 hearing before the Commission, the DOJ witness proposed that courts be permitted to look beyond the set of *Shepard* documents currently captured in the proposed amendment and rely on the police reports themselves. Although the DOJ witness described these as "reliable police documents," that is simply inaccurate. As the example Commenters set forth here illustrates, police reports are at best one-sided, and at worst actively misleading—often in ways that fall disparately on Black defendants.

[52] Jessica Jaglois et al., *Initial Police Report on Tyre Nichols Arrest Is Contradicted by Videos*, N.Y. Times (Feb. 1, 2023), https://www.nytimes.com/2023/01/30/us/tyre-nichols-arrest-videos.html.

[53] *Id.*

[54] *Id.*

[55] *Id.*

might well have reflected the police officers' narrative—and a court relying uncritically on that charging document might have come to the erroneous conclusion that Mr. Nichols, rather than the police officers, had committed a crime of violence. At a subsequent federal sentencing hearing years later, where the Federal Rules of Evidence do not apply,[56] a defendant would face meaningful difficulties in gainsaying such sources of evidence.

The Commenters are in good company with their concerns that using an accusation-based approach to determine whether a prior conviction is a crime of violence or a controlled substance offense will result in injustice. The Supreme Court has already set forth the reasons that "the practical difficulties and potential unfairness of a factual approach are daunting." *Taylor*, 495 U.S. at 601. In *Taylor*, a unanimous Supreme Court raised numerous questions about such a process: "Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed [a qualifying predicate offense]? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed [a qualifying predicate offense], could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, [non-qualifying] offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [a qualifying offense]." *Id.* at 601–02. These questions and concerns have never been answered satisfactorily in the intervening three decades, nor are they addressed in the proposed amendments, or by the Department of Justice.[57]

Moreover, a career offender enhancement that uncritically accepts the convictions resulting from state-court systems cannot help but compound the inequities within those systems that Commenters detailed above. Expanding the career offender guideline to an accusation-based approach will only broaden the number of people who are affected. By relying on an increasing (and nebulous) set of sources outside the elements of the offense of prior conviction, the proposed amendment would set courts to a path of mini-trials.

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[56] Fed. R. Evid. 1101(d).

[57] *See* U.S. Department of Justice, Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Feb. 27, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/DOJ4.pdf.

The Supreme Court has also warned of the pitfalls of this approach, explaining that sentencing courts "would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense," even though "[t]he meaning of those documents will often be uncertain" and "the statements of fact in them may be downright wrong." *Descamps*, 570 U.S. at 270. The "facts" contained "in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Mathis* v. *United States*, 579 U.S. 500, 512 (2016). After all, defendants "often ha[ve] little incentive to contest facts that are not elements of the charged offense—and may have good reason not to," including fears of confusing the jury, or, in the plea context, "irk[ing] the prosecutor or court by squabbling about superfluous factual allegations." *Descamps*, 570 U.S. at 270. As a result, "a prosecutor's or judge's mistake . . . reflected in the record, is likely to go uncorrected." *Mathis*, 579 U.S. at 512. Those "inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id.* Finally—and "[s]till worse"—an accusation-based approach "will deprive some defendants of the benefits of their negotiated plea deals." *Descamps*, 570 U.S. at 271. Thus, "an elements-focus avoids unfairness to defendants." *Mathis*, 579 U.S. at 512.[58]

In sum, based on the Commission's own data, Commenters expect that adopting the proposed amendments would result in significantly heightened sentences across the federal system, without commensurate deterrence and crime prevention. And the overincarceration that will result will disproportionately impact Black defendants and communities. Commenters therefore strongly urge the Commission to follow its data to an outcome that is more just and equitable.

II. The Proposed Career Offender Guidelines Would Exacerbate, Rather than Address, the Difficulties in Implementing the Current Career Offender Guidelines.

The proposed career offender guidelines would also exacerbate the very practical difficulties in administering the guidelines that the Commission purports to address. In the prefatory material explaining its proposed amendment, the Commission does not address the justice and equity issues outlined above. Instead, it focuses primarily on criticism the current career offender guideline has received—primarily, that it is difficult to apply, as evidenced by the amount of litigation resulting from disputes about whether certain prior state court convictions count as

[58] For all of these reasons, the "actual conduct" method proposed by the Department of Justice, *see id.* at 31, is even less likely to allow courts to uncover what "actually" happened that led to decades-old state-court convictions.

qualifying predicate offenses or not.[59] Although Commenters appreciate the Commission's efforts to take that feedback seriously in developing its proposed amendments, the proposal before the Commission now would not redress any of the concerns about the current guideline. Instead, it is likely to exacerbate the practical difficulties of the current practice—even as it deepens inequities and injustices. It is never appropriate to sacrifice fairness, justice, and racial equity for the sake of administrative efficiency. But the proposed amendments will not accomplish even that.

Although the Commission (and the critics it echoes) are certainly correct that the current categorical approach has spurred a high volume of litigation, there is no reason to believe that adopting the proposed amendments would reduce it. Instead, the Commission's proposal is likely to increase litigation. First, the proposal offers minimal guidance on how to accomplish the hard work of determining which Chapter Two guideline "covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted."[60] This difficulty will be particularly acute for categorizing prior state offenses, which will not fall as neatly into the federal guidelines as federal offenses will.

Imagine, for example, a defendant who was previously indicted in state court for "criminal gang activity" based on "drug trafficking *and/or* possession of marijuana."[61] The police had found some illegal substances in her apartment—according to the charging document, an amount just enough to cross the line from simple possession to intent to distribute—but it belonged to her juvenile son. She decided to say it was hers, to keep her son from getting in trouble.[62] She was held pre-trial, didn't have access to a public defender during that time, and couldn't afford the set bail amount.[63] She was worried about what would happen to her job, and her apartment, and her son if she remained in jail. Her attorney, when she got one, didn't have the resources to double-check whether lab tests confirmed the weight of the substances seized (which, in truth, were lower than the charging document had suggested).[64] So she made a deal with the prosecutor to plead guilty in exchange for time served, but that plea agreement was never reduced to writing.

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[59] Proposed Amendments, *supra* n.1, at 146.

[60] *Id.* at 151.

[61] Unlikely as it may seem, some state court proceedings do employ disjunctive indictments of this sort. *See, e.g.*, *United States* v. *Adkins*, 729 F.3d 559, 566 (6th Cir. 2013).

[62] *See* Yoffe, *supra* n.27.

[63] *See id.*

[64] *See* Sixth Amendment Center, *supra* n.20 (noting public defenders' inability to conduct investigations due to lack of resources).

She had a short hearing, in which she pleaded guilty to Count I of the indictment, and the precise amount of illegal substance at issue was not mentioned at the colloquy. She was released from jail, never appreciating that she had pleaded guilty to a felony that could have a significant impact on a future sentence. How, under the proposed amendment, would a sentencing court go about categorizing that prior conviction? How would it determine which Chapter Two guideline most closely matched the "conduct" of a woman who had, in actuality, neither possessed nor trafficked drugs? How would it apply the "by any means" test, where the charging document itself provides different means of committing the offense?

Even for federal offenses, questions abound: imagine, for instance, a situation in which a defendant had been charged with a federal offense that would be categorized under one Chapter Two guideline, agreed with the prosecution in a plea agreement to jointly request the application of a different guideline, and was ultimately sentenced under still a third. When a later court is trying to determine how to categorize this prior offense, which controls? Commenters thus expect that, if the proposal is adopted, significant litigation will ensue as prosecutors and defendants argue over which guideline presents the best match for various prior convictions.[65]

Second, the current approach has some efficiencies insofar as courts routinely interpret cases involving the categorization of predicate offenses as "crimes of violence" and "controlled substance offenses" (or not) under Section 4B1.1 to be coextensive with the similar analysis of predicate convictions under the Armed Career Criminal Act. *See, e.g.*, *United States* v. *Womack*, 610 F.3d 427, 433 (7th Cir. 2010); *see also James* v. *United States*, 550 U.S. 192, 206 (2007) (noting that "the Sentencing Guidelines' career offender enhancement['s] definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony'"), *overruled on other grounds by Johnson* v. *United States*, 576 U.S. 591 (2015).[66] As a result, one controlling case can often answer whether a prior conviction qualifies under *either* enhancement. But if the Commission creates a separate track for the career offender guide, all of the settled law categorizing prior state convictions as qualifying predicates (or not) will fall by the wayside. In other words, parties will have to re-litigate the question of whether, under the new approach, convictions of

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[65] And, as described above, moving to an accusation-based approach will also lead district courts to undertake time-consuming and inefficient mini-trials at sentencing in an effort to determine what conduct underlay a prior conviction.

[66] Commenters thus commend the Commission for making clear in the proposed amendments that the *Borden* rule, holding that a prior conviction with a mens rea of recklessness is insufficient to count as a "violent felony" under the Armed Career Criminal Act, also applies in determining whether a prior conviction is a "crime of violence" under the career offender guideline. *Compare Borden* v. *United States*, 141 S. Ct. 1817 (2021), *with* Proposed Amendments, *supra* n.1, at 151.

certain crimes do or do not count as qualifying predicates. And if a question arises about a state-court offense that has not already been the subject of litigation, then two controlling cases, rather than one, will be required to resolve the issue: one under the revised career offender guideline, and one under the ACCA. And, to the extent litigation under the revised guideline relies heavily on a specific fact pattern, even one case may not suffice to settle the issue of whether a certain state-court offense will qualify or not in every circumstance. Put simply, rather than reducing litigation, the proposed approach would multiply it.

The proposed amendments also contradict feedback the Commission has previously received about the feasibility of implementing the career offender guidelines. Indeed, the Commission itself has acknowledged that, in previous stakeholder meetings, "the primary theme that emerged from the roundtable discussion was the desire to have one definition of 'crime of violence' that would apply throughout criminal law."[67] Moving further away from the categorical approach—by diverting from the approach used for the ACCA—directly contradicts that feedback.

Third, the Commission has expressed concerns that the current categorical approach is a "'legal fiction,' in which an offense that a defendant commits violently is deemed to be a non-violent offense because other defendants at other times could have been convicted of violating the same statute without violence, often leading to 'odd' and 'arbitrary' results."[68] This is not a reason, however, to swing the pendulum all the way to the other side. As explained above, moving to an accusation-based approach, under which a defendant can receive a career offender enhancement if there are "any means" of committing a predicate offense in a way that would fall under an enumerated Chapter Two guideline, would sweep in people who truly had not committed a crime of violence. Or, to put things in parallel terms: it would create a "legal fiction" in which an offense that a defendant commits non-violently is deemed to be a violent offense because other defendants at other times could have been convicted of violating the same statute with violence. Our constitutional system does not view these two possibilities as equivalent; indeed, our criminal system is predicated on the notion that it is better to underincarcerate the guilty than to overincarcerate the innocent. To the extent that there is a particular concern in a particular case, however, sentencing courts remain free to impose an upward variance—as they have always been.

Finally, Commenters also note that, even under the current system, factual and legal errors in understanding and categorizing prior offenses do sometimes

[67] *Report to the Congress*, *supra* n.11, at 50.

[68] Proposed Amendments, supra n.1, at 146.

happen—with devastating consequences for the defendant.[69] The confusion that will surely follow from the proposed amendments would all but guarantee that the number of such mistakes multiplies.

The Commission is well aware that the current career offender guideline is broken, and it has previously urged Congress to enact changes to minimize its harm.[70] The adjustments it now proposes, however, would do the opposite. The Commission should decline to adopt its proposed amendments to the career offender guideline. But, should the Commission proceed, Commenters strongly recommend that, at the very least, the Commission revise Section 4A1.3(b)(3)(A) as well. That provision currently limits the downward departure for defendants sentenced as career offenders under Section 4B1.1 to one criminal history category. If the Commission elects to expand the career offender Guideline—despite all of the reasons not to do so—then the Commission should permit, and indeed, encourage district court judges to exercise their discretion to downward depart as many criminal history categories as they deem necessary to correct course for defendants who have been unjustly swept up in this expansion of the career offender guideline.

III. The Proposed Criminal History Guidelines Properly Eliminate Status Points.

Under the current Section 4A1.1(d), courts are instructed to add two points to a defendant's criminal history calculation "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." The Commission has now set forth three options for revising the way the guidelines address these "status points." Because Commenters agree with the Commission that the inclusion of status points is unsupported by its data, Commenters applaud the Commission's proposal to revise that guideline to minimize reliance on status points, and urge the Commission to eliminate status points entirely.

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[69] *See, e.g.*, John Patrick Bailey, Note, *Run-On Sentence: Remedies for Erroneous Career Offender Enhancements*, 65 Duke L.J. 1477, 1502–03 (2016) (collecting cases of factual error regarding predicate offenses); Joint Motion for Resentencing to Time Served and Request for Order of Immediate Release, Dkt. No. 115, *United States* v. *Pinckney*, Case No. 08-CR-909 (D.S.C. June 9, 2016) (noting legal error in categorizing prior conviction as a predicate offense under the Armed Career Criminal Act).

[70] *See supra* at 11; *see also generally Report to the Congress*, *supra* n.11.

This proposal is well supported by the Sentencing Commission's recent report on status points.[71] The report acknowledges that the inclusion of status points have a significant impact on defendants' guidelines calculations: for 61.5% of defendants—or 46,978 people between fiscal years 2017 and 2021—who received status points, those additions moved them into a higher criminal history category.[72] In most cases, this will meaningfully raise the applicable guidelines range.[73]

As the Commission recognizes, however, its data do not demonstrate that these additional years of incarceration serve the purpose of specific deterrence.[74] Analyzing people who were released from federal prison in 2010, the Commission found that "[t]hose who received status points were rearrested at similar rates to those without status points who had the same criminal history score."[75] In fact, among people with a criminal history score of seven, those without status points were slightly *more* likely to be rearrested within the eight years following release.[76] "While rearrest rates rose as the criminal history score increased, the differences in rearrest rates between status offenders and non-status offenders within each criminal history score were not statistically significant."[77] Overall, the inclusion of status points "only minimally improve[s] the criminal history score's successful prediction of rearrest—by 0.2 percent."[78] In other words, "status points improve the criminal history score's successful prediction of rearrest for only 15 out of 10,000" defendants.[79]

Although status points are not indicative of a propensity to recidivate, they are indicative of inequity. Between fiscal years 2017 and 2021, 32.7% of defendants

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[71] U.S. Sentencing Commission, *Revisiting Status Points* (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf.

[72] *Id.* at 11.

[73] *See* U.S. Sentencing Commission, *Sentencing Table* (Nov. 1, 2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/Sentencing_Table.pdf.

[74] Proposed Amendments, *supra* n.1, at 177.

[75] *Revisiting Status Points*, *supra* n.71, at 3.

[76] *Id.* (69.6% of those with status points, compared to 70.4% of those with status points, were rearrested).

[77] *Id.* at 14.

[78] *Id.* at 3 (score correctly predicts rearrest 65.1% of the time with status points, and 64.9% of the time without); *see also id.* at 17.

[79] *Id.* at 18.

assigned status points were Black[80]—but during that time only 20.5% of all defendants sentenced in the federal system were Black.[81] The additional burden of status points therefore fell disproportionately on Black defendants. This is unsurprising, given that Black communities are more likely to be overpoliced[82]—even though the inclusion of status points has not been found to carry any benefit to public safety.

In its efforts to redress the injustices resulting from the use of status points, the Commission has offered three options for comment: (1) to add a downward departure provision for cases in which status points apply; (2) to decrease the criminal history status points added from two to one, and add a departure provision that could result in either an upward or downward departure; or (3) to eliminate the use of status points altogether, while providing elsewhere "an example of an instance in which an upward departure" may be warranted.[83] Commenters strongly support the adoption of Option 3. The Commission should no longer employ status points as a benchmark for determining a guidelines range when the evidence no longer supports their use. Option 3 is therefore the choice most consistent with the data the Commission has provided.

In sum, the proposal to eliminate the use of status points in calculating criminal history is precisely the right step forward—for all the reasons the career offender proposal is a step backwards. Commenters praise the Commission for the inclusion of Option 3, support the Commission in implementing that revision, and encourage a coherent, unified, and data-driven approach to the overarching issues the Commission considers.

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[80] *Id.* at 7.

[81] *See Interactive Data Analyzer*, *supra* n.10 (select "Sentencing Outcomes" from the top bar; then select years "2017" through "2021" in the "Fiscal Year" dropdown (note that the chart includes the 334,836 cases reported to the Commission during these years); then select "Black" in the "Race" dropdown in the "Demographics" category (note that the chart now includes the 68,798 cases reported to the Commission during these years, within the selected demographic.)).

[82] *See supra* at 5. It is worth noting, for instance, that "[t]he most common prior conviction[]" of defendants assigned status points was the category of "public order offenses." *Revisiting Status Points*, *supra* n.71, at 8. There is a stark discrepancy between the percentage of people assigned status points who had prior convictions for "other public order" offenses (54%) and those who were not assigned status points who had similar prior convictions (41.3%). *Id.* at 9, fig. 3.

[83] Proposed Amendments, *supra* n.1, at 178.

Commenters appreciate the opportunity to share our views on this matter, consistent with our missions of promoting justice and equity in our criminal system, and would be happy to provide further information as requested. If you have any questions or would like to discuss the information in this comment, please contact FAMM's counsel, Jessica Morton, Senior Counsel at Democracy Forward Foundation, at 202-448-9090, or jmorton@democracyforward.org.

Respectfully submitted,

FAMM
American Civil Liberties Union
Bend the Arc: Jewish Action
Equal Justice USA
Japanese American Citizens League
Juvenile Law Center
The Leadership Conference on Civil and Human Rights
NAACP Legal Defense and Educational Fund, Inc.
National Association of Criminal Defense Lawyers
National Center for Transgender Equality
National Council of Churches
The Sentencing Project

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Abolish Slavery Virginia

Topics:

1. Compassionate Release

Comments:

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Submitted on: March 10, 2023

AMERICAN BAR ASSOCIATION

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March 10, 2023

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

Re: ABA Support for Proposed Amendments to U.S.S.G. § 1B1.13; Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement) (February 2, 2023)

Dear Judge Reeves:

On behalf of the American Bar Association (ABA), the largest voluntary association of lawyers and legal professionals in the world, I am pleased to offer these comments in response to the proposed amendments to U.S.S.G. § 1B1.13, referenced above. The ABA supports the proposed changes to U.S.S.G. § 1B1.13 that would improve access to, and judicial discretion over, requests for a reduction to one's sentence based on "extraordinary and compelling" circumstances.

The ABA's historical views on such sentence reductions were recently reaffirmed at our 2022 Annual Meeting with the adoption of ***Ten Principles to Reduce Mass Incarceration*** **("ABA Principles")**.[1] Among other things, the ABA Principles urge jurisdictions to comprehensively reevaluate criminal justice policies, from pretrial detention to parole and probation, to reduce incarceration that is overly punitive, or that has racially disparate outcomes. They bring to bear the expertise and experience of judges, professors, prosecutors, defense attorneys, and other legal professionals on the question of how to reduce reliance on such carceral policies in a way that properly balances public safety with human rights.

Three of the ABA Principles have direct bearing on the Commission's proposed amendments to § 1B1.13[2]:

> **PRINCIPLE 6: Adopt "second look" policies, requiring review of sentences of incarceration at designated times to determine if they remain appropriate.**

[1] *See* ABA Resolution 604 (adopted in August 2022) adopting the ABA Principles, *available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/604-annual-2022.pdf.

[2] The Commentary to the ABA Principles as reproduced here contains minor revisions from the original to make technical corrections and to update hyperlinks.

From the Commentary (excerpted): As 60 current and former prosecutors pointed out in a joint statement, "[a]lthough the role of incarceration is primarily to protect public safety, our criminal legal system currently has few mechanisms to ensure that only those who still pose a serious safety risk remain behind bars."[3] Jurisdictions should adopt such mechanisms. Lengthy sentences should be automatically reviewed and, where appropriate, reduced after the passage of sufficient time. . . . [P]risoners who have served more than 15 years of confinement should have the ability to have their sentence reviewed by a judge or panel of judges who have the power to reduce that sentence after a "second look" at the incarcerated person, his or her record of rehabilitation, and any other relevant circumstances, including their age and health status.

PRINCIPLE 7: Expand and improve opportunities for incarcerated individuals to obtain credit against their sentences for positive behavior, as well as completion of educational, training, or rehabilitative programs.

From the Commentary (excerpted): To be effective and to ensure that such programs reduce rather than perpetuate racial disparities in sentences, limitations on participation in merit-based early release mechanisms should be reduced or eliminated, and the amount of time reduction that can be earned should be increased.[4] Programs should also be available in all facilities and advertised prominently to all eligible individuals.

PRINCIPLE 8: Expand opportunities for incarcerated individuals to obtain early release under compassionate release or similar programs.

From the Commentary (excerpted): [J]urisdictions should consider expanding the use of early release mechanisms by eliminating unnecessary barriers or exceptions to eligibility and broadening the criteria for release.[5]

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[3] Joint Statement on Sentencing Second Chances and Addressing Past Extreme Sentences (April 2021), *available at* https://fairandjustprosecution.org/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf, at 1.

[4] In several states including California, Kansas, Nevada and Illinois, sentences can be reduced over 50% through completion of appropriate programs. Prison Fellowship, *Earned and Good Time Policies: Comparing Maximum Reductions* (2018), *available at* https://www.prisonfellowship.org/wp-content/uploads/2018/04/GoodTimeChartUS_Apr27_v7.pdf.

[5] For example, many states "disqualify people sentenced under . . . 'habitual offender' and 'truth-in-sentencing' laws, [as well as] those sentenced to life in prison." Andreea Matei, *States Could Save Lives by Expanding Compassionate Release during COVID-19 and Beyond*, Urban Institute (June 24, 2020), *available at* https://www.urban.org/urban-wire/states-could-save-lives-expanding-compassionate-release-during-covid-19-and-beyond. Eliminating such barriers would not only improve program effectiveness but also reduce racial disparities, as Black prisoners are far more likely to be sentenced as habitual offenders or to life imprisonment. *See also* Rebecca Silber, *et al*., *Aging Out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations*, Vera Institute for Justice, at 9 (Dec 2017), *available at*

> The application and review processes for compassionate release programs should be streamlined and more accessible.[6] For example, a number of jurisdictions require correctional facilities to nominate prisoners for release.[7] Instead, programs should permit not only incarcerated individuals but also family members and attorneys, to initiate the process.[8] Compassionate release programs also should ensure automatic consideration for geriatric release once a prisoner reaches a certain age and ensure automatic regular reconsideration for geriatric prisoners who remain incarcerated following initial review.[9]

In addition, recent statistics released by the Bureau of Prisons illustrate just how many federal prisoners are being held for unnecessarily long terms of incarceration. As of August 2022, of the 11,000 individuals who were released from federal prison during the pandemic, *only 17* committed new crimes.[10] That extremely low rate of recidivism is unsurprising and should further inform the Commission's approach with respect to second-look sentencing and compassionate release.

RECOMMENDATIONS FOR AMENDMENTS TO U.S.S.G. § 1B1.13

In order to bring the Sentencing Guidelines in line with the First Step Act and ABA policy, we urge you to adopt the proposed amendments to § 1B1.13, including the full bracketed text of the second proposed option to § 1B1.13(b)(6). The ABA considers three of the proposed changes to § 1B1.13 to be critically important for a compassionate release procedure that balances public safety with human rights; is accessible to indigent defendants; and empowers district court judges to fully consider a defendant's individual circumstances.

First, as noted above, the Commission should adopt the proposed amendment to § 1B1.13(a) that would allow individual defendants, as well as the Bureau of Prisons, to seek a reduced sentence under this section. The ABA has long supported policies to improve and increase individuals'

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https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations%E2%80%94Full-Report.pdf.

[6] *Aging Out*, *supra* n.5, at 10; 15-18.

[7] Arkansas, for example, requires corrections officials to initiate the release application. *Id*. at 10 (citing Arkansas SB 450 (2011), § 75, amending Ark. Code § 12-29-404).

[8] *Id.*

[9] *Id.* at 16.

[10] Carrie Johnson, *Released during COVID, some people are sent back to prison with little or no warn*ing, NPR (Aug. 22, 2012), *available at* https://www.npr.org/2022/08/22/1118132380/released-during-covid-some-people-are-sent-back-to-prison-with-little-or-no-warn.

access to compassionate release.[11] Allowing individual defendants to seek relief under this section, many of whom are indigent and do not have post-conviction counsel, would help eliminate one of the "unnecessary barriers" to compassionate release discussed in ABA Principle 8. Motions filed by defendants should be given at least equal weight to those filed by the Bureau.

Second, the Commission should adopt the full text (including the bracketed portion) of proposed U.S.S.G. § 1B1.13(b)(6) option 2.[12] This option empowers district court judges to consider a broad array of circumstances that might be relevant to the defendant's petition for relief, but which might not be anticipated by the Commission. Importantly, this option acknowledges that both changes to the defendant's own circumstances as well as other intervening events, such as a change in law or public policy, could be relevant to the judge's decision. District courts are often in the best position to hear evidence and review the individualized facts that may justify a particular defendant's sentence reduction. Thus, the Commission's policy should not limit a court's discretion to a specific list of relevant circumstances. By the same token, we urge you to consider whether the listed bases for compassionate release in the proposed amendment to § 1B1.13, such as requirements that the defendant have a "terminal" illness or be 65 years old, should be further amended to make clear that they are not intended to restrict what other types of circumstances may be considered.

Third, although the ABA strongly supports a catch-all provision that does not limit the scope of the district court's considerations, the ABA also advises that the Commission should adopt the additional enumerated circumstances proposed in U.S.S.G. § 1B1.13(b). The proposed expansion of these circumstances will encourage district courts not to apply a rigid approach when evaluating a defendant's case. The Commission should consider further expanding the enumerated circumstances to include recognitions of racial or other unwarranted disparities reflected in the original sentence that could be ameliorated through a sentence reduction; conditions of confinement that render the original sentence unduly harsh; and a demonstration of rehabilitation and ability to contribute to society upon release.[13] Similarly, in assessing the defendant's relative public safety risk, the amended § 1B1.13 Policy Statement should advise courts to consider how the defendant's age and health may mitigate the risk of recidivism.

The ABA appreciates the Commission's dedication to revising its § 1B1.13 Policy Statement on the circumstances in which it is appropriate to reduce a previously imposed term of

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[11] *See, e.g.*, ABA Resolution 113B (adopted in February 1996) and ABA Resolution 109 (adopted in August 1996) supporting medical or compassionate release of terminally ill inmates in appropriate cases and encouraging correctional authorities to make individuals aware of the existence of and the procedures for such release.

[12] In August 2004, the ABA adopted policy calling for such a change to 18 U.S.C. 3582(c)(1)(A). *See* ABA Resolution 121C, *available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2004/2004_am_121c.pdf.

[13] In accordance with 28 U.S.C. § 994(t), § 1B1.13(b) should provide that there must be at least one other relevant factor supporting the defendant's release before the court can consider rehabilitation as a factor.

incarceration. We encourage the Commission to adopt further policies in line with the ABA's *Ten Principles to Reduce Mass Incarceration* when possible, and we look forward to providing further comments as appropriate to the Commission in the future.

Sincerely,

Deborah Enix-Ross
President, American Bar Association

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

American Litigation Consultant LLC

Topics:

1. Compassionate Release

Comments:

Compassionate release should be utilized more by the BOP, to send inmates home who are suffering from severe illnesses that are life threatening should they contact Covid. Many courts are using the "public Safety" factor to deny inmates compassionate release when there is evidence that the person has changed their lives. The BOP has spend an untold amount of money to develop the PATTERN Score system showing that an inmate if a low risk for recidivism, yet this status is ignored. I believe that this committee needs to consider these factors in determining any amendments related to Compassionate Releases and implement these amendments retroactively. If an inmate has a proven record of rehabilitation, has a PATTERN SCORE OF LOW, and is ill or has a family member that is terminally ill, they should be released and placed in home confinement. It is much cheaper to do this and if necessary monitor them via GPS tracking than to keep them incarcerated. If they violated the terms of their release they can always be returned to prison to complete their sentences.

Submitted on: January 14, 2023

Friday, March 10, 2023

VIA ELECTRONIC SUBMISSION

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

RE: Proposed Amendments to the Sentencing Guidelines

Thank you for the opportunity to comment on the United States Sentencing Commission's proposed guidelines amendment to prohibit the use of acquitted conduct. Americans for Prosperity Foundation has been working on this issue for years and urging for the end of this unconstitutional practice.[i]

In these comments we will elaborate on the following points in response to the proposed sentencing guidelines changes:

1. Acquitted conduct sentencing violates the Fifth and Sixth Amendments to the Constitution by allowing judges to impose punishment that is not based on facts found by the jury.
2. The practice also completely eviscerates the foundational principle of innocent until proven guilty and allows the government to avoid its responsibility to prove guilt beyond a reasonable doubt before violating our liberty.
3. Lastly, it undermines the legitimacy of our criminal courts at a time when they need to be building trust with the American people.[ii]

Please see below for additional details and the research underscoring why the Commission should do what it can to end to this unjust practice and restore the proper role of the jury in our justice system.

Michael Pepson
Regulatory Counsel
Americans for Prosperity Foundation

Jeremiah Mosteller
Senior Policy Analyst
Americans for Prosperity Foundation

Americans for Prosperity Foundation ("AFPF") is committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Our efforts span a variety of issues including improvements to the criminal justice system that enhance public safety and ensure the protection of constitutional rights. We have spent the past few years urging the Supreme Court to accept a case on the practice of acquitted conduct sentencing alongside a diverse coalition of organizations from across the political spectrum.[iii] We are encouraged that the United States Sentencing Commission ("USSC") now appears poised to reconsider its use under the federal sentencing guidelines.[*]

Currently, the federal code and the sentencing guidelines allow judges to use conduct a defendant was acquitted of by a jury of his peers to legally justify increasing a defendant's sentence or punishment for a separate crime. This practice effectively allows judges to overrule a jury's acquittal decisions when he or she disagrees with the result at trial. This practice is fundamentally inconsistent with the justice system and procedural protections are Founders established in our Constitution and the Bill of Rights. Action by the USSC to limit its application in federal criminal cases will be a substantial step toward the end of this practice.

Acquitted conduct sentencing violates the Fifth and Sixth amendments

The practice of acquitted conduct sentencing is not a case of "constitutional but stupid" but instead a case of judges being able to continue utilizing an unconstitutional

[*] AFPF believes the USSC's structure raises constitutional concerns but takes no position here on those issues. *See generally Mistretta v. United States*, 488 U.S. 361, 413–27 (1989) (Scalia, J., dissenting).

practice. The Fifth and Sixth Amendments in the Bill of Rights provide every American accused of a crime with various rights (a speedy trial, an impartial jury, etc.).[iv] These rights—but especially the right to a jury trial—serve as an important check to prevent the government from abusing its power and utilizing its power against citizens for improper reasons.[v] As Alexander Hamilton wrote:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them it consists in this; the former regard it as a **valuable safeguard to liberty**, the latter represent it as the **very palladium of free government**.[vi]

The Supreme Court has consistently reaffirmed that a fundamental requirement of our right to a jury trial is that every fact "legally necessary to support your term of incarceration" or other punishment "must be found by the jury or admitted by the defendant."[vii] As Justice Scalia noted in *Blakely v. Washington*, the jury cannot "function as circuit breaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong."[viii]

The practice of acquitted conduct sentencing directly violates these core principles of every American's right to a jury trial because it allows a judge to find facts that the jury failed to find as true and then increase the defendant's punishment based on those facts. To make the situation even worse, this practice gives prosecutors a second bite at the apple to secure what is functionally a conviction but at a much lower standard of proof than the standard applied by juries.[ix] This status quo is "at war with the fundamental purpose of the Sixth Amendments jury trial guarantee."[x]

Using acquitted conduct flips "innocent until proven guilty" on its head

Every American knows and understands the concept of "innocent until proven guilty" from television, movies, and common parlance. That is why the response from our friends, advocates, and partners to learning about acquitted conduct sentencing is always shock and confusion about how such a practice can exist in America. This practice is not one that future generations will look back and believe should have existed in a country that values due process, democracy, and limited government.

This well-known principle has been classified by the Supreme Court as "axiomatic and elementary."[xi] We as a country have decided that it is "far worse to convict an innocent man than to let a guilty man go free" because we want to ensure there are proper checks on the government's ability to use its extraordinary power to restrict or violate someone's liberty.[xii]

But hiding in plain sight is our use of acquitted conduct sentencing which not only violates this presumption but allows judges to effectively dispute an affirmative finding that the proof presented does not overcome this presumption beyond a reasonable doubt. Just because a defendant might have been found guilty of *something* does not justify a judge being able to find them guilty of more by ignoring the presumption of innocence at a much lower burden of proof. The government bears the burden of proving guilt and a failure to do so in some cases is a cost we have decided to bear as a society to prevent the use of our justice system by those in power to punish those who may question their policy or political decisions.

Acquitted conduct sentencing weakens the legitimacy of our courts

Not only is acquitted conduct sentencing plainly unconstitutional, but it is also bad sentencing policy. We believe this sentencing practice is an imprudent policy because of the following reasons:

1. The low preponderance standard for judge-found facts at sentencing wrongly shifts the harmful impact of erroneous factfinding onto the defendant rather than the government.
2. It exacerbates the impact of the trial penalty by potentially punishing defendants for exercising their right to a trial rather than accepting a plea agreement.
3. It guts the jury's historical role as a check on government power and unreasonable punishment.[xiii]

Juries serve as the most direct way for Americans to engage in the decisions made by our government and learn more about our justice system and the law. Across the board, Americans perceive juries to be the most legitimate, just, and fair decision-makers in our justice system.[xiv]

Acquitted conduct sentencing threatens the trust jurors, defendants, and community members alike hold in our laws and system of justice. For the jurors who experience acquitted conduct sentencing firsthand, they realize the law does not respect the hours they committed to participating in a trial and that the system can reject their opinion at will. For the defendant who thought he won at least a partial victory or had his right vindicated, only confusion, contempt, and lack of faith in our justice system will be

his lasting memories. For community members, it will be shocking to learn that the sanctity of the jury is systematically disregarded and calls into question the validity of the entirety of our laws and system of justice.

This injustice is the target of broad, cross-ideological efforts

AFPF is not alone in its efforts to end the use of acquitted conduct sentencing. We have been honored to advocate against this unjust practice alongside organizations as diverse as the Cato Institute, National Association of Criminal Defense Lawyers, Niskanen Center, and Dream Corps JUSTICE, as well as the well-respected federal sentencing expert Doug Berman.[xv] Members of the federal and state judiciary across all levels coming from very different judicial philosophies have also questioned or called for an end to this unjust practice.[xvi] Congress has also taken steps toward ending this practice with a nearly unanimous vote to do so in the last House and a key Senate committee having advanced similar reforms.[xvii] This broad criticism underscores the appalling nature of this practice and the need to end it forever.

Action by the sentencing commission will mitigate but not end the practice

We are encouraged to see the USSC propose an amendment to the federal sentencing guidelines that would limit the use of acquitted conduct. These guidelines operate as binding in practice within many courts, even though they are technically advisory under Supreme Court precedent, so a change in the guidelines will likely impact many instances of this unconstitutional practice in the federal system.[xviii] But this change will not prevent judges from using it in the federal system and will not impact the use of the practice in state courtrooms. Only action by Congress can fully end this injustice in

the federal system and only the Supreme Court can end it nationwide, so we urge members of Congress and the Justices to not view adoption of these amendments as a reason to not take additional steps that will truly end the use of acquitted conduct to punish someone a jury found to be innocent.

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[i] Brief of Amici Curiae Americans for Prosperity Foundation, Dream Corps Justice, National Association Of Criminal Defense Lawyers, Niskanen Center, Right on Crime, The R Street Institute, and The Sentencing Project In Support of Petitioner, *Mcclinton v. United States*, No. 21-1557 (U.S. June 30, 2022) (petition for cert. pending); Brief of Amici Curiae Americans for Prosperity Foundation, Dream Corps Justice, and The R Street Institute in Support of Petitioner, *Gaspar-Felipe v. United States*, 4 F.4th 330, cert. denied, 142 S. Ct. 903 (U.S. January 12, 2022); Brief of Amici Curiae Americans for Prosperity Foundation, The National Association Of Criminal Defense Lawyers, Dream Corps Justice, and The R Street Institute In Support of Petitioner, *Osby v. United States*, 832 Fed. Appx. 230, cert. denied, 142 S. Ct. 97 (U.S. June 30, 2021); Michael Pepson & Jeremiah Mosteller*, US Supreme Court Should Tackle Acquitted Conduct Sentencing*, Bloomberg Law (2022), https://news.bloomberglaw.com/us-law-week/us-supreme-court-should-tackle-acquitted-conduct-sentencing; Michael Pepson & Janos Marton, *Stop Letting Judges Punish Defendants for Acquittals*, RealClear Policy (2021), https://www.realclearpolicy.com/articles/2021/09/27/stop_letting_judges_punish_defendants_for_acquittals_796136.html; Americans for Prosperity Foundation, *Why the Supreme Court needs to end acquitted conduct sentencing*, Americans for Prosperity Foundation (2021), https://americansforprosperity.org/supreme-court-acquitted-conduct-sentencing/; Michael Pepson, *Diverse coalition urges Supreme Court to end acquitted conduct sentencing*, Americans for Prosperity (2021), https://americansforprosperity.org/end-acquitted-conduct-sentencing/.

[ii] Gallup, *Confidence in Institutions*, Gallup (2023), https://news.gallup.com/poll/1597/confidence-institutions.aspx (showing that trust in the Supreme Court has declined from 40% in 2020 to only 25% in 2022); National Center for State Courts, *State of the State Courts survey reveals declining public trust, growing confidence in remote hearings*, National Center for State Courts (2022), https://www.ncsc.org/newsroom/at-the-center/2022/state-of-the-state-courts-survey-reveals-declining-public-trust,-growing-confidence-in-remote-hearings.

[iii] For a more comprehensive discussion of these issues, *see supra* note i.

[iv] U.S. Const. amend. V, VI.

[v] *United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) ("It is hard to overemphasize the importance of trial by jury for our revolutionary ancestors who wrote the Declaration of Independence, framed the Constitution, ratified it in state conventions, and explained it in the Federalist Papers."); *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part) ((characterizing jury trial right as "the spinal column of American democracy"); Vikrant P. Reddy & Jordan Richardson, *Why the Founders 8 Cherished the Jury*, 31 Fed. Sent. R. 316 (2019).

[vi] Federalist No. 83.

[vii] *Hester v. United States*, 139 S. Ct. 509, 509 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas, Ginsburg, JJ., dissenting from denial of certiorari); *See also United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019); *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring); *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Scalia, J., concurring).

[viii] *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004).

[ix] *United States v. O'Brien*, 560 U.S. 218, 224 (2010); see also *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam).

[x] United States v. Bell, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc).

[xi] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

[xii] *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); *see also* State v. Melvin, 258 A.3d 1075, 1092 (N.J. 2021).

[xiii] Brief of Amici Curiae Americans for Prosperity Foundation, *Mcclinton v. United States, supra* note iii (2022).

[xiv] Mary R. Rose, et al., *Preferences for Juries Over Judges Across Racial and Ethnic Groups*, 89 Soc. Sci. Q. 372 (2008) (noting differences based on race and ethnicity but all groups still preferred juries); Robert J. MacCoun & Tom R. Tyler, The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy and Efficiency, 12 Law & Hum. Behav. 333, 338 tbl.2 (1988) (finding 68% perceive juries to be fairest and 22.5% perceive judges to be fairest); *See also* Monica K. Miller, et al., *Trust in the jury system: a comparison of Australian and U.S. samples*, 28 Psychiatry Psy. L. 823 (2021) (finding that US citizens have significantly higher trust in juries that Australian citizens); *See generally* John B. Attanasio, *Foreword: Juries Rule*, 54 SMU L. Rev. 1681 (2001) (judges from Texas and the federal system were nearly unanimous in believing that juries were "actually reaching a just and fair verdict").

[xv] Brief of Amici Curiae Americans for Prosperity Foundation, et al. *supra* note iii (June 2022); Brief of Amici Curiae Cato Institute In Support of Petitioner, *Mcclinton v. United States*, No. 21-1557 (U.S. June 30, 2022) (petition for cert. pending); Brief of Amici Curiae Professor Douglas Berman In Support of Petitioner, *Mcclinton v. United States*, No. 21-1557 (U.S. June 30, 2022) (petition for cert. pending);

[xvi] *United States v. Watts*, 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting); *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas, Ginsburg, JJ., dissenting from denial of certiorari); *United States v. Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting) (collecting cases); *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc); *Bell*, 808 F.3d at 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning constitutionality of judge changing defendant's sentence "within the statutorily authorized range based on facts the judge finds without the aid of a jury or the defendant's consent"); *United States v. White*, 551 F.3d 381, 386-97 (6th Cir. 2008) (Merritt, J., dissenting); *U.S. v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J. dissenting); *United States v. Faust*, 456 F.3d 1342, 1348–53 (11th Cir. 2006) (Barkett, J., specially concurring); *United States v. Baylor*, 97 F.3d 542, 549 & n.2 (D.C. Cir. 1996) (Wald, J., specially concurring); *U.S. v. Ibanga*, 454 F. Supp. 2d 532 (E.D. Va. 2006); *State v. Melvin*, 258 A.3d 1075 (N.J. 2021); *People v. Beck*, 939 N.W.2d 213 (Mich. 2019) *State v. Marley*, 364 S.E.2d 133 (N.C. 1988); *State v. Cote*, 530 A.2d 775 (N.H. 1987).

[xvii] U.S. House of Representative Clerk, *Roll Call 83 | Bill Number: H. R. 1621*, U.S. House of Representative Clerk (2022), https://clerk.house.gov/Votes/202283 (405-12 vote); Senator Chuck Grassley, *Senate Judiciary Committee Advances Two Bipartisan Durbin, Grassley Criminal Justice Bills*, Senator Chuck Grassley (2021), https://www.grassley.senate.gov/news/news-releases/senate-judiciary-committee-advances-two-bipartisan-durbin-grassley-criminal-justice-bills ("The legislation was passed out of Committee by a bipartisan vote of 16-6.").

[xviii] *United States v. Booker*, 543 U.S. 220 (2005); United States Sentencing Committee, *Sentences Under the Guidelines Manual And Variances Over Time: Fiscal Years 2012 – 2021*, United States Sentencing Committee (2022), available at https://www.ussc.gov/research/sourcebook-2021 (showing that nearly 70% of federal cases follow the sentencing guidelines).

BRENNAN CENTER FOR JUSTICE

March 13, 2023

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

RE: Public Comment on Proposed Amendment #1, "First Step Act — Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)"

Dear Judge Reeves,

The Brennan Center for Justice at NYU School of Law welcomes the chance to share our views on the Commission's proposed amendments to the U.S. Sentencing Guidelines. The Center has carefully monitored implementation of the First Step Act since its passage in 2018. These amendments mark an important new phase of that process.[1]

We direct our comments to the Commission's proposal to add a new subsection, (b)(5), to U.S.S.G. § 1B1.13 ("Proposal (b)(5)").[2] The new subsection would clarify that judges may consider whether a prison sentence is "inequitable in light of changes in the law" when evaluating whether "extraordinary and compelling reasons warrant" a reduction under the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A).

We applaud the Commission for proposing this important revision and strongly encourage its adoption. Today hundreds, maybe thousands, of people are "serving sentences that Congress itself views as dramatically longer than necessary or fair."[3] Absent intervention, some will spend decades longer in prison than they would under

[1] *See, e.g.*, Ames Grawert & Patricia Richman, *The First Step Act's Prison Reforms*, BRENNAN CENTER FOR JUSTICE (2022), https://www.brennancenter.org/our-work/research-reports/first-step-acts-prison-reforms; Ames Grawert, *What is the First Step Act — and What's Happening With It?*, BRENNAN CENTER FOR JUSTICE (June 23, 2020), https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it.

[2] Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7,180, 7,182–84 (proposed Feb. 2, 2023), https://www.federalregister.gov/documents/2023/02/02/2023-01346/sentencing-guidelines-for-united-states-courts.

[3] United States v. McCoy, 981 F.3d 271, 285–86 (4th Cir. 2020).

current law, perpetuating racial disparities.[4] Proposal (b)(5) would empower federal courts to remedy these injustices on a case-by-case basis. In addition to reducing unnecessary incarceration, that development would "promote respect for the law" and ensure the "just punishment" of offenses, values that are explicitly part of the Commission's congressional mandate in setting federal sentencing policy.[5]

Other commenters are better positioned to emphasize how Proposal (b)(5) would affect people and families burdened by excessive, discredited prison terms. We respectfully refer the Commission to their work.[6] We write, instead, to explain why Proposal (b)(5) is within the Commission's authority and consistent with public safety.

I. Proposal (b)(5) is Consistent with the History of Compassionate Release and its Statutory Framework.

The Commission considers Proposal (b)(5) against the backdrop of a long-running legal debate. In the absence of policy guidance, courts have spent years weighing whether the compassionate release statute authorizes judges to consider nonretroactive changes in law when evaluating the existence of "extraordinary and compelling reasons" warranting a sentencing reduction.[7] For the reasons set forth below, we believe the Commission's proposal properly answers that question in the affirmative.[8]

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[4] *See* McCoy, 981 F.3d at 285–86 (noting other examples of disparities of a decade or longer); United States v. Ruvalcaba, 26 F.4th 14, 15–18 (1st Cir. 2022) (remanding order denying compassionate release, where petitioner claimed that his mandatory life sentence, imposed in 2009, would today be a mandatory 15-year term); United States v. Ballard, 552 F. Supp. 3d 461, 467 (S.D.N.Y. 2021) (Rakoff, J.) (quoting United States v. Haynes, 456 F. Supp. 3d 496, 517 (E.D.N.Y. 2020) (discussing the "disproportionate use" of since-abrogated 18 U.S.C. § 924(c) "stacking" penalties "against Black men")).

[5] *See* 28 U.S.C. § 994(a)(2) (directing the Commission to issue guidance to "further the purposes set forth in" 18 U.S.C. § 3553(a)(2), including, at § 3553(a)(2)(A), the need for federal sentences "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense").

[6] *See, e.g.*, *Compassionate Release: Hearing before the United States Sentencing Commission* (Feb. 23, 2023) (Testimony of Mary Price, General Counsel, FAMM), https://www.U.S.S.C..gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf.

[7] *See, e.g.*, *Ruvalcaba*, 26 F.4th at 24 (diagnosing a split between the courts of appeals); Ram Subramanian & Ames Grawert, *What Can Federal Courts Do About Extreme, Outdated Sentences?*, BRENNAN CENTER FOR JUSTICE (Feb. 17, 2023), https://www.brennancenter.org/our-work/analysis-opinion/what-can-federal-courts-do-about-extreme-outdated-sentences (noting that the circuit split survives the Supreme Court's decision in *United States v. Concepcion*, 142 S. Ct. 2389 (2022)).

[8] It is worth noting the precise contours of the circuit split. Four circuits have held that nonretroactive changes "may be considered in connection with other factors" when evaluating a compassionate release motion. See United States v. Jenkins, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (citing decisions by the First, Fourth, Ninth, and Tenth Circuits). The Second Circuit also arguably permits these considerations. See United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020) ("the First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release").

The History of Compassionate Release

Compassionate release's history and purpose counsel a broad understanding of the statute. Even as it abolished federal parole in 1984, Congress took care to ensure that some avenue for relief would remain in cases where new developments render an otherwise lawful prison term inequitable.[9]

Consistent with that vision, the chief Senate report for what became 18 U.S.C. § 3582(c) described that section as providing "'safety valves'" to "assure the availability of specific review and reduction of a term of imprisonment."[10] Elsewhere, the report acknowledged that there would be "unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances." As examples of such cases, the report listed — in the disjunctive — "severe illness" and "unusually long sentences" presenting "extraordinary and compelling circumstances."[11] Consistent with these remedial purposes, nothing in the statute's development suggests that Congress meant to limit compassionate release to an itemized, narrow list of reasons.[12]

Any discussion of compassionate release must also reckon with Congress's clear desire to make it a more prominent part of the current federal sentencing landscape.[13] For years, only the federal Bureau of Prisons could petition a federal court for compassionate release, and it rarely did so. The First Step Act changed that by allowing people to file their own motions for compassionate release.[14] Effectively, Congress transformed

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[9] *See* Shon Hopwood, *Second Looks & Second Chances* , 41 CARDOZO L. REV. 83, 100 (2019), http://cardozolawreview.com/second-looks-second-chances/ (surveying the history of compassionate release).

[10] S. REP. NO. 98-225, at 121–22 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3304.

[11] S. REP. NO. 98-225, at 55–56. Admittedly this discussion occurred in a response to "the Parole Commission's concerns about its diminished place within the new sentencing regime." United States v. McCall, 56 F.4th 1048, 1065 (6th Cir. 2022) (en banc). But it would be odd for Congress to express this concern in one context and abandon it in another.

[12] The new compassionate release statute replaced a provision that allowed the BOP to move to accelerate a person's parole eligibility. *McCall*, 56 F.4th at 1059 (citing 18 U.S.C. § 4205(g) (repealed 1984)). Notably, the Senate report describes the two provisions as "similar." S. REP. NO. 98-225, at 121 n.298. It is telling, then, that courts had granted relief under the prior statute based on prison overcrowding or exemplary conduct while incarcerated — factors that were not enumerated in the text of the law itself. Curiously, the *McCall* court recounts this history, but finds it uncompelling, because nothing in that history indicated that the prior statute had "contemplated nonretroactive legal developments." 56 F.4th at 1059. What is more remarkable is that the compassionate release statute's predecessor appears to have allowed the BOP, and courts, to consider factors beyond health and family circumstances when accelerating parole eligibility.

[13] The title of the section authorizing prisoner-filed motions proclaims Congress's goal of "increasing the use and transparency of compassionate release." First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (2018); United States v. Maumau, 993 F.3d 821, 824 (10th Cir. 2021) (noting this legislative purpose).

[14] In 2013, the Department of Justice Inspector General revealed that the BOP moved to reduce a sentence under the compassionate release statute at a pace of just 24 cases per year — at a time when the federal prisons held over 200,000 people. U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, I-

compassionate release from an administrative to a primarily judicial remedy, allowing courts to — for the first time — authoritatively and exclusively construe the statute's terms. Lawmakers cannot have expected courts to replicate the BOP's understanding of compassionate release, having just faulted the agency for underusing the law.

The Statutory Text

Congress set just one limit in 1984 on the Commission's authority to define the "extraordinary and compelling reasons" that may merit compassionate release: though judges could consider rehabilitation as one factor among many, "[r]ehabilitation of the defendant alone" would not entitle someone to relief.[15] This explicit exclusion should be understood in its historical context. It reflected Congress's view, at the time, that rehabilitation was an elusive metric — a pessimistic outlook that the First Step Act arguably abandoned.[16] However outdated that statutory boundary may be, permitting courts to consider current sentencing policy and its underlying rationales as factors in compassionate release does not transgress it.

While Congress has declined to make some recent sentencing reforms retroactive, it has never explicitly barred courts or the Commission from considering those reforms in the compassionate release context. As the Supreme Court recently observed in *United States v. Concepcion*, "Congress is not shy about placing such limits where it deems them appropriate."[17] Absent those limitations, the Court continued, federal courts enjoy "broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them," an authority that "carries forward to later proceedings that may modify an original sentence."[18] The *Concepcion* Court reached this conclusion in the context of a different category of

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2013-006, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM, 1 (2013), https://oig.justice.gov/reports/2013/e1306.pdf. Nor did the process move fast enough: 81 prisoners died between 2014 and 2018 while awaiting decision. Mike Riggs, *81 Federal Prisoners Have Died While Waiting for the Government to Decide If They Were Sick Enough to Go Home*, REASON (Feb. 13, 2018), https://reason.com/2018/02/13/81-federal-prisoners-have-died-while-wai/.

[15] 28 U.S.C. § 994(t); *see also Ballard*, 552 F. Supp. 3d at 468 (weighing rehabilitation as one of several factors demonstrating "extraordinary and compelling reasons" for relief).

[16]; S. REP. NO. 98-225, at 38 ("Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated."). By contrast, the legislative history of the First Step Act indicates renewed congressional faith in and commitment to rehabilitation. *See* 164 CONG. REC. H10346-04 (2018) (statement of Rep. Goodlatte) (praising the First Step Act for "plac[ing] a new focus on rehabilitation"); 164 CONG. REC. S7639-03 (2018) (statement of Sen. Cornyn) (observing that the Act would "allow[] prisons to help criminals transform their lives.").

[17] 142 S. Ct. at 2400; *see also id.* ("The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution.").

[18] *Concepcion*, 142 S. Ct. at 2398.

resentencing, but the Ninth Circuit wisely found its general guidance informative when construing the compassionate release statue.[19]

The absence of further explicit limits on compassionate release is especially telling in the case of the First Step Act. Congress chose not to make the sentencing reforms in Sections 401 and 403 of the Act retroactive as part of a political compromise.[20] But that compromise was struck in the same breath as the Act's path-breaking decision to allow imprisoned people to file their own compassionate release motions. If Congress intended to further limit compassionate release, whether as part of a compromise around Sections 401 and 403 or otherwise, it had every opportunity to do so while it already had pen to paper on 18 U.S.C. § 3582. It did not.

II. Proposal (b)(5) Respects the Separation of Powers.

The Commission's proposal would permit judges to grant relief from outdated federal penalties on a case-by-case basis, within parameters first specified by Congress and then interpreted by the Commission. Far from creating a conflict between the branches, this design would facilitate the orderly administration of federal law and represents precisely the kind of policy judgment that Congress expected the Commission to make while administering the "shared responsibility" of federal sentencing.[21]

First, there can be no question that Congress properly delegated the authority to define "extraordinary and compelling" reasons to the Commission. In upholding the constitutionality of the Commission itself, the Supreme Court made clear that Congress may "delegate powers under broad standards."[22] Following that precedent, courts have consistently rejected separation-of-powers challenges to the Commission's work.[23]

Similarly, 28 U.S.C. § 994(t), the statute charging the Commission with defining the boundaries of compassionate release, gave the Commission a question to answer and specific parameters within which to operate. That is "sufficiently specific and detailed to

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[19] *See* United States v. Chen, 48 F. 4th 1092, 1095 n.3 (9th Cir. 2022) ("while *Concepcion* does not opine on what district courts may consider when assessing extraordinary and compelling reasons under § 3582(c)(1)(A), it does support our conclusion that a district court's discretion in sentence modifications is limited only by an express statement from Congress.").

[20] United States v. Andrews, 480 F. Supp. 3d 669, 681–82 n.13 (E.D. Pa. 2020) (quoting Senators Leahy and Grassley). The *Andrews* court read this compromise in isolation from the rest of the statute, and so concluded, mistakenly in our view, that it counseled *against* considering nonretroactive reforms in compassionate release motions. *Id.* at 680–82.

[21] Mistretta v. United States, 488 U.S. 361, 390 (1989).

[22] *Mistretta*, 488 U.S. at 373.

[23] *See, e.g.*, United States v. Harris, 688 F.3d 950, 957–58 (8th Cir. 2012) (rejecting nondelegation challenge to U.S.S.G. § 1B1.10, and collecting similar cases). To our knowledge no court has addressed a nondelegation challenge to U.S.S.G. § 1B1.13. *See* United States v. Bradford, 2023 WL 334755, at *5 (11th Cir. Jan. 20, 2023) (declining to address the issue).

meet constitutional requirements."[24] While this mission does empower the Commission to make vitally important determinations about the purpose and utility of federal prison sentences, the Supreme Court has never suggested that agency delegations "may not carry with them the need to exercise judgment on matters of policy."[25]

Proposal (b)(5) does not overstep the boundaries of that delegation. As noted above, extending compassionate release to encompass cases where changed sentencing laws render a prison term "inequitable" does not conflict with any explicit act of Congress.[26] While the Commission's proposal would have the effect of giving some people the benefit of sentencing reforms that Congress, for one reason or another, did not make retroactive, it would not authorize that relief systematically — a step that would indeed require congressional action.[27] Instead, relief would only extend to those who demonstrate to a federal judge that (1) a change in law has occurred, (2) it renders their sentence "inequitable," and (3) a reduced sentence is otherwise warranted.[28]

Such individualized, discretionary relief is the domain of the judiciary, not Congress.[29] Additionally, there is no risk that Proposal (b)(5)'s limited exception would swallow the general rule against retroactivity. According to the Commission's review of data from FY 2020, "courts cited a sentence-related reason as an 'extraordinary and compelling' reason in support of a grant for 3.2 percent of" movants.[30] Indeed, the most frequently cited sentence-related reason for granting a motion — "multiple 18 U.S.C. § 924(c) penalties," a practice that produced sentences of such "sheer and unusual length" that they

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[24] *Mistretta*, 488 U.S. at 374–75.

[25] *Mistretta*, 488 U.S. at 378; *see also* Gundy v. United States, 139 S. Ct. 2116, 2123, 2129 (2019) ("We have over and over upheld even very broad delegations").

[26] *Cf.* United States v. Feauto, 146 F. Supp. 3d 1022, 1039–41 (N.D. Iowa 2015) (Bennett, J.) (finding that the Commission acted *ultra vires* in promulgating a policy statement that had the effect of "nullifying" governing mandatory minimum penalties), *aff'd on other grounds sub nom* United States v. Koons, 850 F.3d 973 (8th Cir. 2017), *aff'd* 138 S. Ct. 1783, 1790 (2018).

[27] Ram Subramanian & Ames Grawert, *What Can Federal Courts Do About Extreme, Outdated Sentences?*, BRENNAN CENTER FOR JUSTICE (Feb. 17, 2023), https://www.brennancenter.org/our-work/analysis-opinion/what-can-federal-courts-do-about-extreme-outdated-sentences (arguing that further *congressional* action is needed to systematically correct outdated federal sentences).

[28] 18 U.S.C. § 3582(c)(1)(A) (requiring that any sentencing reduction be made only "after considering the factors set forth in section 3553(a) to the extent that they are applicable").

[29] "There is a salient 'difference between automatic vacatur and resentencing of an entire class of sentences' on the one hand, 'and allowing for the provision of individual relief in the most grievous cases' on the other." *Ruvalcaba*, 26 F.4th at 27 (quoting *McCoy*, 981 F.3d at 286–87).

[30] U.S. SENTENCING COMMISSION, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 31–33 & fig.17 (2022), https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf.

galvanized backlash from judges and across the political spectrum — was noted as a basis for relief in fewer than 300 cases between FY 2020 and 2022.[31]

To be sure, Proposal (b)(5) represents a break with the Commission's prior guidance on compassionate release, which focused on health and family circumstances.[32] But that history cannot constrain the Commission's interpretation of the recently expanded compassionate release statute.[33] In authorizing prisoner-filed motions, Congress invited (and arguably required) the Commission to rethink the role of compassionate release in the federal sentencing landscape. Proposal (b)(5) merely accepts that invitation, and it would be strange to let a narrow, abrogated history limit that thinking.

III. The Revised Policy Statement Would Not Jeopardize Public Safety.

The Brennan Center understands and respects the need to ensure that an expanded compassionate release policy remains consistent with public safety.[34] However, based on the Center's years of experience studying crime and recidivism, we do not believe that any increase in compassionate release under Proposal (b)(5) would impact crime rates.

First, in any compassionate release case, judges must explicitly consider the need to "protect the public from further crimes" before granting a motion, and regularly deny relief based on that factor.[35] That makes general recidivism statistics an inappropriate way to understand the effects of compassionate release on recidivism.

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[31] *McCoy*, 981 F.3d at 285; *see also Ballard*, 52 F. Supp. 3d at 467 (criticizing 924(c) "stacking"); *"Unjust, Cruel, and Even Irrational": Stacking Charges under 924(c)*, FREEDOMWORKS (Jan. 29, 2018) (demonstrating broad political support for later amendments to 18 U.S.C. § 924(c)). U.S. SENTENCING COMMISSION, COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2022, tbls. 10, 12, 14 (2022), https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf.

[32] *See McCall*, 56 F.4th at 1059–60.

[33] Relatedly, the Supreme Court has recently expressed skepticism of agencies using old statutes to innovative, new ends. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609–10 (2022); NFIB v. OSHA, 142 S. Ct. 661, 666 (2022) (per curiam) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind"). But those concerns do not arise where, as here, Congress itself recently expanded the statute being construed.

[34] At least one commenter raised this issue explicitly at the recent hearing. See *Compassionate Release: Hearing before the United States Sentencing Commission* (Feb. 23, 2023) (testimony of Chief Kathy Lester, Major City Chiefs Association), https://www.U.S.S.C..gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/MCC.pdf (noting elevated national crime rates and theorizing, by analogy to an unnamed jurisdiction, the impact of expanded early release). For more context on recent crime trends and a review of the best available research on the subject, see Ames Grawert & Noah Kim, *Myths and Realities: Understanding Recent Trends in Violent Crime*, BRENNAN CENTER FOR JUSTICE (July 12, 2022), https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime.

[35] 18 U.S.C. § 3582(c)(1)(A) (incorporating 18 U.S.C. § 3553(a) factors); *see also, e.g.*, *Ballard*, 552 F. Supp. 3d at 469–70 (weighing public safety and recidivism research before granting motion for

Research on a better point of comparison — targeted early release mechanisms — shows instead that the people who benefit from them have relatively low rates of recidivism. From late March 2020 through late July 2022, for example, the federal Bureau of Prisons transferred approximately 11,043 people from prison to home confinement. As of August 1, 2022, just 425 had been returned to prison, and only 17 had been returned to custody "based on committing an additional criminal offense."[36] Turning to the courts, so far 135 people have left prison under Washington, D.C.'s Incarceration Reduction Amendment Act, a "second look" statute that allows judges to release people who were sentenced while youths or young adults after they have served 15 years in prison. According to the U.S. Attorney's Office, just 16 have since been "rearrested" — a broad term that could encompass technical violations of supervision and charges that ultimately end in acquittal.[37] Indeed, practitioners are aware of only *two* rearrests involving allegations of physical violence.[38] Both statistics compare favorably with overall federal recidivism rates, which hover between 18 and 40 percent over the same time periods.[39]

Similarly, there is little to no evidence that even broad retroactive application of changes in federal sentencing law leads to higher recidivism rates. The Commission's own research shows that people released from federal prison through retroactive application of the "Drugs Minus Two" sentencing guidelines amendment were no more likely to be

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compassionate release). Between FY 2020 and 2022, judges cited "protection of the public" thousands of times in denying motions for compassionate release. U.S.S.C., COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2022, tbls. 11, 13, 15.

[36] Email from Brad Korten, Senior Policy Advisor, Office of Rep. Bonnie Watson Coleman, to author (Oct. 31, 2022 12:09 EST) (on file with author).

[37] We are aware of no official report tracking the recidivism rate of those released under D.C.'s "second look" statute. The best, most recent information comes from statistics provided to a journalist covering a hearing on a resentencing motion. Keith L. Alexander, *Man Who Raped Three Women when He Was 16 Seeks Early Release from Prison*, WASHINGTON POST (Feb. 1, 2023), https://www.washingtonpost.com/dc-md-va/2023/02/01/joshua-haggins-rape-abduction-early-release/ ("So far, D.C. judges have ordered the release of 135 people under the law, and 16 have been rearrested, according to data from the Office of the U.S. Attorney for the District of Columbia.").

[38] Email from James Zeigler, Co-Executive Director and Attorney, Second Look Project, to author (Mar. 3, 2023 10:28 EST) (on file with author).

[39] Recidivism is generally defined as rearrest, reconviction, or reincarceration with a stated timeframe — often, three years. *See* Dana Goldstein, *The Misleading Math of Recidivism*, THE MARSHALL PROJECT (Dec. 4, 2014), https://www.themarshallproject.org/2014/12/04/the-misleading-math-of-recidivism. Because these 135 IRAA releases could have occurred at any time since the law's enactment (2017) or its expansion (2021), it is difficult to compare them directly to overall federal recidivism rates. *See* Press Release, American University, SPA Professor Secures Release of Prisoner After 27 Years Under D.C.'s Second Look Act (Jan. 21, 2022), https://www.american.edu/spa/news/second-look-act-release.cfm (noting effective dates of both laws). However, 16 rearrests out of 135 releases suggests a roughly 12 percent rearrest rate among IRAA releases, lower than most if not all points of comparison in the federal system. *See* U.S. SENTENCING COMMISSION, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 21 (2021), https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf (indicating a one-year recidivism rate of 18.2 percent for federal releasees, and a three-year rate of 35.4 percent).

rearrested, reconvicted, or violate the terms of their release than statistically comparable people who served their full term of incarceration.[40]

Lastly, the demographics of likely compassionate release beneficiaries point to a lower-than-average recidivism risk. From FY 2020 through FY 2022, the average compassionate release beneficiary was 50 years old.[41] Generally, "older offenders" — defined as people 50 years of age or older at the time they are sentenced — are less than half as likely to be rearrested after release (21.3%) as those under the age of 50 (53.4%).[42] Even if we assume the revised policy statement would shift the average age at release below 50, beneficiaries would likely continue to skew older — and present a lower risk — than others leaving federal custody.[43]

Expanded options for early release need not come at the expense of public safety. That is especially so where, as Proposal (b)(5) contemplates, relief would be discretionary, individualized, and disproportionally granted to people with a lower risk profile.

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[40] U.S.S.G., App. C, amend. 782 (effective Nov. 1, 2014); U.S.S.G. App. C, amend. 788 (effective Nov. 1, 2014) (making Amendment 782 retroactive). *See also* U.S. SENTENCING COMMISSION, RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT 6–11 (2020), https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

[41] U.S.S.C., COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2022, tbl. 6.

[42] U.S. SENTENCING COMMISSION, OLDER OFFENDERS IN THE FEDERAL SYSTEM 1, 41–44 (2022),https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Older-Offenders.pdf. Even these recidivism statistics are overstated, as they focus on the percentage of people who have been rearrested. "[A]rrest is a poor proxy for criminal activity, as it may reflect policing decisions . . . rather than actual criminality." Ames Grawert & Patricia Richman, *The First Step Act's Prison Reforms,* BRENNAN CENTER FOR JUSTICE, 4 (2022), https://www.brennancenter.org/our-work/research-reports/first-step-acts-prison-reforms.

[43] U.S.S.C., RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010, at 24–25 & fig.12, (demonstrating a sharp decline in recidivism as age at release increases); U.S. SENTENCING COMMISSION, RECIDIVISM OF FEDERAL DRUG TRAFFICKING OFFENDERS RELEASED IN 2010 28–29 (2022), https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Older-Offenders.pdf.

* * * * *

This amendment cycle represents the Commission's first opportunity to affirm the reach of the First Step Act and advance its broad remedial purpose. Proposal (b)(5) would do just that, while remaining consistent with congressional intent and public safety. We encourage the Commission to adopt it as written.

Sincerely,

Ames C. Grawert
Senior Counsel, Justice Program

Ram Subramanian
Managing Director, Justice Program

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

CAN-DO Foundation

Topics:

1. Compassionate Release

Comments:

Our organization has communicated with numerous prisoners who are a combination of old law/new law. This category does not see the parole board, but are also barred from filing a compassionate release due to the old law category attached to their sentence. Michael Montalvo is one of these individuals. He is 77 years old and has served 36 years. He has an exemplary record and deserves some relief. We suggest two proposed changes to the sentencing guidelines for compassionate release which currently apply only to "new law" prisoners and exclude about 300 or more "old law" elderly and ill prisoners with the same offenses who have no access to compassionate release and will die in prison, if language is not crafted to allow these prisoners access to the same "compassionate release" that others can access. We think ALL federal prisoners deserve access to a compassionate release.

2. Changes in the individual circumstances (or events that took place after the sentence was imposed) that would make continuing the sentence inequitable. Under the guidelines the same old drug offense for LWOP is now Base Offense Level 38, for 235-293 months. Amendment 782 and FSA enabled thousands of "new law" drug offense prisoners to reduce life sentences to the 25 to 30 years they had served, and be released. But not one "old law" prisoner`s life sentence for drugs was reduced. We are the oldest and most ill prisoners now. There is a great inequity to the "old law" prisoners who have the same or similar offense conduct and sentences as the new law defendants

Under the First Step Act of 2018, about 15,000 new law prisoners have received sentence reductions, and about 4500 prisoners received compassionate release, but none of those reductions or releases were for "old law" prisoners. Currently, "old law" prisoners cannot receive a sentence reduction or compassionate release only because their offenses were committed prior to November 1, 1987. They did not commit their offense long enough to cross that date-line and be "new law." That is not equity. These old law prisoners are now in the 70s and have served 30 or more years, but they have no access to reduction in sentence. However, under the FSA all

"new law" prisoners who are age 70 and served 30 years of more for an offense committed after November 1, 1987, are eligible for compassionate release reduction in sentence. This is a grave injustice and denial of equity, equal protection, access to the courts to exclude the most elderly and ill federal prisoners from compassionate release because their offense did not continue past November 1, 1987. This is an absurd and harsh injustice. There is a need for equity and equal treatment for prisoners regardless of the date of their offense. Please include a statement that these proposed changes apply to old law prisoners` with offenses committed before November 1, 1987, and are non-parolable, like the guidelines sentences. Also please recommend to Congress to amend 18 U.S.C 3582(c)(1)(A) to include the language "in any case, including offenses committed before November 1, 1987, notwithstanding any other law."

Submitted on: March 10, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

CAN-DO FOUNDATION

Topics:

1. Compassionate Release

12. Miscellaneous Issues

Comments:

JAN R. SCHNEIDERMAN
janrs@outlook.com
516-513-2003

March 14, 2023

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Ladies and Gentlemen of the Commission:

I had the opportunity to attend, in person, the public hearings on February 23-24, 2023. During breaks in the hearings I took advantage of your willingness to engage in discourse with the attendees and approached several of you on various topics. The issue I am addressing here is, I believe, one that has not been addressed and, as such, am taking this opportunity to bring it to the attention of the Commission.

I attended the hearings as a representative of the CAN-DO Foundation. The CAN-DO Foundation communicates on a constant and ongoing basis with many prisoners with varied issues and concerns. Their primary focus is post-conviction relief in the form of clemency and compassionate release motions.

It has come to our attention that there are numerous prisoners who are a combination of old and new law and, as such are not eligible for the relief currently available to "new" law prisoners/defendants. To be specific this "class" or "category" of prisoner does not see the parole board so they have no chance of relief by being paroled. On the other hand, they are also barred from the filing of a compassionate release motion due to the "old" law category that has been attached to their sentence.

There is a prisoner named Michael Montalvo, currently incarcerated in FCI Phoenix, who falls into this no man's land. Michael, a Vietnam Veteran, has served 36 years of a life sentence (41 years with good time) for a 1980's non-violent drug conspiracy offense, and has no possibility of parole or compassionate release. He is currently 77 years old. Michael has a spotless prison record and yet, regardless of how much programing, work, education, or charitable deeds he performs in prison, he is doomed to a fate that others convicted of the same offense some years later do not have to endure. In short, Michael has truly entered into Dante's nine circles of Hell, doomed to wander aimlessly.

Mr. Montalvo communicates regularly with CAN-DO founder Amy Povah. Ms. Povah emailed Michael and asked him for his thoughts on this topic. Like many long-term prisoners Michael has researched his situation and his avenues of relief or in his case, the lack thereof. As I personally am not very familiar with the gap between old and new law I thought it best to provide the commission with Michael's words and thoughts as expressed by him. Sometimes it is just better to "get out of the way" and let someone else do the talking.

From Michael Montalvo via corrlinks:

The "old law" prisoners are deprived of access to compassionate release under the First Step Act which is given to "new law" prisoners with the same offenses and sentences. Unfortunately, at this time, old law prisoners cannot file motions under 18 USC 3582(c)(1)(A) for compassionate release/reduction in sentence because the sponsors of the FSA forgot that the 1984 Sentence Reform Act (SRA) limited 3582(c) motions to offenses committed after November 1, 1987. Currently, the only way for hundreds of old law defendants to have access to compassionate release/reduction in sentence is to request the Warden and the BOP submit a motion under 18 USC 4205(g) to the court for reduction in sentence to time-served. (Note, this is not asking for parole eligibility barred by 4205(h)). The BOP is very stingy. According to the USSC statistics, the BOP only submitted 1% of all motions for compassionate release/reduction in sentence—which clearly is a complete failure to obtain relief for deserving prisoners and especially a failure to provide relief to people like me who have no other options. We really need to get a bill for an "old law fix" to 3582(c)(1) stating "in any case, including offenses committed before November 1, 1987, notwithstanding any other law:" That said, below are my specific comments for the Commission:

I wish to comment on two proposed changes to the sentencing guidelines for compassionate release which currently apply only to "new law" prisoners and exclude about 300 or more "old

law" elderly and ill prisoners with the same offenses who have no access to compassionate release, and will die in prison, because of an oversight in drafting the First Step Act ("FSA"). One of your proposed changes is: when changes in the law would make continued incarceration inequitable. That should include ALL federal prisoners and specifically include "old law" sentences which were often arbitrary at the whim of the judge, and which are, under current guidelines, far less severe than the sentences meted out early in the "war on drugs."

A second proposed change is: Changes in the individual`s circumstances (or events that took place after the sentence was imposed) that would make continuing the sentence inequitable. That change should also include ALL federal prisoners by specifically including (rather than excluding) "old law" sentences for life without parole for drug offenses. Under the current guidelines the same old drug offense for life without parole is now base offense Level 38, for 235-293 months. Amendment 782 and FSA enabled thousands of "new law" drug offense prisoners to reduce life sentences to the 25 to 30 years they had served and be released. But not one "old law" prisoner`s life sentence for drugs was reduced. We are the oldest and most ill prisoners now. There is a great inequity to the "old law" prisoners who have the same or similar offense conduct and the same or perhaps lower sentences as the new law defendants. The new law prisoners can file for compassionate release but the old law prisoners cannot.

Under the First Step Act of 2018, about 15,000 new law prisoners have received sentence reductions, and about 4500 prisoners received compassionate release, but none of those reductions or releases were for "old law" prisoners. Currently, "old law" prisoners cannot receive a sentence reduction or compassionate release only because their offenses were committed prior to November 1, 1987. They did not commit their offense slightly more recently in order to cross that date-line and be deemed "new law." That is not equity. These old law prisoners are now in their seventies and have served 30 or more years, but they have no access to a reduction in sentence. However, under the FSA all "new law" prisoners who are age 70 (and above) and served 30 years or more for an offense committed after November 1, 1987, are eligible for a compassionate release reduction in sentence. This is a grave injustice and a denial of equity and equal protection under the law. The most elderly and ill federal prisoners are being denied access to the courts and therefore being denied compassionate release because their offense was committed prior to November 1, 1987. This is an absurd, arbitrary, and harsh injustice. There is a need for equity and equal treatment for prisoners regardless of the date of their offense.

Please include a statement or amendment that these proposed changes apply to old law prisoners` with offenses committed prior to November 1, 1987, and are non-parolable, like the guidelines sentences. Also, please recommend to Congress to amend 18 U.S.C 3582(c)(1)(A) to include the language "in any case, including offenses committed prior to November 1, 1987, notwithstanding any other law" or words that would have the same effect.

I and the CAN-DO Foundation support Michael Montalvo's proposed modifications (in thought and spirit if not in exact language) to the Guidelines. The current sentencing guidelines for compassionate release, which currently apply only to "new" law prisoners excludes an estimated

300-400 "old" law elderly and infirmed prisoners. These prisoners were convicted of and sentenced for the same or comparable offenses as thousands of others under the "new" law but have no access to compassionate release relief. These prisoners, whose likelihood of recidivism is virtually nil, are doomed to suffer life threatening end of life illnesses at the expense of the Federal Government and away from their families who have been waiting for them to come home for decades and are willing to care for them.

From the point of view of "public confidence" it is virtually impossible to explain to John Q. Public that two prisoners convicted of the same crime are being treated in such vastly disparate ways (one is home and one will die in prison) merely due to what can only be called "bad timing!"

We implore the Commission to consider this anomaly and include in the Amendments language to eliminate this draconian disparity between "new" and "old" law prisoners. While it may seem as if no "fix" is necessary because the Warden/BOP can file for compassionate release for a prisoners I remind you of Michael Montalvo's gracious observation—"the BOP is very stingy." There are hundreds of prisoners caught in this abyss of hopelessness and the only effective fix has to come from this Commission via an amendment to the Guidelines.

On behalf of Michael Montalvo (and hundreds of others similarly situated), I, and the CAN-DO Foundation, thank the Commission for this opportunity. We sincerely hope our concerns will be given due consideration.

Respectfully submitted,

Jan R. Schneiderman

Submitted on: March 14, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Stanton Donald, Church Without Walls

Topics:

1. Compassionate Release

Comments:

the time is now, the reasons are real. Older inmates are less likely to commit crimes. When they need compassion to show to others that we understand one incident should never condemn a person for life. the cost factors for keeping them in prison are a higher cost then releasing them.

Submitted on: March 2, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Colorado Criminal Justice Reform Coalition

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Submitted on: March 13, 2023

UCI University of California, Irvine

Katharine Tinto
Director, Criminal Justice Clinic
Clinical Professor of Law

March 13, 2023

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

Re: Proposed Amendment, U.S.S.G § 1B1.13 (b)(5): Changes in Law

Dear Judge Reeves,

My name is Katie Tinto and I am a Clinical Professor of Law and the Director of the Criminal Justice Clinic at UC Irvine School of Law. The Criminal Justice Clinic (CJC) provides *pro bono* legal representation to individuals in federal prison seeking compassionate release due to their age, health, or inequitable lengthy sentences. Since beginning this work in 2019, CJC has successfully won the release of 15 individuals, five of whom were over the age of 65, six of whom were serving life sentences, and seven of whom had each served more than 30 years in prison. CJC files these motions on behalf of clients throughout the south, including in federal courts in Alabama, Louisiana, Georgia, Texas, and Florida.

At the Commission's public hearing on February 23, 2023, the Commissioners heard testimony from one of CJC's clients, Derrell Gaulden. Mr. Gaulden and his twin brother, Terrell Gaulden, were granted compassionate release by Chief Judge J. Randal Hall of the United States District Court for the Southern District of Georgia on July 19, 2022.

My written comments focus on Proposed Amendment § 1B1.13(b)(5): Changes in Law. At the February hearing, the question was raised whether any change in law would automatically qualify as an "extraordinary and compelling" reason warranting a modification in sentence. In her testimony, Professor Erica Zunkel thoughtfully responded that not all changes in law would necessarily rise to the level of "extraordinary and compelling reasons" because not all changes in law necessarily render a sentence "inequitable."

I wanted to add to this response by pointing out that the determination whether a particular set of facts meets the definition of "extraordinary and compelling reasons" is one that

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courts have been making since first encountering compassionate release motions following the passage of the First Step Act of 2018—and one they would continue to do under Proposed Amendment (b)(5).

Consider two existing definitions of "extraordinary and compelling reasons" from the medical context: "a serious physical or medical condition…that substantially diminishes the ability of the defendant to provide self-care," and a "serious deterioration in physical or mental health because of the aging process." U.S.S.G. §1B1.13, cmt., n.1(A)(ii), (B). These categories ask a court to determine whether a particular set of facts rises to the required standard. For instance, not all individuals will present sufficient facts regarding their illness to rise to the level of a "serious" medical condition that "substantially" diminishes their ability to provide self-care. Similarly, only some individuals over the age of 65 may have a sufficient decline in their health to demonstrate a "substantial" deterioration. In short, courts have been evaluating the unique nature of an individual's medical conditions for several years now, and have been more than capable of determining when these facts rise to the high standard of the type of medical concerns that meets the definition of an "extraordinary and compelling" reason.

Critically, the word "inequitable" in Proposed Amendment (b)(5) functions in the same manner as the existing terms of "serious" and "substantially." These words enable a court to evaluate the complex nature of the factual circumstances before it. A change in a mandatory life sentence may very well cause a sentence to now be deemed "inequitable" whereas a change resulting in a potential sentence within a Guideline range may not. A court is well-equipped to determine when such changes in law render a sentence "inequitable" and, upon a subsequent consideration of the § 3553 sentencing factors, warrant a modification of sentence.

At the public hearing in February, in addition to Mr. Gaulden, the Commission heard live testimony from three witnesses who represent this proposed category of "changes in law." For ease of reference, I've added their sentencing law change in shorthand parentheticals: Bryant Brim (851 life enhancement), Adam Clausen (stacked 924(c)), and Dwayne White (stash house case/851 sentence enhancement). These three witnesses exemplify the power and potential of granting compassionate release to those who had been serving lengthy sentences they would no longer receive today. They also exemplify cases in which courts undoubtedly found the applicable change in law to render their initial sentence inequitable.

But, as the Commissioners are well aware, there remain many individuals who are just like Mr. Brim, Mr. Clausen, and Mr. White, but who are not eligible for compassionate release simply because of the circuit in which they were sentenced. Our Clinic represents several such individuals—individuals who are serving an unjust and severe sentence that would not be imposed today and who have long-standing evidence of rehabilitation, yet who remain incarcerated with no ability to seek compassionate release. Here are three of these individuals:

Leoncio Perez

On April 22, 1998, in the Southern District of Florida, Leoncio Perez was sentenced to life in prison following a jury trial on two counts: conspiring to possess with intent to distribute a detectable amount of cocaine, and possession with intent to distribute a detectable amount of

cocaine. Mr. Perez's mandatory life sentence was based on the recidivist enhancement under 21 U.S.C. § 851(a)(1) for two prior felony drug convictions.

Following the First Step Act of 2018, Mr. Perez would no longer receive a mandatory life sentence if sentenced today for the same offenses. Moreover, one of his prior drug convictions would no longer be considered a requisite prior because he received a sentence of only probation. Mr. Perez's mandatory life sentence also raises concerns of unwarranted co-defendant disparity and the use of the life enhancement as a trial penalty. Mr. Perez's sole co-defendant, who was also charged in both counts in the Indictment, plead guilty and was sentenced to 120 months. Mr. Perez proceeded to trial. One week before jury selection began, the prosecution filed their notice of the recidivist enhancement under 21 U.S.C § 851.

Mr. Perez, now 73 years old, has served over 25 years prison. In all of these years, he has received only four disciplinary infractions. Mr. Perez has worked his entire period of incarceration, including in UNICOR for many years, until due to his declining health, he moved to the recreation department. Mr. Perez has macular degeneration and is slowly going blind. Recently, the BOP evaluated him as a low-recidivism risk and recommended him for a decrease in custody level. Mr. Perez remains close with his son who is a U.S. Marine and his daughter-in-law who is a social worker.

Because he received a life sentence, Mr. Perez does not have a release date.

Darius Reaux

Darius was just 18 years old when he was sentenced to 39 years in prison for a series of armed robberies and carjackings with a group of other young men. On January 16, 2014, Darius was sentenced in the Northern District of Georgia to 468 months in prison. This sentence was comprised of 84 months for the underlying offenses and then a consecutive 32 years for two "stacked" 924(c) offenses. When sentencing Darius, the district court judge stated, "[T]his sentence gives him no chance, if rehabilitated no real chance to return to society as any kind of productive individual."

Immediately upon entering prison, Darius was eager to change the course of his life. He earned his GED, an Associate's Degree in Biblical Studies, and then a Bachelor's in Ministry. In his over 11 years of incarceration, he has had no disciplinary incidents. He completed the Challenge Program and currently works as a Suicide Companion. In 2016, Darius began working in UNICOR, and has quickly risen through the ranks to become a factory leader, mentor, and exceptional employee. Factory Manager Robbie Gill states, "I have every confidence that Darius will make a seamless transition into society and will be a productive law abiding citizen. The skills he has mastered at UNICOR will serve him well in any career. His worth ethic and outstanding attitude will also contribute to his future success."

Darius's current release date is December 13, 2044.

Sean Moffitt

Sean Moffitt, 43 years old, is serving a life sentence after being caught in the infamous undercover policing tactic called a "stash house reverse sting." (This is the set of offenses that hearing witness Mr. White was ensnared in.) In Mr. Moffitt's case, his conviction and sentence are all the more egregious because he never showed up to participate in the crimes. Although Mr. Moffitt participated in earlier conversations with the undercover officer, on the day the suspects and undercover officer were to meet to commit the robbery, Mr. Moffitt did not go. After being arrested approximately one month later, Mr. Moffitt eventually proceeded to trial. Just four days before the trial began, the Government filed a notice of the recidivist enhancement under 21 U.S.C § 851. On October 1, 2013 in the Western District of Pennsylvania, Mr. Moffitt was found guilty of conspiring to possess with intent to distribute cocaine and attempt to possess with intent to distribute cocaine. Mr. Moffitt was then sentenced to mandatory life in prison.

Despite being caught in a highly-criticized sting and serving a life sentence that he would not receive today if sentenced for the same offenses, Mr. Moffitt has chosen to focus on his future and has excelled in his work, education, and personal development. He has had only a single non-violent disciplinary incident during his approximate ten years of incarceration. Mr. Moffitt has taken many professional skills classes and worked for two years in UNICOR's Office Furniture Group. Mr. Moffitt speaks to his mother and 15-year-old son daily.

Because he received a life sentence, Mr. Moffitt does not have a release date.

* * *

These three individuals—Leoncio Perez, Darius Reaux, and Sean Moffitt—are all serving extreme and lengthy sentences they would not receive today if sentenced for the same offenses, and all demonstrate remarkable and consistent rehabilitation. Had these three individuals been sentenced in other district courts in other circuits, they could very well have been the witnesses before you at the Commission's public hearing. They deserve the opportunity to demonstrate to a court that there are extraordinary and compelling reasons warranting a modification in their sentence.

On behalf of CJC, Mr. Gaulden, and all of our incarcerated and now-released clients, thank you very much for inviting formerly incarcerated individuals to testify before the Commission on these important proposals. In addition, thank you for the opportunity to present written comments and for considering these views.

Sincerely,

E. Katharine Tinto
Clinical Professor of Law
Director, Criminal Justice Clinic
UC Irvine School of Law

March 3, 2023

Dear Judge Reeves,

The Compassionate Care Committee of CURE CA, a member of a national nonprofit network of concerned citizens advocating for humane alternatives incarceration and the implementations of restorative justice, supports the proposed amendments to the compassionate release policy statement.

We urge you to adopt the proposed changes in the law that will address unfair sentencing. It is important that people who are serving long sentences that would be different today have a chance for resentencing by the court.

We support other proposed changes in requirements for eligibility for compassionate release, that would include a wide range of issues including public ealth, individual medical needs, abuse and family responsibilities.

Finally, we support giving judges the authority to identify other grounds for compassionate release in addition to those specifically enumerated in this proposal.

Thank you for your thoughtful consideration of our concerns. .

Submitted by

CURE-CA Compassionate Care Committee

P.O. Box 2523

El Segundo, CA.90245

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Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

DARSOL

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

In addition to the comments below, I would also like to say that compassionate release is a gift for the loved ones and family members. When a person is incarcerated, it affects many people, not just the incarcerated one. Compassionate release would be such a gift for loved ones. For those reasons and the reasons below, I support compassionate release.

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Respectfully Yours,
Margaret Hawkins RN, MSNo

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Dewayne Patterson Construction, Inc.

Topics:

1. Compassionate Release

Comments:

It's time for some people to come home.

Submitted on: March 2, 2023

We are the Drug Policy Alliance.

March 13, 2022

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

Re: **USSC Proposed 2023 Amendments to the Federal Sentencing Guidelines Proposed Amendment "Fake Pills"**

Dear Judge Reeves and Members of the Commission,

The Drug Policy Alliance (DPA) respectfully submits the following comments on the Commission's Proposed 2023 Amendments to the Federal Sentencing Guidelines.

The Drug Policy Alliance (DPA) is the nation's leading organization working to advance drug policies centered on science, compassion, health and human rights rather than criminalization and marginalization. For over 30 years, DPA has worked with policymakers in the United States and internationally to end harmful drug war policies, repair its harms and build a non-punitive and equitable regulated drug market.

We agree with comments submitted for the by the Federal Public Defenders and the National Association of Defense Lawyers (NACDL) regarding the proposed amendments relating to implementation of the First Step Act of 2018 relating to compassionate release and amendments to the Federal Safety Valve Statute, the resolution of the circuit conflict relating to acceptance of responsibility points, and the proposed amendment to limit the use of acquitted conduct in determining the Guidelines range.

Our submission seeks to provide additional information regarding the proposed amendment to establish an enhancement relating to what are characterized as misrepresentations or mischaracterizations about the contents of a substance containing fentanyl or a fentanyl analogue.

DPA opposes the proposed amendment to 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." Such an enhancement is the

wrong approach to addressing concerns raised by the Drug Enforcement Agency (DEA) in its October 17, 2022 comment letter and perpetuate decades of harm created by increasingly harsh sentencing policies.

A. Criminalization of the Use and Sale of Controlled Substances and Severe Sentencing Schemes Have Created a Risker and More Dangerous Drug Market with a Deleterious Impact on Public Health.

Overdose deaths have risen sharply over the past decade. In 2021 alone, nearly 108,000 people died from an overdose, with 70 percent of those overdose deaths involving opioids.[1] Changes in the illicit drug supply have vastly increased the risk of fatal overdoses in recent years. Heightened enforcement inevitably results in the transition to more dangerous and more concentrated compounds, which place people who use drugs at greater risk. This well documented "Iron Law of Prohibition" has again manifested in the greater availability of fentanyl and other potent synthetic opioids that have largely replaced the street supply once dominated by heroin and diverted pharmaceutical drugs.[2]

The broad-scale application of restrictive penalties on illicit substance sales and use without regard to their respective potency, purity, and potential harms has resulted in a rapidly changing drug market where manufacturers and distributors are incentivized to create and sell more potent products that will provide similar sensations at a lower dose. When people who use drugs are no longer able to freely access their drug of choice, even though it may be significantly less risky, they will use a more potent and potentially more dangerous substance.

To address the risks associated with those market changes, experts in the field of drug policy have widely urged the adoption of strategic harm-reduction strategies[3], including the explicit authorization of overdose prevention centers[4], drug checking programs, increased access to life-saving medications for opioid use disorder (OUD) such as methadone and buprenorphine[5], and expanded access to naloxone. These measures all have a wealth of scientific evidence demonstrating their effectiveness at decreasing problematic drug use and all associated harms, including transmission of infectious diseases, public nuisance and crime, hospitalizations, and overdose fatalities. They are evidence-based policy solutions.

However, there is no evidence that any sentencing enhancement such as the one proposed will have any deterrent effect or any beneficial impact in making the illicit drug supply safer and the DEA has not submitted any evidence suggesting otherwise. There is no meaningful evidentiary

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[1] Spencer MR, Miniño AM, Warner M. "Drug Overdose Deaths in the United States, 2001–2021." NCHS Data Brief, no. 457. National Center for Health Statistics, 2022. https://dx.doi.org/10.15620/cdc:122556.
[2] Leo Beletsky & Corey S. Davis, Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited, 46 International Journal of Drug Policy, 156, 157 (2017).
[3] Drug Policy Alliance, End Overdose. Available at https://drugpolicy.org/EndOverdose.
[4] Transform Drug Policy Foundation: A Proven Way to Save Lives.
[5] National Academies of Sciences, Engineering, and Medicine, "Medications for Opioid Use Disorder Save Lives," (National Academies Press, Washington, DC, 2019), 38, https://doi.org/10.17226/25310.

record supporting the proposed amendment, or the assertion by the Department of Justice that such an enhancement would "(put) traffickers on notice that they are risking increased punishment by selling fake pills."[6] The Department's assertion that "the most critical data point on which the Commission should base its decision is the CDC estimate that during the 12 months ending in August of 2022, there were 73,102 fatal overdoses due to synthetic opioids," rather than any data or studies suggesting that a guideline enhancement will have any deterrent effect in a market where few participants have access to meaningful information regarding the contents of substances.

Decades of experience with increased enforcement and sentencing strategies and a large body of evidence studying those policies have demonstrated that neither increased arrests nor increased severity of criminal punishment for drug-related offenses have resulted in less use (demand) or fewer sales (supply). In 2011 researchers found that "[c]hanges in hard drug arrest rates did not predict changes in [injection drug use] population rates."[7] A 2017 50-state study also found no relationship between state drug imprisonment rates and drug use.[8] One evaluation of the data concluded that "existing evidence does not support any significant public safety benefit of the practice of increasing the severity of sentences by imposing longer prison terms" and that "research findings imply that increasingly lengthy prison terms are counterproductive."[9] If new or increased criminal sanctions neither decrease supply nor demand, then they serve neither a criminal justice nor public health purpose and should be abandoned.

B. Increasing Penalties in the Manner Proposed is Not Equitable, Will Likely Have Racially Disparate Impacts, and Will Unfairly Punish Unknowing Conduct.

Policymakers throughout the United States have increasingly recognized in recent years that decades of harsh and racially-biased drug enforcement have had devastating and inequitable consequences on individuals and communities. A 2016 Commission analysis of federal fentanyl sentencing revealed that 75 percent of all individuals sentenced for fentanyl trafficking were people of color, suggesting that fentanyl enforcement already mirrors other disparate drug enforcement.[10] Half of the individuals sentenced were classified as "Hispanic" and one quarter were classified as "Black," perpetuating the racial disparities that characterize sentencing for other drugs. The average sentence was 66 months. Over half (52.9%) "did not seem to know

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[6] Comment of Jonathan J. Wroblewski, U.S. Department of Justice by Department of Justice (February 27, 2023.)
[7] Samuel R. Friedman et al., Drug Arrests and Injection Drug Deterrence, 101(2) AM. J. PUB. HEALTH 344-249 (2011).
[8] Pew Charitable Trusts, Letter to The President's Commission on Combating Drug Addiction and the Opioid Crisis RE: The Lack of a Relationship between Drug Imprisonment and Drug Problems, (June 2017), available at http://www.pewtrusts.org/en/research-andanalysis/speeches-and-testimony/2017/06/www.pewtrusts.org/~/media/assets/2017/06/thelack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf
[9] Valerie Wright, Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment, The Sentencing Project (November 2010), available at
[10] "Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids and Fentanyl and Fentanyl Analogues Amendments," United States Sentencing Commission, January 2018.

they had fentanyl" and more than 55 percent of those sentenced were classified as either "couriers" or "street-level sellers.[11]

Harsher penalties for selling and distribution have ended up penalizing users and low-level sellers, while still failing to reduce overdose deaths. The instant attempt to increase penalties will have the same effect. Many people who use drugs also sell drugs on a small scale simply to fund their own drug use.[12] Such low-level distributors are unlikely to have actual knowledge of any facts regarding the composition of pills they are supplied.

The addition of fentanyl or other substances to pills occurs during the manufacturing process, which tends to occur outside of the United States and higher in the supply chain. According to the 2022 National Drug Control Strategy, the "majority of illicit drugs consumed in the United States are produced abroad by TCOs and smuggled into the country."[13] The DEA explains in publicly disseminated information that the "fake prescription pills" at issue in the instant amendment are designed "to look like prescription opioids – such as oxycodone (Oxycontin®, Percocet®), hydrocodone (Vicodin®), and alprazolam (Xanax®); or stimulants like amphetamines (Adderall®) – but contain fentanyl or methamphetamine."[14]

Yet, the Department of Justice provides no explanation about how, people who use and sell such pills at the retail level would know where pills with such markings were manufactured or whether legitimate pills have been adulterated, or were manufactured in an illicit manner and containing unexpected substances. Additionally, the Department provides no support for its assertion that "it is common knowledge among drug traffickers that most fake pills contain fentanyl."[15]

The "reason to believe" standard would likely ensnare essentially any person who provided a pill not directly obtained from a pharmacy and place the accused in the nearly impossible position of rebutting the presumption of knowledge. As such, it is overbroad and should be rejected.

C. Conclusion

Any solution to the overdose epidemic must center public health strategies. There is a real risk that the proliferation of harsh penalties for fentanyl, fentanyl analogs, and other synthetic drugs, like penalties imposed for crack-cocaine in the 1980s, will lead to an increase in the prison population and reverse course on efforts to end mass incarceration, while severely undermining efforts to reduce overdose deaths. Public health and harm reduction solutions exist to effectively address dangerous conditions in the drug supply, including the establishment of overdose

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[11] Id.
[12] Alyssa Stryker, "Rethinking the 'Drug Dealer,'" Drug Policy Alliance, December 17, 2019, Available at http://www.drugpolicy.org/drugsellers.
[13] ONDCP. National Drug Control Strategy 2022.
[14] Drug Enforcement Administration, Fact Sheet: Fake Prescription Pills. Available at https://www.dea.gov/sites/default/files/2022-12/DEA-OPCK_FactSheet_December_2022.pdf
[15] U.S. Department of Justice by Department of Justice (February 27, 2023) at 51.

prevention centers, drug checking services, and others. These interventions are based in science. The instant proposal is not evidence based and should not be adopted.

Respectfully Submitted,

Grey Gardner
Senior Staff Attorney
Department of Legal Affairs
Drug Policy Alliance

DUE PROCESS
INSTITUTE

March 14, 2023

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

RE: *Comment to U.S.S.C's proposed amendment to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) and §6A1.3 (Resolution of Disputed Factors (Policy Statement)) to generally limit the use of acquitted conduct*

Chair Reeves and Members of the Commission:

Due Process Institute is a bipartisan nonprofit that works to honor, preserve, and restore principles of fairness in the criminal legal system. Procedural due process concerns transcend "liberal" and "conservative" political labels and therefore we focus our efforts on these core principles and values that are shared by all Americans. Guided by a bipartisan Board of Directors, and supported by bipartisan staff, we create and support achievable solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

We unequivocally support eliminating the use of acquitted conduct at sentencing, which punishes someone based on unproven allegations that were rejected by a jury (or sometimes, a judge). It has been a priority item on our reform agenda since our founding. We have helped lawmakers draft, introduce, and advance bipartisan legislation that would eliminate acquitted conduct sentencing and filed numerous *amicus* briefs in support of petitions seeking review by the U.S. Supreme Court that advocated the end of this pernicious practice.

We write in support of the Commission's complete elimination of acquitted conduct sentencing, however, rather than a "limitation" of its use as is presented by the current proposal.

The Sixth Amendment jury trial right is one of the critical pillars of our criminal justice system as it enshrines the founders' vision of the jury as a "protection against arbitrary rule." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968). The Framers "appreciated the danger inherent in allowing 'justices named by the crown' to 'imprison, dispatch or exile any man that was obnoxious to the

government, by an instant declaration, that such is their will and pleasure.'"[1] Disregarding the jury's acquittal for the purpose of sentencing ignores the jury's historic role in our criminal legal system. In fact, colonial and early-American juries were often the sentencing authority, not the Court.[2] The punishment was directly tied to the findings of the jury, which could mitigate a sentence by refusing to convict or by convicting the Defendant of a lesser offense.[3] The Founders envisioned this powerful role for the jury based on their inherent skepticism of government power and their commitment to popular sovereignty as a check on this power[4]. Because of the jury's crucial role in protecting individual rights, "trial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'"[5] Importantly, a jury trial is not "a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish."[6] In fact, the Sixth Amendment's "core concern" is to reserve critical facts for determination by the jury.[7] And where a jury rejects the truth of the government's accusations by acquitting, that decision is "accorded special weight" under the Constitution.[8] A jury's power to acquit is so sacrosanct that it is unreviewable by prosecutors or judges. Indeed, "we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision . . . ."[9] Therefore, insulating a jury's verdict of acquittal is crucial to maintaining the jury's constitutional role as a necessary and integral independent check on governmental power.

It seems highly unlikely that the Framers who adopted the Sixth Amendment intended to guard against governmental oppression through criminal juries with the ultimate power to confirm or reject the truth of every accusation, and to partially acquit to lessen unduly harsh punishment, only to allow a judge to nullify the jury's acquittal at sentencing. If sentencing judges cannot go beyond a jury's verdict, we believe they cannot contravene a jury's verdict and still comply with the Sixth Amendment guarantee of a jury trial. As the written and oral testimony of other supporters of this proposal has already indicated, an extremely wide and diverse number of scholars, academics, legislators, and judges agree with our assessment. Indeed, the Commission's own work illustrates that overwhelmingly federal judges are in agreement that acquitted conduct should not be considered "relevant conduct" at sentencing.[10]

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[1] *Alleyne v. United States*, 570 U.S 99, 127 (2013) (Roberts, C.J., dissenting) (quoting in part, 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (alteration omitted)).
[2] Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. of Crim. L. and Criminology 691, 692 (2010).
[3] *Id.* at 692—94.
[4] Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 869-75 (1994).
[5] *Apprendi v. New Jersey*, 530 U.S. 466, 477 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)).
[6] *Blakely v. Washington*, 542 U.S. 296, 306- 07 (2004).
[7] *S. Union Co. v. United States*, 567 U.S. 343, 350 (2012).
[8] *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *United States v. Scott*, 437 U.S. 82, 91 (1978) ("[T]he law attaches particular significance to an acquittal.").
[9] *Burks v. United States*, 437 U.S. 1, 16 (1978).
[10] U.S. Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 5: Relevant Conduct.

In addition to undermining the role and purpose of the jury as well as disrespecting the public's service to their community, acquitted conduct sentencing[11] incentivizes prosecutors to overcharge and to bring even weak charges to trial since they have more than one "bite at the apple." The existence of acquitted conduct sentencing also serves as a profound disincentive to an accused person to challenge either the government's factual allegations or legal theories via a trial. As almost every American criminal defense lawyer has personally experienced, the fact that you must explain to your client that, even if a jury refuses to convict on particular counts (or even in a particular case[12]), it does not limit the government's ability to rely on any of their unproven allegations at any future sentencing for any other crime is frequently the lynchpin in your client's decision to accept a plea bargain—even an unjust one—because the stakes of challenging unjust or overreaching criminal charges at trial under such circumstances is simply too high. The phenomenon of prosecutorial overcharging combined with the fact that a defendant must "win" their federal trial on every count that was charged or face punishment that can be assessed as if they lost on every count in large part explains why the number of federal jury trials has, as the Commission's own data show—dwindled to almost zero. ("In fiscal year 2021, nearly all offenders (56,324; 98.3%) were convicted through a guilty plea."[13])

We write in support of the Commission's complete elimination of acquitted conduct sentencing, rather than a "limitation" of its use as is presented by the current proposal. We have serious concerns about the proposal in so far that it would still allow acquitted conduct to be relied upon in sentencing when "such conduct was admitted by the defendant during a guilty plea colloquy; or (B) was found by the trier of fact beyond a reasonable doubt…." We strongly oppose the portion of the proposed revision to §6A1.3 that invites courts to consider acquitted conduct in determining the sentence to impose within the Guideline range or in determining whether a departure from the range is warranted. And we further oppose the proposed limitation to exclude acquittals "unrelated to the substantive evidence" (i.e. jurisdiction, venue, statute of limitations). In our

[11] While we focus our statement on the abolishment of acquitted conduct sentencing because that is the subject of the Commission's proposal, we urge the Commission to consider eliminating the use of uncharged or dismissed conduct in sentencing as well.

[12] The typical acquitted conduct sentencing case arises when a defendant is indicted on some charges but acquitted on others during the same trial. But in *Asaro v. United States*, No. 18-48-cr (2d Cir. Apr. 23, 2019) (*cert. denied* Apr. 23, 2019), the defendant was acquitted of several serious crimes alleged to have occurred three and four decades earlier, including an alleged robbery and an alleged murder. After a four-week trial, the jury acquitted Asaro of all charges. Approximately two years later, the government again indicted Asaro, this time in connection with property destruction as retribution after a road rage incident. The same prosecutors who had tried Asaro's prior case handled the case. The case was assigned to the same district judge who had presided over Asaro's earlier trial. Before sentencing, the government, the probation office, and the defense all agreed that the range called for by the relevant Sentencing Guidelines was 33 to 41 months' imprisonment. The court nevertheless sentenced Asaro to 96 months—more than double the high end of the range. In so doing, the judge made clear that she was basing the length of Asaro's sentence on the 1978 robbery and 1969 murder for which Asaro was acquitted two years earlier, observing that she was according "particular weight" to those "crimes." In pronouncing Asaro's sentence, the judge explained that she had "reviewed" her notes and the transcript from the earlier trial. In other words, the sentencing judge from the defendant's first trial was now given an opportunity in an unrelated second case a few years later to completely ignore the jury's unanimous multiple "not guilty" verdicts in the first case and replace them with her own opinion in order to sentence Asaro to a prison sentence more than double what was appropriate for the charge to which he had pled guilty.

[13] United States Sentencing Commission, *Federal Register Notice of Proposed 2022-2023 Amendments*, at p. 263.

desire to support the Commission's important mission and substantial agenda in this amendment cycle, we wish to adopt—rather than essentially repeat—the concerns that were well-expressed in the written statements and oral testimony of Melody Brannon, Federal Public Defender for the District of Kansas on Behalf of the Federal Public and Community Defenders and Natasha Sen, Chair of the Practitioners Advisory Group. However, in sum, we believe the proposed limitations would profoundly undermine the Commission's intention in its own proposal designed to increase fairness in sentencing while also reducing sentencing disparities, would lead to further erosions of due process rights, and would lead to unnecessary uncertainty by resulting in numerous legal challenges regarding these limitations.

It is imperative to *all* parties involved in a criminal matter—including the community on whose behalf the prosecution does its work—that an individualized judicial determination of appropriate punishment for crimes which a person has been duly convicted occurs. The relatively modern phenomenon of sentencing laws that allow courts to ignore a jury's findings and punish a person for conduct the government alleged but could not prove beyond a reasonable doubt is abhorrent to that ideal. We thank the Commission for its critical work in considering amendments that would finally bring an end to this practice.

Sincerely,

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202-558-6683

14 March 2023

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Comments of Fair Trials Regarding the 2023 Proposed Amendments to the Sentencing Guidelines

Dear Sentencing Commission:

Fair Trials respectfully submits these comments in support of proposed amendment §1B1.3(c) Acquitted Conduct, proposed amendment §3E1.1(b) Acceptance of Responsibility, and to propose improvements that could strengthen defendants trial rights under those amendments. Fair Trials is an international human rights organization focusing on fair trial rights around the world.[1] We have launched the Plea Bargaining Institute, a home for academics, policymakers, advocacy organizations, and practitioners to share information and research to help shape laws, change policy, and transform practices in the plea bargaining arena.[2] We have also published extensive research on the coercive effect of plea bargaining and best practices surrounding plea bargaining, including The Disappearing Trial.[3] Rebecca Shaeffer, our Interim Global Legal Director, is a member of the American Bar Association Plea Bargaining Task Force set up to examine the role of plea bargaining in the US criminal justice system.[4]

1. Amendment §1B1.3(c) — Acquitted Conduct

The Commission asked for comments on whether the limitation on the use of acquitted conduct is too broad or too narrow. We write today to inform the Commission that,

[1] Fair Trials, https://www.fairtrials.org.
[2] The Plea Bargaining Institute, https://pleabargaininginstitute.fairtrials.org.
[3] *See* Fair Trials, *The Disappearing Trial* (2022) https://www.fairtrials.org/app/uploads/2022/01/The-Disappearing-Trial-report.pdf.
[4] *ABA CJS Plea Bargaining Task Force*, AMERICAN BAR ASSOCIATION https://www.americanbar.org/groups/criminal_justice/committees/taskforces/plea_bargain_tf/.

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while taking the necessary and adequate first steps towards creating a fairer system, the limitation on using acquitted conduct is still too broad because it includes conduct that is admitted to as a result of plea bargaining—a coercive process that cannot be trusted to establish the accuracy of the information and events pled to. To strengthen the amendment, the Commission should remove the ability for judges to use conduct admitted to in a plea colloquy when determining sentence guidelines.

The proposed amendment to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) creates a new subsection (c) that specifically states "acquitted conduct shall not be considered relevant conduct" for determining the guideline range "unless the conduct was admitted by the defendant during a guilty plea colloquy," or the conduct was, beyond a reasonable doubt, found to occur in establishing the conviction offense.[5] This departs from current practice, which allows judges to consider, in determining the sentence, conduct of which the jury has acquitted the defendant if the judge finds the conduct has occurred by a preponderance of the evidence.[6] This proposed amendment also proposes that if "the sentencing judge considers [the conduct] has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."[7] Fair Trials supports this proposal, as the use of acquitted conduct in its current form "defies logic,"[8] is unjust to defendants, erodes public perception of judicial fairness, and is questionably unconstitutional.[9]

However, the amendment in its current form does not go far enough. By limiting the use of acquitted conduct to instances where such conduct is proven by the proposed standard, the amendment seeks to hold defendants accountable for their "true" actions while

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[5] *Proposed Amendments to the Sentencing Guidelines*, United States Sentencing Commission, 216 (Feb. 2, 2023) https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf.
[6] *United States v. Watts,* 519 U.S. 148, 157 (1997).
[7] *United States v. Marshall*, 519 F. Supp. 751, 754 (Wis. E.D. Ct. 1981); *see also* U.S. Sentencing Comm'n, *supra* note 5 at Chp. 8, pg2.
[8] *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting from majority's holding that the court can rely on acquitted conduct when sentencing criminal defendants).
[9] *United States v. McClinton,* 23 F.4th 732, 735 (7th Cir. 2022) (*petition for certiorari filed)* ("Despite this clear precedent, McClinton's contention is not frivolous. It preserves for Supreme Court Review an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionally of allowing courts to factor acquitted conduct into sentencing calculations").

disregarding questionable conduct. The amendment fails to achieve this intention because it assumes that all conduct admitted to in a plea agreement has factually occurred. The reality is that this assumption is false; people frequently plead guilty to conduct they never committed, for a variety of reasons.[10] The plea-bargaining process is coercive in nature and should not be relied upon to establish what happened by a sufficient indicium of reliability.

a. Not Everyone Who Pleads Guilty is Actually Guilty

Exoneration data show that not everyone who pleads guilty is actually guilty. Individuals who pled guilty to serious crimes that they did not commit make up nearly eleven percent of the nation's 360 DNA-based exonerations since 1989.[11] Approximately 44% of the total exonerations that occurred in 2015 stemmed from convictions secured through guilty pleas.[12] Additionally, the National Registry of Exonerations reported that in 2021 they handled 48 exonerations for people who plead guilty to a crime they did not commit—making up approximately 22% of their caseload.[13]

Exoneration data alone cannot fully capture the number of people who plead guilty to crimes they do not commit. Innocent defendants who plead guilty usually receive a lighter sentence, meaning the time and resources necessary to pursue an exoneration may outweigh its benefits. In some states, individuals may be statutorily barred from seeking post-conviction relief after pleading guilty, even if new evidence of their innocence comes to light.[14] Those who are allowed to pursue exoneration may be less likely to do so, convinced that judicial actors will not believe their innocence because a plea deal has been entered.[15] All of this suggests that the number of people who falsely plead guilty is much higher than any statistic currently captures.

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[10] *See 2023 Plea Bargaining Task Force Report*, AMERICAN BAR ASSOCIATION 20 (2023) https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.
[11] Glinda Cooper, Vanessa Meterko, and Prahelika Gadtaula, *Innocents who Plead Guilty : An Analysis of Patterns in DNA Exoneration Cases*, 31 FED. SENT'G REP. 234, 234 (2019).
[12] Fair Trials, *supra* note 3 at 12.
[13] *2021 Annual Report*, NATIONAL REGISTRY OF EXONERATIONS 5 (2022) https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202021.pdf.
[14] Plea Bargaining Task Force Report, *supra* note 10 at 20.
[15] *Innocents who Plead Guilty*, NATIONAL REGISTRY OF EXONERATIONS 1 (2015) https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf.

There is also overlap between false confessions and false guilty pleas. Those who falsely confess to a crime are more than three times more likely to plead guilty to a crime they did not commit.[16] False confessions are prevalent in the United States[17] due to coercive interrogation practices, including the ability of law enforcement to lie about evidence an officer has against an individual.[18] Additionally, certain vulnerable groups (including youth) are at an increased risk of falsely confessing under these pressure techniques.[19] Without interrogation reform to protect individuals against such coercive tactics,[20] false confessions—and in turn, false pleas—will continue to occur.

b. Pretrial Detention and the Trial Penalty Entice People Who Are Factually Innocent to Plead Guilty

There is widespread recognition that plea bargaining is a coercive process that strongarms individuals into accepting guilty pleas for conduct they never committed.[21] Such factors that build into this coercive process include pretrial detention practices and the trial penalty.

Pretrial detention increases a person's likelihood of pleading guilty by 46%.[22] A 2020 Vera Institute report found that people who were detained pretrial reached a faster case disposition than those who were released on bail, primarily because those held in pretrial

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[16] *Guilty Pleas and False Confessions*, NATIONAL REGISTRY OF EXONERATIONS 2 (2015) https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article4.pdf.
[17] *DNA Exonerations in the United States (1989–2020)*, INNOCENCE PROJECT https://innocenceproject.org/dna-exonerations-in-the-united-states/.
[18] Douglas Starr, *This Psychologist Explains Why People Confess to Crimes They Didn't Commit*, SCIENCE (June 13, 2019) https://www.science.org/content/article/psychologist-explains-why-people-confess-crimes-they-didn-t-commit.
[19] *See* Fair and Just Prosecution, *Issues at a Glance: Youth Interrogation: Key Principles and Policy Recommendations* (2022) https://fairandjustprosecution.org/wp-content/uploads/2022/01/FJP-Juvenile-Interrogation-Issue-Brief.pdf?fbclid=IwAR2mnh101J67Q3APWC37_BM7v5U8xwSmlA4k_1CllolyA9jUgwvrN_XaySI.
[20] *The Mendez Principles: The Case for US Legislation on Law Enforcement Interviews*, FAIR TRIALS (July 01, 2021) https://www.fairtrials.org/articles/news/mendez-principles-legislation-law-enforcement-interviews/.
[21] Ram Subramanian, Leon Digard, Melvin Washington II, and Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining*, VERA INSTITUTE, 46 (2020) ("Research shows what is known intuitively – cases exist in which the plea offer is made, and the opportunity to be released from jail, effectively coerce[s] people who are factually innocent into pleading guilty").
[22] *Id.* at 11.

detention plead guilty to get out of jail.[23] Those who have low stake offenses but cannot afford bail may find it more advantageous to plead guilty instead of fighting the false charge because they can start their sentence—or have it completely satisfied under time served—immediately. Pleading is the fastest way for people to get back to their families, jobs, and communities. Additionally, pressures from the pandemic (including overcrowded, unsanitary conditions, and the uncertainty of when a case will actually move forward) has made pleading to get out of jail a more enticing option globally.[24]

The trial penalty also pushes people to accept plea deals for crimes they did not commit. The trial penalty refers to the difference between the sentence received in a plea agreement compared to the sentence likely received if convicted at trial.[25] Sentences imposed after trial are typically three times as long as those offered to defendants in guilty pleas.[26] Additionally, defendants who go to trial are at least twice as likely to receive sentences involving incarceration than similarly situated defendants who accept plea deals.[27] In New York City, plea discounts of 80–98% were given to those who pled guilty in felony cases.[28] Such a drastic difference in sentencing entices individuals to accept the short sentence and "makes taking a plea difficult to turn down."[29]

This fear is intensified with the use of mandatory minimums and the death penalty.[30] Under mandatory minimum sentencing, those who choose to go to trial risk long term incarceration if they are found guilty. Many innocent people simply do not want to take this

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[23] *Id.*
[24] *See* Fair Trials, *Locked up in the Lockdown: Life on Remand During the Pandemic* (2022) https://www.fairtrials.org/app/uploads/2021/11/locked-up-in-lockdown.pdf.
[25] Fair and Just Prosecution, *Issues at a Glance: Plea Bargaining*, 5 (2022) https://fairandjustprosecution.org/wp-content/uploads/2022/02/Plea-Bargaining-Issue-Brief.pdf.
[26] *Id.*
[27] *Id.*
[28] Cooper et al, *supra* note11 at 234.
[29] Toni Messina, *When Going to Trial Isn't Worth It,* ABOVE THE LAW (April 15, 2021) https://abovethelaw.com/2021/04/when-going-to-trial-isnt-worth-it/?rf=1; Subramanian, *supra* note 21 at 47 ("Indeed, researchers have hypothesized that, at least for lower-level charges, factually innocent people may feel the greatest pressure to plead guilty as it is to these people that prosecutors, faced with little compelling evidence of their guilty, will make their most generous plea offers in order to secure a conviction").
[30] *See generally* National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers, *New York State Trial Penalty Report*, 7 (2021) [hereinafter NACDL Trial Penalty]. The New York State Trial Penalty Report's number one recommendation in mitigating the effect of the trial penalty is to "eliminate[e] mandatory minimums."

gamble, even on weak cases.[31] Similarly, people are more likely to accept a plea deal they would have otherwise rejected if their case may result in a death sentence at trial.[32] A research study conducted in New York when the state reinstated the death penalty in 1995 found that people charged in murder cases were 25% more likely to plead guilty following the reinstatement.[33] The risk of a life-altering sentences pressures those who are factually innocent to accept a "lesser than two evils" sentence.

A host of other factors may place pressure on those to accept plea deals. Eye-witness misidentifications, a co-defendants false confession,[34] or police misconduct[35] can make a case appear stronger than it actually is, increasing the risk of going to trial. Charge stacking[36] allows a prosecutor to inflate the prison sentence attached to trial, making the plea deal a more appealing option than it otherwise would be.[37] Prosecutors may also agree to drop some of the auxiliary charges that carry lengthier sentences, such as witness tampering or use of a firearm, in exchange for a quick settle through a plea deal,[38] even if these charges would have been difficult to prove if they went to trial. Ultimately, the trial penalty forces factually innocent defendants to make the difficult choice between pleading guilty and accepting a shorter sentence, or heading to trial to risk spending many more years behind bars if they are unable to convince others of their innocence.

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[31] *Id.* at 52.
[32] Subramanian, *supra* note 21 at 17; *see also* National Registry of Exonerations, *supra* note15 at 3 ("Exonerees who had pleaded guilty were more likely to have been threatened or charged with the death penalty compared with those who had not pleaded guilty").
[33] Subramanian, *supra* note 21 at 17 (citing Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence From New York's 1995 Reinstatement of Capital Punishment*, 8 AMERICAN LAW AND ECONOMICS REVIEW 116, 126 (2006)).
[34] *2021 Annual Report*, *supra* note 13 at 65.
[35] *Id.* A group exoneration occurred in 2003 in Tulia, Texas, when it was discovered a corrupt police officer planted drugs on multiple individuals to charge them with drug sales that never happened. Out of thirty-five defendants, eight went to trial; all eight were convicted and sentenced to large prison sentences. The other twenty-seven defendants plead guilty—despite their factual innocence—and received probation and fines or a few months of jail time. *Guilty Pleas in "Group Exonerations,"* National Registry of Exonerations, 2 (2015) https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article2.pdf.
[36] Defined as the process of building an extremely lengthy prison sentence by bringing multiple, repetitive charges against a defendant. *Opposition to Stacking Charges*, NAACP, https://naacp.org/resources/opposition-stacking-charges.
[37] Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 188 COLUM. L. REV. 1303, 1315 (2018).
[38] Subramanian, *supra* note 21 at 34.

c. Lack of Safeguards in the Plea-Bargaining Process

While the use of trial waivers and the pressures commonly associated with plea bargaining are felt worldwide,[39] the lack of safeguards around plea bargaining in the United States makes it especially difficult to ascertain the truth behind the guilty plea. The trial penalty a phenomenon unique to the United States. Many other nations set a lower-limit on the discount in a sentence a defendant may receive in exchange for a guilty plea (such as a 10-15%, 25%, or 33% reduction).[40] Additionally, some countries (including Chile) require the prosecutor to provide sufficient evidence to support the charges the defendant is pleading to instead of simply accepting the plea at face value.[41] The United Kingdom utilizes a set of standard procedures to shape guilty pleas, ensuring similarly situated defendants receive similar sentences.[42] These safeguards ensure that defendants are not pressured into accepting plea deals based on sentence length and that the court is not blindly trusting guilty pleas. Until such reform is brought to the United States, plea deals cannot be relied upon to accurately establish the information and events plead to.

d. The Guidelines Must Not Allow a Judge to Consider Conduct Not Proven Beyond a Reasonable Doubt

The current use of acquitted conduct is a "dubious infringement of the rights to due process and to a jury trial."[43] This amendment is a good first step in righting the wrongs associated with the use of acquitted conduct in determining sentence guidelines. However, in a system where almost 98% of federal convictions are the result of guilty pleas,[44] it is important for the Sentencing Commission to go further and protect those who do not have the

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[39] *See generally*, Fair Trials, *Young Minds, Big Decisions* (2022) https://www.fairtrials.org/app/uploads/2022/10/Young-minds-big-decisions.pdf.
[40] Rebecca Shaeffer, *The Trial Penalty*, 31 FED. SETN'G REP. 321, 326 (2019). In comparison, the US has an average of 300% higher sentence post-trial vs. post-plea.
[41] *Id.* at 4. In the United States, a "guilty plea is sufficient proof that the defendant [is] guilty . . . A guilty plea ends the controversy and removes the prosecution's burden of proof . . . ." *People v. Rhoades*, 323 Ill. App. 3d 644, 651 (5th Dis. Ct. App. 2001).
[42] Shaeffer, *supra* note 40 at 326. In comparison, the US individualizes plea deals, which may result in drastically different sentences for similarly situated individuals.
[43] *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring).
[44] Fair Trials, *supra* note 3 at 9.

luxury of going to trial and seeking jury protection.[45]

Far too often the conduct admitted to in a plea agreement has not actually occurred. Plea bargaining is a coercive process influenced by numerous outside factors, particularly the difference in the length of sentence imposed if an individual goes to trial instead of pleading guilty. This pressure is unique to the United States, and without the proper safeguards to protect from it, plea deals cannot be used as to reliability determine what actually occurred.

By accepting plea agreements as a form of reliable truth, the current guidelines perpetuate the problems in acquitted conduct. In order to leave no loophole and move away from allowing conduct that has not been proven beyond a reasonable doubt, the Commission must limit the use of plea deals from consideration as well. If the Commission wants to ensure conduct that a defendant has not committed is not considered when setting the sentencing guideline, it cannot consider conduct that was admitted to in a plea colloquy.

2. <u>Amendment §3E2.2(b) — Acceptance of Responsibility</u>

The Commission has also requested comment on the circuit conflict arising out of §3E1.1(b) and whether the guidelines should address the permissible bases for the government withholding a motion for sentence reduction for a defendant's acceptance of responsibility. Circuits are split in determining whether a motion may be withheld by the government when a defendant has raised sentencing challenges or moved to suppress evidence, some circuits arguing that this work in preparing a response is tantamount to preparing for trial.[46] The Commission proposes to amend the guidelines to define "preparation for trial" as "substantive preparations" taken by the government to present its case against the defendant in front of a jury or judge at trial. This would include actions taken close to trial, such as preparation of motions in limine, voir dire and jury instructions, and witness or exhibit lists. This definition would, ordinarily, not include litigation relating to a charging document, pretrial motions, early suppression motions, and sentence objections or appeal waivers.

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[45] *See United States v. Brown*, 829 F.3d. 385, 408 (D.C. Cir. 2018) (Millett, J., concurring) (stating the use of acquitted conduct "guts the role of the jury in preserving individual liberty and preventing oppression by the government").

[46] *United States v. Collins*, 683 F.3d 697, 707 (6th Cir. 2012) (suppression motion required the government "to undertake trial-like preparations").

A defendant is entitled to engage in permissible conduct designed to protect their constitutional rights without fear of reprisal by the government. The Commission's proposed changes are a positive step towards protecting a defendant's right to contest substantive, procedural, and constitutional rights. In *North Carolina v. Pearce*, the Court considered the impact of penalizing defendants in response to their pursuit of remedies for constitutional violations.[47] The Court recognized that retaliatory policies violate due process and serve to deter those who would exercise their constitutional rights.[48]

Here, the Commission highlights the myriad cases in which the courts also recognized this principle with regards to §3E1.1(b).[49] While the current guidelines may not have "forced" the defendant to forgo filing of a suppression motion,[50] ignoring the deterrent impact the withholding of a §3E1.1(b) motion in retaliation for filing a routine pretrial motion fails to fully recognize the coercive nature of this policy. Fair Trials supports this change in guidelines because it rightly recognizes this concern and is a necessary step to increase protections the defendant's right to challenge constitutional violations.

a. The "Bright Light" of the Jury Trial Protects Everyone's Constitutional Rights

The reality is that our criminal legal system works only because the majority of defendants plead guilty.[51] In the federal system, almost 98% of all defendants plead guilty and do not exercise their constitutional right to a trial.[52] This statistic means that the defendant, the court, and the public miss out on the opportunity to reveal constitutional

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[47] *North Carolina v. Pearce*, 395 U.S. 711, 723–24 (1969) (*overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989)).
[48] *Id.*
[49] *United States v. Kimple*, 27 F.3d 1049, 1413 (1994) ("The denial of a reduction under subsection (b)(2) is impermissible if it penalizes a defendant who has exercised his constitutional rights."); *United States v. Marquez*, 337 F.3d 1203, 1211 ("[A] district court may not penalize a defendant for bringing a non-frivolous motion to suppress by denying a reduction under subsection (b)(2)."); *Marroquin*, 136 F.3d at 223 (1998) ("[A] defendant does not lose his right to the one level decrease simply because his attorney has filed pretrial motions to which the government responds . . .").
[50] *Marroquin*, 136 F.3d at 225.
[51] Andrew Manuel Crespo, No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action, 90 Fordham Law Rev. 1, 3–4 (2022).
[52] NACDL Trial Penalty, *supra* 30 at 14; U.S. Sentencing Comm'n, Annual Report and Sourcebook of Federal Sentencing Statistics at 56 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf.

violations—uncovering patterns of misconduct or bias—as well as the opportunity to hold the government to their burden of proof, undermining the defendant's right to presumed innocence.

Trials provide the public the opportunity to oversee the criminal process and in doing so, protect the rights of defendants charged with a criminal violation.[53] This transparency in the system lends legitimacy to the system—it serves as a check on government for which private negotiations between prosecutor and defendant are no substitute.[54] The lack of transparency in plea negotiations means that, for the most part, the pressures to plead guilty are never brought to the public's consciousness. And that pressure can be immense. The incentives to plead guilty despite actual innocence account for many misdemeanor and felony convictions of defendants who, due to this pressure, did not exercise their right to a trial.[55]

This transparency also provides the defendant a meaningful opportunity to challenge and remedy any constitutional violations committed against them. When a Fourth Amendment violation is found to have occurred, the main remedy for that violation is the exclusionary rule.[56] A remedy that is beneficial to the defendant only during trial. The act of filing a motion to suppress, transcription of the hearing, and a written finding by the court all record wrongful actions committed by the government and its agents. Without this process and record, the government is not held to account for bad acts, the defendant does not obtain redress, and the public is not notified of this violation. Deterring a defendant from seeking redress to which they are entitled further undermines opportunities for justice and further delegitimizes the legal system.

b. Motions to Suppress Provide the Defense an Opportunity to Understand the Case Against Them and Prepare a Meaningful Defense

Contrary to the statement made by the United States District Court for the District of

[53] "The bright light of the jury trial deters crime, enhances respect for the law, educates the public, and reinforces their sense of safety much more than a contract entered into in the shadows of a private meeting in the prosecutor's office." Judge Joseph Goodwin of the U.S. District Court for the Southern District of West Virginia, quoted in NACDL Trial Penalty, *supra* note 30 at 13.
[54] Plea Bargaining Task Force Report, *supra* note 10 at 14.
[55] Subramanian, *supra* note 21 at 45–47.
[56] *Wong Sun v. United States*, 371 U.S. 471 (1963)

Massachusetts as quoted in *United States v. Beatty*,[57] all facts and allegations alleged in an indictment or charging document are, by nature of our adversarial system, justifiably in dispute. This guarantee of the presumption of innocence is fundamental to the protection of human rights.[58] Due process entitles a defendant the right to hold the government to its burden and maintain the presumption of innocence unless and until which time they are convicted by a jury or plead guilty.[59]

The choice to plead or go to trial is the right of the defendant alone, but it is the responsibility of their attorney to provide effective and meaningful counsel on that decision.[60] An attorney's effective and meaningful counsel is only as good as the information available to that attorney. The right to access and challenge the admissibility both of exculpatory and inculpatory information is enshrined not only in United States procedural rules,[61] evidentiary rules, [62] and case law,[63] but also in international law.[64] Preventing or deterring exploration of the strength of the charges against the defendant through pretrial motions undermines the effectiveness of the attorney's advice, as well as the "voluntariness" and "knowingness" of the defendant's choice. If a defendant knows that the government will refuse to file a §3E1.1(b) motion for exercising this right, he will be deterred from doing so. And the defendant, the legitimacy of the judicial process, and the public will suffer for it.

Further, if evidence is brought forward that is deemed admissible by the court and

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[57] "It seems to me that the government certainly can take the position that it's not going to move under for the third level under (b) if the defendant requires it to be put to a lot of trouble by contesting facts that ought not genuinely to be in dispute." *United States v. Beatty*, 538 F.3d 8, 13 (2008). This statement, and sentiment, greatly devalues the presumption of innocence.

[58] The International Convention on Civil and Political Rights (ICCPR) comment 32 § 30 requires all public authorities to "refrain from prejudging the outcome of a trial" which is fundamental to the protection of human rights.

[59] *Taylor v. Kentucky*, 436 U.S. 478, 485–86 (1978) ("While use of the particular phrase 'presumption of innocence'—or any other form of words—may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt") (Internal quotes omitted); *see also* ICCPR Article 14(2).

[60] *Marroquin*, 136 F.3d at 224 ("Diligent defense attorneys regularly file motions after arraignment seeking information to enable them better to understand their client's case and help their client choose whether to plead or go to trial. They may also prudently file motions so as to lay ground work for future tactical choices or to deal with current client concerns such as bail and detention").

[61] Fed. R. Crim. P. 16.

[62] Fed. R. Evid. 402.

[63] *Brady v. Maryland*, 373 U.S. 83 (1963).

[64] ICCPR Article 14(3)(b).

inculpates the defendant it may encourage the defendant to plead guilty, preventing a trial and thus assisting in the efficient allocation of government resources. The defendant's opportunity to engage the court and challenge the evidence to be presented against them is a process necessary to ensure meaningful preparation of their defense and to fully understand the charges—including the accompanying evidence—against them.

c. Merely Responding to a Pretrial Motion Is Not Substantive Preparation for Trial

The proposed guidelines that limit the definition of "preparing for trial" to actions taken by the government to prepare a case to present to a jury are appropriate for the purposes of §3E1.1(b). Responding to a motion, timely filed to preserve constitutional rights of the accused, is not a sufficient reason for the government to withhold a §3E1.1(b) motion. Case law from the First, Second, Ninth, Tenth, and D.C. Circuits have used the timing, purpose, and the government's actual effort spent preparing their response of motions to suppress to address whether these motions resulted in substantive preparation for trial.

In *Kimple*, the court distinguished between timely motions filed to preserve constitutional rights and "eve of trial" motions that "do not necessarily serve to vindicate the defendant's constitutional rights."[65] The court held that without meaningful preparation on the part of the government, "merely opposing" a motion "is not sufficient to constitute trial preparation."[66] And in *Marquez*, the court held that the government may not use the fact that the defendant "filed a non-frivolous motion to suppress, and there is no evidence that the government engaged in preparation beyond that which was required for the motion," in order to withhold a §3E1.1(b) motion.[67] The proposed amendments to the guidelines fall squarely within the reasoning of these cases.

d. Conclusion

Due process requires that defendants are presumed innocence until the government proves their guilt beyond a reasonable doubt. While the plea bargaining process is an accepted norm in the United States federal system, a defendant is still entitled to explore and

[65] *Kimple*, 27 F.3d at 1413.
[66] *Id.* at 1414–15.
[67] *Marquez*, 337 F.3d at 1212.

seek redress for constitutional violations against them, as well as be provided the opportunity to prepare an adequate and meaningful defense—including the decision whether or not to plead guilty. The Commission's proposed amendments to §3E1.1(b) are necessary step to increase protections to a defendant's right to challenge constitutional violations.

Yours sincerely,

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March 14, 2023

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

Re: Proposed 2023 Amendments to the Federal Sentencing Guidelines

Dear Judge Reeves:

We are pleased to provide these comments on behalf of FAMM, supporting a number of the Commission's proposed amendments to the federal Sentencing Guidelines. FAMM is a 33-year-old non-profit, non-partisan organization advancing sentencing and corrections reform. Our membership of over 70,000 people includes the currently and formerly incarcerated, as well as their loved ones, and others concerned about the criminal justice system's impact on our communities. We work to elevate the voices of impacted people so that their experiences are taken into account by policy makers. Thank you for the invitation to testify at the hearing in February and for your attention to our written comments.

I. First Step Act: Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(A)

a. Proposed Amendment (B)(1)

i. *Proposed amendment (B)(1)(C) rightfully recognizes the impact of medical care in BOP for certain individuals*

The defendant is suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner.

FAMM endorses the proposed additional subcategory to "Medical Condition of the Defendant" in new subsection (B)(1). This criterion would provide potential relief to individuals whose medical conditions are chronic and/or complex and who are at risk of serious or life-ending consequences should the Bureau of Prisons (BOP) delay or fail to adequately or timely diagnose, test, treat the condition, or refer the patient for testing and treatment. While some courts have

recognized such situations either under the current guideline[1] or using their discretion in the absence of an applicable guideline,[2] (and still others cite both[3]), the addition of this subcategory will give courts confidence to consider motions alleging that people in BOP custody cannot access adequate or timely specialized or long-term care they require.

FAMM hears all too often from incarcerated members or their loved ones on the outside who tell us about failures to provide medical care and delays in being transferred to outside doctors for ordered diagnostic tests and/or treatments.

For example, Ashley S. told us she woke up one morning in late April 2022 to find her head moving in a "no-no" motion. She visited sick call at the first chance, six days later, for her uncontrollable head movement and intense headaches. She was given an appointment two weeks after her sick call, but she was never called out for it. Another three weeks went by before she could get anyone's attention. Medical personnel said they would request CT scans, an MRI, and neurologist consultation, as well as emergency lab work. Those tests were not performed. Another week passed and she talked to and emailed everyone she could reach about her symptoms.

Ashley began to experience severe vertigo and nearly a month after her first symptoms she lost consciousness. In the emergency room some tests were finally conducted to rule out stroke or heart attack. The hospital physician told her she should see a neurologist by May 31. It wasn't until over a month later, July 6, that she was taken for an MRI.

As of July 18, 2022, when Ashley wrote to us, she had not seen or been scheduled to see a neurologist, nor been informed of the MRI results. She wrote:

> The medical staff I have talked to have said that the longer my head shakes the more likely it will be to never stop. I cannot concentrate. People constantly stare at me. I'm in pain. I am dizzy. I feel like I am getting off a carnival ride. My tongue tingles. My stomach is clinched constantly.
>
> This is debilitating. I have never been in any trouble. I am respectful. I don't want to be the kind of inmate who throws a fit to get help. I just want to be a good person who people want to help.
>
> I want to be a human not an inmate.[4]

Were it to adopt (b)(1), the Commission would not be writing on a blank slate. According to compassionate release data, courts cited "BOP failure to provide treatment" in 25 compassionate

[1] *United States v. Roach*, No. 5:97cr-50041, ECF 364, Order Granting Motion for Relief Under the First Step Act at 6 (D.S.D. Jan. 15, 2021).
[2] *United States v. Beck*, 425 F. Supp. 3d 573, 580–84 (M.D.N.C. 2019).
[3] *United States v. Verasawmi*, No. 17-cr-254, ECF 111, Opinion at 14 (D.N.J. July 15, 2022).
[4] Corrlinks from Ashley S. (July 18, 2022) (edited for brevity) (on file with FAMM).

release grants in Fiscal Years 2020 through 2022.[5] While not numerous, these compassionate release grants addressed tragic real or feared outcomes due to inadequate or untimely medical care.

For example -

- Michael Derentz, a 70-year-old prisoner at Ft. Dix, reported lost vision in one eye and was taken to an outside specialist who diagnosed a retinal tear. The doctor wanted him returned in a week, but the BOP delayed the appointment for six weeks. By that time, the neglected retinal tear had progressed to a total retinal detachment. The doctor said Mr. Derentz needed surgery within the week to repair the detachment. The BOP did not make the appointment and, despite the doctor's repeated attempts to reach BOP staff to schedule the surgery, did not return Mr. Derentz to the doctor until more than a month later. By then, the detached retina was inoperable. Mr. Derentz lost the vision in that eye. He filed for compassionate release. Although the government contended that Mr. Derentz's vision issues were being attended to by facility medical staff at Ft. Dix and in the community hospital, the court found otherwise. "[T]he BOP's repeated delays in arranging for care to protect Derentz's vision constitute and extraordinary and compelling reason for release."[6]
- Ronnie Burr was granted compassionate release, because according to the court, despite the fact that a number of doctors ordered biopsies of his ulcers over a two-year period, the BOP failed to schedule a biopsy, "in reckless disregard of [the defendant's] health."[7] The court observed that incarcerated people suffering severe medical issues are "at the BOP's mercy . . . and cannot independently schedule needed medical tests or care."[8] It noted that the BOP's repeated cancellations and failures to schedule endoscopy appointments made it impossible to trust that Mr. Burr would receive timely care while incarcerated. The biopsies were intended to rule out cancer. But by delaying or simply not performing these procedures, the cancer they intended to rule out could go undiagnosed and untreated, "with potentially deadly consequences." Accordingly, "the inadequate medical care and reckless disregard of [the defendant's] health needs constitutes extraordinary and compelling circumstances."[9]
- Lawrence Crowell had lupus, a disease in which one's immune system attacks one's own tissue. It was documented in his medical history, in the PSR, and by an infectious disease specialist who assessed him. BOP medical personnel instead first diagnosed and then

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[5] U.S. Sentencing Comm'n, *Compassionate Release Data Report: Fiscal Years 2020 to 2022*, tbls. 10, 12, & 14 (Sept. 8, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencingstatistics/compassionate-release/20220908-Compassionate-Release.pdf.

[6] *United States v. Derentz,* No. 15-cr-418, ECF 52, Memorandum Opinion at 5-6 (E.D. Pa. June 17, 2022).

[7] *United States v. Burr*, No. 15-cr-362, ECF 129, Memorandum Opinion and Order at 7 (M.D.N.C., Dec. 1, 2022) (Burr Order).

[8] *Id.*

[9] *Id*. at 8.

> treated him for a year for syphilis despite his repeated assertions and evidence to the contrary. BOP and the government opposed Mr. Crowell's compassionate release motion saying that only a rheumatologist can diagnose lupus. The court ordered the BOP to take Mr. Crowell to a rheumatologist but the BOP ignored the order and failed to explain its conduct. "The combination of Mr. Crowell's medical condition and the BOP's response to it, and its blatant disregard of this Court's order, establish extraordinary and compelling reasons to release Mr. Crowell."[10]

Not every complaint of inadequate medical care warrants compassionate release.[11] But when a defendant has evidenced to the court that BOP care is inadequate and/or untimely, release should be considered. Lengthy and unexplained delays of needed medical care, failure to follow up on a doctor's order for urgently needed surgery, provision of inadequate treatment for invasive cancer, and failure to schedule ordered diagnostic procedures in serious cases have been found to justify compassionate release.[12]

A concern has been raised about burdening the courts with determining if and to what extent the BOP is failing to timely provide needed procedures.[13] Courts handle these routine medical questions often in compassionate release cases. Courts cited USSG §1B1.13, Notes I (A)(i) (terminal illness) and (ii) (non-terminal conditions that diminish self-care ability) in 586 compassionate release grants in Fiscal Years 2020-2022.[14] In such cases, judges rely on the parties' briefs, occasional specialist declarations, and especially on medical records maintained by the BOP. Courts use these resources to answer questions about whether an individual is terminally ill or suffering from a medical condition that diminishes their ability to provide self-care in prison. What differentiates proposed (b)(1)(C) cases from traditional medical cases, is the question of whether the individual is receiving the needed procedure or care in a timely or adequate manner and if not, is the incarcerated person in danger of deterioration or death.

But these questions have also been raised in traditional medical cases. Courts often ask what kind of medical care a person is receiving and how this medical care impacts the trajectory of their

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[10] *United States v. Crowell*, No, 1:16-cr-107, ECF 58, Order at 5-6 (D.R.I., Aug. 14, 2020).
[11] *See Burr* Order at 15-16 (collecting cases where compassionate release based on failure to timely or adequately provide care was denied).
[12] *See id.* at 17 (collecting cases).
[13] *See, e.g.*, Testimony of Hon. Randolph D. Moss on Behalf of the Committee on Criminal Law of the Judicial Conference of the United States: Proposed Compassionate-Release Related Amendments to the Sentencing Guidelines at 3 (Feb.23, 2023) (expressing concern that courts will see increased litigation over whether a medical condition exists that requires long-term or specialized care, if BOP is providing the care, and if the condition will worsen).
[14] *See*, U.S. Sentencing Comm'n, *Compassionate Release Data Report, Fiscal Years 2020 to 2022*, at tbls. 10, 12, & 14 (Dec. 2022). While courts denied motions citing terminal or serious medical conditions, the data report does not provide the same level of detail for denials that are provided for grants.

health conditions. Such inquiries are and can be handled by courts referring to medical records.[15] Medical records routinely include chronologies of visits complete with complaints and assessments, test results (and lack of ordered test results), and orders for treatments, procedures or follow-up visits. We expect cases under proposed (b)(1)(C) will rely on the same kinds of records that courts already consult in mill run medical cases, to resolve issues about whether the BOP missed appointments, failed to respond to serious medical complaints, or follow up on ordered procedures, as well as the consequences to the individual's health that could ensue if the individual is not released to seek community treatment.

ii. Proposed amendment (B)(1)(D) appropriately accounts for the lessons learned during COVID

The Defendant presents the following circumstances—

(i) The defendant is housed at a correctional facility affected or at risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;
(ii) The defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and
(iii) such risk cannot be mitigated in a timely or adequate manner.

FAMM supports the Commission's proposal to expand compassionate release eligibility to account for infectious disease outbreaks or public health emergencies that pose risks for complications or death that cannot be mitigated in a timely or adequate manner. While we hope courts will never need to use this provision, we appreciate the Commission's recognition that such situations are indeed extraordinary and compelling, warranting a reduction in sentence review.

If we are confronted by a COVID-like event again, adopting (b)(1)(D) will save lives by giving courts the authority to entertain motions from incarcerated people, and by giving the BOP and U.S. Attorneys the guidance and confidence they need to bring motions for people BOP identifies as at risk.

Starting in 2019 through 2022, courts entertained 27,789 motions for compassionate release.[16] While Commission statistics do not reveal how many of those motions were made by people whose underlying medical conditions could make them vulnerable to serious illness or death should they contract COVID, it is safe to say that the pandemic led to the majority of filings

[15] *See, e.g.*, *Verasawmi*, No. 17-cr-254, ECF 111 at 6-7 (D.N.J. July 15, 2022) (relying on BOP medical records submitted by the government in determining that inadequate medical care may be a relevant factor in finding extraordinary and compelling reasons).
[16] *Supra* note 14 at Tbl. 1.

during those years. But the BOP and U.S. Attorneys sponsored only 1.2 percent of motions granted during the pandemic.[17]

If the Commission does not promulgate (b)(1)(D), it is likely that the BOP will not identify at-risk individuals, and attorneys for the government will not file motions, just as they failed to do in the midst of COVID-19. Besides neglecting medically vulnerable people, the government opposed release in the vast majority of cases placed during COVID through the Compassionate Release Clearinghouse COVID-19 Project,[18] and not just based on factors in 18 U.S.C. § 3553(a).

At the beginning of the pandemic, the government opposed pandemic-based motions explaining that §1B1.13 did not cover vulnerability to COVID exposure, incarcerated people had not exhausted their administrative remedies, and/or because the BOP was taking adequate steps to protect vulnerable people from COVID.

It was abundantly clear early on that the BOP could not protect incarcerated people from COVID. For example, a lawsuit filed on behalf of people housed at the Butner II Federal Correctional Institute alleged:

> Butner's health care system is grossly inadequate to treat the growing number of sick men. The Federal Bureau of Prisons ("BOP") has inadequate infection surveillance, testing, quarantine, and isolation practices, further exacerbating the crisis. What is more, people with pre-existing medical conditions often do not receive the treatment needed for their underlying conditions, presumably because the prison's medical resources are over-taxed.[19]

The early case of Marie Neba is one example. Ms. Neba sought compassionate release while incarcerated at Carswell Federal Medical Center. She initially sought compassionate release due to her cancer diagnosis but she supplemented her motion on March 30, 2020, based on her risk of serious complications from contracting COVID. The government opposed her motion because it said she was still able to work and was exercising with weights, she had not exhausted her administrative remedies with respect to her claim about COVID vulnerability, and the BOP was taking measures to protect people in its facilities from contracting COVID and would be able to meet her needs.

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[17] *Id.* at Tbl. 5.

[18] *See* Written Testimony from Mary Price on behalf of FAMM at 1 (Feb. 15, 2023) (describing the Compassionate Release Clearinghouse), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf.

[19] *Hallinan, et al. v. Scarantino, et al*., No. 5:20-hc-02088, ECF 1, Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 and Class Action Complaint for Injunctive and Declaratory Relief at 2 (E.D.N.C. May 26, 2020) (alleging unsanitary conditions and housing in which incarcerated people are unable to socially distance or quarantine).

The BOP healthcare system failed to protect Ms. Neba.

The record is unclear if the court ever ruled on Ms. Neba's initial motion. Her attorney filed an opposed motion to expedite a ruling on August 26, 2020 because, he explained, he had heard from Ms. Neba's 19-year-old daughter that her mother had been hospitalized and was on life support and had already been resuscitated once. Her daughter had only learned of her mother's condition when private hospital staff reached out to make end of-life arrangements.[20]

Unbeknownst to counsel, Ms. Neba had died the day before.[21]

It was only in May 2020 that the Criminal Division issued guidance to the effect that people with CDC-identified risk factors could be considered as meeting the Serious Medical Condition standard at §1B1.13, Application Note 1(A)(ii).[22] But even that did not change the government's practice of opposing the majority of motions.

The BOP was aware of the existence of individuals who were at risk should they contract COVID. It was aware that Ms. Neba was one such person. Following Ms. Neba's death, the BOP issued a press release stating: "On Tuesday, August 25, 2020, Ms. Neba, who had long-term, preexisting medical conditions, which the CDC lists as risk factors for developing more severe COVID-19 disease, was pronounced dead by hospital staff."[23] It is not clear if the government would not join the expedited motion because Ms. Neba had failed to exhaust or for other reasons, but the BOP clearly had not acted to bring her case and hundreds of others to the attention of the courts.

During COVID, the BOP routinely issued press releases very similar to the one for Ms. Neba, explaining the death was due to the fact the deceased had long-term, preexisting medical conditions recognized by the CDC as risk factors. But, the BOP neither moved for their release nor furloughed individuals although it had the authority under 18 U.S.C. § 3622(a) to do so. Professor Alison Guernsey of the University of Iowa collected every press release and compiled a spreadsheet showing, chronologically every death in custody and, where relevant, compassionate release efforts.[24] The releases make plain that the BOP was aware of the

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[20] *United States v. Tilong*, 4:15-cr-591, ECF 355, Opposed Motion to Expedite Ruling on Sentence Reduction (S.D. Tx, Aug.26, 2020).
[21] Federal Bureau of Prisons, Press Release, Inmate Death at FMC Carswell (August 26, 2020), https://www.bop.gov/resources/news/pdfs/20200826_press_release_crw.pdf.
[22] *See, e.g.*, *United States v. Wright*, 8:17-cr-00388-TDC, ECF 50, *Supplemental Response* (D. Md. May 19, 2020) ("The Government now supplements [its] response in light of intervening Department of Justice guidance. Based on that guidance, the Government concedes that the defendant's Type I diabetes, and perhaps other of her medical conditions, constitute 'extraordinary and compelling circumstance' during the current pandemic, even if these conditions in ordinary times would not allow compassionate release.").
[23] *Supra* note 21.
[24] The University of Iowa College of Law, *Compassionate Release: List of Known Deaths and Compassionate Release Attempts* (March 28, 2020 to Jan 1, 2022),

individuals' vulnerability to COVID and nonetheless failed to act to release them. Meanwhile, the government opposed many cases brought by incarcerated people.

To date, BOP has identified 314 people who died while incarcerated due to COVID.[25]

We hope the guidance provided by proposed subcategory (b)(1)(D) will prompt the BOP and U.S. Attorney Offices to actively identify and seek compassionate release review for at-risk individuals, or at a minimum, refrain from opposing their release when they otherwise meet reduction in sentence criteria.

b. Proposed Amendment (b)(3) is a proper expansion of family circumstances to account for the reality of many incarcerated people and their loved ones

i. Proposed amendment (b)(3)(A), (D)

(A) The death or incapacitation of the caregiver of the defendant's minor child or the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.

(D) The defendant presents circumstances similar to those listed [above] involving any other immediate family member or an individual whose relationship with the defendants is similar in kind to that of an immediate family member.

FAMM supports these proposed additions to the Family Circumstances ground. The principles and concerns that animate providing compassionate release based on the death or incapacitation of a minor child's caregiver support this thoughtful proposed amendment. Children cannot be left to care for themselves, whether they are legally minors or have a mental, cognitive, or physical disability that requires caregiving best provided by a parent. Moreover, family and loved ones' bonds are not necessarily tied to immediate family relationships. Many of our members live in families that include people other than immediate family members. The bonds of love and mutual support among them are evident and should be recognized.

ii. Proposed Amendment (b)(3)(C)

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

FAMM urges the Commission to adopt this subsection, which allows for compassionate release to provide support that no one else can provide to a parent in need of caregiving.

The Commission heard from Bryant Brim, whose release enabled him to care for his mother. Commissioners will recall his moving testimony about the inability of Mr. Brim's alcoholic

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https://law.uiowa.edu/sites/law.uiowa.edu/files/2022-02/List%20of%20Compassionate%20Release%20Attempts%20-%201-31-22.pdf.

[25] Federal Bureau of Prisons, COVID-19 Cases (last visited March 10, 2023), https://www.bop.gov/coronavirus/.

brother to care for their mother, and whose lapses and absences led to her dehydration or abandonment.[26]

While Mr. Brim sought compassionate release due to vulnerability to COVID, the life sentence he would not have received, and his exemplary rehabilitation, the judge pointed out "what [made] Mr. Brim's situation particularly precarious is the health of his mother, Ruth Brim. 87-year-old Ruth Brim is in her twilight years and . . . has heart disease, suffered seizures and strokes, is partially blind and partially paralyzed, and is functionally bed-ridden."[27] She required assistance with getting in and out of bed, getting to the toilet and tub, with food preparation, and with sorting and ensuring her medications were taken correctly. Her other son's absences, sometimes for days at a time — including due to brushes with the law — had endangered her life. She was in fact alone when she suffered a third stroke.[28] Mr. Brim's brief pointed to court decisions that had extended the family circumstances prong to justify release to care for loved ones other than minor children.[29]

The government opposed release because the policy statement does not recognize release to care for a parent in need of care and because, in its view, other family members could have cared for Mr. Brim's mother.[30] This was not the case as other family members were not available.[31]

The court granted Mr. Brim's release and, as the Commission heard, Mr. Brim's consistent and loving caregiving has transformed his mother's life and improved her health and mobility.

FAMM agrees that this amendment is needed. While a number of courts support compassionate release in these circumstances, a number do not, primarily because no policy statement exists

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[26] Written Testimony from Bryant Brim at 2-3 (Feb. 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Brim.pdf.
[27] *United States v. Brim*, No. 8:93-cr-98, ECF 560, Motion for Compassionate Release Pursuant to 18 U.S.C. § 3582(c)(1) at 12 (C.D. Cal, Nov. 25, 2020).
[28] *Id*.
[29] *Id*. at 31-32 (relating that a "growing number of courts have found extraordinary and compelling reasons can exist when a defendant is the only available caregiver of incapacitated close family members other than spouses or registered partners—particularly parents"); *see also United States v. Wooten*, No. 3:13-CR-18, 2020 WL 6119321, at *4 (D. Conn. Oct. 16, 2020) (collecting cases and noting that following *United States v. Brooker*, earlier decisions to the contrary "are even less persuasive"); *United States v. Bucci*, 409 F.Supp.3d 1, 2 (D. Mass 2019) (holding there is "no reason to discount this unique role because the incapacitated family member is a parent and not a spouse"); *United States v. Lisi*, 440 F.Supp.3d 246, 252 (S.D. N.Y. 2020) (finding extraordinary and compelling reason where defendant's mother was ill and her hired aides were incompetent); *United States v. Hasanoff*, No. 10-CRCase 8:93-cr-00098-DDP, ECF 560 (Nov. 25, 2020).
[30] *Brim*, ECF 570, Government's Opposition to Defendant Brian Keith Brim's Motion for Compassionate Release Pursuant to 18 U.S.C. § 3582(c)(1)(A)(1) at 49, 55.
[31] *Id.* ECF 575, Reply in Support Notice of Motion and Motion to Reduce Sentence Pursuant to Compassionate Release at 8-10 (Feb. 1, 2021).

that recognizes parental caregivers.[32] Adding proposed (D) to Family Circumstances will give courts confidence that they can account for situations like that faced by Mr. Brim and his mother.

c. Proposed Amendment (b)(4) provides hope to survivors of sexual violence in prison

> *Victim of Assault.—The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.*

FAMM greatly appreciates the Commission's inclusion of (b)(4) in the slate of proposed amendments to the guidelines. Sexual abuse in custody is unequivocally an extraordinary and compelling circumstance. Prisoners who are abused by the very people responsible for ensuring their safety must have an avenue to seek a sentence reduction. The Commission's proposed amendment provides that. It also gives hope to the people who have survived abuse at the hands of BOP employees. Recognizing sexual abuse as a ground for release dignifies survivors; it says, we see you. It also signals that the justice system's intolerance of abuse is not limited to using survivors' victimization to try and punish perpetrators, but embraces the government's duty to find and release survivors so that they can heal.

Although we support the inclusion of such an amendment, we write to raise a few concerns, primarily with suggestions proposed by the Department of Justice in the February 2023 hearing.[33]

In its written testimony, the Justice Department wrote that it "takes very seriously allegations that individuals have suffered sexual and physical abuse at the hands of correctional officers or other BOP employees or contractors while in custody."[34] To that end, DOJ agrees that "in certain circumstances" a sentence reduction may be warranted. But the DOJ has asked the Commission to introduce a burden of proof on the petitioner in these cases – that the conduct they allege should only be considered by a court if there has been "a criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case."[35] This proposal by

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[32] *Id.* ECF 570 at 50-51 (collecting cases in which courts have not found support for parent caregiver release).

[33] FAMM previously wrote about the need for a robust guideline amendment addressing these heinous circumstance, and also wrote with some threshold questions about this proposed amendment, about the definition of sexual assault. *See* Written Testimony from Mary Price (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf; Letter from Mary Price & Shanna Rifkin to the Hon. Carlton W. Reeves at 3-4 (Oct. 17, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/famm2.pdf.

[34] Written Testimony from Jonathan Wroblewski at 5 (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf.

[35] *Id.* at 6.

DOJ would place a higher burden on individuals who are victims of abuse by federal employees than on any other compassionate release litigants. Of equal concern, this proposal would restore the DOJ (and the BOP) as the gatekeeper of compassionate release motions – undoing Congress' crowning reform to § 3582(c)(1)(A) in the First Step Act.

When Congress reformed compassionate release in the First Step Act to allow individuals to file directly in court, it did so after decades of failure and intransigence by the BOP and DOJ.[36] BOP has persistently and abjectly failed to take seriously its role in compassionate release cases.[37] As such, the Commission should reject any proposal that would restore the government's control of a compassionate release motion. DOJ's proposal does just that – it sets up a requirement that the government needs to have made an official finding that the alleged sexual abuse occurred. This is precisely the kind of one-sided, government-controlled process that the First Step Act rejected. Moreover, DOJ has not shown that it has an administrable plan in place to implement the standard it asks the Commission to impose.

The DOJ has made numerous public statements regarding the victims of sexual abuse in custody.[38] It has said that it takes these situations very seriously. But in practice, its handling of these cases reflects a Justice Department that is unprepared and ill-equipped to manage and advance the investigation of what we understand is widespread sexual abuse in custody.

For one, internal disagreement on how sexual assault cases should be handled threatens the availability of government-initiated compassionate release. It could also reflect the Department and the BOP's unwillingness to tackle this issue. Take, for example, the case of Aimee Chavira.[39] Ms. Chavira was abused by a number of corrections officers at FCI Dublin.[40] She reported the abuse to prison officials, including the Warden who was recently convicted at trial of sexually abusing women at Dublin. Ms. Chavira has endured retaliation for reporting the conduct. Because no one took these allegations seriously, she meticulously documented them in her own notebook. But prison guards who were implicated by her writing seized that notebook. A BOP psychologist at Dublin told Ms. Chavira that she was "crazy." Ms. Chavira met with federal agents and prosecutors and under penalty of perjury detailed the accounts of abuse that she suffered at Dublin. A few months ago, Ms. Chavira filed a request with the Warden at her facility asking BOP to bring a motion for compassionate release on her behalf given the sexual abuse she endured.

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[36] *See supra* note 18 at 12.
[37] *Id.*
[38] *See, e.g.*, The Principal Associate Deputy Attorney General, Working Group of DOJ, *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* (Nov. 2, 2022).
[39] Note, Aimee Chavira is Erica Zunkel's client. Ms. Chavira's story is told in more detail in Zunkel's submissions to the Commission.
[40] Written Testimony from Erica Zunkel Before the U.S. Sentencing Comm'n at 29 (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Zunkel.pdf.

BOP and DOJ's responses highlight the internal disorganization that stands in the way of relief for these women. Responding to Ms. Chavira's request, the General Counsel for the BOP acknowledged that her assertions were "extremely concerning" but said that "the Office of General Counsel has not been notified of a final adjudication of Ms. Chavira's allegations," and as a result, that it "currently lacks sufficient documentation to determine whether her circumstances are 'extraordinary and compelling.'"[41] He denied her request. However, according to a New York Times story, other officials familiar with the case "do not dispute her allegations."[42] Those officials characterized the denial as temporary, but, despite repeated requests by Ms. Chavira's counsel,[43] no information has been provided as to what might lead to an approval, or the timetable for such an approval.[44]

Justice Department representatives testified at the Commission's hearings on February 23 and 24. Their testimony and the questions elicited from the commissioners highlighted the shortcomings of the government's proposal. When pressed on how long it takes to conduct investigations that would lead to evidence the government would find sufficient to warrant compassionate relief, the Justice Department officials could provide no timetable. When asked about what these investigations would look like, who would be responsible for them, when they would occur, and what would suffice to trigger an investigation, the witnesses had no illuminating responses. Moreover, the Justice Department could not answer how it intends to handle situations like Ms. Chavira's where an adjudication is impossible due to circumstances outside of the petitioner's control; one of her main abusers committed suicide when federal law enforcement officers began investigating him. In the Department's view, Ms. Chavira is without recourse because the government does not know how to handle her account and cannot take action against her abuser. The government's plan is no plan at all.

Post-First Step Act, it is a petitioner's burden to provide to the court an explanation of the circumstances that would warrant relief, and to substantiate those circumstances for a court to rule in their favor. To this end, courts routinely examine evidence in a petitioner-initiated compassionate release request and determine if there is enough to support a finding. Only in the context of sexual abuse cases, however, is the government saying the petitioner's own explanation is not good enough. In the First Step Act, Congress expressly removed the government from gatekeeping compassionate release claims. And now, the government is demanding to be gatekeeper once again by proposing that a judge can only entertain a sexual abuse-based motion if the government substantiates the survivor's claims. Moreover, the Justice Department's proposal sends a message to survivors of abuse that their stories and experiences have zero credibility on their own. But for reasons identified by both the DOJ Inspector General

[41] *Id.* at 31 & n.1.
[42] Glenn Thrush, *Justice Dept. Struggles to Carry Out Early Release Program for Abused Inmates*, N.Y. TIMES (Feb. 22, 2023), https://www.nytimes.com/2023/02/22/us/politics/federal-prisons-inmate-abuse.html.
[43] Correspondence from Erica Zunkel, Ms. Chavira's counsel, seeking clarification of the adjudication standard is on file with Erica Zunkel.
[44] *Supra* note 42.

and The Senate Permanent Subcommittee on Investigations, the government's own investigative ability lacks the credibility and competency that is demanded in these highly sensitive cases.

On October 12, 2022, the Inspector General wrote to Colette Peters, the Director of the BOP, "to notify [her] of serious concerns" with the manner in which BOP "handles investigations of alleged misconduct by BOP employees."[45] In summarizing the findings of the investigation, the IG wrote:

> we were told by OIA [Office of Internal Affairs for BOP] that, in cases that have not been accepted for criminal prosecution, the BOP will not rely on inmate testimony to make administrative misconduct findings and take disciplinary action against BOP employees, unless there is evidence aside from inmate testimony that independently establishes the misconduct, such as a video capturing the act of misconduct, conclusive forensic evidence, or an admission from the subject. The OIA further informed the OIG that the BOP uses inmate statements in administrative proceedings solely for investigative lead purposes.[46]

As the IG points out, BOP's refusal to rely on a survivor's words flies in the face of logic and ignores practice, given that "such testimony is fully admissible in criminal and civil cases, . . . [I]nmates are not disqualified from providing testimony with evidentiary value in federal courts, and there is no valid reason for the BOP to decline to rely on such testimony . . . ." Based on the BOP's illogical and impractical approach to investigations, the government's demand that a survivor actually secure an administrative finding against a BOP employee raises a next-to-impossible bar.[47] There is no credible reason why the Justice Department should insist on such a heightened standard that is in exclusive control of the government. Not only is it unduly restrictive, it disempowers and erases the voice of the survivor. And, it would bar their access to the courts.

The DOJ IG is not alone in expressing serious concern over BOP's capacity to investigate sexual assault claims. In a report published in December 2022, the Senate Permanent Subcommittee on Investigations (PSI) "found that mechanisms that BOP employs to identify and prevent sexual abuse of female prisoners by BOP employees are ineffective."[48] And, these mechanisms can be

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[45] Michael E. Horowitz, Inspector General, Dep't of Just., *Management Advisory Memorandum, 23-001, Notification of Concerns Regarding the Federal Bureau of Prisons' (BOP) Treatment of Inmate Statements in Investigations of Alleged Misconduct by BOP Employees* at 1 (Oct. 2022), https://oig.justice.gov/sites/default/files/reports/23-001.pdf.

[46] *Id.*

[47] *Id.* at 3 ("BOP's reluctance to rely on evidence provided by inmates enhances the likelihood that employees who have engaged in misconduct avoid accountability for their actions and remain on staff, thereby posing serious insider threat potential, including the risk of serious harm to inmates.").

[48] Permanent Subcommittee on Investigations, United States Senate, *Sexual Abuse of Female Inmates in Federal Prison* at 3 (Dec. 2022), https://www.hsgac.senate.gov/wp-

controlled by the perpetrators of abuse. At Dublin, the former officer responsible for training other prison staff on the Prison Rape Elimination Act requirements and audits, was himself convicted of sexually abusing female prisoners.[49]

BOP has also failed to hold employees accountable for misconduct, thus preventing the finding or conviction the Department would make survivors and courts wait for. As of October 2022, BOP had a backlog of approximately 8,000 cases of BOP employee misconduct. Some of the cases have been pending for more than five years, despite BOP guidelines that complaints of employee misconduct should be resolved within 120-180 days.[50] Absent their resolution, all the survivors will be barred from relief, under the Department's proposal.

These widespread and systemic failures and inaction are the very type of conduct that led Senators to remove the power grip that BOP had over compassionate release cases. Nothing has changed in BOP.

Requiring an administrative finding by BOP presents considerable concerns. So too does requiring a criminal or civil adjudication. Survivors of violence should not be held in an unpredictable waiting game, dependent on complex decisions regarding whether or when a prosecutor will exercise discretion to file charges. Those decisions can involve a calculus that in no way implicates the veracity of the claims made by survivors, or the evidence they have collected. But the decision to not prosecute would, if the DOJ's formulation is adopted, deny the court any ability to address the veracity of a survivor's evidence of abuse. Similarly, given the insurmountable roadblocks that prisoners face in bringing civil cases against government agencies,[51] requiring such a finding is a Sisyphean task.

In the First Step Act, Congress eliminated the BOP's control over who courts may consider for compassionate release. Incarcerated people have been able to present their cases before the sentencing court, using the evidence available to them. Judges have made reasoned determinations, with arguments from both sides, about whether that individual presents extraordinary and compelling reasons. Sexual abuse cases should be treated no differently than any other category for relief. The DOJ's proposal would bar the courtroom doors to survivors of sexual abuse unless the government has formally recognized the conduct. The First Step Act eliminated the government's control and the Commission should not permit it to sneak back in under the guise of ensuring veracity or protecting government prosecutions.

d. Proposed Amendment (b)(5) is a proper exercise of the Commission's authority and responds to longstanding injustice in federal sentencing

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content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf.

[49] *Id.* at 4.

[50] *Id.*

[51] Andrea Fenster & Margo Schlanger, Prison Policy Initiative, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act* (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html.

Changes in Law.—The defendant is serving a sentence that is inequitable in light of changes in the law.

As the Commission knows from our appearance at the compassionate release hearing and written testimony, FAMM supports expanding the definition of extraordinary and compelling reasons to account for changes in the law that render a sentence inequitable.[52]

We write to supplement our testimony in light of concerns voiced by other commenters and questions raised by Commissioners at the hearing.

i. Proposed (b)(5)Changes in the Law will ameliorate sentencing disparities

The Department of Justice predicts that adopting changes in the law that render a sentence inequitable "will lead to widespread sentencing disparities, as the Commission's proposal will exacerbate the conflict among the courts of appeals on the statutory scope of Section 3582(c)(1)(A)(i)."[53] The Department did not explain how it arrived at that prediction. We hazard a guess that it believes some circuits will not recognize the amendment based on challenges to the amendment brought by the government. In other words, continued disparity would likely result from the government's litigation position in court, rather than the impact of the amendment itself.

In fact, this proposed amendment will actually help *minimize* the sentencing disparity that currently exists, rather than exacerbate it, by providing courts with an applicable policy statement. As FAMM, the DOJ, and other commenters noted, the current disagreement among the circuits is unsurprising in light of the absence of guiding policy.

The government's position at the Commission is even more curious given that the government took a rather different position before the Supreme Court in opposing petitions for certiorari on the circuit split issue. There, it explained that the Commission would and should resolve the split and doing so would lead to more consistent application of compassionate release.

The government correctly explained to the Supreme Court that "[t]he the Sentencing Commission could promulgate a new policy statement that resolves the disagreement. Under Section 3582(c)(1)(A), any sentence reduction must be 'consistent with applicable policy statements issued by the Sentencing Commission.'"[54] The brief related that the circuits that permit district courts to rely on the First Step Act non-retroactive changes have done so in light of §1B1.13's inapplicability. "Nobody disputes, however, that the Commission has the power—indeed, the statutory duty—to promulgate a policy statement that applies to prisoner-filed

[52] Oral Testimony of Mary Price before the U.S. Sentencing Comm'n (Feb. 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf.
[53] Written Testimony from Jonathan J. Wroblewski at 8 (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf.
[54] *Jarvis v. United States*, No. 21-568, Br. for the United States in Opp'n of Cert. at 17 (Dec. 2021).

motions, or that *it could resolve this particular issue*."[55] It then laid out a set of possibilities, all predicting that the Commission would forbid or limit the use of non-retroactive changes in the law.[56]

If the Department perhaps believed that disparity will flow from circuits that would not abide by the Commission's adoption of the minority circuits approach, it did not advise the Court of that possibility. It only advised the Commission of that possibility when it became clear that the agency took seriously the practical experience of courts, and proposed amendment (b)(5).

But the Commission should not resolve this dispute by giving weight to the government's litigation position. The Commission should resolve this dispute by making a sound and reasoned policy decision. The resulting policy statement, fulfilling § 994(t)'s direction, will provide district and appellate courts the guidance the law requires. Courts must ensure a reduction is consistent with policy statements issued by the Commission and courts ruling on these motions would give the agency's interpretation appropriate deference.[57] That should limit disparate treatment of compassionate release.

Furthermore, FAMM believes that the specter of disparity is overblown. Compassionate release is an exception to the rule of finality and its use *can* lead to disparity, even in jurisdictions where all courts are following the same rules. But that kind of disparity is to be expected given the highly individualized inquiry compassionate release motions demand. No two people present the same set of circumstances or features, and comparisons among individuals will often be difficult to draw. This is precisely as the statute intended.

Our criminal justice system provides that uniformity and consistency sometimes must give way to individualized considerations. The Supreme Court explained in *United States v. Booker* that "Congress sought to 'provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities … [and] maintaining sufficient flexibility to permit individualized sentences *when warranted*. 28 U. S. C. § 991(b)(1)(B)."[58]

Review to determine if an individual demonstrates extraordinary and compelling reasons justifying reducing the sentence is a highly specific inquiry based on the individual's circumstances and the § 3553(a) factors. How does one begin to find similarly situated compassionate release petitioners when the medical, family, or change-in-the-law situations vary widely among petitioners and even within eligibility categories? Even if there are overlapping features between categories of the enumerated grounds for relief, judges still must evaluate the § 3553(a) factors, which, once again, are uniquely tailored to each person.

One of the implicit principles animating compassionate release is that a sentence may no longer serve the purposes of punishment and should be reduced. Reducing a sentence consistent with

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[55] *Id.* (emphasis added).
[56] *Id.* at 18.
[57] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 982 (2005) ("[I]t is for agencies, not courts, to fill statutory gaps.").
[58] *United States v. Booker*, 543 U.S. 220, 264 (2005).

the policy statement and grounded in reasons that are relevant to the purposes of punishment will be appropriate. Moreover, as the witness for the Federal Public and Community Defenders stated at the compassionate release hearing, warranted disparity is better than unwarranted uniformity

ii. Proposed (b)(5) includes an important limiting principle

As a preliminary matter, FAMM points out that the government's submission and testimony mischaracterize the Commission's proposal in (b)(5). For example, the Department's letter

- explains that the United States has taken the litigation position in *Jarvis v. United States* and other cases that *a change in sentencing law* that is not retroactive is not extraordinary as required by the statute.[59]
- warns the Commission against conflicts with "even . . . more permissive courts of appeals, if it were to permit reductions based *on the mere fact that sentencing law had changed*."
- states that proposed (b)(5) could allow defendants to "move for compassionate release *any time there is a change in the law . . . .*"[60]

Of course that is not the Commission's proposal or intent. Instead, the Commission proposes to address *only those changes that render the sentence inequitable.*

Moreover, FAMM finds the government's focus on what is and isn't "extraordinary" puzzling. For example, in *Jarvis,* the government cited approvingly to the decision below. It found that a change in law made by the First Step Act was not "extraordinary and compelling," and that risks of exposure to COVID were not extraordinary and compelling. The government's opposition relied on the court's ruling that "[f]acts like the First Step amendments (which impact[] hundreds of prisoners) and COVID-19 (which impacts all prisoners) are too general to satisfy this individualized analysis."[61]

Certainly one can disagree about the breadth of "extraordinary" reasons, but the fact that a circumstance can affect hundreds or thousands of people should not convince the Commission that it is therefore not "extraordinary." This is, of course, because the court must examine how the circumstance that may generally affect a large group of people *actually and directly* impacts the individual petitioner. Common, widespread circumstances may become both extraordinary and compelling in a particular context. In fact, shortly after filing the Brief in Opposition in the Supreme Court, the Justice Department made a concession that supports this view. It agreed that people with underlying medical conditions making them uniquely vulnerable to COVID *did* present extraordinary and compelling reasons.[62]

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[59] *Supra* note 53 at 7 (emphasis added).
[60] *Id*. (emphasis added).
[61] *Supra* note 54 (emphasis added).
[62] *See, e.g., United States v. Wright*, 8:17cr00388-TDC, ECF 50, Supplemental Response (D. Md. May 19, 2020) ("The Government now supplements [its] response in light of intervening Department of Justice guidance. Based on that guidance, the Government concedes that the defendant's Type I diabetes, and perhaps other of her medical conditions, constitute

Moreover, the Guidelines have never referenced rarity or scarcity of a reason as a prerequisite to finding a reason "extraordinary." For many years, for example, the Commission has recognized the combination of age plus time served plus chronic age-related medical conditions as an extraordinary and compelling reason. Growing old and developing chronic medical conditions, while serving long sentences is hardly a rare circumstance. Currently, over 10,000 people 61 years old and older are incarcerated in the federal Bureau of Prisons.[63] Many of them are suffering from age related chronic conditions.[64] The Commission recognizes that constellation of factors as "extraordinary and compelling."[65]

Similarly, changes in the law, while uncommon, still affect a number of incarcerated people. The Commission proposes to cabin changes in the law by reference to their impact on the fairness of the sentence. Equity is a substantive limiting principle in (b)(5). Individuals must be able to convince the court not only that they are serving a sentence that could not be imposed today, but also that the sentence is inequitable. This is a robust standard.

Between 2020 and 2023, courts decided over 27,789 compassionate release motions. Only 379 motions were granted on grounds based on non-retroactive changes made by the First Step Act.[66] Those grants represent 1.36 percent of all motions filed and 8.4 percent of all motions granted.

Courts in the circuits that permit use of changes in the law have already tilled the ground in opinions that the Commission can point to if it feels the need to provide examples of inequity. One measure of inequity is the difference between the sentence imposed and the sentence the individual would serve had they been sentenced after the First Step Act. Courts have rendered release decisions that can help their colleagues understand what inequity looks like in the (b)(5) context.

Take, for example, the Tenth Circuit. There, changes in the law are considered extraordinary and compelling reasons when viewed in light of the extent of the disparity between the sentence imposed and those available following the First Step Act, and when accompanied by one or more additional reasons.[67]

'extraordinary and compelling circumstances' during the current pandemic, even if these conditions in ordinary times would not allow compassionate release.").

[63] Federal Bureau of Prisons, *Inmate Age*, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp. (last visited March 14, 2023).

[64] *See* Office of the Inspector General, U.S. Dep't of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* at ii (Revised Feb. 2016), https://oig.justice.gov/reports/2015/e1505.pdf.

[65] USSG §1B1.13, comment. (n.1 (b)).

[66] U.S. Sentencing Comm'n, *Compassionate Release Data Report: Fiscal Years 2020 to 2022*, tbls. 10, 12, & 14 (Sept. 8, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencingstatistics/compassionate-release/20220908-Compassionate-Release.pdf.

[67] *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021).

A Wyoming district court judge granted the release of Leonard Uram, a decorated Vietnam veteran who had been sentenced to life in prison due to two prior felony convictions that can no longer trigger §851 enhancements. Mr. Uram's guideline range would have been 188 to 235 months absent the enhancement and he had already exceeded that sentence, serving more than 25 years. The court found a "drastic sentencing disparity," that, when combined with the defendant's exceptional military career and "near-non-existent disciplinary record" — he had incurred only one disciplinary violation while incarcerated — to be extraordinary and compelling reasons warranting early release.[68] Notably, the government did not oppose the substance of the motion.[69]

Another case, in the District of Colorado, involved Robert Bernhardt who was serving life for possession with intent to distribute methamphetamine and two counts of using and carrying a firearm. He was in declining health and, though fully vaccinated, at risk should he contract COVID. He was "an exemplary inmate," whose sentence to die in prison was disparate when compared with the 12-year sentence he had been offered to plead guilty, the mandatory 35-year sentence he would have been subject to under the First Step Act, and the sentences imposed on his co-defendants that did not exceed 13 years.[70] The unopposed motion in Bernhardt includes citations to numerous cases from around the country in which judges have afforded similar relief.[71]

Even in the absence of an applicable policy statement, judges have demonstrated their ability to discern a case presenting truly extraordinary and compelling circumstances from a case without them. The Commission's proposed amendment, which provides judges with discretion to recognize changes in the law that render a sentence inequitable, will help aid the assessment of these cases.

Although (b)(5) as drafted, is sufficient to limit the circumstances justifying release, were the Commission to feel that more guidance and explicit limiting language is necessary, FAMM would support the additions to the proposed language offered by Professor Erica Zunkel in her comment—

> Changes in Law—For the purposes of § 1B1.13(b)(5), a "change in the law" is a legal development, whether by statute or binding judicial decision, that would have affected the defendant's sentence had it occurred prior to their initial sentencing. Legal developments that primarily would have affected a defendant's conviction rather than sentence are not covered by this subsection. However, such changes may be considered,

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[68] *United States v. Uram*, No. 2:96-cr-00102, ECF 503, Order Granting Defendant's Unopposed Motion for Sentence Reduction and Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A) at 12 (D.Wyo Nov. 2, 2022).
[69] *Id*.
[70] *United States v. Bernhardt*, No 1:96-cr-00203, ECF 804, Order Granting Defendant's Unopposed Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(1) (Nov. 8, 2022).
[71] *Id.* at ECF 801, Defendant's Unopposed Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582 (c)(1)(A)(i) at 14, nn 10 & 11 (Oct 28, 2022).

along with other individualized factors, by judges exercising their discretion under §1B1.13(b)(6).[72]

This language would ground the policy statement in the changes in law that FAMM urges the Commission to retain, while providing substantive guidance to courts on which changes in the law contribute to extraordinary and compelling reasons when they result in inequity in given cases. And, it focuses the courts' attention on the impact of the change on sentencing, which is the heartland inquiry of (b)(5).

We also recognize that should the Commission wish to provide additional guidance to courts, it could refer to the Circuits that currently recognize changes in the law. They generally require those changes be in addition to other extraordinary and compelling reasons.[73]

iii. Courts can, and already do, distinguish between 18 U.S.C. § 3582(c)(1)(A), 28 U.S.C. § 2255, and USSG §1B1.10

Some commenters expressed concerns, and commissioners had questions, about whether any structural limitations would cabin the use of (b)(5), or whether the Commission should limit the application of (b)(5) more directly. One witness raised a question how a change-in-the-law compassionate release provision "interacts with other rules relating to finality, including, for example, the rule relating to availability of collateral relief under 28 U.S.C. § 2255."[74]

FAMM believes that the laws and distinct aims of 28 U.S.C. § 2255 and 18 U.S.C. § 3582(c)(1)(A) provide adequate guidance to courts considering (b)(5)-based motions. The delineation between habeas and compassionate release is clear based on the purpose and scope of each statute. Moreover, courts have already demonstrated their ability to discern a true compassionate release claim from a habeas claim masquerading as compassionate release.

Compassionate release is a limited and express exception to the general rule of finality in criminal sentencing.[75] Its exercise is entirely discretionary and concerns a judge's power to modify the length of a sentence that was valid when it was imposed but no longer meets the purposes of punishment.[76] Relief under § 2255, however, is neither discretionary nor limited to modifying the length of a sentence. A challenge under § 2255 tests the *validity, legality, or*

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[72] Letter from Erica Zunkel, et al. to the Honorable Carlton W. Reeves, at 11-12 (March 13, 2023).
[73] *See, e.g.*, *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022).
[74] *Supra* note 13.
[75] *See* 18 U.S.C. § 3582(c)(1)(A); *see also United States v. Saccoccia*, 10 F.4th 1 at 3 (1st Cir. 2021) (explaining that "[c]ompassionate release is a narrow exception to the general rule of finality in sentencing.").
[76] *Id.* "A court . . . *may* reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) . . . ." Included in those factors are the purposes of punishment. *See* 18 U.S.C. § 3553(a)(2).

constitutionality of a conviction, that may result in the legal innocence of the defendant. If a judge finds a claim valid under § 2255, relief is not discretionary.[77]

As one court points out, the two statutes are

> distinct vehicles for relief. [Section 2255] deals with the legality and validity of a conviction and provides a method for automatic vacatur of sentences (when warranted under the statute). In contrast . . . the compassionate release statute is addressed to the court's discretion as to whether to exercise leniency based on an individualized review of a defendant's circumstances (it is not a demand of a district court to recognize and correct what a defendant says is an illegal conviction or sentence).[78]

Thus, one can imagine certain claims that would be facially inappropriate if argued as a "change in law" under (b)(5).[79] Courts are already able to draw these lines and distinguish between claims brought under § 3582 that are actually § 2255 motions.[80]

For example, the Tenth Circuit allows a non-retroactive change made by the First Step Act to be considered an extraordinary and compelling reason warranting reduction in sentence (in essence what (b)(5) would permit).[81] But that court observed in *United States v. Wesley* that the "extraordinary and compelling reason" standard is not limitless.[82] The court rejected an argument that prosecutorial misconduct could be an extraordinary and compelling reason for compassionate release. The prosecutorial conduct-based claim went to the constitutionality of Wesley's conviction and sentence.[83] *Wesley* cited to similar rulings in six other circuits distinguishing claims that must be brought under § 2225 from those under § 3582(c)(1)(A).[84]

Relatedly, the Commission asked for comment on whether subsections (b)(5) and (b)(6) are "in tension" with the agency's determinations regarding retroactivity under §1B1.10. Several witnesses also raised this question. The Department asserted that adopting (b)(5) and either option 2 or 3 of (b)(6) will "eliminate the restrictions that Section 3582 and §1B1.10 place on sentence reductions predicated upon a Guideline amendment." This would include considering

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[77] 28 U.S.C. § 2255(b) (instructing that a court "*shall* discharge the prisoner or resentence him or grant a new trial or correct the sentence").
[78] *United States v. Trenkler*, 47 F.4th 42, 48 (1st Cir. 2022) (internal citations omitted).
[79] There may be certain circumstances where a judge may, in her discretion, consider a traditional § 2255-type argument among other factors in (b)(6) options 2 or 3. Additionally, nothing precludes a judge from considering these facts as part of the § 3553(a) analysis.
[80] *See United States v. Wesley*, __ F.4th __, No. 22-3066, 2023 WL 2261817 (10th Cir. Feb. 28, 2023) (denying motion asserting various grounds for finding extraordinary and compelling reasons in his case, including alleged prosecutorial misconduct, because challenges to the constitutionality of conviction and sentence can only be brought under § 2255).
[81] *See United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021).
[82] *Wesley*, 2023 WL 2261817 at *20.
[83] *Id.* at *3.
[84] *Id.* at *16-17.

guideline reductions other than those identified in §1B1.10, and even to impose a sentence lower than permitted under that provision.[85]

As with the distinction between habeas and compassionate release claims, there should be little difficulty in distinguishing between motions that should be made under §1B1.10 and those under appropriate for §1B1.13. As the Commission knows, there are structural differences between the two reduction authorities. Section 1B1.10 is used when the Commission lowers a guideline sentence *and* makes the change retroactively available. By law, the Commission must specifically identify which lower guideline changes to make retroactive, and how much relief to permit.[86]

If the Commission lowers a guideline only prospectively, courts will be readily able to identify and address (b)(5) claims that might undermine the Commission's decision not to list the amendment under §1B1.10.

To the extent that the Commission is concerned that litigants disappointed about the extent of a retroactive reduction they received will resort to retrying their §1B1.10 motion via §1B1.13, the Commission could clarify that such claims are properly brought under the former, not the latter. Consistent with § 994(u), the Commission has limited §1B1.10 relief, directing that courts may not reduce the term except for a listed amendment and, with a couple of exceptions, not below the minimum of the amended guideline range.[87]

Similarly, most individuals denied §1B1.10 relief, as a practical matter could hardly ask the court to reconsider its decision under §1B1.13. Courts denying retroactive application of guideline changes cite inapplicability of the change as the top reason (ranging from 64 percent to 76.6 percent) for the denials.[88] In other words, there was no change in the law that applied in the cases before them. Those denied based on public safety, purposes of sentencing, or other reasons, will hardly find a court willing to revisit the issue simply because it is pleaded in a §1B1.13 motion.

Finally, compassionate release motions under (b)(5) would have to show both a change in the law and that the failure to apply the change renders the sentence inequitable. As a substantive matter, we think a court would be hard-pressed to find this change (or lack thereof) inequitable enough to justify a reduced sentence.

FAMM believes that the statute and guidelines provide sufficient guideposts for courts to follow. FAMM urges the Commission to adopt proposed amendment (b)(5). Doing so would provide potential relief to people whose continued incarceration under existing and future changes in the law is inequitable.

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[85] *Supra* note 53 at 8.
[86] 18 U.S.C. § 994 (u).
[87] USSG §1B1.10(b)(2)(A).
[88] *See supra* note 18 at 7-8 (discussing retroactivity denial rates).

e. Proposed Guideline (b)(6) reflects lessons from the past four years – the Commission cannot anticipate every scenario that may transpire, and a catchall helps provide necessary relief in discrete situations

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

Option 2: Other Circumstances.—As a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.]

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

FAMM supports Option 3 and strongly opposes Option 1. FAMM strongly favors Option 3 over Option 2.

Courts around the country have been exercising their discretion in a real time preview of how practice under proposed (b)(6) can account for circumstances not enumerated in §1B1.13. While differences in outcomes exist, the very robust practice in which the courts have been engaged in the past three years provides the Commission with the information it needs to update the policy statement. Judges exercising (b)(6)-like discretion since the First Step Act granted motions on un-enumerated grounds. The Commission now proposes to add some of those new reasons to §1B1.13. These include the untimely or inadequate provision of medical care that puts a person at medical risk, the BOP's inability to protect people at risk of serious illness or death should they suffer exposure to infectious disease, the need to care for parents who are alone and in need of caregiving, and, of course, non-retroactive changes in the law made by the First Step Act.

In the Sentencing Reform Act, Congress provided that the sentencing guidelines be periodically amended based on, among other things, feedback from the judiciary.[89] This amendment cycle shows off that feedback mechanism operating at its very best. The outcomes and written opinions from courts ruling on compassionate release motions in the absence of applicable guidelines are now helping the Commission ensure the guidelines reflect best compassionate release practices.

This terrific set of proposed amendments to §1B1.13 might not have been identified had judges not been able to exercise discretion under a catchall that almost mirrors the proposal in (b)(6) Option 3.[90] And most importantly, many people are now back home, contributing to their

[89] The Commission was to periodically "review and revise [the guidelines], in consideration of comments and data coming to its attention . . . ." 28 U.S.C. § 994(o).
[90] USSG §1B1.13, comment. (n. (1)(D)).

families and their communities because of that discretion. The Commission heard from several of them in the hearing on compassionate release.

As FAMM and others have pointed out, even as the Commission is poised to add a number of litigation-tested reasons to the §1B1.13 list, it cannot see into the future to identify those we have not experienced or cannot imagine. It needs to leave an avenue open for unanticipated events that may occur and justify consideration for reduction in sentence.

Moreover, the Commission cannot and should not try to account for every unusual, one-off reason that happens so infrequently it doesn't merit mention in their own §1B1.13 subcategory, but is nonetheless extraordinary and compelling. The Commission heard from several compassionate release beneficiaries whose grants were predicated in part on just such unusual grounds.

- Gwen Levi told commissioners about her experience of being released to home confinement under the CARES Act and then ordered to return to prison to serve the rest of her sentence because her failure to answer a halfway house phone call constituted "escape."[91]
- Dwayne White testified about his 25-year incarceration, imposed when he was 22, as a result of the fake stash house sting operation that some law enforcement agencies used, but then abandoned following deserved criticism of the methods and the excessive sentences imposed for crimes that never happened.[92]

Option 3 is the only way to keep a path cleared for people with unforeseen and unusual extraordinary and compelling reasons, so they can be identified and their release considered. It will also guarantee that judicial decisions continue to inform the Commission in its mission to periodically review and revise the guidelines.

The Justice Department asked the Commission to adopt option 1: "[t]he defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)].]" A number of the formerly incarcerated individuals who testified before the Commission would likely have remained incarcerated today if Option 1 were in place. It is impossible to hear that panel and think theirs were not extraordinary and compelling reasons and that their continued incarceration would serve the interest of justice.

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[91] Oral Statement of Gwen Levi (Feb. 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Levi.pdf.

[92] Oral Statement of Dwayne White (Feb. 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/White.pdf; *see also supra* note 40 at 18-23.

Moreover, as highlighted by Joshua Matz's testimony, option 1 is unnecessarily restrictive and confusingly so.[93] It is likely to lead to more litigation as courts and litigants grapple with identifying which circumstances would be "similar in nature and consequence" to the enumerated grounds. The Commission has been fairly precise about the nature and circumstances outlined in the proposed enumerated grounds. How similar in nature to those grounds would the Option 1 circumstances need to be?

Option 2 is not nearly as concerning as Option 1. However, Option 2 unnecessarily, and without justification, limits a sentence reduction to "changes in the defendant's circumstances." This limitation is far narrower than the policy statement currently affords to the Director of the BOP. To be sure, many compassionate release motions will involve a change in circumstances, there are others that may not, or would need to stretch to fit that standard. Judges should not be prohibited from considering reasons, without limit, just as they have been able to do with such good effect as described above.

FAMM urges the Commission to promulgate Option 3.The last three years have demonstrated conclusively that discretion to identify the unanticipated or neglected extraordinary and compelling reason can both improve compassionate release by providing feedback to the Commission on common but un-enumerated grounds and provide discretion in the unusual and infrequent extraordinary and compelling reason.

II. Proposed Amendment, First Step Act: Drug Offenses

a. The Commission should update the safety valve to reflect Congress' language and intent in the First Step Act

The Sentencing Reform Act of 1984 "extensively overhauled sentencing at the federal level" which included the implementation of mandatory minimums so as to "provide a meaningful floor in sentences for certain serious federal controlled substance and weapons-related cases."[94] However, Congress later realized that the federal sentencing guidelines and statutory minimums did "not always operate in a satisfactorily integrated manner."[95] The statutory safety valve was created in 1994 with the passage of the Violent Crime Control and Law Enforcement Act.[96] The safety valve provision was implemented to "refine the operation of certain mandatory minimum sentencing provisions applicable in federal drug trafficking cases" which would permit the least culpable participants to receive "reductions in prison sentences for mitigating factors" that were already reflected in the guidelines.[97]

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[93] Oral Statement of Joshua Matz at 1:11:00 (Feb. 23, 2023), https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-february-23-24-2023.
[94] H.R. REP. NO. 103-460, Background (1994). *See also* Sentencing Reform Act, Pub. L. No. 98-473, Title II, § 212(a)(2), 98 Stat. 1989 (1984).
[95] H.R. REP. NO. 103-460, Summary and Purpose (1994).
[96] Violent Crime Control and Law Enforcement Act, Pub. L. No. 103–322, § 80001, 108 Stat. 1796 (1994).
[97] *Id.*

The safety valve was amended by the First Step Act of 2018.[98] The amendment expanded applicability of § 3553(f) to cover more offenses and defendants with a somewhat more extensive prior criminal record.[99] When Congress amended the statutory safety valve, it did so with the aim to mitigate the harm of "failed policies" that "created harsh sentencing, harsh mandatory minimum penalties."[100] FAMM, which was a key advocate in Congress for the safety valve in 1994 and in 2018, appreciates the Commission's efforts to incorporate the FSA's changes into the guidelines. FAMM believes that the guideline change should reflect the spirit of the First Step Act – to expand access to the safety valve, not to further narrow it.

Congress expanded both the statutory offenses and the eligibility criteria for safety valve relief.[101] The original safety valve was only available to defendants who had no more than one criminal history point. But now, a court may disregard a statutory minimum if:

> (1) the defendant does not have--
>
> > (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> >
> > (B) a prior 3-point offense, as determined under the sentencing guidelines; **and**
> >
> > (C) a prior 2-point violent offense, as determined under the sentencing guidelines; [102]

b. Updating Section 5C1.2 with the language in the First Step Act and selecting Option 1 will honor Congressional intent

As the Commission noted in the background to the proposed amendment, Congress "directed the Commission to promulgate or amend guidelines and policy statements to 'carry out the purposes of [section 3553(f)].'"[103] In following this directive, the current guidelines incorporate the statutory text of Section 3553(f) in §5C1.2. Section 5C1.2 has historically mirrored the statutory language. The Commission has proposed to update §5C1.2 to, once again, mirror the statutory language added by the First Step Act to §3553(f). FAMM supports the Commission's updates to §5C1.2(a) which do just that. We also support the proposed changes to §5C1.2(b), which ensure that the guideline reflects Congress' purpose.[104]

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[98] First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221.
[99] *See id.* (expanding the safety valve to apply to convictions under the Maritime Drug Enforcement Act and to defendants with up to four criminal history points).
[100] 164 Cong. Rec. S7762 (Daily ed. Dec. 18, 2018) (Statement of Sen. Booker).
[101] 18 U.S.C § 3533(f)(2018).
[102] *Id.* (emphasis added).
[103] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(b).
[104] Now that people with higher criminal history category are eligible for safety valve relief, USSG §5C1.2(b) should accommodate that with the relevant guideline range, as the Commission's proposal does.

Amending the guidelines reflect the statutory language is as far as the Commission need go at this point in time. In recent months, a circuit split has emerged about the interpretation of the criminal history criteria outlined above in (1)(A)-(C). Some courts read the bolded "and" as being conjunctive.[105] In these circuits, "and" means "and" – a person is safety-valve eligible unless they meet all three of (a); (b); and (c). But other courts read "and" to mean "or," making it disjunctive.[106] In these circuits, if a person meets just one of (a); (b); or (c) they are ineligible for the safety valve. Given the split over the statutory language, both the Department of Justice and defendants asked the Supreme Court to grant certiorari. The Court agreed and granted certiorari in *United States v. Pulsifier* on February 27, 2023.[107]

The Commission has proposed two options for §§2D1.1 and 2D1.11, both of which incorporate the safety valve in a two-level reduction for eligible defendants. Option 1 would leave the text of §§ 2D1.1(b)(18) and 2D1.11(b)(6) unchanged, while option 2 would amend the language in those provisions to provide that the two-level reduction would apply to defendants who do not have *any* of the disqualifying offenses for eligibility. In other words, in option 2, the two-level reduction would follow the disjunctive approach of the Fifth, Sixth, Seventh, and Eighth Circuits.

FAMM urges the Commission to adopt option 1. This approach will not settle the split but will preserve the language on which the differing circuits rely until the Supreme Court resolves the correct interpretation and impact of "and" in the coming term.

Option 2, on the other hand, could undermine the Commission's historical approach of aligning the guidelines with the statutes on which they are based and, in particular, "carry out the purposes" of section 3553(f).[108] Imagine if the Court agrees with the conjunctive approach to "and" and the Commission has adopted Option 2. In that scenario, the statutory safety valve would require a different approach than the guidelines safety valve. District courts would need to perform two separate safety valve determinations, one based on statute and one based on the guidelines. This is not what Congress contemplated or the Commission would intend.

As noted above, Congress was clear that the Commission should create amendments that are in line with Congress' goals in creating and amending 3553(f).[109] We will have clarity on how to interpret Congress' updates to the statutory safety valve when the Supreme Court rules next year. While not ideal, a delay allows the Commission to wait for the Supreme Court to decide the issue rather than getting ahead of the Court by adopting Option 2.

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[105] *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).

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

[107] *See* S. Ct. Granted & Noted List, Oct. Term, https://www.supremecourt.gov/orders/23grantednotedlist.pdf.

[108] *See supra* note 103.

[109] *Id.*

In short, to ensure that the Commission is respecting the spirit and intent of Congress, it should not take action that would appear to be directly at odds with Congress or second guess the Court. When the Supreme Court issues its opinion in *Pulsifier*, the Commission will be well poised to take any further action that might be warranted. The Commission should adopt option 1, and make the changes to §5C1.2 that bring the provision in line with the updating language from the FSA.

III. Proposed Amendment: Acquitted Conduct

FAMM is thrilled that the Commission's proposed amendments would forbid the use of acquitted conduct as part of a guideline calculation of relevant conduct under §1B1.3. Enhancing a sentence with acquitted conduct has long been a stain on the federal sentencing process. It undermines public confidence in the federal criminal system and public confidence is key to the legitimacy of the courts. As one jurist noted, "[i]nstitutional legitimacy is critical to the effectiveness of the judicial branch of government."[110] Acquitted conduct sandbags defendants, and offends practitioners, the general public, and judges.

Jury trials are a vanishing act in the federal system.[111] One of the systemic problems leading to their demise is the use of acquitted conduct. As we discussed in an amicus brief before the Supreme Court on the issue, the practice provides the government with incentives to overcharge and pressures defendants to plead guilty when not otherwise warranted. We explained that if the defendant succumbs to the government's aggressive charges and pleads guilty, the government wins; if he goes to trial and is convicted on those charges, the government still wins; and if he goes to trial and persuades a jury that he is innocent of them, the government still wins, so long as it secures conviction on a more easily proved offense and persuades the sentencing judge of his guilt by a preponderance of reliable "information" (not necessarily even "evidence").[112]

Acquitted conduct serves as a heads-we-win-tails-we-win for the government. This is particularly pernicious because an individual's liberty is on the line. What incentive does a defendant have to ask the government to prove its case, when, even a win at trial means that acquitted conduct may be considered relevant by the sentencing judge?

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[110] *Hallows Lecture: Tough Talk and the Institutional Legitimacy of Our Courts*, Marquette Law School (Mar. 7, 2017), https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2017-fall/2017-fall-p45.pdf.

[111] U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines*, at 212 (Feb. 2, 2023) (explaining that 98.3 percent of defendants pled guilty in FY 2021), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf.

[112] *McClinton v. United States*, No. 21-1557, Brief of National Ass'n of Federal Defenders and FAMM as Amici Curiae Supporting Petitioner for Cert. at 7 (July 14, 2022), https://www.supremecourt.gov/DocketPDF/21/21-1557/230055/20220714103728274_Brief.pdf.

If the defendant does elect to go to trial, she is forced to argue to two different factfinders with two different standards of proof. That is because argument and evidence that resonates with a jury can alienate judges, and vice versa.[113]

How confident can jurors and the general public be about the integrity of the jury trial system when the jury's verdict can be undermined in this way?

In deciding not to use acquitted conduct as part of a guideline calculation one judge noted that the "jurors . . . who sacrificed seven weeks to hear the evidence and arguments and thoroughly deliberate each charge would likely be shocked to learn that [the defendant] could be sentenced on the basis of conduct that they determined the government had not proven beyond a reasonable doubt."[114]

Most judges do not think that acquitted conduct should be considered relevant conduct for purposes of sentencing. In a survey conducted by the Commission, 84 percent of judges said that acquitted conduct should not be deemed relevant conduct.[115] One judge noted that, "allowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-trial guarantee."[116]

The fact that some judges may use acquitted conduct at sentencing, while others strive not to, only contributes to unwarranted disparities across the country, undermining a goal of the Guidelines.[117]

It is high time to eliminate acquitted conduct in sentencing and the Commission has the power to do so. As the government has argued to the Supreme Court urging denial of certiorari of a case challenging acquitted conduct, the "Sentencing Commission could promulgate guidelines to preclude such reliance."[118] The proposed amendment is an important step to that end. But the Commission's proposal raises concerns for FAMM. Put simply, it does not go far enough and its exceptions risk creating more confusion.

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[113] *See, e.g.*, Scalia & Garner, *Making Your Case: The Art of Persuading Judges* 31(2008) ("It is often said that a 'jury argument' will not play well to a judge. Indeed, it almost never will.").
[114] *United States v. Katallah*, 41 F.4th 608, 646-47 (D.C. Cir. 2022) (internal quotation marks omitted).
[115] U.S. Sentencing Comm'n, *Survey of Unites States District Judges: January 2010 through March 2010*, Tbl. 5 (June 2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.
[116] *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millet, J., concurring in the denial of rehearing en banc); *see also United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) ("Many judges and commentators have [] argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system.").
[117] 28 U.S.C. § 991(b)(1)(B) (observing a purpose of the Sentencing Commission is to "avoid unwarranted sentencing disparities").
[118] *See United States v. McClinton* (No. 21-1557), *Br. in Opp.* at 15. The Government filed a letter a few months later alerting the Court to the Commission's proposed guideline. *https://www.supremecourt.gov/DocketPDF/21/21-1557/252407/20230118095503909_Letter%2021-1557%20%2021-8190%20%2022-118%20%2022-5345%20%2022-4828.pdf*.

As written, the proposal instructs that "acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless such conduct—(A) was admitted by the defendant during a guilty plea colloquy; or (B) was found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction."[119]

We fear that lawyers, judges, and defendants across the country will struggle to interpret these limitations. The exceptions rely on confusing and circular reasoning. The limitations appear to say that acquitted conduct cannot be used unless the defendant was convicted of a charge. But if the defendant was convicted, then the conduct is inherently not acquitted conduct. Although the government is concerned that judges won't know how to identify acquitted conduct, judges, particularly those that sat through the fact-finding portion of the criminal case, are uniquely positioned to identify which conduct the defendant has been acquitted of.

The issue for comment suggests the proposed limitations are meant to get at the exceedingly rare instances of overlapping conduct in a criminal proceeding between acquitted and convicted charges. The Commission should not fashion a rule that will capture a circumstance that is out of the ordinary and only rarely likely to occur. The government seems to suggest that split verdicts happen frequently. They note that "[o]ften in civil rights cases" the verdicts may be split.[120] For one, jury verdicts are necessarily rare, given that only 1.7% of criminal cases went to trial in FY 2021.[121] And even if trials occurred with more frequency, only 0.1% of all criminal cases in FY 2021 resulted from civil rights offenses.[122] The scenario the government paints as occurring "often" plainly occurs rarely. The Commission should strain instead to avoid a result that would sow more confusion into the sentencing process.

Acquitted conduct should also not, as the Commission proposed, be used to select a point within the guideline range or to justify an upward departure from the Guidelines. Were the Commission to prohibit acquitted conduct generally, but permit its use to establish a departure or a sentence within a guideline range, this would lead to confusion and unwarranted disparities. It also sends mixed signals as to the Commission's view on acquitted conduct. If acquitted conduct is to be prohibited as relevant conduct, why then permit its use for an upward departure? It would undermine the force of the prohibition and do little to restore public confidence in the fairness of the proceeding.

FAMM urges the Commission to eliminate the use of acquitted conduct as relevant conduct, and to do so by promulgating guidance to the effect that "acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range, a sentence within the range, or a departure above the range."

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[119] U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, at 213 (Feb. 2, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf.
[120] *Supra* note 53 at 15.
[121] *Supra* note 119 at 212.
[122] U.S. Sentencing Comm'n, *Use of Guidelines and Specific Offense Characteristics*, Fiscal Year 2021, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2021/Ch2_Guideline_Based.pdf.

FAMM applauds the Commission for its efforts to end the use of acquitted conduct at sentencing. We hope that the Commission's final rule will be unequivocal and without exceptions.

IV. Conclusion

FAMM thanks the Commission for considering our views on these important proposed amendments.

Sincerely,

Mary Price
General Counsel
FAMM

Shanna Rifkin
Deputy General Counsel
FAMM

FOR THE PEOPLE

fortheppl.org

March 14, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Amendment on Compassionate Release

Dear Judge Reeves,

I am writing in response to the Commission's recent request for public comment on its proposed amendments to the compassionate release policy statement (U.S.S.G. §1B1.13). I am the Founder and Executive Director of For The People, a national nonprofit organization leading the implementation of Prosecutor-Initiated Resentencing (PIR), a legal mechanism that allows prosecutors to identify persons whose continued incarceration no longer serves the interest of justice and motion the court for resentencing.

Under 18 U.S.C. § 3582(c)(1)(A) (i.e., the compassionate release statute), a court is authorized to grant a sentence reduction if, after exhausting administrative remedies, an incarcerated person demonstrates "extraordinary and compelling reasons" for a reduced sentence, and the court finds that relief is warranted under the 18 U.S.C. § 3553(a) sentencing factors. The statutory text and legislative history of § 3582(c)(1)(A) make clear that Congress created this mechanism because it recognized that courts needed a flexible tool for reconsidering lengthy sentences and for releasing people whose continued incarceration would be inequitable.[1]

I write today to urge the Commission to adopt an expansive compassionate release amendment to ensure the mechanism can be used in a range of extraordinary and compelling circumstances, including to address overly harsh sentences or cases where there have been non-retroactive changes to sentencing law. A broad compassionate release amendment would help promote

[1] *See* Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 102 (2019).

public safety, serve the interests of crime victims, and give courts an avenue for addressing sentences that today may be found to be fundamentally unfair.

Since 1980, the federal prison population has increased 600 percent—from about 25,000 to over 150,000 today. More than half of the incarcerated people in the federal system have served a decade or more behind bars.[2] Though the number of incarcerated people in federal prisons has declined since reaching its peak in 2013, the population has grown again in recent years.[3]

Many of the people incarcerated in the federal system were sentenced under harsh mandatory penalties adopted during the height of extreme punishment. While some of these penalties have been rolled back, the reductions have not benefited all of those people serving time under outdated policies. Research shows that draconian prison sentences have diminishing returns, as they can keep people incarcerated long after they pose a significant threat to public safety.[4] Given the high cost of incarcerating people as they age, primarily due to increased health care needs, overly harsh sentences can displace critical resources that could be spent on drug or mental health treatment, education, or other activities that promote public safety.

A broad compassionate release mechanism can promote safety inside and outside the prison walls. We hear from people who have been resentenced and released through Prosecutor-Initiated Resentencing that when people in prison learn about the potential opportunity for release, they become motivated to further their education, seek out substance abuse treatment, and pursue other rehabilitative programming. Moreover, when incarcerated people return home, they often are available to provide support to their families through employment, caregiving for elderly relatives, and co-parenting, while also eliminating the out-sized costs that come with having an incarcerated family member. Additionally, when people are safely released from prison, they are uniquely poised to mentor young people and to provide counseling which can potentially interrupt cycles of crime and help strengthen their communities.[5]

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[2] The Sentencing Project, *How Many People Are Spending Over a Decade in Prison?* (Sept. 2022), https://www.sentencingproject.org/app/uploads/2022/10/How-Many-People-Are-Spending-Over-a-Decade-in-Prison.pdf.

[3] Population Statistics, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp (last updated March 9, 2023).

[4] *See* Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 113-31 (2018), https://www.sentencingproject.org/wp-content/uploads/2018/11/UMKC-Law-Review-Scale-of-Punishment.pdf.

[5] *See* For The People, *Prosecutor-Initiated Resentencing: California's Opportunity to Expand Justice and Repair Harm* (Dec. 2021), https://www.fortheppl.org/s/ForThePeople_Report_121321.pdf.

Compassionate release can also serve the interests of crime victims. While many victims want accountability for people who commit crimes, they do not uniformly favor long sentences. A national survey found that many crime survivors want the criminal justice system to focus more on rehabilitation than punishment.[6] In working with victims through the Prosecutor-Initiated Resentencing process, we have found that many victims support release for people who have served a significant portion of their sentences and transformed their lives while in prison.

Finally, I urge the Commission to adopt an expansive compassionate release amendment that can be applied by courts to address sentences where changes in law or other circumstances have resulted in fundamentally unfair punishment. Reductions in criminal penalties under the First Step Act reflect Congress's view—which in turn reflects a national consensus—that previous sentencing laws were too harsh, and that the law would be "a step forward in making our prison system more just and more fair."[7] I hope the Commission will remain mindful of justice and equity as it determines the extraordinary and compelling reasons that can support a sentencing reduction through compassionate release.

Sincerely,

Hillary Blout
Founder and Executive Director
For The People

[6] *See* Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victims' Views On Safety and Justice* (2016), https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf.

[7] Press Release, Sen. Cory Booker, *Booker Statement on First Prisoner Released Due to First Step Act Reforms* (Jan. 4, 2019), https://www.booker.senate.gov/news/press/booker-statement-on-first-prisoner-released-due-to-first-step-act-reforms.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Free Prisoners

Topics:

1. Compassionate Release

Comments:

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.
I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.
Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Submitted on: March 10, 2023

fwd.us

March 14, 2023

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20008

Re: Proposed 2022-2023 Amendment to § 4B1.2 of the Sentencing Guidelines and the Elimination of the "Categorical Approach"

Dear Judge Reeves:

FWD.us is a bipartisan organization that believes America's families, communities, and economy thrive when more individuals are able to achieve their full potential. To that end, FWD.us is committed to ending mass incarceration, eliminating racial disparities in the criminal legal system, expanding opportunities for the people and families impacted by the criminal justice system, and data-driven approaches to advancing public safety.

It is with this commitment in mind that we submit these comments on the Sentencing Commission's Proposed 2022-2023 Amendments to the Federal Sentencing Guidelines as published in the Federal Register on February 2, 2023. Our comments focus on the limited issue of the Commission's proposal to replace the "categorical approach" for determining whether a person's prior state conviction qualifies as a "controlled substance offense" or "crime of violence" for purposes of imposing the career offender sentencing enhancement[1] in § 4B1.1 of the Sentencing Guidelines. Specifically, we note:

- The categorical approach acts as an important limit on the reach of the already-embattled career offender enhancement by curbing the number of state convictions considered predicate offenses under § 4B1.2;

[1] Formerly incarcerated people and advocates have long called for replacing labels, such as "career offender," that stigmatize and pre-judge individuals. Our research found that such labels elicit biased reactions compared to more neutral terminology such as "individual with a criminal record." FWD.us, "People First: Drop the Harmful Labels From Criminal Justice Reporting," https://www.fwd.us/criminal-justice/people-first/.

- The proposed amendment would lead to increased application of § 4B1.1 and lengthier sentences, especially for people of color and in drug-related cases, despite evidence that increased incarceration does not advance public safety; and

- The Commission should engage in further study of the impact of § 4B1.1 before taking any action on the proposed amendment.

In its 2016 *Report to the Congress: Career Offender Sentencing Enhancements* (hereinafter the "2016 Report"), the Commission itself recognized that § 4B1.1 created troubling disparities in sentencing and "has resulted in overly severe penalties for some [people]," particularly people convicted of drug-related offenses, and recommended that the guideline be narrowed to focus on crimes of violence.[2] Judges have responded to the excessive recommended guideline sentences and disparate application of the career offender enhancement by increasingly imposing below-guideline sentences. Indeed, in 2021 judges gave below guidelines sentences in these cases almost 80% of the time, making § 4B1.1 one of the Sentencing Guidelines' least influential provisions.[3] The amendment currently under consideration by the Commission would not only leave the concerns raised in the 2016 Report unresolved, but would exacerbate the disparities identified in the report and lead to a dramatic increase in sentencing exposure, especially for people with prior state-level drug convictions. Given the decreasing influence of the enhancement, broadening its scope now would only make its application more arbitrary and haphazard.

The Department of Justice and the Federal Defenders are in agreement that the Commission should not adopt the proposed amendment to § 4B1.2 at this time.[4] *We now write to add our voice to the call for the Commission to postpone its decision on the amendment in order to allow further consideration of the amendment's impact on racial disparities and the length of sentences for people charged with drug-related offenses.*

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[2] U.S. Sentencing Commission, "Report to the Congress: Career Offender Sentencing Enhancements," at 2-3, Aug. 2016, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

[3] U.S. Sentencing Commission, "Quick Facts: Career Offenders," FY 2021, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf.

[4] *See* Comments of the U.S. Dep't of Justice at 3, Feb. 27, 2023 (proposing alternative approaches and concluding, "If the Commission is not inclined to adopt either option, we would encourage the Commission to postpone its decision for a year to permit publication and further consideration of the various options…."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/DOJ4.pdf; Comments of the Federal and Community Defenders by Juval O. Scott at 2, Mar. 8, 2023 ("The Commission should take no action that will expand this problematic guideline. It definitely should not take the actions proposed here."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/FPD4.pdf.

The Categorical Approach Acts as an Important Limit on the Reach of the Already-Embattled Career Offender Enhancement by Curbing the Number of State Convictions Considered Predicate Offenses under § 4B1.2

Section 4B1.1 of the Sentencing Guidelines provides for an enhanced offense level *and* criminal history category where 1) the person being sentenced on an instant federal conviction was at least 18 years old at the time of the commission of the instant offense; 2) the instant offense is a felony that is a crime of violence or a controlled substance offense; and 3) the person has at least two prior felony convictions for either crimes of violence or controlled substance offenses. Section 4B1.2 goes on to provide definitions for both "crime of violence" and "controlled substance offense." In determining whether a prior state conviction meets the definitions in § 4B1.2, courts use the categorical approach, which requires judges to compare the statutory elements of the state crime of conviction with the elements of the relevant federal criminal statute rather than consider the facts and circumstances of the underlying conviction.[5] In practice, this means that if the state statute of conviction is broader than the federal statute—that is, if it criminalizes conduct that would not be considered criminal under the relevant federal statute—the conviction does not satisfy the categorical approach and cannot be considered as a predicate for a § 4B1.1 career offender enhancement. The result is a limitation on the number of convictions that can serve as predicate offenses for the career offender enhancement. This limitation, in turn, prevents people with certain prior state convictions from facing significantly longer sentences under § 4B1.1.

The Commission has not conducted an empirical analysis of the number of people or cases that would be implicated by the elimination of the categorical approach, but cases like the Second Circuit's recent decision in *United States v. Gibson*[6] suggest the potential for a broad impact. In *Gibson*, the Second Circuit found that the relevant federal law was "categorically narrower than the state-law counterpart" and held that Mr. Gibson's New York State conviction for attempted sale of a controlled substance in the third degree did not qualify as a controlled substance offense under § 4B1.2.[7] *Gibson* is notable, in particular, because it addresses a New York State conviction for a drug sale under New York Penal Law § 220.39—a very common felony conviction—and, by extension, all New York felony drug convictions.[8]

The proposed amendment currently under consideration would replace the categorical approach with a factor-based approach that asks judges to look at "1) the elements, and any means of committing such an element, that formed the basis of the defendant's conviction, and

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[5] The categorical approach was adopted from the Supreme Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990) (establishing the categorical approach for determining whether a prior conviction qualifies as a "violent felony" or "serious drug offense" under the Armed Career Criminal Act).
[6] 55 F.4th 153 (2d Cir. 2022).
[7] *Id.* at 167. For Mr. Gibson, this meant the difference between a Guidelines range of 92-115 months and a range of 155-188 months under § 4B1.1. *Id.* at 158.
[8] The application of the categorical approach is contingent on underlying state law, and because criminal laws differ from jurisdiction to jurisdiction, the impact of the categorical approach varies from court to court, making an empirical analysis critical to understand the impact of the proposed change.

2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means."[9] By instructing judges to look behind the statutory elements to the underlying accusations, the change has the potential to sweep in many more state convictions as predicate offenses for the career offender enhancement, especially given the prevalence of certain state convictions like New York's § 220.39 that have been excluded from consideration, exposing more people to the career offender enhancement. Given the already-reduced influence of the enhancement among judges and prosecutors,[10] eliminating the categorical approach and bringing more people within its ambit would merely substitute one form of arbitrariness for another while simultaneously subjecting more people to it, without any evidence that the change would advance public safety.

The Proposed Amendment Would Likely Lead to Increased Application of the Career Offender Enhancement and Lengthier Sentences, Especially for People of Color and in Drug-Related Case, Despite Evidence that Increased Incarceration Does Not Advance Public Safety

The impact of the proposed amendment could be dramatic, contributing to further racial disparities in sentencing and unnecessary expansion of the prison population. According to data published by the Commission, of 57,287 cases reported to the Commission in 2021, 1,246 (2.3%) involved people sentenced as career offenders, the vast majority of whom were sentenced for drug trafficking offenses (77.8%).[11] The average sentence for people sentenced under § 4B1.1 was 141 months in prison, and over 63% were sentenced to 10 years or more in prison.[12] These sentences were not handed down equally: over 58% of people sentenced under this provision were Black.[13] Over 45% of people sentenced under § 4B1.1 had an increase in both offense level and criminal history category: the average offense level increased from 23 to 31 and the average criminal history category increased from IV to VI.[14] **On average, this represents an increase from a range of 70-87 months to a range of 188-235 months.** And according to the 2016 Report, while people sentenced as career offenders represented only 3.4% of the people sentenced in 2014, they represented 11.4% of the Bureau of Prisons population.[15] As these statistics show, even a relatively small increase in the number of people subject to § 4B1.1 could result in hundreds of people, overwhelmingly people of color and those charged with drug trafficking offenses, seeing their guidelines ranges more than double. These

[9] U.S. Sentencing Commission, "Proposed Amendments to the Sentencing Guidelines," at 151, Feb. 2, 2023, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf.
[10] "Quick Facts: Career Offenders" (noting that judges imposed below-guidelines sentences in approximately 80% of career offender cases in 2021).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] 2016 Report at 24.

changes go against a significant body of research showing that any contested and minimal benefits of increased sentence lengths and incarceration generally are far outweighed by the harms to individuals, communities, and public safety as a whole.[16]

The conclusions of the Commission's 2016 Report to Congress reinforce our concern that the Commission's proposed amendment would exacerbate the disparate and disproportionate guidelines ranges. The 2016 Report provided an extensive overview of the career offender guidelines. Among other things, it concluded 1) that the enhancement had the greatest impact on people convicted of federal drug trafficking charges because of the higher statutory maximum penalties for drug-related offenses; 2) that people charged only with drug trafficking, but sentenced under § 4B1.1 "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"; and 3) that § 4B1.1 should be reserved for people with at least one crime of violence.[17] Despite the Commission's comprehensive analysis and evidence-based recommendations, no changes were ever made to these provisions.

The Commission Should Engage in Further Study of the Impact of § 4B1.1 before Taking any Action on the Proposed Amendment

As noted above, while the elimination of the categorical approach would almost certainly broaden the reach of the career offender enhancement significantly and subject many more people—disproportionately Black and Latinx—to lengthy prison sentences, there is currently no formal impact analysis of the proposed change. Before taking any action on the amendment, the Commission should:

- Catalog existing case law that excludes state convictions from consideration as predicate convictions under § 4B1.2 in order to estimate how many people and underlying state convictions would potentially be subject to the enhancement were the categorical approach to be eliminated;

- Conduct an impact analysis focusing on the anticipated increase in incarceration resulting from the proposed amendment;

- Examine whether, and to what extent, the proposed amendment would exacerbate already-existing racial disparities in the application of the career offender enhancement and in federal sentencing more generally;

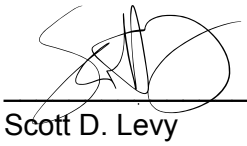
[16] *See* Laura Bennett and Felicity Rose, Center for Just Journalism and FWD.us, "Deterrence and Incapacitation: A Quick Review of the Research," https://justjournalism.org/page/deterrence-and-incapacitation-a-quick-review-of-the-research; FWD.us, "Advancing Public Safety and Moving Justice Forward," https://www.fwd.us/wp-content/uploads/2022/09/Advancing-Public-Safety.pdf.
[17] 2016 Report at 2-3.

- Engage a broad array of stakeholders to assess the holistic impact of any change to § 4B1.1; and

- Continue the work started by the Commission in its 2016 Report and reassess whether application of § 4B1.1 is justified in drug-related cases.

We thank the Commission for its thoughtful and deliberate consideration of the current amendment proposals. Because we fear that eliminating the categorical approach would increase incarceration, exacerbate racial disparities, and further entrench the disproportionate treatment of people charged with drug-related offenses, we urge the Commission to take no action on the amendment at this time. We look forward to working with the Commission in future amendment cycles to identify data-driven changes that will safely reduce our national reliance on incarceration and eliminate racial disparities in the system.

Sincerely,



Scott D. Levy
Chief Policy Counsel
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GIFFORDS
LAW CENTER
TO PREVENT GUN VIOLENCE

March 14, 2023

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

Re: Comment on United States Sentencing Commission Proposed Revisions to Compassionate Release, Increase in Firearms Penalties

Dear Judge Reeves,

Giffords Law Center to Prevent Gun Violence ("Giffords"), a non-profit gun violence prevention organization led by former Congresswoman Gabrielle Giffords, submits this comment in response to the United States Sentencing Commission's ("Commission's") Notice of Proposed 2022-2023 Amendments to the United States Sentencing Guidelines ("Guidelines").[1] Gun violence is an ongoing public health epidemic in the United States, claiming nearly 43,000 lives and causing tens of thousands of injuries each year—tragic and preventable deaths.[2] Giffords researches, drafts, and defends the laws, policies, and programs proven to effectively reduce gun violence, and advocates for the interests of gun owners and law enforcement officials who understand that Second Amendment rights have always been consistent with gun safety legislation and community violence prevention. Our publications dive deep into our country's gun violence crisis, and through our analysis and original research we explore the problem of gun violence and present solutions.

We write to provide comments on the Commission's Proposed Amendments: Firearm Offenses. As a gun violence prevention organization, we specifically write to share our subject matter expertise, and encourage that any amendments that may be adopted are grounded in evidence-informed approaches to prevent gun violence, and do not exacerbate the existing racial disparities

[1] Giffords is a non-profit social welfare organization based in Washington, D.C. that is dedicated to saving lives from gun violence. Led by former Congresswoman Gabrielle Giffords, it shifts culture, changes policies, and challenges injustice, inspiring Americans across the country to fight gun violence.

[2] Based on the calculations made by Giffords Law Center staff of the last 5 years of available data, 2017 to 2021. Centers for Disease Control and Prevention, Wide-ranging Online Data for Epidemiologic Research (WONDER), "Underlying Cause of Death, 1999–2021," last accessed March 9, 2023, https://wonder.cdc.gov.

in federal firearms sentences. This aligns with the Commission's mandate to "reduce sentencing disparities and promote transparency and proportionality in sentencing."[3]

Prior to 2022, three out of every four federal weapons prosecutions were for simple illegal gun possession—rather than prosecutions targeting straw purchasers and gun trafficking, which are key to reducing gun violence.[4] Research indicates that this almost singular focus on illegal possession of firearms will not effectively reduce gun violence. It will, however, have a highly damaging and disparate impact on young Black men. A disproportionate number of young men of color already face lengthy prison sentences for nonviolent gun possession offenses.[5] According to the Commission's most recent data, "[f]irearms offenders were primarily United States citizens (96.3%) and male (96.2%). Just over half (55.2%) were Black, 24.1% were White, and 17.4% were Hispanic."[6]

Our work demonstrates that "society can better protect public safety *without* resorting to automatic and draconian punishment for every single person caught with an illegal gun, a policy that essentially criminalizes the fear and trauma that too often lead some young men of color to pick up a gun in the first place."[7] The United States is an outlier both on gun violence and prison population. Americans are 25 times more likely to be killed by a gun homicide than people in other high-income countries, and the United States accounts for 4% of the world's population but 35% of global firearm suicides,[8] and 25% of the world's prisoners.[9] Tackling the enormous toll of gun violence in the United States is critical, but the evidence does not suggest that increasing

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[3] US Sentencing Commission, "Sentencing Resources Guide," July 2021, https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC-Resources-Guide-Jul2021.pdf.

[4] TRAC, "Federal Weapons Prosecutions Rise for Third Consecutive Year," TRAC Reports, Inc., November 29, 2017, https://trac.syr.edu/tracreports/crim/492.

[5] *See* Giffords Law Center to Prevent Gun Violence, "A Second Chance: The Case for Gun Diversion Programs," December 7, 2021, https://giffords.org/lawcenter/report/a-second-chance-the-case-for-gun-diversion-programs. Giffords Law Center is supportive of alternative sentencing programs such as those discussed in our 2021 report, A Second Chance: The Case for Gun Diversion Programs. *Id.* As noted in the report, "diversion may significantly reduce recidivism and, in turn, enhance public safety while reducing the staggering costs of the criminal justice system." *Id.*

[6] US Sentencing Commission, "Fiscal Year 2021 Overview of Federal Criminal Cases," April 2022, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf.

[7] Giffords Law Center to Prevent Gun Violence, "A Second Chance: The Case for Gun Diversion Programs," December 7, 2021, https://giffords.org/lawcenter/report/a-second-chance-the-case-for-gun-diversion-programs.

[8] Erin Grinshteyn and David Hemenway, "Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015," *Preventive Medicine* 123, (2019): 20–26; Mohsen Naghavi, et al., "Global Mortality from Firearms, 1990–2016," *JAMA* 320, no. 8 (2018): 792–814.

[9] Michelle Alexander and Cornel West, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (New York: The New Press, 2010).

federal weapons prosecutions and convictions will reduce gun violence.[10] This comports with general findings from the US Department of Justice that "[s]ending an individual convicted of a crime to prison isn't a very effective way to deter crime."[11] As the Department of Justice acknowledged in the same publication, "[i]ncreasing the severity of punishment does little to deter crime."[12]

Researchers at the Johns Hopkins Bloomberg School of Public Health Center for Gun Policy and Research conclude "if there are deterrent effects from long prison sentences, those effects are small and costly."[13] "[I]mprisonment, compared with noncustodial sanctions such as probation, does not prevent reoffending and often has a criminogenic effect on those who are imprisoned."[14] Other researchers have reached similar conclusions: "there is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs . . . . there is little evidence of a specific deterrent effect arising from the experience of imprisonment compared with the experience of noncustodial sanctions such as probation . . . . it is clear that lengthy prison sentences cannot be justified on a deterrence-based, crime prevention basis."[15]

Incarceration is "neither the most effective way to change people nor the most effective way to keep people safe."[16] As the National Academy of Sciences notes, "most studies estimate the crime-reducing effect of incarceration to be small and some report that the size of the effect

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[10] Steven Raphael and Jens Ludwig, "Prison Sentence Enhancements: The Case of Project Exile," in Evaluating Gun Policy: Effects on Crime and Violence (Washington DC: Brookings Institution Press, 2003), https://gspp.berkeley.edu/assets/uploads/research/pdf/Exile_chapter_2003.pdf; National Research Council, "The Crime Prevention Effects of Incarceration," in The Growth of Incarceration in the United States: Exploring Causes and Consequences, eds. J. Travis, B. Western, & S. Redbumeds, 156 (2014), https://www.nap.edu/read/18613/chapter/7#156; *see also* Edward K. Chung, "Project Safe Neighborhoods: A Targeted And Comprehensive Approach?" *Federal Sentencing Reporter* 30, no. 3 (2018).

[11] US Department of Justice, Office of Justice Programs, National Institute of Justice, "Five Things About Deterrence," May 2016, https://www.ojp.gov/pdffiles1/nij/247350.pdf.

[12] US Department of Justice, Office of Justice Programs, National Institute of Justice, "Five Things About Deterrence," May 2016, https://www.ojp.gov/pdffiles1/nij/247350.pdf.

[13] Johns Hopkins Bloomberg School of Public Health, Center for Gun Policy and Research, "Reducing Violence and Building Trust: Data to Guide Enforcement of Gun Laws in Baltimore," June 4, 2020, https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-violence-prevention-and-policy/_docs/reducing-violence-and-building-trust-gun-center-report-june-4-2020.pdf, p.24.

[14] *Id.*

[15] Daniel S. Nagin, "Deterrence in the Twenty-First Century," *Crime and Justice* 42, Crime and Justice in America 1975-2025 (2013): 201-02, https://www.journals.uchicago.edu/doi/pdf/10.1086/670398.

[16] Vera Institute of Justice, "Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration," 2017, https://www.vera.org/downloads/publications/accounting-for-violence.pdf.

diminishes with the scale of incarceration."[17] Furthermore, there is evidence that individuals leaving prison after incarceration are *more* likely to reoffend because of the effects of prison.[18] Spending one night incarcerated can trigger a cavalcade of consequences, including "job loss, impeding access to stable housing, education and healthcare disruption, voting, occupational licensing, loss of public benefits, parent-child separation and more."[19] Moreover, "[c]ertain experiences that are prevalent in jails and prisons have long been recognized as psychologically destructive."[20] This includes devastating impacts on physical and mental health.[21]

Aggressive prosecutorial strategies, such as those pursued by grant recipients funded under the federal Project Safe Neighborhoods ("PSN") umbrella resulted in an astronomical increase in federal gun possession cases in the early 2000s, and no corresponding impact on the national rate of gun homicide.[22] Four years after PSN began, federal prosecutions for weapons charges and convictions had nearly doubled as compared to five years earlier, but there was no corresponding drop in gun violence—the gun homicide rate actually *increased*.[23]

Similar results are seen in localized studies. For example, in a 2021 Illinois study, researchers determined that when the state emphasized prosecuting illegal gun possession and increasingly harsh punishments—with a disproportionate impact on Black men—prison admissions for gun possession offenses increased 27% between 2014 and 2019, while admissions for all other crimes

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[17] Jeremy Travis, et al., "The Growth of Incarceration in the United States: Exploring Causes and Consequences," *National Academies Press*, 2014, https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1026&context=jj_pubs.

[18] David Roodman, "The Impacts of Incarceration on Crime," *Open Philanthropy Project*, September 25, 2017, http://dx.doi.org/10.2139/ssrn.3635864; Francis T. Cullen, et al., "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science," *The Prison Journal* 91, no. 3 (2011), doi: 10.1177/0032885511415224, https://doi.org/10.1177%2F0032885511415224.

[19] Heather Warnken, "Testimony in Opposition: House Bill 481," University of Baltimore Center for Criminal Justice Reform, https://s3.documentcloud.org/documents/23617343/hb-481-written-testimony-opposition.pdf.

[20] Benjamin C. Hattem, "Carceral Trauma and Disability Law," *Stanford Law Review* 72, no. 4 (April 2020): 995, https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/04/Hattem-72-Stan.-L.-Rev.-995.pdf.

[21] Mark L. Hatzenbuehler et al, "The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High-Incarceration Neighborhoods," *American Journal of Public Health* 105, no. 1 (January 2015): 138-143, https://pubmed.ncbi.nlm.nih.gov/25393200/; Michael Massoglia and Brianna Remster, "Linkages Between Incarceration and Health," *Public Health Reports* 134, no. 1 suppl. (May 2019): 8S-14S, https://doi.org/10.1177/0033354919826563.

[22] Brittany Nieto and Mike McLively, "America at a Crossroads: Reimagining Federal Funding to End Community Violence," Giffords Law Center to Prevent Gun Violence, December 17, 2020, https://giffords.org/lawcenter/report/america-at-a-crossroads-reimagining-federal-funding-to-end-community-violence.

[23] *Id.* We note that during the March 7, 2023 hearing on the Proposed Amendments: Firearm Offenses, the Department of Justice claimed that PSN was a successful program. *See* United States Courts, "USSC Public Hearing - March 7 - Live Stream Day 1," March 7, 2023 ("We don't talk enough about Project Safe Neighborhoods. It's one of the best things that we do in the department.").

fell 38%, and gun homicides in the state *increased* nearly 29% in the same time period.[24] Additional imprisonment for gun possession offenses did not lead to a decrease in gun homicides.

Prioritizing prosecutions for illegal gun possession has not improved public safety and has irreparably altered innumerable lives. Increasingly severe punishments for individual illegal gun possession have contributed to more convictions and lengthier sentences for individuals who have not committed an act of violence.[25] This Commission's data demonstrates that in 2021, only 5.8% of federal firearms cases involved the use of a firearm in the commission of a violent or drug trafficking crime, while two-thirds (66.8%) involved illegal possession of a firearm.[26]

The enforcement of gun laws is not separate from the structural racism and implicit biases that infiltrate the criminal legal system. Jurisdictions that have studied the demographics of gun cases have made troubling observations—such as prosecutors in Minneapolis, Minnesota who determined that nearly every gross misdemeanor gun case brought by their office involved a young Black man—with Black men and youth representing 75% of total convictions for non-violent illegal gun possession offenses.[27] Alarmingly, Black males comprised less than six percent of the overall county population.[28] By this Commission's own data, in the first half of 2018, approximately 75% of gun charges prosecutions were against people of color.[29] In 2019, Black Americans accounted for more than half of all felon-in-possession-of-a-firearm defendants, while

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[24] David E. Olson, et al., "Sentences Imposed on Those Convicted of Felony Illegal Possession of a Firearm in Illinois: Examining the Characteristics and Trends in Sentences for Illegal Possession of a Firearm," Center for Criminal Justice Research, Policy & Practice, Loyola University Chicago, July 2021, https://www.luc.edu/media/lucedu/ccj/pdfs/firearmpossessionsentencinginillinois.pdf.

[25] Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration* (New York: Random House, 2019), 57-59; *See also* James Forman Jr., "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow," *New York University Law Review*, no. 87 (2012): 21.

[26] US Sentencing Commission, "Fiscal Year 2021 Overview of Federal Criminal Cases," April 2022, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf.

[27] Giffords Law Center to Prevent Gun Violence, "A Second Chance: The Case for Gun Diversion Programs," December 7, 2021, https://giffords.org/lawcenter/report/a-second-chance-the-case-for-gun-diversion-program (citing Interview with Mary Ellen Heng (City Attorney's Office of Minneapolis), January 16, 2020.

[28] *Id.*

[29] US Sentencing Commission, "Quick Facts, Felon in Possession of a Firearm Fiscal Year 2018," accessed March 12, 2023, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf.

only comprising 15% of the total US population.[30] Black men—less than 7% of the US population—accounted for 97.7% of the defendants.[31]

In light of the sobering statistics about the criminal legal system when it comes to firearms prosecutions and sentencing, Giffords supports alternatives to incarceration where the evidence indicates that such programs promote public safety, such as diversion programs.[32] We acknowledge that in November 2022, the Commission identified as one of its final priorities, a "multiyear study of court-sponsored diversion and alternatives-to-incarceration programs . . . including consideration of possible amendments to the [Guidelines] that may be appropriate."[33] Giffords would also support future revisions to the Guidelines that would embrace such programs. A 2018 study of prosecutor-led diversion programs funded by the National Institute of Justice included impact evaluations from five alternative sentencing programs, and concluded that participants in all five programs were less likely to be convicted and incarcerated, and in four of the five programs, participants had reduced rates of recidivism.[34] Similarly, the National Academies of Sciences has noted that "[c]ommunity-based programs and focused policing interventions in general . . . appear to be more effective than prosecutorial policies, including

[30] US Sentencing Commission, "Quick Facts, Felon in Possession of a Firearm Fiscal Year 2019," accessed March 12, 2023, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf; US Census Bureau, "ACS 5-Year Estimates Comparison Profiles," 2018, https://data.census.gov.

[31] Brittany Nieto and Mike McLively, "America at a Crossroads: Reimagining Federal Funding to End Community Violence," Giffords Law Center to Prevent Gun Violence, December 17, 2020, https://giffords.org/lawcenter/report/america-at-a-crossroads-reimagining-federal-funding-to-end-community-violence.

[32] While judicial discretion decisions can contribute to positive outcomes, we also recognize that sentences relying on prosecutorial and judicial discretion have previously lead to harsher sentences for Black defendants. US Sentencing Commission, "2012 Report to the Congress: Continuing Impact of United States v. Booker on Federal Sentencing," December 2012, https://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing, 108 (finding that prison sentences of Black men were nearly 20% longer than those of white men for similar crimes between 2007 and 2011). So-called "objective" criteria such as prior arrest history and conviction record "are often more heavily influenced by whether or not that person's poor, Black neighborhood is hyper-surveilled than it is illegal behavior. And that can be influenced by defendant characteristics such as race, gender identity, socioeconomics, and disability status, leading directly to the disparities documented across the continuum of arrests, prosecutions, convictions, and sentencing." Heather Warnken, "Testimony in Opposition: House Bill 481," University of Baltimore Center for Criminal Justice Reform, https://s3.documentcloud.org/documents/23617343/hb-481-written-testimony-opposition.pdf.

[33] US Sentencing Commission, "Alternatives to Incarceration and Diversion Programs," accessed March 13, 2023, https://www.ussc.gov/guidelines/primers/alternatives-incarceration-and-diversion-programs-0.

[34] Michael Rempel, et al., "NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness," Center for Court Innovation, April 2018, https://nij.ojp.gov/library/publications/nijs-multisite-evaluation-prosecutor-led-diversion-programs-strategies-impacts.

mandatory sentences."[35] Depriving judges of discretion for those convicted of certain crimes to participate in diversion programs could therefore come at the expense of safer communities.

The Bipartisan Safer Communities Act ("BSCA"), which Part A of Proposed Amendments: Firearms Offenses addresses, represented a step forward in federal gun safety policy and created new means of addressing gun violence in this country. However, depending on which approaches are adopted by the Commission to implement the BSCA, revisions to the Guidelines could further exacerbate the current racial disparities in federal sentences for firearms offenses, while failing to meaningfully contribute to preventing gun violence.

The BSCA created new avenues for the investigation and prosecution of straw purchasing and gun trafficking, which is an important development in federal law. Straw purchasing is the most common channel identified in gun trafficking investigations, and corrupt gun retailers account for a higher volume of guns diverted into the illegal market than any other single trafficking channel.[36] However, the BSCA does not step away from penalizing individuals for possessing firearms (regardless of whether those firearms are used in connection with a crime). As Giffords has previously noted, the straw purchase and trafficking penalty structure established by these BSCA provisions and the potential implications these harsh penalties could have on people prosecuted under them, particularly people of color, are concerning.[37]

We use this comment to provide commentary on the Issues for Comment in Parts A, B, and C of Proposed Amendments: Firearms Offenses. This comment is in addition to the Zimroth Center/NYU Law Working Group comment. As both comments acknowledge, sentencing guidelines have enormous implications for individuals and communities beyond the criminal legal system. In amending the Guidelines, it is critical for the Commission to consider the evidence outlined above that federal firearms sentences result in disparate outcomes, and that lengthy carceral sentences do not meaningfully contribute to preventing gun violence.

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[35] Alan I. Leshner, et al., "Priorities for Research to Reduce the Threat of Firearm-Related Violence," 7 Institute of Medicine and National Research Council of the National Academies, 2013, http://www.ncdsv.org/images/IOM-NRC_Priorities-for-Research-to-reduce-the-threat-of-firearm-related-violence_2013.pdf.

[36] Giffords Law Center to Prevent Gun Violence, "Trafficking and Straw Purchasing," accessed March 12, 2023, https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing.

[37] Giffords Law Center to Prevent Gun Violence, "Bipartisan Safer Communities Act," June 12, 2022, https://giffords.org/memo/senate-proposal-on-gun-violence-prevention-package.

(A) Bipartisan Safer Communities Act

Part A, Issue For Comment 2

The Commission sought comment on whether the changes to the Commentary in §2K2.1 set forth in Options 1 and 2 are adequate to address the amended definition of "misdemeanor crime of domestic violence" at 18 USC § 921(a)(33). We believe the amendments adequately address the amended definition of "misdemeanor crime of domestic violence." The BSCA partially addressed the so-called "dating partner" loophole by prohibiting a person convicted of a misdemeanor crime of domestic violence against a serious former or current dating partner from possessing firearms. This prohibition, unlike other prohibitions under 18 USC § 922(g)(9), expires if "[five] years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence" and the individual has no other misdemeanor crime of domestic violence convictions and no subsequent convictions for "a misdemeanor under Federal, State, Tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, or any other offense that would disqualify the person under section 922(g)."

The dangerous nexus between domestic violence and firearms is well-documented. A gun in the hands of an abuser makes a woman five times more likely to be killed.[38] Every 14 hours, a woman is shot and killed by a current or former intimate partner in the United States.[39] Women in the US are 21 times more likely to be killed with a gun than women in other high-income countries.[40] Although domestic violence disproportionately affects women, it touches people in every segment of our society. An abuser's access to a gun creates a danger that extends beyond the family, into the community and even to mass shootings. One study found that in more than 68% of mass shootings between 2014 and 2019, the perpetrator either killed at least one intimate partner or family member or had a history of domestic violence,[41] suggesting a connection between public firearm violence and intimate partner violence. Nonetheless, our laws have far too many loopholes—beyond the "dating partner" loophole—that enable domestic abusers to access weapons. For example, even though nearly half of all intimate partner homicides are committed by

[38] Giffords Law Center to Prevent Gun Violence, "Statistics," accessed March 12, 2023, https://giffords.org/lawcenter/gun-violence-statistics/#dv.
[39] Federal Bureau of Investigation, Uniform Crime Reporting Program: Supplementary Homicide Reports (SHR), 2014-2018.
[40] Erin Grinshteyn and David Hemenway, "Violent Death Rates in the US Compared to Those of the Other High-income Countries, 2015," *Preventive Medicine* 123, (2019): 20–26.
[41] Lisa B. Geller, et al.,"The role of domestic violence in fatal mass shootings in the United States, 2014-2019," *Injury Epidemiology* 8, no. 38 (May 31, 2021), https://injepijournal.biomedcentral.com/articles/10.1186/s40621-021-00330-0.

dating partners,[42] until the BSCA was enacted, federal law allowed convicted abusive dating partners to legally purchase and possess firearms.

While we will never discount this dangerous nexus, we also recognize that perpetrators of domestic violence and firearm violence are driven by similar factors, including: "low economic opportunity, unstable or insecure housing opportunity, insecure employment opportunity, [and] income inequality."[43] As noted above, the Commission's decisions regarding carceral sentences could inadvertently increase instability.[44] As a practical matter, the Commission is bound by Congress's determination that individuals convicted of a misdemeanor crime of domestic violence against a dating partner, without any prior or further convictions should be allowed access to firearms after five years. As such, the Commission must ensure the Guidelines uphold the intent of the BSCA, including establishing that these individuals shall not receive improper sentence enhancements.

In Options 1 and 2, the Commission's proposed amendments to Application Note 13, the Application of Subsection (b)(5), clarifies that an individual convicted of a misdemeanor crime of domestic violence who has met the factors in 18 USC § 921(a)(33) to make the conviction no longer firearm prohibitory is not an individual to whom transfer of a firearm would be illegal and should thus not result in the transferor receiving a sentence enhancement at §2K2.1(b)(5)(C).

We support this amendment and recommend referencing 18 USC § 921(a)(33). By referencing 921(a)(33), the Guidelines will not need to be amended if any changes are made to the provision, generally. Additionally, 18 USC § 921(a)(33) clearly describes when a misdemeanor crime of domestic violence is not relevant to the application of the enhancement at §2K2.1(b)(5)(C).

Part A, Issue for Comment 4

The Commission sought comment on whether it should change the current base offense levels of 14 and 20 applicable to the defendants under §2K2.1(a)(4)(B) and §2K2.1(a)(6)(B) pursuant to Option 2. As the Zimroth Center/ NYU Law Working Group comment Giffords signed onto stated, option 1 is our preference for fulfilling Congress' intent to impose harsher penalties on straw purchasers and gun traffickers without exacerbating race disparities.

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[42] US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Homicide Trends in the United States, 1980-2008: Annual Rates for 2009 and 2010," November 2011, https://bjs.ojp.gov/content/pub/pdf/htus8008.pdf.

[43] Stu Vanairsdale, "Q&A with Dr. Shani Buggs of UC Davis' Violence Prevention Research Program," November-December 2022, https://www.sactownmag.com/shani-buggs-violence-prevention-research-program.

[44] Heather Warnken, "Testimony in Opposition: House Bill 481," University of Baltimore Center for Criminal Justice Reform, https://s3.documentcloud.org/documents/23617343/hb-481-written-testimony-opposition.pdf.

The Commission was created to "reduce sentencing disparities and promote…proportionality in sentencing."[45] Option 2's focus on increasing base offense levels would contribute to mass incarceration and the criminal legal system's negative impacts on communities of color, exacerbating race disparities in sentencing and the criminal legal system. Federal law enforcement's main method for fighting gun violence has been to prosecute individuals found illegally possessing guns, which has a disproportionate negative effect on communities of color. In 2021, this Commission reported that over half of the people sentenced under §2K2.1, for unlawful receipt, possession, or transportation of firearms, were Black; nearly three-quarters were Black or Hispanic.[46] Black and Brown communities are suffering at the hands of this country's criminal legal system.

Research tells us that longer sentences neither reduce nor deter crime nor reduce recidivism. "Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes."[47] Data has also shown that the "tough on crime" mentality does not actually reduce crime or enhance public safety. In fact, as discussed above, researchers have demonstrated that incarceration can have a null or increased criminal effect on future behavior.[48]

Giffords has previously recommended that "prosecutors around the country implement diversion programs, including for certain individuals facing nonviolent firearm-related charges."[49] As such, instead of increasing base offense levels in §2K2.1, the Commission should permit sentencing judges to encourage the use of alternatives to incarceration, such as diversion programs, when appropriate by providing base offense levels that encourage the use of these alternatives. Early data on diversion programs that provide an alternative to incarceration, including by providing an opportunity to stay out of prison and have their conviction dismissed and sealed, suggest that diversion may significantly reduce recidivism and, in turn, enhance public safety while reducing the staggering costs of the criminal legal system.[50] The Commision should also encourage the use of other alternatives, including deferred prosecution agreements and probation.

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[45] United States Sentencing Commission, https://www.ussc.gov.

[46] United States Sentencing Commission, "Fiscal Year 2021: Overview of Federal Criminal Cases," April 2022, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf.

[47] US Department of Justice, Office of Justice Programs, National Institute of Justice, "Five Things About Deterrence," May 2016, https://www.ojp.gov/pdffiles1/nij/247350.pdf.

[48] Daniel S. Nagin, et al., "Imprisonment and Reoffending," *Crime and Justice* 38 (2009), https://www.journals.uchicago.edu/doi/abs/10.1086/599202.

[49] Giffords Law Center to Prevent Gun Violence, "A Second Chance: The Case for Gun Diversion Programs," December 7, 2021, https://giffords.org/lawcenter/report/a-second-chance-the-case-for-gun-diversion-programs.

[50] *See id.*

Part A, Issue for Comment 7

The Commission sought comment on the Proposed Amendment that would provide a new [2][3][4] level enhancement in §2K2.1 based on the criminal affiliations of the defendant. While we disagree with the BSCA's directive to provide an enhancement for criminal affiliation, we recommend that the Commission, in fulfilling its obligation to comply with the directive, consider the whole individual, including risk factors that led to their gang affiliation as well as culpability. The Commission should also apply a "cap," not allowing §2K2.1(b)(9) in Option 1 to be cumulative with other enhancements.

Many individuals are groomed for gang-affiliation from a young age, whether by a parent, sibling, other family member, or friend. An individual's environment plays a huge role in the decisions they make and should be considered and addressed when assessing and assigning culpability. Specifically, we recommend the Guidelines consider the presence of risk factors that may have led to gang-affiliation and the specific offense.[51]

As suggested above, gang-affiliation does not occur in a vacuum. When law enforcement is not trusted to protect and serve a community's interests fairly and effectively, cycles of community violence and retaliation take root.[52] These cycles of violence claim numerous lives and impose physical and invisible wounds on even more people.

Young people in impacted neighborhoods often suffer devastating and traumatic effects from growing up in a climate where life is precarious and they experience chronic exposure to shootings, bloody injuries, and death.[53] Living every day in fear takes a terrible toll.[54] More than half of young people exposed to violence suffer some form of PTSD,[55] and experts at the National Institute of Justice have noted that "youth living in inner cities show a higher prevalence of post-traumatic stress disorder than soldiers" in our wartime military.[56] Young people who are exposed

[51] youth.gov, "Risk and Protective Factors, last accessed March 14, 2023, https://youth.gov/youth-topics/preventing-gang-involvement/risk-and-protective-factors.
[52] *See* Giffords Law Center to Prevent Gun Violence, "In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence," September 9, 2021, https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/.
[53] *See* Aditi Vasan et al., "Association of Neighborhood Gun Violence WIth Mental Health-Related Pediatric Emergency Department Utilization," *JAMA Pediatrics* 175, no. 12 (2021):1244-2151.
[54] *See* Thomas Abt, *Bleeding Out: The Devastating Consequences of Urban Violence–and a Bold New Plan for Peace in the Streets*, (New York: Basic Books, 2019), 21.
[55] *Id*. at 22.
[56] "Inner-City Oakland Youth Suffering from Post-Traumatic Stress Disorder," *CBS SF Bay Area*, May 16, 2014, https://sanfrancisco.cbslocal.com/2014/05/16/hood-disease-inner-city-oakland-youth-suffering-from-post-traumatic-stress-disorder-ptsd-crime-violence-shooting-homicide-murder/.

to violence can become hypervigilant about their surroundings and perceived threats, and many exhibit severe PTSD symptoms such as disturbed sleep, chronic illness, fatalistic thinking, hopelessness, anger, impulsivity, and feelings of powerlessness.[57] And, youth of color are disproportionately impacted, with one study finding that 56% and 49% of Black and Latinx[58] youth, respectively, lived less than a mile away from a gun homicide.[59] This proximity and exposure leads to and exacerbates mental health problems like elevated levels of psychological distress, depression, and suicidal ideation.[60]

A number of these young people choose to battle feelings of defenselessness or powerlessness by joining informal cliques of other young people, usually young men. These groups offer the perception of safety in numbers and the promise of pursuing vigilante justice on group members' behalf.[61] People who have been victims of or witnesses to violence are particularly likely to join these groups.[62]

There is a persistent myth that most "inner city" shootings are perpetrated by large, highly organized, even transnational criminal gangs involved in vicious turf wars around illegal drug markets.[63] In reality, "most gangs in the United States are small, informal groups that have limited capacity for highly organized crime."[64] It is often believed that people affiliate with these groups

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[57] Jennifer Lynn-Whaley and Josh Sugarmann, "The Relationship Between Community Violence and Trauma," Violence Policy Center, July 2017, http://vpc.org/studies/trauma17.pdf; Lois Beckett, "Living in a Violent Neighborhood Is As Likely to Give You PTSD As Going to War," *ProPublica*, February 3, 2014, https://www.propublica.org/article/the-ptsd-crisis-thats-being-ignored-americans-wounded-in-their-own-neighbor.

[58] "Latinx" is the term used by the study's authors.

[59] Nicole Kravitz-Wirtz et al., "Inequities in Community Exposure to Deadly Gun Violence by Race/Ethnicity, Poverty, and Neighborhood Disadvantage among youth in Large US Cities," *Journal of Urban Health* 99, (2022): 610–625, https://doi.org/10.1007/s11524-022-00656-0.

[60] Melissa E. Smith et al., "The impact of exposure to gun violence fatality on mental health outcomes in four urban U.S. settings," *Social Science & Medicine* 246, (2020):112587, doi: 10.1016/j.socscimed.2019.112587.

[61] Lynn-Whaley and Josh Sugarmann, "The Relationship Between Community Violence and Trauma," Violence Policy Center, https://vpc.org/studies/trauma17.pdf; Lois Beckett, "Living in a Violent Neighborhood Is As Likely to Give You PTSD As Going to War," ProPublica, February 3, 2014, https://www.propublica.org/article/the-ptsd-crisis-thats-being-ignored-americans-wounded-in-their-own-neighbor.

[62] *See, e.g.*, US Department of Justice, Office of Justice Programs, "Evidence Integration: Gangs," last accessed March 12, 2023, https://ojp.gov/programs/gangs.htm (noting that commonly identified risk factors for "gang" membership include violent victimization, perceived lack of safety in school, and perceived lack of safety in the community); Robert Apel and John D. Burrow, "Adolescent Victimization and Violent Self-Help," *Youth Violence & Juvenile Justice*, 9, no. 2 (August 2010): 112–133, https://journals.sagepub.com/doi/abs/10.1177/1541204010376939; Dana Peterson, et al., "Gang Membership and Violent Victimization," *Justice Quarterly*, 21, no. 4 (December 2004), http://www.antoniocasella.eu/restorative/Peterson_2004.pdf.

[63] *See* Thomas Abt, *Bleeding Out: The Devastating Consequences of Urban Violence–and a Bold New Plan for Peace in the Streets*, (New York: Basic Books, 2019), 145–146.

[64] *See id*. at 145.

because they glorify criminality or violence. But in communities that suffer from rampant exposure to violence, some desperate young people join these groups because they are seeking protection from violence, not running toward it.[65]

In communities where most shootings go unreported and unaddressed, these groups offer the perception of safety and accountability; a research review published by the US Office of Juvenile Justice and Delinquency Prevention notes that "youth most commonly join gangs for the safety they believe the gang provides."[66] These groups are in many ways perceived to be a substitute for law enforcement and the criminal legal system's failures to deliver justice or safety.[67]

Gang-affiliation is not simple and should not be assessed as such. Any enhancement recommended in the Guidelines should be assessed sparingly and increase the offense level minimally. Further, any enhancement provided under this provision should be capped, requiring a judge to provide a written explanation if they choose to exceed the level enhancement. Additionally, specific offense characteristics level reductions in §2K2.1(b)(9) of Option 1 should not be tied to level enhancements under §2K2.1(b)(5). Instead the (b)(9) level reductions should apply more broadly to anyone convicted under the relevant statutes. By limiting the reductions to only those that "receive[] an enhancement under subsection (b)(5)" the proposed amendments minimize the BSCA's intent to consider a defendant's unique circumstances, such as being in an abusive relationship or being coerced into purchasing a firearm. It also minimizes the impact of the reductions because they will be countered by the enhancements in (b)(5).

(B) Firearms Not Marked with Serial Number ("Ghost Guns")

Part B, Issue for Comment 1

The Commission sought comment on whether it should further revise the enhancement at §2K2.1(b)(4), which the Proposed Amendment has amended to address firearms that are not marked with a serial number, also known as "ghost guns."[68] Specifically, the Commission is

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[65] *Id.* at150.

[66] James C. Howell, "Gang Prevention: An Overview of Research and Programs," US Department of Justice Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, December 2010, https://www.ncjrs.gov/pdffiles1/ojjdp/231116.pdf.

[67] *See id*. at 144.

[68] Ghost guns are untraceable, "do-it-yourself" firearms manufactured in the home. These firearms can be assembled by unlicensed persons, obtained without a background check, lack serial numbers, are not subject to a record-keeping requirement, and are therefore untraceable by law enforcement if used in a crime. Ghost guns evade all the regulations that apply to the regulated firearms industry, and thus are an attractive option for people who would otherwise be unable to pass a background check and purchase a firearm. *See* Giffords Law Center to Prevent Gun Violence, "Ghost Guns," last accessed March 12, 2023, https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ghost-guns; Giffords Law Center to Prevent Gun Violence, "Ghost Guns: How Untraceable Firearms

considering whether to add a *mens rea* requirement that the defendant *knew, or had reason to believe*, that the firearm was stolen, had an altered or obliterated serial number, or was not otherwise marked with a serial number.

As we have recommended elsewhere in this comment, at sentencing, judges should have the opportunity to consider the whole individual and their circumstances. We therefore recommend the Commission include a *mens rea* requirement so that differently situated individuals are not treated identically under the Guidelines. Specifically, an individual who "knew" a firearm was stolen, had an altered or obliterated serial number, or was not otherwise marked with a serial number is not identically situated to an individual who had "reasonable cause to believe" a firearm was stolen, had an altered or obliterated serial number, or was not otherwise marked with a serial number. By adding a *mens rea* requirement, the guidelines can permit more holistic sentences.

We support the inclusion of ghost guns in the enhancement at §2K2.1(b)(4), the addition of a *mens rea* requirement, and encourage differing levels based on the defendant's *mens rea*.

(C) Issues for Comment on Further Revisions to §2K2.1

Part C, Issue for Comment 1

The Commission also sought comment on whether it should further revise §2K2.1 to address firearms offenses. Other than addressing the directive in the BSCA and ghost guns discussed above, we recommend against further revisions that would increase the offense level for any offense. Instead, we encourage the Commission to consider a different approach to sentencing policies and practices, as the Commission is already researching as one of its November 2022 priorities.[69] The Guidelines suggest incarceration as the answer to criminal activity when there are other options that not only reduce court backlogs and generate cost savings but also have positive long term impacts on individuals and communities.

Given the reality that the majority of violent crime in any given city is committed by a very small percentage of high-risk individuals, a more strategic approach to gun-related cases is needed, one that includes as many off ramps as possible for individuals who do not actually pose a threat to their communities.[70]

Threaten Public Safety," May 21, 2020, https://giffords.org/lawcenter/report/ghost-guns-how-untraceable-firearms-threaten-public-safety.

[69] US Sentencing Commission, "Alternatives to Incarceration and Diversion Programs," accessed March 13, 2023, https://www.ussc.gov/guidelines/primers/alternatives-incarceration-and-diversion-programs-0.

[70] *See* Giffords Law Center to Prevent Gun Violence, "A Second Chance: The Case for Gun Diversion Programs," December 7, 2021, https://giffords.org/lawcenter/report/a-second-chance-the-case-for-gun-diversion-programs.

Sentences for gun-related offenses are more often for possession than actual acts of violence. According to this Commission, in 2021 only 5.8% of federal firearms cases involved the use of a firearm in the commission of a violent or drug trafficking crime, while two-thirds (66.8%) involved illegal possession of a firearm, usually by someone who had been convicted of a prior felony.[71]

As described above, relying so heavily on incarceration can actually worsen public safety by exacerbating the conditions that drive violence,[72] and is "neither the most effective way to change people nor the most effective way to keep people safe."[73] There is strong evidence that incarceration is criminogenic, meaning that people exiting prison are actually more likely to reoffend because of the effects of prison.[74]

Recognizing that this is both a policy issue and a sentencing issue, we encourage the Commission to take no action to further amend the offense levels in §2K2.1 in a way that will increase an individual's length of incarceration and instead keep open sentencing judges' authority to recommend alternatives to incarceration by suggesting lower base offense levels where appropriate throughout §2K2.1.

Part C, Issue for Comment 2

The Commission sought comment on whether it should amend §2K2.1 to specifically address offenses that involved the burglary or robbery of a federal firearms licensee. We recommend the Commission not amend §2K2.1 to address these offenses.

Guideline §2K2.1(b)(1) already addresses a major difference between simple thefts, robberies, and burglaries: the quantity of firearms involved, providing increased level enhancements relative to

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[71] United States Sentencing Commission, "Fiscal Year 2021: Overview of Federal Criminal Cases," April 2022, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf.

[72] Daniel Kim, "Social determinants of health in relation to firearm-related homicides in the United States: A nationwide multilevel cross-sectional study," *PLOS Medicine* 16, no. 12 (December 17, 2019), https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002978#sec016.

[73] Danielle Sered,"Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration," Vera Institute of Justice, 2017, https://www.vera.org/downloads/publications/accounting-for-violence.pdf. *See also* Jeremy Travis, et al., "The Growth of Incarceration in the United States: Exploring Causes and Consequences," *National Academies Press*, 2014, https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1026&context=jj_pubs.

[74] David Roodman, "The Impacts of Incarceration on Crime," Open Philanthropy Project, September 25, 2017, http://dx.doi.org/10.2139/ssrn.3635864; Francis T. Cullen, et al., "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science," *The Prison Journal* 91, no. 3 (2011), https://doi.org/10.1177%2F0032885511415224.

the quantity of firearms involved in the offense.[75] The Guidelines suggest that an offense that involves three to seven firearms receive a 2-level enhancement, 8 to 24 firearms receive a 4-level enhancement, 25 to 99 firearms receive a 6-level enhancement, 100 to 199 firearms receive a 8-level enhancement, and 200 or more firearms receive a 10-level enhancement.

Additionally, while the number of FFL burglaries "directly contributes to the rise in violent gun crime," and "are a significant source of illegally trafficked firearms,"[76] it is a mistake to solely focus on the burglar, providing significant sentence enhancements. If the sole focus is burglars, the system is overlooking the industry's culpability. Gun thefts are preventable, yet thefts from gun stores are a major source of guns used in crime.[77] For years, the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) has urged firearm retailers to strengthen security measures in their stores in order to prevent these thefts. The gun industry has insisted that it will implement the necessary security measures voluntarily. Nevertheless, burglaries and robberies at gun stores continue to remain high, with many dealers failing to utilize security measures and heed ATF's warnings; in order to reduce these problems and keep communities safe, laws governing these businesses must be strengthened.

As we have stated throughout this comment, our criminal legal system is racially and ethnically disparate; people of color are disproportionately convicted of and sentenced for myriad crimes. As such, continuing to add on enhancements will not only result in the continued mass incarceration of people of color and the suffering of families and communities impacted by this inequitable system,[78] creating a vicious cycle with the criminal legal system, but it ignores the research that explains long sentences are ineffective at deterring crime and reducing recidivism.[79] As we have

[75] In response to the Commission's Notice of Proposed 2022-23 Priorities, Deputy Attorney General Lisa Monaco recommended enhancing penalties for burglaries and robberies. Among the reasons for this enhancement, the Deputy Attorney General explained that burglaries and robberies often involve the theft of multiple weapons. *See* Deputy Attorney General Lisa Monaco, Public Comment on United States Sentencing Commission Proposed Priorities 2022-2023, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj-dag.pdf.
[76] US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Congressional Budget Submission: Fiscal Year 2018, May 2017, https://www.justice.gov/file/968946/download.
[77] Pierre Thomas, et al., "More than 500 Gun Store Burglaries Expected This Year, Says ATF," November 30, 2016, *ABC News*, https://abcnews.go.com/US/abc-exclusive-500-gun-store-burglaries-expected-year/story?id=43861292.
[78] Michael Massoglia, et al., "Linkages Between Incarceration and Health," *Public Health Reports* 134, no 1 suppl (May 2019): 8S-14S, https://doi.org/10.1177/0033354919826563; Mark L Hatzenbuehler, "The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High-Incarceration Neighborhoods," *American Journal of Public Health* 105, no. 1 (January 2015): 138-143, https://doi.org/10.2105/AJPH.2014.302184.
[79] US Department of Justice, Office of Justice Programs, National Institute of Justice, "Five Things About Deterrence," May 2016, https://www.ojp.gov/pdffiles1/nij/247350.pdf.

noted throughout this Comment, research tells us that in some cases incarceration may increase crime.[80]

If the Commission decides to amend §2K2.1 to specifically address offenses that involve the burglary or robbery of a federal firearms licensee, we recommend that the enhancement be an alternative to the enhancement at §2K2.1(b)(4)(A). In addition, we recommend the Commission include a level reduction that is based on mitigating factors, including the defendant's role and culpability. Nearly three-quarters of firearm offenders in fiscal year 2021 were Black or Hispanic;[81] creating a level reduction would help "reduce sentencing disparities and promote transparency and proportionality in sentencing."

Part C, Issue for Comment 3

The Commission also sought comment on whether it should add other types of prior convictions as the basis for applying base offense levels or specific offense characteristics, and if so, what base offense level or offense level increase the Commission should provide for any such prior conviction. Currently the Guidelines consider prior felony convictions of a crime of violence or controlled substance offense for applying base offense levels or specific offense characteristics.

Some communities, particularly communities of color, consistently experience a much larger police presence than others; as a result, individuals in those communities face a much higher chance of being caught committing a crime than people in other communities. We submit for the Commission's consideration that at present, when prior convictions are considered, the criminal legal system risks multiplying injustice by giving more weight to an individual's prior conduct that may only have been noticed by the government because they had the misfortune of being born into an over-policed community.

A person's race or ethnicity does not make that person more or less likely to participate in criminalized activity. However, in 2021, Black and Hispanic men and women made up approximately 14%[82] and 19%[83] of the country's population, but at year end 2021, made up nearly 31% and 32% of sentenced prisoners under the jurisdiction of the federal correctional authorities,

[80] Daniel S. Nagin, et al., "Imprisonment and Reoffending," *Crime and Justice* 38 (2009), https://www.journals.uchicago.edu/doi/abs/10.1086/599202.
[81] US Sentencing Commission, "Fiscal Year 2021 Overview of Federal Criminal Cases," April 2022, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf.
[82] US Census Bureau, "DP05 ACS DEMOGRAPHIC AND HOUSING ESTIMATES," 2021: ACS 1-Year Estimates Data Profiles, https://data.census.gov/table?t=Populations+and+People&y=2021&tid=ACSDP1Y2021.DP05.
[83] *Id*.

respectively.[84] This is in comparison to white men and women who made up approximately 58% of the country's population[85] but 22% of sentenced prisoners under the jurisdiction of the federal correctional authorities.[86] As a result, when prior convictions are considered in determining a base offense level or specific offense characteristics, racial and ethnic disparities in the criminal legal system are perpetuated. Consequently, the Commission should not add other types of prior convictions as the basis for applying base offense levels or specific offense characteristics.

Part C, Issue for Comment 4

The Commission sought comment on whether it should amend the definition of "firearms" in Application Notes 1 of §2K2.1 to include devices which are "firearms" under 26 USC § 5845(a) but not under 18 USC § 921(a)(3), such as those "designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun." We recommend that the Commission amend the definition of "firearms" to include "firearms" under 26 USC § 5845(a). The Guidelines take into account the type of firearm used in an offense when assessing a base offense level. The base offense level for offenses involving firearms described in 26 USC § 5845(a) are greater than the level for the same offense involving a firearm described in 18 USC § 921(a)(3). In doing this, the Commission has correctly acknowledged the dangerousness and deadliness of 26 USC § 5845(a) firearms.

The Commission's question here, whether to amend the definition of "firearms" in Application Notes 1 of §2K2.1 to include devices which are "firearms" under 26 USC § 5845(a), acknowledges the Guideline's oversight. While 26 USC § 5845(a) firearms are distinguished in the base offense level at §2K2.1(a), they are not in the specific offense characteristics at §2K2.1(b). Specifically, because "firearms" are defined in Application Notes 1 as having the meaning given the term in 18 USC § 921(a)(3), it is not immediately clear that any of the specific offense characteristics that reference "firearm" would apply where the offense involved a 26 USC § 5845(a) firearm.

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[84] Based on the calculations made by Giffords Law Center staff of the percent of Black and Hispanic sentenced prisoners under the jurisdiction of federal correctional authorities, December 31, 2021. E. Ann Carson, "Prisoners in 2021 - Statistical Tables," US Department of Justice, Office of Justice Programs, December 2022, https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf.

[85] US Census Bureau, "DP05 ACS DEMOGRAPHIC AND HOUSING ESTIMATES," 2021: ACS 1-Year Estimates Data Profiles, https://data.census.gov/table?t=Populations+and+People&y=2021&tid=ACSDP1Y2021.DP05.

[86] Based on the calculations made by Giffords Law Center staff of the percent of White sentenced prisoners under the jurisdiction of federal correctional authorities, December 31, 2021. E. Ann Carson, "Prisoners in 2021 - Statistical Tables," US Department of Justice, Office of Justice Programs, December 2022, https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf.

For example, §2K2.1(b)(1) suggests a two-level enhancement if the offense involved three to seven "firearms". According to the definition of "firearms" in Application Notes 1, one could argue that the two-level enhancement would only apply if the firearms involved in the offense were 18 USC § 921(a)(3) firearms. Thus, if the offense involved four 26 USC § 5845(a) firearms and no 18 USC § 921(a)(3) firearms, the two-level enhancement would not apply because none of the four firearms are 18 USC § 921(a)(3) firearms.

As such, we recommend the definition of "firearms" in Application Notes 1 of §2K2.1 should include devices which are "firearms" under 26 USC § 5845(a) but not under 18 USC § 921(a)(3).

Conclusion

The United States Sentencing Guidelines have enormous implications for individuals and communities. As the Commission amends the Guidelines, it is critical for the Commission to consider the evidence that federal firearms sentences result in disparate outcomes and have disparate impacts on people of color. Further, long carceral sentences do not meaningfully contribute to preventing gun violence but, in fact, may increase crime.

The BSCA issued the Commission a directive to amend its Guidelines to ensure individuals sentenced under the new straw purchasing and trafficking statutes are subject to increased penalties in comparison to those currently provided, however, this directive does not require excessive sentences. We encourage the Commission to consider the latitude they have in formulating the Guidelines and the individuals who will be impacted.

We thank you for the opportunity to provide comment on the Commission's Proposed 2022-2023 Amendments to the United States Sentencing Guidelines.

Sincerely,

Giffords Law Center to Prevent Gun Violence

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Hidden Prison Horrors

Topics:

1. Compassionate Release

Comments:

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.
I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.
Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Submitted on: March 10, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

The Hinda Institute

Topics:

1. Compassionate Release

5. Crime Legislation

6. Categorical Approach and Other Career Offender Issues

10. Alternatives-to-Incarceration Programs

Comments:

Dear Sirs and Madams,

The Hinda Institute, which advocates for at-risk populations as a part of Chabad Lubavitch, recommends that Compassionate Release be expanded and that alternatives to incarceration - such as house arrest - also be utilized. Finally, the collateral consequences of convictions must be addressed, particularly for those on the sex offender registry. Reentry for this last category is made near impossible by the confluence of laws and restrictions, without sufficient distinction as to the risks involved.

Thank you.

Submitted on: March 9, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Humane Prison Hospice Project

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.
Sandra Fish/HumanePrisonHospice Project

Submitted on: March 2, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

International CURE

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Submitted on: March 2, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

INELDA

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

We support the proposed amendments to the compassionate release policy statement an especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

We also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering our views.

Respectfully,

Kris Kington-Barker
International End of Life Doula Association (INELDA)

Submitted on: March 11, 2023

March 13, 2023

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission One Columbus Circle, N.E.
Suite 2-500, South Lobby Washington, D.C. 20002-8002
150 West Flagler Street, Suite 1500 Miami, Florida 33130-1556

Re: Directly-Impacted Advocacy Community Comments on the Commission's February 2, 2023 Proposed Amendments to the Guidelines

Dear Judge Reeves:

The Formerly Incarcerated Persons (FIP) Working Group of the Justice Roundtable is writing for the first time to share our perspective on Proposed Amendments to the Sentencing Guidelines. Our community opposes the USSC's current proposals on both "the First Step Ac" and "Acquitted Conduct."

The Justice Roundtable was founded in 2003 by Nkechi Taifa at the Open Society Policy Center to bring together policy advocates across organizations to collaborate in areas of mutual interest. In 2018, in response to growing recognition of the importance of directly impacted voices, a special working group was formed to empower the voices of those with lived experience of mass incarceration in federal policy campaigns and the broader Justice Roundtable community.

Today, the Formerly Incarcerated Persons Working Group (FIPWG) continues to center the voices and leadership of those closest to the problem, in the belief that they are also often closest to the solution yet furthest from resources and opportunity.[1] As a community, we collectively represent centuries of experience in carceral settings. We know a concrete cage the size of a parking space is a poor tool to solve the underlying social and economic problems they are employed to address. We have witnessed firsthand the deep racial bias that our criminal legal system perpetuates. And we have experienced the viscerally dehumanizing effects of the American approach to "justice."

Our unifying belief is in equal access to opportunity. Too often involvement in the legal system exacerbates the marginalizations and obstacles to success that predominantly drive illegal conduct in the first place. We work collaboratively as a community of directly-impacted persons toward an approach to harm that focuses on restoration and reintegration. We believe that someone's future should be more important than their past, and that no one should be permanently defined by an historical conviction. Our community therefore further embraces a red line against policies that include "carveouts" or exclusions based on an historical crime of conviction. We know from our lived experienced that society is better served when everyone is allowed to return home and reintegrate into their communities after they have completed their sentences.

[1] Glenn E. Martin, a directly-impacted leader and founder of JustLeadershipUSA, deserves credit for mainstreaming this perspective and value in our community.

The proposed approach to both FSA and Acquitted Conduct falls far short of this vision of a more just society. Any policy that restricts access to ameliorative programming violates our community's commitment to equal access to opportunity for all. And continuing to punish people who have been acquitted of alleged conduct violates the fundamental premise of our legal system.

Response to USSC's Proposed Amendment to Guidelines on the First Step Act

Context on Fifty Years of Mass Incarceration & Failed Policies Harming our Community

Our country is 50 years into mass incarceration and the failed "War on Drugs" — a war that continues to decimate communities, perpetuate racial disparities, and bloat our prison system; and do so with no discernible improvement to public safety. Throughout this time, laws passed were both capricious and overly harsh, and resulted in long sentences that did not make our communities safer or reduce recidivism rates. Instead, these laws disproportionately targeted and harmed Black and Brown communities. For example, White people have historically accounted for the majority of crack users in the United States, yet since the early 90s, Black Americans have been sent to prison for crack offenses almost seven times more often than their white counterparts. In addition, Black people are punished more severely for crack convictions than white people and are disproportionately given longer sentences for similar convictions. The result of these laws has led to the separation of Black families and the perpetuation of trauma within communities that continues to this day.

Overview of The First Step Act (FSA)

On December 21, 2018, President Trump signed into law the bipartisan First Step Act (FSA) of 2018. The FSA represents a step toward a long overdue departure from our overly punitive approach and woefully lacking correctional system. The Act's goal is to develop an intentional programmatic structure that improves criminal justice outcomes, while reducing the size of the federal prison population and enhancing public safety. It seeks to achieve the underlying goals by instituting programs that would reduce recidivism risk, incentivize individual development and success, improve access to family, introduce sentencing reforms and institute Bureau of Prison (BOP) oversight of programmatic mandates of FSA.

Reduce Recidivism Risk: The Attorney General to develop a risk and needs assessment system to be used by Bureau of Prisons (BOP) to assess the recidivism risk and needs of all persons incarcerated and to engage individuals in recidivism reductions programs to address ones need in an effort to reduce this risk.

FSA requires BOP to assist persons incarcerated in applying for federal and state benefits and obtain identification, which are to include a social security card, driver's license or other official photo identification, and birth certificate.
The FSA also expands the Second Chance Act. The BOP is required to develop guidance for wardens and community-based facilities to enter into recidivism reduction partnerships with nonprofit and faith-based and community-based organizations to deliver recidivism reduction programming.

Incentivized Development and Success: By participating in FSA programs persons incarcerated can earn up to 54 days of good time credit for every year of their imposed sentence rather than for every year of their sentence served. Eligible participants can earn time credits towards pre-release custody.

Offenses that would deem incarcerated persons ineligible to earn time credits are generally categorized as violent, or involve terrorism, espionage, human trafficking, sex and sexual exploitation; additionally excluded offenses are a repeat felon in possession of firearm, or high-level drug offenses.

Improve Family Access to Persons Incarcerated: The Act requires the BOP to house incarcerated persons in facilities as close to their primary residence as possible, and to the extent practicable, within 500 driving miles. BOP makes designation decisions based on, but not limited to, the following factors:

1. bed space availability
2. the incarcerated person's security designation
   the incarcerated person's programmatic needs,
3. the incarcerated person's mental and medical health needs
4. any request made by the incarcerated person related to faith-based needs,
5. recommendations of the sentencing court

BOP is also required, subject to these considerations and an incarcerated person's preference for staying at his/her current facility or being transferred, to transfer an incarcerated person to a facility closer to his/her primary residence even if the inmate is currently housed at a facility within 500 driving miles.

The FSA reauthorizes and modifies a pilot program that allows BOP to place certain elderly and terminally ill incarcerated persons in home confinement to serve the remainder of their sentences.

Sentencing Reforms: The FSA reforms drug sentences for those individuals who have prior offenses, make retroactive the provisions of the Fair Sentencing Act, and expand the safety valve for low level offenders

Modifies Mandatory Minimums for Drug Offenses: The FSA makes changes to mandatory minimum sentences for some drug traffickers with prior drug convictions by doing the following:

1. Increasing the threshold for prior convictions that count toward triggering higher mandatory minimums for repeat offenders,
2. Reducing the 20-year mandatory minimum to a 15-year mandatory minimum - applicable where the offender has one prior qualifying conviction
3. Reducing a life-in-prison mandatory minimum to a 25-year mandatory minimum - applicable where the offender has two or more prior qualifying convictions.

Makes the Fair Sentencing Act Retroactive: The FSA made the provisions of the Fair Sentencing Act of 2010 - which reduced the sentencing disparity between crack cocaine and powder cocaine for 100:1 to 18:1 - retroactive so that incarcerated persons who received longer sentences for possession of crack cocaine before the enactment of the Fair Sentencing Act can submit a petition in federal court to have their sentences reduced.

Expanding the Safety Valve: The FSA also expands the safety valve provision, to allow judges to sentence low-level, nonviolent persons convicted of drug offenses with minor criminal histories to less than the required mandatory minimum.

Programmatic Oversight: The FSA requires the submission of reports to review the BOP's implementation of the law and assess the effects of the new risk and needs assessment system. The Attorney General consults with an Independent Review Committee (IRC). The duties the IRC performs, in assisting the Attorney General, include but are not limited to:

1. Conducting a review of the existing prisoner risk and needs assessment systems in operation on the date of enactment of this Act;
2. Developing recommendations regarding evidence-based recidivism reduction programs and productive activities;
3. Conducting research and data analysis on: evidence-based recidivism reduction programs relating to the use of prisoner risk and needs assessment tools;
4. Advising on the most effective and efficient uses of such programs; and which evidence-based recidivism reduction programs are the most effective at reducing recidivism, and the type, amount, and intensity of programming that most effectively reduces the risk of recidivism;
5. Reviewing and validating the risk and needs assessment system.

Two years after the enactment of the First Step Act, and each year thereafter for the next five years, the DOJ will submit reports to Congress on various aspects of the FSA. Within two years of BOP implementing the system, and every two years thereafter, the Government Accountability Office will audit how the new risk and needs assessment system is being used at BOP facilities.

The Formerly Incarcerated Persons Working Group's Position on Proposed Changes to the First Step Act's Safety Valve Provision

While the focus of our response to the USSC proposed changes to the FSA will be directed at the modifications to the expansion of the safety valve, the above FSA overview is offered to give one a sense of the spirit and intentions of the FSA. Prior to the FSA, only those with one criminal history point or below were eligible for the safety valve relief. As a result of the FSA relief is available to those who do not have the following:

1. more than four (4) criminal history points, according to the sentencing guidelines;
2. a prior three (3) point offense, according to the sentencing guidelines; "*and"*
3. a prior two (2) point violent offense, according to the sentencing guidelines

It is our understanding that there is a conflict related to the criminal history criteria for FSA eligibility, and the use of *"and"* as a conjunction versus a disjunction. The Federal Defenders and The Department of Justice have petitioned the courts for clarification. While it has always been our desire for the maximum number of incarcerated persons to be eligible for FSA programs - for it will improve family reunification, reduce recidivism risks, and improve public safety - *we think it is important for the USSC to refrain from making substantive changes and allow the judicial branch (courts) to weigh-in with a decision. It is important for the incarcerated community and their families to have a clear understanding of eligibility criteria for the FSA. Additionally we think a decision by the USSC to make substantive changes may be used to influence the court's decision.*

Our Position has Always been Clear, Congress' Intentions have Always been Clear

As advocates who are formerly incarcerated it was always our intention as negotiators of the FSA to be inclusive, having broad reaching impact — and when Congress ultimately passed the Act it was with that understanding as well. Our friends who are currently incarcerated are hungry to participate in FSA programs, and they desire growth and want success, and any policy that would restrict or deny eligibility is inconsistent with our wishes and incongruent with Congress' will. Although

it was widely understood at the time that the FSA would not completely reverse the impact of mass incarceration, we knew it would be a gracious step in the right direction and an acknowledgement of a need to change the course of our criminal justice system.

It is important to note that it is five (5) years since the First Step Act was passed into law and we have yet to see it fully implemented. Incarcerated persons have expressed grave concerns regarding the lack of access to FSA eligible programs, the inexact formula for calculating earned time credits, and BOP staff have indicated they have no guidance on how to proceed with full implementation, Additionally there are concerns regarding the algorithm as a racially biased tool for determining recidivism risk.

The FSA was envisioned as a law that would offer tangible hope and an attainable path for growth and reconnection to family and community. The sentencing commission's proposal to exclude persons who were intended to be eligible for the safety valve is in opposition with our intentions, and we surmise is in contradiction with the spirit of Congress' approval of the FSA. It is our fear that as we look at the prospects of the proposed changes being enacted — coupled with the current challenges with FSA implementation — will lead to confusion for incarcerated persons who might be eligible, set back progress even more, threaten future gains, and erode faith in the FSA's goals.

Our community strongly urges the USSC to make no substantive changes to the First Step Act eligibility criteria that might reduce the number of people who have access to this opportunity for a better life.

Response to USSC's Proposed Amendment to Guidelines on Acquitted Conduct

Like most people unfamiliar with the details of the law, Keeda Haynes thought that being acquitted of an offense meant that the prosecution had failed to prove its case beyond a reasonable doubt, thereby preventing any punishment to stem from the acquittal. However, when she was found guilty of aiding and abetting a conspiracy but acquitted of the actual conspiracy as well as the underlying objective of the conspiracy, she learned that "acquitted" really carried no meaning when she could still be held accountable for the offense(s) that she had been acquitted of at sentencing. Allowing someone's sentence to be enhanced, sometimes drastically, is counterintuitive to justice and fairness which are at the very core of the criminal legal system.

The use of acquitted conduct is a longstanding principle that has been permitted even before the adoption of the United States Sentencing Guidelines ("the Guidelines"). Since the promulgation of the Guidelines, the Commission has not directly addressed acquitted conduct, but has instead acquiesced to the inference of the courts that the use of acquitted conduct is permissible under other Guideline principles. Throughout the years, however, several judges, scholars, political leaders, various criminal justice organizations, lawyers and even some current Justices have called into question the legality of the use of acquitted conduct to enhance an individual's sentence. Then and now, that criticism focused on (1) the use of acquitted conduct violates the right to a jury outlined in the 6th Amendment; and (2) the preponderance of the evidence standard violates the DUE Process Clause, when proof beyond a reasonable doubt is the standard when some is faced with having their liberty taken away.

Additionally, the use of acquitted conduct creates racial disparities under the guidelines. With the over representation of Black individuals in the criminal legal system, they are more likely to have acquitted conduct used against them to enhance their sentence than white individuals.

Proposed Amendment 8 seeks to limit the definition of relevant conduct under 1B1.3 by adding a new subsection (c) generally limiting the use acquitted conduct by adding:

(c) ACQUITTED CONDUCT. -

(1) LIMITATION. – Acquitted conduct shall not be considered relevant conduct for the purpose of determining the guideline range unless such conduct- (A)
  (A) was admitted by the defendant during a guilty plea colloquy: or
  (B) was found by the trier of fact beyond a reasonable doubt; to establish, in whole or part, the instant offense of conviction.

(2) DEFINITION OF ACQUITTED CONDUCT.— For purposes of this guideline, "***acquitted conduct***" means conduct (*i.e.*, any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.
Under 6A1.3 – Resolution of Disputed Factors (Policy Statement)

….Acquitted conduct, however, generally shall not be considered relevant conduct for purposes of determining the guideline range. *See* subsection (c) of §1B1.3 (Relevant Conduct). Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).

This Justice Roundtable Working Group of Formerly Incarcerated Persons, appreciates the Commission for, once again, reassessing the use of acquitted conduct at sentencing. As directly impacted individuals this is an issue that is of utmost importance to us and our community. The addition of subsection (c), that limits the use of acquitted conduct is a step in the right direction, however, it is not something that this Working Group can support at this time.

While the situations are limited concerning when the use of acquitted conduct would violate an individual's right to a jury outlined in the Sixth Amendment, their rights are still violated the same. Allowing acquitted conduct to be used at sentencing in ***any*** situation to ***determine*** the guideline range will continue to undermine an individual's rights to a jury trial outlined in the Sixth Amendment which includes the finality of the previously adjudicated case. Furthermore, the preponderance of the evidence standard used to resolve disputes of acquitted conduct would essentially allow the prosecutor to gain leverage they would not have by circumventing the exclusionary rule and obtaining or threatening to obtain what is equivalent to a conviction, but without providing an individual the safeguards afforded in the actual Constitution.

Interestingly, sandwiched in the Commission's commentary about acquitted conduct, they cite numbers for individuals who pled guilty, the number of individuals that went to trial and the number of individuals who "were acquitted of at least one offense" for the fiscal year 2021. The Commission seems to be inferring that only 157 individuals (or 0.3 percent), would be impacted by limiting the use of acquitted conduct. However, based upon Proposed Amendment (c)(1) (A), "nearly all offenders (56,324; 98.3%)" could be impacted by this limited proposed amendment. Whether it is one person or one-thousand people impacted, a long-standing policy that infringes upon ***anyone's*** constitutional rights should not only be prioritized but also amended.

In its Issues for Comment, the Commission asks (1) Does the proposed amendment allow a court to consider such "overlapping" conduct for purposes of determining the guideline range? Should the Commission provide additional guidance to address this conduct; and (2) whether the limitation on the use of acquitted conduct is too broad or too narrow. If so, how?

As stated above, this Working Group does not support, nor do we believe that acquitted conduct should be used in any situation to ***determine*** the guideline range and that would include "overlapping conduct". Consistent with our position of the use of acquitted conduct, we believe that as it is currently written, it is too narrow. We believe that instead, it should read that acquitted conduct may ***not be*** considered in determining the guideline range ***under any circumstance.***

While nothing can be done for Keeda Haynes' sentence, the prioritization of Proposed Amendment 8, by the Commission will be a step in the right direction. However, to begin the process of restoring fairness and justice back into our criminal legal system, a broader amendment that does not allow acquitted conduct to be used in any situation to determine an individual's guideline range is what is needed for those who came behind Keeda and those who are still to come.

Last Prisoner Project Comment on United States Sentencing Commission's Proposed Amendment Relating to Criminal History and the Impact of Simple Marijuana Possession Offenses

The Last Prisoner Project ("LPP") submits the following comments to the United States Sentencing Commission ("the Commission" or "USSC") in response to the Commission's January 12, 2023 notice of proposed amendments. Specifically, LPP is addressing Part C of Amendment #7, which concerns the impact simple possession of marijuana offenses have on criminal histories.

LPP commends the Commission for taking steps to better reflect the current legal and policy landscape surrounding cannabis activity in the United States. According to the Commission's research, despite twenty-one states having legalized marijuana for adult use, simple possession of marijuana offenses still result in criminal history points being added to sentencing calculations. This policy leads to longer sentences for thousands of Americans each year.[1] As most jurisdictions, including the federal government, are moving away from criminalizing marijuana, LPP supports the Commission's proposal to exclude marijuana offenses from criminal history score sentencing calculations. Furthermore, given the growing momentum behind cannabis legalization, LPP urges the Commission to consider implementing additional reforms to federal sentencing guidelines for cannabis crimes.

Sentencing Guidelines Should Reflect Current Notions of Criminality

A seismic shift in attitudes and laws in the United States has thoroughly changed the way Americans approach the issue of marijuana production, sales, and consumption.[2] These shifting societal sentiments have resulted in a "green rush" that's seen countless individuals, corporations, and state governments

[1] *See* United States Sentencing Commission Report, *Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System* (2023), 216, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20230110_Marijuana-Possession.pdf [*hereinafter* "U.S.S.C."].

[2] *See* Ted Van Green, "Americans overwhelmingly say marijuana should be legal for medical or recreational use," *Pew Research Center* (Nov. 22, 2022), https://www.pewresearch.org/fact-tank/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/ (citing a Pew Research Center survey finding that "the overwhelming share of U.S. adults (88%) say either that marijuana should be legal for medical and recreational use by adults (59%) or that it should be legal for medical use only (30%) and just one-in-ten (10%) say marijuana use should not be legal").

profiting from activity that the federal government continues to consider criminal.[3]

The U.S. cannabis market was valued at $13.2 billion in 2022, and the industry is expected to expand at a compound annual growth rate of 14.2 percent through 2030.[4] The growth of the sector has proved to be a boon for governmental coffers, with California alone having netted $4.6 billion in cannabis tax revenues since 2018.[5] All the while, researchers estimate that up to 40,000 people continue to languish behind bars for having engaged in the type of cannabis-related conduct that much of the nation has seen fit to decriminalize, legalize, and tax.[6][7] In fact, there are still more arrests for marijuana possession every year than for all violent crimes combined.[8]

Despite marijuana remaining a Schedule I drug federally, states continue to legalize the substance. Today, only three states have no public cannabis access program.[9] Additionally, local, state and federal political leaders are increasingly taking concrete action to mitigate the harms caused by decades of cannabis prohibition. In October of 2022, President Biden pardoned all federal simple marijuana possession offenses and formally encouraged state governors to do the same.[10] Officials have followed suit, as evidenced by former Oregon Governor Kate Brown pardoning over 45,000 individuals with marijuana convictions and

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[3] Accordingly, it is no surprise that in the decade since Washington and Colorado first legalized cannabis for adult use, nationwide, 21 states plus the District of Columbia and Guam have legalized marijuana for recreational use. *See* National Conference of State Legislatures Report, *State Medical Cannabis Laws* (2022), https://www.ncsl.org/health/state-medical-cannabis-laws.

[4] *See* Grand View Research Report, *U.S. Cannabis Market Size, Share & Trends Analysis Report By End-use (Medical, Recreational, Industrial), By Source (marijuana, Hemp), By Derivative (CBD, THC), And Segment Forecasts, 2023 - 2030* (2022), https://www.marketresearch.com/Grand-View-Research-v4060/Cannabis-Size-Share-Trends-End-31892231/.

[5] *See* News Release, Yating Campbell, Manger, Office of Public Affairs , *California Department of Tax and Fee Administration Reports Cannabis Tax Revenues for the Third Quarter of 2022* (Nov. 18, 2022), https://www.cdtfa.ca.gov/news/22-12.htm.

[6] *See* Mark Mauer, *Can Marijuana reform end mass incarceration?*, The Hill (Aug. 12, 2016), https://thehill.com/blogs/pundits-blog/crime/291298-can-marijuana-reform-end-mass-incarceration/ (Marc Mauer, Executive Director of The Sentencing Project, stating "of the 1.5 million people in state or federal prisons, only about 40,000 are incarcerated for a marijuana offense. The vast majority of this group is behind the walls for selling, not using, the drug, often in large quantities"); Note that more granular data will require additional research. As noted above, prior cannabis offenses have been used to enhance subsequent convictions, which may have resulted in vastly increased terms of imprisonment. Thus, a close analysis of the offenses of conviction and predicate triggers will be necessary to see the extent to which cannabis criminalization is a factor in US state and federal incarceration.

[7] This is a dramatic change of course from the cannabis prohibition efforts that began in the early 20th century, first on the state level, and then in 1937 on the federal level with the enactment of the Marihuana Tax Act. Indeed, the stranglehold on use of cannabis was further tightened by the passage in 1970 of the Controlled Substances Act, the primary barrier to even conducting medical research due to cannabis being a "Schedule I" substance, the same category as heroin and a more restricted category than cocaine, a "Schedule II" substance under the Controlled Substances Act; *See* The Marihuana Tax Act of 1937, Pub. L. 75–238, 50 Stat. 551 (1937); *Also see* Controlled Substances Act, Pub. L. 91–513, title II, §101, 84 Stat. 1242 (1970).

[8] According to the FBI, 545,602 people were arrested for marijuana law violations in 2019– comprising almost half (40%) of all drug arrests in the U.S and 92% of arrests were for simple possession, not for selling or manufacturing. *See* Emily Earlenbaugh, *More People Were Arrested For Cannabis Last Year Than For All Violent Crimes Put Together, According To FBI Data,* Forbes (Oct. 6, 2020), https://www.forbes.com/sites/emilyearlenbaugh/2020/10/06/more-people-were-arrested-for-cannabis-last-year-than-.for-all-violent-crimes-put-together-according-to-fbi-data/?sh=277ab91122fc.

[9] *See supra* note 3.

[10] *See* Michael D. Shear and Zolan Kanno-Youngs, *Biden Pardons Thousands Convicted of Marijuana Possession Under Federal Law*, The New York Times (Oct. 6, 2022), https://www.nytimes.com/2022/10/06/us/politics/biden-marijuana-pardon.html

Connecticut Governor Ned Lamont announcing the automatic clearing of over 44,000 cannabis records.[11][12] City officials in places like New Orleans and Birmingham have also taken steps to pardon municipal marijuana possession offenses.[13] These actions signify that, beyond the shifting legal landscape for cannabis use, public perception of cannabis has also changed. The vast majority of Americans, including the sitting president, no longer feel that cannabis use is something that should continue to be criminalized.[14]

We have changed our approach to criminalizing cannabis, and thus, the US Sentencing Guidelines must be adjusted to reflect this current climate. Continuing to punish individuals for an activity that is legal for a majority of Americans does not comport with our country's shared values of justice and fairness. It is only fitting that *any* marijuana offense, regardless of what jurisdiction it occurred within, should be eliminated from consideration as a factor in calculating an individual's criminal history score for sentencing purposes.

Removing Marijuana Offenses from Criminal History Scores Will Result in More Equitable Sentencing

When one considers the well-documented racial disparities found in the enforcement of cannabis laws, [15]

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[11] *See* Whitney Woodworth, *Oregon Gov. Kate Brown pardons 45K for marijuana crimes* Statesman Journal (Nov. 21, 2022), *https://www.statesmanjournal.com/story/news/local/2022/11/21/oregon-gov-brown-pardons-45k-for-marijuana-crimes-convictions-erases-millions-dollars-fines/69668394007/*.

[12] *See* Press Release, Ned Lamont, Governor, State of Connecticut, *Governor Lamont Announces Thousands of Low-Level Cannabis Possession Convictions To Be Cleared for Connecticut Residents Other Record Erasures Under Connecticut's Clean Slate Law Expected To Begin in the Second Half of 2023* (Dec. 6, 2022), *https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2022/12-2022/Governor-Lamont-Announces-Thousands-of-Low-Level-Cannabis-Possession-Convictions-To-Be-Cleared*.

[13] WBRC Staff, *Birmingham Mayor Randall Woodfin to pardon some closed marijuana convictions*, WBRC News (Apr. 20, 2022), https://www.wbrc.com/2022/04/20/birmingham-mayor-randall-woodfin-pardon-some-closed-marijuana-convictions/; *Also see* Jessica Williams, *New Orleans just pardoned thousands of people who were cited for marijuana possession*, NOLA News (Aug. 5, 2021), https://www.nola.com/news/article_4a192e80-f61e-11eb-ba76-6f04bd87e3dd.html?mode=comments.

[14] A 2021 Gallup poll found that 68% of U.S. adults back legalizing cannabis. *See* Kyle Jaeger, *Strong Majority Of Americans Continues To Support Marijuana Legalization At Record High Level, New Gallup Poll Finds*, Marijuana Moment (Nov. 4, 2021), https://www.marijuanamoment.net/strong-majority-of-americans-continues-to-support-marijuana-legalization-at-record-high-level-new-gallup-poll-finds/.

[15] Racial disparities in the enforcement of cannabis-related crimes are well documented across several jurisdictions. *E.g.,* A 2022 Washington Post analysis of marijuana-related code citations in the state's court system concluded that, "while marijuana arrests overall dropped in the year since Virginia became the first state in the South to legalize, Black adults accounted for nearly 60 percent of marijuana-related cases before the state's general district and circuit courts, an analysis of marijuana-related code citations in the state's court system concluded… despite Black people accounting for about 20 percent of the state population."; Karina Elwood and John D. Harden, *After Virginia legalized pot, majority of defendants are still Black*, The Washington Post (Oct. 16, 2022), https://www.washingtonpost.com/dc-md-va/2022/10/16/virginia-marijuana-enforcement-disparities/. An analysis of Texas marijuana possession arrests from 2017 to 2019 found that, despite the fact Black people comprised only 12.9% of the state's population, they comprised 30.2% percent of all possession arrests. Texas NORML Report, Marijuana Possession Arrest Report 2017-2021 (2022), *https://www.texasnorml.org/wp-content/uploads/2022/04/TexasNORML-Marijuana-Possession-Arrest-Report-2017-2021.pdf.* Mark Hallum, *People of color made up 94% of marijuana arrests by NYPD in 2020, data and Legal Aid says*, AMNY News (Mar. 10, 2021), https://www.amny.com/news/people-of-color-made-up-94-of-marijuana-arrests-by-nypd-in-2020-data-and-legal-aid-says/ (an analysis of marijuana-related arrests in 2020 in New York City's five boroughs reported that people of color comprised 94 percent of those arrested). Corrinne Hess, *Report: Black Wisconsinites 4.3 Times More Likely To Be Convicted For Possession Of Marijuana: Milwaukee County Arrests For Possession Of Marijuana Cut In Half Since 2010*, Wisconsin Public Radio News (Mar. 22, 2021), https://www.wpr.org/report-black-wisconsinites-4-3-times-more-likely-be-convicted-possession-marijuana (a 2021 analysis conducted by the

it is clear that excluding marijuana offenses from criminal history scores will also result in a more equitable approach to sentencing.

In 2013, a report from the American Civil Liberties Union (the "ACLU") found that, despite virtually indistinguishable rates of cannabis consumption amongst racial groups, Black residents of the United States were 3.73 times as likely to be arrested for marijuana possession than their white counterparts.[16] A 2020 follow-up to the ACLU report found that, despite several states legalizing or decriminalizing cannabis, these racial disparities remained essentially unchanged. [17] Data indicates that these racial disparities appear to persist in conviction rates and sentencing.[18]

As sentencing guidelines are meant to be considered objectively and reflect an accurate prediction of an individual's criminality, removing marijuana convictions from individuals' criminal history scores would be a step toward creating a more equitable sentencing process. In addition, excluding marijuana convictions from consideration altogether is also in line with the current administration's position on the criminality of cannabis use. As President Biden stated, "sending people to prison for possessing marijuana has upended too many lives and incarcerated people for conduct that many states no longer prohibit."[19] If permanently enacted, this proposed amendment would help alleviate, or at the very least not further exacerbate, the racial disparities in our criminal legal system.

It's also worth noting that the availability of avenues through which individuals can clear marijuana

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Milwaukee County, Wisconsin District Attorney's Office reported that Black Wisconsinites were 4.3 times more likely than their white counterparts to be convicted for having marijuana. The worst disparities in Wisconsin are in Ozaukee County, where Black people are 34.9 times more likely to be arrested and Manitowoc County, where Black people are 29.9 times more likely to be arrested). Paul Schwartzman and John D. Harden, *D.C. legalized marijuana, but one thing didn't change: Almost everyone arrested on pot charges is Black*, Washington Post (Sep. 15, 2020), https://www.washingtonpost.com/local/legal-issues/dc-marijuana-arrest-legal/2020/09/15/65c20348-d01b-11ea-9038-af089b63ac21_story.html (according to a 2020 analysis by The Washington Post, 89% of the 3,631 marijuana arrests made in the District of Columbia between 2015 and 2019 were of Black people, even though they make up only 45%of the city's population). Southern Poverty Law Center Report, ALABAMA'S WAR ON MARIJUANA (2018), https://www.splcenter.org/20181018/alabamas-war-marijuana (an analysis of marijuana possession arrest data in Alabama for the years 2012-2016 reported, "Black people were approximately four times as likely as white people to be arrested for marijuana possession (both misdemeanors and felonies) in 2016 – and five times as likely to be arrested for felony possession. These racial disparities exist[ed] despite robust evidence that white and black people use marijuana at roughly the same rate"). Logan Perrone, *2021 Pennsylvania data shows widened racial disparities in marijuana possession arrests:*
Cumberland County saw the largest disparity, with 18.6 times as many Black people arrested for marijuana possession, FOX 43 News (Jul. 15, 2022), https://www.fox43.com/article/news/crime/2021-pennsylvania-data-shows-widened-racial-disparities-in-marijuana-possession-arrests-county/521-242d35d4-7600-4205-a222-ddecd10d170a (data compiled by the Pennsylvania State Police found that, in 2021, Black Pennsylvanians were arrested for marijuana possession at a rate five times higher than white Pennsylvanians in 2021).

[16] *See* American Civil Liberties Union Report, *The War on Marijuana in Black and White* (2013), https://www.aclu.org/wp-content/uploads/legal-documents/1114413-mj-report-rfs-rel1.pdf.

[17] *See* American Civil Liberties Union Report, *A Tale of Two Countries: Racially Targeted Assets in the Era of Marijuana Reform* (2020), https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform.

[18] A 2021 analysis of federal prison population estimated that 60% of approximately 3,016 individuals serving time in federal prison for marijuana offenses were of Hispanic descent, and over the past five years, 67% of individuals receiving prison sentences for marijuana offenses were Hispanic. Recidiviz Report, *Ending Federal Prison Sentences for Marijuana Offenses* (2021), https://assets.website-files.com/5e7ff048d75a9b3c5df52463/61abf4d36aefde8dec64a000_FED_SRA_final_12.2.21.pdf.

[19] *See* White House Briefing Room, *Statement from President Biden on Marijuana Reform* (2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/#:~:text=As%20I%20often%20said%20during,many%20states%20no%20longer%20prohibit.

possession offenses from their records is highly dependent on the jurisdiction in which the offense took place. As noted above, many executive offices (whether it be the president, state governors, or mayors) have pardoned all simple marijuana possession offenses. In some jurisdictions, like Oregon, that pardon results in automatic record clearance. However, in most jurisdictions, pardoned offenses still appear on an individual's criminal record, perpetuating barriers to employment, housing, and educational opportunities– to name just a few of the collateral consequences accompanying even a low-level marijuana conviction.

Although several states have established methods for individuals to expunge or remove previous marijuana-related convictions, disparities still exist among those who can access this relief successfully. Clearing one's record can be overwhelming, especially for individuals lacking a legal background, technical knowledge, or easy access to criminal records and court filings. Eligible individuals with language barriers or illiteracy also struggle to clear their records. Consequently, race and socioeconomic status often determine who can overcome these difficulties and access record clearing and expungement. Unfortunately, most eligible individuals do not complete these record-clearing processes.[20]

This disparity in accessing record-clearing mechanisms for marijuana offenses is yet another inequality present in the Commission's current guidelines, which include marijuana possession offenses in criminal history scores. It is unfair that those who, for the reasons named above, could not clear their records successfully are subject to harsher sentencing ranges.

A Marijuana Conviction is Not a Valid Predictor of Future Criminality.

The US Sentencing Guidelines Manual states that a "defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[21] The manual goes on to note that because "[r]epeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation," an individual's criminal history must be considered during the sentencing phase "[t]o protect the public from further crimes of the…defendant."[22]

In the case of a simple marijuana possession offense, however, there is little correlation between cannabis use and criminality. According to a national study of recidivism, individuals convicted of drug offenses have significantly lower recidivism rates than those convicted of violent or property-related crimes.[23] Additionally, a 2020 report authored by the Commission found that individuals convicted of marijuana-related offenses have one of the lowest rates of recidivism when compared to other drug offenses.[24] In one of the few available studies on recidivism rates for individuals where drug possession (as opposed to trafficking) was their primary offense, the rate of recidivism was incredibly low as compared to national

[20] *See* Prescott, J.J. and Starr, Sonja B., *Expungement of Criminal Convictions: An Empirical Study* (March 16, 2019). Harvard Law Review, Vol. 133, No. 8, pp. 2460-555 (June 2020), https://ssrn.com/abstract=3353620 or http://dx.doi.org/10.2139/ssrn.3353620 (finding that among those legally eligible for expungement, just 6.5% obtain it within five years of eligibility).

[21] U.S.S.C. Guidelines, Guidelines Manual, §4A1.1 (Nov. 2021).

[22] *Id.*

[23] *See* United States Department of Justice: Office of Justice Programs, Bureau of Justice Statistics Report, SPECIAL REPORT: 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014) 14 (2018), https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf. *See also* Lurigio, A. J., & Swartz, J. A. *The nexus between drugs and crime: Theory, research, and practice*. FEDERAL PROBATION, 63, 67-72. (1999) (stating that "criminal activity is neither an inevitable consequence of illicit drug use (apart from the illegal nature of drug use itself) nor a necessary or sufficient condition for criminal behavior… the evidence that drug use alone inexorably leads to criminal activity is weak.")

[24] *See* U.S.S.C. Report, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

averages.[25]

In short, as there is no evidence that marijuana possession convictions are valid predictors of future criminal behavior (and thus do not endanger public safety), they should be excluded from individuals' criminal history score calculations.

Conclusion

Like all components of criminal sentencing, criminal history score calculations should be proportionate to the offense and no greater than necessary to further the goal of public safety.

Additionally, sentencing guidelines should be equitable and structured in a way that works to reduce racial disparities. The amendment proposed by the Commission, which would remove marijuana possession convictions from the criminal history score calculations, moves us closer to this goal.

Given this and the sweeping changes to our nation's approach to criminalizing cannabis, we urge the Commission to adopt the proposed amendment. In addition, we encourage the Commission to commit to conducting a further review as to how all marijuana convictions (including those beyond simple possession) factor into sentencing. We appreciate the opportunity to comment on this proposal and thank the Commission for its time and consideration.

Respectfully Submitted,

Sarah Gersten
Executive Director and General Counsel
Last Prisoner Project

[25] *Compare* The Urban Institute, *Assessing the Impact of Utah's Reclassification of Drug Possession Justice Reinvestment Initiative* (2020), https://www.urban.org/sites/default/files/publication/102273/assessing-the-impact-of-utahs-reclassification-of-drug-possession_0.pdf (finding that reconviction and imprisonment rates in the 12 months following release from prison averaged 2.3 percent) *with* United States Department of Justice: National Institute of Justice Report, *Measuring Recidivism* (2008), https://nij.ojp.gov/topics/articles/measuring-recidivism (finding that 44% of individuals released from prison will reoffend within the first year of release.)

LAW ENFORCEMENT LEADERS
To Reduce Crime & Incarceration

March 14, 2023

The Honorable Carlton W. Reeves, Chair
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Public Comment on the U.S. Sentencing Commission's Proposed Amendment to the Compassionate Release Policy Statement

Dear Judge Reeves:

I write to you today as the Executive Director of Law Enforcement Leaders to Reduce Crime & Incarceration to express our support for the Commission's proposed updated policy statement governing reductions in imprisonment under 18 U.S.C. § 3582(c)(1)(A) ("compassionate release"). Our national coalition includes over 200 current and former law enforcement officials from across the political spectrum dedicated to protecting public safety and reducing mass incarceration. Recognizing that incarceration often has a criminogenic effect, and with estimates that up to 40 percent of the U.S. prison population is incarcerated without a "compelling public safety reason,"[1] we support sensible reforms to reduce recidivism and unnecessary incarceration that also enhance public safety.

We strongly supported the First Step Act of 2018, which gave judges the authority to consider motions for compassionate release filed by incarcerated people.[2] We recognized that the Bureau of Prisons (BOP) had not used its authority to bring motions for eligible people and that judges were in the best position to consider motions for early release. Since the passage of the First Step Act, we have watched courts use their discretion prudently. Particularly during the pandemic, courts used compassionate release not only to save lives but also to address excessive sentences, after taking a close look to determine that an individual's release did not implicate public safety concerns.[3]

The Commission now proposes to expand the grounds for compassionate release, including by allowing judges to consider compassionate release in instances where a person is serving a sentence that is inequitable in light of changes in the law. Today hundreds, maybe thousands, of people are "serving sentences that Congress itself views as dramatically longer than necessary or fair."[4] Absent intervention, some will spend decades longer in prison than they would under current law, perpetuating racial disparities.[5] We support the proposed amendment to empower federal courts to remedy these injustices on a case-by-case basis.

We recognize that this amendment will not make the First Step Act's sentencing reforms retroactive, a change we urged Congress to adopt in the First Step Implementation Act.[6] Instead,

the Commission's proposal would simply permit judges in individual cases to determine whether an extreme disparity exists between the sentence a person received and the sentence they would be exposed to today – and if so, whether that extreme disparity is an extraordinary and compelling reason warranting consideration for a reduction in sentence. Even if the judge determines it does, the judge then must conduct the highly individualized analysis under §3553(a) to, among other things, ensure that public safety will be protected before modifying a sentence.[7]

Sentencing-related decision-making in our justice system works best when judges can exercise discretion based on careful, individualized, fact-based assessments. This amendment would give judges more discretion to review excessive sentences on a case-by-case basis in a way that advances both justice and safety. We urge you to adopt this sensible amendment.

Respectfully yours,

Ronal W. Serpas, Ph.D.
Executive Director, Law Enforcement Leaders
To Reduce Crime & Incarceration
Former Police Superintendent,
New Orleans, Louisiana

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[1] James Austin et al., *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, at 5, 7-8, https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated.

[2] First Step Act, S. 756, 115th Congress (2018) (enacted); Law Enforcement Leaders to Reduce Crime & Incarceration (Executive Director Ronal Serpas), Letter to President Trump, *Re: Police Perspective: First Step Act and Sentencing Reform,* November 13, 2018, at 1, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://live-lawenforcementleaders.pantheonsite.io/wp-content/uploads/2018/11/LEL-Cover-letter-package.pdf; Law Enforcement Leaders to Reduce Crime & Incarceration (Executive Director Ronal Serpas), Letter to Senators McConnell and Schumer*, Re: FIRST STEP Act (S. 2795) & Sentencing Reform and Corrections Act (S.1917),* July 13, 2018, at 2, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://live-lawenforcementleaders.pantheonsite.io/wp-content/uploads/2018/11/LEL-Cover-letter-package.pdf; Law Enforcement Leaders to Reduce Crime & Incarceration, Briefing Memo, *Briefing Memo: First Step Act & Sentencing Reform*, 2018, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://live-lawenforcementleaders.pantheonsite.io/wp-content/uploads/2018/11/LEL-Briefing-Memo.pdf.

[3] *See* United States Sentencing Commission, *Compassionate Release: The Impact of the First Step Act and Covid-19 Pandemic*, March 2022.

[4] United States v. McCoy, 981 F.3d 271, 285–86 (4th Cir. 2020).

[5] *See* McCoy, 981 F.3d at 285–86 (noting other examples of disparities of a decade or longer); *see also* United States v. Ruvalcaba, 26 F.4th 14, 15–18 (1st Cir. 2022) (remanding order denying compassionate release, where petitioner claimed that his mandatory life sentence, imposed in 2009, would today be a mandatory 15-year term); United States v. Ballard, 552 F. Supp. 3d 461, 467 (S.D.N.Y. 2021) (Rakoff, J.) (quoting United States v. Haynes, 456 F. Supp. 3d

496, 517 (E.D.N.Y. 2020) (discussing the "disproportionate use" of since-abrogated 18 U.S.C. § 924(c) "stacking" penalties "against Black men")).

[6] Letter from Law Enforcement Leaders to Reduce Crime & Incarceration to Senate Leadership, *Re: Law Enforcement Leaders Support for the First Step Implementation Act of 2021 (S. 2014),* May 17, 2021, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://live-lawenforcementleaders.pantheonsite.io/wp-content/uploads/2021/05/5.17.2021_LEL-Support_First-Step-Implementation-Act.pdf.

[7] The record so far related to the relatively broad retroactive application of the "Drugs Minus Two" sentencing guidelines amendment, *see* U.S.S.G., App. C, amend. 782 (effective Nov. 1, 2014) and U.S.S.G. App. C, amend. 788 (effective Nov. 1, 2014) (making Amendment 782 retroactive), provides an instructive comparison. *See* U.S. Sentencing Commission*, Retroactivity & Recidivism; The Drugs minus Two Amendment* (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf. Notably, courts had to engage in an individualized public safety-related inquiry in order to grant the reduction. *Id.* at 4 ("Another requirement in §1B1.10 particularly relevant to the study of recidivism is the requirement that the sentencing judge individually assess the risk to public safety in every case before granting a sentence reduction."). Individuals released have been no more likely to be rearrested, reconvicted, or violate the terms of their release than statistically comparable people who served their full term of incarceration. *See id.*, at 6-11.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Life Coach Each one Teach One Reentry Fellowship

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Or, feel free to write your own. Either way, if you have a personal story to share, or ways in which compassionate release has impacted you or your loved one, please include that story in the message you send to the Commission! The deadline is March 14 — less than a week! — so please don't wait to submit.

Savvy Shabazz

MEDICAL JUSTICE ALLIANCE

The Honorable Carlton W. Reeves
Chair United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Public Comment on Proposed Amendment #1, "First Step Act – Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)"

Dear Judge Reeves:

I. Introduction

On behalf of the Medical Justice Alliance, we thank you for providing us with the opportunity to comment on proposed amendments to the Sentencing Guidelines for the amendment year ending May 1, 2023. The Medical Justice Alliance ("MJA") is a non-profit group of physicians, clinicians, and professionals in the healthcare arena who support broadening criteria for compassionate release and other measures to support people who are incarcerated and facing health challenges. In reviewing hundreds of cases involving medical care in the Bureau of Prisons ("BOP"), we can attest that numerous people with severe medical conditions failed to qualify for compassionate release because they were not found to be "terminally ill" and suffered greatly because of the inability of the BOP to provide the medical support they needed. We have seen patients develop kidney failure, face worsening cancer, and come to the brink of death from Covid because the rules for compassionate release were too narrow. We have seen patients die while their compassionate release cases were still pending. We applaud the aims of the First Step Act of 2018 and strongly support the Sentencing Commission's proposals to broaden the criteria in ways that will better capture the complexity and needs of the medically vulnerable in prison. Based on our experiences, we support the proposed amendment to Section 1B1.13 - Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A). We also offer suggestions for accompanying commentary to help clarify the medical criteria. We believe the examples we provide will help guide Courts, attorneys, medical providers, and other stakeholders, and help ease any potential strain on judicial resources.

II. About the Medical Justice Alliance

MJA is made up of a network of physicians, clinicians, and professionals in the healthcare arena practicing in communities around the country, who volunteer their time and medical expertise to protect the constitutional right to medical care for people in carceral facilities. MJA's network

includes over 200 medical professionals in 24 states who practice across 21 different medical specialties. To date, MJA volunteers have reviewed more than 250 cases on behalf of individuals in carceral facilities across 34 states. MJA primarily provides pro bono medical record review and written and oral testimony by physician volunteers for individuals being held in carceral facilities.

Approximately 30 percent of MJA's cases involve people petitioning the Bureau of Prisons and their Sentencing Court for compassionate release based on their declining health, chronic medical conditions, need for more advanced specialty care, and physical limitations or disabilities. The First Step Act of 2018 ("FSA"), Pub. L. No. 115-391, was a much-needed change in the law allowing individuals convicted of federal crimes to file their own motions for a sentence reduction. Based on this change, MJA physician volunteers are able to work directly with individuals who are incarcerated and their attorneys to review medical records and, when necessary, provide testimony in support of their motions. Cases in which MJA physician volunteers are involved are approximately three times more likely to achieve compassionate release than the national average. This discrepancy illustrates the role physicians have been playing in compensating for the current limited compassionate release criteria.

III. Support for the Proposed Amendment

In our experience, the current requirement that people must be diagnosed with a terminal illness or debilitating medical condition is too restrictive and excludes many people who have multiple, serious medical conditions that require a high-level of care or specialty services that the BOP is unable to provide. In reviewing medical records for these cases, MJA physician volunteers have frequently flagged gaps in critical medical treatment that can worsen disease states and cause premature deaths for both curable and incurable illnesses. Based on the review of tens of thousands of pages of medical records, MJA strongly endorses changes to the Federal Sentencing Guidelines that would affirmatively allow more individuals to qualify for compassionate release so they can access community-based medical treatments as well as mitigate illness and death in the event of a future deadly infectious disease outbreak.

The proposed amendment expands the list of extraordinary and compelling reasons to include: (a) defendants who have "a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner," and (b) defendants "housed at a correctional facility affected or at risk of being affected by" an "outbreak of [an] infectious disease" or other "public health emergency," where the defendant faces an "increased risk of . . . severe medical complications or death" that "cannot be mitigated in a timely or adequate manner."[1] From our

[1] MJA strongly suggests changing the language of the proposed amendment from "not being provided in a **timely or adequate** manner" to "not being provided in a **timely and effective** manner," and "cannot be mitigated in a **timely**

physician volunteers' experience working on compassionate release cases dating back to the early days of the Covid pandemic, MJA supports both amendments with some slight changes, along with some suggested clarifying guidance. We address each in turn below.

A. Medical conditions that require long-term or specialized medical care

MJA has reviewed records and provided testimony in support of many individuals whose medical conditions require long-term or specialized medical care, and who are not receiving that care in a timely and effective manner, placing them at risk of serious deterioration in health or premature death. In our professional opinion as practicing physicians, these individuals would benefit from community-based care outside of a carceral setting and should be granted compassionate release if they otherwise qualify. As noted above, MJA strongly suggests changing the language of the proposed amendment from "not being provided in a **timely or adequate** manner" to "not being provided in a **timely and effective** manner" to better represent the benchmark of what a community physician would be providing if the person was not incarcerated. The access to medical care that people have while incarcerated is frequently characterized by obstacles and delays, and is often not up to community standards of effective care even when provided. As a result, what begins as a treatable or curable illness often develops into an incurable medical condition due to insufficient treatment by the time their motions reach the Court. Although Courts sometimes do grant compassionate release to these individuals, the rulings are extremely variable, at least in part because of the lack of medical guidance around qualification, and would benefit from this amendment to the guidelines. MJA cases are also often the outliers in terms of positive results because the clients have the benefit of testimony from an independent physician volunteer outside of the BOP system. Approximately 50 percent of federal compassionate release cases involving an MJA physician volunteer have been granted by the Courts according to available data at the time of this Comment. In comparison, only 16.2 percent of total federal compassionate release cases were granted by the Courts from October of 2019 to September of 2022.[2] This difference in success rates illustrates the gap between the number of individuals that likely would qualify for release but are currently being denied by the Courts.

To provide just a few examples:

- A MJA client in his early 60s had many serious medical conditions, including a stroke, type 2 diabetes, and untreated cancer. Signs of his cancer, which MJA's physician volunteer found was likely advanced cancer after reviewing the medical records, were

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or adequate manner" to "cannot be mitigated in a **timely and effective** manner" to better represent the benchmark of what a community physician would be providing if the person was not incarcerated.

[2] U.S. Sentencing Commission, Compassionate Release Data Report (Dec. 2022), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf

ignored by the BOP during his compassionate release proceedings. The client ultimately died before the Court could rule on his case.

- A MJA client in his early 50s showed clear signs of kidney disease, but a nephrology consult, which is the standard of care, was not provided until he required emergency admission to an outside hospital for kidney failure. The client was granted compassionate release by the Court after a MJA physician volunteer provided written testimony based on a review of his medical records. Before being granted release, the client had to have urgent heart surgery and was placed on dialysis.
- A MJA client in his late 40s had a leg amputation and suffered from severe pain as a result of numerous falls. He also had diabetes and insulin resistance that were not appropriately monitored and treated, which put him at a high risk of death from stroke or heart attack within several years. Despite a MJA physician volunteer's testimony regarding the client's physical disability and life threatening medical conditions, the client was denied compassionate release by the Court. The Court's ruling may have been different had it been able to rely on the language in the proposed amendments.
- A MJA client in his mid-40s had a respiratory illness, chronic cough, and a significant family history of pulmonary disease. He was not referred by BOP staff for an evaluation by a pulmonologist. It was only after an MJA physician volunteer reviewed the client's medical records and recommended a pulmonologist referral that the client was granted compassionate release by the Court. A delay in his release would have meant a delay to diagnosis and treatment for his respiratory disease.
- A MJA client in his mid-40s has advanced cancer and multiple organ failure that put him on an end-of-life trajectory. MJA's physician volunteer found that the BOP facility struggled to provide the high level of care that the client needed, including routine testing and measures to prevent multiple falls. His case is pending before the Court.[3]

i. Relevant Commentary

In addition to changing the language to "not being provided in a timely and effective manner," this proposed amendment would also benefit from accompanying commentary to help the Courts consistently and objectively evaluate motions for compassionate release under this provision. MJA recommends adoption of medical criteria that help the Court understand what constitutes "medical conditions requir[ing] long-term or specialized medical care" to include but not be limited to diagnoses of active cancer, heart failure, respiratory failure, liver disease, kidney disease, dementia/Alzheimer's, COPD, stroke/cerebrovascular accident/transient ischemic attack, severe decubitus ulcers or other complex wounds, traumatic brain injury, hemiplegia/hemiparesis, paraplegia/quadriplegia, epilepsy, coronary artery disease, serious

[3] These cases also illustrate the need for broadening the criteria for compassionate release as none of these clients were 65 years of age or older at the time and therefore did not meet the criteria for Elderly Prisoners with Medical Conditions under 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g).

mental illness, or a physical disability according to the Social Security Administration.[4] Consideration by the Court should also include, where relevant, whether the individual requires assistance with at least one activity of daily living, including eating, dressing, mobility, bathing, and toileting, which helps indicate whether they require long-term care. Finally, the Court's consideration of whether the individual is receiving care in a timely and effective manner would ideally benefit from an independent physician's review of the medical records.[5]

B. Outbreak of infectious disease or other public health emergency

MJA was initially born out of the need for medical expert review and testimony during the Covid pandemic, specifically because of the large outbreaks in carceral facilities, the impact on individuals at high risk for severe manifestations of Covid, and the inability of carceral facilities – like most congregate settings – to mitigate that risk. MJA supports the amendment to expand compassionate release to those "housed at a correctional facility affected or at risk of being affected by" an "outbreak of [an] infectious disease" or other "public health emergency," where the defendant faces an "increased risk of . . . severe medical complications or death" that "cannot be mitigated in a timely or adequate manner." As noted above, MJA strongly suggests changing the language of the proposed amendment from "not being mitigated in a **timely or adequate** manner" to "not being mitigated in a **timely and effective** manner" to better represent the benchmark of what a community physician would be providing if the person was not incarcerated.

In the United States, over 1,130,000 million people have died from Covid, at least 7,000 of whom were in carceral facilities.[6] Incarcerated individuals are at higher risk for contracting Covid and are at higher risk of dying from it than those in the general population.[7] Individuals in carceral facilities have rates of Covid around four times higher than that of the general population and rates of death from Covid are twice as high as the general population.[8] There have been over 640,000 cases of Covid among people who are incarcerated and when cases among correctional facility employees are added, the number is approximately 900,000.[9]

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[4] 20 C.F.R. § 404.1505 defines disability as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months."

[5] Alternatively, the policy statement could suggest that the Court request written or oral testimony from the individual's treating physician at an outside hospital providing specialty or other long-term care. This testimony could be requested through the defense attorney or via subpoena.

[6] This number is difficult to accurately pinpoint given the current reporting requirements for carceral facilities nationwide, which were changed in 2019.

[7] Marquez, N., Ward, J.A., and Parish, K., *Covid Incidence and Mortality in Federal and State Prisons Compared with the US Population, April 5, 2020 to April 3, 2021* (Oct. 6, 2021), *available at* https://jamanetwork.com/journals/jama/fullarticle/2784944

[8] Council on Criminal Justice, *Impact Report: Covid and Prisons* (Sept. 2, 2020), *available at* https://counciloncj.org/Covid-and-prisons/

[9] The COVID Prison Project, National Covid Statistics, *available at* https://covidprisonproject.com/data/national-overview/

It is well documented that certain pre-existing diseases predispose patients to a more severe course of Covid disease.[10] These pre-existing conditions include, but are not limited to, cancer, obesity, diabetes, heart conditions, chronic kidney disease, chronic lung disease, chronic liver disease, cerebrovascular disease, and asthma.[11] Advanced age, while not a disease, has also been identified as a major determinant for risk of a severe form of Covid.[12]

Infected patients with these conditions should be closely monitored for the development of severe manifestations of Covid, as delays in recognition lead to delays in treatment and worse outcomes including death or disability. The BOP is often not equipped to monitor people in carceral facilities with these and other risk factors who are exposed to or test positive for Covid or other infectious diseases. MJA supports the proposed amendment's expansion to other infectious diseases and public health emergencies, which carry similar dangers to what people in carceral facilities experience due to Covid outbreaks.

To provide just a few examples:

- A MJA client in her early 50s had diagnosed medical conditions that put her at high risk for severe manifestations of Covid. After she reported symptoms and tested positive for Covid, she experienced a rapid progression of the disease. Despite making multiple sick call requests, she did not receive adequate medical attention. MJA's physician volunteer reviewed her records and found that her oxygen saturation levels decreased at an alarming rate and that she should have been referred to an outside hospital. By the time she was finally admitted to a community hospital, she had to be intubated and mechanically ventilated at a time when the mortality rate for patients requiring mechanical ventilation was approximately 50 percent. As a result of this severe course of disease, she still suffers from shortness of breath, weakness, and heart failure.
- A MJA client in his early 40s had numerous medical conditions that substantially raised his risk of death from Covid as well as other causes. These conditions included high blood pressure and obesity. His conditions had not been adequately monitored or treated by the facility, likely leading to his kidney and eye damage. His unmitigated disease progression further increased his risk of a severe course of Covid disease. MJA's physician volunteer strongly recommended that the Court consider alternatives to confinement that would better allow the client to limit his risk of exposure of Covid and

[10] Centers for Disease Control and Prevention, Underlying Medical Conditions Associated with Higher Risk for Severe Covid: Information for Healthcare Professionals (updated Feb. 9, 2023), *available at* https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html
[11] Centers for Disease Control and Prevention, Underlying Medical Conditions Associated with Higher Risk for Severe Covid: Information for Healthcare Professionals (updated Feb. 9, 2023), *available at* https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html
[12] Centers for Disease Control and Prevention, Risk for Covid Infection, Hospitalization, and Death by Age Group (updated Feb. 6, 2023), *available at* https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html

obtain the medical support he needed. The client was denied compassionate release by the Court.

- A MJA client in his early 50s who had a constellation of medical conditions that substantially raised his risk of death from Covid, including high blood pressure, obesity, an intermittent abnormal heart rhythm, and prostate disease. At the time a MJA physician volunteer reviewed his records, the client reported that providers at the facility cautioned him against getting the Covid vaccine, despite the fact that he had requested it multiple times and he had no contraindications to receive the vaccine.

i. Relevant Commentary

As stated above, MJA suggests changing the language of the amendment to "cannot be mitigated in a timely and effective manner." In terms of the suggested policy statements, as they relate to Covid, MJA recommends adoption of language that defines "increased risk of . . . severe medical complications or death," to include but not be limited to people over 50 years of age, as well as people with diagnoses of active cancer, heart failure, coronary artery disease, chronic lung disease, chronic liver disease, chronic kidney disease, diabetes, dementia, obesity, stroke/cerebrovascular accident, HIV, mental health conditions, pregnancy and recent pregnancy, or a physical disability according to the Social Security Administration.[13] The Court should also require the BOP to provide proof that any individuals with confirmed or suspected infections are in medical isolation, and any exposed individuals are in quarantine and receiving serial testing. Additionally, people in quarantine or medical isolation should be housed in units that do not constitute restrictive housing conditions (such as solitary confinement or segregated housing), with as much care as possible to mitigate the mental and physical harms to people in carceral facilities that stem from medical isolation.

MJA further recommends the adoption of a policy statement that takes into consideration any evidenced medical conditions that present a risk for severe course of infection in the case of future outbreaks of infectious disease. MJA also recommends adoption of a policy whereby "cannot be mitigated in a timely and effective manner" requires proof by the BOP to the Court that they have successfully taken measures to medically separate the medically vulnerable individual from any suspected infectious outbreaks.

In conclusion, MJA's network of over 200 medical volunteers reviewed or provided testimony in over 70 federal compassionate release cases as they relate to these amendments. Based on our experience, we support the amendment to expand the grounds for compassionate release and offer our policy statement recommendations to help provide guidance to the BOP, the Courts,

[13] 20 C.F.R. § 404.1505 defines disability as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months."

and other stakeholders and to ease any strain on judicial resources. Please reach out to the MJA at info@medicaljusticealliance.org if we can help provide any additional information or assistance in any way. Our physician volunteers would welcome the opportunity to work with the Sentencing Commission on medical criteria and policy statements to help make this amendment and any additional expansion of compassionate release both substantively meaningful and workable for all parties.

Sincerely,

Dr. Mark Fenig, MD, MPH[14]
Executive Director, Medical Justice Alliance

Dr. William Weber, MD, MPH[15]
Medical Director, Medical Justice Alliance

[14] Dr. Fenig has a Masters of Public Health from Yale University and a Medical Degree from the Sackler School of Medicine. He completed an emergency medicine residency at Emory University School of Medicine. He currently works at Stony Brook University and Montefiore Medical Center departments of emergency medicine, and is an assistant professor of emergency medicine in New York.

[15] Dr. Weber graduated *magna cum laude* from Northwestern Feinberg School of Medicine and completed a Masters Degree in Public Health at Northwestern Graduate School. He completed an emergency medicine residency and fellowship at the University of Chicago. He currently works on faculty at Harvard Medical School and the Beth Israel Deaconess Medical Center.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

My Federal Prison Consultant, LLC

Topics:

1. Compassionate Release

Comments:

1B1.13 (b) is flawed:

Medical Circumstances if now flawed due to the FSA.

While it's not a recommended change in the guidelines, a person who earns FTC will release before the 75% regardless of a medical condition because the BOP interprets eligibility at 75 % of the full "sentence".

In my opinion and recommendation, the BOP should have the discretion to calculate the 75 % of the net vs gross: ie: Statutory release date.

It makes absolutely zero sense to set eligibility for CR to a date that is past the FSA statutory release date!

Submitted on: January 13, 2023

National Association of Assistant United States Attorneys

Safeguarding Justice for All Americans

March 14, 2023

Chair Judge Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Public Comments on Proposed 2023 Amendments to the Federal Sentencing Guidelines

Dear Chair Judge Carlton W. Reeves, Vice Chairs, and Commissioners:

The National Association of Assistant United States Attorneys (NAAUSA)–representing the interests of over 6,400 Assistant U.S. Attorneys (AUSAs) working in the 94 U.S. Attorney Offices–provides the following comments regarding the Proposed Amendments to the U.S. Sentencing Guidelines.

AUSAs are dutifully committed to defending the innocent and prosecuting the guilty through our federal criminal justice system. The system relies on public trust to succeed. The U.S. Sentencing Guidelines foster this trust by promoting the predictable and fair application of the law. While individualized determinations are necessary, the guidelines are designed to encourage a degree of uniformity among similarly situated offenders. This uniformity ensures offenders across the country, regardless of case outcome, can understand their sentence and feel their sentence is fair compared to their peers.

The uniformity the U.S. Sentencing Guidelines provide also guard against other potential ills. When the guidelines are clear and well-structured, there is less room for personal bias in decision-making. Offenders from Mississippi to California can look to the guidelines and know their sentence was fair. For these reasons, we encourage judges to heed the guidelines and encourage the Commission to adopt our recommendations below.

I. First Step Act–Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)

NAAUSA submitted oral and written testimony for the U.S. Sentencing Commission Public Hearing on February 23 and February 24, 2023. Our written testimony is reprinted below.

NAAUSA has no feedback on the proposed amendment to § 1B1.13(a).

NAAUSA has concerns regarding the proposed amendments to § 1B1.13(b)(1)(C) and (D). Lessons from the COVID-19 pandemic warn against qualifying broad and ill-defined medical circumstances as extraordinary and compelling reasons for reductions in sentences.

During the COVID-19 pandemic, AUSAs received a significant and burdensome volume of medical compassionate release requests– most of which were denied. These requests placed AUSAs in the unexpected and unproductive position of making medical determinations about inmates. As one AUSA told NAAUSA, "[The compassionate release requests are] [t]ime consuming and exhausting. I feel as if I was required to make medical decisions based upon my review of the medical records. I'm not qualified to make those determinations."

The proposed amendment amplifies these concerns. Unlike COVID-19 compassionate release, which was meant to be limited to COVID-related risk factors, the proposed amendment is far more expansive and will result in a significantly higher volume of requests. The amendment shifts the burden to prosecutors to argue around an inmate's medical issues. Yet, AUSAs are not trained nor skilled in interpreting Bureau of Prison (BOP) medical records. Both attorneys and judges may be inadvertently led by faulty science without adequate knowledge to know otherwise.

Further, the expected volume of these requests will make it hard for AUSAs to dedicate the necessary time and attention to understanding the medical issues behind each one. Nonetheless, AUSAs will always work hard to provide each request the diligence it is due, but we urge the Commission to understand this burden and how it will divert AUSA time away from meritorious requests and new cases.

NAAUSA proposes the Commission add language to § 1B1.13(b)(1)(C) requiring the defendant provide *independent medical documentation from at least two medical professionals* indicating (1) that their medical condition requires long term or specialized medical care, (2) that without such care the defendant is at risk of serious deterioration in health or death, and (3) that such care is not being provided in a timely or adequate manner.

NAAUSA proposes the Commission add language to § 1B1.13(b)(1)(D) requiring the defendant provide *independent medical documentation from at least two medical professionals* indicating (1) that the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and (2) that such risk cannot be mitigated in a timely or adequate manner.

NAAUSA has no feedback on the proposed amendment to § 1B1.13(3)(A), (B), or (C).

NAAUSA has concerns regarding the proposed amendment to § 1B1.13(3)(D). NAAUSA is concerned that "*an individual whose relationship with the defendant is similar in kind to that of an immediate family member*" is too vague a standard and impossible to counter.

A defendant can broadly interpret the language to include virtually any person with whom he/she maintains a close relationship. Yet it is impossible for a prosecutor to corroborate these claims without an intrusive inquiry into the defendant's personal life, and perhaps into the individual's life who is the subject of the compassionate release claim. This inquiry will be necessary to provide the judge a complete record from which to exercise their discretion. Conducting such an inquiry would require a significant commitment of time and prosecutorial resources and result in prolonged evidentiary hearings, which will also require the commitment of significant judicial resources.

For example, imagine Defendant X claims Person Y, a lifelong friend, is similar in kind to an immediate family member, and requires the defendant to act as a caregiver.

To corroborate this claim, the prosecutor will need to dig deep into the defendant's life, which may require interviews and testimony from a wide array of witnesses, including family members, friends, associates, employers. The investigation may also require the prosecutor to locate and interview family, friends and associates of the individual alleged to require the care to determine the nature of the relationship with the defendant and whether there are other potential caregivers.

Outstanding questions remain: how long must two people have known each other to develop a relationship *similar in kind to that of an immediate family member*? Must there be any familial ties?

These inquiries are far outside the scope of traditional prosecutorial work and the assessments of which relationships would qualify under the provision are far too subjective. Adopting such an ill-defined provision will likely result in similarly situated offenders receiving disparate treatment and is precisely the type of overbroad judicial discretion the Guidelines were designed to proscribe. The current language hampers the prosecutor's ability to establish a full and complete record for the court and risks the release of unworthy offenders.

NAAUSA encourages the Commission to provide a more clearly defined standard for § 1B1.13(3)(D). For example, the Commission could limit the guidance to familial relationships that have been formally recognized under law or a similar more readily provable standard.

NAAUSA has serious concerns regarding the proposed amendment to § 1B1.13(4). The recent reports detailing sexual abuse against inmates in BOP facilities is abhorrent and demands action. Unfortunately, the action proposed in this amendment would not solve the problem and would, instead, shift the problem onto the public in the form of diminished public safety.

The proposed amendment merely addresses a symptom, not the cause, and does nothing to encourage the BOP to take concrete steps to address this problem. NAAUSA fully

supports Congressional and Executive Branch action to require the BOP to address the issue of sexual assaults of inmates.

Nevertheless, releasing defendants, who are also victims, does not solve this problem. It will not enhance public safety and it will not encourage BOP to address their personnel issues. It will allow incarcerated persons to re-victimize their communities; ultimately, continuing a vicious cycle of victimization. It also sends the wrong message about our justice system. While an inmate who is the victim of an assault is equally as deserving of justice as any other crime victim; an inmate should not receive a windfall through the granting of compassionate release.

Every other extraordinary and compelling circumstance provides reason to believe the defendant will not return to a life of crimes–the defendant is ill, elderly, or must serve as a primary caregiver–but this circumstance lacks any similar justification.

NAAUSA urges the Commission to reject the proposal for § 1B1.13(4).

NAAUSA opposes the proposal for § 1B1.13(5). First, this policy undermines the role of Congress and the rule of law. Federal law mandates a statute expressly provide for retroactive sentencing adjustments. 1 U.S.C. § 109. It is the role of Congress to decide if a sentence can be adjusted by a change in the law, not the Sentencing Commission. Further, the Supreme Court has repeatedly recognized that retroactive resentencing based on changes in the law *is not the norm*. *See Dorsey v. United States*, 567 U.S. 260, 280 (2012); *Landgraf v. Usi Film Prods*, 511 U.S. 244, 265 (1994). This principle is rooted in the rule of law. The law requires finality, predictability, and certainty. This proposal directly contravenes these established principles.

Similarly, given that certain provisions of the First Step Act were specifically *not* made retroactive, the proposed amendment raises serious concerns related to the violation of the separation of powers. The Sentencing Commission is not a legislative body made up of members directly accountable to the voters. Rather, it is a Commission appointed by the Executive Branch. Enacting a provision that allows courts to consider changes in the law that were not expressly made to apply retroactively impermissibly encroaches on Congress's legislative authority.

This amendment is also in direct tension with Section 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), which makes clear under what circumstances and to what extent a reduction in term based on an amended guideline may be granted.

The proposed amendment takes this policy even further and will dramatically expand access to early release. As discussed, compassionate release was greatly expanded through the COVID-19 pandemic. Thousands of BOP inmates were granted compassionate release or otherwise released from BOP custody as a result of the pandemic. The U.S. Sentencing Commission has not adequately researched the impact this unprecedented expansion of compassionate release has had on public safety, and further expanding access to

compassionate release without this data would be both irresponsible and dangerous. We highly encourage the Commission to wait until those studies can be conducted and make a data-driven decision before further expanding access to compassionate release. As noted, federal prosecutors overwhelmingly reported the COVID-related expansion resulted in a significant volume of frivolous requests which diverted substantial attorney time away from new cases and meritorious claims. Further expansion of early release is likely to negatively impact public safety.

NAAUSA urges the Commission to reject the proposal for § 1B1.13(5).

Finally, NAAUSA supports Option 1 for § 1B1.13(6), without the inclusion of paragraph (4) and (5) which NAAUSA opposes. Option 1 properly limits the scope of additional circumstances to those "similar in nature and consequence" to the other listed paragraphs. This provision (less proposed sub-paragraphs (b)(4) and (5)) provides judges a clear benchmark for assessing unique circumstances– they must be similar to the existing paragraphs.

Options 2 and 3 lack clarity and permit subjectivity. Under Options 2 and 3, a judge is provided wide latitude to consider circumstances outside those outlined in the guidance. This undermines the uniform, predictable, and fair application of the law. If a judge can fashion in circumstances based on their view of what is inequitable (Option 2) or extraordinary and compelling (Option 3), than there is nothing preventing a judge from accepting a circumstance far outside the range of the guidelines and potentially improper. The preceding paragraphs would serve no use at all. For example, in *United States v. Brooker*, 976, F.3d 228, 238 (2d Cir. 2020), the Second Circuit indicated that applying the FSA to the current compassionate release Guideline, a judge is free to find "extraordinary and compelling circumstances" exist where an inmate received a lengthy but lawful sentence with which the judge considering the compassionate release request disagrees. Under the Second Circuit's analysis, which Options 2 and 3 would appear to endorse, the Guideline as amended begins to look more like a "second look" statute and less like compassionate release as defined by long standing and widely accepted circumstances. There is nothing in the FSA that can reasonably read to endorse this type of action by the Sentencing Commission.

NAAUSA urges the Commission to adopt Option 1 for proposal for § 1B1.13(6).

II. First Step Act–Drug Offenses

NAAUSA supports Option 2 for §§2D1.1 and 2D1.11. It is critical the Commission provide clarity in the law and resolve circuit splits that result in unequal justice depending on a defendant's location.

The conjunctive interpretation of the Ninth and Eleventh Circuits has made defendants with significant criminal histories eligible for safety-valve relief under Section 3553(f)(1). This is directly contrary to the goal of a two-level reduction.

We also feel the clear definition of "violent offense," linked to 18 U.S.C. § 16, will promote necessary clarity and consistency within the law.

III. Firearms Offenses

NAAUSA supports Option 2 for §2K2.1.

Given the clear intent by Congress in the Bipartisan Safer Communities Act to increase penalties for firearms related offenses and the sharp increases in violent crimes committed with guns which gave rise to passage of the Act, NAAUSA believes that Option 2 is the more effective way to implement Congressional intent. NAAUSA would also recommend that the highest offense level enhancements proposed in Option 2 be adopted under the guideline.

IV. Circuit Conflicts

NAAUSA opposes the proposed definition for "preparing for trial" under §3E1.1(b) and supports adopting the framework outlined in *Wade v. United States*, 504 U.S. 181 (1992).

Currently, the government may move to provide the defendant with a one-level reduction when the defendant has "assisted authorities in the investigation or prosecution of his own misconduct 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." §3E1.1(b).

The government is provided the discretion to bring such a motion precisely because the government is the party most aware of whether the defendant's assistance permitted the government to avoid preparation and allocate resources effectively. The proposed amendment would significantly limit the government's discretion to withhold the motion, undermining its purpose and the Congressional intent for the provision.

Further, as the Department of Justice testimony notes, it will be difficult to distinguish between the litigation of suppression motions (or various other pre- and post-trial challenges) and trial preparation. There is substantial overlap in these categories, and the proposed amendment will likely lead to additional litigation to define the contours of the amendment.

Conversely, the *Wade* framework–providing the government may refuse to file a motion so long as the decision is "rationally related to any legitimate Government end" and not based on "an unconstitutional motive"–provides appropriate, but not unlimited, latitude to government actors to decide when such a motion is appropriate. 504 U.S. 181, 185-87 (1992).

NAAUSA supports Option 2 for the proposed amendment to §4B1.2(b).

The Commission should define the term "controlled substance" to include both substances covered by the Controlled Substances Act *and* substances otherwise controlled under applicable state law.

First, Option 2 is consistent with the definition for a "controlled substance offense" – which includes *both* offenses under federal and state law. As the Department of Justice's testimony highlights, Option 1 would lead to the oddity where if the state's definition of the controlled substance is even slightly broader than the federal definition, then every state conviction involving that substance would no longer qualify as a "controlled substance offense" under §4B1.2(b). Likewise, if a particular state drug offense is not divisible by drug type, and the relevant state drug schedules include any chemical compound that is not federally controlled, then every violation of that state statute would fail to qualify as a "controlled substance offense," even if a particular defendant's offense conduct indisputably involved a federally controlled substance.

NAAUSA concurs with this element of the Department's testimony entirely. We provide additional testimony only to emphasize that in 2022, drug overdose deaths sored about 100,000. Our nation is amidst a drug abuse crisis. An unnecessarily and arbitrary restriction on controlled substance sentencing will only make it harder for law enforcement to combat the spread of life-threatening narcotics. We urge the sentencing commission to consider the devastating effects drug abuse is having on our communities as it considers these provisions.

V. Criminal History

NAAUSA *strongly* opposes both proposed options for Zero Point Offenders as well as the related presumption of probation for zero-point offenders.

This would be a windfall to white-collar defendants, and would exacerbate existing sentencing disparities between white-collar defendants and defendants convicted of non-white-collar offenses. Furthermore, the provision in § 4C1.1(a)(4) appears to only focus only on financial hardship to individuals while ignoring cases where there is substantial financial hardship imposed on the government, financial institutions, and/or the market. In cases where the financial hardship falls on institutions or the market, proving substantial harm on individuals is often onerous if not impossible. This particular provision appears to be an attempt to relitigate how the severity of financial crimes is calculated in § 2B1.1, and NAAUSA submits that it is inappropriate to seek to achieve by reducing how criminal history points are assessed.

VI. Acquitted Conduct

NAAUSA submitted oral and written testimony for the U.S. Sentencing Commission Public Hearing on February 23 and February 24, 2023. Our written testimony is reprinted below.

Currently, a judge may consider conduct proved by a preponderance of evidence when determining an appropriate sentence for a convicted individual. Judicial discretion to

consider "acquitted conduct" acknowledges the realities of federal prosecutions and the high burden of proof required to convict an individual. Protections are already in place to ensure individuals are not improperly connected to unrelated conduct during sentencing. Allowing some consideration of conduct an individual has either not formally admitted to as part of a guilty plea or which has been found to be proven by a jury beyond a reasonable doubt ensures the court has a full picture of the individual's conduct. The proposed amendment would impermissibly obstruct judges from conducting the statutorily required analysis for imposing a sentence under 18 U.S.C. § 3553(a) and constitutes a bridge to the eventual elimination of consideration of relevant conduct at sentencing.

It is important to note that acquitted conduct is not synonymous with notions of actual innocence. Rather, the term refers to any conduct that was determined by the factfinder to not have been proven beyond a reasonable doubt. Judges are more than capable of appropriately exercising their discretion when deciding to consider acquitted conduct or conduct not otherwise admitted to by the defendant at sentencing. Indeed, the law requires that such conduct be proven at sentencing by a preponderance of the evidence to even be considered. This burden of proof ensures the defendant is not held responsible for conduct based on insufficient evidence, while at the same time enabling the court to understand the full scope of the defendant's criminal activity.

This proposal would essentially bar the court from considering any evidence not resulting in a guilty verdict at trial or admitted at a plea. This severely and unfairly limits the court's view of the defendant's conduct. Given the frequent overlapping nature of evidence applicable to different offenses charged within a single case, there is a significant likelihood that the proposed amendment will generate massive amounts of litigation, disparate results among similarly situated offenders, and a lack of predictability at sentencing.

The proposed Guideline would also result in illogical and unjust outcomes. For example, consider the case of a defendant who is charged with five counts of being a felon in possession of a firearm for being in constructive possession of five firearms found in his vehicle. The defendant could be acquitted of all but one count, because there was DNA found on only one gun; however, under the proposed amendment, the court could not consider the four additional firearms recovered from the defendant's vehicle for purposes of enhancing the defendant's base offense level because he was acquitted of possessing the four other firearms. Such a result nullifies provisions related to accounting for relevant conduct that exist throughout the Sentencing Guidelines.

Finally, this proposal seems to rely on misconceptions about the role of conduct history in charging, plea bargaining and sentencing.

Charging and plea bargaining are distinct steps in the criminal justice process from sentencing. During the sentencing phase, the prosecution seeks to achieve a variety of objectives, such as seeking imposition of punishment, restoration to victims, facilitating rehabilitation, and deterring unlawful conduct. While charging is crime-specific, the unique goals of sentencing require a fuller picture of an individual's past conduct, including

all aspects of an offender's characteristics, background and offense conduct. Conduct that can be proved by a preponderance of evidence is critical to this picture, even if the individual was acquitted on certain offenses or did not specifically admit guilt to certain facts as part of a plea.

The proposed amendment does nothing more than allow defendants to cherry pick those facts that reflect positively on the offender at sentencing while hamstringing the court from giving relevant conduct its due weight in calculating the offender's sentencing range.

For these reasons, NAAUSA opposes the proposed inclusion of § 1B1.3(c).

VII. Fake Pills

NAAUSA supports the proposed amendment related to fake pills.

NAAUSA remains concerned about the ability of prosecutors to successfully keep illicit narcotics off the streets. Currently, reports indicate children under age 14 are dying of fentanyl poisoning at a rate faster than any other age group and child deaths by accidental ingestion are on the rise. These risks are highest when fentanyl is camouflaged as legal medication.

We fully support action by the commission to increase prosecutorial tools against those who disguise lethal poisons as legal medication.

VIII. Conclusion

As the voice of federal prosecutors and civil attorneys, NAAUSA appreciates the opportunity to share our perspective with the Commission. Thank you for considering our comments.

If you have any additional questions or wish to set up a meeting to discuss the issues raised in these comments, please reach out to our Washington Representative, Natalia Castro, at ncastro@shawbransford.com.

Sincerely,

Steven Wasserman
President

March 14, 2023

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

Re: Proposed Amendments To The Sentencing Guidelines, Policy Statements, And Official Commentary

Dear Judge Reeves:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Colloquially known as "compassionate release," 18 U.S.C. §3582(c)(1)(A) authorizes a court to modify a term of imprisonment that has already been imposed if certain conditions are met. After recognizing that BOP had failed in its role as the compassionate release gatekeeper from 1984 until December 2018,[9] a bipartisan Congress passed the FSA2018, which sought to "increase[e] the use and transparency of compassionate release."[10] Congress expanded §3582(c)(1)(A) by giving courts the authority to modify a term of imprisonment "upon motion of the defendant" rather than only upon a motion brought by the BOP.[11] A district court can now reduce a prison sentence based upon a defendant-filed motion (after exhaustion of remedies): if 1) "extraordinary and compelling reasons" exist that may "warrant a sentence reduction;" 2) such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and 3) the court has considered any applicable §3553(a) factors. Congress defined only one limit on what may count as an "extraordinary and compelling" reason: "rehabilitation of the defendant alone."[12]

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

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

[9] From 2006-2011, the BOP approved an average of only 24 requests per year in a program that was "poorly managed" and resulted "in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided." Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, at i (Apr. 2013), *available at* https://oig.justice.gov/reports/2013/e1306.pdf.

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

[11] 18 U.S.C. §3582(c)(1)(A) ("[T]he court, upon motion of the Director of the Bureau of prisons, or upon motion of the defendant . . .may reduce the term of imprisonment.")

[12] *See* 28 U.S.C. §944(t).

With the passage of the FSA2018, the policy statement addressing compassionate release, U.S.S.G. §1B1.13, came into conflict with the revised language of §3582(c)(1)(A).[13] Because the Commission had been without a quorum since the passage of the FSA2018, §1B1.13 could not be revised to conform to the amended language of §3582(c)(1)(A). As a result, nearly every circuit court has found that §1B1.13 applies only to compassionate release motions initiated by the Director of the BOP, not to defendant-filed motions.[14]

In the absence of an applicable policy statement, district courts made "individualized assessments of each defendant's sentence" upon "full consideration of the defendant's individual circumstances" to determine what constitutes extraordinary and compelling reasons, including, but not limited to the examples outlined in §1B1.13.[15] Under this rigorous standard, district courts have been able to address many factors unanticipated by §1B1.13, including a global pandemic,[16] the sexual victimization of prisoners in custody,[17] inadequate medical care in prison,[18] as well as changes in the law as applied to the individual defendants.[19]

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[13] Section 3582(c)(1)(A)(i) does not define the "extraordinary and compelling reasons" that might merit compassionate release. However, the application note to §1B1.13 describes four categories of "extraordinary and compelling reasons." The first three set forth specific circumstances under which such reasons could exist, having to do with a defendant's medical condition, health and age, and family circumstances. *See* U.S.S.G. §1B1.13 cmt. n.1(A)–(C). The fourth is the so-called "catchall" category, located at Application Note 1(D) and labeled "Other Reasons."

[14] *See United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). *But see United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[24] 28 U.S.C. §994(a)(2)(C).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[36] *See United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). *But see United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021).

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

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

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

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

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

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

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

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

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

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

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

[44] 18 U.S.C. §3582(c)(1)(A).

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

[46] U.S.S.G. §1B1.13(a)(2).

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

E. The Government's concerns are unfounded.

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

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

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

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

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

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

[51] *See* First Step Act §603(b).

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

[53] *Id.*

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

F. Proposed Modifications to (b)(5)

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

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

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

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

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

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

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

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

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

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

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

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

[61] JaneAnne Murray, et al., *Second Look = Second Chance: Turning the Tide Through NACDL's Model Second Look Legislation*, National Association of Criminal Defense Lawyers, at 9-13 (2021) *available at* https://nacdl.org/SecondLook (factors to be considered include: age at time of the offense; age at time of the petition; nature of the offense; petitioner's current history and characteristics; petitioner's role in the original offense; input from health care professionals; any statement from the victim; whether the original sentence penalized the exercise of constitutional rights; whether the sentence reflects ineffective assistance of counsel; any evidence that the petitioner is innocent; any other relevant information).

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

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

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

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

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

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

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

[63] 28 U.S.C. §994(t).

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

[65] First Step Act §603(b).

[66] *See* 28 U.S.C. § 991(b)(1)(C).

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

C. Option 3 is the best choice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[74] *Id.*

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

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

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

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

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

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

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

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

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

[79] *See infra* Part IV.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[88] *Id.*

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

[90] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[98] U.S.S.G. §1B1.13 cmt. n. 2.

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

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

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

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

> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> (B) a prior 3-point offense, as determined under the sentencing guidelines; **and**
> (C) a prior 2-point violent offense, as determined under the sentencing guidelines.[105]

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

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

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

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

[104] Prior to the FSA, 18 U.S.C. §3553(f) allowed a district court to impose a sentence below the mandatory minimum only if the defendant did "not have more than 1 criminal history point, as determined under the sentencing guidelines." 18 U.S.C. §3553(f)(1) (2017).

[105] 18 U.S.C. §3553(f)(1) (2018).

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

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

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

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

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

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

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

[111] *See id.*

[112] *Id.*

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

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

Acquitted Conduct

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

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[113] *Id* (emphasis in original)

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

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

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

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

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

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

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

[118] U.S. Const. art. III, §2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[127] *Id.*

[128] *Id.* at 213.

[129] *Id.* at 224.

[130] *Id*. at 242.

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

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

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

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

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

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

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

Impact of Simple Possession of Marijuana Offenses

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

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

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

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

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

[135] *Id*.

[136] *Id*.

[137] *Id.*

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

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

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

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

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

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

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

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

[143] *Id.*

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

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

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

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

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

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

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

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

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

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

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

Alternatives-To-Incarceration Programs

NACDL welcomes the Commission's focus on court-sponsored diversion and alternatives to incarceration (ATI) in the federal system. These programs, long a feature of state criminal legal systems, are finally being instituted across the federal system at a grassroots level in recent years with considerable success. It is time for the Commission to give these programs its official imprimatur and subject them to its analytical expertise. We urge the Commission not to defer this issue for further research and study but rather to amend the guidelines this cycle with a robust and fulsome statement of support for diversion and ATI programs.

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

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

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

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

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

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

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

results are encouraging.[157] As a group of researchers studying these federal programs recently concluded:

> Successful completion of an ATI program is associated with more favorable case dispositions and less severe sentences. Participants are more likely to avoid new arrests for criminal behavior, remain employed, and refrain from illegal drug use while their cases are pending in court. Such positive outcomes help defendants place their best foot forward while awaiting sentencing, demonstrating to the judge that they are on the path to rehabilitation, and thus deserving of more favorable disposition that imposes "a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)" of that provision. 18 U.S.C. § 3553(a).[158]

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

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

[158] *Id.* at 12.

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

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

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

[162] *See* Model Penal Code: Sent'g § S1.02(2), reporters' note b (3) (Am. Law Institute 2021) (citing sampling of literature on adverse effects of incarceration on families).

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

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

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

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

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

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

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

Finally, we urge the Commission to consider more systemic changes to the guidelines to facilitate and encourage non-custodial sentences, including a presumption of probation for first-time non-violent offenders,[167] offense-level reductions for first-time offenders, elimination of the zones in the Sentencing Table or at least a large expansion of Zones A and B, where probation-only sentences are authorized.

Respectfully submitted,

JaneAnne Murray
Chair, NACDL Sentencing Committee

John Albanes
Legal Director, NACDL Return to Freedom Project

Liz Budnitz
Resource Counsel, NACDL Return to Freedom Project

Amanda Clark Palmer
Member, NACDL Sentencing Committee

Darlene Bagley Comstedt
Member, NACDL Sentencing Committee

Elizabeth Blackwood
Counsel & Project Director, NACDL First Step Act Resource Center

Nathan Pysno
Director, NACDL Economic Crime & Procedural Justice

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

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

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

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

March 14, 2023

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002
ATTN: Public Affairs – Proposed Amendments

Re: Sentencing Commission's Proposed Amendment to §4C1.1 Adjustment for Certain Zero-Point Offenders: Definition of "Covered Sex Crime"

Dear Chairman Reeves and Members of the Commission:

As President and CEO of the National Center for Missing & Exploited Children ("NCMEC"), I am writing to raise a significant concern relating to the Proposed Amendments to the sentencing guidelines. NCMEC's concern arises specifically from the proposed amendment set forth in §4C1.1 Adjustment for Certain Zero-Point Offenders Options 1 and 2 and the proposed definition of "covered sex crime". While NCMEC commends the Commission's efforts to modernize the sentencing guidelines, in light of the serious negative ramifications on child victims presented by the exclusionary language of §4C1.1, NCMEC urges the Commission to revise the proposed definition of "covered sex crime" to include all child sexual offenses in order to protect children victimized by offenders who possess, receive, and traffic in child pornography.[1]

I. Background on NCMEC's Work to Prevent and Combat Child Sexual Exploitation

As background, NCMEC is a private, non-profit organization created as a grassroots response to an unthinkable tragedy. In 1981, 6-year-old Adam Walsh was with his mother in a Florida shopping mall when he vanished without a trace. The search for Adam revealed many inadequacies that plagued missing children investigations at the time. Revé and John Walsh endured 10 excruciating days searching for Adam before he was found murdered 100 miles away. The Walshes channeled their grief and came together with other child advocates to create NCMEC in 1984. Over the past 38 years, NCMEC has grown to become the leading nonprofit organization and the nation's congressionally designated clearinghouse and resource center to help find missing children, reduce child sexual exploitation, and prevent child victimization.

A. CyberTipline

NCMEC created the CyberTipline in 1998 to serve as an online mechanism for members of the public and electronic service providers to report incidents of suspected child sexual exploitation, including the online trafficking of child sexual abuse material (CSAM). Every day NCMEC bears witness to the constant flow of

[1] NCMEC uses the term child sexual abuse material (CSAM) to refer to images and videos defined as child pornography under federal law. In the context of this letter, NCMEC will use both CSAM and child pornography as the latter term is used by the Commission in the proposed amendment to the guidelines.

horrific child sexual abuse and exploitive material that floods into the CyberTipline. Since its inception 25 years ago, the CyberTipline has received more than 153 million reports containing more than 321 million images, videos, and other content. Currently, NCMEC receives an average of more than 80,000 CyberTipline reports every day.[2]

In NCMEC's experience, it is common for offenders who have distributed CSAM online at some point also to have or seek access to children to perpetuate hands-on sexual abuse. Because most members of the public will never see CSAM, it is essential to understand the nature of the content reported to the CyberTipline. The images and videos reported to NCMEC are not merely sexually suggestive or older teenagers who "look young." This content depicts crime scene activity. Children – including infants and toddlers – are raped, abused, and exploited in this imagery. Children are physically and sexually abused each time an image or video is made. They are revictimized every time a sexually abusive image or video in which they are depicted is traded online and a new predator takes personal gratification in their anguish or uses the imagery to entice another child into sexual abuse.

B. Child Victim Identification Program ("CVIP")

NCMEC created CVIP in 2002 after repeatedly seeing images of the same children and tracking which children had been identified by law enforcement and which children were unidentified and potentially in abusive situations. CVIP operates with three core goals: (1) to help verify if CSAM seized by law enforcement from offenders depicts previously identified child victims; (2) to help identify and locate unidentified child victims; and (3) to provide recovery services to child survivors and their families. Since CVIP was created in 2002, NCMEC has processed over 375 million images and videos and has helped law enforcement identify over 25,900 children depicted in images and videos of online sexual abuse.

II. Definition of "Covered Sex Crime" Within §4C1.1 Exclusionary Criteria Should Include All Child Sex Offenses

NCMEC acknowledges the Commission's focus in reexamining sentencing for first time offenders, however, as drafted, NCMEC opposes the Commission's Amendment Options 1 and 2 for §4C1.1 Adjustment for Certain Zero-Point Offenders. The Amendment reverts to a past crime paradigm that recognizes only "hands-on" abuses and disregards the explosive growth in online child sexual exploitation over the past two decades and the immense harm the distribution of these images inflicts on child victims both during the actual victimization and long after it ends. In NCMEC's experience, it is common for perpetrators who have distributed child sexual abuse imagery online at some point also to have or seek access to children to perpetuate hands-on sexual abuses. Additionally, far from being a passive crime, the child sexual exploitation imagery distributed online frequently involves extreme violence, sadistic acts, and horrific sexual abuse and torture of children, including infants. It is well-documented that children victimized by the distribution of sexually abusive images in which they are depicted suffer harm in addition to, and different from, the hands-on abuse inflicted on them. Because the online distribution of images never ends, child victims live with this perpetual harm into adulthood, and new cycles of abuse are created each time additional perpetrators share these images online, and use them not only for their own self-gratification, but also to drive the market for the creation of new CSAM, normalize the sexual abuse of children and entice additional children into abuse.

[2] The CyberTipline receives reports relating to users and victims from the United States and from around the world. In 2022, approximately 90% of CyberTipline reports submitted to NCMEC related to an international user or victim and were referred to an international law enforcement agency.

The Commission's Amendment would fail to protect children victimized by offenders who possess, receive, and traffic in CSAM. NCMEC proposes revising the definition of "covered sex crime" in §4C1.1 Options 1 and 2 to include all child sex offenses, thereby acknowledging and protecting against the immense harm to child victims caused by online sexual exploitation. Specifically, NCMEC requests that the Commission implement the following changes to §4C1.1(b)(5):

> "Covered sex crime" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, ~~not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense~~; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this definition.

Thank you in advance for your consideration of the concerns raised in this letter on behalf of NCMEC's mission and the children and families we serve. We strongly encourage the Commission to avoid the negative impact on child safety that would arise from the current definition of "covered sex crime" within the proposed amendment to §4C1.1 Adjustment for Certain Zero-Point Offenders and to adopt NCMEC's revision to ensure children are not revictimized. We welcome an opportunity to discuss our concerns with you in person, to provide you with additional information regarding the sexual exploitation cases we have worked on, and to provide further recommendations on how the Sentencing Commission could better protect child victims while still fulfilling its ultimate policy goals.

Sincerely,

Michelle C. DeLaune

Michelle C. DeLaune
President & CEO

The National Council for Incarcerated and Formerly Incarcerated Women and Girls

Comment From The National Council For Incarcerated and Formerly Incarcerated Women and Girls
On Proposed Amendments to U.S.S.G. § 1B1.13
March 14, 2023

Introduction

The National Council for Incarcerated and Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women. The founders came together in the prison yard at FCI Danbury because they were frustrated that policy makers were focusing their attention exclusively on men. They also wanted the voices of incarcerated people to be heard – those who understand the harm the current system inflicts and have the expertise to create an alternative system that recognizes each person's humanity. The prison experience increases trauma in women and, if they are mothers, to the children they are separated from. It deepens poverty in the individual lives of incarcerated people and the overall economic stability of their communities.

Although The National Council's long-term goal is to end the incarceration of women and girls, we are also working to address conditions of confinement for those still living inside prisons. We support women seeking compassionate release and work to raise awareness of the horrific conditions in our prisons and jails. Through our "Reimagining Communities" project, a national infrastructure for supporting community-based initiatives led by incarcerated, formerly incarcerated, and directly affected women and girls, we are supporting community organizing, economic development, and participatory budgeting. Our work will expand opportunities for those in low-income communities to keep residents out of the criminal legal system.

The National Council would like to share the "boots on the ground" perspective of how compassionate release works in practice. Since the First Step Act was passed, we have received hundreds of emails from incarcerated women describing their situations and seeking help. We have set up a network of law students and have supervised the filing of nine compassionate release motions: one is pending, two were granted, six were denied, although two of those movants were transferred to home confinement under the CARES Act. We are honored to speak for those who cannot speak for themselves and are grateful for the Commission's promise that their voices "will be heard."

Family Circumstances

Mass incarceration is destroying families, especially those led by women, making it imperative that the Commission broaden the guidelines for release when the caretaker of a minor child(ren) is no longer able to fulfill that function. Fifty-eight percent of women in federal prison are mothers of minor children. An estimated 58,000 women every year are pregnant when they enter prisons. Most of these women are the primary caretakers of their children; 90% of fathers in state prison reported that their children lived with their mother, while only about 25% of mothers in prison identified their child's father as the current caregiver.

Mothers face the often-insurmountable challenge of the Adoption and Safe Families Act, which requires child welfare agencies to request the termination of parental rights whenever a child has lived in foster care for 15 of the most recent 22 months, with very limited exceptions. Children of incarcerated women are at 5 to 8 times greater risk of being placed in the foster system than children of incarcerated fathers per analysis of federal data sources. This increases risk of long-term family separation and also increased risk of incarceration for the children when they grow up. The foster system is also particularly destructive of Black families: in 2017, 25% of foster children were Black.

Incarcerated women leave their children with grandparents two to three times as often as other potential caretakers (e.g., father, sibling, or friend).

Table 4. *The Living Situations of Minor Children with Incarcerated Parents* (N = *4,719*)

	Mother Incarcerated ($n = 690$), *n* (%)	Father Incarcerated ($n = 4{,}029$), *n* (%)	z_{un}	Risk Ratio
Child's caregiver				
Child's father/mother	190 (28)	3,650 (90)	−39.31**	0.31
Child's grandparent	374 (54)	304 (7.5)	32.29**	7.20
Another relative	166 (24)	162 (4)	19.12**	6.00
Family friend	16 (2)	16 (>0.5)	5.68**	5.84
Foster home	57 (8)	40 (>1)	12.43**	8.00
Agency or institution	15 (2)	12 (>0.5)	6.04**	7.30
Other	30 (4)	46 (1)	6.18**	4.00

**$p < .01$.

This is not a theoretical danger. According to the Marshall Project, "In about 1 in 8 of these cases [3 million national child welfare cases reviewed], incarcerated parents lose their parental rights, *regardless of the seriousness of their offenses*, according to the analysis of records maintained by the U.S. Department of Health and Human Services between 2006 and 2016." (Emphasis added). Because women have to leave their children with caregivers who may not be able to care for a child for an extended prison term, they are five times more likely than men to have their children end up in foster care and thus lose their parental rights. Parents who have short sentences because of the nature of their

transgression and lack of criminal history may still lose all parental rights if their children end up in the foster care system. That means the parent will not know where their child is living, whether they are healthy and well-treated because they are allowed no contact at all. Their only hope is for the child to find the parent once they turn 18.

In light of the potential catastrophic consequences of even a short prison sentence, the National Council urges the Commission to add **"severe illness or** incapacitation" to the draft language for Section (b)(3)(A). In light of the time needed to prepare and file a compassionate release motion, waiting until a caretaker is "incapacitated" is to wait too long. Sara Gallegos left her children in the care of her mother when she was sentenced to 20 years for delivering two money orders to further a drug conspiracy after her husband was murdered and she had no way to support her children. Her mother, who is in her 70s with multiple health conditions, lost her job when COVID began and ended up in a homeless shelter with the two children, where they all were infected with the virus and Ms. Gallegos's son ended up in the hospital. Ms. Gallegos's mother can function but cannot care for a 6-year-old and pre-teen, both of whom are traumatized by the disintegration of their family since the murder of Ms. Gallegos's husband and her incarceration.

Ms. Gallegos's motion for compassionate release was denied in a one-paragraph boilerplate order. Doc 119, *United States v. Sara Eugenia Gallegos*, No. 17-cr-00136 (W.D. Tex. July 27, 2021).

Ms. Gallegos was sentenced to 20 years for her transgression of sending two money orders in furtherance of a drug conspiracy, which has already led to homelessness for her children and will likely put them on the path to incarceration. By adding **"severe illness"** to the grounds for compassionate release, Ms. Gallegos would have grounds to seek release based on her mother's poor health. She would also have grounds for appeal based on abuse of discretion if the judge essentially ignores her next motion, as he did the first.

V.B.'s mother has stage 4 cancer and has difficulty doing basic housework and walking V's daughter to school. V.B. has counsel but preparing a compassionate release motion, securing medical records, the pre-sentencing report, and finding local counsel takes months. V.'s daughter's wellbeing hangs on the thread of her mother's health, which is frail and worsening. Black's Law Dictionary defines incapacitation as the "quality, state, or condition of being disabled or lacking legal capacity." A woman who is unable to walk her granddaughter to school is not completely "incapacitated," but a child's welfare should not be put in jeopardy because a woman in her 70s with cancer is still able to get out of bed. By changing the criteria for eligibility to a caretaker with "severe illness," the Commission would address the problem of ill and aging grandparents and also introduce consistency in criteria across the guidelines.

Another solution would be to amend the language to "Incapacitation **as a caregiver.**" An aging grandparent who is still able to perform activities of daily living is not necessarily qualified to care for a child, especially one such as Sara's six-year-old daughter who often

acts out due to the trauma of losing her home and being separated from her mother. Sara's mother does not have the physical strength to deal with her granddaughter when she is out of control, nor does she understand how to communicate with her pre-teen grandson who has suicidal ideation. V.B.'s mother struggles to cook for her granddaughter and cannot make it possible for her granddaughter to engage in normal childhood activities such as after school programs.

The National Council commends the Commission for not tying eligibility for compassionate release for parents to the nearly impossible standard of proving a negative: there is no other caretaker available. This requirement places an intolerable burden on families: distant relatives are faced with taking on the financial and emotional challenge of raising a child traumatized by the loss of parents because of incarceration, disappearance, or death, or telling a parent that they will not prevent the loss of her child. The fundamental principle of family law should apply in this context, namely the best interests of the child. Absent the rarest of circumstances involving child abuse, no child would be better off with reluctant relatives or in the foster care system than with a parent. Finally, the Commission should emphatically reject implications that incarcerated people cannot be loving parents, or that they somehow must prove that they are good parents, because they violated criminal law. That trope adds to the dehumanization of people in prison and props up the disgrace of mass incarceration.

Compassionate Release Should be Available to Victims of Sexual Assault

The National Council commends the Commission for introducing a provision for providing compassionate release to victims of sexual assault. Women are more likely to enter incarceration with a history of abuse, trauma, and mental health conditions. Eighty-six (86) percent of women in jail have experienced sexual violence and 77 percent have experienced intimate partner violence. Revictimization by prison staff – who have complete control over their victims – compounds this existing trauma. Research extending back 40 years discredits characterization of sexual assault as a "short term" condition and, by extension, the idea that granting compassionate release would be a "windfall" that would allow the rape survivor to "revictimize" their communities.

The Centers for Disease Control and Prevention website on sexual violence says that "Sexual violence consequences are physical, like bruising and genital injuries, sexually transmitted infections, and pregnancy (for women) and psychological, such as depression, anxiety, and suicidal thoughts. Survivors may suffer from post-traumatic stress disorder and experience re-occurring reproductive, gastrointestinal, cardiovascular, and sexual health problems." They calculate that the lifetime cost of rape is over $122,000 for each survivor including medical costs and lost productivity amongst others.

Sexual assault and rape have long been known to cause chronic and long lasting physical and mental health damage to survivors. A 1985 study of 35 rape victims found that rape victims were "significantly more depressed, generally anxious, and fearful" and those who had not experienced rape. The only variable that made the depression and anxiety worse was having been raped multiple times. The UCLA Health Center said that "Even if it

occurred decades ago, time doesn't necessarily dissolve the trauma experienced from sexual assault." Licensed clinical social worker and trauma specialist at the UCLA Rape Treatment Center Jane Willens says "It's common to see intense emotions such as guilt, self-blame, and shame. There is often underlying anxiety, anger, and depression. The assault also impacts the ability to trust oneself and others, particularly if the assailant was a known acquaintance." Sexual assault and rape can affect the brain and nervous systems resulting in symptoms such as chronic headaches, body aches,
fatigue, dizziness and nausea, sexual difficulties, and emotional issues.

In short, sexual assault, especially when it happens repeatedly and the victim has no way to escape, causes long-term damage which should be treated as any other serious medical condition. Nor does increasing the penalty for the perpetrator do anything to help the victim. Especially for incarcerated people, who know first-hand the pain that prison inflicts on families, perpetuating harm will not bring them comfort. Nor is the physical and psychological harm any different if the perpetrator is another incarcerated person and thus the same remedy – eligibility for compassionate release – should also be the same.

Concerns about false accusations, interference with ongoing investigations, and "trials within trials" are unfounded. They all focus on the alleged transgressor whereas the guideline is designed to recognize the extraordinary needs of the victim. People with untreated medical conditions are considered for compassionate release regardless of whether there is an ongoing investigation against the doctor for malpractice or criminal assault. The idea that sexual assault could be faked or only validated through a criminal investigation is abhorrent. FCI Dublin was known as Camp Rape for years; it took the arrest of the Warden and Chaplain for the system to take some meaningful action. The cover-up of sexual abuse in the Bureau of Prisons must end; creating a pathway to compassionate release for victims so that they can heal and bear witness to their ordeal, should they so choose, is the place to start.

People who are incarcerated do not lose their humanity. The trauma of literally being locked in with an abuser is not lessened for someone who has transgressed themselves. Incarcerated victims of sexual assault should be treated as any other victim. Just as no one would think that putting a sexual assault survivor in prison is a good idea, similarly it is not a solution to transfer an incarcerated victim to another prison which will be equally ill-equipped to provide therapy and a place to heal.

Retroactivity

Many others have explained why allowing judges to take changes in the law into account when deciding compassionate release is not an end-run around Congress's prerogative to decide if laws will be retroactive or not. The National Council would like to provide an example that illustrates why judges need the flexibility to be allowed to include changes in their decision-making.

Pam Tyler's partner was arrested after selling drugs to a government informant. He decided to try to beat the case by killing the informant and pressured Pam and others to

assist him in this plan. The victim was wounded, and Ms. Tyler's partner was sentenced to life in prison for this attempted murder and drug dealing. Pam was sentenced to 60 years for her role in the attempted murder. Due to changes in career offender laws, her partner's sentence was reduced to 30 years in 2021. *United States v. Tyler*, No. 04-20044-02-KHV, at *1-2 (D. Kan. Jul. 21, 2022). Ms. Tyler was not a career offender, so she could not benefit. She was not involved in the drug conspiracy at all. After serving 17 years, she applied for compassionate release in 2022 because her sentence was now twice as long as the ringleader's and she was not eligible for any reduction in sentence because she had not committed enough crimes. The judge granted her compassionate release because of the sentence disparity based on her wide discretion in the absence of "applicable" sentencing guidelines. *Id.* at *6 ("In these circumstances, the disparity between the defendant's sentence of 60 years and Ivory's revised sentence of 30 years is unconscionable and constitutes an extraordinary and compelling reason for release."). Had she not had the ability to take changes in law into account, Pam Tyler would be incarcerated for an additional three decades after her partner was free, although his greater culpability is undisputed.

The Commission Should Adopt Broad Language for the Compassionate Release Guidelines

Much of the testimony during the hearing on the compassionate release guideline was made by policymakers and executive staff rather than practitioners. As a result many abstract concerns were raised and theoretical problems manufactured to deter the Commission from adopting the broad language in the draft guidelines for compassionate release. The National Council urges the Commission not to let the parade of horribles – an overwhelmed judicial system, "revictimized" communities, encroachment on the separation of powers, lack of finality, and inconsistency in outcomes – distract it from drafting Guidelines that recognize that each person on a prison bunk has their own story, many of which are truly extraordinary and compelling, and that their voices need to be heard if true justice is to be served.

Many of the objections to broadening the language of the compassionate release guidelines take individual provisions out of context in order to create the specter of someone being inappropriately released from prison. The compassionate release statute has two components – extraordinary and compelling circumstances and the 3553(a) factors. Thousands of motions have been denied although the movant established extraordinary and compelling circumstances because the court found they were a danger to public safety or had simply had not served a sufficient percentage of their sentence. There is always a horror story, such as a parent who abuses a child after early release, but no system is perfect. The key point is that opponents are reduced to trotting out single anecdotes rather than citing statistics. The fact is that of the 11,000 people released under the CARES Act, 17 – or 0.015% – committed new crimes. The guidelines for determining eligibility for "extraordinary and compelling" should be broad: if something is extraordinary, it is, by definition, hard to anticipate and write into policy. But that is only half of the analysis. Anyone whose situation is extraordinary can still be vetted under 3553(a), and thousands of denials have been based on those factors.

The courts will not be overwhelmed by compassionate release motions if the Commission broadens the definitions of "extraordinary and compelling," and they are fully capable of handling any uptick that might occur. Plenty of barriers already exist to limit the number of pro-se motions from incarcerated people, including screening by clerk's offices and prohibitions against vexatious litigants. Judges have denied motions with checklist, boilerplate, and text order denials, procedures which appellate courts have deemed acceptable due to the simplicity of the cases. *See, e.g., United States v. High*, 997 F.3d 181, 188–89 (4th Cir. 2021).

Concern about prosecutors not being able to interpret medical records is also a red herring. Anyone who can review their own medical records can understand BOP medical records because prison facilities provide primary care. The National Council has supervised law students who have collectively reviewed over 10,000 pages of medical records and they have never had a problem describing and documenting medical issues to the court. Differing opinions between doctors about the best form of care may be opaque to a lay person, but such professional disputes are not "extraordinary and compelling" but a feature of competent medical care.

Compassionate release motions must be based on egregious circumstances: contraindicated treatment or no treatment at all. *United States v. Douglas*, No. CR 10-171-4 (JDB), 2021 WL 214563, at *6 (D.D.C. Jan. 21, 2021) (granting compassionate release in part because the BOP was giving the movant Lisinopril, which "may even increase his risk of becoming infected with COVID-19"). One does not need special training to know that abnormal lab results require follow-up or that people with cancer require some combination of surgery, chemotherapy, or radiation. The National Council has advocated on behalf of clients who 1) nearly bled to death from untreated uterine fibroids; 2) had an untreated hernia that made her look 9 months pregnant; 3) did not receive the correct medication after suffering several hypertensive emergencies; 4) was not informed for over six months that she had cancer; or 4) was given randomly varied hormone injections while transitioning from female to male, to list a few examples.

Litigating a compassionate release motion is no different from any other. A decent brief supported with medical records can easily show whether the "extraordinary and compelling" standard has been met, which will generally require the incarcerated person's life to be in danger. *United States v. Beck*, 425 F. Supp. 3d 573, 574 (M.D.N.C. 2019) (granting a reduction in sentence because of the movant's "invasive cancer and BoP's history of indifference to her treatment"); *United States v. Robles*, No. 19CR4122, 2022 WL 229362, at *2 (S.D. Cal. Jan. 26, 2022) (granting compassionate release after the BOP did not schedule needed open-heart surgery after Ms. Robles had five strokes). The courts have handled motions during a once-in-a-century pandemic and the past three years and there is no reason to think that their ability to do so will change in the future.

Victims' Concerns Are Integrated into Adjudication of Compassionate Release Motions

Victims rightly have a strong voice in the compassionate release process, but they should not have veto power. In all the compassionate release motions which The National

Council has litigated involving individual victims, the prosecutor contacted the victim or their family and included their views in the opposition brief. In each case, the judge weighed those views. The analysis for compassionate release under 3553(a) starts with the original transgressions and the victim, but it does not end there. A person should not be deprived of liberty any longer than necessary. 18 USC §3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.").

Therefore, the Commission should continue to follow Congress's lead by not excluding categories of people, such as "violent offenders." The judge has to consider who the movant is *today* and whether that person still needs to be in prison. Looking at the question solely through the lens of the victim distorts the picture. The victim's interests are represented in the analysis for the need for punishment, deterrence, and the safety of the public. In making the latter determination, judges consider the movant's entire criminal history. Movants must show that they have been sufficiently punished, that their incarceration has been arduous enough to deter others, and that they are no longer a danger to the public. In addition, they must show exemplary rehabilitation — but only after they have demonstrated extraordinary and compelling circumstances. The task of convincing a judge to grant compassionate release is already monumental enough to protect victims.

We appreciate the opportunity to comment and the Commission's openness to a wide range of perspectives.

Respectfully submitted,

Andrea James
Executive Director

Catherine Sevcenko
Senior Counsel

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Mo NORML

Topics:

1. Compassionate Release

Comments:

Expand compassionate release.
Release all non violent marijuana defendants.

Submitted on: March 9, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

National Pardon Association

Topics:

1. Compassionate Release
2. First Step Act- Safety Valve and Conforming Changes to §2D1.1
3. Firearms Offenses
4. Circuit Conflicts Concerning §3E1.1(b) and §4B1.2(b)
5. Crime Legislation
6. Categorical Approach and Other Career Offender Issues
7. Criminal History
8. Acquitted Conduct
9. Sexual Abuse of a Ward Offenses
10. Alternatives-to-Incarceration Programs
11. Fake Pills
12. Miscellaneous Issues
13. Technical Amendment

Comments:

I believe nobody is perfect we all deserve a second chance!

Submitted on: March 11, 2023

New Civil Liberties Alliance

March 14, 2023

VIA USSC Public Comment Submission Portal

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle NE
Suite 2-500
Washington, DC 20002-8002

Re: Comments to the Proposed 2023 Amendments to the Federal Sentencing Guidelines

Dear Judge Reeves and Members of the Commission,

The New Civil Liberties Alliance ("NCLA") welcomes this opportunity to comment on the proposed amendments to the *Sentencing Guidelines for United States Courts*, 88 Fed. Reg. 7180 (Feb. 2, 2023), by the United States Sentencing Commission ("USSC" or the "Commission").

NCLA generally supports the Commission's efforts to resolve the existing Circuit split regarding USSG § 4B1.2, as the current version of that Guideline has invited repeated use of *Stinson* deference in the district courts, to the detriment of the constitutional rights of countless criminal defendants. As discussed below, faithful application of *Stinson* deference also invites constitutional mischief, depriving defendants of their due process rights and often expanding the amount of time individuals are sentenced beyond the times prescribed by Congress. The amendment to USSG § 4B1.2 is a good first step, but additional work is necessary to alleviate district courts' reliance on *Stinson* deference and the harms that reliance incurs.

STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization founded by Columbia Law School professor Philip Hamburger to defend constitutional freedoms against unlawful exercises of administrative power. NCLA challenges constitutional defects in the modern American legal framework by bringing original litigation, defending Americans from unconstitutional actions, filing *amicus curiae* briefs, and petitioning for a redress of grievances in other ways, including by filing rulemaking comments. Although Americans still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

NCLA is particularly disturbed by the widespread practice of extending judicial "deference" to the Commission's commentary on the U.S. Sentencing Guidelines. This deference regime raises grave constitutional concerns that the Supreme Court never considered in *Stinson v. United States*, 508 U.S. 36 (1993)—and has not discussed since. Several constitutional problems arise when Article III judges abandon their duty of independent judgment and "defer" to others' views about how to interpret criminal laws. NCLA has filed *amicus curiae* briefs in support of abandoning or cabining the use of so-called *Stinson* deference in appellate courts throughout the country and the United States Supreme Court, as well as representing Mr. Marcus Broadway in his petition for *certiorari* to the United States Supreme Court on this same issue.[1]

SUMMARY OF CERTAIN PROPOSED AMENDMENTS

The Commission is proposing to amend the Guidelines to address two circuit conflicts that have evolved regarding certain inchoate offenses. *See* Proposed 2023 Amendments to the Federal Sentencing Guidelines at 167-173.[2] The first circuit conflict identified by the Commission is "whether the definition of controlled substance offense in § 4B1.2(b) includes the inchoate offenses listed in Application Note 1 to § 4B1.2." *Id.* at 168. The second circuit conflict identified by the Commission is "whether certain conspiracy offenses qualify as crimes of violence or controlled substance offenses" under Application Note 1 to § 4B1.2. *Id.* at 169. While the Commission's synopsis discusses *Stinson* deference regarding the first circuit conflict, it ignores the role that *Stinson* plays as to the second conflict. *Id.* at 169.

To resolve these conflicts, the Commission has proposed to "amend[] § 4B1.2 and its commentary" to include the inchoate offenses provision in the Guideline itself and revising that provision "to provide that the terms 'crime of violence' and 'controlled substance offense' include aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.'" *Id.* at 169-70.

THE HISTORY OF *STINSON* DEFERENCE AND ITS APPLICATION POST-*KISOR*

In *Kisor v. Wilkie*, all nine justices agreed on the need to "reinforce" and "further develop" the limitations on the deference that courts owe to an administrative agency's interpretation of its own rules. 139 S. Ct. 2400, 2408, 2415 (2019); *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch,

[1] *See, e.g.*, Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Defendant-Appellant, *United States v. Vargas*, No. 21-20140 (5th Cir. Sept. 30, 2022), ECF No. 00516492152; Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Petitioner, *Moses v. United States*, 143 S. Ct. 640 (2023); Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Defendant-Appellant, *United States v. Moses*, No. 21-4067 (4th Cir. Feb. 9, 2022), ECF No. 40-2; Brief for New Civil Liberties Alliance and Due Process Institute as *Amici Curiae* Supporting Petitioner, *Wynn v. United States*, No. 142 S. Ct. 865 (2022); Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Appellant, *United States v. Tabb*, No. 18-338-cr (2d Cir. May 5, 2020), ECF No. 196; Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Appellant, *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020), *cert. granted and vacated*, 142 S. Ct. 56 (2021) (mem.); Petition for Writ of Cert., *Broadway v. United States*, 141 S. Ct. 2792 (2021).

[2] Citations to the *Proposed 2023 Amendments to the Federal Sentencing Guidelines* are made to the "Reader-Friendly" version; *see* https://www.ussc.gov/guidelines/amendments/proposed-2023-amendments-federal-sentencing-guidelines.

J., concurring in judgment); *id.* at 2448-49 (Kavanaugh, J., concurring in judgment). *Kisor* held that courts may defer to an agency's interpretation *only* if a regulation proves "genuinely ambiguous" after a court has "exhaust[ed] all the 'traditional tools of construction.'" *Id.* at 2415.

Prior to *Kisor*, courts had been deferring "reflexive[ly]" to agencies' regulatory interpretations, without first conducting their own exhaustive textual analysis like the Constitution requires. *See ibid.* As the Court acknowledged in *Kisor*, this reflexive deference was likely the result of the "mixed messages" that the Court has sent in cases where it has "applied *Auer* deference without significant analysis of the underlying regulation[,]" or where the Court has "given *Auer* deference without careful attention to the nature and context of the interpretation." *Id.* at 2414.

Of all the mixed messages the Supreme Court has sent about the appropriate role of agency deference, 1993's *Stinson* decision has been among the most damaging given its application to criminal sentencing. 508 U.S. at 38. In *Stinson*, the Court ruled that courts must defer to the United States Sentencing Commission's commentary interpreting the Sentencing Guidelines unless that commentary "is inconsistent with, or a plainly erroneous reading of, that guideline." *Ibid. Stinson* held that such deference was appropriate even if the interpretation "may not be compelled by the guideline text." *Id.* at 47.

Following *Stinson*, the courts of appeals began to give "nearly dispositive weight" to the Commission's commentary over "the Guidelines' plain text." *United States v. Nasir*, 982 F.3d 144, 177 (3d Cir. 2020) (en banc) (Bibas, J., concurring in part), *cert. granted and judgment vacated*, 142 S. Ct. 56 (2021) (mem.); *see also United States v. Mendoza-Figueroa*, 65 F.3d 691, 692-63 (8th Cir. 1995) (en banc) ("Every court has agreed that the Commission's extensive statutory authority to fashion appropriate sentencing guidelines includes the discretion to include drug conspiracy offenses in the category of offenses that warrant increased prison terms for career offenders.").

Several courts of appeals read *Stinson* as requiring reflexive deference, relying on the explicit language in *Stinson*. For example, the Tenth Circuit has quoted *Stinson* for its rule that "Guideline application notes are 'authoritative unless [they] violate[ ] the Constitution or a federal statute, or [are] inconsistent with, or a plainly erroneous reading of, that guideline.'" *United States v. Linares*, No. 21-3210, 2023 WL 2147307, at *5 (10th Cir. Feb. 22, 2023) (modifications in original) (quoting *Stinson*, 508 U.S. at 38). With no inquiry at all concerning a Guideline's ambiguity, *Stinson* deference is reflexive by its very terms.

To their credit, the Third, Fourth, Sixth, Eleventh, and D.C. Circuits have recognized that a strict reading of *Stinson* is inconsistent with the Supreme Court's modern administrative-law jurisprudence, the Sentencing Commission's legal authority, and the Constitution. For example, the Eleventh Circuit recently determined that "[t]o follow *Stinson*'s instruction to treat the commentary like an agency's interpretation of its own rule, we must apply *Kisor*'s clarification of *Auer* deference to *Stinson*." *U.S. v. Dupree*, 57 F.4th 1269, 1276 (11th Cir. 2023) (en banc); *see id.* at 1277 (finding that § 4B1.2(b) "unambiguously excludes inchoate offenses").[3] The majority of the other circuits, however, adhere to the

[3] The "Synopsis of the Proposed Amendment" relies on *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017) for the proposition that the "Eleventh Circuit[] continue[s] to hold that inchoate offenses like attempt and conspiracy qualify as controlled substance offenses, reasoning that the commentary is consistent with the text of § 4B1.2(b) because it does not include any offense that is explicitly excluded by the text of the guideline." *Proposed 2023 Amendments to the*

outdated language in *Stinson* and refuse to reconsider their circuit precedent in light of *Kisor*. *But see United States v. Vargas*, 45 F.4th 1083 (5th Cir. 2022) (ordering rehearing en banc in a *Stinson* deference case).

Moreover, *Kisor* made clear that courts must exhaust the "traditional tools of construction" before deferring to an agency. 139 S. Ct. at 2415. The rule of lenity is a traditional tool of construction "perhaps not much less old than construction itself" that protects core liberties against government intrusion. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The courts of appeals, however, divide on whether lenity applies before deference, or even applies at all. *Compare Nasir*, 17 F.4th at 474 (Bibas, J., concurring) ("A key tool in that judicial toolkit is the rule of lenity."), *with United States v. Cingari*, 952 F.3d 1301, 1310-11 (11th Cir. 2020) ("cast[ing] doubt" if lenity applies before *Stinson* deference). But the commentary challenged in *Stinson* interpreted the Guidelines in favor of a more lenient sentence, such that the rule of lenity was not at issue. *See* 508 U.S. at 47-48.

When courts apply *Stinson* deference to the Sentencing Guidelines, they systematically violate the due-process rights of criminal defendants by increasing the Guideline range approved by Congress without fair warning and without clear statutory language. The impact on criminal defendants can be substantial, as *Stinson* deference may "expand the list of crimes that trigger career-offender status, which may well lead judges to sentence many people to prison for longer than they would otherwise deem necessary." *United States v. Lewis*, 963 F.3d 16, 28 (1st Cir. 2020) (Torruella & Thompson, JJ., concurring); *see also* Petition for Writ of Certiorari at 2, *Broadway v. United States*, 141 S. Ct. 2792 (2021). (noting "Mr. Broadway will languish in prison, away from his family and community, for over 2,000 days longer than Congress prescribed" due to *Stinson* deference's application in his case).

Problematically, faithful application of *Stinson* deference also invites other constitutional harms. First, it requires judges to abdicate the duty of their office by forgoing their independent judgment in favor of an agency's legal interpretation. *See Perez v. Mortgage Bankers Ass'n*, 572 U.S. 92, 110 (2015) (Scalia, J., concurring in judgment) (deference requires courts "to 'decide' that the text means what the agency says"). This is especially true when "a sentence enhancement potentially translates to additional years or decades in federal prison," as "we cannot forget that '[t]he structural principles secured by the separation of powers protect the individual as well.'" *United States v. Campbell*, 22 F.4th 438, 446-47 (4th Cir. 2022) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). "In such circumstances, 'a court has no business deferring to any other reading, no matter how much the [Government] insists it would make more sense.'" *Id.* (quoting *Kisor*, 139 S. Ct. at 2415).

Second, deference jeopardizes the judicial impartiality due process requires. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Commw. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (judicial bodies "not only must be unbiased but also must avoid even the appearance of bias"); *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring) (the Constitution forbids proceedings "infected by … bias"). *Stinson* deference institutionalizes bias by requiring courts to "defer" to the government's legal interpretation in violation of a defendant's right to due process of law. *Cf.* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Rather than exercise their own judgment about what the law is, judges under *Stinson* defer as a matter of course to the judgment of one of the litigants before them: the federal government.

Federal Sentencing Guidelines at 168. But *Lange* was abrogated by *Dupree*. 57 F.4th at 1279 ("So, if [*United States v. Smith*, 54 F.3d 690 (11th Cir. 1995)], is wrong, then *Lange* is, too.").

The government litigant wins merely by showing that its preferred interpretation of the commentary "is not plainly erroneous or inconsistent with" the Guidelines. *Stinson*, 508 U.S. at 47. A judge cannot simply find the defendant's reading more plausible or think the government's reading is wrong—the government must be *plainly* wrong.

The *Stinson* problem can be addressed in several ways, including, as here, through amendments to the Sentencing Guidelines that are promulgated through notice-and-comment rulemaking and approved by Congress before they take effect. *See Mistretta v. United States*, 488 U.S. 361, 393-94 (1989); *see also Guerrant v. United States*, 142 S. Ct. 640 (2022) (Sotomayor & Barrett, JJ., respecting the denial of certiorari) ("It is the responsibility of the Sentencing Commission to address this division to ensure fair and uniform application of the Guidelines.").

COMMENTS

I. The Proposed Amendments to Guideline § 4B1.2 and Its Commentary Are a Good First Step to Alleviating the Harm That *Stinson* Deference Inflicts

The Commission and its Guidelines are constitutional only because: (1) the Commission promulgates them and any amendments thereto through notice-and-comment rulemaking; and (2) Congress reviews every Guideline before it takes effect. *Mistretta*, 488 U.S. at 393-94. By contrast, the Sentencing Reform Act permits Commission commentary by implication only, and it is not subject to congressional review or notice and comment. *See Stinson*, 508 U.S. at 41. Neither the Commission's intentions nor its procedures elevate its commentary to the Sentencing Guidelines to a higher status as a matter of law. Rather, "the Commission acts unilaterally" when it issues commentary, "without that continuing congressional role so vital to the Sentencing Guidelines' constitutionality." *Campbell*, 22 F.4th at 446; *see also United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2020) ("Only the guidelines (not the commentary) must go through notice-and-comment rulemaking. 28 U.S.C. § 994(x). So if the Commission could freely amend the guidelines by amending the commentary, it could avoid these notice-and-comment obligations. The healthy judicial review that *Kisor* contemplates thus will restrict the Commission's ability to do so.").

Thus, when the Commission promulgates or amends the Sentencing Guidelines and presents them to Congress, "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit." *Mistretta*, 488 U.S. at 393-94. This is in contrast to the use of *Stinson* deference, which expands the breadth of the Sentencing Guidelines without congressional oversight or approval and "raises troubling implications for due process, checks and balances, and the rule of law." *Lewis*, 963 F.3d at 28 (Torruella & Thompson, JJ., concurring).

By moving the terms "crime of violence" and "controlled substance offense" into Guideline § 4B1.2, the Commission provides Congress with the ability to consider, review, amend, revoke, or approve those terms. That action alleviates the need for judges to defer to commentary, as to this Guideline, and removes the constitutional harm caused or invited by applying *Stinson* deference.[4]

[4] NCLA takes no position between the two options presented and submits comments only in support of including the definitions in the text of § 4B1.2 rather than the commentary to avoid triggering *Stinson* deference.

II. The Proposed Amendments Do Not Address the Commentary to Other Guidelines That Has Triggered *Stinson* Deference and Further Review and Amendments Are Necessary

The "crime of violence" and "controlled substance offense" definitions are not the only sections of the Guidelines that have triggered *Stinson* deference. And while those other Guidelines have not caused the same cavernous rift among the courts of appeals as Application Note 1 to § 4B1.2 has caused, that does not make them any less worthy of consideration for amendment to alleviate reliance on *Stinson* deference and restore defendants' due process rights.

For example, in *Riccardi*, the Sixth Circuit determined that under *Kisor*, instead of "immediately" deferring to USSG § 2B1.1's commentary, which included a "mandatory $500 loss amount" that was not in § 2B1.1's text, it must instead engage with the Guideline's text. 989 F.3d at 486. As the court noted, Application Note 3(F)(i) to § 2B1.1 "instructs that [in certain cases] the [automatic] loss 'shall be not less than $500' for each 'unauthorized access device[.]'" *Id.* at 479. This instruction unquestionably expands that Guideline. *See United States v. Kirilyuk*, 29 F.4th 1128, 1138 (9th Cir. 2022); *see also id.* at 1139 (holding that the commentary "contorts the meaning of 'loss'" and "is not binding"). The upward departure in sentencing that may occur because of that contortion, due to deferring under *Stinson*, could be staggering. *Id.* at 1138 ("Applying the $500-per-card multiplier balloons the 'loss' to $60 million—17 times greater than the intended loss."); *see also Riccardi*, 989 F.3d at 479-80(the stolen "gift cards had an average value of about $35 for a total value of about $47,000" but applying the commentary's minimum loss "amounted to a total loss amount of $752,500," "increas[ing] her offense level by 14").

The Commission need not wait for a circuit split to alleviate this or other issues stemming from drafting choices made between the Guidelines themselves and commentary to those Guidelines. As Judge Joan Larsen recently articulated, including language like "'Shall be considered' is the language of a policy choice, not of interpretation" and "conjure[s] a construction, rather than constru[ing] a text." *United States v. Phillips*, 54 F.4th 374, 388 (6th Cir. 2022) (Larsen, J., concurring). The Guidelines commentary is replete with similar "shall be" and "shall be considered" phrasing, which is likely to invite *Stinson* deference and trigger constitutional problems in the future. *See, e.g.,* USSG § 2B1.1 n.3(F)(i)-(iii) (using "shall be" or "shall be considered" language to set minimum loss amounts in certain cases not expressly stated in the Guideline). NCLA recommends that the Commission consider affirmatively removing language from any commentary that indicates a policy choice, because such choices belong to the U.S. Congress—not the U.S. Sentencing Commission.

Very truly yours,

/s/ *Kara Rollins*

Mark Chenoweth, President
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March 13, 2023

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Proposed Amendments

Re: Comments on Proposed Amendment to the Guidelines Manual Regarding Acquitted Conduct

Dear Commissioners:

On behalf of the Federal Courts Committee, Criminal Courts Committee, and White Collar Crime Committee of the New York City Bar Association[1] ("City Bar"), we respectfully submit the

[1] The City Bar, founded in 1870, has over 23,000 members practicing throughout the nation and in more than fifty foreign countries. It includes among its membership lawyers in many areas of law practice, including present or former federal prosecutors as well as lawyers who represent defendants in criminal cases. The Federal Courts Committee is charged with studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts. The Criminal Courts Committee studies the workings of the Criminal Term of the New York State Supreme Court and the New York

following comments on the United States Sentencing Commission's ("Commission") Proposed 2022–2023 Amendments to the Federal Sentencing Guidelines Manual. More specifically, the City Bar submits its comments concerning Proposed Amendment 8 regarding Acquitted Conduct. The City Bar appreciates this opportunity to comment on the Proposed Amendment.

I. INTRODUCTION

The City Bar applauds the Commission's effort to limit the use of acquitted conduct in applying the Federal Sentencing Guidelines ("Guidelines"). Previously, the City Bar encouraged legislators to prohibit the consideration of uncharged conduct at federal sentencing, and it endorsed legislation that would have precluded federal courts from considering acquitted conduct, except for purposes of mitigating a sentence.

As detailed in the April 2020 Report of the City Bar's Federal Courts Committee on the Prohibiting Punishment of Acquitted Conduct Act of 2019, jurists, academics, practitioners, and commentators have for years raised concerns that Supreme Court jurisprudence, federal statutory law, and the Guidelines permit sentencing courts to use conduct for which a defendant was acquitted to enhance a convicted defendant's sentence.[2] While legal practitioners and commentators have almost uniformly decried the use of acquitted conduct in federal sentencing, federal courts have continued to consider such conduct in applying the Guidelines. Following the Supreme Court's decision in *United States v. Watts*, 519 U.S. 148 (1997), every single circuit court has affirmed lower courts' consideration of acquitted conduct when sentencing within the statutory range authorized by the jury verdict.[3] In recent years, however, an increasing number of jurists

City Criminal Court. The White Collar Crime Committee focuses on the white collar criminal space and includes prosecutors and former prosecutors, as well as defense attorneys. The White Color Crime Committee joins in the letter, except for those members who are government lawyers and are not able to take a position.

[2] *See* N.Y. City Bar Ass'n, "Report on Legislation by the Federal Courts Committee: Prohibiting Punishment of Acquitted Conduct Act of 2019" (Apr. 2020); *see also United States v. Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting) (collecting cases); *United States v. Baylor*, 97 F.3d 542, 549 & n.2 (D.C. Cir. 1996) (Wald, J., specially concurring) ("[M]any individual judges have expressed in concurrences and dissents the strongest concerns, bordering on outrage, about the compatibility of such a practice with the basic principles underlying our system of criminal justice."); Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1627–28 (2012) (noting that even after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 245 (2005), "the Guidelines preserve the problem of acquitted conduct increasing sentences," which "stands in sharp tension with the jury's constitutional role because judges continue to comply with the Guidelines, and the Guidelines continue to instruct judges to consider relevant conduct in sentencing"); Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 27 (2016).

[3] *See, e.g.*, *United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022) ("The Supreme Court has held that 'a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.' The holdings in this circuit have followed this precedent, as they must." (quoting *Watts*, 519 U.S. at 157)); *United States v. Medley*, 34 F.4th 326, 336 (4th Cir. 2022) ("Whether or not we agree or disagree with the precedent from the Supreme Court and this Court, we are bound to follow it."); *see also United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014) (noting that, following *Watts*, the D.C. Circuit and "every numbered circuit ha[ve] addressed the constitutionality of sentencing based on acquitted conduct and reached the same conclusion"); Br. for the United States in Opp'n to Pet. for Writ of Cert. at 11–12, in *McClinton v. United States*, No. 21-1557 (filed October 28, 2022; petition pending) ("[E]very federal court of appeals with criminal jurisdiction has recognized, after *Booker*, that a district court may consider acquitted conduct for sentencing purposes.")

have expressed concerns about the constitutionality of permitting the use of acquitted conduct to factor into and increase a defendant's sentence, including the late Justices Scalia and Ginsburg, and current Justices Thomas, Gorsuch, and Kavanaugh.[4]

For the reasons expressed by these jurists and commenters, the City Bar supports, with the modifications stated below, the proposed amendment's limitation on the use of acquitted conduct for purposes of determining the applicable Guidelines range in individual cases.

II. PROPOSED AMENDMENT 8

On February 2, 2023, the Commission proposed an amendment to Guidelines Section 1B1.3 that would generally prohibit federal judges from considering acquitted conduct as relevant conduct for purposes of calculating a defendant's advisory Guidelines range. However, the proposed amendment would still allow federal judges to consider conduct that the defendant otherwise admitted during a guilty plea colloquy or that was "found by the trier of fact beyond a reasonable doubt to have established, in whole or in part, the instant offense of conviction." The proposed amendment would define "acquitted conduct" to include both (1) conduct "underlying a charge of which the defendant had been acquitted by the trier of fact;" and (2) conduct that a defendant successfully moved for acquittal under Rule 29 of the Federal Rules of Criminal Procedure or an analogous state or local provision. The Commission also proposed an amendment to the Commentary for Section 6A1.3 to conform with the amendment to Section1B1.3.

The Commission has invited any comments on two issues concerning the proposed amendment:

1. To the extent that conduct "underlying an acquitted charge" may overlap with conduct found beyond a reasonable doubt to establish the offense of conviction, does the proposed amendment allow a court to consider such "overlapping conduct"? If so, should the Commission provide additional guidance on such conduct.

2. Whether the proposed limitation on the use of acquitted conduct in sentencing is too broad or too narrow? For example, should the proposed amendment include or exclude acquittals for reasons unrelated to the substantive evidence, such as for lack of jurisdiction or venue or the statute of limitations.

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[4] *See Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of *certiorari*) (calling for a review of consideration of acquitted conduct at sentencing); *United States v. Bell*, 808 F.3d 926, 927–28 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*) (explaining that courts using acquitted conduct to "impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial"); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning constitutionality of sentencing judge changing defendant's sentence "within the statutorily authorized range based on facts the judge finds without the aid of a jury or the defendant's consent").

III. THE CITY BAR SUPPORTS, WITH MODIFICATIONS, THE PROPOSED AMENDMENT PRECLUDING THE USE OF ACQUITTED CONDUCT AT SENTENCING

The City Bar supports the proposed amendment to the Guidelines to limit the use of acquitted conduct at sentencing. The City Bar, however, recommends modifications to the proposed amendment to make clear that conduct underlying an acquitted charge that overlaps with conduct found beyond a reasonable doubt to establish an offense of conviction may only be considered for purposes of determining the applicable advisory Guidelines if it is legally necessary to establish the offense of conviction. In addition, the proposed amendment is too narrow in that it still allows the use of conduct for which a defendant was acquitted for enhancing a sentence under the Guidelines. The City Bar encourages the Commission to prohibit more broadly the use of conduct for which a defendant was acquitted as a basis of any enhancement.

a. Comment on Issue 1: "Overlapping" Conduct

The Commission should provide additional guidance regarding overlapping conduct. Conduct underlying an acquitted charge that overlaps with conduct found beyond a reasonable doubt to establish an offense of conviction should not be considered for purposes of determining the applicable Guidelines range beyond that conduct which was legally necessary to establish the count(s) of conviction. As presently drafted, proposed Guidelines Section 1B1.3(c) is ambiguous. It provides that acquitted conduct shall not be considered relevant conduct for purposes of determining the Guidelines range unless such conduct "establish[ed], in whole or in part, the instant offense of conviction." Absent clarification, it is unclear whether this exception to the prohibition on considering acquitted conduct applies only to conduct that was a necessary element of the offense of conviction, or rather to conduct simply included, among others, in the charges and presented to the trier of fact.

This ambiguity in the definition of "established" could be particularly salient when the offense of conviction is a money laundering or conspiracy charge. For example, a defendant might be convicted of a money laundering offense, but acquitted of charges that he committed the alleged specified unlawful activity.[5] Similarly, a defendant might be convicted of a conspiracy involving numerous alleged overt acts, without the jury specifying which overt act was proven beyond a reasonable doubt, and also acquitted of one or more substantive offenses related to the alleged overt acts.[6] Conversely, the question might arise in a situation where a defendant is acquitted of a

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[5] *See, e.g., United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008) (vacating sentence for money laundering where district court failed to consider defendant's acquitted drug trafficking conduct).

[6] In *United States v. Young*, 09 Cr. 223 (TEJ), 2011 WL 884002 (S.D. W.Va. Mar. 11, 2011), for example, the defendants were convicted of a multi-object conspiracy to possess, transport, and sell stolen property, but were acquitted of a substantive count concerning the possession of a specific stolen vehicle that was found on the property of a co-conspirator. The possession of the stolen vehicle was the only alleged overt act that specifically involved the co-conspirator. At sentencing, the district court included as relevant conduct not only the vehicle, but also all stolen property found in the possession of the co-conspirator. *Id.* at *11; *cf. United States v. Kiel*, 658 F. App'x 701, 711–12 (5th Cir. 2016) (affirming district court's calculation of offense level for multi-object conspiracy based on every bank robbery listed as an overt act, even those not charged as substantive offenses).

conspiracy charge, but convicted of related substantive charges along with his alleged co-conspirator.[7]

Given this ambiguity, the City Bar recommends that the Commission modify the language of the proposed amendment to Section 1B1.3 so that only acquitted conduct that overlaps with conduct legally necessary to the factfinder's determination of guilt on the offense(s) of conviction may be considered for purposes of determining the applicable advisory Guidelines range.[8] In the alternative, the Commission should provide additional guidance for the application of the new provision.

b. Comment on Issue 2: Breadth of Limitation on the Use of Acquitted Conduct

The City Bar believes that there is no meaningful distinction between acquittals based on the substantive evidence and acquittals for other reasons, such as lack of jurisdiction, venue, or violations of the statute of limitations. Consideration of all acquittals should be precluded for purposes of determining the applicable advisory Guidelines range.

A contrary rule would lead to inconsistency in the treatment of acquittals rendered by juries and judges for the same reasons. For example, a jury that determined the prosecution had not adequately proven venue could render an acquittal on a general verdict form with no further explanation. Yet, a court, on its own or presented with a motion for acquittal, could enter a judgment of acquittal on the same record for the same reason. If conduct relating to "non-substantive" acquittals could be considered, the defendant acquitted by the court would be unfavorably situated compared to the defendant acquitted by the jury, as the acquitted conduct could be considered for the Guidelines range for the former, but not the latter. There is no principled basis for treating these similarly situated defendants differently.

The proposed amendment is also too narrow in that it permits the continued consideration of acquitted conduct, on a preponderance of the evidence standard,[9] for determination of upward departures. Multiple Guidelines provisions allow for upward departures based on factual circumstances that may be presented to, but rejected by, the jury.[10] To the extent that the proposed amendment allows for upward departures on the basis of acquitted conduct, the amendment does not go far enough to address the concerns that have motivated the amendment itself, and leaves an

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[7] *See, e.g., United States v. Sumerour*, 18 Cr. 582 (KGS), 2020 WL 5983202 (N.D. Tex. Oct. 8, 2020) (rejecting loss amount for health care fraud calculated by the U.S. Probation Office that included losses stemming from an acquitted conspiracy charge).

[8] To avoid confusion regarding the deference to be accorded the Commission's understanding of the proposed Guidelines amendment, the Commission should incorporate such changes into the text of the proposed Guidelines provision itself, and not limit such guidance to the commentary. *Cf. United States v. Banks*, 55 F.4th 246, 255 (3d Cir. 2022) (holding that, following *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), courts must exhaust all the traditional tools of construction and conclude that a Guidelines provision is genuinely ambiguous before according deference to the Commission's commentary interpreting the Guidelines).

[9] *See, e.g., United States v. Rasheed*, 981 F.3d 187, 193 (2d Cir. 2020).

[10] *See, e.g.*, U.S.S.G. § 5K2.5 (upward departure for property loss or damage not otherwise taken into account by Guidelines); *id.* § 5K2.6 (upward departure for use of a weapon); *id.* § 5K2.9 (upward departure when offense of conviction was committed to facilitate or conceal another offense).

exception that might, in practice, render the amendment ineffectual. The City Bar recommends that the consideration of acquitted conduct for purposes of upward departures be prohibited under the proposed amendment.

IV. CONCLUSION

The City Bar fully supports the Commission's efforts to limit the use of acquitted conduct at sentencing, without any distinction between acquittals based on the substantive evidence and acquittals for other reasons. However, the Commission should provide additional clarity for the application of the proposed amendment of Section 1B1.3 to "overlapping" conduct. The City Bar also respectfully requests that the Commission consider whether acquitted conduct, proven only by a preponderance, may continue to be used for determining upward departures.

Respectfully,

Richard Hong

Richard Hong, Chair
Federal Courts Committee

Drafting Subcommittee
Jonathan B. New, Chair
Neil P. Kelly
Alvina Pillai

Anna Cominsky

Anna G. Cominsky, Co-Chair
Criminal Courts Committee

Carola Beeney

Carola Beeney, Co-Chair
Criminal Courts Committee

Jenna Dabbs

Jenna Dabbs, Chair
White Collar Crime Committee

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Play4Youths

Topics:

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

Comments:

The Act needs to be addressed

Submitted on: February 27, 2023

March 4, 2023

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002

Members of the United States Sentencing Commission,

Decisions to order a reduced sentence through federal compassionate release under 18 U.S.C. § 3582(c)(1)(A) may provide a restorative solution to individual defendants and their families. As the nation's largest Christian non-profit serving prisoners, former prisoners, and their families, Prison Fellowship writes to express our priorities as the United States Sentencing Commission (USSC, or "the Commission") seeks to give federal courts necessary guidance for exercising this significant authority.[1]

Compassionate release is a key mechanism in federal law that enables courts to carefully consider whether a reduced sentence is appropriate to effectuate justice.[2] Courts must identify whether a.) an "extraordinary and compelling reason" justifies this sentencing relief and b.) conduct an assessment of what sentencing modification, if any, is appropriate given established 3553(a) sentencing factors.[3] These statutory factors demand a comprehensive case review, requiring evaluation of "the nature and circumstances of the offense and the history and characteristics of the defendant"; public safety risk; applicable sentencing ranges and USSC guidelines; and the need for any imposed sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[4]

The First Step Act enacted several improvements to the statute governing federal compassionate release. In the absence of a quorum, the Commission has been unable to update its policy statement regarding what circumstances constituent an "extraordinary and compelling reason" for an order of compassionate release.[5] Absent this clarity, federal courts lack clear guardrails on when and how to appropriately use this sentencing relief mechanism, which has brought concerning discrepancies among circuit courts.[6] We commend the Commission's work to provide courts with urgently needed parameters for imposing a justly reduced sentence under 18 U.S.C. § 3582(c)(1)(A). Through an updated policy statement, USSC will help courts identify whether an "extraordinary and compelling reason" justifies compassionate release in tandem with evaluation of 3553(a) sentencing factors. We write to share our support for the following proposed amendments:

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[1] USSC, *Proposed 2023 Amendments to the Federal Sentencing Guidelines*, United States Sentencing Commission (Feb. 2023), https://www.ussc.gov/guidelines/amendments/proposed-2023-amendments-federal-sentencing-guidelines.
[2] 18 U.S.C. § 3582(c)(1)(A) (2018).
[3] USSC, *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic*, United States Sentencing Commission (March 2022), https://www.ussc.gov/research/research-reports/compassionate-release-impact-first-step-act-and-covid-19-pandemic.
[4] 18 U.S. Code § 3553(a) (2018).
[5] Jordan S. Rubin & Madison Alder, *Restocked Sentencing Panel Prioritizes 'Compassionate Release'*, Bloomberg Law (Oct. 2022), https://news.bloomberglaw.com/us-law-week/restocked-sentencing-panel-prioritizes-compassionate-release.
[6] *Id*.

- **(b)(1)(C) and (b)(1)(D):** The COVID-19 pandemic exposed the grave, potentially deadly risks that may face aging and immunocompromised federal prisoners during a public health emergency.[7] This amendment would clarify the ability of federal courts to consider compassionate release orders in cases involving a clearly articulated and serious risk to a defendant's health, and offer prudent inclusion of a public health crisis. Although not within the authority of the Commission, this amendment change should be complemented by robust congressional funding and oversight necessary for improved correctional health care within the BOP.
- **(b)(1)(C):** Within its existing policy statement, the Commission acknowledges that specific caregiving duties constitute an "extraordinary and compelling reason" that can justify a compassionate release order following evaluation of 3553(a) sentencing factors. This amendment builds on established USSC's directives to recognize similar caregiving duties for a defendant's adult child or incapacitated parent.
- **(b)(1)(6) (Option 3):** "Extraordinary and compelling reasons" that could be reasonable grounds for a compassionate release order may exist for a future case but cannot be reasonably identified in advance by the Commission. Although Prison Fellowship supports this amendment, federal courts must exercise this discretion with due care to ensure that justice is served. Courts should draw from case law as much as possible when determining if an "extraordinary and compelling reason" exists beyond the scope of applicable Commission policy statements. To promote transparency and public deliberation between federal courts, the Commission, and lawmakers, judges should clearly articulate on record why such an "extraordinary and compelling reason" exists for a modified sentence.

When exercised with prudence and deliberation, federal compassionate release is a justified avenue for appropriate sentencing relief for incarcerated men and women in the BOP. Thank you for the opportunity to express our priorities to the Commission and for your work to support federal courts in conducting their vital public service.

Sincerely,

David Jimenez
Senior Manager of Government Affairs
Prison Fellowship

[7] PF, *COVID-19 Updates: How Prison Fellowship Continues Its Mission Amid Prison Closures*, Prison Fellowship (Last Visited March 2023), https://www.prisonfellowship.org/2021/06/weekly-update-on-prison-fellowship-and-covid-19/.

Via Electronic Submission to: www.comment.ussc.gov
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Re: Proposed Amendments to Sentencing Guidelines from January 12, 2023 Meeting

To Whom it May Concern:

Thank you so much for reviewing this submission. My name is Amber D. Lengacher and I am an attorney and the owner and Chief Executive Officer of Purple Circle LLC, a cannabis compliance consulting firm. I applaud the United States Sentencing Commission ("the Commission") for its efforts in updating sentencing guidelines to reflect society's changing views as to cannabis use and possession.

Purple Circle is just my latest venture in the cannabis space. I began my cannabis career in 2017 at renowned nationwide cannabis law firm, Vicente LLP, first as law clerk then as an associate attorney. There, I helped clients obtain cannabis business licenses all over the country, submitted comments to the U.S. Drug Enforcement Administration and other regulatory agencies regarding the continued impact of cannabis prohibition, and advised clients when the United Nations rescheduled cannabis in international drug treaties. In 2020, my career took me in-house to work for a multi-state cannabis operator first as Licensing Manager and eventually as Corporate Counsel. There, I helped the company win licensure as a Class 1 Production Licensee in the State of Georgia's emerging low-THC cannabis industry and oversaw regulatory approvals for the largest merger in cannabis history as of the date of this writing. I also sat on the Company's Diversity, Equity, and Inclusion ("DEI") Committee, guiding companywide DEI efforts as to initiatives, partnerships, supplier diversity and more.

Last year, I initiated a personal partnership with Last Prisoner Project on my own time, representing pro bono an individual who is currently federally incarcerated for non-violent

cannabis crimes in the filing of a motion for compassionate release. The client's crimes originated in a state that has since regulated the medical use of cannabis.

Then in the Fall of 2022, I founded Purple Circle on the idea that the cannabis industry should represent the community on which it was built and to help realize that goal by providing affordable and accessible compliance advice.

On a personal note, despite the tremendous professional success I have encountered in the cannabis industry, cannabis is also responsible for one of the worst days of my life. Shortly after I turned 18, I was arrested for cannabis possession. As a young adult, I incriminated myself which led to my arrest, an experience that still causes me anxiety and panic to this day. Upon arrival at the sheriff's station, I was fingerprinted and photographed before stripping for a bodily inspection and spending the night in general population, orange jumpsuit and all. Looking back decades later, I know that I experienced extreme moments of privilege throughout this occurrence, despite how terrible it was. There was privilege in my ability to afford bail and a powerful attorney. There was even more privilege in that attorney's ability to convince the judge to let me join a pre-trial diversion program, resulting in no long-standing convictions on my criminal record. I was privileged that I could afford to pay the exorbitant fees related to probation and to have a vehicle to take me to community service so I could successfully complete that program. I am so thankful I was able to complete that program successfully and that the incident hasn't impacted my life in even greater ways.

That said, the trauma of this incident—even with as minor as it was—has followed me to this day, creating obstacles to my success. From job and college applications, bar admission disclosures, even having to tell a room full of strangers about it during jury duty selection; time and time again this infraction has caused trauma in my life and made me, and others, question whether I belonged. Even with the privilege I experienced back then, over twenty years later, the impact of this event still follows me. Keeping perspective though, I often am humbled when I think of the experiences of those who are less privileged dealing with similar encounters. Without financial support and other resources like transportation and an education, these incidents often result in generational impacts that impede financial success in families across the country, decade after decade. Even now, despite the tide of cannabis legalization sweeping the globe, the continued impacts of prior "marihuana" offenses are felt far and wide.

To date, 37 states, three territories, and the District of Columbia have regulated medical use and possession of cannabis and 21 states, two territories, and the District of Columbia have regulated the adult use and possession of cannabis.[1] These jurisdictions continue to expunge state-level cannabis-related charges from the criminal backgrounds of their residents and issue massive pardons, as many as 44,000 recently in Connecticut.[2] Recently at the federal level, President Joseph Biden announced extensive pardons for federal cannabis offenders and

[1] https://www.ncsl.org/health/state-medical-cannabis-laws.

[2] https://www.ganjapreneur.com/connecticut-gov-announces-pardons-for-about-44000-cannabis-cases/#:~:text=Announces%20Pardons%20for%20Roughly%2044%2C000%20Cannabis%20Cases,-Fri%20%2F%20Dec%209th&text=The%20office%20of%20Connecticut%20Gov,erased%20starting%20January%201%2C%202023.

instructed federal officials to begin the process of updating the schedules contained in the Controlled Substances Act as to cannabis (sometimes referred to herein as "marihuana").[3] An overwhelming majority of Americans support the regulation of cannabis and the end of prohibition.[4]

Constitutional scholar and legal expert, Erwin Chemerinsky, wrote in *Cooperative Federalism and Marijuana Regulation* that "[t]he struggle over marijuana regulation is one of the most important federalism conflicts in a generation."[5] He goes on further to say, "Yet even if the federal government voluntarily refrains from enforcing its drug laws against those complying with robust state regulatory regimes, the ancillary consequences flowing from the continuing federal prohibition remain profound." One of those such consequences is the continued enforcement of enhanced sentences on individuals who have previous cannabis-related convictions in their backgrounds.

Again, I certainly appreciate the Commission's time and effort spent proposing updates to sentencing guidelines to reflect these changing laws and societal views, especially the addition of language to Section 3 of the Application Notes related to §4A1.3 detailing procedures for the application of a downward departure in career-offender sentencing for previous charges related to possession of marihuana for personal use, without an intent to sell or distribute it to another person. **This update is long overdue, and I support it in lieu of adoption of my comments below.**

That said, I understand the Commission has invited public comment as to the two points below, to which I have responded as highlighted:

1. Part C of the proposed amendment provides for a possible downward departure if the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person. The Commission seeks comment on whether it should provide additional guidance for purposes of determining whether a downward departure is warranted in such cases. If so, what additional guidance should the Commission provide?

   Response: If the comment to #2 is rejected below, I support the Commission providing additional guidance around the existing updates as to rare instances when a downward departure would not be warranted in such marihuana-related cases, such as stipulating that it would not be appropriate in cases that resulted in serious injury, bodily harm, or death. Research shows that "judges' explanations [of downward departures] reflect their individual philosophies of punishment, their evaluations of the defendant, the victim and the offense, their attempts to

[3] https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/.
[4] https://www.pewresearch.org/fact-tank/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/
[5] See *Cooperative Federalism and Marijuana Regulation*, Chemerinsky, Erwin, Forman, Jolene, Hopper, Allen, Kamin Sam, UCI Law Scholarly Commons (available here: https://scholarship.law.uci.edu/faculty_scholarship/369/)

correct what they view as problematic guideline issues, and/or their concerns about various court and correctional contexts and constraints."[6] Sentencing is complex and providing guidance to judicial authorities as to when they are not permitted to grant downward departures, and only in the rarest of circumstances, will provide a clear path to the application of such departure, as intended by these proposed rule changes.

2. The Commission also seeks comment as to whether there is an alternative approach it should consider for addressing sentences for possession of marihuana. For example, instead of a departure, should the Commission exclude such sentences from the criminal history score calculation if the offense is no longer subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense? Alternatively, should the Commission exclude all sentences for possession of marihuana offenses from the criminal history score calculation, regardless of whether such offenses are punishable by a term of imprisonment or subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense?

   Response: I would support either of these alternatives, preferably the latter in which the Commission would exclude *all* sentences related to marihuana from the criminal history score calculations, regardless of whether such offenses are punishable in that jurisdiction. Federal cannabis reform is on the horizon. Recently several pieces of federal legislation, including the SAFE Banking Act and the MORE Act have received incredible legislative attention in D.C.,[7] in addition to the Medical Marijuana and Cannabidiol Research Expansion Act[8] that was adopted and the VA Medicinal Cannabis Research Act[9] that is pending currently in both Houses of Congress. The federal Office of Personnel Management recently announced it was proposing the changes to federal hiring practices related to cannabis, making disclosures less stringent, partly because of "changing societal norms" amid the state-level legalization movement and to widen the applicant pool for qualified federal workers.[10] I invite the Commission to prepare for federal legalization by amending its sentencing guidelines now to exclude all prior marihuana offenses as to criminal history calculation. The Commission could do so by updating its policies to reflect these changing societal views and implementing language as set forth below:

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[6] See *Why do Judges Depart? A Review of Reasons for Judicial Departures in Federal Sentencing*, Kaiser, Kimberly and Spohn, Cassia, Criminology, Criminal Justice, Law & Society, Vol. 19, Issue 2, Pages 44-62 (2018).
[7] https://www.congress.gov/bill/117th-congress/house-bill/1996; https://www.congress.gov/bill/117th-congress/house-bill/3617.
[8] https://www.congress.gov/bill/117th-congress/house-bill/8454
[9] https://www.marijuanamoment.net/senate-panel-set-to-vote-on-veterans-marijuana-research-bill-this-week/
[10] https://www.marijuanamoment.net/new-federal-job-applications-wont-ask-about-most-marijuana-use-unless-it-was-within-the-past-90-days/

3. **Downward Departures.—**

(A) **Examples.**—A downward departure from the defendant's criminal history category may be warranted ~~if, for example,~~ based on any of the following circumstances:

(i) ~~the~~The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant received criminal history points from a sentence related to marihuana.

(B) **Downward Departures from Criminal History Category I**.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

Again, I sincerely appreciate the time and effort the Commission has already put forth in regard to updating the sentencing guidelines and am happy to collaborate further as needed via the contact information below. Initiatives such as these are incredibly important to my clients and the cannabis community. I look forward to further collaboration and updates.

Regards,

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REFORM

March 15, 2023
The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: REFORM Alliance Comment on the Commission's Proposed Guidelines Amendments

Dear Judge Reeves,

REFORM Alliance appreciates the opportunity to comment on the Commission's proposed amendments to the sentencing guidelines as published on February 2, 2023. As a national nonprofit seeking to promote safe, evidence-based pathways to release from prison and transform supervision policies, culture, and laws to better promote public safety and pathways to work and wellbeing, we appreciate the Commission's attention to ensuring the full implementation of the First Step Act in the proposed amendments while providing the courts greater guidance on what accounts for an "extraordinary and compelling reason" for compassionate release. Our comment seeks to uplift the Commission's work in this area while providing a few suggestions for additional changes.

Background

Compassionate release policies restore dignity to our criminal justice system and permit the Bureau of Prisons (BOP) and federal government to better prioritize correctional resources and promote public safety by allowing the court to reduce an imposed term of imprisonment for "extraordinary and compelling reasons" when the reduction is consistent with applicable policy statements issued by the Sentencing Commission.[1] These policies are well-aligned with research demonstrating that recidivism diminishes greatly with age, while continuing to incarcerate sick, elderly, and dying individuals requires exponentially more care and resources. A 2017 report by this Commission shared data suggesting that people 65 or older at the time of release were approximately *5x less likely to be rearrested* over an eight-year follow-up period than people under 21. However, a National Institute of Corrections report put the annual cost of incarcerating elderly individuals *at more than 2x* the cost of incarcerating others in the general population. For these reasons, expanding and improving compassionate release policies is common sense.

With this in mind, lawmakers codified key reforms in the First Step Act of 2018 to improve and expand federal use of compassionate release. Prior to the First Step Act, the use of compassionate release was largely thwarted due to bureaucratic processes that relied on the BOP to initiate motions for compassionate release. Between 1992 and November 2012, the BOP submitted only 492 motions for compassionate release to the court; this translates to roughly 24 motions a year.[2] During this time, the number of admissions to BOP facilities grew from 25,000 to nearly 56,000 people per year, and the total prison population expanded rapidly.[3]

[1] See 18 U.S.C. § 3582(c)(1)(a) and 18 U.S.C. 4205(g) (for crimes committed before November 1, 1987).
[2] Families Against Mandatory Minimums, *The Answer is No* (2012) at 34
[3] Ibid, p. 35; Bureau of Justice Statistics, *Prisoners in 2012: Trends in Admissions and Releases, 1991-2012 (Revised)* (2014), at 3

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To remedy this issue, the First Step Act has allowed individuals to directly petition the court for compassionate release when individuals have exhausted all administrative resources to appeal a failure of the BOP to bring a motion, or where there has been a lapse of 30 days from the time the warden of an individual's facility received such a request. The First Step Act also provides for notification of family members, partners, and defense counsel so they can help prepare and submit petitions on behalf of eligible incarcerated individuals, and requires BOP employees to assist incarcerated individuals with their petitions when a request is made by those parties to do so. This Commission was tasked with updating their policy statements and guidelines to account for these statutory changes.

Notwithstanding the Commission's lack of quorum and subsequent inability to update their statements and guidelines, the timing of this relief could not have been more opportune. During the COVID-19 pandemic, incarcerated individuals and their families were able to petition the court directly for compassionate release to avoid infection and death behind prison walls. A report by this Commission found that 7,014 people submitted a motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A) in FY 2020, with 1,805 ultimately granted relief by the court.[4] In one year, the court granted nearly 4x as many compassionate release reductions than were granted during the two decade span between 1992 and 2012. Yet the Commission's outdated policy statements and guidelines following implementation of the First Step Act contributed to inconsistencies in how and when compassionate release is granted across circuit and district courts, and even resulted in a circuit split in one matter.[5]

Response to Proposed Guidelines

We find that the newly proposed guidelines rectify such matters. Specifically, we support the movement of the commentary's list of extraordinary and compelling conditions regarding the defendant's medical condition, age, family circumstances, and "other reasons" into the guideline itself, along with the addition of language to clarify that the Commission's statement also provides context on when defendant-initiated petitions may be granted following the First Step Act. This change will further emphasize the importance of granting compassionate release in the cases previously described in the commentary, regardless of whether the BOP or defendant initiates the motion.

We also support the proposed guidelines' expansion of the list of "extraordinary and compelling reasons" for compassionate release and provide some additional suggestions below:

- **Medical Criteria.** A prison sentence should not be akin to a death sentence. The addition of a new medical criterion that would support compassionate release when the defendant is suffering from a condition requiring long-term care that their correctional facility is unable to provide in a timely, adequate manner would ensure that defendants with serious or rare illnesses are given the treatment they require. Additionally, such a change would help curb the occurrence of preventable deaths behind bars. States like Colorado and Wisconsin provide similar reasons for compassionate release in times of chronic illness or special, costly medical treatment.[6] Likewise, the new criterion reflecting increased health risks during a public health emergency or infectious disease outbreak mirrors what courts have already found to be a compelling reason in their rulings and would better prepare courts for any future public health emergencies. We must never forget that prisons – with their close quarters,

[4] Of the individuals granted relief, 96% had filed their own motion with the court. United States Sentencing Commission, *Compassionate Release: The Impact of The First Step Act and COVID-19 Pandemic* (2022), at 3
[5] Id. at pp. 6-9.
[6] Colorado Code §§ 17-1-102, 17-22.5-403.5; Wisconsin Code § 302.113

overcrowding, understaffing, and limited medical supplies and personnel – are the perfect vectors for disease. In 2020, deaths in state and federal prisons increased by almost half. [7] We must prevent the same loss of life from ever occurring again. We appreciate the Commission's work in this area and propose no additional changes.

- **Age of the Defendant Criterion.** The significant elderly population behind prison walls presents a unique challenge to both BOP and state prisons across the nation. As noted by the National Institute of Corrections, elderly individuals can be vulnerable to abuse and predatory behavior as their physical and mental capacities diminish, and often require special physical and programmatic accommodations in stark, inflexible prison environments.[8] At the same time, recent research suggests that elderly individuals serving long sentences – whether for violent or nonviolent crimes – are *less* likely to return to prison for a new crime than younger individuals.[9] That said, we believe that the Commission has a unique opportunity to improve its current age of the defendant criterion by lowering the age from 65 to 60, and requiring the defendant to serve at least 10 years of his or her sentence or 50% (in lieu of 75%) of his or her sentence, whichever is less. This amendment would better ameliorate the risks to, needs of, and costs for the growing aging prison population behind bars, reflect the lower age criteria embraced by many states, and mirror some of the current BOP criteria for recommending compassionate release. Virginia and Wisconsin both allow for geriatric parole at 65 years of age if an individual has served five years behind bars, and at 60 years of age if an individual has served ten years behind bars.[10] The BOP program statement[11] allows for recommendations for compassionate release when an individual is at least 65 years old and has served 50% of their sentence under certain circumstances.

- **Family Circumstances Criteria.** American families are not monolithic. Many people are raised by their grandparents or extended family, and many parents are the primary caregivers of adult children with disabilities. The proposed guidelines better reflect this reality by rightly expanding the list of family circumstances qualifying for a compassionate release to include specific circumstances where a defendant's release could ensure proper care of an adult child with a disability or serious medical condition; an incapacitated parent where the incarcerated individual would be the only caregiver for that parent; or similar care for another immediate family member or individual akin to an immediate family member (such as a grandparent who raised the incarcerated individual). Absent this expanded pathway to release, these individuals risk becoming wards of the state. We appreciate the Commission's work in this area and propose no additional changes.

- **New Victim of Assault Criterion.** Experiencing physical or sexual assault behind bars, especially from persons in power charged with protecting individuals who are incarcerated, is uniquely dehumanizing and can be severely detrimental to rehabilitation. Research suggests that experiencing – or even witnessing – violence in prison increases the chances that a person will abuse alcohol or other substances.[12] It can also cause victims to isolate themselves from others and hurt prosocial

[7] Jennifer Valentino-DeVries and Allie Pitchon, *As the Pandemic Swept America, Deaths in Prisons Rose Nearly 50 Percent*, Feb. 19, 2023
[8] National Institute of Corrections, *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates* (2004)
[9] J.J. Prescott, Understanding Violent-Crime Recidivism (2020), at 1643.
[10] VA § 53.1-40.0; Admin Code DOC 302.41
[11] Federal Bureau of Prisons, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g) (2019), at 6
[12] Shelly A. Mcgrath et. al, *The Effects of Experienced, Vicarious, and Anticipated Strain on Violence and Drug Use among Inmates* (2012)

relationships.[13] Tragically, these instances of violence are far too common behind prison walls.[14] For these reasons, we ardently support the addition of a new criterion which would support compassionate release when the defendant has been a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer, employee, or contractor of the BOP while in custody. However, we believe this provision should be expanded to include *all* incarcerated individuals who have been victims of sexual assault or physical abuse resulting in serious bodily injury while in custody, regardless of whether the assault or injury was perpetrated by another inmate, a BOP staff person or contractor, or a volunteer within a BOP facility. Asking defendants to learn prosocial skills, desist from violence, combat addiction, and pursue new avenues for education and employment while chaining them to a place where they have suffered and are in continued danger of sexual and serious physical abuse is counterproductive and inhumane.

- **New Changes in Law / "Other Circumstances" Criteria.** When changes in law occur or new, unanticipated circumstances arise that call for compassion, it is paramount that courts have the flexibility to award relief and respond accordingly. We believe the Commission's inclusion of a compassionate release criterion for when a defendant is serving a sentence that is inequitable in light of legislative changes helps provide a mechanism for ameliorative relief in addition to that provided under §1B1.10. However, to clarify the relationship between the two policy statements, we recommend the Commission add "and that is not already eligible for a sentence reduction under §1B1.10" to the end of proposed section (b)(5). To afford courts wide discretion in determining what other circumstances meet the "extraordinary and compelling reasons" threshold, we recommend the Commission pursue option 3 for proposed section (b)(6). This would allow courts to grant compassionate sentence reductions in particularly unique, narrow circumstances that wouldn't be common enough to warrant explicit mention in the Commission's statement.

Conclusion

The United States Sentencing Commission is tasked with an incredible mission: to continually establish and amend sentencing guidelines for the judicial branch in order to reduce sentencing disparities, promote transparency, and ensure proportionality in federal sentencing. The Commission's newly proposed guidelines are a clear fulfillment of that mission, and we thank the Chair and his fellow Commissioners for their work on this matter. With some small improvements, we believe these proposed guidelines will greatly clarify when courts should award compassionate release in response to BOP-initiated *and* defendant-initiated motions, and provide more responsive, safe, and effective avenues for compassionate release related to a defendant's medical condition, age, family circumstances, and physical safety behind bars. As a result, the federal government will be able to better prioritize its resources; families and communities will be made stronger; victims will be granted the space to recover away from the site and perpetrator(s) of their trauma; and the humanity and dignity of incarcerated individuals will be better respected.

[13] Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath* (2009)
[14] Allen J. Beck et. al , *Sexual Victimization Reported by Adult Correctional Authorities*, 2009–11(2014)

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March 14, 2023

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

Re: Public Comment on Proposed Amendments to the United States Sentencing Commission's United States Sentencing Guidelines

Dear Judge Reeves and Members of the Commission:

The Remington Center's Oxford Federal Project's attorney faculty and clinical students represent clients who are incarcerated in federal prison and seeking a sentence reduction or modification. We write to share our perspectives on the proposed amendments to U.S.S.G. § 1B1.13 that would implement the First Step Act's changes to 18 U.S.C. § 3582(c)(1)(A), as well as proposed changes to the career offender designation. We have worked with many clients who have filed for compassionate release and been denied, despite compelling circumstances, or who could benefit from a robust Compassionate Release system that includes health-related changes and other "second look" components. Further, having worked with many individuals designated as career offenders based on state-level drug offenses, the Commission should work to decrease the scope of the career offender designation as it pertains to prior drug offenses qualifying for the designation. Thus, we encourage the Commission to adopt the proposals that would best realize the aims of the relevant statutes and broader sentencing system.

I. U.S.S.G. § 1B1.13(b)(1): Medical Circumstances of the Defendant

We write to generally voice our support for the proposed changes with expanded medical circumstances that would give rise to a motion for compassionate release. We support the proposed change in §1B1.13 regarding "Medical Circumstances of the Defendant." That language is in the commentary following the guideline. We believe that directly inserting the criteria for medical circumstances into the guideline itself will increase its use and effectiveness for those incarcerated people suffering significant illnesses and other conditions in prison. The process now suggests to courts that people seeking compassionate release must demonstrate "extraordinary and compelling reasons" and then leaves it largely up to discretion to determine what that means, leading to significant cross-country disparities.

The proposed amendment would give courts concrete factors to consider when evaluating a motion, while still preserving an ability to determine such release is appropriate in circumstances not contemplated by the listed examples.

We have been involved in many cases in which motions for compassionate release have been filed. Most of these are denied, despite evidence of serious medical issues. We believe that placing more of an emphasis on what type of health conditions could qualify for compassionate release will help incarcerated individuals better be considered for release to mitigate significant health concerns.

That said, we encourage the Commission to reconsider the possible implications of the proposed amendments to U.S.S.G. § 1B1.13(b)(1)(D). The proposed changes create eligibility for an incarcerated person to seek compassionate release due to "(I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate … authority," but limits the relief to those at an "increased risk of suffering severe medical complications or death" when the risk "cannot be mitigated in a timely or adequate manner." As this proposal stands, this provision could limit the ability of incarcerated people, counsel, courts, and the Bureau of Prisons to react in the event of another public health crisis.

The proposal appears to stem from the COVID-19 pandemic. In the early days of the pandemic, courts granted motions for compassionate release at an unprecedented rate due to the combined effect of the First Step Act and the horrible dangers and realities of the pandemic (though the majority were still denied.)[a] Although COVID-19 continues to wreak havoc in prisons, in March 2022, the most recent month with available data, courts denied 86.6% of motions for compassionate release.[b]

COVID-19 highlighted how difficult it is to evaluate risk and determine whether it can be mitigated in a timely or adequate manner.[c] COVID-19 has had a disproportionate effect on incarcerated people. They are infected at a rate five times higher than the nation's average.[d] The death rate is also significantly higher than the population at large.[e] Thus, the

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[a] U.S. SENTENCING COMM'N, *U.S. Sentencing Commission Report Release Data Report*, Table 1 (Sept. 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220908-Compassionate-Release.pdf.

[b] *Id*.

[c] *See, e.g*., Megan Molteni & Adam Rogers, *How Masks Went From Don't-Wear to Must-Have*, WIRED (July 6, 2020), https://wired.me/science/health/how-masks-went-from-dont-wear-to-must-have/ (discussing how rapidly the public health messaging shifted in the early days of the COVID-19 pandemic, for example, in the CDC's inconsistent guidance about whether masks mitigated the transmission of the virus).

[d] EQUAL JUSTICE INITIATIVE, *COVID-19's Impact on People in Prison* (April 16, 2021), https://eji.org/news/covid-19s-impact-on-people-in-prison/.

[e] *Id*.

risk has been and remains high, and mitigation efforts have been deleterious in and of themselves. For example, the use of solitary confinement to stop the spread of the virus increased 500 percent in the early days of the pandemic.[f] In 2022, two years into the pandemic, the entire federal prison system went into lockdown due to the Omicron variant.[g] Incarcerated people were sequestered in their cells nearly all day, and had limited access to programming, visitation, medical care, libraries, and other facilities.[h] COVID-19 continues to present on-going and profound difficulties—the question remains whether the risk has been mitigated in an "adequate" or "timely" way.

The difficulties of assessing timeliness and adequacy are not likely to be clearer during the next pandemic. For example, red flags have been raised across the world about the possibility of an outbreak of H5N1, the bird flu.[i] H5N1 has a fatality rate of up to 56%.[j] §1B1.13(b)(1)(D)(iii) does not provide useful guidance for the next public health crisis. Omitting or reconsidering the provision could facilitate courts' ability to respond to such a crisis if, and when, they are required to do so.

II. U.S.S.G. § 1B1.13(b)(6): Other Circumstances

As for the Commission's request for feedback on U.S.S.G. § 1B1.13(b)(6), we encourage the Commission to adopt Option 2 of the proposed amendments. This option best aligns with the congressional intent motivating the First Step Act and broader sentencing law by creating an avenue for those who cannot currently meet any of the compassionate release requirements, but still have compelling circumstances giving rise to a need for relief.

The express congressional intent of the compassionate release provisions of the First Step Act is to "increase access to prompt judicial relief."[k] Adopting the broadest version of the proposed language will allow courts to give meaning to the statute based on the unique circumstances of each incarcerated person. Courts will always have discretion in ruling on

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[f] *Id.*

[g] Katie Rose Quandt & Allison Altshule, *COVID-fueled Solitary Confinement Still Plagues Prisons and Jails*, SOLITARY WATCH (Mar. 22, 2022), https://solitarywatch.org/2022/03/22/covid-fueled-solitary-confinement-still-plagues-prisons-and-jails/.

[h] *Id.*

[i] Zeynep Tufekci, *An Even Deadlier Pandemic Could Soon Be Here*, N.Y. TIMES (Feb. 3, 2023), https://www.nytimes.com/2023/02/03/opinion/bird-flu-h5n1-pandemic.html.

[j] *Id.*

[k] Yolanda Bustillo, *Compassionate Release During Crises: Expanding Federal Court Powers*, 40 YALE L. & POL'Y Rev. 223, 261 (2021)

the motions, thus the United States Sentencing Guidelines (Guidelines) should not limit courts when the intent is to create broad eligibility.[l]

Moreover, this version of the guideline would give greater effect to 18 U.S.C. § 3553(a) and provide an ability to give it meaning after a sentence is issued. That provision states that the court shall "impose a sentence sufficient, but not greater than necessary" to meet the goals of punishment. The statute emphasizes equitable incarceration. Option 2 of the proposed language of the guideline best mirrors this intention. It does not create new strictures for eligibility but allows eligibility to address any changing circumstances that have rendered a defendant's imprisonment inequitable.

One of our client's situations emphasizes the potential utility of such a mechanism. Our client was indicted for a conspiracy involving more than 500 grams of a mixture or substance containing methamphetamine. That alleged drug quantity, combined with two prior Illinois cocaine convictions, would mandate a life sentence.[m] During plea colloquy, our client told the court that he would not admit to the quantity alleged because the actual amount involved was 300 grams. The prosecutor proposed letting our client admit the lesser amount while also asserting that if not for the plea, he would face a mandatory life sentence. Yet this statement was inaccurate: the amount that our client would have admitted to would have allowed a life sentence as the *maximum* sentence. The minimum would have been 10 years—significantly less than the 20-year sentence that our client accepted.

In an order granting a motion appointing new appellate counsel, the Seventh Circuit highlighted the fact that the prosecutor, defense attorney, and district judge all conveyed inaccurate information about the sentencing consequences of the plea. In those circumstances, our client contends that the guilty plea was not knowing or voluntary.

But despite the Seventh Circuit finding that our client was misinformed at sentencing, he has not been successful in moving for a sentence modification due to a variety of factors. Our client was sentenced in 2015. He will not be released until 2035. Had he gone to trial, perhaps his sentence could have ended in less than two years from today. Of course, there is no guarantee that a court would have determined that the minimum sentence was appropriate. Still, our client was entitled to make informed decisions based on accurate information and have a court due the same. Nevertheless, it is very likely he would be serving a significantly shorter sentence with that information.

Yet under the current Guidelines and statutory scheme, our client has little recourse. He has filed three motions for compassionate release since the pandemic began relating both to his sentencing and the pandemic and has been denied relief each time. Given the Seventh Circuit's ruling in *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020), which held that the Illinois cocaine definition was broader than its federal counterpart, the conviction used as a sentence enhancement would likely not count. He would have a strong case to modify his sentence on that basis, but the terms of his plea agreement do not allow him to do so under

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[l] *Id*.

[m] 21 U.S.C. §§ 842(b)(1)(A)(viii).

existing law. But the proposed Option 2 for Section 6 could allow our client, and those like him, to seek a sentence reduction or modification to ensure that the sentence given remains adequate, but not greater than necessary, to promote § 3553(a) sentencing factors. Given the circumstances present at the time of our client's sentencing, and those that have arisen since it was issued, it could be "inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence."

Guidelines that would allow people like our client to bring a claim would embody the intent of both § 3582 and § 3553(a).

III. Option 1 for U.S.S.G. § 4B1.2(b) Best Serves the Uniformity Goals of the Guidelines.

Option 1 for U.S.S.G. § 4B1.2(b) best serves the uniformity goals of the Guidelines, 28 U.S.C. §994(f), because under Option 2, a defendant's potential sentence can vary widely based on the mere time and place of their arrest. Using the federal Controlled Substances Act (CSA), which has been stable and acts a nationwide benchmark for controlled substance offenses, limits geographical variation. Option 2's disparate outcomes can be illustrated by the rapidly changing definition of THC, the current differences between elements of similar drugs at the federal and state level, and the inclusion of certain drugs at the state level, but not at the federal level. In general, courts who have ruled similarly to Option 2 simply do so due to textual analysis of the current language of § 4B1.2(b) without much underlying policy rationale. *See, e.g., Ruth* 966 F.3d 642. Option 2 creates significant differences for those from different states, who had offenses in prior generations, and who have no other warranted reason for a significantly disparate sentence. The Commission should enact a limited, more uniform definition to avoid disparity, lessen the effect of the substantial increase in sentences that the designation brings, and to best reflect the initial language of §994(h).

A. Differences for Tetrahydrocannabinol ("THC") Post-Agricultural Improvement Act.

At the Federal Level, THC is banned unless the THC level is below 0.3%. *See* 21 U.S.C. § 1308.11(d)(31)(i); 7 U.S. Code § 1639o(1). This is due to the passage of the Agriculture Improvement Act, which legalized the production of hemp at the federal level, with the definition of hemp requiring less than 0.3% of THC. 132 Stat. 4490.

After its passage, several states changed their own laws to reflect the new consensus of .3% THC being considered legal hemp. Some such states are as follows:

- Texas's Act, HB 1325, legalized hemp, effective May 2019.
- New Hampshire: HB 459 legalized hemp, effective January 2020.
- Idaho: HB 126 to legalize hemp until April 2021.

Today, every state allows Hemp with a THC level under .3% to be cultivated. But that process was slow, with it not always being clear that every law would pass.

This is important because it illustrates how under Option 2, a person could be subject to a felony, and potentially career offender merely based on the time and place of their arrest. In three years after the Agricultural Improvement Act was passed, states passed bills legalizing hemp at different speeds. This means, a person caught with hemp could face drastically different sentences and be potentially subject to the career offender status, simply because they were caught in the "wrong" state, or in the "right" state but at the "wrong" time. This is not uniform and does not follow the policy of the Guidelines.

The above is illustrative, but these laws have had real consequences. In Arizona in 2017, a defendant was arrested for an Arizona offense that included hemp as a controlled substance. *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021). At the time of their arrest, Arizona law prohibited any level of THC. *Id.* at 705. While serving his sentence, the Agricultural Improvement Act was signed into office, legalizing hemp. *Id.* at 704. Later, Arizona legalized Hemp altogether. Ariz. Rev. Stat. § 3-311. The Ninth Circuit overturned their career offender status because the Court felt it was not aligned with the text and purpose of the Federal CSA. *Bautista,* 989 F.3d at 702. The Ninth Circuit, like the Second Circuit, looked at the goals of avoiding unwarranted disparities, §991(b)(1)(B), and other similar policies on which federal sentencing is based.

Under Option 2, and the Fourth, Seventh, Eighth, and Tenth Circuit, the defendant would still be in prison due to a federal career status determination, even though they did not violate a marijuana offense under the federal CSA. This demonstrates how Option 2 would cause a ripple effect of disparate outcomes in a way that Option 1 would not.

B. Differences Between Cocaine's Definitions at the State and Federal Level.

State and federal drug cocaine definitions often differ, potentially subjecting a defendant to differing career offender determinations based on the state they live in.

The inclusion of cocaine in most CSAs include definitions for isomers. At the federal level, isomer is defined as "optical and geometric isomers." 21 U.S.C. § 812, Schedule II(a)(4); see also id. § 802(14) ("As used in schedule II(a)(4), the term 'isomer' means any optical or geometric isomer."); § 802(17)(D) (defining "narcotic drug" to include "[c]ocaine, its salts, optical and geometric isomers, and salts of isomers"); *United States v. Ruth*, 966 F.3d 642, 647 (7th Cir. 2020).

At the state level, isomer is often defined differently. Some states define it more broadly, including positional isomers. Illinois, 720 ILCS 570/206(b)(4); Idaho, Idaho Code §§ 37-2701(q); 37-2705(d). Other states include positional and chain isomers. *See, e.g.*, Georgia, GA Code § 16-13-21(14) (2020). A few states do not even explicitly require isomers in their definition, defining cocaine more broadly to simply require the use of coca leaves with cocaine and ecgonine. See, e.g., La. Stat. Ann. § 40:964 Schedule II.

These variations in cocaine determinations illustrate the disparate outcomes for a person based on the state they live in. There are at least four variations of "cocaine" offenses between the federal level and different state levels. Again, these variations do not serve the

Guideline's policy goal of uniformity. Option 1 would solve this by having the federal law be the only applicable law for the federal career offender status.

C. Some States Schedule Different Drugs That are Not Listed Under the Federal CSA.

Some states have different substances prohibited under their state CSA which are not listed under the Federal CSA, which creates further disparate outcomes based on where people live.

As the pharmaceutical industry and advocacy around controlled substances continues to grow at increasing rates, the odds of disparities between states grows. Already some courts have had to address issues around drugs that are prohibited at the state CSA level but not under the federal CSA. *United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018) ("Chorionic gonadotropin"); *See Jones v. United States*, No. 18-CR-40077-JPG, 2022 WL 4777516, at *4 (S.D. Ill. Oct. 3, 2022) ("Dextrorphane").

To prevent a future legal landscape where states have varying drugs that are or are not legal, and which may cause a federal career offender status, the Guidelines should simply limit the federal career status definition to those substances which are listed under the federal CSA.

In sum, because of the rapidly evolving legal landscape around the country regarding what constitutes a controlled substance complicates the use of prior drug offenses as career offender predicates. As a result, to best create a uniform definition of what qualifies for enhancement purposes, using the federal CSA is the best approach, and the Commission should select Option 1.

IV. Proposed Amendment Relating to Categorical Approach

Proposed Amendment (6) Part A, the amendment to U.S.S.G. § 4B1.2 as it applies to the career offender designation, fails to meet its intended goal of simplifying the approach to determining whether a prior offense is a predicate crime of violence or controlled substance offense for of the Guidelines. If anything, this amendment further complicates an already complex system, while failing to stray away from the framework underlying the current categorical/modified categorical approach. Furthermore, this approach would tread upon the sanctity of a state's judgment by relitigating the meaning of a state statute and even considering conduct that a judge or jury did not evaluate in leading to that state conviction. The proposed removal of the categorical approach would fail to meet the goal of simplification and would create far more confusion.

The proposed amendment appears to bring little change to the current (modified) categorical approach, except for expanding the universe of facts considered. For the categorical approach, a sentencing court must look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions" at the state level,

to determine whether the specific offense qualifies as a predicate offense under the guidelines. *Taylor v. United States*, 495 U.S. 575, 600 (1990). The modified categorical approach allows the sentencing court to look at certain documents to determine what offense was committed. *Shepard v. United States*, 544 U.S. 13, 26 (2005).

The proposed amendment fails to stray away from this element comparing inquiry but adds additional factual review. Under the proposed amendment, a court would still look at the elements that made up the defendant's prior conviction and then compare it to a federal definition listed in the Guidelines that is deemed "most appropriate." And in instances where the modified categorical approach would have been necessary, a court would still have to look at qualifying documents to determine whether the offense under the state statute qualifies, but rather than just consider the statute, the federal court will need to effectively re-adjudicate the case.

If anything, the proposed amendment seems more complex. For example, we here at the Frank J. Remington Center have a client who has three prior domestic abuse assault convictions under Iowa Code § 708.2A. Section 708.2A redirects to the statute for assault, a necessary component of Iowa's definition of domestic abuse assault. Iowa Code § 708.1. Part of Iowa's assault statute reads,

> A person commits an assault when, without justification, the person does any of the following: Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

§ 708.1(2)(a). Given that the assault offense can be committed both with or without the requisite use of force in § 4B1.2(a), the statute becomes indivisible and therefore should not qualify as a crime of violence under the Guidelines. *See Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 579 U.S. 500 (2016). But if the proposed amendments pass, our client's path, and those of similarly situated defendants, becomes unclear. The client's domestic abuse assault convictions may still no longer qualify as a crime of violence, given that the court will still be comparing his offense to the listed offense in the Guidelines. All the same, a judge might determine, based on alleged facts that were unnecessary for the conviction, that since one could commit assault with an act that was "intended to cause pain or injury," his offense could fall under U.S.S.G. § 2A2.2, which defines aggravated assault. Despite our client being convicted of assault without an element of intent to inflict serious injury, he may still fall under the new proposed amendments. This would make the new amendment overinclusive, spiking career offender designations, and would continue to complicate the career offender system by creating ambiguities.

These proposed amendments also risk eroding the deference to a state's criminal laws and judgments. As the proposed amendment explains, a court will determine whether a state offense fulfills the Guidelines' requirement by looking at,

> (1) the elements, and any means of committing such an element, that formed the basis of the defendant's conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means.

U.S. SENTENCING COMM'N, *Proposed Amendments to the Sentencing Guidelines*, 147 (2023). This would require a federal court to relitigate a prior conviction to determine whether state level offense would also fall under a listed federal offense. A court would have to compare the elements of the state offense or conduct that may or not have been specifically found by a jury or judge, to a long list of federal offenses and would ultimately be required to pick one of those federal offenses. This would require far more litigation in deciding which federal offense would be the correct choice for assessing the state offense, wasting considerable judicial resources. It should be the role of the state court to determine what a defendant must plead to be guilty of an offense. A state court is better equipped than a federal court to determine the elements and fit of a state offense.

The proposed amendment could also contradict Congress's intent creating the initial Guidelines, including the statutorily created career offender designation. Congress had no intention of requiring federal courts to dig deep into a state trial court's decision and determine whether a state offense qualifies as a predicate offense and expend substantial judicial resources in the process. As explained in *Taylor*,

> …the legislative history of the enhancement statute shows that Congress generally took a categorical approach to predicate offenses. There was considerable debate over what kinds of offenses to include and how to define them, but no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case. If Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history.

495 U.S. at 601. While this speaks to the Armed Career Criminal Act, it generally seems to apply to § 994(h), which features nearly identical language. The proposed amendment, removing the categorical/modified categorical approach, conflicts with Congress's original goal in establishing the Guidelines and if passed, would conflict with a state's ability to determine the elements of its own offense.

The proposed amendment may have the laudable goal of replacing a complicated categorical and modified categorical approach, but it doesn't appear to achieve this outcome. The amendment as drafted would create a great deal of uncertainty in the way courts analyze state level offense in determining whether they qualify as a predicate offense for a career offender enhancement. Furthermore, it would require federal courts to undertake a lengthy fact-finding process in determining whether a state level offense would qualify as predicate

offense under the Guidelines. The proposal appears fall short of its intended goal and risks injecting further ambiguity and disparity into an already complex system.

V. Conclusion

We appreciate the opportunity to submit public comment on these important sentencing issues. We also applaud the Commission and its staff on the considerable work done and thought given to these many Guidelines amendments.

Sincerely,

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March 14, 2023

Chair Judge Carlton W. Reeves
U.S. Sentencing Commission
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RE: Comment on Proposed Amendments to the Federal Sentencing Guidelines

Dear Chair Judge Carlton W. Reeves, Vice Chairs, and Commissioners:

Rights Behind Bars (RBB) provides the following comments regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.[1]

RBB is a legal non-profit organization that works alongside incarcerated people to challenge the cruel and inhumane conditions of confinement through litigation and advocacy. We work in solidarity with community-based organizations and collectives and apply a movement lawyering approach to our affirmative litigation. For example, we are currently part of the Dublin Prison Solidarity Coalition, which is focused on seeking systemic remedies to the sexual abuse that occurred to hundreds of women in FCI Dublin in California. This Coalition has submitted a separate Comment on these proposed amendments.

RBB has represented or have spoken to dozens of survivors of sexual abuse who would benefit immensely from compassionate release. We also have represented incarcerated people with unmet medical needs, serious mental illness, or other disabilities. Our Comment addresses the possible new categories of extraordinary and compelling reasons for a "victim of assault," USSG § 1B1.13(b)(4), and for the "medical circumstances of the defendant," *id.* § 1B1.14.

We write **in support** of including these new categories providing eligibility for compassionate release. We have proposed revisions to make these categories as clear and inclusive as possible.

We thank the members of the Commission for considering our Comment.

[1] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts*, 88 Fed. Reg. 7180 (Feb. 2, 2023).

1. **The Commission should not require a "finding" of sexual assault for a prisoner to petition for compassionate release on that basis.**

The Department of Justice ("DOJ") in its testimony urges the Commission to require prisoners who petition for compassionate release on the basis of a sexual or physical assault to produce a "finding" that the assault occurred. As a practical matter, administrative, civil, or criminal proceedings will rarely result in this kind of finding, and, even when they do, will take years.

A. Administrative Processes

Administrative proceedings cannot reliably or timely yield "findings" of either physical or sexual assault.

i. Sexual Assault

Administrative processes rarely result in "findings" of sexual abuse. Allegations of sexual abuse are governed by the Prison Rape Elimination Act (PREA), which has two main tools for detecting and validating sexual assault: audits and complaints. Neither reliably or timely produce "findings" that a prisoner could use to petition for compassionate release.

Complaints. First, the process resolving a PREA complaint is extremely long. PREA requires the BOP to maintain channels for prisoners to report sexual abuse. *See* Prison Rape Elimination Act, 42 U.S.C. § 15606. The usual grievance process serves this function, though the rules for grieving sexual abuse are more forgiving in one way: that is, there is no time limit for when a prisoner can file an initial grievance a grievance alleging sexual abuse. 28 C.F.R. §115.52(b)(1). Complaints of sexual abuse, once reported, are also handled differently. Per DOJ's regulations, "Allegations of physical abuse by staff shall be referred to the Office of Internal Affairs (OIA) in accordance with procedures established for such referrals." *Id*. at (c)(2). OIA in turn refers complaints about possible criminal misconduct by staff to the Office of the Inspector General (OIG). A referral to OIG stops the administrative process at least until the criminal prosecution has concluded. A decision by the OIA that allegations are not substantiated kicks the complaint back to the regular grievance system, with its usual, strict timelines.

Both outcomes would significantly delay, and possibly stymie, a prisoner's petition for compassionate release if they were dependent on a "finding." These problems are compounded by the fact that a prisoner's complaint of sexual abuse is likely to stay within OIA for a very, very long time. BOP policy dictates that OIA has 90 days to issue a decision, and may take an extension of 70 days. 28 C.F.R. § 115.52(d)(2)-(3). But the reality is much bleaker. According to the Senate Subcommittee's report, "BOP has accrued a backlog of approximately 8,000 cases," "with some cases pending for more than five years." *See* United States Senate Permanent Subcommittee on Investigations, *Sexual Abuse of Female Inmates in Federal Prisons*, 19, 25 (Dec. 2022)

[hereinafter Senate Subcommittee report].[2] Per the report, "BOP does not expect to be able to clear the backlog for another two years, at the earliest." *Id*. at 25.

A second problem with the administrative investigation process is that many prisoners never report sexual abuse in the first place—and for good reason. As the DOJ Working Group report concluded:

> [V]ictims feared the consequences of reporting abuse perpetrated by BOP staff. During listening sessions, formerly incarcerated individuals reported that corrections officers have threatened retaliation against reporting individuals, including by restricting access to children. Furthermore, BOP policies meant to protect victims may inadvertently cause negative consequences for those who report abuse. For security reasons, well-intentioned officials may transfer a victim to another BOP facility, where they are usually more distant from their family and community, or place them into the Special Housing Unit ("SHU"), where they inevitably lose privileges—such as visits, phone calls, and commissary access—which are lifelines to those who are incarcerated. The placement of victims in SHU, even if intended for protection, can have a chilling effect on reporting.

See Working Group of DOJ Components, *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons*, 12 (Nov. 2, 2022) [hereinafter DOJ Working Group Report].[3] Anecdotally, we have heard clients tell us that they have had all these same experiences and refuse to report. For example, survivors who have attempted to report sexual abuse have faced solitary confinement, threats of violence, theft of basic necessities through cell searches, punitive and overly sexualized strip searches, and verbal abuse that often involves racial epithets or slurs based on gender, sexual orientation, national origin, and immigration status. DOJ has recommended changes to reduce these problems and increase reporting. But whether those changes will be implemented, or have the intended effect, is far from certain.

Third, there are reasons to doubt that all complaints are investigated, and also that investigations are reliable. As the Senate Subcommittee's report pointed out: "[W]hen complaints of BOP employees' sexual abuse are submitted to the Warden, he is obligated to refer them onto BOP OIA. However, if the Warden does not do so, there is no way for BOP OIA to know that he had received the complaints at all." Senate Subcommittee Report 26. PREA does not create a private right of action, so prisoners have no way to ensure that their allegations will be investigated with they do report. Anecdotally, we have heard that allegations of sexual assault, including by staff, are often not investigated or are dispensed with in a pro forma way.

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[2] The Senate Subcommittee's report is available at https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf.

[3] The DOJ Working Group's report is available at https://www.justice.gov/d9/pages/attachments/2022/11/03/2022.11.02_bop_sexual_misconduct_working_group_report.pdf.

FCI Dublin is a prime example of why there is no reliable way to ensure that investigations are completed when investigations are initiated internally. The warden of FCI Dublin until 2022, Ray Garcia, engaged in rampant sexual abuse of women in his custody, and was ultimately found guilty of three counts of sex with an incarcerated person, four counts of abusive sexual contact, and one count of lying to the FBI.[4] Mr. Garcia, in his role as Warden, was tasked to refer allegations of abuse to OIA, led trainings on the Prison Rape Elimination Act (PREA), and led the audit examining FCI Dublin's compliance with PREA as recently as Spring of 2021 even as he engaged in sexual conduct and relations with the incarcerated people under his care. This was part of a corrupt institutional climate where many other officers at all levels committed abuse and harassment of prisoners in their custody and protected one another from allegations surfacing of abuse. FCI Dublin exemplifies that relying on BOP staff at any level to initiate investigations will always be unreliable, as survivors will understandably be fearful to file reports directly with the same correctional officers who are part of the ongoing pattern of abuse and who work together to protect one another.

Audits. Audits are PREA's other tool that could, in theory, produce a "finding" about sexual assault. PREA audits are periodic reviews of federal facilities intended to measure compliance with PREA's 45 standards. *Id*. at 19. The auditors review policies and documentation, including prisoner complaints, and also interview staff and prisoners. Audits are also unlikely to reliably produce findings, for the simple fact that these audits are spectacularly ineffective. Take, for example, the audits of FCC Coleman and FCI Dublin—two facilities with rampant, pervasive sexual abuse. As the Senate Subcommittee reported, "PREA audits during all of the relevant periods for these facilities came back clean: these audits found that FCC Coleman and FCI Dublin were compliant with all PREA standards before, during, and after the multiple, documented instances of sexual abuse." *Id.* at 20.

In sum, administrative processes do not yield reliable "findings" about sexual or physical assault, and so a prisoner should not have to have one in hand in order to petition for relief in federal court.

ii. Physical Assault

Prisoners must pursue their complaints about physical assaults by staff or other prisoners through the BOP's administrative grievance process, leaving them in danger at least until they fully undergo the long grievance process. Under BOP regulations, and with few exceptions, a prisoner must submit a grievance to the Warden within 20 days of the assault; if the grievance is denied, then the prisoner has 20 days to appeal the decision to the Regional Director; and if that appeal is denied, then the prisoner has 30 days to appeal the decision to the General Counsel. Administrative Remedy Program, 28 C.F.R. §§ 542.14(d), 542.15(a).[5] A prisoner who fails to complete this process within this strict timeline defaults on the grievance, and their complaint will be thrown

[4] Richard Winton, *Former Warden at Female Prison Known as 'Rape Club' Guilty of Sexually Abusing Women Behind Bars*, LA TIMES, (Dec. 8, 2022, 3:09 PM) https://www.latimes.com/california/story/2022-12-08/ex-warden-at-female-prison-guilty-of-sexually-abusing-inmates

[5] BOP regulations for its Administrative Remedy Program are available at https://www.bop.gov/policy/progstat/1330_018.pdf.

out. There are countless technical ways that a grievance process can be thrown out for simple mistakes or formalities, for example including more than one issue on the same form, 28 C.F.R. § 542.14(c)(2), which often forces prisoners to start the process all over. In addition to being strict, the administrative grievance process is long. In total, the policy allows the Warden, Regional Director, and General Counsel 90 days to respond to the grievance, and can take an extension of 20-30 days more. 28 C.F.R. § 542.18. That means that a prisoner who completes all the steps of the administrative grievance process must wait up to 190 days for a response. These technical requirements leave people in prison unprotected during the time their administrative process is fully being exhausted, and often means that people in prison have a distrust in the process.

Second, physical assaults are often not reported, and even when they are, investigations are unreliable. Because physical assault in the BOP has not received the same attention as sexual assault in recent years, we have less hard information about the frequency of reporting, and the internal machinations of BOP investigations. But our experience tells us that, prisoners often do not report physical assault, particularly by staff, because they fear retaliation or other adverse actions. Prisoners also tell us that investigations, when they happen at all, are cursory and unreliable, and fail to substantiate allegations even when there is ample proof of wrongdoing and prisoners are severely harmed. One reason for this is that investigators typically interview the officer charged with misconduct, and other officers who were present. Prisoners are almost never interviewed, including the prisoner who was the victim of assault. Also, notably, policy does not require BOP to refer allegations of physical abuse to the Office of Internal Affairs (OIA), the unit within BOP that handles all allegations of sexual assault. Instead, investigators can be handled by regular BOP staff, which creates even less separation between the investigators and investigated. Unreliable investigations have the additional, negative effect of discouraging reporting.

B. Civil Cases

Civil cases also do not reliably or timely produce "findings" about physical or sexual assault. If anything, civil litigation is an even harder path for incarcerated victims of abuse than administrative processes.

First, prisoner cases about sexual and physical assault—like the overwhelming majority of civil cases—usually settle instead of going to trial. Settlement is typically contingent on defendants not having to admit wrong-doing. This means that even the most successful prisoner civil cases will end with no "finding" that would entitle the prisoner would not be entitled to compassionate release.

Second, civil litigation is lengthy. In our experience, cases alleging sexual and physical assault by prison staff take about two years to litigate. Recent developments in case law have created even more delays: prisoners who seek to money damages from federal officials who violate their constitutional rights must fall within *Bivens*—a doctrine that specifies, in effect, which constitutional rights are self-executing, and which require Congress to create a separate cause of action. *See, e.g.*, *Egbert v. Boule*, 596 U.S. __ (2022). The constitutional rights that fall within *Bivens* are shrinking, and most courts hold that a prisoner who seeks only damages for physical or

sexual assault by a federal prison official cannot state a claim for relief.[6] What this means is that, to get relief, would-be plaintiffs must present an administrative claim under the Federal Tort Claim Act first, before proceeding to federal court. In our experience, the government's response is invariably a pro forma denial. But because the government has six months to respond to the claim, *see* 28 U.S.C. § 2675(a), civil litigation is delayed even further.

And third, prisoners must strictly comply with the administrative grievance processes described above, including their tight timelines for reporting abuse and appealing decisions. That is because civil rights litigation, including litigation alleging sexual or physical abuse, is subject to the Prison Litigation Reform Act, which requires plaintiffs to exhaust their administrative remedies before filing in federal court. 42 U.S.C.A. § 1997e(a). A prisoner who fails to follow the procedures will have their case thrown out, even if it is meritorious.

Civil litigation is not a reliable or timely process to produce a "finding" that a prisoner can use to petition for relief in federal court.

C. Criminal Cases

Finally, criminal cases will not produce "findings" that will be the basis for compassionate release. For one, criminal cases can take years to resolve, from the initial reporting of an incident to a conviction or plea. Second, the burden of proof for a criminal conviction—beyond a reasonable doubt—is also high, and higher than the standard that a federal court should use when deciding whether a person qualifies for compassionate release. Finally, prosecutions of federal employees run into an additional hurdle: that is, that any admissions an employee makes during an administrative investigation cannot be used against that employee in a criminal prosecution—and

[6] *See, e.g.*, *Millbrook v. Spitz*, No. 1:18-cv-01962, 2019 WL 4594275 (D. Colo. Sep. 23, 2019) (no *Bivens* remedy where officers "slammed" handcuffed "Plaintiff's head" and "tried to break his arms" causing "permanent nerve damage in his wrists and fingers and in- juries to his head, neck, back, and arms"); *Anderson v. United States*, No. 4:18-cv-0871, 2021 WL 4990798 (N.D. Tex Oct. 26, 2021) (no *Bivens* remedy where officer slammed door of medical transport, trapping prisoner's foot between door and frame; officer refused to release door before transport, causing fracture to foot, breaking all of prisoner's toes, and resulting in permanent disability); *Freeman v. Provost*, No. 3:19-cv-421, 2021 WL 710376 (S.D. Miss. Jan. 27, 2021) (no *Bivens* remedy where prisoner suffering from sickle-cell disease was restrained, seated and then "continuously sprayed with OC gas" until "soaked"; officers refused to take prisoner to a decontamination station although prisoner warned them he could not tolerate pepper spray because of his sickle cell, resulting in weeks of vomiting, hair and weight loss, and pain due to severe sickle cell episode.), *adopted by* 2021 WL 709704 (S.D. Miss. Feb. 23, 2021); *Harrison v. Nash*, No. 3:20-cv-374, 2021 WL 2005489 (S.D. Miss. Apr. 26, 2021) (same where officers took handcuffed prisoner to the ground and "beat" his head "on the ground four or five times."), adopted by 2021 WL 2006293 (S.D. Miss. May 19, 2021); *Winstead v. Matevousian*, No. 1:17–cv–00951, 2018 WL 2021040 (E.D. Cal. May 1, 2018) (same where officer paid inmate to assault another inmate) adopted by 2018 WL 3357437 (E.D. Cal. Jul. 9, 2018); *Longworth v. Mansukhani*, No. 5:19-ct-3199, 2021 WL 4472902 (E.D.N.C. Sep. 29, 2021) (same where prison facilities secretary repeatedly sexually abused mentally-ill inmate and knowledgeable prison staff failed to intervene).

in fact, a prosecutor would have "to show that it had reasons to pursue criminal charges independent from anything disclosed in the *Garrity* interview and that none of the evidence used in the prosecution was derived from the *Garrity* interview." Senate Subcommittee Report at 13. As the Senate report summarized: "The practical effect is that if" the BOP employee admits to wrongdoing in an administrative proceeding, "it's a get out of jail free card under certain circumstances." *Id*. at 13 (cleaned up).

In sum, administrative processes, civil litigation, and criminal prosecutions would not reliably or timely produce the "finding" that the DOJ is asking for. The Commission should not require a prisoner to produce a finding in order to petition for compassionate release.

2. The Commission should provide the broadest eligibility for the proposed new category relating to victims of "sexual assault or physical abuse."

A. Defining "Sexual Assault"

In the proposed amendment, the Commission has included the following category as an extraordinary and compelling reason warranting the reduction of a term of imprisonment: "VICTIM OF ASSAULT.—The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody." USSG § 1B1.13(b)(4) (proposed amendment).

While the U.S. Sentencing Guidelines do not reference sexual assault, the definition of "serious bodily injury," discussed further below in section 2.B, references "criminal sexual abuse under 18 U.S.C. § 2241 or § 2242." USSG § 1B1.1, commentary note 1(M). Both statutes rely on the term "sexual act," which is defined as:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person....

18 U.S.C. § 2246(2).

Notably absent from these criminal acts is the chapter's definition of "sexual contact"—"the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse

or gratify the sexual desire of any person," 18 U.S.C. § 2246(3), which is covered by another statute, 18 U.S.C. § 2244.

The only discussion of "sexual assault" in the U.S. Code is found in the discussion of sexual assault survivors' rights. 18 U.S.C. § 3772. There, sexual assault means "any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent." *Id.* § 3772 (c). Again, a fair reading of this definition excludes "sexual contact" given the use of the term "sexual act."

We recommend the Commission replace the term "sexual assault" with "sexual abuse and sexual harassment" and use the definitions provided in the National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act ("PREA Standards"), which apply to all prisons and jails. *See* 28 C.F.R. § 115.6. Sexual harassment includes "[r]epeated verbal comments or gestures of a sexual nature to a [prisoner] by a staff member, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures." *Id.* Sexual abuse by a staff member includes:

> (1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;
> (2) Contact between the mouth and the penis, vulva, or anus;
> (3) Contact between the mouth and any body part where the staff member … has the intent to abuse, arouse, or gratify sexual desire;
> (4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member … has the intent to abuse, arouse, or gratify sexual desire;
> (5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member … has the intent to abuse, arouse, or gratify sexual desire;
> (6) Any attempt, threat, or request by a staff member… to engage in [sexual abuse];
> (7) Any display by a staff member … of his or her uncovered genitalia, buttocks, or breast in the presence of [a prisoner], and
> (8) Voyeurism[.]

Id.

As we describe below, we have spoken to or represent numerous survivors of sexual abuse as defined by these PREA standards whose circumstances would not qualify as sexual abuse under the U.S. Code. Nevertheless, the abuse they experience is just as harmful and damaging to their emotional and psychological well-being. Sexual abuse and sexual harassment never serve a valid penological purpose. And as one federal court found, harassing behavior—nonroutine pat-downs, propositions for sex, intrusions while plaintiff was not fully clothed, and sexual comments—"evidenced intent to initiate sexual contact with [the plaintiff], a state of mind … consistent with the 'obduracy and wantonness … that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.'" *Berry v. Oswalt*, 143 F.3d 1127, 1133 (8th Cir. 1998) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). The Commission should not withhold compassionate

release from individuals who are just as fearful of ongoing abuse—and who may soon experience abuse that *does* meet the standard for sexual abuse under more demanding standards. Such a policy would seriously misunderstand the nature of sexual abuse in the culture of certain facilities.

B. "Serious Bodily Injury" should not be required for sexual violence survivors to be eligible for compassionate release.

As drafted, the amendment language is unclear whether qualifying for compassionate release would require a "serious bodily injury" as a result of sexual assault. The proposed amendment states, "The defendant was a victim of sexual assault **or** physical abuse resulting **in serious bodily injury** committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody." USSG § 1B1.13(b)(4) (proposed amendment) (emphasis added). The following are potential interpretations of the proposed amendment:

1) A "serious bodily injury" is required for both sexual assault and physical abuse in order to qualify or;
2) The "serious bodily injury" only applies to physical assault, and not sexual assault.

Though we do not believe a "serious bodily injury" should be required for either type of abuse, if it is required at all, it should not attach to sexual abuse. The proposed amendment does not comment on how to define "sexual assault," nor does it make clear whether "serious bodily injury" applies to sexual assault.

In another part of the current guidelines, "bodily injury" is defined as "any significant injury; *e.g.*, an injury that is painful and obvious, or is a type for which medical attention ordinarily would be sought." USSG § 1B1.1, commentary note 1(B). "Serious bodily injury," however, is a higher threshold:

> "Serious bodily injury" means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

USSG § 1B1.1, commentary note 1(M). 18 U.S.C. § 2241 is the aggravated sexual abuse statute under federal criminal law, whereas 18 U.S.C. § 2242 is the sexual abuse statute. Under the sexual abuse statute, a person in a federal prison who knowingly causes another to engage in a sexual act by threatening that person or "placing that other person in fear," engages in a sexual act with a person who is incapable of understanding the nature of the conduct or physically incapable of declining to engage in the conduct, or who engages in a sexual act without the other person's consent, including through coercion, is criminally liable. 18 U.S.C. § 2242. The aggravated sexual abuse statute applies when a person in a federal prison uses force, threat or fear of death, serious bodily injury, or kidnapping, or drugs or intoxicants, to cause another person to engage in a sexual act—or renders a person unconscious and then engages in a sexual act. *Id.* § 2241. Thus, serious bodily injury is a requirement for only aggravated sexual assault. If the Commission does not

intend to limit compassionate release to those survivors of aggravated sexual abuse, it should clarify that serious bodily injury is not a requirement.

Though of course some survivors have serious injuries as a result of the abuse they experience, oftentimes, they do not. Requiring a physical injury does not logically align with having an expansive definition of "sexual abuse" (as suggested above) and would run afoul of the intention of the more expansive definition of sexual abuse under PREA.

Through our work with the Dublin Prison Solidarity Coalition, we have heard from countless survivors who have experienced horrific abuse that may not meet the "serious bodily injury" requirement in the ambiguous construction of the amendment. The following are only some of these examples, which are also referenced to in the Dublin Prison Solidarity Coalition's letter:

- One survivor was forced by an officer to exchange sexual favors including forcing her to perform oral sex on another prisoner while this officer watched. On another occasion this same officer forced her to strip and dance naked while he watched. He pulled another officer to watch her together, and then he forced her to masturbate while they both watched.

- Another survivor faced repeated explicit sexual harassment by one officer. He eventually took her to an office in the facility and instructed her to pull down her underwear, pull up her clothes, and bend over. He hit her buttocks while making vulgar comments about her buttocks and genitals and explained how he wanted to have sex with her. On other occasions, he also rubbed his penis against her hands through his pants while she was trying to perform her prison job.

- Another woman was drugged and sexually fondled by medical officers. She was forcibly drugged with a substance that made her less than lucid during a medical check. While she was drugged and incapacitated, the officer fondled her breasts. This survivor heard that this officer committed the same abuse to other women in the same prison.

- Another survivor woke up in the Special Housing Unit (SHU) after being beaten by guards. When she woke up, she was naked with officers standing over her taking photos and videos of her. While she was detained in the SHU, another officer told her how he wanted to have violative sex with her. Not long after, another officer touched her breasts and genitals over her pants.

- One officer sent letters to one particular survivor on a daily basis. He kissed her countless times and touched her breasts and genitals over her clothes. He also touched her twice under her clothes. Even after this officer quit his job at the prison, he attempted to stalk her and communicate with her.

- Another officer often gave one particular woman a time frame where he expected her to do what he instructed when he came by her cell. He often requested her to be topless while she rubbed lotion on herself. He also instructed her to show him her breasts and genitals. When this officer was put on administrative leave for sexually assaulting other women in the facility, another officer simply picked up where he left off and continued to instruct this survivor to strip for him while he made vulgar comments about her body.

These horrific experiences of sexual abuse or harassment by officers might not be sufficient for prosecution under the sexual abuse statute, 18 U.S.C. § 2242. Yet, survivors remain in a state of danger nonetheless. Although recognizing physical harms is important, most of the long-term harm of sexual violence is mental and emotional. Many of the survivors who do not have physical injuries from their abuse have detailed deep emotional and psychological harms. This includes new or worsening psychological conditions that require medication and treatment, thoughts of depression and suicide, nightmares, anxiety, black-outs, and a sense of permanent distrust. Furthermore, many individuals who are sexually abused inside prison already enter into prison with a history of childhood or partner sexual abuse. Their experience with sexual abuse and harassment in prison causes individuals to be triggered and re-traumatized, often resulting in deep emotional wounds and reversions in the healing process. These effects often outlast the potential effects of physical injuries, as they must deal with the ripple effects of this trauma for the rest of their lives. It also makes survivors even more vulnerable to perpetual abuse by more individuals inside prisons. Survivors have little to no access to mental health services, even those that are required under PREA (see Dublin Solidarity Coalition letter for specific examples). As a result, the only means of keeping survivors meaningfully safe in these dangerous situations is through compassionate release.

Bodily harm does not adequately define the harmful effects of sexual abuse and harassment and leaves a huge portion of especially vulnerable survivors without the possibility safety. For these reasons, it is imperative not to require a "serious bodily harm" to qualify for compassionate release under the proposed amendment.

- <u>C. Proposed Revision</u>

To solve both the issue with defining "sexual assault" and the construction issue, the amendment can be altered as follows:

"VICTIM OF ABUSE.—The defendant was a victim of physical abuse resulting in serious bodily injury, or was a victim of sexual abuse or sexual harassment as defined at 28 C.F.R. § 115.6, committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody."

3. The Commission should not require a prisoner to produce two independent medical evaluations in order to petition for compassionate release on that basis.

The National Association of Assistant United States Attorneys (NAAUSA) is requesting that the Commission require prisoners to obtain two independent medical evaluations in order to file a compassionate release petition on that basis.

This requirement would be impossible for prisoners to meet in practice. To state the obvious, prisoners have little to no control over their own access to medical care, which is controlled by BOP. Given that BOP controls their health care, it is also unclear how a prisoner could go about getting an evaluation from an "independent" physician—and, more to the point, how prisoners, who have little money and almost no way to earn any, would be able to pay for it.

Assuming that the courts and all parties would benefit from professional summaries of a prisoner's medical and mental health conditions, who bears the burden for producing that report is critically important. Massachusetts' recent medical parole statute, enacted in 2018, is a good example of this problem, and a possible solution. The Massachusetts medical parole statute predicates release on a finding that a prisoner is either "terminally ill" or "permanently incapacitated," and requires, as part of a prisoner's medical parole evaluation, a physical examination by a licensed physician. The Massachusetts Department of Corrections (DOC) initially took the position that the prisoner-petitioner had the burden for producing that report. On a challenge to that policy, the Massachusetts Supreme Court wisely recognized:

> [T]he [DOC] superintendent is in a far better position to meet this burden than a permanently incapacitated or terminally ill prisoner. While incarcerated, prisoners are entirely dependent on the department for access to health care services. … The department's contract health care provider maintains records of all on-site medical care provided to prisoners, as well as records of treatment at outside medical facilities. … To require … the prisoner … to obtain a written diagnosis from a licensed physician would place that formidable burden on … those so poorly able to bear it.

Buckman v. Commissioner of Correction, 138 N.E.3d 996, 1008 (Mass. 2020). Per the court's decision, physicians employed by the Massachusetts DOC or their private medical contractor now provide those evaluations, which accompany each prisoner's application for medical parole, sometimes along with the complete medical records.

In sum, if the Commission were inclined to make a physician's evaluation a required part of the application, then the burden should be on BOP to produce an independent evaluation.

* * *

As advocates for survivors of abuse and people with disabilities and serious mental illness in prisons, jails, and immigration detention centers across the country, and as a member of the Dublin Prison Solidarity Coalition, Rights Behind Bars appreciates the opportunity to share our perspective with the Commission. Thank you for considering our comments.

Sincerely,

Sophie Angelis
D Dangaran
Amaris Montes
RIGHTS BEHIND BARS
416 Florida Avenue N.W. #26152
Washington, D.C. 20001

March 13, 2023

US Sentencing Commission Members
Attention: Public Affairs
One Columbus Circle, NE Suite 2-200, South Lobby
Washington, DC 20002-8002

RE: # LET MY PEOPLE GO!

Dear United States Sentencing Commission Members,

In response to your request for public opinion, we have provided a riddle for a matter of thought.

QUESTION: **Why Did Pharoah Not Want To Let The Captives Go?**

ANSWER: **Because he was in De Nile.**

As we request changes to today's Draconian System, we can only compare the similarities of America's slave holding institutions that held Blacks for 400 years to the Hebrews held in captivity for 400 years. America would not only fail to pay for the damages and debt caused by human trafficking but continue its death and destruction by deliberately withholding resources and goods and services. This missive addresses today's Modern Day Slavery and its systematic impact.

Since the arrival of Europeans, groups of people have be conquered and their resources stolen. However, this war could not be fought without the advantage of firearms a tool whereby Europeans have used skillfully to divide, conquer, terrorize, manage the masses and maintain power. Their war tactic of controlling and manipulating access has exterminated millions. For example, when land was the nation's addiction, guns were used to slaughter the Natives and their Buffalo, who were later relocated to reservations and now account for the nation's highest suicide rate and opioid overdose. Blacks were also conquered and placed on plantations that would later evolve into prisons. Natives were even tricked by religion beguilement. Both ethnic groups fought relentlessly to avoid captivity long before they knew their final destination, which makes them Prisoners of War (POW). These war strategies are the same tactics used by Hitler against the Jews. However, the Biochemical agent used was not gas but Smallpox upon the Natives and Crack/Cocaine for Blacks and Brown people.

Historically, this war has strategically starved out its enemy, the Natives, by slaughtering the Buffalo, a primary source of their livelihood and the systematic removal of Black men from the home, creating a dependency of government protection and its provision through subsidies. The lie has been so detrimental that it has caused Blacks to desire a Dream that has always been a nightmare and those who once owned this stolen property are forced to walk back over their own threshold to obtain the Dream under DACA. The Natives should have built a wall at the shores and sent the other migrants home with their slaves.

DECREE THE WAR OVER ON THE DARKER HUE ?

John Ehrichman, Assistant to the President for Domestic Affairs Under President Richard Nixon said, "***You want to know what this War on Drugs was really all about? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and Black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or Black, but by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. "Did we know we were lying about the drugs? Of course we did."*** - John Ehrichman.

When slavery ended and Cotton was no longer King, Europeans through the CIA flooded Black and Brown Communities with a new Cotton called Cocaine that created a new economic market for slaves to make up the difference by which the government failed to pay reparations. Informants and addicts were used for bait. Poverty would attract the rat and the cheese called Crack would become a numbing agent for all who were in pain mentally and financially.

Please note that during slavery, those enslaved in the West Indies were allowed to smoke Marijuana in order to produce under relaxation. Today Marijuana is used as slave bait to find more of Master's profitable drugs. Could you imagine what Master would have done had he known the effects of Cocaine? I am sure the wall would have been removed and slavery would have expanded west and further south. Please note, drugs were given to those who fought in WWII to assist in completing their mission due to the shortage of men. So NO, the threat of death or addiction is not the primary cause of incarceration, but who dies, who is allowed to make profit and who profit can made from.

If what they sold, distributed, manufactured and possessed were dangerous to the human body then CEOs of the Tobacco Industry and those of the Pharmaceutical industry who produce opioids with awareness of its potential harms would have been charged with murder or Death By Distribution. The ATF would no longer protect the profit of CEOs but CITIZENS who die from cancerous products that murders 12K people a year on average. Instead, Cigarette Cartels will not be mandated to take mugshots or appear before a judge but will appear before a Committee rather than the Courts. They will not be asked to "Cooperate" but to donate their proceeds in the form of foundations and drug awareness. They will not plead GUILTY nor INNOCENT, yet their product will remain on the shelf and will be protected by the ATF. Every retailer will be mandated to pull the protected product from the back of its shelves. The CEO's will not spend one day in prison and will never pay a dime in restitution or reparation for the 400 years of free labor. In fact, the Federal Food and Drug Administration (FDA) will provide protection for the deadly product though tobacco is not a food and fail to label its product as a drug though it be highly addictive. America's job will to be to preserve the profits of White Supremacy and fail to protect its citizens.

DO CIGARETTE CARTELS AND OPIOID PHARMACEUTICALS ALSO BENEFIT FROM QUALIFIED IMMUNITY?

Are Blacks more preferred on your courts and in your courts than your education institutions and laboratories. Please watch March Madness and review who is on the court versus who is in the stands. This in itself is a diabolical injustice and certainly engineered.

PO Box 26952 Raleigh, NC 27611 saveoursonsus@yahoo.com 919.349.7622

TOO MUCH LIKE SLAVERY

In an effort to abolish modern day slavery we must recognize the Patterns of Practice often found in yesterday's Slave Codes to today's Implementations.

The once Private/Public Partnership has now been turned into a Public/Private Partnership whereby slaves are no longer owned by private slave owners but the State who immediately became the fiduciary holders of slave bodies. Immediately after the Civil War, slavery once again became legal under the 13th Amendment and the continued war against Black Rights, Black Wealth, Black Freedom, Black Protection, Black Equity and Black Access many were either Lynched or Incarcerated after having been accused on possessing something White belonging to Master.

However, Master's KING COTTON has transformed into King Oxycontin, Crack, Cocaine, Heroin, Fentanol, Meth and all forms of White possible. Those who still love the thirst of hunting slaves as a sport use the smell of Marijuana to capture its prey in slave states. Slave Bidders are no longer slave brokers like John Armsfield or Isaac Franklin but Defense Attorneys and US Prosecutors.

Under Meritorious Manumission or Cooperation, Blacks can purchase their freedom like those informed Master of other Blacks who planned to escape. This has caused millions to be lynched and or incarcerated. During slavery, a Black man's freedom hinged on his cooperation of a slave. Today, the federal government uses Black men and women to provide information in order to reduce sentences. Unfortunately, our communities are still infested with unemployment and very Black businesses in thriving cities. This internal warfare co-sponsored by White Supremacy killed Los Angelos Rapper and Gang Member, Nipsey Hussle. His murderer was not Eric Holder, Jr. who pulled the trigger but Eric Holder, Sr. who remained quiet as he failed to address the deprivation of humanity due to fatherlessness and the assault of America on the Black Family.

In the 1600s slavery was endorsed by certain states and slaves were owned by individual slave owners. Today, those slave owners are now owned by the state and many of the plantations have been turned over to the state and used as prisons, such as Butner, NC. The state is now responsible for housing, feeding and managing today's slaves versus supplanters and as early as Reconstruction, former owners partnered with the state to recapture their loss through the peonage system instituted by the state, whereby, Black men were accused of committing a crime and sentenced back to former plantations.

Slave Patrollers Yesterday's Slave Patrollers are today's Police Officers who have recruited other Minorities to engage in their war against Minorities. Immediately after slavery, Congress deputized the Buffalo Soldiers, a Black militia in 1866 to kill Natives who were a threat to the migration of White Settlers heading west. These were not Settlers but those who slaughtered their way to wealth.
Fugitive Slave Act. Under this act, slaves could be captured and beaten an inch near death, but owners were prohibited from killing them. Today, possessing, manufacturing, or distributing Master's new cotton can result in a modern day Lynching by taser, gun, the knee or a tree.
Slave Codes Former forbid slaves to congregate beyond three people. Today, Blacks like Philando Castille are forbidden to possess a firearm legally. Eric Gardner of Staten Island, NY was murdered for selling a product he should have accrued royalties too, due to his ancestor's free labor.

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FEDERAL LIFERS

Below are Federal Lifers who have been sentenced as early as 1994 under the Omnibus Crime Bill.

Willie Lee Harris
Since 1994

Leslie D. Allen
Since 2006

Willie E. Carter
Since 2005

Gilberto Chineag

Alberto Mercado Cruz
Since 2010

Nathaniel Dean
Since 1991

Enrique Antunez
Since

Ecliserio Martinez-Garcia
Since 1997

James L.Gibson
Since 2009

Juan Jackson
Since 1991

Ismael Lira
Since 2004

David Gonzalez
Since 2004

Samuel Gray
Since 1999

Daniel Hernandez
Since 1999

Tyshawn Hill
Since 2005

Eldred Hardy
Since 2005

Johnny Leonard
Since 1994

Sherman Mitchell
Since 2013

Willie L. Parsons
Since 1995

Charles Samson
Since 2004

Amos Junior Scott
Since 2000

Calvin Solomon
Since 1994

Anthony Stutson
Since 1992

Everett Taylor
Since 1994

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Richard Vieux Since 1995 | Jermaine L. Wood Since 1998 | Jabari Williams Since 2006 | Jonathan Wright Since 2011

REMAINING NON-VIOLENT LIFERS

Ramon Garza, Jr.	**Age 57**	**HISPANIC**
Charles Clark	**Age 71**	**BLACK**
Jorge Bueno-Sierra	**Age 75**	**HISPANIC**
Armando Garcia	**Age 66**	**HISPANIC**
Ronald Parson	**Age 64**	**BLACK**
Stacey LaDrake Parson	**Age 53**	**BLACK**
Enrique Borja-Antunez	**Age 52**	**WHITE**
Tony Lenald Ford	**Age 53**	**BLACK**
Johnny Martinez	**Age 59**	**HISPANIC**
Tavis D. Doyle	**Age 54**	**BLACK**
Earl R. Lippert	**Age 52**	**WHITE**
Jasper Vargas	**Age 57**	**HISPANIC**
Jahmal Green	**Age 47**	**BLACK**
Felipe Hernandez	**Age 60**	**BLACK**
Eli Tom Orr	**Age 69**	**BLACK**
Walter Johnson	**Age 59**	**BLACK**
Stanley Cornell	**Age 55**	**BLACK**
Albert Mercado-Cruz	**Age 51**	**HISPANIC**
Alexis Altuna	**Age 47**	**WHITE**
Charles B. Swanson	**Age 41**	**WHITE**
Errol Winter	**Age 57**	**BLACK**
Alejandro Casillas Prieto	**Age 50**	**HISPANIC**
Gilberto Chineag	**Age 78**	**HISPANIC**
Antoine Coleman	**Age 42**	**BLACK**
John Charles Fletcher	**Age 52**	**BLACK**
Daniel Hernandez	**Age 53**	**HISPANIC**
Walter Johnson	Age 54	**BLACK**

Joaquin Mendez-Hernandez	**Age 46**	**HISPANIC**
Sherman Mitchell	**Age 46**	**BLACK**
Danny White	**Age 57**	**BLACK**
Corey L. Johnson	**Age 45**	**BLACK**
Ivan Rodrgio Campilo-Restrepo	**Age 72**	**HISPANIC**
Gabriel Ruiz Salcedo	**Age 44**	**HISPANIC**
Terrence Peters	**Age 53**	**BLACK**
Harold Creighton	**Age 46**	**WHITE**
Christopher Kelso	**Age 50**	**BLACK**
Damon Causey	**Age 52**	**BLACK**
Bernard Williams	**Age 50**	**BLACK**

I dedicate this missive to the men in my family who all have felony records and according to the state and federal government are prohibited from being together. This was the first time in 30 years all were out at one time though three out of the four were on either state or federal probation.

From Left to Right

Timothy Earl Bryant: Currently incarcerated for Murder. He and his friend fought over a prostitute whose only boyfriend was who could supply her with drugs at the time. He sits awaiting sentencing in the Wake County Detention Center of North Carolina.

Brian James Bronson: Currently on federal probation for expanding master's Cocaine To Crack. This is called 'Ready Rock" and stretches its value. This same concept was used by former Sharecroppers like his father and grandfather. Blacks would cover the pebble with cotton to stretch its profits because Master was sure to cheat the workers. In fact, Blacks would always owe, making them a slave for life . This concept of who benefits and who cheats is still very much a part of today's society. There are punishments for those who cheat Master but none for whom Master cheats.

Marcus Antonio Williams: Marcus started selling drugs around the age of 12. He is currently in holding waiting on his sentence for a gun possession charge as well as an altercation involving the protection of his sister. Though Marcus may have made a wrong choice, his choice could be no different than Kyle Rhittenhouse who premeditated coming to a Black Lives Matter event to slaughter protestors and get away with murder. Marcus does not need a prison sentence. Marcus needs Privilege and Protection. He needs to obtain a set of modern day forefathers who sit on the bench and attorneys that will protect his hate. Perhaps he needs to kill Blacks for a more worthy cause. Marcus needs a water bottle or a hamburger to affirm that he is a privileged subject.

Michael Hodge: The only cousin who is not on probation but a former felon. He is a minister and a mentor and works extensively throughout the state traveling.

Again, You need to **COOPERATE** AND NO LONGER **COMPLY** WITH THE LIE. **LET MY PEOPLE GO!**

Prophet Dr. Kimberly D. Muktarian

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March 14, 2023

United States Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington, DC 200002-8002
Attention: Public Affairs—Proposed Amendments.

Re: Proposed 2022-2023 Amendments and Issues for Comment, Amendment 1, Sentencing Guidelines for United States Courts, U.S. Sentencing Commission

Dear Chairman Reeves:

On behalf of The Sentencing Project, we submit the following comments and suggestions regarding the proposed amendment one to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023 and published in the Federal Register on February 2, 2023.[1]

The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. For three decades we have worked to advance evidence-based sentencing at the state and federal level.

The Commission requests comment on proposed amendments to the policy statement at §1B1.13, relating to compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). Section 994(t) of Title 28, United States Code, requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." Since the statutory provision was amended by Congress via the 2018 First Step Act, courts have generally held that the Commission's existing policy statement on compassionate release is outdated and operated without Commission guidance. Without such guidance, compassionate release rulings have varied widely, individuals who deserve relief have been denied, and significant circuit splits have arisen. We therefore encourage the Commission to clearly articulate in the Guidelines the circumstances where compassionate release is appropriate while allowing judges to retain discretion on par with that currently granted to the Bureau of Prisons.

A. Background

Under 18 U.S.C. § 3582(c)(1)(A)(i), a court may reduce a sentence, commonly referred to as compassionate release, based on "extraordinary and compelling reasons," after consideration of the 18 U.S.C. § 3553(a) sentencing factors and provided that the reduction is consistent with the

[1] United States Sentencing Commission (2023), 2022-2023 Proposed Amendments to the Federal Sentencing Guidelines, 88 FR 7180.

applicable policy statements of the Sentencing Commission.[2] The bipartisan Sentencing Reform Act of 1984 abolished parole in favor of a system in which a defendant's term of imprisonment was determined by a judge, applying presumptive sentencing guidelines, at a public sentencing hearing.[3] The Sentencing Reform Act created compassionate release as a much-needed safety valve following the abolition of parole – a means of still granting relief to individuals whose continued incarceration pose little public safety benefit and for whom extraordinary and compelling circumstances necessitate release.[4]

Congress charged the Commission with "describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction."[5] The sole limit imposed by Congress, to avoid the replication of parole, was that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[6] The Commission's current policy statement, §1B1.13, has defined "extraordinary and compelling" reasons to include a terminal illness; serious physical or mental health concerns of the incarcerated individual, minor child, or incapacitated partner; and age-related physical or mental deterioration.[7] The statement also grants the Bureau of Prisons wide discretion to identify additional "extraordinary and compelling" reasons. We urge the Commission to extend that broad discretion to federal judges. The Commission's proposed amendments to the policy statement already take significant steps toward that goal, and we suggest minor modifications to move them further.

B. Defining "Extraordinary and Compelling Reasons" to Include Additional Medical and Family Circumstances

We encourage the Commission to expand the definition of "extraordinary and compelling reasons" in the policy statement to address additional circumstances affecting the health and safety of incarcerated individuals and their families. We recommend these changes to the proposed guideline to ensure that it is maximally effective at protecting the lives of people in custody.

a. Medical Circumstances of the Individual in Custody

The proposed amendment would add two new subcategories to the "Medical Condition of the Defendant" category at new subsection (b)(1). The first would provide relief to individuals suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner. We recommend a minor alteration: as articulated by the Federal Defenders, subsection (b)(1)(C) should refer to medical care that is not being provided in a timely or "effective," rather than merely "adequate," manner. As Kelly Barrett, First Assistant Federal Public Defender for the District of Connecticut, testified, the word "adequate" may be interpreted similarly to a deliberate-indifference standard and "discourage courts from granting

[2] 18 U.S.C. § 3582(c)(1)(A)(i).
[3] Sentencing Reform Act of 1984, Public Law 98-473; 98 Stat. 2032.
[4] Section 3582(c)(1)(A)(i).
[5] 28 U.S.C. § 994(t).
[6] 28 U.S.C. § 994(t).
[7] *See* USSG §1B1.13 (2018).

relief so that an individual can get medical care in the community (where other factors militate in favor of release) in all but the most extreme circumstances."[8] Shifting to the word "effective" will allow subsection (b)(1) to supplement, rather than parallel, the eighth amendment – allowing courts to simply find that an individual needs care more quickly or in a different manner than is available in federal prisons, without finding that the Bureau failed to provide constitutionally required care.

The second new subcategory is responsive to the future crises like the covid-19 pandemic. It provides the opportunity for relief to individuals in the following circumstances: (1) they are housed at a correctional facility affected or at risk of being affected by an ongoing outbreak of infectious disease or an ongoing public health emergency declared by the appropriate governmental authority; (2) they are at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or ongoing public health emergency; and (3) such risk cannot be mitigated in a timely or adequate manner. We recommend that this section encompass any emergency situation that threatens the lives and health of individuals in prison that cannot be mitigated.

While we applaud the Commission's acknowledgement of the danger of infectious diseases, the last two decades have demonstrated that the health of incarcerated individuals may be threatened by extraordinary circumstances beyond pandemics. For example, Orleans Parish Prison fell into a state of chaos in the wake of Hurricane Katrina[9] and extreme heat waves have threatened the health of individuals in southern prisons.[10] As the climate warms, these extraordinary events will become more frequent and pervasive. While many may be able to be mitigated via transfers out of the impacted area, the Commission should nonetheless preserve the discretion of judges to consider such circumstances.

b. Family Circumstances of the Individual in Custody

The proposed amendment would modify the "Family Circumstances" category at new subsection (b)(3) in three ways to encompass a more accurate understanding of the family. The proposed amendment would extend the current subcategory relating to the death or incapacitation of the caregiver of a defendant's minor child by making it also applicable to a defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition. The proposed amendment would also add a new subcategory to the "Family Circumstances" category – extending it to when a defendant's parent is incapacitated and the defendant is the only available caregiver for the parent. Finally, the proposed amendment preserves judicial discretion by adding a more general subcategory applicable if the individual presents circumstances similar to those listed in the other subcategories of "Family Circumstances" involving any other immediate family member or an individual whose relationship with the defendant is similar to that of immediate family.

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[8] Federal Public and Community Defenders (2023), Statement of Kelly Barrett, First Assistant Federal Public Defender for the District of Connecticut, Before the United States Sentencing Commission Public Hearing on Compassionate Release.

[9] *See* American Civil Liberties Union (2006), *Abandoned & Abused: Orleans Parish Prisoners in the Wake of Hurricane Katrina*.

[10] Dholakia, N. (2022), *Prison is Already Hell and Climate Change is Making It Worse*, Vera Institute.

We applaud this expansion and recommend that the Commission provide further guidance as to what constitutes an "immediate family member," as federal regulatory definitions differ. For example, 29 C.F.R. § 780.308 defines "immediate family" to include parents, spouses, children, and those similarly situated, such as step-children and foster children, whereas 40 C.F.R. § 170.305 defines "immediate family" to include grandparents, aunts/uncles, nieces/nephews, and cousins. We urge the Commission to adopt the latter definition to reflect a diversity of families, especially low-income families, impacted by incarceration. The latter definition is more consistent with the reality of many Americans who reside in households outside a traditional definition of the nuclear family.

C. Commission "Victim of Assault" Proposal

The Sentencing Project is gravely concerned about the well-document prevalence of sexual abuse and violence within the Bureau of Prisons.[11] We applaud the Commission's inclusion of this proposed amendment. We urge minor changes to guarantee that the guideline encompasses the full breadth of sexual abuse and other violence within federal prisons. Currently, the guideline has the potential to exclude: (1) abuse by other incarcerated individuals acting on their own accord or at the direction of a correctional officer, contractor, or employee, (3) abuse by others who may have custody or control over the individual who are not an officer, contractor, or employee, (4) physical or sexual assault which does not result in serious bodily injury, and (5) sexual abuse which does not constitute an assault. We urge the Commission to correct these deficiencies, which exclude many survivors of abuse. For example, as Professor Erika Zunkel testified at the Commission's February 24, 2023 hearing, the current proposal would exclude the victims of the guard at FCI Dublin who forced two women to "strip naked for him during rounds and took photos, and stored a 'large volume of sexually graphic photographs' on his BOP issued cell phone."[12]

Accordingly, we join the Federal Defenders[13] in urging the Commission to revise the guideline as follows to account for a wider range of harm:

> VICTIM OF ABUSE —The defendant was a victim of sexual or physical abuse in prison, where such abuse resulted in serious bodily injury or where it was perpetrated by a prison employee, contractor, or volunteer.

As the Defenders note, extending relief to those who are abused by other incarcerated individuals recognizes that the purpose of compassionate release is not to penalize the Bureau, it is to provide for the safety and health of incarcerated people. Furthermore, the Bureau is responsible

[11] *See e.g.,* Daniels, C. (2022), Sexual abuse rampant in federal prisons, bipartisan investigation finds, The Hill; Winton, R. (2022). Former warden at female prison known as 'rape club' guilty of sexually abusing women behind bars, LA Times.

[12] Statement of Erica Zunkel Clinical Professor of Law and Associate Director, University of Chicago Law School's Federal Criminal Justice Clinic (2022), Before the United States Sentencing Commission Public Hearing on Compassionate Release.

[13] Federal Public and Community Defenders (2023), Statement of Kelly Barrett, First Assistant Federal Public Defender for the District of Connecticut, Before the United States Sentencing Commission Public Hearing on Compassionate Release.

for the safety of people in their custody and bears responsibility for preventing violence within its walls, regardless of the identity of the perpetrator.

The Sentencing Project also urges the Commission to reject the Department's proposal that such abuse be substantiated by a finding of liability or conviction. The sentencing judge considering the individual's application for relief is well-equipped to determine the merit of the individual's claim of abuse. To rely on a conviction both fails to reflect the reality that the Department has a poor history of investigating and prosecuting such claims. It would also threaten the safety of incarcerated victims, who would face potential retaliation and further abuse while awaiting trial. The Department argues that a "mini-trial" on the abuse claim before the sentencing judge could complicate the investigation and prosecution of criminal cases, but the Commission should prioritize justice and safety for the survivors of such violence over the ease with which the Department secures convictions.

D. Commission Proposal to Include "Changes in Law" as an Enumerated "Extraordinary and Compelling" Reason

The Commission proposes language that would permit courts to reduce a sentence whenever "[t]he defendant is serving a sentence that is inequitable in light of changes in the law." The Commission possesses the legal authority to adopt this language and should do so to resolve an urgent circuit split and advance safety and justice. Four courts of appeals permit a court to consider non-retroactive changes in sentencing law in combination with other extraordinary and compelling reasons[14] and five courts of appeals have held the opposite.[15] This deep circuit split has created profoundly unequal and arbitrary access to post-conviction justice.

The plain text of the statute makes clear that Congress did not intend to exclude changes in the law from being considered as extraordinary circumstances. If it wished to do so, it could have articulated that limit as it did with the restriction that rehabilitation alone does not rise to the level of an extraordinary and compelling circumstance. The silence of the statute on changes in law should be construed in a manner most consistent with judicial discretion. As the U.S. Supreme Court articulated in *Concepcion v. United States*, judges enjoy broad discretion to consider all relevant information in sentencing at trial, that discretion is carried forward to sentence modification hearings, and it is bounded only by express limitations on what information may be considered from the Constitution or Congress.[16]

Additionally, when Congress amended the statute in 2018 with the First Step Act, it could have again limited the ability of courts to consider changes in law but declined to do so. Congress's failure to make all provisions of the First Step Act retroactive does not mean that they intended to bar all individuals from relief based on changes in the law – it merely indicates that the

[14] *See United States v. Chen*, 48 F.4th 1092, 1096 (9th Cir. 2022); *United States v. Ruvalcaba*, 26 F.4th 14, 28 (1st Cir. 2022); *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020).
[15] *See United States v. McCall*, 56 F.4th 1048, 1050 (6th Cir. 2022) (en banc); *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (citing *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022); *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021)).
[16] *Concepcion v. United States*, *597 U.S.* ___ (2022).

Congress intended for such relief to not be automatic, but rather subject to the heightened criteria for compassionate relief, such as the requirement that such individuals meet the 18 U.S.C. § 3553(a) sentencing factors. Indeed, in her Senate Floor comments about the First Step Act, Senator Amy Klobuchar made clear that lawmakers were aware that courts could potentially consider changes in law to be grounds for relief, acknowledging that some prior sentencing laws "resulted in prison sentences that actually don't fit the crime" and that the provisions in the First Step Act "allow[] people to petition courts … for an individualized review based on the particular facts of their case."[17] As such, the Commission is well within its power to amend the policy statement to include changes in law as an extraordinary and compelling factor.

The Commission is also correct to include changes in law as a potential ground for relief as a matter of policy. This year, the United States marks the fiftieth year of mass incarceration.[18] Research makes abundantly clear that extreme sentences and high incarceration rates are not necessary for public safety[19] and a growing level of bipartisan acknowledgment of that fact has led Congress to repeatedly lower sentences.[20] The United States will not, however, meaningfully lower its incarceration rate without providing pathways to relief for the individuals already serving extreme sentences – especially those sentences that Congress has already deemed unjust. Permitting compassionate release based on changes in law helps fill this gap for individuals who can safely return to the community.

E. Commission Proposals Regarding Additional "Extraordinary and Compelling" Reasons

Policy statement §1B1.13 has always had an open-ended catchall category which empowered the Bureau to identify additional extraordinary and compelling circumstances not otherwise articulated. Vesting this power solely in the Bureau reflected that at the time of the policy statement's drafting, the Bureau controlled compassionate release motions. With the First Step Act's 2018 passage, incarcerated individuals are now permitted to bring their cases directly to the courts. Accordingly, the Commission should update the open-ended catch-all provision to provide the same discretion to courts as it previously has to the Bureau – as in Option 3 for the proposed sub. (b)(6). The other potential options offered by the Commission are overly restrictive and a departure from the power already granted to the Bureau, and also likely to produce substantial litigation. As the Covid-19 pandemic demonstrated, conditions may always arise that are outside the enumerated categories of relief and it is vital that courts possess the necessary flexibility to respond rapidly and efficiently when needed.

F. Conclusion

Thank you for this opportunity to provide feedback and for considering our views. The Commission's proposed amendments are a strong step toward creating the robust compassionate release system that Congress intended and the nearly 160,000 people incarcerated in federal prisons and their loved ones deserve.

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[17] 164 Cong. Rec. S7747-48 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar).
[18] Ghandnoosh, N. (2023), *Ending 50 Years of Mass Incarceration: Urgent Reform Needed to Protect Future Generations*, The Sentencing Project.
[19] Ghandnoosh, N. (2021), *A Second Look at Injustice*, The Sentencing Project.
[20] *See* First Step Act of 2018, Public Law 115-391; Fair Sentencing Act of 2010, Public Law 111–220.

Sincerely,

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The Sentencing Project

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Sam Calloway, Spirit and truth ministries

Topics:

1. Compassionate Release

Comments:

We feel that many are given too much time, especially first offenders

Submitted on: March 12, 2023

By the Grace of G-d

Public Comment to the U.S. Sentencing Commission's Proposed Amendments to the Sentencing Guidelines

Prepared by Tzedek Association

About Tzedek Association:

Tzedek Association is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty and humanitarian cases around the globe. Tzedek was instrumental in the drafting and passing of the First Step Act, among other criminal justice reform legislation, such as a provision in the CARES Act that allows for home-confinement for inmates vulnerable to COVID-19 based on CDC approved high risk criteria. Tzedek continues to work to ensure that the FSA is correctly implemented in accordance with statute, the intent of Congress and spirit of the legislation, as well as many other important criminal justice reform efforts.

Introduction:

The United States has less than five percent of the world's population, but close to one-quarter of its prisoners—an incarceration rate five to ten times that of other Western democracies. Indeed, the U.S. incarcerates more people (both in absolute numbers and per capita) than any nation on Earth, including the far more populous China, which rates second, and authoritarian Russia, which rates third.

Over the past 40 years, the number of people held in prisons and jails in the United States per capita has more than quadrupled, with the total number of incarcerated persons now around 2 million. Since 1970, the U.S. prison population has risen 700 percent, a rate that far outpaces that of the general U.S. population and crime rates. Nearly half of all those incarcerated in the United States are serving time for non-violent drug, property, or public order crimes. Despite recent declines, every state and the federal government have seen a massive increase in inmate populations in recent decades.

This epidemic of incarceration has arguably done little to reduce crime and has, along the way, helped to destroy innumerable lives, especially the children and spouses of incarcerated individuals. Reform and clarity of what our justice system is truly about is desperately needed. We need to provide alternatives to incarceration, reduce excessively long sentences especially for non-violent first-time offenders, give incarcerated individuals the education and training they need to successfully reintegrate and find employment after leaving prison, lift barriers to reentry and yes, show compassion. Everyone would benefit from a criminal justice system that takes seriously its obligation to rehabilitate as well as to hold people accountable for their misdeeds.

The United States Sentencing Commission (USSC) plays a pivotal role in enlightening our justice system, particularly through the Sentencing Guidelines.

The comments we propose here are intended to address some of what we believe are the shortcomings in our criminal justice system that we hope can be clarified and corrected via instruction to judges throughout the country through the proposed amendments to the Sentencing Guidelines. While these proposals all deal with the federal criminal justice system, the hope is that enacting these reforms would also inspire state legislators—who often look to the federal system for guidance—to enact similar reforms.

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Amendment to 18 U.S.C. §3582(c)(1)(A)

The First Step Act (FSA) is the most monumental criminal justice reform legislation passed in decades. In Title 1, it seeks to meaningfully assist incarcerated individuals to rehabilitate themselves and provide them with the necessary tools that will help them to successfully reenter society as contributive members of society. It also incentivizes men and women in our federal prison system to utilize their time in prison more productively by participating in recidivism reduction programs, job training, educational courses and faith-based activity that have all proven to reduce the risk of reoffending but also creating a more productive experience while incarcerated.

The subsequent provisions in the FSA are important if not critical compassionate pieces, as well as sentencing reforms, that are significant improvements to our justice system.

We believe there are instances in which the FSA is *not* being interpreted correctly by the courts and by the DOJ/BOP, and thus not being implemented correctly. We believe that the Sentencing Guidelines should help clarify these issues, to provide proper counsel to judges on how the FSA should, in fact, be interpreted and implemented. Below are our comments pertaining to 18 U.S.C. § 3582(c)(1)(A).

Comments regarding Amendment to 18 U.S.C. § 3582(c)(1)(A).

1. The Commission's proposed amendments to 18 U.S.C. § 3582(c)(1)(A) are praiseworthy and has been needed since the FSA was passed into law in December of 2018. We thank the Commission for its attention to this important issue. The change brought about by the FSA that provides the ability for inmates to petition a court directly with a request for compassionate release -- a Reduction in Sentence (RIS) – instead of only the BOP/DOJ submitting such petitions was one of the most monumental and significant reforms of our justice system made by the FSA. It is an issue of fairness, but also compassion. In a very general way, we strongly encourage the USSC to define this provision, and specifically the criteria of "compelling and extraordinary circumstances", in the broadest way possible, to include the proposed amendments for which the Commission is seeking comment at this time, and more, as per our recommendations below, as well as from other organizations and individuals with additional ideas. Judges should have broad discretion in considering these requests.

2. Specifically, we believe that "compelling and extraordinary circumstances" should include factors pertaining to the inmate's circumstances that they consider to be extraordinary or compelling that were not or could not have been considered at sentencing. For example:

    a) The sentence of the inmate may have changed since their initial sentencing, either due to changes in the Guidelines, case law, or statutory reform, and thus had they been sentenced subsequently they may have received a lower sentence because of those changes.

    b) If the loss amount drove the sentence and the sentencing court did not take into consideration inflation and other considerations.

    c) If *mens rea*, motive, purpose and personal culpability issues were not sufficiently considered at sentencing. Specifically, (a) instances in which aggravating sentencing enhancements were imposed in instances in which the defendant did not exhibit sufficient *mens rea* with respect to a sentencing factor to justify the corresponding sentencing enhancement, and/or (b) that the sufficient *mens rea* was not adequately proven at the appropriate burden of proof, and/or the offense level calculation was disproportionate to the individual's personal culpability. The government should generally be required to prove a culpable state of mind with respect to the extent of the harm and any key offense facts that impact Guideline ranges such as the amount of drugs or the amount of loss involved in the offense, and greater proof of a more culpable state of mind should generally be required for greater sentencing enhancements.

    d) The sentence was impacted by acquitted conduct that was considered as "relevant conduct" at sentencing.

e) The sentence reflected a trial penalty -- the substantial difference between the sentence offered in a plea offer prior to trial versus the sentence the inmate received after trial.

f) Family hardship considerations, such as the loss of caretaking or financial support to third parties due to the inmate's incarceration that has proven detrimental to their well-being. Or significant financial hardship the inmate's family has suffered from the absence of the inmate as a result of the incarceration in other ways, including but not limited to emotional and psychological harm to children, a special needs child in the defendant's family, a family member with medical or mental health issues, a spouse, or elderly parents.

g) Other collateral consequences resulting from the inmate's incarceration (*e.g.*, loss of employment and income, other formal and informal societal sanctions, the embarrassment and shame the inmate or their family have experienced from the offense as a result of the incarceration, and the defendant's demonstration of genuine remorse and sincere effort to make amends to any victims or the broader community.)

Alternatives to Incarceration

The length of stay for released federal prisoners doubled between 1988 and 2012, from an average of 17.9 months to 37.5 months. But increasingly, lengthy prison terms for federal offenses have become counterproductive for promoting public safety. Long-term sentences produce diminishing returns for public safety as individuals "age out" of the high-crime years; such sentences are particularly ineffective for drug crimes as drug sellers are easily replaced in the community; increasingly punitive sentences add little to the deterrent effect of the criminal justice system; and mass incarceration diverts resources from program and policy initiatives that hold the potential for greater impact on public safety. Further, there is evidence that prison sentences—especially lengthy ones—are "criminogenic," *i.e.*, actually increase crime and criminal attitudes by exposing first-time offenders to more hardened offenders and reducing post-incarceration opportunities for jobs, housing, and social connections.[1]

The comments below promote alternative sentencing (such as home arrest, electronic monitoring, weekend jail stays, and other forms of supervision) for first-time, non-violent offenders.

These comments also address how an "act of violence" should be defined, which relates to comments being sought by the USSC at this time in the Career Offender section.

[1] Marc Mauer. "Long-Term Sentences: Time to Reconsider the Scale of Punishment." The Sentencing Project. November 5, 2018. https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/

Favoring Alternatives to Prison Incarceration for a Certain Limited Class of Nonviolent Offenders.

The USSC asks for comments regarding how and when it should study alternatives to incarceration, among other questions on this important and impactful topic. In answer to the questions asked, we believe that *whatever will produce guidelines as soon and expeditiously as possible, and as boldly and expansively as possible*, should be the guiding light in this endeavor.

We propose that the USSC should immediately begin a comprehensive review of the federal sentencing system that culminates in a report to Congress and the public on the effectiveness of the current system, its conformity to the purposes set forth under Section 3553(a) of Title 18 of the United States Code, and whether the current list of factors to be considered when imposing a sentence under Section 3553(a) of Title 18 of the United States Code are producing the desired result and within the public's interest, and includes recommendations for appropriate reforms. We propose that this review should be conducted at least every ten years.

We offer further specific comments on this important subject:

1. We propose that the USSC should advise Congress to amend Title 18 of the U.S. Code Section 3553(b) to delete subsections (1) and (2) and insert a subsection that would address Alternatives to prison sentences. The new subsection should establish that for defendants with no prior felony convictions for federal or state criminal offenses, and no act of violence involved in the offense for which they were convicted, it shall be presumed, absent a jury finding of aggravating circumstances, that alternatives to prison shall be sufficient to satisfy justice. Alternatives shall include, but are not limited to, supervised probation, community service, home confinement, fines, restitution to victims, intermittent confinement, confinement in residential confinement centers, electronic monitoring, and participation in rehabilitation, faith-based or other programs. For defendants to whom this section applies, on the motion of the defendant a court that imposed a prison sentence prior to the enactment of this guidance should impose an alternative to prison for the remainder of the defendant's sentence as if this guidance was in effect at the time the offense was committed.

2. We further propose that the USSC should advise Congress to amend Title 18 of the U.S. Code Section 3553(f) by adding a subsection that would establish that the defendant does not qualify for alternative sentencing under subsection (b)(1) of this section.

3. Importantly, we propose that the USSC should amend its Sentencing Guidelines, Section 5B1.1, by adding a new subsection (c) that should read as follows:

"For defendants with no prior felony convictions for federal or state criminal offenses, and who committed no act of violence in the offense for which they were convicted, alternatives to prison shall be considered sufficient to comply with the purposes set forth in 18 U.S.C. Section 3553(a)(2), absent a jury finding of aggravating circumstances that would warrant a sentence of incarceration.

Supervised probation, community service, home confinement, intermittent confinement, fines, restitution payments to victims, electronic monitoring, participation in rehabilitation programs, participation in faith-based programs, placement in residential confinement centers, and other authorized alternatives to prison shall all be presumed to be sufficient for first offenders convicted of crimes that did not involve acts of violence. Intermittent confinement may include alternatives such as being home on weekends and in prison on weekdays or vice versa. Prisoners may be sentenced by judges directly to "Residential Confinement Centers" or may be placed in such Residential Confinement Centers by the Federal Bureau of Prisons, as long as their sentence is less than five years. Probation officers shall include a discussion of viable alternatives to prison in the pre-sentencing report."

We further propose a basis for a presumption in favor of alternatives to incarceration: people who demonstrate pretrial and/or presentence rehabilitation, such as through exemplary performance on pretrial release, should also presumptively receive an alternatives-to-prison sanction. This alternative basis captures a number of deserving folks who might otherwise be excluded, and it properly adds a focus on rehabilitation to the Guidelines.

Definitions:

An "act of violence" shall be defined as causing or intentionally attempting to cause actual physical harm to another person, attempting to sexually assault another person, actually sexually assaulting another person, or intentionally putting another person in reasonable fear of imminent violence.

"Residential Confinement Centers" shall be centers based in communities for the purpose of confinement similar to Residential Reentry Centers contracted by the Federal Bureau of Prisons.

4. Additionally, we propose that the USSC amend its Sentencing Guidelines, Section 5C1.2(a) by adding a new subsection (6) that should read as follows:

"(6) the defendant does not qualify for alternative sentencing under section 5B1.1(c)."

5. We propose that the USSC should advise Congress to amend Title 18 U.S.C. 3552(a) to add the following sentence:

"The report shall include a discussion of viable alternatives to prison."

6. We also propose that the USSC amend its Sentencing Guidelines, Section 6A1.1 by adding a new subsection (c) that should read as follows:

"The pre-sentencing report shall include a discussion of viable alternatives to prison."

7. We propose that the USSC should advise Congress to provide a sense of Congress that Rule 32 of the Federal Rules of Criminal Procedure shall be revised by adding to section (d)(1) a new subsection (F) to read as follows:

"F. Include a discussion of viable alternatives to prison."

8. We propose that the USSC should advise Congress to amend Title 28 of the U.S. Code Section 997 to add a sentence that shall read as follows:

"As part of its annual report, the Commission shall address its effort to develop and expand alternatives to prison for as many federal defendants as possible."

9. We propose that the USSC should advise Congress to amend Title 28 of the U.S. Code Section 994(j) to read as follows:

"The Commission shall ensure that the Guidelines recommend imposing a sentence other than imprisonment in cases in which the defendant is a first offender of a federal or state felony offense whose conviction was not for a crime that involved an act of violence, absent a jury finding of aggravating circumstances that would warrant a prison sentence."

Definitions:

"Act of violence" shall be defined as causing or intentionally attempting to cause actual physical harm to another person, attempting to sexually assault another person, actually sexually assaulting another person or intentionally putting another person in reasonable fear of imminent violence.

10. We propose that the USSC should advise Congress to amend Title 28 of the U.S. Code Section 994 by adding a new subsection (z) to read as follows:

"The Commission shall further evaluate, develop, and promote alternatives to prison as a strategy to divert appropriate convicted individuals from prison, and shall promote the availability of evidence-based sentencing alternatives to incarceration across the system."

11. We propose that the USSC should advise Congress to amend Title 28 of the U.S. Code Section 991 by revising subsection (a) to read as follows:

"(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of nine voting members and three nonvoting members. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. One of the vice-chairs shall be dedicated to researching, developing, and proposing alternatives to prison to be included in the United States Sentencing Guidelines and associated materials. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than five of the members of the Commission

shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an *ex officio*, nonvoting member of the Commission. The Chair of the United States Parole Commission, or the Chair's designee, shall be an *ex officio*, nonvoting member of the Commission. A federal public defender shall be an *ex officio*, non-voting member of the Commission, to be appointed by the President. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown."

Acquitted Conduct

Judges sentencing defendants to months or years in prison for acquitted conduct should have never been allowed to begin with. As Chairman of the Senate Judiciary Committee, Senator Dick Durbin (D-IL), recently put it: "Under our Constitution, defendants can only be convicted of a crime if a jury of their peers finds they are guilty beyond a reasonable doubt. However, federal law inexplicably allows judges to override a jury verdict of 'not guilty' by sentencing defendants for acquitted conduct. This practice is inconsistent with the Constitution's guarantees of due process and the right to a jury trial…If any American was acquitted of past charges by a jury of their peers, then some sentencing judge down the line shouldn't be able to find them guilty anyway and add to their punishment. A bedrock principle of our criminal justice system is that defendants are innocent until proven guilty. The use of acquitted conduct in sentencing punishes people for what they haven't been convicted of. That's not acceptable and it's not American."[2]

Nevertheless, current federal law allows judges to override a jury's not-guilty verdict by sentencing a defendant for the very conduct he or she was acquitted of by the jury. This is because the law requires a jury to convict beyond a reasonable doubt but allows a judge to impose sentencing enhancements based on the less demanding standard of preponderance of the evidence. Respectfully, this approach is wrong. We believe it disrespects at best, and violates at worst, the Constitution which requires a greater level of proof, proof beyond a reasonable doubt, for **all** elements of an offense including *mens rea*, before a defendant can be punished criminally.

Specifically, this judicial practice is an affront to the Fifth and Sixth Amendments which guarantee due process and the right to trial by jury. These rights are fundamental to our criminal justice system. It has been roundly criticized by practitioners, judges, and scholars. In one case, three defendants were convicted of possessing small amounts of crack cocaine but were acquitted by the jury on conspiracy to distribute charges. Nevertheless, the judge increased their sentences based on them engaging in a conspiracy. Though the Supreme Court did not take the case, Justice Scalia, joined by Justice Ginsburg and Justice Thomas, stated that the practice of sentencing based on acquitted conduct "has gone on long enough" and constituted a likely violation of the Sixth Amendment.[3]

Allowing acquitted conduct to be considered at sentencing also exacerbates the "trial penalty", which is generally manifested in the significant difference in sentence between what a defendant receives via plea bargain and what his or her sentence would be if convicted at trial. This trial penalty has virtually eliminated the constitutional right to a trial in the federal system.[4] In this comment, we ask that the USSC do whatever is in its power to stop or at least limit this unfair and unconstitutional practice from continuing.

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[2] https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-cohen-armstrong-introduce-bipartisan-bicameral-prohibiting-punishment-of-acquitted-conduct-act

[3] See Jones v. United States.

[4] National Association of Criminal Defense Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018), http://www.nacdl.org/trialpenaltyreport.

Prohibiting Acquitted Conduct.

1. We propose that the USSC recommend to Congress to amend Section 3661 of title 18, United States Code, by inserting: ", except that a court of the United States shall not consider, except for purposes of mitigating a sentence, acquitted conduct under this section" before the period at the end.

2. We further propose that the USSC recommend to Congress to amend Section 3673 of title 18, United States Code—

(1) in the matter preceding paragraph (1), by striking "As" and inserting the following:

"(a) As"; and

(2) by adding at the end the following:

"(b) As used in this chapter, the term 'acquitted conduct' means—

"(1) an act—

"(A) for which a person was criminally charged and with regard to which—

"(i) that person was adjudicated not guilty after trial in a Federal, State, or Tribal court; or

"(ii) any favorable disposition to the person in any prior charge was made, regardless of whether the disposition was pretrial, at trial, or post trial; or

"(B) in the case of a juvenile, that was charged and for which the juvenile was found not responsible after a juvenile adjudication hearing; or

"(2) any act underlying a criminal charge or juvenile information dismissed—

"(A) in a Federal court upon a motion for acquittal under rule 29 of the Federal Rules of Criminal Procedure; or

"(B) in a State or Tribal court upon a motion for acquittal or an analogous motion under the applicable State or Tribal rule of criminal procedure.".

Mens rea Reform

The Honorable Judge Jack Weinstein & Fred Bernstein wrote[5]:

"In the guidelines era, *mens rea* has been all but eliminated from the sentencing of drug offenders. This development is a disastrous departure from the great traditions of Anglo-American law…It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial…Punishing a defendant for facts she 'reasonably should have foreseen' is tantamount to punishing negligent conduct. This is a substantial departure from 2b1 traditional principles of *mens rea*. The Model Penal Code, for example, permits criminal liability only in cases of extreme negligence, and then only rarely. Moreover, punishments are 'proportional' to mental states."

The Honorable Judge Gerard E. Lynch similarly wrote[6]:

"The guidelines significantly muddle questions of *mens rea* as applied to factors that can have a dramatic effect on culpability…The lack of attention to *mens rea* issues [means] the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases."

The need for the reform of *mens rea* is long overdue. Below we recommend the Commission address this foundational issue.

Notably, the Commission is considering adding *mens rea* to 2K2.1(b)(4) and the government has asked it to expand the *mens rea* in 2D1.1(b)(13) to permit a two-level enhancement on proof of "reason to believe" that unlawfully distributed pills are adulterated in certain ways, among other examples. Accordingly, we appropriately provide comment below regarding *mens rea* given that targeted *mens rea* reforms are on the table this cycle.

[5] Judge Jack Weinstein & Fred Bernstein, The Denigration of Mens Rea in Drug Sentencing, 7 FEDERAL SENTENCING REPORTER 121 (1994).
[6] Judge Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 FEDERAL SENTENCING REPORTER 112 (1994).

State of Mind Matters.

1. We propose that the USSC should revise the Sentencing Guidelines to provide uniformity to terms that speak of *mens rea*, such as "willfully", "knowingly" and "state of mind", being that these terms have been defined and interpreted differently and inconsistently in different courts throughout the country.

2. We further propose that the USSC revise the Sentencing Guidelines to provide that—for any conduct to result in a higher offense level—the government bears the burden of proving that the conduct was done intentionally and with full knowledge of its consequences.

3. We further propose that the USSC specify that the conduct of others should only be used to enhance a person's sentence if the person knew of and endorsed that conduct with full knowledge of its consequences.

4. We further propose that the USSC should recommend to Congress to amend Title 28 of the U.S. Code Section 994 by adding a new subsection (c)(8) to read as follows:

"the *mens rea* and personal culpability of the defendants at the time of the offense"

Title 18 of the U.S. Code Section 3553(e), is amended by inserting after "committed an offense." the following: "The court shall have the authority to impose a sentence below a level established by statute as a minimum sentence or to depart from the offense level if the court finds on the record that the *mens rea* or personal culpability of the defendant at the time of the offense does not support application of the prescribed mandatory minimum or the offense level calculation."

USSC *Mens rea* Review.

1. We propose that the USSC should regularly undertake a comprehensive review of the U.S. Criminal Code to identify overlapping, unnecessary and duplicative federal criminal laws, as well as those that lack appropriate and consistent *mens rea* elements and proportionate statutory sentencing ranges, and to assess the feasibility of gathering all federal criminal laws and all regulatory crimes into a single title of the U.S. Code organized in a way that is both useful to practitioners and understandable by the general public. The Commission's review should be informed by data concerning the most widely applied and most commonly sentenced federal offenses, and the Commission should consider whether certain offenses could and should be more appropriately addressed by state criminal justice systems. This review should be completed within four years. The review should be reported to Congress with specific recommendations as to legislation that Congress should consider to revise the U.S. Criminal Code. Subsequent reviews and reports to Congress shall occur not less than every five years.

2. We further propose that the USSC should review and revise the Sentencing Guidelines to ensure the Guidelines properly incorporate, and to ensure courts properly consider, *mens*

rea, motive, purpose and personal culpability issues at sentencing. This review and revision of the Guidelines should ensure: (a) that aggravating sentencing enhancements are imposed only in instances in which the defendant exhibited sufficient *mens rea* with respect to a sentencing factor to justify the corresponding sentencing enhancement, and (b) that the sufficient *mens rea* is adequately proven at the appropriate burden of proof. The government should generally be required to prove a culpable state of mind with respect to any key offense facts that impact Guideline ranges such as the amount of drugs or the amount of loss involved in the offense, and greater proof of a more culpable state of mind should generally be required for greater sentencing enhancements. This review and revision of the Guidelines should also ensure that courts are fully and clearly instructed to consider any and all mitigating aspects of a defendant's *mens rea* motive, purpose and personal culpability as a basis for a departure under the Guidelines.

3. We further propose that the USSC should review collateral sanctions imposed by federal and state laws to ensure courts properly consider the nature and impact of collateral consequences likely to be endured by federal defendants. The USSC should conduct research and issue a report within three years concerning the array of collateral consequences faced by federal defendants. This report should give special attention to whether and how collateral consequences may undermine or otherwise impede the effectiveness of the recidivism reduction provisions in Title I of the FIRST STEP Act of 2018 and should include specific recommendations to Congress as to how to mitigate the harmful impacts of collateral consequences, as well as recommendations for courts as to how they should adjust sentencing practices in light of the punitive nature of collateral consequences.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

UNCLE OTTO'S

Topics:

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

Comments:

Please address this act. It will help alot of people who deserve it.

Submitted on: February 27, 2023

PROPOSED AMENDMENT 1: FIRST STEP ACT—REDUCTION IN TERM OF IMPRISONMENT UNDER 18 U.S.C. § 3581(C)(1)(A)

Synopsis of the Proposed Amendment: Prior to the First Step Act, a Court was authorized to grant a reduction in a defendant's term of imprisonment under section 18 U.S.C. § 3582(c)(1)(A) only "upon motion of the Director of the Bureau of Prisons." Section 603(b) of the First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to file a motion seeking a sentence reduction after fully exhausting all administrative rights to appeal a failure of the Bureau of Prisons ("BOP") to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier.

18 U.S.C. § 3582(c)(1)(A) does not define "extraordinary and compelling reasons." The proposed amendment would implement the First Step Act's relevant provisions by amending §1B1.13 and its accompanying commentary: specifically, revise the policy statement to reflect that 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, authorizes a defendant to a file a motion seeking a sentence reduction.

The proposed amendment would also revise the list of "extraordinary and compelling reasons" in §1B1.13 five different ways. First, to move the list of extraordinary and compelling reasons from the Commentary to the guideline itself as a new subsection (b). Second, to add two new subcategories to the "Medical Condition of the Defendant" category at new subsection (b)(1). Third, to modify the "Family Circumstances" category at new subsection (b)(3). Fourth, to add two new categories to the list (involving the victim of assault and changes in the law). Fifth, to revise the provision currently found in Application Note 1(D) of §1B1.13. Finally, to move the current Application Note 3 into the guideline itself as a new subsection (c).

Issues for Comment

Issue 1: The proposed amendment would revise the list of "extraordinary and compelling reasons" in §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) in several ways. The Commission invites comment on whether the proposed amendment—in particular proposed subsections (b)(5) and (6)—exceeds the Commission's authority under 28 U.S.C. § 994(a) and (t), or any other provision of federal law.

Issue 2: The proposed amendment would make changes to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) and its corresponding commentary to implement the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018). The Commission seeks general comment on the proposed changes and whether the Commission should make any different or additional changes to implement the Act.

Issue 3: The proposed amendment would revise the categories of circumstances in which "extraordinary and compelling reasons" exist under the Commission's policy statement at §1B1.13. The Commission adopted the policy statement at §1B1.13 to implement the directive in 28 U.S.C. § 994(t). As noted above, the directive requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The Commission also has the authority to promulgate general policy statements regarding the application of the guidelines or other aspects

of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). *See* 28 U.S.C. § 994(a)(2)(C).

The Commission seeks comment on whether the proposed categories of circumstances are appropriate and provide clear guidance to the courts and the Bureau of Prisons.

Should the Commission further define and expand the categories? Should the Commission provide additional or different criteria or examples of circumstances that constitute "extraordinary and compelling reasons"? If so, what specific criteria or examples should the Commission provide? Should the Commission consider an altogether different approach for describing "what should be considered extraordinary and compelling reasons for sentence reduction"?

Issue 4: The proposed amendment brackets the possibility of adding a new category of "extraordinary and compelling reasons" to §1B1.13 relating to defendants who are victims of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody. The Commission seeks comment on whether this provision should be expanded to include defendants who have been victims of sexual assault or physical abuse resulting in serious bodily injury committed by another inmate.

Issue 5: Section 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) sets forth the applicable policy statement for determining in what circumstances and to what extent a reduction in a term of imprisonment as a result of an amended guideline range may be granted. In *Dillon v. United States*, 560 U.S. 817 (2010), the Supreme Court held that proceedings under 18 U.S.C. § 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and that §1B1.10 remains binding on courts in such proceedings.

The Commission seeks comment on whether the proposed amendment—proposed subsections (b)(5) and (6)—is in tension with the Commission's determinations regarding retroactivity of guideline amendments under §1B1.10. If so, how should the Commission resolve this tension? Should the Commission clarify the interaction between §1B1.10 and §1B1.13? If so, how?

Probation Department's Response

Issue 1: The Eastern District of Michigan does not have any comments related to this amendment proposal.

Issue 2: The Eastern District of Michigan does not have any comments related to this amendment proposal.

Issue 3: The Eastern District of Michigan does not have any comments related to this amendment proposal.

Issue 4: The Eastern District of Michigan does not have any comments related to this amendment proposal.

Issue 5: The Eastern District of Michigan does not have any comments related to this amendment proposal.

PROPOSED AMENDMENT 2: FIRST STEP ACT—DRUG OFFENSES

Synopsis of the Proposed Amendment: This proposed amendment responds to the First Step which contains numerous provisions related to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. Although Commission action is not necessary to implement most of the First Step Act, revisions to the *Guidelines Manual* may be appropriate to implement the Act's changes to the eligibility criteria of the "safety valve" provision at 18 U.S.C. § 3553(f), and the recidivist penalties for drug offenders at 21 U.S.C. §§ 841(b) and 960(b). The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive.

Part A: Safety Valve

The proposed amendment would implement the provisions of the First Step Act expanding the applicability of the safety valve provision by amending §5C1.2 and its corresponding commentary. Specifically, it would revise §5C1.2(a) to reflect the broader class of defendants who are eligible for safety valve relief under the Act. Part A would also bracket a possible revision to the minimum offense level that §5C1.2(b) requires for certain defendants. Revision of this provision may be appropriate given the expanded class of defendants who would qualify for safety valve relief under the proposed revisions to §5C1.2(a).

Changes to the Commentary to §5C1.2. First, it would revise Application Note 1 by deleting the current language and adding the statutory definition for the term "violent offense." Second, Part A would bracket the possibility of adding a new application note stating that "in determining whether the defendant meets the criteria in subsection (a)(1), refer to §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)." Third, Part A would also revise Application Note 7, to implement the new statutory provision stating that information disclosed by a defendant pursuant to 18 U.S.C. § 3553(f) may not be used to enhance the defendant's sentence unless the information relates to a violent offense. Finally, it would make additional technical changes to the rest of the Commentary by renumbering and inserting headings at the beginning of certain notes.

Make conforming changes to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)), which makes a specific reference to the number of criminal history points allowed by §5C1.2(a)(1). Finally, Part A would also make changes to §2D1.1 and §2D1.11, as the 2-level reductions in both guidelines are tethered to the eligibility criteria of paragraphs (1)–(5) of §5C1.2(a). It provides two options for amending §2D1.1(b)(18) and §2D1.11(b)(6).

The Commission provides two options to consider on *Part A*:

> *Option 1* would not make any substantive changes to §2D1.1(b)(18) and §2D1.11(b)(6), allowing their 2-level reductions to automatically apply to any defendant who meets the revised criteria of USSG §5C1.2. Because §5C1.2(a)(1) would closely track the language in 18 U.S.C. § 3553(f)(1), as amended by the First Step Act, the "and" used to set forth the criminal history criteria in §5C1.2 might

be read by some courts as *disjunctive* (*e.g.*, the courts in the Fifth, Sixth, Seventh, and Eighth Circuits) and by other courts as *conjunctive* (*e.g.*, the courts in the Ninth and Eleventh Circuits). Option 1 would not resolve the circuit conflict for purposes of §2D1.1(b)(18) and §2D1.11(b)(6).

Option 2 would amend §2D1.1(b)(18) and §2D1.11(b)(6) to provide that their 2-level reductions apply to all defendants who meet the criteria in §5C1.2(a)(2)–(5). It would also incorporate into those provisions the same criminal history criteria from revised §5C1.2(a)(1) but set forth the criteria *disjunctively*, consistent with the approach of the Fifth, Sixth, Seventh, and Eighth Circuits. As a result, a defendant would not be eligible for the 2-level reduction in §2D1.1(b)(18) or §2D1.11(b)(6) if the defendant presents *any* of the disqualifying conditions relating to criminal history.

Part B: Recidivist Penalties for Drug Offenders

Amend §2D1.1(a)(1) and split it into two subparagraphs. Subparagraph (A) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2), where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a "serious drug felony or serious violent felony." Subparagraph (B) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a "felony drug offense."

Amend USG §2D1.1(a)(3), which provides for a base offense level of 30 for a defendant convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a "similar offense." Specifically, it would replace the term "similar offense" with "felony drug offense," as provided in the relevant statutory provisions.

Issues for Comment

Part A: Safety Valve

Issue 1: Changes to §5C1.2 (Limitation of Applicability of Statutory Minimum Sentences in Certain Cases) and its corresponding commentary to implement the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018). The Commission seeks general comment on whether the Commission should make any different or additional changes to implement the Act.

Issue 2: 18 U.S.C. § 3553(f)(1) sets forth the criminal history criteria for the safety valve in subparagraphs (A) through (C). Each subparagraph sets forth the specific criminal history condition followed by the phrase "as determined by the guidelines." Circuits have reached different conclusions about what constitutes a "1-point," "2-point," or "3-point" offense, and also seem to disagree on whether such interpretation arises from the statute itself or from proper guideline operation. *Compare, e.g.*, *United States v. Garcon, 54 F.4th 1274, 1280–84 (11th Cir. 2022)* (en banc) (concluding that criminal history events are considered differently for purposes of

subsection 3553(f)(1)(B) and (C) than subsection (A), and articulating that interpretation as primarily stemming from the statute), with *United States v. Haynes, 55 F.4th 1075, at *4 (6th Cir. 2022)* ("[Section] 3553(f)(1) refers only to 'prior 3-point' and 'prior 2-point violent' offenses 'as determined under the sentencing guidelines'—which means all the Guidelines, including §4A1.2(e)."). The Commission seeks comment on whether it should provide guidance on what constitutes a "1-point," "2-point," or "3-point" offense, "as determined under the sentencing guidelines," for purposes of §5C1.2.

Issue 3: Part A provides two options for amending subsection (b)(18) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and subsection (b)(6) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) in light of the proposed revisions to §5C1.2(a), which reflect the changes to 18 U.S.C. § 3553(f) enacted by the First Step Act.

The Commission provides two options on *Issue 3*:

> *Option 1*: Leave the text of §2D1.1(b)(18) and §2D1.11(b)(6) unchanged, so that their offense-level reductions would apply to all defendants who meet the criteria in revised §5C1.2(a)(1)–(5). As discussed above, a circuit conflict has arisen as to whether the "and" connecting the subparagraphs that set forth the criminal history criteria in 18 U.S.C. § 3553(f)(1) operates *disjunctively* or *conjunctively*.
>
> *Option 2:* Amend §2D1.1(b)(18) and §2D1.11(b)(6) to provide that their 2-level reductions would apply to all defendants who meet the criteria in §5C1.2(a)(2)–(5). It would also incorporate into those provisions the same criminal history criteria from revised USSG §5C1.2(a)(1) but set forth the criteria *disjunctively*, so that the reductions would be available only to defendants who do not present any of the listed disqualifying conditions.

The Commission seeks comment on each of these options. Which option, if any, is appropriate? In the alternative, should the Commission incorporate into §2D1.1(b)(18) and §2D1.11(b)(6) the same criminal history criteria from revised §5C1.2(a)(1) but set forth the criteria *conjunctively*, so that defendants must present all the listed disqualifying conditions to be ineligible for their reductions? Should the Commission consider an altogether different approach? If so, what approach should the Commission provide and why?

Part B: Recidivist Penalties for Drug Offenders

There are no issues for comment.

Probation Department's Response

Part A: Safety Valve

Issue 1: The Eastern District of Michigan does not recommend any additional or alternative changes to §5C1.2 to implement the First Step Act beyond those proposed.

Issue 2: The Eastern District of Michigan does not believe additional guidance on what constitutes a "1-point," "2-point," or "3-point" offense is necessary beyond that proposed in Application Note 2. The recommended wording refers the reader to §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History) and provides further instruction to read the section together before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

Issue 3: The Eastern District of Michigan selects Option 2, consistent with *U.S. v. Haynes, 55 F.4th 1075 (6th Cir. 2022).* Option 2 sets the criteria to qualify for the safety-valve reduction *disjunctively*, or would disqualify a defendant who meets any single disqualifying conditions listed in these subsections (A) through (C):

> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> (B) a prior 3-point offense, as determined under the sentencing guidelines; and
> (C) a prior 2-point violent offense, as determined under the sentencing guidelines

This approach is also consistent with other circuits including the Fifth, Seventh, and Eighth Circuits. As a result, the defendant would not be eligible to receive the two-level reduction if he/she presents *any* of the disqualifying conditions relating to criminal history. Option 1 makes no substantive changes to §2D1.1(b)(18) and §2D1.11(b)(6) and would not resolve the circuit conflict regarding the *disjunctive v. conjunctive* application of the safety-valve relief. The Nineth and Eleventh Circuits have held that the "and" connecting subparagraphs (A), (B), and (C) are *conjunctive* meaning that the defendant must meet *all* three subsections to become ineligible to receive safety-valve relief. Under Option 1, most drug trafficking defendants would qualify to receive safety-valve relief under 18 U.S.C. § 3553(f)(1).

Part B: Recidivist Penalties for Drug Offenders

Not Applicable.

PROPOSED AMENDMENT 3: FIREARMS OFFENSES

Synopsis of the Proposed Amendment: This proposed amendment is to USSG §2K2.1 to A) implement the Bipartisan Safer Communities Act; and B) make any other changes that may be warranted to appropriately address firearms offenses.

The Act created two new offenses at 18 U.S.C. §§ 932 and 933, relating to purchases and trafficking of firearms offenses. Both new offenses carrying a statutory maximum term of imprisonment of 15 years.

In addition, the Act increased the statutory maximum term of imprisonment for offenses under 18 U.S.C. §§922(d), 922(g), 924(h) and 924(k) from 10 to 15 years. It also made changes to the elements of some of these offenses.

The Act also expanded the definition of "misdemeanor crime of domestic violence" at 18 U.S.C. §921(a)(33), to include offenses against a person in "a current or recent former dating relationship"; and added a new provision indicating that a person is not disqualified from shipping, transporting, possessing, receiving, or purchasing a firearm under chapter 44 of title 18, U.S.C., by reason of a conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship if certain criteria are met.

The proposed amendment contains three parts (*Parts A, B and C*). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A Bipartisan Safer Communities Act

Part A of the proposed amendment contains three sections. The first involves new offenses and Increased penalties for Straw Purchasing and Firearms Trafficking Offenses. Part A of the proposed amendment implements part of the directive of the Bipartisan Safer Communities Act by addressing the new offenses at 18 U.S.C. § 932 and 933 and increasing penalties for other offenses applicable to straw purchases and trafficking of firearms. First, Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. §§ 932 and 933 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Offenses involving firearms trafficking and straw purchases are generally referenced to this guideline. Second, Part A of the proposed amendment would amend §2K2.1 to address the new offenses and increase penalties for straw purchases and trafficking of firearms, as required by the directive. Two options are presented.

Part A of the proposed amendment also addresses the part of the directive that requires the Commission to "consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any

coercion, domestic violence survivor history, or other mitigating factors." See Pub. L. 117–159, §12004(a)(5) (2022).

In response to the directive, Options 1 and 2 of Part A of the proposed amendment would add a new [1][2]-level reduction based on certain mitigating factors.

Finally, Part A of the proposed amendment addresses the part of the directive that requires the Commission to "review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual." See Pub. L. 117–159, §12004(a)(5) (2022). Options 1 and 2 of Part A of the proposed amendment would provide a new [2][3][4]-level enhancement in response to this part of the directive.

Part B Firearms Not Marked with Serial number ("Ghost Guns")

The enhancement at §2K2.1 currently does not apply to "ghost guns." "Ghost guns" is the term commonly used to refer to firearms that are not marked by a serial number by which it can be identified and traced, and that are typically made by an unlicensed individual from purchased components (such as standalone parts or weapon parts kits) or homemade components. Because of their lack of identifying markings, ghost guns are difficult to trace and determine where and who manufactured them, and to whom they were sold or otherwise disposed. The Commission has heard from commenters that the very purpose of "ghost guns" is to avoid the tracking and tracing systems associated with a firearm's serial number and that they increasingly are associated with violent crime. Commenters have also indicated that §2K2.1 does not adequately address "ghost guns," as the enhancement at §2K2.1(b)(4)(B) only covers firearms that were marked with a serial number when manufactured but where such identifier was later altered or obliterated.

Part B of the proposed amendment would respond to these concerns by revising §2K2.1(b)(4)(B) to provide that the 4-level enhancement applies if any firearm had an altered or obliterated serial number or was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(16))]. Part D of the proposed amendment also brackets the possibility of making the revised enhancement not applicable to antique firearms, as defined in 18 U.S.C. § 921(16).

Part C Further Revisions to §2K2.1

The Commission seeks comment on whether it should further revise §2K2.1 to appropriately address firearms offenses.

Issues for Comment

Part A Bipartisan Safer Communities Act

Issue 1: The directive in the Bipartisan Safer Communities Act requires the Commission to ensure that defendants convicted of the new offenses at 18 U.S.C. §§ 932 and 933 and other offenses

applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines for such straw purchasing and trafficking of firearms offenses. The two options presented in Part A of the proposed amendment would amend §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to increase penalties in response to the Act. The Commission seeks comment on whether either of the options presented in Part A of the proposed amendment would provide appropriate penalties for cases involving straw purchases and trafficking of firearms. Should the Commission adopt either of these options or neither? Are there particular changes to the penalty levels in either of these options that should be made?

In addition, the Commission seeks comment on whether additional changes should be made to §2K2.1 in response to the part of the directive that requires the Commission to increase penalties for offenses involving straw purchases and trafficking of firearms. If so, what additional changes would be appropriate?

Issue 2: As described above, the Bipartisan Safer Communities Act also amended the definition of "misdemeanor crime of domestic violence" at 18 U.S.C. § 921(a)(33) to include misdemeanor offenses against a person in "a current or recent former dating relationship." The Act also added a new provision at section 921(a)(33)(C) stating as follows:

> A person shall not be considered to have been convicted of a misdemeanor crime of domestic violence against an individual in a dating relationship for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had firearm rights restored unless the expungement, pardon, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms: Provided, That, in the case of a person who has not more than 1 conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship, and is not otherwise prohibited under this chapter, the person shall not be disqualified from shipping, transport, possession, receipt, or purchase of a firearm under this chapter if 5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted of another such offense, a misdemeanor under Federal, State, Tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, or any other offense that would disqualify the person under [18 U.S.C. §] 922(g). The national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act (34 U.S.C. 40901) shall be updated to reflect the status of the person. Restoration under this subparagraph is not available for a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person

who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.

Issue 3: In response to the directive in the Bipartisan Safer Communities Act, Part A of the proposed amendment includes an Option 1 that would amend §2K2.1 to, among other things, revise the firearms trafficking enhancement at §2K2.1(b)(5) to apply to straw purchase and other trafficking offenses. The revised enhancement would result in higher penalties for straw purchasers and certain firearms traffickers. The Commission seeks comment on whether having higher penalties for straw purchasers than prohibited persons raises proportionality concerns the Commission should address. If so, how should the Commission address those concerns?

Issue 4: Part A of the proposed amendment includes an Option 2 that would revise §2K2.1(a) in several ways. Among other things, it would keep current §2K.1(a)(4)(B) with a base offense level of 20 applicable if the (A) offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. In addition, Option 2 would delete current §2K2.1(a)(6)(B) but still keep the base offense level of 14 applicable to any defendant who (A) was a prohibited person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The Commission seeks comment on whether it should change the current base offense levels of 14 and 20 applicable to the defendants described above. If so, what offense level would be appropriate to any such defendant, and why?

Issue 5: Options 1 and 2 of Part A of the proposed amendment would add to §2K2.1 a new [1][2]-level reduction based on certain mitigating factors. Option 1 provides that the reduction applies if the defendant [received an enhancement under the new subsection (b)(5) proposed in Option [1][was convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person] and meets other certain criteria]. Option 2 provides that the reduction applies if subsection (b)(9) does not apply and the defendant is convicted under 18 U.S.C. § 922(d), § 924(h), § 924(k), § 932, or § 933, and meets the same other criteria provided in Option 1. The Commission seeks comment on whether this new adjustment should apply more broadly. Instead of providing a [1][2]-level reduction, should the Commission provide a departure provision applicable to defendants who meet the criteria?

The Commission also seeks comment on whether the criteria provided in Options 1 and 2 for this new reduction are appropriate. Should any criterion be deleted or changed?

Should the Commission provide additional or different criteria?

The Commission further seeks comment on the criminal history requirement provided in Options 1 and 2. Is the proposed requirement appropriate to respond to Congress' intent to address "straw purchasers without significant criminal histories"? Should the Commission instead use a different criminal history requirement than the one proposed in Options 1 and 2?

Issue 6: The probation department for the Eastern District of Michigan believes that the departure provision of Application Note 15 could be deleted. It appears the deletion would be appropriate as the criteria would be similar to criteria contained in the proposed amendments. Therefore, the goal of the departure is met with either of the new subsections and it is no longer needed.

Issue 7: In response to the directive contained in the Bipartisan Safer Communities Act, Options 1 and 2 of Part A of the proposed amendment would provide a new [2][3][4]- level enhancement in §2K2.1 based on the criminal affiliations of the defendant. Option 1 provides that the new enhancement would be applicable if the defendant [received an enhancement under the new subsection (b)(5) proposed in Option 1][was convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person] and meets other criteria. Option 2 provides that the new enhancement would be applicable if the defendant is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person; and meets the other the same other criteria provided in Option 1. The Commission seeks comment on whether the new enhancement should apply more broadly. Should the Commission provide additional or different criteria for purposes of applying this enhancement? In addition, how should this new enhancement interact with the existing enhancements at §2K2.1? Should the new enhancement be cumulative with other enhancements, or should it interact with other enhancements in some other way (e.g., by establishing a "cap" on its cumulative impact with other enhancements)? Should the Commission instead provide an altogether different approach to respond to this part of the congressional directive? In light of this new provision, a person with a conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship is not disqualified from shipping, transporting, possessing, receiving, or purchasing a firearm under chapter 44 of title 18, United States Code, if the criteria described above are met. Are the changes to the Commentary to §2K2.1 set forth in Options 1 and 2 adequate to address this new provision? If not, how should the Commission address it?

Part B Firearms Not Marked with Serial number ("Ghost Guns")

Part B of the proposed amendment would expand the scope of subsection (b)(4) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to address firearms that are not marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(16))], in addition to firearms that were stolen or had an altered or obliterated serial number. The Commission seeks comment on whether it should further revise the enhancement at §2K2.1(b)(4). For example, should the Commission insert

in §2K2.1(b)(4) a mental state (*mens rea*) requirement that the defendant knew, or had reason to believe, that the firearm was stolen, had an altered or obliterated serial number, or was not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(16))?

Part C Further Revisions to §2K2.1

Issue 1: Parts A of the proposed amendment would amend §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to respond to the Bipartisan Safer Communities Act. Part B of the proposed amendment would amend §2K2.1 to address concerns expressed by some commenters about firearms that are not marked by a serial number (*i.e.*, "ghost guns"). The Commission seeks comment on whether it should further revise §2K2.1 to appropriately address firearms offenses.

Issue 2: Offenses under 18 U.S.C. § 922(u) are referenced to §2K2.1. Section 922(u) prohibits stealing or unlawfully taking or carrying away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce. The Department of Justice has expressed concerns that all offenses under 18 U.S.C. § 922(u), which covers conduct of varying severity (including simple theft, burglary, and robbery), are treated the same in §2K2.1. According to the Department of Justice, burglaries and robberies of federal firearms licensees are particularly dangerous crimes that often involve multiple weapons. Currently, §2K2.1 provides at subsection (b)(4)(A) a 2-level enhancement if any firearm was stolen. Application Note 8(A) of §2K2.1 provides that this 2-level enhancement should not apply if the base offense level is set at level 12 under §2K2.1(a)(7) (*e.g.*, a defendant convicted under 18 U.S.C. § 922(u)) because the base offense level takes into account that the firearm or ammunition was stolen. The Commission seeks comment on whether it should amend §2K2.1 to specifically address offenses where the offense involved the burglary or robbery of a federal firearm licensee. For example, should the Commission add an enhancement to §2K2.1 that would be applicable if the offense involved the burglary or robbery of a federal firearms licensee? If so, what level of enhancement should the Commission set forth for such conduct? How should this enhancement interact with the stolen firearms enhancement at §2K2.1(b)(4)(A)? Should the Commission provide that both enhancements are to be applied cumulatively or in the alternative?

Issue 3: The base offense levels at §2K2.1(a) include as factors that form the basis for their Application certain recidivism requirements, such as whether the defendant committed the instant offense subsequent to sustaining one or more felony convictions of either a crime of violence or controlled substance offense. The Commission seeks comment on whether it should add other types of prior convictions as the basis for applying base offense levels or specific offense characteristics, and what base offense level or offense level increase should the Commission provide for any such prior conviction. For example, should the Commission provide for increased penalties if the defendant committed the instant offense subsequent to sustaining a conviction or multiple convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm? If so, should the Commission treat prior convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm the same as prior convictions for a crime of violence or a controlled substance offense and provide the same level of enhancement? If not, what base offense level or level increase should the Commission set forth for prior convictions for a misdemeanor crime of

domestic violence or an offense that involved a firearm?

Issue 4: The general definition of "firearm" in §2K2.1 at Application Note 1 is drawn from 18 U.S.C. § 921(a)(3). However, §2K2.1 applies a higher base offense level to offenses involving firearms described in 26 U.S.C. § 5845(a). Although section 5845(a) generally defines a more limited class of firearms than section 921(a)(3), there are a limited number of devices—such as those "designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun" which are "firearms" under section 5845(a) but not section 921(a)(3). Thus, such devices are "firearms" for purposes of the increased base offenses levels in §2K2.1(a)(1), (3), (4)(B)(i)(II), and (6), but not for purposes of specific offense characteristics referring to "firearms," such as §2K2.1(b)(1). The Commission seeks comment on whether it should amend the definition of "firearms" in Application Note 1 of §2K2.1 to include devices which are "firearms" under section 5845(a) but not section 921.

Issue 5: The Commission seeks general comment on whether it should amend §2K2.1 to increase penalties for defendants who transfer a firearm to a minor. If so, how?

Probation Department's Response

Part A Bipartisan Safer Communities Act

Issue 1: The Eastern District of Michigan believes that Option 2 best meets the goals and directives of the Bipartisan Safer Communities Act, as well as provides appropriate penalties for the cases being targeted by this amendment. It appears the changes proposed in this option ensure that defendants convicted of the named offenses are subjected to increased penalties. Further, the probation department believes that Option 2 provides a significant increase in the penalties under 2K2.1. Therefore, no additional changes would be necessary to comply with the directives of the Bipartisan Safer Communities Act.

Issue 2: The Eastern District of Michigan believes that the changes to the Commentary under §2K2.1 are adequate to address the new provision.

Issue 3: The Eastern District of Michigan does not believe that the revise enhancement would cause any proportionality concerns. The enhancement and higher penalties for straw purchasers and certain firearms traffickers would further speak to the seriousness of the conduct in question and meet the ultimate goals of the new congressional act. Additionally, the probation department believes the possible reductions due to certain mitigating circumstances, for these types of defendants further prevents any proportionality issues.

Issue 4: The Eastern District of Michigan believes that the current base offense levels of 14 and 20 are appropriate and no further change is needed.

Issue 5: The Eastern District of Michigan believes that new adjustment is applied correctly and does not need to be applied more broadly. It appears the application of this reduction is appropriate under either option one or two and meets the goals of the new congressional act. Additionally, the probation department believes that the criteria provided for this reduction is appropriate. The criteria as written appears to meet the directives of the new congressional act.

Additionally, it is the opinion of the probation department from the Eastern District of Michigan that the criminal history requirement appropriately responds to Congress' attempt to address "straw purchasers without significant criminal history. The criteria for the reduction and the reduction itself properly addresses any mitigating factors, while also ensuring that the guidelines also reflect the need to deterrence from this type of offense.

Issue 6: The Eastern District of Michigan believes that the departure provision of Application Note 15 could be deleted. It appears the deletion would be appropriate as the criteria would be similar to criteria contained in the proposed amendments. Therefore, the goal of the departure is met with either of the new subsections and it is no longer needed.

Issue 7: The Eastern District of Michigan believes that the new enhancement does not need to be applied more broadly and that the criteria set forth in both options A and B make it very clear when this enhancement applies. Additionally, the probation department believes that this enhancement should be cumulative with other enhancements as defendant's with criminal affiliations could very well increase the seriousness of the offense and pose a greater risk to the public. Therefore, this type of enhancement should be fully counted toward the total offense calculation without an established "cap". The enhancement as explained in both parts A and B appears to properly meet the objectives of the new congressional directive.

Part B Firearms Not Marked with Serial number ("Ghost Guns")

The Eastern District of Michigan does not believe the Commission should insert a mental state requirement into §2K2.1(b)(4). The probation department believes the burden of knowing whether a firearm is stolen, has an obliterated/altered serial number, or is not otherwise marked, lies with the individual in possession of that firearm (i.e., the defendant). It is not necessary for the guidelines to consider whether the defendant knew or has reason to believe the firearm was otherwise illicit. Mere possession of such illicit firearm is sufficient for this subsection.

Part C Further Revisions to §2K2.1

Issue 1: The Eastern District of Michigan believes the insertion of "or was not otherwise marked with a serial number" within §2K2.1(b)(4), adequately addresses the intentions of the Bipartisan Safer Communities Act. The purpose of "ghost guns", much like possessing a stolen firearm, or obliterating a serial number from a firearm, is to inhibit the ability of investigators to accurately track a firearm from the purposes of accountability. Inclusion of "ghost guns" within §2K2.1(b)(4) appropriately takes this conduct into consideration within the guidelines.

Issue 2: The Eastern District of Michigan supports the DOJ's concerns regarding burglaries and robberies of federal firearms licensees. The Eastern District of Michigan regularly sees cases involving this conduct. However, for the purposes of §2K2.1 it is important to make a distinction between theft from an FFL (18 U.S.C. § 922(u)) and burglary/robbery of an FFL. It seems unlikely that an individual convicted of burglarizing/robbing an FFL would be convicted solely of an offense referenced to §2K2.1. Instead, that conviction would be referenced to §2B3.1- Robbery, which already provides for an increase if the object of the offense was a firearm (§2B3.1((b)(6)). Should the Commission add an enhancement to §2K2.1 that would be applicable if the offense involved the burglary or robbery of a federal firearms licensee, the probation department suggests

that it be applied in the alternative to the stolen firearms enhancement as both of these SOCs would aim to address the same underlying conduct.

Issue 3: The Eastern District of Michigan believes the guidelines, as currently written, accurately account for repeat offenders and those with violent convictions. The base offense levels at §2K2.1(a) as well as the Armed Career Criminal Act account for these factors. It is the probation department's view that many "simple" gun possessors often receive sentences far below the guideline range despite prior convictions of crimes of violence or controlled substance offense. Adding additional recidivist enhancements may likely exacerbate this disparity. The probation department does not believe any further changes are necessary to §2K2.1 for these factors.

Issue 4: The Eastern District of Michigan supports aligning the definition of "firearms" within the guidelines. Such alignment would relieve the confusion of such devices being considered "firearms" for base offense level purposes but not for specific offense characteristics. It is the probation department's experience that this difference has become confusing for judges and attorneys. While this alignment would further punish those defendants who possess those weapons that fall between 18 U.S.C. § 921(a)(3) and 26 U.S.C. § 5845(a), the probation department does not see any disadvantage to this alignment.

Issue 5: The Eastern District of Michigan rarely sees this type of conduct. However, to address the increased inherent danger of transferring a firearm to a minor, the probation department would suggest expanding §2K2.1(b)(5), to read: If the defendant engaged in the trafficking of firearms, *or transferred any firearm to a minor*, increase by 4 levels.

PROPOSED AMENDMENT 4: CIRCUIT CONFLICTS

Synopsis of the Proposed Amendment: This proposed amendment addresses certain circuit conflicts involving §3E1.1 (Acceptance of Responsibility) and §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying resolution of circuit conflicts as a priority, including the circuit conflicts concerning (A) whether the government may withhold a motion pursuant to §3E1.1(b) because a defendant moved to suppress evidence; and (B) whether an offense must involve a substance controlled by the Controlled Substances Act (21 U.S.C. § 801 *et seq*.) to qualify as a "controlled substance offense" under §4B1.2(b)). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive. There are two parts to this Proposed Amendment.

Part A Circuit Conflicts Concerning §3E1.1(b)

Amend §3E1.1 and its accompanying commentary to address circuit conflicts regarding the permissible bases for withholding a reduction under §3E1.1(b). It would set forth a definition of the term "preparing for trial" that provides more clarity on what actions typically constitute preparing for trial for the purposes of §3E1.1(b). The proposed amendment would include the following definition of preparing for trial: 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. Preparing for trial is ordinarily indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. 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. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered preparing for trial.

Part B Circuit Conflicts Concerning §4B1.2(b)

Amend §4B1.2 by adding a definition of the term "controlled substance" to address a circuit conflict concerning whether the definition of "controlled substance offense" in §4B1.2(b) only covers offenses involving substances controlled by federal law. Two options are presented.

> *Option 1*: Sets forth a definition that adopts the approach of the Second and Ninth Circuits, in which "controlled substance offense" only includes offenses involving substances controlled by federal law (the Controlled Substances Act), and not offenses involving substances that a state's schedule lists as a controlled substance, but the CSA does not. Meaning, it would limit the definition of the term to substances that are specifically included in the CSA.

Option 2: Sets forth a definition that adopts the Fourth, Seventh, Eighth and Tenth Circuits, in which a "controlled substance offense" includes substances either included in the CSA or otherwise controlled under applicable state law.

Issues for Comment:

Part A Circuit Conflicts Concerning §3E1.1(b)

Amend subsection (b) of §3E1.1 to provide a definition for the term "preparing for trial." The Commission seeks comment on whether the proposed definition of "preparing for trial" is appropriate for purposes of §3E1.1(b). If not, what definition should the Commission provide?

In the alternative, should the Commission address the circuit conflicts in a manner other than the one provided in Part A of the proposed amendment? For example, should the Commission address the breadth of the government's discretion to withhold a §3E1.1(b) motion, either by incorporating the framework outlined in *Wade v. United States*, 504 U.S. 181, 185–86 (1992) (*i.e.*, an "unconstitutional motive" or a reason "not rationally related to any legitimate Government end") (*see, e.g.*, *United States v. Adair*, 38 F.4th 341, 361 (3d Cir. 2022)), or by specifying a different standard?

Part B Circuit Conflicts Concerning §4B1.2(b)

In addition to the two options provided, the Commission seeks comment on whether the Commentary to USSG §2L1.2 contains a definition for the term "drug trafficking offense" that closely tracks the definition of "controlled substance" in §4B1.2(b). If the Commission amends §4B1.2(b) to include a definition of "controlled substance", should the Commission also amend Application Note 2 to §2L1.2 to include the same definition for purposes of "drug trafficking offense" definition?

Probation Department's Response

Part A Part A Circuit Conflicts Concerning §3E1.1(b)

The Eastern District of Michigan supports the proposed amendment and the definition of preparing for trial. Providing a definition will provide guidance on whether the reduction for acceptance of responsibility is applicable and appropriate. At this time, no other additions need to be made to address the circuit conflicts.

Part B Circuit Conflicts Concerning §4B1.2(b)

The Eastern District of Michigan believes Option 1 of the proposed amendment would provide for the most consistency across the country. Rather than looking to 50 states' schedule lists of controlled substances, probation officers can readily rely on those that are listed under the CSA. This could help reduce sentencing disparities due to irregularities in the type of substances involved and the jurisdiction in which defendants are convicted. Furthermore, this option is most aligned with Chapter Four of the Guidelines Manual. For example, the definition of a "felony

offense" at USSG §24A1.2(o) is not determined by the imprisonment classification in the state the defendant was convicted, but rather the federal definition of a felony. Another example includes Offenses Committed Prior to Age 18 (USSG §4A1.2, Application Note 7). Looking to each state's classification of what constitutes a felony offense or juvenile adjudication would create too much ambiguity, and what constitutes a controlled substance by individual states would do the same. Option 1 would be best to avoid disparities among jurisdictions.

The Eastern District of Michigan would recommend further clarification by the Commission as to the timing of the classification of substances (i.e., whether the substance was on the CSA list at the time of the prior conviction or if it is on the CSA list at the time of sentencing for the instant offense). In this regard, the Eastern District of Michigan would support the former – in that, prior convictions should be determined based on the drug schedules that were in effect at the time guilt for that offense was determined.

The Eastern District of Michigan further supports the same definition of what constitutes a "controlled substance" be included at USSG §2L1.2. Adopting Option 1 and adding the same definition to §2L1.2 would create efficiency and uniformity.

PROPOSED AMENDMENT 5: CRIME LEGISLATION

Synopsis of the Proposed Amendment: This proposed amendment responds to recently enacted legislation. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying as a priority "[i]mplementation of any legislation warranting Commission action").

The proposed amendment contains eleven parts (Parts A through K). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A

Responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (2017), by amending Appendix A (Statutory Index) and the Commentary to §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). It also makes a technical correction to the Commentary to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Part B

Responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018), by amending Appendix A, §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). In addition, Part B brackets the possibility of amending the Commentary to §§4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and 5D1.2 (Term of Supervised Release) to exclude offenses under 18 U.S.C. § 2421A from the definitions of "covered sex offense" and "sex offense."

Part C

Responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (2018), by amending Appendix A and §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the Commentary to §§2A2.4 (Obstructing or Impeding Officers) and 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Part D

Responds to the SUPPORT for Patients and Communities Act, Pub. L. 115–271 (2018), by amending Appendix A and the Commentary to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery).

Part E

Responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. 115–299 (2018), by amending Appendix A and the Commentary to §2X5.2.

Part F

Responds to the Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435 (2019), by amending Appendix A and the Commentary to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Part G

Responds to the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92 (2019), by amending Appendix A and the Commentary to §2X5.2.

Part H

Responds to the Representative Payee Fraud Prevention Act of 2019, Pub. L. 116–126 (2020), by amending Appendix A and the Commentary to §2B1.1.

Part I

Responds to the Stop Student Debt Relief Scam Act of 2019, Pub. L. 116–251 (2020), by amending Appendix A and the Commentary to §2B1.1.

Part J

Responds to the Protecting Lawful Streaming Act of 2020, Pub. L. 116–260 (2021), by amending Appendix A. I

Part K

Responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (2021), by amending Appendix A and the Commentary to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts).

Issues for Comment

Part A

In response to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (2017), Part A of the proposed amendment would reference 21 U.S.C. § 333(b)(8) to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural

Product). The Commission seeks comment on whether any additional changes to the guidelines are required to account for section 333(b)(8)'s offense conduct. Specifically, should the Commission amend §2N2.1 to provide a higher or lower base offense level if 21 U.S.C. § 333(b)(8) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to §2N2.1 in response to section 333(b)(8)? If so, what should that specific offense characteristic provide and why?

Part B

Issue 1: In response to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018), Part B of the proposed amendment would reference 18 U.S.C. § 2421A to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and would make various revisions to those guidelines to account for the new statute's offense conduct. The Commission seeks comment on whether the proposed revisions are appropriate and on whether the Commission should make other changes to the guidelines to account for section 2421A's offense conduct. In particular, Part B of the proposed amendment would rely on the specific offense characteristics and special instructions in §§2G1.1 and 2G1.3 to produce the appropriate offense levels for the aggravated offense at 18 U.S.C. § 2421A(b). Should the Commission account for the aggravated offense in a different way, for example, by providing a higher base offense level if a defendant is convicted of that offense? If so, should the Commission use one of the base offense levels currently provided for convictions under other offenses, such as level 28, provided by §2G1.3 for a conviction under 18 U.S.C. § 2422(b) or 2423(a), or level 34, provided by §§2G1.1 and 2G1.3 for a conviction under 18 U.S.C. § 1591(b)(1)?

Issue 2: The new offenses codified at 18 U.S.C. § 2421A are included in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 of the United States Code, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. As indicated in the synopsis, §§4B1.5 and 5D1.2 provide definitions for the terms "covered sex crime" and "sex offense," respectively, that generally include offenses in chapter 117 of title 18, with notable exceptions. The chapter 117 offenses that the Commission excluded from the definitions of "covered sex crime" and "sex offense" do not criminalize conduct involving the direct sexual exploitation of a minor by the defendant, but rather are primarily concerned with the transmission or filing of information about individuals. Part B of the proposed amendment brackets the possibility of amending the Commentary to §§4B1.5 and 5D1.2 to exclude offenses under 18 U.S.C. § 2421A from the definitions of "covered sex offense" and "sex offense." Section 2421A offenses generally involve the posting or sharing (*i.e.*, transmission) of information about an individual, which may not necessarily involve the direct exploitation of a minor victim by the defendant. The Commission seeks comment on whether excluding offenses under 18 U.S.C. § 2421A from the definitions of "covered sex crime" and "sex offense" for purposes of §§4B1.5 and 5D1.2 is appropriate due to the nature of such offenses. Should the Commission, instead, include the aggravated form of the offense under 18 U.S.C. § 2421A(b) in the definitions of "covered sex crime" and "sex offense"?

Part C

In response to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (2018), Part C of the proposed amendment would reference 18 U.S.C. § 39B to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Part C of the proposed amendment would also reference 18 U.S.C. § 40A to §2A2.4 (Obstructing or Impeding Officers). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for the new criminal offenses created by the FAA Reauthorization Act.

Part D

In response to the SUPPORT for Patients and Communities Act, Part D of the proposed amendment would reference 18 U.S.C § 220 to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for section 220's offense conduct. Specifically, should the Commission amend §2B1.1 or §2B4.1 to provide a higher or lower base offense level if 18 U.S.C § 220 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to section 220? If so, what should that specific offense characteristic provide, and why?

Part E

In response to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Part E of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2259(d)(4) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for the new offense conduct at 18 U.S.C. § 2259(d)(4).

Part F

In response to the Foundations for Evidence-Based Policymaking Act of 2018, Part F of the proposed amendment would reference 44 U.S.C. § 3572 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 3572's offense conduct. Specifically, should the Commission amend §2H3.1 to provide a higher or lower base offense level if 44 U.S.C. § 3572 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to section 3572? If so, what should that specific offense characteristic provide and why?

Part G

In response to the National Defense Authorization Act for Fiscal Year 2020, Part G of the proposed amendment would amend Appendix A (Statutory Index) to reference 10 U.S.C. § 2733a(g)(2) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for the new offense conduct at 10 U.S.C. § 2733a(g)(2).

Part H

In response to the Representative Payee Fraud Prevention Act of 2019, Part H of the proposed amendment would reference 5 U.S.C. §§ 8345a and 8466a to §2B1.1 (Theft, Property Destruction, and Fraud). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for the offense conduct covered by sections 8345a and 8466a. Specifically, should the Commission amend §2B1.1 to provide a higher or lower base offense level if 5 U.S.C. § 8345a or § 8466a is the offense of conviction? If so, what should that base offense level be for each of these sections and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to 5 U.S.C. § 8345a or § 8466a? If so, what should that specific offense characteristic provide and why?

Part I

In response to the Stop Student Debt Relief Scam Act of 2019, Part I of the proposed amendment would reference 20 U.S.C. § 1097(e) to §2B1.1 (Theft, Property Destruction, and Fraud). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 1097(e) offenses. Specifically, should the Commission amend §2B1.1 to provide a higher or lower base offense level if 20 U.S.C. § 1097(e) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to 20 U.S.C. § 1097(e)? If so, what should that specific offense characteristic provide and why?

Part J

Issue 1: In response to the Protecting Lawful Streaming Act of 2020, Part J of the proposed amendment would reference 18 U.S.C. § 2319C to §2B5.3 (Criminal Infringement of Copyright or Trademark). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 2319C offenses. Specifically, should the Commission amend §2B5.3 to provide a higher or lower base offense level if 18 U.S.C. § 2319C is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to 18 U.S.C. § 2319C? If so, what should that specific offense characteristic provide and why? The new statute at 18 U.S.C. § 2319C provides enhanced penalties if (1) the

offense was committed in connection with one or more works being prepared for commercial public performance, and the offender knew or should have known that the work was being prepared for commercial public performance; or (2) if the offense is a second or subsequent offense under 18 U.S.C. § 2319C or § 2319(a). Should the Commission amend §2B5.3 to address these enhanced penalties? If so, how should the Commission address them and why?

Issue 2: Currently, §2B5.3 includes a specific offense characteristic at subsection (b)(2) providing a 2-level enhancement "[i]f the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution." The new offense at 18 U.S.C. § 2319C mainly addresses the streaming (*i.e.*, offering or providing "to the public a digital transmission service") of works "being prepared for commercial public performance." The Commission seeks comment on whether current §2B5.3(b)(2) adequately accounts for section 2319C's offense conduct. If not, what revisions to §2B5.3(b)(2) would be appropriate to account for this conduct? Should the Commission instead revise §2B5.3 in general provide one or more specific offense characteristics or departure provisions to better account for this conduct? If so, what should the Commission provide?

Part K

In response to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Part K of the proposed amendment would reference 31 U.S.C. §§ 5335 and 5336 to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for sections 5335 and 5336 offenses. Specifically, should the Commission amend §2B1.1 to provide a higher or lower base offense level if 31 U.S.C. § 5335 or § 5336 is the offense of conviction? If so, what should that base offense level be for each of these sections and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to 31 U.S.C. §§ 5335 and 5336? If so, what should that specific offense characteristic provide and why? The new statute provides an enhanced penalty for offenses under 31 U.S.C. §§ 5336(c)(4) and 5336(h)(2) offenses if the offense was committed while violating another law or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period. Should the Commission amend §2B1.1 to address this enhanced penalty? If so, how should the Commission address it and why?

Probation Department's Response

Part A

At this time, the Eastern District of Michigan has not encountered cases of this nature. Considering this, we offer no response or position to this proposed amendment.

Part B

Issue 1: The proposed revisions to the specific offense characteristics and special instructions of the Sentencing Guidelines are appropriate to account for offense conduct for offenses under 18 U.S.C. § 2421A. The impact of whether such changes should instead be made to the base offense level or in some other ways are not known considering the new changes or revisions are in response to a new statute.

Issue 2: The Eastern District of Michigan believes offenses under 18 U.S.C. § 2421A should not be included in the definitions of "covered sex crimes" and "sex offense." 18 U.S.C. § 2421A offenses generally involve posting or sharing of information about an individual, which may not necessarily involve the direct exploitation of a minor victim by the defendant. Including such offenses as covered sex crimes or sex offenses may have unintended consequences or increased penalties for a defendant.

Part C

At this time, the Eastern District of Michigan has not encountered cases of this nature. Considering this, we offer no response or position to this proposed amendment.

Part D

At this time, the Eastern District of Michigan has not encountered cases of this nature. Considering this, we offer no response or position to this proposed amendment.

Part E

The Eastern District of Michigan supports the proposed amendment. At this time, no other additions need to be made.

Part F

At this time, the Eastern District of Michigan has not encountered cases of this nature. Considering this, we offer no response or position to this proposed amendment.

Part G

At this time, the Eastern District of Michigan has not encountered cases of this nature. Considering this, we offer no response or position to this proposed amendment.

Part H

At this time, the Eastern District of Michigan has not encountered cases of this nature. Considering this, we offer no response or position to this proposed amendment.

Part I

At this time, the Eastern District of Michigan has not encountered cases of this nature. Considering this, we offer no response or position to this proposed amendment.

Part J

At this time, the Eastern District of Michigan has not encountered cases of this nature. Considering this, we offer no response or position to this proposed amendment.

Part K

At this time, the Eastern District of Michigan has not encountered cases of this nature. Considering this, we offer no response or position to this proposed amendment.

PROPOSED AMENDMENT 6: CAREER OFFENDER

Synopsis of the Proposed Amendment: This is a result of the Commission's multiyear work on §4B1.2 (Definitions of Terms Used in Section 4B1.1), including possible amendments to (A) provide an alternative approach to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense"; and (B) address various application issues, including the meaning of "robbery" and "extortion," and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022). The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all parts, as they are not mutually exclusive.

Part A: Listed Guideline Approach

Amend §4B1.2 to address recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of §4B1.1 (Career Offender). It eliminates the categorical approach from the guidelines by defining "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an offense. Part A also makes conforming changes to the guidelines that use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2.

Part B: Meaning of Robbery

Address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a "crime of violence" under §4B1.2, as amended in 2016. It would amend §4B1.2 to add a definition of "robbery" that mirrors the Hobbs Act robbery definition at 18 U.S.C. § 1951(b)(1). Part B also brackets a provision defining the phrase "actual or threatened force," for purposes of the new "robbery" definition, as "force sufficient to overcome a victim's resistance," informed by the Supreme Court's holding in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). Finally, Part B makes conforming changes to the definition of "crime of violence" in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense.

Part C: Inchoate Offenses

Amend §4B1.2 to address two circuit conflicts regarding the commentary provision stating that the terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a "crime of violence" and a "controlled substance offense."

The Commission provides two options for Part C.

> *Option 1*: Address the conspiracy issue in a comprehensive manner that would be applicable to all other inchoate offenses and offenses arising from accomplice liability. It would eliminate the need for the two-step analysis discussed above by adding the following to new subsection (c): "To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a

'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability."

Option 2: Take a narrower approach, addressing only conspiracy offenses without addressing whether a court must perform the two-step analysis described above with regard to other inchoate offenses. Option 2 would instead add a provision to new subsection (c) that brackets two alternatives addressing conspiracy to commit a "crime of violence" or a "controlled substance offense." The first bracketed alternative provides that an offense of conspiring to commit a "crime of violence" or a "controlled substance offense" qualifies as a "crime of violence" or a "controlled substance offense," regardless of whether an overt act must be proved as an element of the conspiracy offense. The second bracketed alternative provides that an offense of conspiring to commit a "crime of violence" or a "controlled substance offense" qualifies as a "crime of violence" or a "controlled substance offense," only if an overt act must be proved as an element of the conspiracy offense.

Part D: Definition of "Controlled Substance Offense"

Amend the definition of "controlled substance offense" in §4B1.2(b) to include offenses involving an offer to sell a controlled substance and offenses described in 46 U.S.C. § 70503(a) and § 70506(b).

Issues for Comment:

Part A: Listed Guideline Approach

Issue 1: Allow courts to look to the documents expressly approved in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), in determining whether a conviction is a "crime of violence" or a "controlled substance offense." The Commission seeks comment on whether additional or different guidance should be provided. For example, should the Commission provide a specific set of factors to assess the reliability of a source of information, such as whether the document came out of the adversarial process, was accepted by both parties, or was made by an impartial third party? Should the Commission list specific sources or types of sources that courts may consider, in addition to the sources expressly approved in *Taylor* and *Shepard* (*i.e.*, the *Shepard* documents)? Are there any documents or types of information that should be expressly excluded?

Issue 2: The Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States) contains definitions for the terms "crime of violence" and "drug trafficking offense" that closely track the definitions of "crime of violence" and "controlled substance offense," respectively, in §4B1.2(b). *See* USSG §2L1.2, comment. (n.2). If the Commission were to promulgate Part A of the proposed amendment, should the Commission also amend the Commentary to §2L1.2 to mirror the proposed approach for §4B1.2?

Part B: Meaning of Robbery

Issue 1: Provide a definition of "robbery" for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1) and §2L1.2 (Unlawfully Entering or Remaining in the United States) that mirrors the Hobbs Act definition of "robbery" at 18 U.S.C. § 1951(b)(1). The Commission seeks comment on whether the proposed definition of "robbery" is appropriate. Are there robbery offenses that are covered by the proposed definition but should not be? Are there robbery offenses that are not covered by the proposed definition but should be?

Issue 2: The proposed amendment brackets the possibility of defining the phrase "actual or threatened force," for purposes of the proposed "robbery" definition, as "force that is sufficient to overcome a victim's resistance," which is consistent with the Supreme Court's holding in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). The Commission seeks comment regarding whether the definition of "actual or threatened force" is necessary after the *Stokeling* decision. If so, is the proposed definition of the phrase appropriate? Are there robbery offenses that would be covered by defining "actual or threatened force" in such a way but should not be? Are there robbery offenses that would not be covered but should be?

Part C: Inchoate Offenses

Issue 1: In determining whether an inchoate offense is a "crime of violence" or a "controlled substance offense," some courts have employed a two-step analysis. First, courts compare the substantive offense to its generic definition to determine whether it is a "crime of violence" or a "controlled substance offense." Then, these courts make a second and separate analysis comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. Option 1 of Part C of the proposed amendment would amend §4B1.2 (Definitions of Terms Used in Section 4B1.1) to clarify that the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit a "crime of violence" or a "controlled substance offense," or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or a "controlled substance offense" are a "crime of violence" or a "controlled substance offense" if the substantive offense is a "crime of violence" or a "controlled substance offense." The Commission seeks comment on whether the guidelines should be amended to make this clarification by eliminating the two-step analysis some courts use in determining whether an inchoate offense is a "crime of violence" or a "controlled substance offense." Should the guidelines adopt a different approach?

Issue 2: The Commission also seeks comment more broadly on how the guidelines definitions of "crime of violence" and "controlled substance offense" should address aiding and abetting, attempting to commit, soliciting to commit, or conspiring to commit a "crime of violence" or a "controlled substance offense," or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or a "controlled substance offense." Specifically, should the Commission promulgate any of the options provided above? Should the Commission provide additional requirements or guidance to address these types of offenses? What additional requirements or guidance, if any, should the Commission provide? Should the Commission differentiate between "crimes of violence" and "controlled substance offenses"? For example, should the guidelines require proof of an overt act for purposes of a conspiracy to commit a controlled substance offense, but not include such a requirement for conspiracy to commit a crime

of violence? Alternatively, should the Commission exclude inchoate offenses and offenses arising from accomplice liability altogether as predicate offenses for purposes of the "crime of violence" and "controlled substance offenses" definitions?

Part D: Definition of "Controlled Substance Offense"

Amend the definition of "controlled substance offense" in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) to include offenses involving an offer to sell a controlled substance. The Commission seeks comment on the extent to which such offenses should be included as "controlled substance offenses" for purposes of the career offender guideline. Are there other drug offenses that are not included under this definition, but should be? If the Commission were to amend the definition of "controlled substance offense" in §4B1.2(b) to include other drug offenses, in addition to offenses involving an offer to sell a controlled substance, should the Commission revise the definition of "controlled substance offense" at §2L1.2 (Unlawfully Entering or Remaining in the United States) to conform it to the revised definition set forth in §4B1.2(b)?

Probation Department's Response

Part A: Listed Guideline Approach

Issue 1: The Eastern District of Michigan supports the proposed amendment. The topic of what is considered a "crime of violence" and "controlled substance" offense have been a point of contention in our district. As such, the probation department believes additional guidance from the commission regarding the reliability of a source of information, such as whether the documents came out of adversarial process, was accepted by both parties, or was made by an impartial third party, would be beneficial and would help eliminate any question as to what is considered a "crime of violence" and "controlled substance." In addition, the probation department feels the proposed list of documents for consideration in determining whether a state offense is a "crime of violence" or a "controlled substance offense" is sufficient and includes all documents to be considered. Regarding any types of information that should be expressly precluded, the probation department believes that a prior presentence report completed at the State level and police reports should be expressly excluded from consideration for this subsection.

Issue 2: The Eastern District of Michigan believes the commentary to §2L1.2 should be amended by the Commission to mirror the proposed approach for §4B1.2. The probation department feels this is necessary for consistency in the Guidelines Manual.

Part B: Meaning of Robbery

Issue 1: If the proposed amendment under Part A is not implemented, the Eastern District of Michigan supports adding a definition of Robbery to §4B1.2. This approach appears to be practical and consistent with other areas of the Guidelines Manual as this section already defines "forcible sex offense" and "extortion". As the Commission has stated, the guidelines have relied on case law for the purposes of defining most enumerated offense. Therefore, this approach would remove

the ambiguity of case law definitions across circuits. The Eastern District of Michigan believes this should also be reflected in §2L1.2. The probation department feels this is necessary for consistency in the Guidelines Manual.

There are other enumerated offenses under §4B1.2(a)(2) that are left undefined and/or without specific statute definitions. Therefore, if the proposed amendment under Part A is not implemented, it is recommended that the Commission consider providing additional guidance on those terms. The probation department did not identify any other offenses that are not covered or offenses that should not be.

Issue 2: The Eastern District of Michigan further supports adding the definition of "actual or threatened force" for the purposes of Robbery and agrees with the wording from the Supreme Court's decision in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). The probation department did not identify any other offenses that are not covered or offenses that should not be.

Part C: Inchoate Offenses

Issue 1: If the Commission does not implement the proposed amendments in Part A, the Eastern District of Michigan supports Option 1. Although Option 1 appears to be most practical and efficient, it also appears overarching. Meaning defendants who were not previously classified as career offenders, could easily be classified as a career offender regardless of culpability. Based on the underlying substantive offense alone, the district could see an influx in career offender designations. Option 2 requiring that the overt act must be proved as an element of the conspiracy offense would be difficult to navigate, especially for prior state convictions, and more so when the conviction arose from a plea bargain. However, the first part of Option 2, which states "An offense of conspiring to commit a 'crime of violence' or a 'controlled substance offense' qualifies as a 'crime of violence' or a 'controlled substance offense,' regardless of whether an overt act must be proved as an element of the conspiracy offense" is overly broad and could lead to the same effect as Option 1. Therefore, the Eastern District of Michigan supports the second part of Option 2 if the proposed Amendments in Part A are not implemented.

Issue 2: As noted above, the Eastern District of Michigan supports the proposed amendment in Part A, in which the categorical approach is eliminated and definitions "crime of violence" and "controlled substance offense" are based on a list of guidelines instead. It would eliminate the complicated nature of navigating elements of an offense – especially a state offense. Inchoate crimes are generally found at USSG §2X1.1 and Part A of the proposed amendment would include the substantive offenses for these types of crimes.

Excluding inchoate offenses and offenses arising from accomplice liability altogether appears to be underreaching. Defendants who are high risk for recidivism would no longer be designated as a career offender. While including all inchoate offenses and offenses arising from accomplice liability would appear to have an overarching effect, and those not previously classified as career offenders, could easily be classified as so. Therefore, the Eastern District of Michigan recommends

the Commission's approach in Part A be applied to inchoate crimes in that "[t]he approach set forth by this guideline requires the court to consider not only the statute of conviction, but also the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any of the elements, and any means of committing such an element, that formed the basis of the defendant's conviction. The court is also permitted to use certain additional sources of information, as appropriate, while conducting this inquiry."

Part D: Definition of "Controlled Substance Offense"

The Eastern District of Michigan supports the proposed amendment to §4B1.2(b) which would account for prior offenses wherein a defendant "offered to sell" controlled substances. It should be noted in 2008, the Commission amended the Commentary to §2L1.2 to clarify that an offer to sell a controlled substance is a "drug trafficking offense" for purposes of that guideline, by adding "offer to sell" to the conduct listed in the definition of "drug trafficking offense." For consistency purposes and to avoid confusion, the probation department feels the amendment to §4B1.2 is appropriate. The probation department cannot identify any other drug offenses that should be included under this definition. If the Commission were to add any additional drug offenses to the definition of a "controlled substance" offense under §4B1.2(b), the Eastern District of Michigan believes the Commission should revise the definition of "controlled substance offense" at §2L1.2 to reflect the changes set forth in §4B1.2(b).

PROPOSED AMENDMENT 7: CRIMINAL HISTORY

Synopsis of the Proposed Amendment: The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all parts, as they are not mutually exclusive. Parts A through C of the proposed amendment all address the Commission's priority on criminal history. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) ("In light of Commission studies, consideration of possible amendments to the *Guidelines Manual* relating to criminal history to address (A) the impact of 'status' points under subsection (d) of section 4A1.1 (Criminal History Category); (B) the treatment of defendants with zero criminal history points; and (C) the impact of simple possession of marihuana offenses."). Part B of the proposed amendment also addresses the Commission's priority on 28 U.S.C. § 994(j). *Id*. ("Consideration of possible amendments to the *Guidelines Manual* addressing 28 U.S.C. § 994(j).").

Part A: Status Points Under §4A1.1

Part A of the proposed amendments addresses the impact of "status" points under the guidelines. Three options are provided.

> *Option 1* would add a downward departure provision in Application Note 4 of the Commentary to §4A1.1 for cases in which "status" points are applied.
>
> *Option 2* would reduce the impact of "status" points overall, by decreasing the criminal history points added under §4A1.1(d) from two points to one point. It would also add a departure provision in Application Note 4 of the Commentary to §4A1.1 that could result in either an upward departure or a downward departure, depending on the circumstances.
>
> *Option 3* would eliminate the "status" points provided in §4A1.1(d). It would also make conforming changes to §2P1.1 (Escape, Instigating or Assisting Escape) and §4A1.2 to reflect the removal of "status" points from the *Guidelines Manual*. In addition, Option 3 would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which an upward departure from the defendant's criminal history may be warranted.

Part B: Zero Point Offenders

Part B of the proposed amendment sets forth a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders). New §4C1.1 would provide a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three for zero-point offenders who meet certain criteria. It provides two options for establishing the criteria.

> *Option 1* would make the adjustment applicable to zero-point offenders with no prior convictions. It would provide a [1][2]-level decrease if the defendant meets all of the following criteria: (1) the defendant did not receive any criminal history

points from Chapter Four, Part A, and had no prior convictions or other comparable judicial dispositions of any kind; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims]; (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime]. Under Option 1, approximately 10,500 offenders sentenced in fiscal year 2021 would have been eligible under §4C1.1 depending on the exclusionary criteria.

Option 2 would make the adjustment applicable to all offenders who had no countable convictions (*i.e.*, offenders who received zero criminal history points based upon the criminal history rules in Chapter Four). It would provide a [1 level][2 levels] decrease if the defendant meets all of the following criteria: (1) the defendant did not receive any criminal history points from Chapter Four, Part A; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims]; (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime]. Option 2 also provides for an upward departure that would be applicable if the adjustment under new §4C1.1 substantially underrepresents the seriousness of the defendant's criminal history. Under Option 2, approximately 13,500 offenders sentenced in fiscal year 2021 would have been eligible under §4C1.1 depending on the exclusionary criteria.

Both options include a subsection (c) that provides definitions and additional considerations for purposes of applying the guideline.

Part C: Impact of Simple Possession of Marijuana Offenses

Responding to the legalization of marijuana and decriminalization of simple possession of marijuana cases throughout the country. While marijuana remains a Schedule I controlled substance under the federal Controlled Substances Act 9CSA), many states have reduced or eliminated penalties for possessing small quantities of marijuana. Part C of the proposed

amendment provides for a possible downward departure if the defendant received criminal history points from a sentence for possession of marijuana for personal use, without an intent to sell or distribute it to another person.

Issues for Comment

Part A: Status Points Under §4A1.1

Issue 1: Option 3 of Part A of the proposed amendment would eliminate the "status" points provided in subsection (d) of §4A1.1 (Criminal History Category). Instead of eliminating "status points" altogether, should the Commission eliminate "status points" related to certain categories of prior offenses, but not others? For example, should "status points" continue to apply if the defendant was under a criminal justice sentence resulting from a violent prior offense? Should "status points" continue to apply if the defendant was recently placed under a criminal justice sentence involving a custodial or supervisory component?

Issue 2: Option 3 of Part A of the proposed amendment would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which an upward departure from the defendant's criminal history may be warranted. Instead of a departure provision, should the Commission account in some other way for the "custody status" of the defendant during the commission of the instant offense? If so, how should the Commission account for such "status"?

Part B: Zero Point Offenders

Issue 1: Set forth a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), that provides a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three if the defendant meets certain criteria. It provides two options: one option for zero-point offenders with no prior convictions and another option for zero-point offenders with no countable convictions. The Commission seeks comment on which option is preferable, or whether there is an alternative approach that the Commission should consider. For example, if the Commission decides to exclude offenders with prior convictions, should the Commission consider a third option that nevertheless makes the new adjustment available to offenders with prior convictions that were not counted under a specific provision of §4A1.2 (Definitions and Instructions for Computing Criminal History)? If so, what type of prior convictions that did not receive criminal history points should not be excluded? For example, should the Commission allow the new adjustment to apply to offenders with prior convictions for misdemeanors and petty offenses that were not counted under §4A1.2(c)? Should the Commission instead exclude offenders with certain prior convictions that were not otherwise counted under §4A1.2? For example, should the Commission exclude offenders with prior convictions for sex offenses or violent offenses that were not counted for criminal history purposes? If the Commission were to promulgate an option of §4C1.1 that excludes offenders with prior convictions not countable under Chapter Four, Part A (Criminal History), are there any practical issues or challenges that such an

approach would present due to the availability of records documenting such convictions? If so, what are these practical issues or challenges?

Issue 2: Provides that the [1 level] [2 levels] decrease under the new guideline applies if the defendant meets all of the criteria set forth in the two options. Should the Commission incorporate additional or different exclusionary criteria into either of the options set forth in Part B of the proposed amendment? Should the Commission change or remove any of the exclusionary criteria set forth in either of the options thereby making the adjustment available to a broader group of defendants?

Issue 3: If the Commission were to promulgate one of the proposed options, what conforming changes, if any, should the Commission make to other provisions of the *Guidelines Manual*?

Issue 4: Part B of the proposed amendment would also amend the Commentary to §5C1.1 (Imposition of a Term of Imprisonment) to address the alternatives to incarceration available to "zero-point" offenders. The Commission seeks comment on whether it should provide additional guidance about how to apply this new departure provision. If so, what additional guidance should the Commission provide? For example, should the Commission provide guidance on how courts should determine whether the instant offense of conviction is "not an otherwise serious offense"?

Part C: Impact of Simple Possession of Marijuana Offenses

Issue 1: Provides for a possible downward departure if the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person. The Commission seeks comment on whether it should provide additional guidance for purposes of determining whether a downward departure is warranted in such cases. If so, what additional guidance should the Commission provide?

Issue 2: The Commission also seeks comment on whether there is an alternative approach it should consider for addressing sentences for possession of marihuana. For example, instead of a departure, should the Commission exclude such sentences from the criminal history score calculation if the offense is no longer subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense? Alternatively, should the Commission exclude all sentences for possession of marihuana offenses from the criminal history score calculation, regardless of whether such offenses are punishable by a term of imprisonment or subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense?

Probation Department's Response:

Part A: Status Points Under §4A1.1

Issue 1: The Eastern District of Michigan does not believe status points should be eliminated. While the probation department recognizes the recent research[1] of status points and the minimal correlation to recidivism, the report also noted "the inclusion of status points in the criminal history score may address culpability and other statutory purposes of sentencing." Therefore, the determination of criminal history goes beyond simple determination of prior offenses. A defendant's continued criminal activity speaks to, at a minimum, respect for the law and may impact the protection of the public. As noted in previous responses from the Eastern District of Michigan, without a systematic method of distinguishing a motivated defendant who in good faith, complies with the orders of the court from a defendant who fails to do so, both are treated similarly. If the Commission includes a list of excludable offenses, situations and/or scenarios, this could create uncertainty and confusion, akin to the current criticism of the interpretation of the Commentary to the guidelines as a whole. Finally, determining whether a defendant is under a "criminal justice sentence" is well established in the Eastern District of Michigan and more broadly, the Sixth Circuit.

Issue 2: The Eastern District of Michigan does not believe status points should be eliminated. As such, the probation department has not identified any other changes to the Guidelines Manual affiliated with Part A, Option 3, of the proposed amendment.

Part B: Zero Point Offenders

Issue 1: It is noted, determination of countable convictions does face real, tangible challenges, including availability of records, quality of documentation and type of sentence (e.g., Holmes Youthful Trainee Act, plea by mail, uncounseled misdemeanor). As such, given time constraints, the officer is required to rely upon the available information and calculate the criminal history in an accurate, yet favorable, manner. As such, the defendant may potentially receive a reduction based upon the information at hand, not a true lack of scorable criminal history.

Issue2: The Eastern District of Michigan tentatively supports the proposed amendment. The probation department believes an individual without any prior convictions and therefore, no criminal history points under any of the categories in Chapter Four, (Option 1) is the only viable "zero-point offender" option.

Furthermore, the Eastern District of Michigan supports the inclusion of the following criteria: (1) the defendant did not receive any criminal history points from Chapter Four, Part A, and had no prior convictions or other comparable judicial dispositions of any kind; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant's acts or omissions did not result in substantial

[1] U.S. Sentencing Commission, REVISITING STATUS POINTS (2022), available at https://www.ussc.gov/research/research-reports/revisiting-status-points.

financial hardship to [one or more victims][five or more victims][25 or more victims]; (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime]

It is noted, recent USSC data[2] revealed that "despite two intervening major developments in the federal criminal justice system: the Supreme Court's decision in Booker and increased use of evidence-based practices in federal supervision…nearly two-thirds of violent offenders released in 2010 were rearrested, compared to more than one-third of non-violent offenders."

As the Commission reviews Option 2, it may wish to consider a numerical limit on the number of offenses for those offenders "who had no countable convictions." For instance, as is common in our court, many officers could provide examples of defendants with numerous misdemeanor convictions not counted under 4A1.2(c). (I specifically thought of a case with over 20 non-countable convictions, in addition to 14 pending warrants, and 36 dismissals for similar offenses)

As noted in a previous response from the Eastern District of Michigan, "if the goal is to provide alternative sentences for first offenders, applying a two-level reduction (when applicable) would have a greater impact on the applicable guideline range…Additionally, a one-level reduction for higher offense levels would have a similar effect or impact in the applicable guideline range…Ideally, this would reduce any disparity between defendants."

Issue 3: The Eastern District of Michigan has not identified any other conforming changes to the Guidelines Manual, beyond the guidance provided in the proposed amendment, Adjustment for Certain Zero-Point Offenders.

Issue 4: While the Eastern District of Michigan agrees with inclusion of additional information to provide further guidance regarding potential "zero-point" offenders, alternatives to incarceration and any definition of "not an otherwise serious offense," inclusion of additional information in the guideline itself, as opposed to the Commentary, is the preferred solution. The Commentary is often applied differently in courts across the United States, whereas the guideline provides a clear, concise reference point for all parties.

Part C: Impact of Simple Possession of Marijuana Offenses

Issue 1: The Eastern District of Michigan believes that if the Commission were to amend the Guideline manual to include a departure for simple possession of marijuana cases, additional guidance would be warranted. As the amendment is written now, it states "a downward departure

[2]U.S. Sentencing Commission, RECIDIVISM AND FEDERAL SENTENCING POLICY (2022), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/rg_recidivism-series-2022.pdf

may be warranted based on the following: the defendant received criminal history points from a sentence for possession of marijuana for personal use, without an intent to sell or distribute it to another person." The Eastern District of Michigan believes this language is vague and could create confusion and/or uncertainty. For instance, the defendant is charged with Delivery/Manufacture of Marijuana; however, later pleads guilty to a lesser charge of Possession of Marijuana. The question then becomes would the defendant qualify for this departure based on the offense of conviction or the actual conduct. In addition, the question of how much marijuana is considered "personal use" would also come into play. If the Commission decides to include this departure, the Guidelines Manual should include an application note explaining how to interpret what is a qualifying prior marijuana offense.

Issue 2: The Eastern District of Michigan believes accounting for simple possession of marijuana cases would be better suited for consideration under §4A1.2(c), instead of under a departure. The probation department believes a provision under §4A1.2(c)(1) is the most applicable guideline section for possession of marijuana offenses. The offense of possession of marijuana was illegal at the time of the state conviction, therefore should remain a part of the defendant's criminal history computation. Moving possession of marijuana offenses to §4A1.2(c)(1) would reflect how some states have since legalized marijuana, while others have not. Providing the same provisions to the other §4A1.2(c) offenses would take into account the changes in local laws and regulations.

PROPOSED AMENDMENT 8: ACQUITTED CONDUCT

Synopsis of the Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to the *Guidelines Manual* to prohibit the use of acquitted conduct in applying the guidelines. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022). The proposed amendment would amend §1B1.3 to add a new subsection (c) providing that acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless the conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, the instant offense of conviction. The new provision would define "acquitted conduct" as conduct underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction. The proposed amendment would also amend the Commentary to §6A1.3 (Resolution of Disputed Factors (Policy Statement)) to make conforming revisions addressing the use of acquitted conduct for purposes of determining the guideline range.

Issues for Comment

Issue 1: The proposed amendment is intended to generally prohibit the use of acquitted conduct for purposes of determining the guideline range, except when such conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish the instant offense of conviction. However, conduct underlying an acquitted charge may overlap with conduct found by the trier of fact beyond a reasonable doubt to establish the instant offense of conviction. Does this proposed amendment allow a court to consider such "overlapping" conduct for purposes of determining the guideline range? Should the Commission provide additional guidance to address this conduct?

Issue 2: The Commission seeks comment on whether the limitation on the use of acquitted conduct is too broad or too narrow. If so, how? For example, should the Commission account for acquittals for reasons such as jurisdiction, venue, or statute of limitations, that are otherwise unrelated to the substantive evidence?

Probation Department's Response

Issue 1: The Eastern District of Michigan supports defining and limiting the use of acquitted conduct for the purposes of split verdicts. These cases, while uncommon, pose a unique challenge to the presentence writer and the Court. In these cases, the presentence writer and Court can be put into a position to essentially "retry" the case with a lower burden of proof- a preponderance of the evidence. This becomes necessary when considering specific offense characteristics or expanded relevant conduct for the offense of conviction. Often the conduct between convicted and acquitted conduct overlap, making the application of SOCs or expanded relevant conduct difficult. The probation department would also suggest the Commission add language making clear that "acquitted" conduct is not dismissed conduct.

Issue 2: The Eastern District of Michigan believes any amendment limiting the use of acquitted conduct should include language making clear that for the purposes of Relevant Conduct, acquitted conduct only refers to substantive innocence, and not jurisdiction, venue, etc. This would be

similar to the delineation of Expunged Convictions (§4A1.2(j)) through §4A1.2 application notes 6 and 11.

PROPOSED AMENDMENT 9: SEXUAL ABUSE OFFENSES

Synopsis of the Proposed Amendment: The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive. Part A of the proposed amendment responds to recently enacted legislation. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying as a priority "[i]mplementation of any legislation warranting Commission action"). Part B of the proposed amendment is a result of the Commission's "[c]onsideration of possible amendments to the *Guidelines Manual* to address sexual abuse or contact offenses against a victim in the custody, care, or supervision of, and committed by law enforcement or correctional personnel." *Id*.

Part A of the proposed amendment responds to title XII of the Violence Against Women Act Reauthorization Act of 2022 ("the Act"). The Act is part of the Consolidated Appropriations Act of 2022, Pub. L. 117–103 (2022). It created two new offenses concerning sexual misconduct while committing civil rights offenses and sexual abuse of an individual in federal custody.

Part B of the proposed amendment addresses concerns regarding the increasing number cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision. In its annual letter to the Commission, the Department of Justice urged the Commission to consider amending the *Guidelines Manual* to better account for such sexual abuse offenses, including offenses under 18 U.S.C. § 2243(b) and the offense conduct covered by the new statute at 18 U.S.C. § 2243(c) (discussed in Part A of the proposed amendment). According to the Department of Justice, the provisions of the guideline applicable to such offenses, §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), do not sufficiently account for the severity of the conduct in such offenses, nor provide adequate penalties in accordance with the statutory maximum terms of imprisonment provided for these offenses.

Issues for Comment

Part A

Issue 1: In response to the Violence Against Women Act Reauthorization Act of 2022, Part A of the proposed amendment would reference 18 U.S.C. § 250 to §2H1.1 (Offenses Involving Individual Rights). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 250's offense conduct. Specifically, should the Commission amend §2H1.1 to provide a higher or lower base offense level if 18 U.S.C. § 250 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add specific offense characteristics to §2H1.1 in response to section 250? If so, what should any such specific offense characteristic provide and why? The new statute at 18 U.S.C. § 250 provides different maximum statutory terms of imprisonment, ranging from two years to any term of years or life, depending on the sexual misconduct involved in the offense. Should the Commission amend §2H1.1 to

address this range of penalties? If so, how should the Commission address these different penalties and why?

Issue 2: In response to the Violence Against Women Act Reauthorization Act of 2022, Part A of the proposed amendment would reference 18 U.S.C. § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 2243(c)'s offense conduct. Specifically, should the Commission amend §2A3.3 to provide a higher or lower base offense level if 18 U.S.C. § 2243(c) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to §2A3.3 in response to section 2243(c)? If so, what should that specific offense characteristic provide and why?

Part B

Issue 1: Part B of the proposed amendment would amend §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts) to increase the base offense level of the guideline from 14 to [22]. The proposed base offense level of [22] for §2A3.3 would result in proportionate penalties with offenses sentenced under §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), where, like §2A3.3, the victim is incapable of granting consent. Specifically, §2A3.2 provides a base offense level of 18 and a 4-level increase at §2A3.2(b)(1) that applies in cases where the victim was in the custody, care, or supervisory control of the defendant. The Commission seeks comment on whether the proposed base offense level for §2A3.3 is appropriate and, if not, what should the base offense level be and why. Are there distinctions between sexual offenses against minors and sexual offenses against wards that may warrant different base offense levels? If so, what are those distinctions and how should they be accounted for in §2A3.3?

Issue 2: Part B of the proposed amendment would also amend §2A3.3 to provide a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) for cases where the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242). This cross reference is the same as the one currently provided for in §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts). The Commission seeks comment on whether adding a cross reference to §2A3.1 in §2A3.3 is appropriate to address the presence of aggravating factors in the offenses referenced to this guideline, such as causing serious bodily injury and the use or threat of force. If not, how should the Commission take into account such aggravating factors? For example, should the Commission add specific offense characteristics to address these aggravating factors?

Probation Department's Response

The Eastern District of Michigan does not have any comments related to this amendment proposal.

PROPOSED AMENDMENT 10: ALTERNATIVES TO INCARCERATION PROGRAMS

Synopsis of the Proposed Amendment: In November 2022, the Commission identified as one of its policy priorities a "[m]ultiyear study of court-sponsored diversion and alternatives-to-incarceration programs (*e.g.*, Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program), including consideration of possible amendments to the *Guidelines Manual* that might be appropriate." U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022). As part of its work on this priority, the Commission is publishing these issues for comment on alternative-to-incarceration programs to inform the Commission's consideration of this policy priority.

Issues for Comment

Issue 1: The Commission invites general comment on how it should approach any study related to this policy priority. What should be the scope, duration, and sources of information of such a study, and what specific questions should be addressed?

The Commission further seeks comment on any relevant developments in recent legal or social science literature on court-sponsored diversion and alternatives-to-incarceration programs.

Issue 2: The Commission invites general comment on whether the *Guidelines Manual* should be amended to address court-sponsored diversion and alternatives-to-incarceration programs. The Commission also seeks comment on whether it should consider amending the guidelines for such purposes during this amendment cycle, or whether it should first undertake further study of court-sponsored diversion and alternatives-to-incarceration programs. In either case, how should the Commission amend the *Guidelines Manual* to address court-sponsored diversion and alternatives-to-incarceration programs?

For example, should the Commission add to Chapter Five, Part K, Subpart 2 (Other Grounds for Departure) a new policy statement permitting a downward departure if the defendant successfully completed the necessary requirements of an alternative-to-incarceration court program? If so, what type of programs should be addressed by such departure provision? Should the Commission provide criteria for purposes of applying a departure provision related to alternative-to-incarceration court programs? If so, what criteria should the Commission use? For example, should such a downward departure only apply to defendants who successfully completed the necessary requirements of an alternative-to-incarceration court program? In the alternative, should the Commission allow the departure to apply also to defendants who productively participated in any such program without fulfilling all requirements because they were administratively discharged from the program due to reasons beyond the defendant's control (*e.g.*, health reasons, scheduling issues)?

Probation Department's Response

The Eastern District of Michigan does not have any comments related to this amendment proposal.

PROPOSED AMENDMENT 11: FAKE PILLS

Synopsis of the Proposed Amendment: This proposed amendment is a result of the Commission's consideration of miscellaneous guidelines application issues. The proposed amendment responds to concerns expressed by the Drug Enforcement Administration (DEA) about the proliferation of "fake pills" (i.e., illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills) containing fentanyl or fentanyl analogue. According to the DEA, these fake pills resemble legitimately manufactured pharmaceutical pills (such as OxyContin, Xanax, and Adderall) but can result in sudden death or poisoning due to the unknown presence and quantities of dangerous substances, such as fentanyl and fentanyl analogues.

In order to address this issue, the DEA recommended that the Commission review the 4-level enhancement for knowingly distributing or marketing as another substance a mixture or substance containing fentanyl or fentanyl analogue as a different substance at subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking). Specifically, the DEA suggested that the Commission consider changing the mens rea requirement to expand the application of the enhancement to offenders who may not have known fentanyl or fentanyl analogue was in the substance but distributed or marketed a substance without regard to whether such dangerous substances could have been present.

The proposed amendment would amend §2D1.1(b)(13) to add a new subparagraph with an alternative 2-level enhancement for cases where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug. The new provision would refer to 21 U.S.C. § 321(g)(1) for purposes of defining the term "drug."

Issues for Comment

Issue 1: The proposed amendment would amend subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)) to add an alternative 2-level enhancement applicable if the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug. The Commission seeks comment on whether the proposed alternative enhancement at §2D1.1(b)(13)(B) is appropriate to address the concerns raised by the Drug Enforcement Agency. If not, is there an alternative approach that the Commission should consider? Should the Commission expand the scope of §2D1.1(b)(13)(B) to include other synthetic opioids? If so, what other synthetic opioids should be included?

Issue 2: The Commission also seeks comment on whether the mens rea requirement proposed for §2D1.1(b)(13)(B) is appropriate. Should the Commission provide a different mens rea requirement for the new provision? If so, what mens rea requirement should the Commission provide? Should

the Commission instead make §2D1.1(b)(13)(B) an offense-based enhancement as opposed to exclusively defendant-based?

Probation Department's Response

*Issue 1***:** The Eastern District of Michigan believes that that proposed alternative enhancement under §2D1.1(b)(13)(B) is appropriate to address the concerns of the Drug Enforcement Administration. The probation department has limited knowledge of other synthetic opioids being represented as legitimate pharmaceutical drugs, therefore there is no information that would lead to the department recommending any other synthetic opioids being added to this enhancement.

Issue 2: The Eastern District of Michigan believes that the mens rea requirement in this updated enhancement is appropriate. The conduct addressed in this enhancement appears best addressed by a defendant-based enhancement as this conduct does necessitate some forms of mens rea and it does not seem appropriate to apply this enhance to a defendant that lacks any mens rea.

PROPOSED AMENDMENT 12: MISCELLANEOUS

Synopsis of the Proposed Amendment: This proposed amendment is a result of the Commission's consideration of miscellaneous guidelines application issues. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying as a priority "[c]onsideration of other miscellaneous issues, including possible amendments to . . . (B) section 3D1.2 (Grouping of Closely Related Counts) to address the interaction between section 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) and section 3D1.2(d); and (C) section 5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect that the Bureau of Prisons no longer operates a shock incarceration program."). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

Part A responds to a guideline application issue concerning the interaction of §2G1.3 and §3D1.2 (Grouping of Closely Related Counts). Although subsection (d) of §3D1.2 specifies that offenses covered by §2G1.1 are not grouped under the subsection, it does not specify whether or not offenses covered by §2G1.3 are so grouped. Part A would amend §3D1.2(d) to provide that offenses covered by §2G1.3, like offenses covered by §2G1.1, are not grouped under subsection (d).

Part B revises the guidelines to address the fact that the Bureau of Prisons ("BOP") no longer operates a shock incarceration program as described in §5F1.7 (Shock Incarceration Program (Policy Statement)). Part B would amend the Commentary to §5F1.7 to reflect the fact that BOP no longer operates the program.

Issues for Comment

None.

Probation Department's Response

Not Applicable.

PROPOSED AMENDMENT 13: TECHNICAL

Synopsis of the Proposed Amendment: This proposed amendment makes various technical changes to the *Guidelines Manual*.

Part A of the proposed amendment makes technical changes to provide updated references to certain sections in the United States Code that were redesignated in legislation. The Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. 115–282 (Dec. 4, 2018) (hereinafter "the Act"), among other things, established a new chapter 700 (Ports and Waterway Safety) in subtitle VII (Security and Drug Enforcement) of title 46 (Shipping) of the United States Code. Section 401 of the Act repealed the Ports and Waterways Safety Act of 1972, previously codified in 33 U.S.C. § 1221–1232b, and restated its provisions with some revisions in the new chapter 700 of title 46, specifically at 46 U.S.C. §§ 70001–70036. Appendix A (Statutory Index) includes references to Chapter Two guidelines for both former 33 U.S.C. §§ 1227(b) and 1232(b). Specifically, former section 1227(b) is referenced to §§2J1.1 (Contempt) and 2J1.5 (Failure to Appear by Defendant), while former section 1232(b) is referenced to §2A2.4 (Obstructing or Impeding Officers). Part A of the proposed amendment amends Appendix A to delete the references to 33 U.S.C. §§ 1227(b) and 1232(b) and replace them with updated references to 46 U.S.C. § 70035(b) and 70036(b). The Act did not make substantive revisions to either of these provisions.

Part B of the proposed amendment makes technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective December 1, 2015, the Office of Law Revision Counsel eliminated the Appendix to title 50 of the United States Code and transferred the non-obsolete provisions to new chapters 49 to 57 of title 50 and to other titles of the United States Code. To reflect the new section numbers of the reclassified provisions, Part B of the proposed amendment makes changes to §2M4.1 (Failure to Register and Evasion of Military Service), §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism), and Appendix A (Statutory Index). Similarly, effective September 1, 2016, the Office of Law Revision Counsel also transferred certain provisions from Chapter 14 of title 25 to four new chapters in title 25 in order to improve the organization of the title. To reflect these changes, Part B of the proposed amendment makes further changes to Appendix A.

Part C of the proposed amendment makes certain technical changes to the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). First, Part C of the proposed amendment amends the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9 to reorganize the controlled substances contained therein in alphabetical order to make the tables more user-friendly. It also makes minor changes to the controlled substance references to promote consistency in the use of capitalization, commas, parentheticals, and slash symbols throughout the Drug Conversion Tables. For example, the proposed amendment would change the reference to "Phencyclidine (actual) /PCP (actual)" to "Phencyclidine (PCP) (actual)." Second, Part C of the proposed amendment makes clerical changes throughout the Commentary to correct some typographical errors. Finally, Part C of the proposed amendment amends the Background Commentary to add a specific reference to Amendment 808, which replaced the term "marihuana equivalency" with the new term "converted

drug weight" and changed the title of the "Drug Equivalency Tables" to "Drug Conversion Tables." *See* USSG App. C, amend. 808 (effective Nov. 1, 2018).

Part D of the proposed amendment makes technical changes to the Commentary to §§2A4.2 (Demanding or Receiving Ransom Money), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and to Appendix A (Statutory Index), to provide references to the specific applicable provisions of 18 U.S.C. § 876.

Part E of the proposed amendment makes technical changes to the commentary of several guidelines in Chapter Eight (Sentencing of Organizations). First, the proposed amendment replaces the term "prior criminal adjudication," as found and defined in Application Note 3(G) of §8A1.2 (Application Instructions ― Organizations), with "criminal adjudication" to better reflect how that term is used throughout Chapter Eight. In addition, the proposed amendment makes conforming changes to the Commentary to §8C2.5 (Culpability Score) to account for the new term. Part E of the proposed amendment also makes changes to the Commentary to §8C3.2 (Payment of the Fine ― Organizations). Section 207 of the Mandatory Victims Restitution Act of 1996, Pub. L. 104–132 (Apr. 24, 1996), amended 18 U.S.C. § 3572(d) to eliminate the requirement that if the court permits something other than the immediate payment of a fine or other monetary payment, the period for payment shall not exceed five years. Part E of the proposed amendment would revise Application Note 1 of §8C3.2 to reflect the current language of 18 U.S.C. § 3572(d) by providing that if the court permits other than immediate payment of a fine or other monetary payment, the period provided for payment shall be the shortest time in which full payment can reasonably be made.

Part F of the proposed amendment makes clerical changes to correct typographical errors in: §1B1.1 (Application Instructions); §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)); §1B1.4 (Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)); §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)); §2D2.3 (Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs); §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production); §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information); §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition); §2M1.1 (Treason); §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents); the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes); the Introductory Commentary to Chapter Two, Part T, Subpart 3 (Customs Taxes); the Introductory Commentary to Chapter Three, Part A (Victim-Related Adjustments); §3A1.1 (Hate Crime Motivation or Vulnerable Victim); the Introductory Commentary to Chapter Three, Part B (Role in the Offense); §3C1.1 (Obstructing or Impeding the Administration of Justice); the Introductory Commentary to Chapter Three, Part D (Multiple Counts); §3D1.1 (Procedure for Determining Offense Level on Multiple Counts); §3D1.2 (Groups of Closely Related Counts); §3D1.3 (Offense Level Applicable to Each Group of Closely Related Counts); §3D1.4 (Determining the Combined

Offense Level); §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)); §4B1.1 (Career Offender); §5C1.1 (Imposition of a Term of Imprisonment); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); the Introductory Commentary to Chapter Five, Part H (Specific Offender Characteristics); the Introductory Commentary to Chapter Six, Part A (Sentencing Procedures); Chapter Seven, Part A (Introduction to Chapter Seven); §8B1.1 (Restitution ― Organizations); §8B2.1 (Effective Compliance and Ethics Program); §8C3.3 (Reduction of Fine Based on Inability to Pay); and §8E1.1 (Special Assessments ― Organizations).

Part G of the proposed amendments also makes clerical changes to the Commentary to §§1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)) and 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment), to update the citation of Supreme Court cases. In addition, Part G of the proposed amendment amends (1) the Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to add a missing reference to 18 U.S.C.§ 844(o); (2) the Commentary to §2M6.1 (Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons Of Mass Destruction; Attempt or Conspiracy), to delete the definitions of two terms that are not currently used in the guideline; (3) the Commentary to §§2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose) and 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), to correct references to the Code of Federal Regulations; and (4) the Commentary to §3A1.2 (Official Victim), to add missing content in Application Note 3.

Issues for Comment

None.

Probation Department's Response

Not Applicable.

Clinical Programs
UNIVERSITY OF DENVER

March 14, 2023

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

Re: Proposed Amendments to the Sentencing Guidelines, §1B1.13, Concerning Victims of Assault

Dear Judge Reeves:

The University of Denver College of Law Civil Rights Clinic (Clinic) welcomes this opportunity to comment on the proposed amendments announced by the United States Sentencing Commission. Our Clinic is comprised of Clinical Professors of Law and law students whose focus is on the constitutionality of the conditions in which people are held in federal and state prisons. We support the Commission in its aim to update the Sentencing Guidelines in a manner consistent with the First Step Act of 2018 (FSA) and the reality of the lives of incarcerated individuals. We write to show our support for the proposed amendments to §1B1.13, Reduction in Terms of Imprisonment under 18 U.S.C. § 3582(c)(1)(A), governing compassionate release.[1]

In particular, our Clinic supports amending §1B1.13 to include a category for "victims of sexual assault . . . committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody" (Amendment (b)(4)) as an extraordinary and compelling reason for compassionate release.[2] Our Clinic currently represents a woman who was sexually assaulted by a Bureau of Prisons (BOP) officer while incarcerated at Federal Correctional Institution (FCI) Dublin. Our Clinic has seen first-hand the importance of including sexual assault as an extraordinary and compelling circumstance that may warrant release so our client, and others like her, can receive meaningful mental health treatment outside of the BOP and recover from this trauma. However, we recommend that the Commission consider adopting a term boarder than "sexual assault" within the Amendment (b)(4). Further, we urge the Commission not to adopt the Department of Justice's (DOJ) suggested addition to Amendment (b)(4) that any sexual misconduct be independently substantiated.

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[1] U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, §1B1.13 REDUCTION IN TERMS OF IMPRISONMENT UNDER 18 U.S.C. § 3582(C)(1)(A) (POLICY STATEMENT) 1, 6 (Preliminary) (Jan. 12, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230112_prelim_RF.pdf.

[2] *Id*.

A. FCI Dublin is a case study in why Amendment (b)(4) makes sense.

In the past year, FCI Dublin has been in the news because of the rampant and systemic sexual violence and abuse perpetrated by BOP employees against incarcerated women. The egregious nature of what happened in FCI Dublin, and the lack of services and treatment for women who were abused at the hands of those tasked with their protection, highlights the importance of Amendment (b)(4).

FCI Dublin is a low-security prison east of Oakland, California that currently houses 406 women.[3] The sexual violence and abuse was so pervasive there that BOP employees would routinely and openly make sexually explicit remarks to women.[4] BOP employees would also terrorize women and point out the "blind spots" in the prison—areas that surveillance cameras did not cover and where the misconduct could continue without being captured on video.[5] Thus far, five former correctional officers have been charged with sex crimes at FCI Dublin, and three have pled guilty to these crimes.[6] In December 2022, a jury found the former warden of FCI Dublin guilty of eight counts of sexual abuse and one count of lying to the Federal Bureau of Investigation (FBI).[7]

During the former warden's trial, several of his victims and the former prison psychologist testified that the former warden often bragged that he would not be investigated because he was close friends with the head of the Special Investigative Services (SIS).[8] The SIS officer who was in charge of all criminal matters within the prison and determines, with the warden's assistance, whether the matter shall be referred to federal, state, or local law enforcement.[9] Even the former chaplain of the facility was sentenced to seven years for sexual abuse.[10] During the former chaplain's sentencing, the judge said, "there is a culture of rot at Dublin, and it was important for the world to see this egregious behavior."[11] Since the trials of the former warden and former chaplain, the systemic sexual violence and abuse at FCI Dublin has been in the public eye and has received significant attention from local and national media. A recent bipartisan Senate investigation found similar widespread sexual violence and abuse in

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[3] Federal Bureau of Prisons, Federal Correctional Institution Dublin, https://www.bop.gov/locations/institutions/dub/ (last visited Mar. 9, 2023).

[4] Michael Balsamo & Michael R. Sisak, *Women's prison in Dublin nicknamed 'the rape club:' AP Investigation*, KTVU Fox 2, Feb. 7, 2022.

[5] Lisa Fernandez, *'Cultural rot:' U.S. Congressional team tours Dublin prison after sex scandal widens*, KTVU Fox 2, Mar. 13, 2022.

[6] Lisa Fernandez, *Former Dublin prison warden found guilty of sex abuse charges*, KTVU Fox 2, Dec 8, 2022.

[7] Lisa Fernandez, *Dublin prison warden sex abuse trial: How the jury came to its guilty verdict*, KTVU Fox 2, Dec. 9, 2022.

[8] *Id*.; Department of Justice, Federal Bureau of Prisons, *Program Statement 1350.01, Criminal Matters Referral*, Jan. 11, 1996.

[9] Lisa Fernandez, *'This is rape:' Judge sentences Dublin prison chaplain to 7 years for sex abuses*, KTVU Fox 2, Aug. 31, 2022.

[10] *Id.*

[11] *Id*.

various prisons.[12] Senator Ossoff and others on the Permanent Subcommittee on Investigations published a 60-page report on the systematic abuses that permeate women's prisons beyond FCI Dublin.[13] The investigation found that the BOP has failed to prevent and respond to the sexual abuse of incarcerated women.[14] The report details how the BOP cannot adequately protect women in BOP from sexual violence and abuse, which supports the adoption of (b)(4). The women who experienced sexual violence or abuse within FCI Dublin had no meaningful way of reporting the abuse or receiving help.

B. Amendment (b)(4) is warranted because sexual abuse victims cannot adequately heal from the trauma of their abuse in a BOP facility and should be afforded the opportunity to seek release from custody so that their treatment needs can be met.

Sexual abuse and violence are associated with high rates of posttraumatic stress disorder (PTSD), depression, anxiety, and an increased risk of suicidal ideation and attempts.[15] Prior to incarceration many women experience high rates of early trauma and maltreatment, adverse family experiences, and substance abuse.[16] Counseling is very rare in BOP, and even when it is available it is inadequate in addressing the needs of the people seeking it.

Victims of sexual violence or abuse need proper mental health treatment and continued incarceration prevents them from healing.[17] "Treatment for sexual violence or abuse is best described as multi-modal in that several techniques and approaches are used to assist the victim, with cognitive behavioral techniques showing the most efficacy."[18] Before a victim can receive treatment, it's important to "determine if the individual is free from the threat of further harm, abuse, or victimization."[19] Treatment after sexual violence is "complex and must be performed by trained clinicians, with expertise in working with sexual abuse victims."[20] This is important "because meaningful improvement of trauma-based symptoms and conditions cannot take place if there is ongoing trauma occurring for the individual."[21] Survivors of sexual violence or abuse by BOP employees must deal with their trauma in a setting that is very similar, if not the same, as where their abuse took place. Victims cannot start to heal from this trauma in a BOP facility because they will never have the feeling of safety that they need to begin treatment. Even if victims of sexual violence in BOP are moved from the facility in which they were abused to a separate facility, they are often stigmatized by BOP officials in the new facility.

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[12] Carrie Johnson, *Senate probe found some federal prison staff abused female inmates without discipline*, National Public Radio, Dec. 14, 2022.

[13] Staff of S. Permanent Subcomm. on Investigations, Comm. on Homeland Sec. and Gov't Affs., 117th Cong., Rep. on Sexual Abuse of Female Inmates in Federal Prisons (2022) [hereinafter Report on Sexual Abuse].

[14] *Id*. at 4.

[15] *See* Attachment A (report of Dr. Katherine Porterfield) at 3.

[16] *Id.* at 6.

[17] Jennifer Hartsfield, Susan Sharp & Sonya Conner, *Cumulative Sexual Victimization and Mental Health Outcomes Among Incarcerated Women*, Dignity: A Journal of Analysis of Exploitation and Violence, Vol. 2: Iss. 1 (2017).

[18] *See* Attachment A at 10.

[19] *Id.* at 11.

[20] *Id.*

[21] *Id.*

Our client, who has a history of mental health issues, experienced a stark decline in her mental health after she was sexually assaulted by a BOP officer at FCI Dublin. Prior to our client's sexual assault, our client did not receive meaningful psychological treatment for her pre-existing depression and trauma. After her sexual assault, she has experienced many symptoms similar to PTSD but was once again not offered meaningful treatment to address these symptoms. The adoption of Amendment (b)(4) would allow our client and other victims of institutional sexual violence to seek necessary treatment in a safe space outside of the BOP.

The Commission must act to ensure that victims subjected to sexual violence and abuse by BOP staff have an opportunity to heal. It can do this by adopting Amendment (b)(4). We encourage the Commission to accept the DOJ's position of placing a comma after "sexual assault" to modify the sentence, so that "serious bodily injury" applies to physical abuse only. As evidenced above, emotional trauma is significant in victims of sexual violence and abuse, and we want to make clear that individuals would be able to assert that as a basis for relief.

C. The Commission should consider a revision to Amendment (b)(4) that accounts for the variety of ways in which institutional sexual violence and abuse can be perpetrated and experienced.

Institutional sexual violence and abuse take many forms. While proposed Amendment (b)(4) identifies only victims of "sexual assault," we encourage the Commission to consider using a broader term. The DOJ defines the term "sexual assault" to include any nonconsensual sexual act proscribed by federal, tribal, or State law, including when the victim lacks capacity to consent.[22] This term thus requires a "sexual act."

Instead, the Commission might find the National Institute of Justice (NIJ) definition of "sexual violence" instructive, because it is more broadly defined as "a specific constellation of crimes including sexual harassment, sexual assault, and rape."[23] Specifically, the NIJ defines "sexual harassment" as "degrading remarks, gestures, and jokes, indecent exposure being touched, grabbed, pinched, or brushed against in a sexual way."[24] Further, federal criminal law and the Guidelines commonly refer to "sexual abuse," not "sexual assault."[25]

Being a victim of sexual violence or abuse is extraordinary and compelling because of the totality of circumstances relating to sexual misconduct, including long-term psychological harm, which may or may not result from a de facto sexual *act*.[26] For example, the women incarcerated at FCI Dublin were subjected to a range of sexual violence and abuse, from being fondled and

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[22] Off. on Violence Against Women, *Sexual Assault*, DEP'T OF JUST., https://www.justice.gov/ovw/sexual-assault (last visited Mar. 13, 2023).

[23] *Overview of Rape and Sexual Violence*, NAT'L INST. OF JUST. (Oct. 25, 2010), https://nij.ojp.gov/topics/articles/overview-rape-and-sexual-violence#note1.

[24] *Id.*

[25] USSG §§2A3.1 through 3.3.

[26] *See* Erica Zunkel, Clinical Professor and Associate Director at Univ. of Chicago L. Sch.'s Fed. Crim. Just. Clinic, Written Testimony before U.S. Sentencing Commission on Proposed Amendments to the Federal Sentencing Guidelines (Feb. 23, 2023), 29-32, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Zunkel.pdf.

groped, told to undress, coerced into having their pictures taken to being sexually assaulted and raped.[27] Many of the women at Dublin whose stories have been shared nationwide would be ineligible for relief under a strict standard requiring an overt sexual act. Rather, it is the pattern and practice of continued sexual violence that has led to serious psychological harm.

It is well-documented that experiencing sexual violence increases the risk of psychiatric disorders and emotional dysregulation.[28] The harm to a victim's mental health is not only attributed to experiencing sexual assault, but can happen regardless of the type of sexual violence a person experiences.[29] Further, the rampant sexual harassment and constant fear that women experienced while in FCI Dublin can have long-term and continued debilitating effects on many women's mental health, even without being forced into a sexual act.[30] Our Clinic thus believes that a broader term is warranted so that victims of sexual violence of all kinds are able to seek relief under Amendment (b)(4).

D. The Commission should not add a requirement to Amendment (b)(4) that sexual misconduct be substantiated by an adjudication or administrative finding.

The Commission should not add a requirement to Amendment (b)(4) that any alleged sexual misconduct be independently substantiated by an administrative or legal proceeding, such as by a criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case, as the DOJ suggests.[31] First, any such addition would create significant delays and barriers for victims seeking a sentence reduction under the statute. Second, this addition would improperly revert investigative and decision-making power to the DOJ and/or BOP and create a higher burden for defendants requesting a sentence reduction based on being sexually abused than for defendants requesting reductions based on other grounds.

First, an addition to Amendment (b)(4) that any sexual misconduct be substantiated in accordance with the DOJ's proposal would create additional barriers and unjustifiable delays to filing a motion for sentence reduction and to courts granting a reduction. Many victims of sexual violence or abuse must already wait months or years to report being sexually abused by a BOP employee.[32] Indeed, for some victims, the first time they disclose being sexually abused may be when requesting that the warden file for compassionate release on the victim's behalf to satisfy the exhaustion requirement of 18 U.S.C. § 3582(c)(1)(A). As the DOJ itself stated in its written testimony:

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[27] Lisa Fernandez, *Retaliation is real, FCI Dublin prison psychologist testifies at warden trial*, KTUV Fox 2, Nov. 30, 2022; Lisa Fernandez, *supra* note 6.

[28] *See* Attachment A at 12.

[29] *Id.*

[30] Zunkel, *supra* note 26, at 29-30; Lisa Fernandez, *supra* note *5.*

[31] U.S. Dep't of Just., Written Testimony before the U.S. Sentencing Commission on the Proposed Amendments to the Federal Sentencing Guidelines (Feb. 15, 2023), 6, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf [hereinafter U.S. Dep't of Just. Written Testimony].

[32] *See generally* Lisa Fernandez, *supra* note 27 (explaining that incarcerated women in FCI Dublin could not safely report being sexually abused to any BOP employees while in FCI Dublin because of reporting requirements of the psychologist and how rampant the abuse was).

> victims are less likely to report their abuse for fear of losing access to privileges and vital services like drug treatment, psychological or spiritual counsel, or access to vocational training. Indeed, in some instances, the very BOP employees who provide those lifelines, *i.e.*, the drug treatment counselor, the educational specialist, the prison chaplain, are the ones committing the abuse. Moreover, inmate-victims of sexual abuse also fear that if they report abuse, they will be transferred to another facility farther from their family or placed in the Special Housing Unit (SHU) . . . .[33]

This is true for our client, who had to wait a year—until she was transferred from FCI Dublin to report that she was a victim of sexual violence. Like many victims, our client feared for her safety if she reported—that BOP employees and even other incarcerated women would physically harm her. She also did not feel that reporting would produce any benefit because it seemed unlikely that her report would reach anyone who would intervene or do something about it while at FCI Dublin.[34] In FCI Dublin, the former psychologist encouraged many women not to tell her about any sexual abuse women experienced because the psychologist was required to report staff misconduct to the warden of the facility and she was concerned women would face further retaliation if the warden learned of their reports.[35] As mentioned above, women also could not report to SIS officers because of their relationship with staff who were sexually abusing women or because they were engaging in misconduct too.[36] Victims, like our client, need significant mental health treatment that they are unable to get in the BOP. Requiring them to wait even longer for any relief just so that the BOP and/or DOJ can substantiate that they were sexually abused is unjustified and unreasonable.

During the Commission's public hearing, the DOJ was unable to provide even an estimate for how long an investigation to substantiate a victim's experience might take. Criminal and civil cases can take months or years before resolution. An administrative finding may be similarly lengthy. For example, more than two dozen former BOP employees from FCI Dublin are still being investigated,[37] and we believe that the DOJ may also still be investigating our client's assault. This lengthy delay is not unusual. The BOP Office of Internal Affairs (OIA) has "a backlog of approximately 8,000 [misconduct] cases, with some cases pending for more than five years."[38]

In addition, BOP has a culture that is at odds with conducting proper and thorough investigations into these sensitive matters—especially those related to the misconduct of its own employees. For example, the SIS coordinator at FCI Dublin, who was employed during all of the years of notorious and rampant sexual abuse, remains at FCI Dublin. No administrative action was taken against this individual. Further, an Office of Inspector General (OIG) report made clear that for allegations of sexual misconduct that are not criminally prosecuted, the OIG does

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[33] U.S. Dep't of Just. Written Testimony, *supra* note 31, at 21.
[34] *See* Lisa Fernandez, *supra* note 27.
[35] Lisa Fernandez, *supra* note 27.
[36] *Id.*
[37] Lisa Fernandez, *Dozens of Women Detail Rape and Retaliation at Dublin Prison, Real Reform is Questioned*, FOX KTVU 2 (Sept. 23, 2022); Report on Sexual Abuse, *supra* note 13, at 14, 17.
[38] Report on Sexual Abuse, *supra* note 13, at 25.

not even pursue administrative or disciplinary action if allegations are based only on the words of survivors.[39] However, as noted in a recent DOJ report, sexual misconduct allegations rely heavily on victim statements and credibility, more so than allegations of other kinds of misconduct, and other evidence corroborating victim's allegations of sexual violence and abuse often does not exist.[40] The decks are stacked against victims whose words and experiences are consistently devalued in the carceral setting.

Second, limiting Amendment (b)(4) to situations in which any sexual misconduct is already substantiated also creates a higher burden for defendant-victims of sexual abuse than for other defendants seeking a sentence reduction based on other grounds. Under 18 U.S.C. § 3582(c)(1)(A)(i), courts may reduce a defendant's term of imprisonment when a *defendant's circumstances* are extraordinary and compelling. The statute does not ask or require anyone to inquire into whether another individual committed wrongdoing or misconduct. For example, in compassionate release cases based on a defendant's medical condition, a court is not asked to determine whether BOP doctors or staff committed malpractice or misconduct regarding medical care. Determining a BOP employee's guilt, liability, or discipline is not a prerequisite to granting a defendant's motion for sentence reduction in the medical context. The DOJ's suggested addition to Amendment (b)(4) would create this kind of prerequisite, but only for victims of sexual assault. Consequently, the DOJ's proposed substantiations requirement may prevent courts from ever reviewing a victim-defendant's motion for sentence reduction.

Finally, a requirement that sexual misconduct be substantiated places undue weight on the facts and circumstances of the sexual act. While the experience of sexual violence—in whatever form—is an important part of the inquiry, a substantiation requirement runs the risk of minimizing the combination of experiences that institutional sexual violence involves—experiences that, taken together, make being a victim extraordinary and compelling. Institutional sexual violence or abuse involves the sexual misconduct, but also encompasses a host of negative associated outcomes, including ongoing emotional and psychological harm.[41] The combination of experiencing sexual violence or abuse by a BOP employee, the resulting emotional and psychological harm, and any additional mental health decline that occurs from continued incarceration in the entity responsible for the abuse, is what makes being a victim of sexual violence or abuse extraordinary and compelling.

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[39] OFF. OF INSPECTOR GEN., DEP'T OF JUST., MANAGEMENT ADVISORY MEMORANDUM 23-001, NOTIFICATION OF CONCERNS REGARDING THE FEDERAL BUREAU OF PRISONS' (BOP) TREATMENT OF INMATE STATEMENTS IN INVESTIGATIONS OF ALLEGED MISCONDUCT BY BOP EMPLOYEES 1 (2022).

[40] OFF. OF THE DEPUTY ATT'Y GEN., DEP'T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE DEPARTMENT OF JUSTICE'S RESPONSE TO SEXUAL MISCONDUCT BY EMPLOYEES OF THE FEDERAL BUREAU OF PRISONS 14 (2022).

[41] *See* Attachment A at 3-5.

E. Conclusion.

We commend the Commission for proposing the addition of Amendment (b)(4), the "victim of assault" category, to the list of extraordinary and compelling reasons enumerated in policy statement §1B1.13. The DU Civil Rights Clinic urges the Commission to adopt Amendment (b)(4) with our suggested slight revisions. Additionally, the Commission should not add a requirement to Amendment (b)(4) that any sexual misconduct be substantiated by an administrative or legal proceeding, as the Department of Justice suggests. We appreciate the opportunity to comment on the Commission's proposals. Please contact us if you have any questions or would like to discuss our comment further.

Sincerely,

Meredith B. Esser, Clinical Teaching Fellow
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Laura L. Rovner, Director and Professor of Law
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Attachment A

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Laura Rovner
University of Denver College of Law
Civil Rights Clinic
2255 E. Evans Avenue, Ste. 335
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March 13, 2023

Dear Ms. Rovner:

You have asked for my opinion on the psychological impact of institutional sexual violence on women in a custodial context and recommendations around therapeutic care after sexual abuse or sexual violence in an institution. This report draws on my clinical expertise as a psychologist who has specialized in the evaluation and treatment of severe trauma for the past twenty-five years, as well as on scientific and clinical literature that examines the deleterious impact of sexual abuse on victims and treatment outcomes. For this report, I was not provided with any records nor was I asked to opine on any case-specific facts.

Specifically, in this report, I will address:

1. The impact of sexual violence as a trauma
    A. Definitions of sexual violence
    B. Outcomes of sexual violence

2. Institutional sexual violence: Environmental factors, power dynamics and barriers to disclosure
    A. Outcomes
    B. Carceral environmental factors in institutional sexual abuse or sexual violence
    C. Power dynamics in carceral settings with sexual abuse or sexual violence
    D. Disclosure of sexual abuse or sexual violence

3. Standard of therapeutic care for victims of institutional sexual abuse or sexual violence

Qualifications

My qualifications are outlined in my curriculum vitae, attached. In sum, I am a clinical psychologist, licensed to practice in the State of New York. I received my Ph.D. in Clinical Psychology from the University of Michigan in 1998. My pre-doctoral and post-doctoral training included extensive training in the evaluation and diagnosis of mental disorders. Since 1998, I have worked as a psychologist at Bellevue Hospital and NYU School of Medicine at the

Bellevue/NYU Program for Survivors of Torture. I have evaluated, treated, and supervised the treatment of numerous children, adolescents, and adults who have experienced war trauma, abuse, and torture. I have evaluated individuals and served as an expert for court proceedings in the Military Commissions in Guantanamo Bay; US Federal Court, Southern and Eastern Districts in New York and the Western District of Missouri; Superior Court, Skagit County, Washington, and for immigration proceedings in courts through the Executive Office of Immigration Review. I have trained hundreds of health professionals and attorneys on the evaluation and treatment of childhood trauma, war, and torture and have lectured or conducted seminars on issues of torture and complex trauma sponsored by a wide variety of organizations, including human rights organizations, governmental entities, universities, and the International Criminal Court.

I have co-authored several publications pertaining to the assessment and treatment of trauma, including that suffered by survivors of torture, including as a contributor to the United Nations' *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*. I have also published on treatment of traumatic stress in children. These peer-reviewed articles have been published in textbooks and professional journals, including *The Journal of Nervous and Mental Disease*; *The Prevention Researcher*; *Psychiatry: Interpersonal and Biological Processes*; *OMEGA – Journal of Death and Dying*; and *Journal of the American Academy of Child & Adolescent Psychiatry*. I serve as an ad-hoc reviewer on several peer-reviewed journals and presses, including *Anxiety, Stress, and Coping: An International Journal, Cambridge University Press Medical Group, International Journal of Law and Psychiatry, Journal of Clinical Child and Adolescent Psychology,* and *Journal of Clinical Psychology.*

The trauma of sexual violence

The experience of sexual violence is widely understood to be a seriously deleterious event, with potentially wide-ranging negative health and mental health effects on victims. There is a robust body of scientific research, as well as extensive clinical literature that demonstrates the harm done to individuals who suffer sexual assault. The terms sexual assault or sexual violence can constitute a range of offenses done to another person.[1] For purposes of this report, the National Institute of Justice definition of sexual violence will be used, which is: "a specific constellation of crimes including sexual harassment, sexual assault, and rape."[2]

Sexual violence can range from harassment to assault to rape. For the purposes of this report, definitions widely agreed upon and operationalized through the United States Department of Justice are cited here:[3]

1. Sexual harassment: Ranges from "degrading remarks, gestures, and jokes to indecent exposure, being touched, grabbed, pinched, or brushed against in a sexual way."

[1] For the purposes of this report, I will use the term "sexual violence" to include sexual victimization, sexual abuse, and sexual assault.
[2] *Overview of Rape and Sexual Violence*, NAT'L INST. OF JUST. (Oct. 25, 2010), https://nij.ojp.gov/topics/articles/overview-rape-and-sexual-violence#note1.
[3] *Id.*

2. Sexual assault: "Covers a wide range of unwanted behaviors—up to but not including penetration—that are attempted or completed against a victim's will or when a victim cannot consent because of age, disability, or the influence of alcohol or drugs. Sexual assault may involve actual or threatened physical force, use of weapons, coercion, intimidation, or pressure and may include—
    a. Intentional touching of the victim's genitals, anus, groin, or breasts.
    b. Voyeurism.
    c. Exposure to exhibitionism.
    d. Undesired exposure to pornography.
    e. Public display of images that were taken in a private context or when the victim was unaware."
3. Rape: "…nonconsensual oral, anal, or vaginal penetration of the victim by body parts or objects using force, threats of bodily harm, or by taking advantage of a victim who is incapacitated or otherwise incapable of giving consent. Incapacitation may include mental or cognitive disability, self-induced or forced intoxication, status as minor, or any other condition defined by law that voids an individual's ability to give consent."

The serious negative impact of sexual violence has been well-documented across several decades of extensive research and clinical study. As the field of traumatology—the study of the impact and treatment of physical injuries emanating from traumatic events—expanded over the past decades to include the study of psychological injuries that occur due to traumatic events, knowledge as to how sexual violence harms people psychologically and what is needed for healing and recovery has also expanded and deepened.

Outcomes of sexual violence:

Psychiatric disorders

There is extensive multidisciplinary research demonstrating the negative outcomes of sexual violence on individuals' biological, psychological and social functioning. Research has revealed an increased risk of multiple psychiatric conditions, as well as poor health and behavioral outcomes in survivors. Survivors of sexual assault have shown high rates of posttraumatic stress disorder (17-65% of survivors meet criteria across studies), depression (13-51% met criteria), anxiety (13-49% met criteria), alcohol use disorders (13-49% met criteria), drug use disorders (23-44% met criteria).[4]

Posttraumatic stress disorder (PTSD) has received extensive attention in terms of sexual violence because it is a diagnosis that is linked specifically to suffering traumatic events. Rape survivors, along with combat veterans, were some of the first patients identified as suffering from the particular constellation of symptoms that came to be known as posttraumatic stress disorder. These symptoms were: somatic (body-based) complaints, fear and anxiety, and self-blame. Over time, empirical study of and clinical experience with survivors of rape and other traumas have uncovered the complex neurophysiology that leads trauma survivors to develop PTSD. Trauma, defined as a life-threatening event, or an event in which there is severe threat to

[4] Rebecca Campbell, Emily Dworkin & Giannina Cabral, *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 TRAUMA, VIOLENCE & ABUSE (special issue) 225, 225-26 (2009).

the individual's bodily and/or psychic safety, mobilizes neurochemical and endocrine systems throughout the brain and body to react to the threat. These reactions—such as "fight or flight" activation and/or shut down and dissociation--while adaptive to the individual's survival in the moment of trauma, can lead to difficulties after the trauma. Memories of the traumatic events return intrusively, thereby activating the same brain and body reactions that occurred during the trauma and leading to severe discomfort and impairment in survivors. PTSD, then, entails symptoms across multiple domains, including intrusive reexperiencing of memories, alterations in arousal and mood, and avoidance and numbing. These symptoms are frequently seen in survivors of all types of sexual violence, even when individuals do not meet the full threshold for PTSD.

Behavioral outcomes: Problems with self and others

Sexual violence has been shown to lead to a range of behavioral problems in survivors, including increased drug and alcohol use, risk-taking behaviors, isolation and withdrawal from others and suicidal ideation and actions. Survivors of sexual violence often report intense feelings of self-hatred and shame in the aftermath of victimization, feelings that often center around the thought that they should have prevented the abuse or somehow handled it differently. Survivors report feeling "changed" and "damaged," sometimes to a degree that leads them to try to harm or kill themselves. Survivors of sexual assault have been found in multiple studies to be at substantial risk for suicidal ideation and attempts.[5] Risk-taking behaviors, such as putting themselves in dangerous situations, are not uncommon, as survivors attempt to gain mastery over feelings of powerlessness. Indeed, revictimization is common in survivors of sexual violence.

Sexual violence leads to distortions in thinking in many survivors that can affect their reactions to other people, as they may overestimate or underestimate threats in their environments. Individuals who suffer from a hyperaroused nervous system "uproar" in the aftermath of victimization may feel hypervigilant and always on alert for further threat, leading them to isolate or avoid other people, feeling unable to trust or feel secure. Conversely, survivors who had to dissociate or "shut down" during the sexual violence may continue to experience dissociative responses that lead them to misinterpret their environment or detach from reality in ways that can risk further harm coming to them. Survivors of sexual abuse often demonstrate a poor ability to discern safety, protect themselves, and respond to internal cues of discomfort and danger due to dissociation.[6] This vacillation between states of fear and hyper-threat detection and shut-down detachment leads survivors to appear erratic and unstable in their decisions and behaviors at times. Indeed, multiple experiences of victimization may lead survivors to minimize or deny the coercive aspects of the sexual violence, even leading them to feel that they consented. People around them may feel confused about their inconsistent responses to the world, not realizing that the survivor is flipping between states of arousal and shut-down as a result of their trauma. Seeking help may seem impossible to sexual violence survivors, as they feel unable to explain their bewildering feelings and behaviors.

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[5] Emily R. Dworkin, Suvarna V. Menon, Jonathan Bystrynski & Nicole E. Allen, *Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis*, 56 CLINICAL PSYCH. REV. 65, 66 (2017.)

[6] Judy Cashmore & Rita Shackel, *The Long-Term Effects of Child Sexual Abuse*, CFCA Paper No. 11, Austl. Inst. of Fam. Serv. 1, 12 (2013).

Impact on memory:

There is wide variability in trauma survivors' acquisition, retrieval and recounting of memories of traumatic events. For some, the details and aspects of the trauma are vividly remembered and able to be recalled with specificity, even years later. For others, neurophysiological, psychological and social factors may influence their ability to recall specifics, creating lapses or ruptures in their memory and their recall. One critical neurobiological function affected by trauma is the encoding and retrieval of autobiographical memory—that is, events that happened to a person. Healthy memory functioning results in the accurate encoding of information in the brain and the subsequent ability of the person to recall and recount the information in a clear, stable manner. Any part of this process--the encoding, the retrieving or the recounting--can be affected by trauma. A trauma survivor may have fragmented memories of what occurred during a trauma, due to faulty encoding because of dissociation during the trauma, or she may have difficulty retrieving the memory because of psychophysiological arousal that occurs when the events are recalled or she may be unable to recount the memory, due to shame and disgust and the concomitant avoidance that accompanies these emotions. Thus, there are multiple, interrelated pathways—neurophysiological, emotional, and social—towards impaired or altered memory in survivors after sexual abuse. Survivors also may have parts of sexual abuse that they remember vividly and other aspects that are foggy, vague, or confused, or aspects of the memory that change across time.[7] This variability must be considered when survivors are asked to describe sexual abuse, as they may become symptomatic and suffer severe distress or have gaps in their memories. Questioning that focuses on clarifying details should be done with trauma-sensitive interviewing techniques, so as to not retraumatize a survivor.

Institutional sexual violence: Environmental factors, power dynamics and barriers to disclosure

Institutional sexual violence is defined as any type of sexual assault, harassment or rape perpetrated by an official or staff of an institution on an inmate/resident. It is critical to note that incarcerated people cannot legally consent to a sexual act because of their position as wards of the state.[8] Sexual abuse of incarcerated people can occur on the premises of that institution or in some other setting or context or circumstance where the institution has in any way allowed, facilitated or created the circumstances that made the abuse possible.[9] There are difficulties in determining the prevalence of institutional sexual violence because of the nature of it—i.e. exploitation of inmates in circumstances with tremendous power differentials from their perpetrators, dependency on perpetrators for basic needs and coercion techniques designed to keep inmates from disclosing the abuse. In one large study of rates of reported sexual abuse of women in state prisons, 7.6% of women inmates reported sexual victimization and 1.7% reported

[7] Anke Ehlers & David M. Clark, *A Cognitive Model of Posttraumatic Stress Disorder*, 38 BEHAV. RSCH. & THERAPY 319, 324 (2000).
[8] *Deterring Staff Sexual Abuse of Federal Inmates*, OFF. OF THE INSPECTOR GEN. (2005), https://oig.justice.gov/sites/default/files/archive/special/0504/index.htm.
[9] Tamara Blakemore, James Leslie Herbert, Fiona Arney & Samantha Parkinson, *The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence*, 74 CHILD ABUSE & NEGLECT 35, 36 (2017).

sexual assault.[10] Those who study sexual violence against inmates in prisons estimate that 33% of victims of sexual violence by staff in prisons are women, though women make up only 7% of inmates in the US.[11] Several aspects of institutional sexual abuse are considered that make it a uniquely destructive form of sexual violence. Below, factors unique to institutional abuse in a carceral settings will be discussed.

Vulnerable victims

Individuals in prisons and detention centers are likely to have a number of other stressors in their lives that precipitated or contributed to their having been incarcerated. Inmates in these settings often have suffered adverse life events and have mental illness and other functional impairments. It is well-documented that incarcerated women have high rates of early trauma and maltreatment, adverse family experiences such as family conflict and abandonment, and substance abuse and psychosocial and medical problems.[12] As discussed earlier, previous victimization may leave an incarcerated person more vulnerable to further abuse or coercion. Additionally, conditions of poverty, discrimination, and community violence may be factors in the lives of incarcerated women that have contributed to their poor functioning before they were incarcerated. Thus, women who suffer sexual violence in institutions may have other trauma and adversity in their lives that make them even more vulnerable after suffering abuse.

Carceral environmental factors

Prisons, jails and detention centers have conditions that make sexual violence more likely and potentially more severe for victims. Prisons and jails inherently entail restrictions on inmates' freedom, including restrictions on movement, on communication with the outside world, and on activities in which they can engage. The physical space of prisons and detention centers is widely varied, ranging from dormitory housing to locked individual or shared cells around a common area to solitary confinement units where isolated prisoners have no contact with anyone except guards. Prisoners' movement is restricted and highly controlled by staff. Staff may make decisions about how and where to move a prisoner, thereby creating opportunities for abuse to occur away from other inmates, staff or video cameras. Additionally, staff may enter prisoners' cells and require restraints, such as handcuffs or shackles that greatly hamper inmates' ability to move or protect themselves. Thus, overall, prisoners are in highly restrictive settings where staff have potentially unfettered access to them, including in physically isolated and restrictive environments.

Power dynamics in carceral settings

Power dynamics in institutional settings such as prisons and detention centers create the conditions for those in custody to be exploited and to then have little recourse as to how to

[10] Nancy Wolff, Cynthia L. Blitz, Jing Shi, Ronet Bachman & Jane A. Siegel, *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. OF URB. HEALTH 835, 844 (2006).
[11] Gina Fedock, Cristy Cummings, Sheryl Kubiak, Deborah Bybee, Rebecca Campbell & Kathleen Darcy, *Incarcerated Women's Experiences of Staff-Perpetrated Rape: Racial Disparities and Justice Gaps in Institutional Responses*, 36 J. of Interpersonal Violence 8668, 8669 (2019).
[12] *See generally,* BARBARA OWEN, JOYCELYN POLLOCK, JAMES WELLS & JENNIFER LEAHY, CRITICAL ISSUES IMPACTING WOMEN IN THE JUSTICE SYSTEM: A LITERATURE REVIEW (Nat'l Inst. of Corrs. 2014).

respond, report or prevent further harm coming to them. Sexual abuse of women prisoners takes place in an environment in which the victims have highly restricted physical liberty, as well as extensive time in the presence and control of perpetrators. Also, guards and correctional officers and even other prison staff have the power to enact punishment on those in their custody, remove and grant them privileges, and affect decisions that are made about their conditions of confinement. Staff members with more institutional power, such as those higher up the chain of command, are likely to be perceived by incarcerated women as having more ability to control them, punish them or affect their conditions of confinement. Additionally, as mentioned above, inmates have limited contact and communication with people on the outside world. Further, women prisoners' already-restricted movements and communications are also monitored by prison guards and staff.

There is a "continuum of coercion" that can occur in institutional settings where sexual victimization takes place, where those in power use a range of privileges, punishments, threats and frank violence to enact sexual violence against their stewards.[13] On the one hand, some perpetrators use their power and control to "groom" victims until the person feels complicit in the sexual activities that the perpetrator enacts. Grooming refers to the building of trust with victims, so as to then engage in inappropriate activity with them (usually sexual in nature), while preventing them from disclosing or challenging the behaviors. Critical to the process of grooming is that the perpetrator offers inducements to behaviors that are inappropriate, such as rewards for engaging in sex acts, allowing explicit photographs, etc. For example, a guard or prison staff member allows an inmate more time out of her cell, only to then demand sexual activity from her. The victim, then, experiences these activities as something she "chose" to do and so she will be even less likely to disclose the activities, fearing blame or retaliation. In particularly coercive dynamics of sexual violence, victims cling to moments of positive emotion, kindness and small tokens or privileges from the abuser, even believing that the perpetrator cares for them, and they try to block out the reality of how much they are being threatened, used and hurt. Victims learn to deny their own feelings and do what is necessary to keep themselves from being abused in a worse way.

Institutional sexual violence can involve frank coercion, in which abusers use force, power and threat to enact abuse on victims. These types of dynamics are more common in "closed systems," where perpetrators have high power and close extended proximity to inmates. In these situations, perpetrators control their victims' environment, their access to basic bodily needs, their privacy and, in doing so, create a culture of compliance. Threats of institutional consequences become a powerful force for control as staff/perpetrators demand silence from those they abuse. The staff's coercive control—"the systematic repetitive infliction of psychological trauma"— takes away the victim's sense of autonomy.[14] While violence can be used in this process, simply the threat of harm or punishment is also effective in creating compliance, especially in individuals with little power or recourse. This process can result in

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[13] BARBARA OWEN, JAMES WELLS, JOYCELYN POLLOCK, BERNADETTE MUSCAT & STEPHANIE TORRES, GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN'S FACILITIES vii, viii, 42, 92 (2008).

[14] Judith Lewis Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 J. of Traumatic Stress 377, 383 (1992).

passivity or seeming acquiescence in victims, sometimes called "learned helplessness," as they stop resisting abuse and even appear to move towards it.

Peer dynamics in prisons

Peer dynamics in prisons or detention facilities also contribute to the deleterious effects of sexual violence and the unlikelihood that inmates will disclose their victimization. Many factors make the disclosure of abuse a highly problematic choice for a victim. An inmate who has suffered sexual violence can be ostracized and shunned by other inmates, further magnifying what can be intense feelings of shame surrounding the event. Information about sexual violence also travels quickly, both inside and outside of prison, adding to the humiliation of the event. Inmates can be vulnerable to being victimized again because other inmates view her as weak and damaged. Victims of sexual violence in prison must redouble their efforts to be perceived as "tough" in order to prevent additional abuse. All of these dynamics contribute to the widely proven fact that survivors of institutional abuse may not disclose abuse for years, if ever.

Disclosure of sexual trauma: Why don't victims tell?

Studies and investigations repeatedly demonstrate that people who have been sexually abused in prison do not disclose their abuse. One study found that only 8% of sexually victimized inmates had reported their abuse.[15] This finding, robustly reported in multiple studies of sexual abuse, demonstrates the profound barriers to inmates' ability to come forward after violence by staff. The dynamics of institutional sexual violence described above—coercive control, grooming and environmental control—contribute to the difficulty victims have in disclosing the abuse. Even seemingly contrasting dynamics, in fact, are often used in combination by perpetrators to prevent disclosure. Small privileges and actions designed to make a victim feel "special" are combined with harsh, threatening responses that make clear the power differential that exists between the victim and abuser. Additionally, peer dynamics in prisons or detention facilities of residents scapegoating and further victimizing those who have been abused create powerful reasons for survivors to stay silent.

Pragmatically, the nature of imprisonment is that information that inmates wish to convey must go through the channels within the institution, especially for inmates who do not have attorneys or supportive relationships on the outside. Thus, survivors of institutional abuse must report their abuse to the very staff who may be aware of it already, may have colluded or ignored the abuse in some way or, in the very least, may not believe inmates or want to create negative consequences for staff peers. Reporting staff abuse has been shown to result in retaliation against inmates, including punishment, loss of privileges or frank abuse.[16]

In addition to all of the systemic barriers to reporting abuse, survivors also may struggle with emotional reactions to sexual violence that prevent them from coming forward. Shame, humiliation and feelings of guilt can occur, particularly if the coercion from the staff entailed rewards or privileges that make the survivor feel somehow complicit in the abuse. Self-blame is

[15] RAMONA R. RANTALA, JESSICA REXROAT & ALLEN J. BECK, DEPT. OF JUST., NCJ 244227, SURVEY OF SEXUAL VIOLENCE IN ADULT CORRECTIONAL FACILITIES, 2009-11 – STATISTICAL TABLES (2014).
[16] Fedock et al., *supra* note 11, at 8673.

a frequent experience for survivors of sexual violence across all settings. Additionally, other mental health struggles, such as depression, addiction, or psychosis, that affect mood, motivation and clarity of thought could also inhibit a survivor from coming forward.

Treatment for sexual victimization

Experts in the treatment of sexual violence note that sexual assault and rape, unlike other crimes, lead to outcomes that frequently do not resolve without proper mental health treatment.[17] As discussed above, the experience of sexual violence has been shown to lead to pervasive and severe negative outcomes in survivors, many of which are exacerbated by the particular dynamics and conditions of institutional sexual violence. These negative mental health and behavioral outcomes frequently require professional evaluation and treatment in order to be addressed and are unlikely to remit on their own.

There is extensive treatment literature on effective practices for evaluating and treating survivors of sexual violence. Components of assessment and treatment that have shown to be most effective will be discussed below.

Assessment of survivors

Because the potential harmful consequences of sexual violence encompass a wide range of physical, emotional, cognitive and behavioral problems, treatment of sexual violence survivors must begin with a thorough, trauma-focused evaluation. For survivors of institutional sexual violence, it is critical that assessment begins from a position of determining the survivors' condition in a manner that allows them to be completely open about what happened to them. This means they must be free of concerns about retribution or retaliation for reporting their abuse. Survivors who are incarcerated by the institution or system in which the abuse took place are unlikely to be able to freely describe what happened to them, not only because they may fear reataliation, but also because their symptoms will be heightened by being in the setting where the abuse took place.

Survivors' symptoms may change over time, so it is important to assess them at multiple points if possible—in the immediate aftermath of the assault, after initial medical assessment and any needed medical care and at later points, as the survivor has settled into a post-acute stage. Some survivors will have a decrease in symptoms over the course of several months, post-assault, but it has been shown that about 50% of sexual assault survivors will go on to have ongoing symptoms several months and even years after the assault.[18] Assessment of survivors of sexual violence requires an evaluation to determine what diagnosis, if any, the survivor is suffering from and what symptoms are causing the person difficulty or impairment.[19] Assessment must include thorough evaluation of PTSD, depression, suicidality, and any other

[17] Katrina A. Vickerman & Gayla Margolin, *Rape Treatment Outcome Research: Empirical Findings and State of the Literature* 29 Clinical Psych. Rev. 431, 432 (2009).
[18] Edna B. Foa, Barbara O. Rothbaum, David S. Riggs & Tamera B. Murdock, *Treatment of Posttraumatic Stress Disorder in Rape Victims: A Comparison Between Cognitive-Behavioral Procedures and Counseling*, 59 J. of Consulting & Clinical Psych. 715 (1991).
[19] EDNA B. FOA & BARBARA OLASOV ROTHBAUM, TREATING THE TRAUMA OF RAPE: COGNITIVE-BEHAVIORAL THERAPY FOR PTSD 91-93 (Guilford Press 1998).

symptoms or problems in functioning. Survivors' symptoms—such as avoidance of memories, hyperarousal and dissociation—may directly affect the survivors' ability to recount what happened to her and how it is affecting her. Thus, an evaluation must be conducted that uses care and trauma-informed methods of interviewing, so as not to retraumatize the subject.

Treatment after sexual violence: Best practices

Despite the many negative health and mental health outcomes that have been shown to come from sexual violence, there is also robust evidence that therapeutic intervention that addresses the negative impacts of sexual violence can be highly effective. Empirical study of therapeutic practice for treatment of survivors of sexual assault and violence has identified several components of treatment that are most effective in decreasing mental health problems and behavioral problems, such as PTSD, dysregulated emotions, anxiety, substance abuse, and addiction. There is evidence that individual therapy is most effective for sexual assault survivors, rather than group therapy.[20] Treatment for sexual assault is best described as multi-modal in that a number of techniques and approaches are used to assist the survivor, with cognitive behavioral techniques showing the most efficacy.[21] There are several therapeutic components that are widely recognized to be effective in decreasing symptoms. These are:

1. Establishment of safety: The first component of treatment after trauma of any kind, much less sexual violence, is to determine if the individual is free from the threat of further harm, abuse, or victimization. This principle is widely accepted as the starting point of therapy because meaningful improvement of trauma-based symptoms and conditions cannot take place if there is ongoing trauma occurring for the individual. Thus, for individuals who are suffering intimate partner violence, family abuse, or abuse in an institution such as a prison—all situations in which the person may still reside with a perpetrator--the establishment of safety takes priority before any movement into treatment. As Judith Herman, one of the pioneering experts in trauma treatment, has written,

   > The first task of recovery is to establish the survivor's safety. This task takes precedence over all others, for no other therapeutic work can possibly succeed if safety has not been adequately secured. No other therapeutic work should even be attempted until a reasonable degree of safety has been achieved.[22]

   For individuals who suffered sexual violence by staff while incarcerated, it is essential that they be removed from the facility where they were abused. Consideration must be then given to whether these victims can receive meaningful treatment in another carceral setting, particularly one that is administered and run by the same institutional authorities who supervised the facility in which they were abused. If perpetrators were able to abuse those in their custodial care with impunity, these victims are unlikely to feel free from

[20] Joanne E. Taylor and Shane T. Harvey, *Effects of psychotherapy with people who have been sexually assaulted: A meta-analysis*, 14 Aggression and Violent Behavior 273, 282-83 (2009).
[21] Vickerman & Margolin, *supra* note 17, at 438.
[22] JUDITH L. HERMAN, TRAUMA AND RECOVERY 159 (Basic Books 1992).

further abuse or retaliation simply by being moved to a different facility in the same system. Additionally, environmental factors—such as cells, guards' keys and video cameras—may serve as visceral reminders of the abuse, "flipping" the survivor into states of reexperienced trauma as she sees the triggering item and is brought back to the state of powerlessness and fear. Indeed, for survivors of interpersonal violence, environmental reminders of their victimization are potent triggers that often worsen symptoms substantially.

2. Psychoeducation: Once safety has been established for a survivor of sexual violence, several components of therapy are recommended. First, survivors are encouraged to learn about and understand the reactions and symptoms that are causing them difficulty, with a goal of understanding the neurophysiological reactions to trauma that have led to their current condition. Thus, survivors are taught about normal reactions to trauma and taught to recognize them in themselves.

3. Coping enhancement and stabilization: Most treatment of sexual violence victims entails a focus on building coping strategies to deal with symptom management, including hyperarousal, anxiety, intrusive reexperiencing, avoidance, and negative thinking. This can include the teaching of array of skills, including breathing techniques, mindfulness, thought-stopping and distraction. The development of these practices assists survivors in developing more stable functioning.

4. Narrative expression: Once coping has been enhanced, treatment protocols for trauma survivors often contain a component of narrative expression and exposure to the traumatic memory. Repeated exposure to the trauma narrative in a careful, therapeutic context has been shown to be highly effective at decreasing symptoms after trauma in general, and sexual assault, specifically. This phase of treatment can take time and requires that the survivor be in a safe, stable living condition with coping resources available to her.

5. Cognitive treatment: Finally, most trauma-focused treatments for sexual violence address cognitive distortions and meanings that the survivor is struggling with, in order to decrease negative, self-blaming, and guilt-based thoughts and feelings. Treatment with this type of cognitive appraisal requires a trained practitioner in cognitive-behavioral methods.

Overall, treatment for survivors of sexual violence has shown good effectiveness, with certain important parameters. First, the survivor must not be suffering ongoing trauma or threat of victimization or there will not be a meaningful opportunity to recover from the past victimization. Second, a multi-modal treatment protocol that addressed neurophysiological symptoms, cognitive distortions and social impact of trauma is best suited for survivors of sexual violence. Finally, practitioners who provide the treatment must be trained in trauma-focused treatment and evidence-based practices with the most effective methods available.

Summary

Sexual abuse of inmates in institutional, custodial settings is highly traumatizing for the victims. The deleterious effects of sexual violence are widely accepted and proven in clinical practice and empirical study in the field of psychology. Sexual violence can lead to longstanding, pervasive problems in functioning, including in psychological, physical, social and behavioral domains. Experiencing sexual violence has been shown to increase the risk of psychiatric disorder, suicidality, emotional dysregulation, memory problems, and interpersonal and cognitive distortions. Institutional abuse in carceral settings takes place within an environment of high control and isolation, thereby exacerbating the likelihood of worse victimization across time and multiple perpetrators. The dynamics of grooming, coercion, threats, and a peer culture of scapegoating contribute to the high likelihood that victims will not disclose their abuse, a robustly proven finding. Neurophysiological responses to abuse, such as dissociation and memory impairment also serve as barriers to disclosure, as victims detach from and block access to memories, both consciously and unconsciously. People may wait years before coming forward to report that they were sexually abused, if they come forward at all. Sexual abuse of prisoners by those who are supposed to protect them has devastating consequences and can contribute to difficulties in psychological, social and physical health across the lifespan.

Survivors of sexual violence require therapeutic intervention to address the damaging consequences of victimization. The first principle of trauma treatment is the ensuring of safety for the survivor. That is, it is widely proven that meaningful treatment cannot take place if individuals feel that they are still in danger of harm or threats of retaliation. Safety requires that an individual is in an environment of protection and freedom from further threats or abuse. For survivors of institutional abuse, continuing to be held by the same institutional stakeholders, in the setting in which the abuse took place, with myriad triggers and environmental reminders, will likely prevent any therapeutic benefit from taking hold. In order to plan treatment, a trauma-focused assessment is required to determine the breadth and depth of symptoms, as well as any diagnoses of the survivor. Individual treatment that entails psychoeducation, skill-building, narrative and cognitive/behavioral methods is most appropriate for individuals who have been victims of sexual violence. This treatment is complex and must be performed by trained clinicians, with expertise in working with sexual violence survivors.

If I can provide further information, please do not hesitate to contact me.

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Education

University of Michigan, Ann Arbor, Michigan
Doctor of Philosophy, Clinical Psychology (1998)
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Dissertation Topic: Meeting the Needs of Parentally Bereaved Children: A Model of Child-Centered Parenting
Awards: Regents Fellowship (1992-1996); Power Fellowship (1995-1996); Summer Research Fellowship (1994, 1995); Rackham Dissertation Grant (1997)

Georgetown University, Washington, D.C.
Bachelor of Arts, Interdisciplinary Studies: English, philosophy, history. (1986)
Awards: Graduated cum laude; National Jesuit Honor Society
Extensive extracurricular theater and social service experience

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Professional and Board Memberships

Committee to Protect Journalists, Secondary Traumatic Stress Advisory Group (2019).

American Psychological Association, Member (2008-2012).

International Society for Traumatic Stress Studies, Member (Ongoing).

Warrior Relief, Board member. (2013).

826NYC, Advisory Board member (2005-present).

Hands of Change, Advisory Board member (2003-2008).

Editorial Positions

APA Books, Invited peer reviewer, American Psychological Association, Washington, DC (2018).

Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Editorial working group contributor: Psychological evidence of torture. (2018-2021).

Journal of Traumatic Stress, Ad hoc reviewer. (2017-present).

Journal of Clinical Child and Adolescent Psychology, Ad hoc reviewer, American Psychological Association, Div. 53. (2015).

Journal of Clinical Psychology, Ad hoc reviewer, Wiley Periodicals. (2015).

Cambridge University Press Medical Group, Ad hoc reviewer, Cambridge, UK (2014).

Anxiety, Stress, and Coping: An International Journal, Ad hoc reviewer, Brunner-Routledge Press. (2013).

The Psychosocial Impact of Detention and Deportation on Migrant Families. Inter-American Commission on Human Rights, Washington, DC. Expert reviewer on report by authors Brabeck, K., Lykes, MB., Lustig, S. (2013).

International Journal of Law and Psychiatry, Ad hoc reviewer, Universite de Montreal. (2012).

American Psychological Association Task Force on the Psychosocial Effects of War on Children and Families Who Are Refugees From Armed Conflict Residing

in the United States, Chair. *American Psychological Association.* (2008-2010).

Clinical Experience/Employment

New York University School of Medicine, New York, NY
Clinical Instructor, Psychiatry (5/03-9/21)

Bellevue/NYU Program for Survivors of Torture, New York, NY
Psychological Consultant (7/19-present)
Senior Psychologist (7/08-present)
Clinical Co-Director (11/01-7/08)
Staff Psychologist (9/99-11/01)
Provided clinical services to adults, children/adolescents and families at this clinic for survivors of torture and war trauma. Conducted evaluation and assessment services as well as individual, family, and group therapy. Provide trainings and consultations nationally on issues pertaining to trauma, torture, and refugee mental health. Supervised psychological, psychiatric and social work trainees.

Journalist Trauma Support Network, Dart Center for Journalism and Trauma, Columbia University School of Journalism, New York, NY.
Consulting Psychologist (11/20-present)

Freedom House, Washington, DC.
Consultant (2/18-present)
Consulted with managers and teams at Freedom House on trauma-informed practices and conducted trainings and workshops on trauma-facing work in human rights across the organization.
Conducted trainings with Freedom House-funded programs in Iraq and Pakistan on trauma-informed human rights practices and addressing secondary traumatic stress.

United States District Court, Southern and Eastern Districts of New York, New York, NY.
Psychological expert/Consultant (Varied)
Served as evaluator/consultant in Federal District Court for several cases.

Office of Military Commissions Chief Defense Counsel, Washington, DC/Guantanamo Bay, Cuba
Psychological expert/Consultant (9/08-present)

Serve as evaluator/consultant for defense teams in Office of Military Commissions in Guantanamo Bay. Have conducted extensive evaluations of several detainees, including psychological testing, interview, and observation.

NYU Child Study Center, New York, NY

Post-Doctoral Fellow (9/98-8/99)

Recipient of clinical fellowship at this multi-disciplinary mental health clinic for children and adolescents. Provided assessment, evaluation, and treatment services for children and families within the Center's Anxiety Disorders Clinic, Attention Deficit/Hyperactivity Clinic, Infant and Early Childhood Development Clinic, and Learning and Academic Achievement Institute. Consulted at The Children's Storefront in Harlem, NY. Provided parenting workshops through the Center's Parenting Institute.

University Center for the Child and Family, Ann Arbor, MI

Intern/Practicum Student (9/93-10/96)

Recipient of training fellowship on clinical and research issues pertaining to loss in families. Provided individual, couples, and family therapy. Conducted therapy groups with divorced parents, bereaved siblings, and children from violent homes. Administered psychological assessments for custody, forensic, and academic evaluations (WAIS/WISC, MMPI, Exner Rorschach). Areas of specialization: loss and bereavement in families, therapy with the deaf and hearing-impaired.

University of Michigan Hospital, Child and Adolescent Psychiatric Division, Ann Arbor, MI

Practicum Student (1/94-5/94)

Administered psychological assessment and co-led Social Skills Group for inpatient adolescents.

Preventive Intervention Project, Judge Baker Children's Center, Boston, MA

Project Coordinator (9/90-8/92)

Coordinated longitudinal project examining a family-based intervention for depressed parents. Contributed to development of assessment battery, coding systems, and reliability studies, participated in grant and manuscript writing.

McLean Hospital, Belmont, MA

Mental Health Worker (5/89-8/90)

Responsibilities on a 23-bed locked psychosocial unit included milieu management, treatment planning, case presentation at treatment conferences and crisis intervention. Co-led adolescent group.

Castle School, Cambridge, MA

Senior Counselor/Team Leader (2/87-3/89)

Responsibilities at a 12-bed residential school for emotionally disturbed adolescents included milieu and case management, crisis intervention, hiring and scheduling staff.

Adolescent and Family Development Project, Harvard University, Boston, MA

Research Assistant (6/89-1/91)

Coded interviews using Q-Sort of Ego Processes.

La Casa de la Mujer, Chimbote, Peru

Community Organizer (6/86-11/86)

Planned and participated in workshops providing psychological, legal, and educational information in impoverished communities.

Teaching/Training Experience

New York University Medical School, NY, NY

Clinical Instructor

Clinical Supervisor, Psychological Interns and Externs, Psychiatric Residents (1999-present)

Third year Residents Course Co-Director: Introduction to Clinical Work with Survivors of Torture (2003-2006)

Lecturer, Intern and Residents Seminars, (2001-present)

The Second City, Detroit, MI; New York, NY

Facilitator/Improvisation Instructor **(**1994-present)

Design and conduct intensive workshops for businesses, focusing on team-building, creativity, and communication skills in organizations. Clients include Pfizer Pharmaceuticals, Major League Baseball, MTV, and General Motors.

Performer/Understudy (1994-2001)

Served as performer and understudy for Main Stage company, corporate theater company and touring company of *The Second City*, Detroit, MI.

Zone, Sports Media Consulting, Cleveland, OH (2007-present)
Conduct sports media training and consultations for professional athletes, coaches, general managers and collegiate athletes and coaches, including NBA, NHL and MLB.

The American Musical and Dramatic Academy, New York, NY
Improvisation Instructor (1/99-12/99)
Designed and taught improvisation course for acting students in this conservatory program.

The University of Michigan, Ann Arbor, MI
Graduate Student Instructor (1994, 1996)
Utilized role-play, lecture and discussion formats in this course on introductory counseling skills. Supervised undergraduate teaching assistants.

Gilda's Club, New York, NY
Improvisation Instructor (2/97-2/99)
Taught course on improvisation at this wellness center for individuals with cancer.

Georgetown University, Washington, DC
Improvisation Instructor (Summer, 1997)
Taught course on improvisation at the Alumni College.

The Castle School, Cambridge, MA
Drama Teacher (2/87-2/89)
Taught drama and improvisation at this residential school for emotionally disturbed teens.

Publications

United Nations. (2022). *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*. Contributing editor. New York: United Nations.

Porterfield, K. (In Press). Trauma-informed client communication strategies for lawyers. In Maki, H., Florestal, M., McCallum, M., and Wright, J. (Eds.) Trauma-Informed Law: A Primer for Lawyer Resilience and Healing. American Bar Association (Chicago, IL).

Porterfield, K. (2020). Principles of care of survivors of organized violence in a global society, In Rubin, N and Flores, R. (Eds.) The Cambridge Handbook of Psychology and Human Rights, Cambridge University Press.

WITNESS. (2020). Video as Evidence Field Guide: Using Video to Support Accountability for Sexual and Gender-Based Violence Crimes (SGBV). Invited contributor.

Brabeck, K.M., **Porterfield, K**., & Loughry, M. (2015). Psychosocial and mental health issues, assessment, and interventions with immigrant individuals and families facing detention and deportation in the United States. In D. Kanstroom and M.B. Lykes (eds). *The new deportations delirium: Interdisciplinary responses*. New York University Press.

Lindhout, A. & **Porterfield, K.** (2014). Healing in forgiveness: A discussion with Amanda Lindhout and Dr. Katherine Porterfield. *European Journal of Psychotraumatology, Vol. 5. Available online at: http://www.ejpt.net/index.php/ejpt.*

American Psychological Association. (2010). *Resilience and Recovery after War: Refugee Children and Families in the United States: Report of the APA Task Force on the Psychosocial Effects of War on Children and Families Who are Refugees from Armed Conflict in the United States*. Washington, DC: Lead author/Chair.

Porterfield, K. & Akinsulure-Smith, A. (2007). Therapeutic Work with Children and Families. In H. Smith & A. Keller (Eds.), *Like a Refugee Camp on First Avenue: Insights and Experiences from the Bellevue/NYU Program for Survivors of Torture* (pp 299-335). New York, Grant-funded publication.

Keller, A., Lhewa, D., Rosenfeld, B., Sachs, E., Aladjem, A., Cohen, I., Smith, H., **Porterfield, K.**, Wilkinson, J., Perdomo, L., & Smith, Y. A. (2006). Traumatic experiences and psychological distress among an urban refugee population. *Journal of Nervous and Mental Disease, 194 (3), 188-194*.

Saldinger, A., Cain, A., & **Porterfield, K.** (2005). Traumatic stress in adolescents anticipating parental death. *The Prevention Researcher, 12 (4), 17-20.*

Saldinger, A., Cain, A., **Porterfield, K.** & Lohnes, K. (2004). Facilitating attachment between school-aged children and a dying parent. *Death Studies, 915-938.*

Saldinger, A., **Porterfield, K.**, & Cain, A. (2004). Meeting the needs of parentally-bereaved children: A framework for child-centered parenting. *Psychiatry: Interpersonal and Biological Processes, 67(4)*, 331-352.

Saldinger, A., Cain, A., & **Porterfield, K.** (2003). Managing traumatic stress in children anticipating parental death. *Psychiatry: Interpersonal and Biological Processes,* 66 (2), 168-181.

Porterfield, A., Cain, A., & Saldinger, K. (2002-2003). The impact of early loss history on parenting of bereaved children: A qualitative study. *Omega: Journal of Death and Dying,* 47(3):203-220.

Beardslee, W, Salt, P., **Porterfield, K.**, et al. (1993). Comparison of preventive interventions for families with parental affective disorder. *J. Am. Acad. Child Adolesc. Psychiatry,* 32(2), 254-263.

Presentations

Porterfield, K. (June 27-28, 2022). Creating a trauma-informed journalism practice. Two-day training for IWMF: Reclaiming Voices conference for exiled Afghani women journalists. Washington, DC.

Porterfield, K. (May 5, 2022). Trauma-informed interviewing: Biopsychosocial approaches. Training for New York Times reporting staff. (Virtual).

Porterfield, K. (April 12, 2022, April 25, 2022). The biopsychosocial imprint of secondary traumatic stress in journalism. Training for Axios Media. (Virtual).

Einashe, I. & Porterfield, K. (March 18, 2022, March 25, 2022). The biopsychosocial imprint of trauma in journalism: How to recognize, how to respond. Two day training for Refugee Journalism Project for 20 refugee journalists working in UK in exile. (Virtual)

Porterfield, K. (March 17, 2022). Coping through the trauma of COVID-19: Cultivating biopsychosocial wellbeing in critical care staff with a webinar series.

Critical Care Grand Rounds, Columbia University, New York Presbyterian Hospital. (Virtual)

Porterfield, K. (March 15, 2022). Trauma-informed journalism: Biopsychosocial approaches. Training for Prologue Podcast. (Virtual).

Porterfield, K. (March 2, 2022). Trauma-informed journalism: Biopsychosocial approaches. Training for Beech Hill Podcast. (Virtual).

Porterfield, K. (February 14, 2022). Trauma-informed journalism: Biopsychosocial approaches. Training for NPR Podcast "Louder Than a Riot." (Virtual).

Sachs, E., Newman, E., Shapiro, B., & Porterfield, K. (January 28 and February 4, 2022). Treating journalists in distress. Two-part training for Comcast/Compsych clinicians serving NBC News. CEs provided. (Virtual).

Akinsulure-Smith, A, and Porterfield, K. (January 27, 2022). Trauma-informed work with persecuted minorities. Two-part training for Hammurabi Human Rights Organization, Iraq. (Virtual).

Porterfield, K. and Meneses, R. (January 6 and 13, 2022). Trauma and resilience: A workshop for freelance journalists. Two-day workshop sponsored by Dart Center Europe and the Rory Peck Trust. (Virtual).

Porterfield, K. (December 13-14, 2021). Trauma-informed practice for journalists. Part of team for two-day training with Next Generation Safety and International Women's Media Foundation. (In-person).

Porterfield, K. (December 8, 2021). The biopsychosocial imprint of trauma in journalism: Recognizing and developing a wellbeing practice. Training for Insider Media staff. (Virtual).

Porterfield, K. (November 18, 2021). The biopsychosocial imprint of trauma in journalism: Recognizing and developing a wellbeing practice. Training for Time Magazine newsroom staff. (Virtual).

Porterfield, K. (October 26, 2021). Trauma-informed lawyering: A biopsychosocial approach. Training for Columbia University Government Program clinic. NY, NY. (Virtual)

Porterfield, K. (October 22, 2021). Trauma-informed lawyering: A biopsychosocial approach. Training for Columbia University Immigration and International human rights clinics. NY, NY. (Virtual)

Porterfield, K. (October 13, 2021). Trauma-informed work with incarcerated people. Training for NYU Solitary Confinement and Prison Teaching Projects. NY, NY. (Virtual)

Porterfield, K. (September 29, 2021). Cultivating resilience in the ICU and ECMO team. Invited panelist at 32nd Annual ELSO International Conference. (Virtual).

Porterfield, K. (September 13, 2021). The biopsychosocial imprint of trauma in journalism: Recognizing and developing a wellbeing practice. Training for Society for Professional Journalists. (Virtual).

Porterfield, K. (September 1-2, 2021). The biopsychosocial imprint of trauma in journalism: Recognizing and developing a wellbeing practice. Training for Dart Centre Europe: Red de Mujeres Comunicadoras de Internacional. (Virtual)

Porterfield, K. (August 27, 2021). Managing stress amidst crisis: Press-freedom work in Afghanistan. Workshop presented for Dart Center for Journalism and Trauma. (Virtual).

Porterfield, K. (August 25, 2021, October 12, 2021). Secondary traumatic stress in journalism: A biopsychosocial approach to wellbeing. Two-part training for Patch Media staff. (Virtual).

Porterfield, K. (August 16, 2021). Trauma-informed press freedom work: A biopsychosocial approach to wellbeing. Training for staff at Free Press Unlimited. (Virtual).

Edwards, S, Colon, R. & Porterfield, K. (July 22, 2021). Treatment of an adolescent victim of sex trafficking: Medical and mental health considerations. Mental health and medical conference, Adolescent Health Center, Mt. Sinai Hospital. (Virtual).

Porterfield, K. (July 14, 2021). The biopsychosocial imprint of trauma and trauma-informed interviewing. Training for Lost in Europe staff. (Virtual).

Porterfield, K. (July 8, 2021). The biopsychosocial imprint of trauma: Tips for journalists. Training for Radiolab Staff. (Virtual).

Porterfield, K. (June 29, 2021, August 18, 2021). Coping through trauma: Journalist well-being practice in a crisis. Training for Miami Herald newsroom staff. (Virtual).

Porterfield, K. (June 24, 2021). Secondary traumatic stress in journalism: A biopsychosocial approach to well-being. Training for McClatchy News Organization staff. (Virtual).

Porterfield, K. (June 17, 2021). The biopsychosocial imprint of trauma: How to recognize, how to respond. Training for Journalist in Distress (JID) Network caseworkers. (Virtual).

Pradhan, A., Prasow, A., Sethi, A., & Porterfield, K. (May 4, 2021). Guantanamo and beyond: A panel discussion on military commissions, torture and the way forward. Invited participant. Webinar for American Bar Association, Criminal Justice Division.

Porterfield, K. (April 29, 2021). Secondary traumatic stress in journalism: A biopsychosocial approach to well-being. Training for Public Source News staff (Virtual).

Porterfield, K. (April 9, 2021). Understanding the biopsychosocial imprint of complex trauma. 2021 Annual Conference Tennessee Association of Criminal Defense Lawyers. (Virtual).

Porterfield, K. (April 7, 2021). The biopsychosocial imprint of trauma: Working with traumatized clients. 2021 Annual Conference (CLE's provided). The Public Defenders Association of Pennsylvania. (Virtual).

Sachs, E., Porterfield, K, Newman, E., & Shapiro, B. (March 26, 2021, April 4, 2021). Trauma-informed therapeutic practice with journalists. Training for pilot program of Journalist Trauma Support Network. Dart Center for Journalism and Trauma. (Virtual).

Einashe, I. & Porterfield, K. (March 3-4, 2021). Trauma-informed field work with children and their families: Creating a frame for effective and ethical interviewing.

Training for *Norwegian Refugee Council* staff by the Dart Center for Journalism and Trauma. (Virtual)

Porterfield, K. (February 18, 2021). Enhancing well-being during a time of chronic stress. Webinar for Physicians for Human Rights staff. (Virtual)

Porterfield, K. (February 12, 2021). Wake Forest Law Review Symposium: Secondary trauma in the legal profession. Invited panelist. (Virtual)

Porterfield, K. (December 3, 2020). Coping with the stress of COVID-19 in legal work. Federal Public Defender Conference, District of Kansas. (Virtual)

Porterfield, K. (November 24, 2020, February 2, 2021). Enhancing well-being during a time of chronic stress. Webinars for Covid Tracking Project staff. (Virtual)

Porterfield, K. (November 12, 2020, February 18, 2021). Enhancing well-being during a time of chronic stress. Webinars for Physicians for Human Rights staff. (Virtual)

Porterfield, K. (October 27, 2020). Working with traumatized client: The biopsychosocial imprint of trauma. Advancing Real Change Seminar. (Virtual)

Porterfield, K. (October 19, 2020). Secondary traumatic stress in journalism: A biopsychosocial approach to well-being. Training for the International Women's Media Foundation, Hazardous Environments Training. Washington, DC. (Virtual)

Porterfield, K. (October 14, 2020). Interviewing individuals in solitary confinement: Recognizing and responding to trauma. Training for NYU Solitary Confinement Project. NY, NY. (Virtual)

Porterfield, K. (October 2, 2020). Enhancing well-being during a time of chronic stress: Lessons from the trauma field. Webinar for Federal Defenders of San Diego CJA conference. (Virtual)

Porterfield, K. (September 28, 2020). The biopsychosocial imprint of complex childhood trauma. Webinar for University of Texas Law School Capital Punishment Clinic. (Virtual)

Porterfield, K. (June 23, 2020). Enhancing well-being during a time of stress: A model of self-assessment and care. Webinar for CCR Intern class. NY, NY. (Virtual)

Porterfield, K. (June 18, 2020). Trauma-informed work with incarcerated youth. Webinar for Center for Motivation and Change. NY, NY. (Virtual)

Porterfield, K. (June 3, 2020). Recognizing and responding to the biopsychosocial impact of stress: Enhancing well-being in yourself and your team. Webinar for Freedom House international management team. Washington, DC. (Virtual)

Porterfield, K. (May 22, 2020). Working with traumatized populations during a time of stress. Webinar for International Women's Media Foundation staff. Washington, DC. (Virtual)

Porterfield, K. (May 2020-October 2020). Coping through trauma: A biopsychosocial approach to managing stress and well-being in an ongoing trauma. Webinars for New York Presbyterian Pulmonary Critical Care teams. NY, NY. (Virtual)

Porterfield, K. (April 30, 2020). Enhancing well-being during a time of stress: A model of self-assessment and care. Webinar for Military Commissions Defense Operations staff. Washington, DC. (Virtual)

Porterfield, K. (April 22, 2020). Recognizing and responding to the biopsychosocial impact of stress: Enhancing well-being in yourself and your team. Webinar for Center for Constitutional Rights management team. Washington, DC. (Virtual)

Porterfield, K. (April 9, 2020). Enhancing well-being during a time of stress: A model of self-assessment and care. Webinar for Center for Constitutional Rights staff. Washington, DC. (Virtual)

Porterfield, K. (April 8, 2020). Enhancing well-being during a time of stress: A model of self-assessment and care. Webinar for Freedom House Emergency Assistance Program. Washington, DC. (Virtual)

Porterfield, K. (March 30, 2020). Making the world hurt less: Enhancing wellbeing during a time of stress. Webinar for International Women's Media Foundation. Washington, DC. (Virtual)

Porterfield, K. (March 19, 2020). Lessons learned from journalists covering pandemics. Webinar for International Women's Media Foundation. NY, NY. (Virtual)

Porterfield, K. and Sachs, E. (February 28, 2020, March 27, 2020). Secondary traumatic stress in journalism: A biopsychosocial approach to well-being. Training for the Nieman Foundation Fellows, Harvard University, Cambridge, MA. (Virtual)

Porterfield , K. (February 14, 2020). The biopsychosocial imprint of trauma in human rights work. Training for Cardozo Law School, Immigrant Rights Project. New York, NY.

Porterfield, K. (December 11, 2019). The biopsychosocial imprint of complex trauma: Implications for evaluation and treatment. Grand Rounds, St. Elizabeth's Hospital, Washington, DC.

Porterfield, K. (November 14-15, 2019). The biopsychosocial imprint of trauma; and Secondary traumatic stress: Strategies for well-being. Presentations at Federal Defenders Orientation Training, Santa Fe, NM.

Porterfield, K. (November 1, 2019). The biopsychosocial imprint of trauma in vulnerable populations. Columbia University Law School. Capital and immigration clinics. NY, NY.

Porterfield, K. (October 24, 2019). The biopsychosocial imprint of trauma in human rights advocacy. Columbia University Law School. International Human Rights Clinic. NY, NY.

Porterfield, K. (September 21, 2019). Interviewing traumatized children. Presenter at *Through the Eyes of Young Children: Reporting on Children and the International Refugee Crisis*. Conference sponsored by DART Center for Journalism and Trauma, Columbia School of Journalism, New York, NY.

Porterfield, K. (September 20, 2019). Recognizing and preventing secondary traumatic stress in journalism. Safety Training for Female Journalists. Sponsored by ROAAAR and International Women's Media Foundation. Brooklyn, NY.

Porterfield, K. (September 18th, 2019). The biopsychosocial impact of trauma: Recognizing trauma and enhancing well-being. Training for Immigrant Justice Corps. New York, NY.

Porterfield, K. (April 19, 2019). The biopsychosocial impact of trauma: Working with traumatized populations. Training for Columbia Law School Immigration Clinic, NY, NY.

Porterfield, K. (April 4, 2019). Recognizing and responding to traumatized patients in a medical setting. Presentation at Global Health Conference, Physician Assistants for Global Health and Mount Sinai Health System Dept of PA Services. NY, NY.

Porterfield, K. (March 1, 2019). The Biopsychosocial impact of trauma: Human rights work with traumatized populations. Training for staff of the Center for Constitutional Rights, NY, NY.

Porterfield, K. (January 26, 2019). Secondary traumatic stress in journalism: A biopsychosocial approach to well-being. Training to the Nieman Foundation Fellows, Harvard University, Cambridge, MA.

Porterfield, K. (November 16, 2018). The biopsychosocial imprint of childhood trauma: Complex Post-traumatic Stress Disorder. Presentation at 26th Annual Virgina Bar Association Capital Defense Workshop, Richmond, VA.

Porterfield, K. (November 8, 2018). The biopsychosocial imprint of trauma; and Secondary traumatic stress: Strategies for well-being. Presentations at Federal Capital Habeas Unit Training, Santa Fe, NM.

Porterfield, K., Pradhan, A., Satterthwaite, M., Singh, A., (October 19, 2018). The Meaning of Torture in National Security. Invited panelist. Why International Law Matters: 97th Annual Meeting of the American Branch of the International Law Association. Fordham Law School, New York, NY.

Porterfield, K. (October 3, 2018). Uncompartmentalizing: Learning from a refugee health care experience. Critical Issues in Emergency Medicine. Invited panelist. Bellevue Hospital Emergency Medicine Department, NY, NY.

Porterfield, K. (June 19, 2018). The Biopsychosocial Imprint of Trauma. Plenary Presentation. Federal Death Penalty Authorized Case Consultation and Training Conference, Administrative Office of the US Courts. Atlanta, GA.

Porterfield, K. (June 4, 2018). The Imprint of Trauma in Human Rights Work. Training for Center for Reproductive Rights. New York, NY.

Haidt, J., Porterfield, K., Van Bavel, J. (June 3, 2018). The Roots of Extremism: The Fundamentalist in Your Brain. Invited panelist. World Science Festival, New York, NY.

Porterfield, K. (May 15, 2018). The Imprint of Trauma in Human Rights Work. Training for Reprieve. New York, NY.

Porterfield, K. (March 21, 2018). The Biopsychosocial Imprint of Trauma: How to Recognize, How to Respond. Plenary Presentation. Capital Habeas Unit National Conference, Federal Judicial Center, Santa Fe, New Mexico.

Porterfield, K., Kleinman, S., Katz, C, Mukherjee, E. (February 26, 2018). Changes in Policy and Practice in Asylum Law. Invited panelist. New York County Psychiatric Society. New York, NY.

Porterfield, K. (February 13, 2018). The Imprint of Trauma in Human Rights Work. Training for Physicians for Human Rights national and international staff. New York, NY.

Porterfield, K. and Smith, H. (February 16, 2018). Building the foundation of trauma-based treatment for refugee clients. Day long training for mental health providers. Sponsored by Better Health for Northeastern New York & Alliance for Better Health Care. Albany, NY.

Porterfield, K. (January 18, 2018). Interviewing survivors of trauma in a Journalism Context. Presentation at The Dart Center for Journalism and Trauma, Columbia University. New York, NY.

Porterfield, K. (January 10, 2018). The biopsychosocial imprint of complex trauma: Implications for evaluation and treatment in forensic and community contexts. Full-day training sponsored by Institute of Law, Psychiatry, and Public Policy at the University of Virginia, and by the Virginia Department of Behavioral Health and Developmental Services. Jointly provided by the Office of Continuing Medical Education of the University of Virginia School of Medicine.

Porterfield, K. (November 30, 2017). The impact of enhanced interrogation and rendition. Testimony at public hearings for North Carolina Commission of Inquiry on Torture. Raleigh, NC.

Porterfield, K. (July 7-10, 2017). The biopsychosocial impact of trauma: Issues for journalists. Training for International Women's Media Foundation, Hazardous Environment Training, Mexico City, Mexico.

Porterfield, K. (June 14, 2017). Working with traumatized prisoners: barriers and strategies for attorneys. Invited presentation to The Innocence Project staff and interns. New York, NY.

Porterfield, K. (May 17, 2017). The biopsychosocial impact of trauma: Human rights work with traumatized populations. Full day training for staff of MADRE, New York, NY.

Porterfield, K. (May 11, 2017). Human rights and psychology: A view from Guantanamo. Presentation at the Watkinson School. Hartford, CT.

Porterfield, K. (March 24, 2017). The biopsychosocial impact of trauma: Treatment and care of survivors. One-day workshop. Institute for Individual and Family Counseling, University of Miami School of Education and Human Development. Miami, FL.

Akinsulure-Smith, A; Porterfield, K.; Smith, H. (December 9, 2016). Assessment and treatment of torture survivors: Resilience-centered healing. Invited Webinar. American Psychological Association Division 56 Webinar Series.

Porterfield, K. (October 13, 2016) Interviewing survivors of trauma and torture in a human rights context. Invited lecturer at Columbia University Law School Human Rights Clinic. New York, NY.

Porterfield, K. (October 6, 2016). Working with traumatized clients: Strategies for advocates and lawyers. Presentation at CUNY Law School Family Law and Immigration and Human Rights Clinics. Brooklyn, NY.

Porterfield, K. (September 22-25, 2016). International Criminal Court: Trial advocacy training program. Office of the Prosecutor. Invited faculty. Hague, Netherlands.

Porterfield, K. (August 11, 2016). Introduction to complex trauma. Invited presenter to Federal Capital Habeas Corpus Conference. Washington, DC.

Akinsulure-Smith, A; Porterfield, K.; Smith, H. (August 4, 2016). Assessment and treatment of torture survivors: Integrative approach to service provision. Invited Symposium. American Psychological Association Convention. Denver, CO.

Porterfield, K. (June 8, 2016) Human rights and psychology, Grand Rounds, Maimonides Hospital, Brooklyn, NY.

Porterfield, K., Lebowitz, L. (May 13, 2016). The impact of childhood trauma, Federal Capital Habeas Project Annual Conference. Atlanta, Georgia.

Porterfield, K. (February 5, 2016). Trauma and the refugee client: Barriers and strategies for care. Webinar for SUNY Albany School of Public Health: Center for Public and Continuing Education Series: Advancing Cultural Competence in the Workplace.

Porterfield, K. and LeBoeuf, D. (January 23, 2016). Childhood trauma: Moving past checklists and diagnoses. Presentation (Via remote) to the Alabama Criminal Defense Lawyers Association. Birmingham, AL.

Porterfield, K. (November 3, 2015). Impact of psychological torture: Perspectives from Guantanamo and the Bellevue/NYU Program for Survivors of Torture. Invited presentation to the American Academies of Science, Engineering and Mathematics Human Rights Committee, Washington, DC.

Porterfield, K. (October 30, 2015) Moving past checklists and diagnoses: Childhood trauma. Federal Death Penalty Strategy Session, Administrative Office of the US Courts, Fort Lauderdale, FL.

Porterfield, K. (October 20, 2015). A psychologist's view from death row and Guantanamo. Presentation at the Watkinson School. Hartrford, CT.

Porterfield, K. (October 16, 2015) Interviewing survivors of trauma and torture in a human rights context. Invited lecturer at Columbia University Law School Human Rights Clinic. New York, NY.

Porterfield, K. (October 14, October 21, 2015). Working with traumatized clients: Strategies for lawyers and advocates. Training for the staff at The Bronx Defenders. New York, NY.

Porterfield, K., Figley, C, Smith, C., Gobin, R., Gold, S., Rom-Rymer, B., and Rhoades, G., (September 25, 2015) The Hoffman Report: Division 56 discusses initial reactions and plans. Webinar sponsored by APA Division 56.

Porterfield, K. (September 16, 2015). Traumatic grief in victims and families. Invited training for Administrative Office of the US Courts, Defense-Initiated Victim Outreach, Alexandria, VA.

Porterfield, K. (July 22-23, 2015). Communication strategies with a traumatized client and Self-care for staff, Presentations at "Building Awareness, Skills and Knowledge: A Community Response to the Torture Survivor Experience" Conference sponsored by Refugee Services National Partnership for Community Training and Tennessee Office for Refugees, Nashville, TN.

Sowards, G, LeBoeuf, D., Holdman, S., Poteet, D., Nevin, D., Porterfield, K. (July 13, 2015). From Death Row to Guantanamo: Practical ethics in the interface between law and mental health. Panel presentation at the International Congress of Law and Mental Health, Vienna, Austria.

Porterfield, K. (May 28, 2015). Impact of trauma on the refugee family with children: Clinical considerations and recommendations for care; Working with clients who have suffered trauma: Strategies for effective communication; Secondary trauma and self-care in working with traumatized refugee populations. Intensive Case Management Training Conference, Lutheran Immigration and Refugee Service, Baltimore, MD.

Porterfield, K. (May 2, 2015) Resilience and recovery after wrongful incarceration, Working with those who have experienced wrongful incarceration. Invited speaker at the 2015 Innocence Network Conference. Orlando, FL.

Porterfield, K. (January 22, 2015). Secondary trauma for lawyers and advocates conducting human rights work. Invited presentation to the Innocence Project staff and students. New York, NY.

Porterfield, K. (November 19, 2014). Working with traumatized clients: Strategies for advocates and lawyers. Presentation to Georgia Capital Defenders Annual Conference, St. Simons Island, GA.

Porterfield, K. (October 23-25, 2014). Complex trauma in mitigation. National Association of Criminal Defense Lawyers: 16th Annual Making the Case for Life Seminar. (October 23-25, 2014). Charlotte, NC.

Porterfield, K. (October 16, 2014). Working with traumatized clients: Strategies for advocates and lawyers. Presentation at CUNY Law School Family Law and Immigration Clinics. Brooklyn, NY.

Porterfield, K. (June 6, 2014, September 18, 2014, October 21,2014) Working with traumatized prisoners: Barriers and strategies for attorneys. Invited presentation to The Innocence Project staff. New York, NY.

Porterfield, K. (May 13, 2014). The psychological effects of chronic systematic child abuse and neglect: Lessons llearned from the field. Invited Speaker, 22nd Annual Children's Justice Conference, Washington State Department of Social and Health Services, Spokane, WA.

Porterfield, K. (May 5-18, 2014). Working Effectively with Traumatized Children and Families in the Aftermath of Torture and Refugee Trauma: Core Principles. Two week E-Learning Seminar for refugee service providers for Gulf Coast Jewish Family and Community Services, National Partnership for Community Training.

Porterfield, K. (April 23, 2014). The Unmaking of the Underdog, TEDx Presentation, TEDx Editors' Pick, Franklin and Marshall College, Lancaster, PA.

Porterfield, K. (April 9, 2014). A Graded Therapeutic Approach to the Traumatized Refugee Client. Webinar presented to staff of Jewish Family Services and affiliated clinicians, Syracuse, NY.

Porterfield, K. (March 26, 2014). Human Rights and the Role of Psychologists: A View from Guantanamo. Invited speaker, The Watkinson School, Hartford, CT.

Porterfield, K. (March 13, 2014) Childhood Trauma: What the Research—Established and Emerging—Teaches Us About Clients. Authorized Case Training and Consultation Conference, Federal Death Penalty Resource Counsel. Louisville, Kentucky.

Porterfield, K. (March 6, 2014) Inhuman Incarceration: An Interdisciplinary Discussion on the Consequences of the Prison Industrial Complex. Invited panelist. CUNY School of Law, Queens, NY.

Porterfield, K. (November 21, 2013) Working with Traumatized Prisoners: Barriers and Strategies for Attorneys. Invited presentation to The Innocence Project staff and student lawyers. New York, NY.

Porterfield, K. (October 15-16, 2013) Working Clinically with Traumatized Refugee Children and Families; Complex Marginalization and the Refugee Client; Unspoken Human Rights Conference: Restoring Dignity and Healing from Trauma and Torture. Interdisciplinary conference sponsored by Refugee Services National Partnership for Community Training. Utica, NY.

Porterfield, K. (October 15, 2013). Working with Traumatized Immigrant and Refugee Clients in a Legal Context. Presentation to CUNY School of Law Immigration Clinic. New York, NY.

Porterfield, K. (May 17, 2013). Working Clinically with the Traumatized Refugee Child and Family; Two Week E-learning Seminar for Gulf Coast Jewish Family and Community Services Providers.

Porterfield, K. (April 16, 2013). Working Clinically with the Traumatized Refugee Child and Family and Complex Marginalization: Addressing the Refugee Experience in Your Agency. Presentations at Building Bridges Conference: The Refugee Journey, Fargo, ND.

Porterfield, K. (March 13, 2013). Managing Secondary Trauma in Work With Refugees, Webinar Conference Call facilitated for Gulf Coast Jewish Family & Community Services.

Porterfield, K. (February 13, 2013). Human Rights Abuses and the Role of Psychologists, Presentation at Fordham Law School Seminar on International Law and Terrorism, New York, NY.

Porterfield, K. (February 12, 2013). Psychological Evaluations in the War on Terror. Presentation to The Watkinson School, Hartford, CT.

Porterfield, K. and Akinsulure-Smith, A. (December 6, 2012) Human Rights Abuses: Impunity and Advocacy: The View from Guantanamo and the Hague. Presentation at City College of New York; Psychology Department.

Porterfield, K. (November 16, 2012) Traumatized Clients in Capital Cases: Barriers and Strategies for Attorneys. Invited presenter, Virginia Bar Association Capital Defense Training, Richmond, VA.

Porterfield, K. and Akinsulure-Smith, A. (October 26, 2012) Human Rights Abuses: Impunity and Advocacy: The View from Guantanamo and the Hague. Presentation at Bellevue Hospital Center Psychiatry Case Conference.

Porterfield, K. (June 6, 2012) Traumatizing Lives, Traumatizing Imprisonment: Working with Multiply Traumatized Clients in Prisons, Presentation at Arnold and Porter Law Firm, New York, NY.

Porterfield, K. (May 15, 2012) Traumatized Clients: Signs, Symptoms, and Strategies for Building Relationships, Office of the Appellate Defender, New York, NY.

Porterfield, K., Akinsulure-Smith, A, O'Hara, S. (April 19, 2012) Refugees and Psychosocial Well-being, Invited panelist at United Nations Psychology Day

conference, Human Rights for Vulnerable People: Psychological Contributions and the United Nations Perspective, New York, NY.

Porterfield, K. (April 17, 2012) Working Effectively with Traumatized Children and Families in the Aftermath of Torture and Refugee Trauma: Core Principles, Webinar presented for National Partnership for Community Training, Florida Center for Survivors of Torture, New York, NY.

Porterfield, K. (March 23, 2012) Clients Traumatized by Incarceration and Security Measures, Signs, Symptoms and Strategies for Building Relationships, Presentation at Bureau of Prisons Homicides Authorized Case Training and Consultation Conference, Denver, CO.

Porterfield, K. (March 12, 2012) Traumatized Clients: Signs, Symptoms, and Strategies for Building Relationships, Neighborhood Defenders Service, Harlem, NY.

Porterfield, K. (March 8, 2012) Working Effectively with Traumatized Children and Families in the Aftermath of Torture and Refugee Trauma: Core Principles, Presentation at "Fostering the Resilient Spirit: Holistic Responses in the Torture Treatment Field." Tulane University School of Social Work, New Orleans, LA.

Porterfield, K. (February 13, 2012) Working Clinically with Traumatized Children and Families, ½ day training provided at Center for Family Life, Brooklyn, NY.

Porterfield, K. (November 11, 2011) Harnessing Knowledge: Advocacy and Prevention and Bearing Witness: The Experience of the Media, Invited panelist: Recovery from Trauma: Lessons from Ground Zero and Beyond, Peter C Alderman Foundation/NYU Hospital, New York, NY.

Porterfield, K., Keller, A., & Xenakis, S. (November 5, 2011) Torture and Maltreatment in the War on Terror: Rupturing Professional and Clinical Bonds, Panelist: International Society for Traumatic Stress Studies, Baltimore, MD.

Porterfield, K., LeBoeuf D., Holdman, S., (November 4, 2011) Traumatized Clients: Signs, Symptoms, and Strategies for Building Relationships**.** Invited speaker, Federal Death Penalty Resource Counsel, New Orleans, LA.

Porterfield, K. (June 8, 2011) Multicultural Issues in Service Provision to Traumatized Refugees, Invited speaker, US Committee for Refugees and Immigrants Conference, Arlington, VA.

Porterfield, K. ((May 13, 2011) Complex Trauma as a Factor in Mitigation, Invited speaker, Habeas Corpus Resource Center Spring Conference, San Francisco, CA.

Porterfield, K. and Keller, A. (January 14, 2011) Interviewing Trauma Survivors in a Legal Context, Half-day training for Open Society Institute Justice Initiative Team, New York, NY.

Porterfield, K. (January 13, 2011). Inner Healing after War. Invited panelist. United Nations NGO on Mental Health, New York, NY.

Porterfield, K. (January 11, 2011). Torturing the Mind: U.S. Involvement in Psychological Torture. Invited panelist. New York Religious Campaign Against Torture, New York, NY.

Porterfield, K. (June 16, 2010). Working with Traumatized Children in an Asylum Context. Invited speaker. Asylum Officers' Training, Newark, NJ.

Porterfield, K (April 23, 2010). Complex Trauma as a Factor in Mitigation, Invited speaker, Seventh National Seminar on the Development and Integration of Mitigation Evidence: New Science, New Strategies, Seattle, Washington.

Porterfield, K. (March 19, 2010). Working with Traumatized Refugee Populations. Invited Panelist at Boston College Conference "Deportation, Migration, Human Rights." Boston, MA.

Porterfield, K. (February 26, 2010). Working with Traumatized Individuals in a Legal/Human Rights Context. Presentation to Center for Constitutional Rights Staff, New York, NY.

Porterfield, K. (December 7, 2009) Integrated Treatment of a First Responder From 9/11: CBT Methods in a Long-term Treatment. Grand Rounds Invited Presenter, Manhattan Psychiatric Center, New York, NY.

Porterfield, K. (October 15, 2009). Introduction to Exposure Therapy. Counseling Methods Course, City College, New York, NY.

Porterfield, K. (September 11, 2009). Integrated Treatment of a First Responder From 9/11: CBT Methods in a Long-term Treatment. Bellevue Hospital Case Conference Invited Presenter, Bellevue Hospital, New York, NY.

Porterfield, K., Akinsulure-Smith, A, Kia-Keating, M. and Betancourt, T. (August 7th, 2009). War-Affected Children Residing in the U.S.: Challenges and New Directions for Psychologists. Chair of Panel at the American Psychological Association 2009 Convention. Toronto.

Porterfield, K. (July 19, 2009). Working with Traumatized Children in a Legal/Human Rights Context. Presentation to staff of Kids in Need of Defense (KIND) Staff Retreat, Washington, DC.

Porterfield, K., Xenakis, S., and Keram, E. (June 12, 2009). Psychological Issues in Working with Detainees in Guantanamo. Panel Presentation to Office of Military Commission Defense Counsel, Washington, DC.

Porterfield, K. (May 17, 2009). Interviewing Trauma Survivors in a Legal/Human Rights Context. Presentation at ACLU Human Rights Documentation Training, ACLU National Office, New York, NY.

Porterfield, K (March 29, 2009). Interviewing Survivors of Torture and Trauma in a Legal Context. Seminar presented to Columbia University Law School, International Human Rights Clinic, New York, NY.

Porterfield, K (March 4, 2009). Recognizing and Responding to the Traumatized Refugee Child and Family. Presentation at Health Care for Immigrant Families: What the Pediatrician Should Know, Conference sponsored by New York Chapter 3, District II, of the American Academy of Pediatrics, New York, NY.

Porterfield, K. (February 24, 2009). Interviewing Survivors of Trauma in a Legal Context. Seminar presented to CUNY Law School Immigration and International Women's Human Rights Clinics.

Porterfield, K., Keller, A. (June 28, 2008). How to Recognize, Document and Understand the Effects of Torture. Training for Military Commissions Defense: Capital Case Consult, Washington College of Law, American University, Washington, DC.

Porterfield, K. (May 9, 2008). Interviewing Survivors of Gender-Based Violence in a Legal Context. Training for Human Rights USA. New York, NY.

Porterfield, K. and Keller, A. (April 18, 2008). Interviewing Survivors of Trauma in a Legal Context: Barriers and Strategies. Training for Office of Military Commissions, Office of the Chief Defense Counsel, Guantanamo Team.

Porterfield, K. (April 16, 2008). Understanding the Effects of Refugee Trauma and Vicarious Traumatization. Full day staff training at Interfaith Migration Ministries, New Bern, North Carolina.

Porterfield, K. (April 16, 2008). Working with Refugee Children in Schools. Training for Guidance and ESL staff, New Bern Public Schools, Craven District, New Bern, North Carolina.

Porterfield, K. (April, 2, 2008). Trauma, Testimony, and Recovery: Human Rights Tensions and Challenges in the Treatment of Torture Survivors, Invited Lecturer, Human Rights: A Culture in Conflict, Georgetown University.

Porterfield, K. (February 14, 2008). Interviewing Survivors of Trauma in a Legal Context, Seminar presented to CUNY Law Immigration and Domestic Violence Clinics, New York.

Porterfield, K. & Gray, A. (January 23, 2008). Serving Children Who are Torture Survivors. Webinar provided for the National Consortium of Torture Treatment Centers.

Porterfield, K. (January 15, 2008). Interviewing Survivors of Gender-Based Violence: Clinical Considerations. Training provided for Human Rights Watch Research Staff.

Porterfield, K, Nguyen, L., Gutierrez, G., (November 15, 2007). Psychology, Law and Torture: Retraumatization and Reenactment in Torture Victims. Panelist, ISTSS National Conference, Baltimore, MD.

Porterfield, K. (October 24, 2007). Interviewing Survivors of Torture in a Legal Context. Training provided for Center for Constitutional Rights Asylum Attorneys, Davis Polk Law Firm, New York.

Porterfield, K. (February 15, 2007) Interviewing Survivors of Torture in a Legal Context, Training provided for Center for Constitutional Rights Guantanamo Habeas Project, New York, NY.

Porterfield, K. (January 25, 2007)., Pinochet to Rumsfeld: Accountability to US Officials for Torture. Invited panelist at event sponsored by the Center for Constitutional Rights and The Nation, New York, NY.

Porterfield, K (August 23, 2006). Introduction to Clinical Issues with Traumatized Patients. Psychological Interns Seminar, Bellevue Hospital, New York, NY.

Porterfield, K. (June 5, 2006). From Horror to Hope: Clinical Work with Children and Adolescents Affected by War, Invited presenter at Living in State of High Alert: Traumatized Children and Families in a Stressful Society. Manhattan Child and Adolescent Services Committee Conference, Fordham University, New York, NY.

Porterfield, K. (March 6, 2006, November 30, 2005) Interviewing Survivors of Torture in a Legal Context, Training provided for Center for Constitutional Rights Guantanamo Habeas project, New York, NY.

Porterfield, K. (September 30, 2005). Clinical Work with War-Traumatized Children—Two Case Presentations. The University Center for the Child and Family, University of Michigan, Ann Arbor, MI.

Porterfield, K. (September 29, 2005). From Horror to Hope: Clinical Work with Children and Adolescents Affected by War. Invited Lecturer, University of Michigan Department of Psychology, Ann Arbor, MI.

Porterfield, K. and Schoen, S. (September 23, 2005). Interviewing Survivors of Torture in a Legal Context. Training provided for attorneys working on Guantanamo and Abu Ghraib cases, Center for Constitutional Rights, New York, NY.

Porterfield, K. and Schoen, S. (August 4, 2005). Interviewing Survivors of Torture in a Legal Context, Training provided for attorneys working on Guantanamo and Abu Ghraib cases, American Civil Liberties Union, New York, NY.

Porterfield, K. (July 14, 2005). Through My Eyes: Children's Drawings from Conflict Zones. Invited Panelist at Chelsea Art Museum Exhibit, Sponsored by Amnesty International.

Porterfield, K. (February 5, 2005) Integrated Treatment with a Survivor of Gang Rape in Kosovo. Presentation to William Alan White Institute, Refugee Trauma Study Group, New York, NY.

Porterfield, K. & Akinsulure-Smith, A. (November 15, 2004). Two Short Term Group Treatment Models for War Trauma Survivors. Workshop presented at The International Society for Traumatic Stress Studies 20th Annual Meeting: "War as a Universal Trauma." New Orleans, LA.

Porterfield, K. (April 21, 2004). From Horror to Hope: Clinical Work with Children and Adolescents Affected by War. Rachel Summerfield Memorial Lecture, University of Chicago, Chicago, IL.

Porterfield, K. (March 24, 2004) Integrated Treatment with a Survivor of Gang Rape in Kosovo. Presentation to Institute for Contemporary Psychotherapy, New York, NY.

Porterfield, K. & Akinsulure-Smith, A. (April 15, 2003). Responding to Disasters: Mental Health Assessment and Self-Care. Presentation for Beth Israel Social Work In-Service Training, New York, NY.

Porterfield, K. (September 12, 2002). Psychiatry Takes to the Streets: Bellevue Hospital Responds to 9/11. NYU Psychiatry Grand Rounds Panel Presentation, New York, NY.

Porterfield, K. (June 17, 2002). Caring for Traumatized Refugee Children: Identification, Advocacy, and Treatment. Traumatized Youth and Families: The Road to Recovery, Eighteenth Annual Manhattan Child and Adolescent Services Committee Conference, New York, NY.

Porterfield, K. (June 6, 2002). Psychological and Physical Consequences of Torture and Refugee Trauma. Presentation to Multicultural Integration Grantees, United States Department of State, New York, NY.

Porterfield, K. (May 29, 2002). An Integrated Treatment Approach of a Traumatized Rescue Worker from September 11th. Psychological Interns Seminar, Bellevue Hospital, New York, NY.

Porterfield, K. (May 20, 2002). Recognizing and Responding to Traumatized Children in Schools. Presentation for teachers/guidance counselors: Liberty High School, New York, NY.

Smith, H. & Porterfield, K. (April 9, 2002). Psychological and Physical Consequences of Torture and Refugee Trauma: Introduction to Clinical Issues, and Caring for Traumatized Refugee Children: Identification, Advocacy, and Treatment. Presentations at World Relief Conference on Refugee Mental Health, Boise, Idaho.

Porterfield, K. (February 15, 2002). Caring for Traumatized Refugee Children: Identification, Advocacy, and Treatment. Presentation for Interns and Post-doctoral Fellows: The NYU Child Study Center, New York, NY.

Porterfield, K. (January 25, 2002). Recognizing and Responding to Traumatized Children in Schools. Presentation for teachers/guidance counselors: Brooklyn International Middle School, Brooklyn, NY.

Porterfield, K. (January 16, 2002). Caring for Traumatized Refugee Children: Identification, Advocacy, and Treatment, Presentation for Child Life staff, Bellevue Hospital Center, New York, NY.

Porterfield, K. (November 19, 2001). Recognizing and Responding to Traumatized Children in Schools. Presentation for guidance counselors: Manhattan Comprehensive Day and Night School, New York, NY.

Porterfield, K. (October 13, 2001). Responding to Children's Needs in the Wake of the World Trade Center Attacks. Presentation for parents: St. Ignatius Loyola School, New York, NY.

Porterfield, K. (October 3, 2001). Recognizing and Responding to Traumatized Children in Schools. Presentation for teachers and staff: Brooklyn International High School, Brooklyn, NY.

Leviss, J. & Porterfield, K. (January 16, 2001). Working with Traumatized Refugee Populations: Medical and Psychological Considerations. Department of Community Medicine, St. Vincent's Hospital, New York, NY.

Porterfield, K. (January 8,2001). Effects of Refugee Trauma on Children and Families. Metropolitan Hospital/Behavioral Health Services: Child and Adolescent Case Conference, New York, NY.

Porterfield, K. (November 17, 2000) Competencies that Social Workers Need to Enter the Field of International Social Welfare. Invited panel member, International Social Welfare Symposium, Columbia University School of Social Work, New York, NY.

Porterfield, K. and Leviss, J. (October 4, 2000). Recognizing and Responding to Refugee Trauma. Training at the Floating Hospital, New York, NY.

Keller, A. and Porterfield, K. (September 13, 2000). Psychological and Physical Consequences of Torture: Introduction to Clinical Issues. Training for Jamaica Clinic Staff, Queens, NY.

Porterfield, K. and Leviss, J. (August 2, 2000) Psychological and Physical Consequences of Torture: Introduction to Clinical Issues. Training for Ryan Health Center Mental Health Staff: New York, NY.

Porterfield, K. (July 13, 2000) Psychological and Physical Consequences of Torture: Introduction to Clinical Issues. Training at Coney Island Hospital Department of Behavioral Health, Brooklyn, NY.

Porterfield, K. (June 28, 2000, August 16, 2000) Working with Traumatized Refugees in Resettlement: Identification and Advocacy. Training for resettlement staff of Catholic Community Services, Newark, NJ.

Porterfield, K. (June 23, 2000). Recognizing and Responding to Traumatized Refugee Children and Families and Working with Language Interpreters. Presentations at Interfaith Refugee Ministry Conference: "Kosovar Albanians in Connecticut: Honoring the Past, Building for the Future," Waterbury, CT.

Porterfield, K. (June 8, 2000). Helping Your Child's Adjustment After War. Presentation to Kosovar Albanian parents at Yonkers Public Schools and Bilingual/ESL Department: Yonkers, NY.

Smith, H. and Porterfield, K. (May 13, 2000). Mental Health Needs of the Refugee Family. Presentation to Bosnian, Kosovar Albanian and Roma refugees, Bridge Refugee Services, Knoxville, TN.

Smith, H. and Porterfield, K. (May 12-13, 2000). Psychological and Physical Consequences of Torture and Recognizing and Responding to Traumatized Refugee Children in School. Presentations at Post-traumatic Stress Disorder Conference for Bridge Refugee and Sponsorship Services, Knoxville, TN.

Porterfield, K. (March 30, 2000). Caring for Traumatized Refugee Children: Identification, Advocacy, and Treatment and Recognizing and Responding to Traumatized Refugee Children in School. Presentations at Bellevue/NYU/Solace Conference: Refugee Resettlement: Therapeutic Factors and Interventions: New York, NY.

Porterfield, K. (March 22, 2000). Recognition of Trauma in Children and Practical Strategies for Helping Refugee Children in School. Presentation for Staff Development at Belleville School Number Four: Belleville, NJ.

Porterfield, K. (March 18, 2000). Introduction to Clinical Issues in Refugees Traumatized by War. Presentation to refugee community leaders, Lutheran Social Services, Fargo, North Dakota.

Porterfield, K. (March 16-17, 2000). Psychological and Physical Consequences of Torture, Recognizing and Responding to Traumatized Refugee Children, Helping the Refugee Family Heal, Secondary Traumatization and Burnout, Post-Traumatic Stress Disorder: Clinical Aspects of Working with Traumatized Refugees, and Working with Interpreters and Working Multiculturally, Presentations at Lutheran Social Services Conference: Building Bridges: From Newcomer to Citizen: Fargo, North Dakota.

Impalli, E, Porterfield, K., and Keller, A. (March 1, 2000). Clinical Assessment and Interventions with Survivors of Torture and Refugee Trauma. Presentation at Catholic Community Services: Newark, NJ.

Impalli, E. and Porterfield, K. (February 17, 2000). Therapeutic and Pragmatic Issues in Clinical Interviewing with Interpreters. Presentation at International Institute of New Jersey's Cross Cultural Counseling Center: Jersey City, NJ.

Keller, A. and Porterfield, K. (January 20, 2000). The Impact of Trauma on Refugee Children. Presentation at International Rescue Committee: New York, NY.

Porterfield, K. (December 16, 1999). Practical strategies for helping refugee children in school. In-service training for District 10 Guidance Counselors, Bronx, NY.

Porterfield, K, and Rolovic, S (November 16, 1999). The Unpredictable Nature of Trauma in Children: A Family-Based Approach to Working with Families from Kosovo. Presentation at the 1999 National ORR Conference: Resettlement Through the Eyes of a Refugee Child, Washington, DC.

Steinberg, D. and Porterfield, K. (June, 1999). Separation Anxiety and Panic in a Pre-Schooler: Assessment and Treatment. Presentation at Child and Adolescent Psychiatry Grand Rounds, New York University Medical Center, New York, NY.

Porterfield, K. (April, 1999). The Transition Towards Adolescence: Influences on Girls' Self-Feelings. Presentation to parents at Marymount Middle School, New York, NY.

Porterfield, K. (May, 1999). The Family Life Cycle: Marriage and Parenting. Presentation to parents at St. Ignatius Loyola Elementary School, New York, NY.

Porterfield, K. and Saldinger, A. (April, 1998). Child-Centered Parenting of the Parentally Bereaved Child. Presentation at the American Orthopsychiatry Conference: Washington, DC.

Porterfield, K. (May, 1998). The Family Life Cycle: Marriage and Parenting. Presentation to parents at St. Ignatius Loyola Elementary School, New York, NY.

Porterfield, K. (April, 1996). Divorce Groups for Children: The Parental Component. Presentation to the University Center for the Child and Family, Ann Arbor, MI.

Miller, J., Porterfield, K. and Litzenberger, B. (October, 1995). Psychotherapy with the Deaf and Hearing-Impaired. Presentation to the University Center for the Child and Family, Ann Arbor, MI.

Porterfield, K. (April, 1995) A Time-Limited, Problem-Focused Psychotherapy with and Eating-Disordered Adolescent. Presentation to the University Center for the Child and Family, Ann Arbor, MI

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

UV4SOR

Topics:

1. Compassionate Release

Comments:

he Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002
Dear Judge Reeves:
Thank you, your Honor and Commission members for the opportunity to respond to the Commission's proposed amendment changes to Compassionate Release. I submit my response, not as an attorney, but as an affected family member of a young adult in Federal custody.
The Commission's transparency, efforts to include the public, and provide live streamed testimony from such a wide range of stakeholders is greatly appreciated.
We don't want to see exclusions. As a criminal justice reform advocate by circumstance, I have met so many families who have lost hope and faith in our national justice system. We have become disheartened because of carve outs, especially those who have loved ones domiciled in low security with convictions that research has documented as having low recidivism rates, yet these loved ones cannot participate in programming for early release, nor receive even minimally adequate medical treatment for chronic conditions, if they receive any at all. Because of your and the Commission's actions, we see sincere heartfelt efforts to fix a very broken system. We have a glimmer of hope now, and are counting on the Commission to push through these much needed reforms.
I would like to thank the Commission for proposing these thoughtful and expanded amendments "to revise and expand §1B1.13, broadening the Commission's guidance on what should be considered "extraordinary and compelling reasons" for compassionate release: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons" while also granting courts discretion to consider the entire collection of circumstances that might warrant a sentence reduction in a particular case." With these changes, § 3582(c)(1)(A) Motion of Sentence reduction would be able to serve as a meaningful safety valve.

Instead of addressing point by point, I completely agree with Ms. Kelly Barrett, Federal Public Defender's testimony and her entire compelling written statement. I appreciate the Commission recognizing the need for Eldercare. In addition to all the positive benefits, like lowering recidivism by expanding compassionate release to include other family members that Ms. Barrett wrote and testified about, and the testimony from those who were granted compassionate release, there will be significant financial benefits to the government by keeping the family member at home instead of in assisted living or skilled care. I have no siblings and was responsible for both of my parents' care at the end of their lives, so I have lived it. In my case, both parents had debilitating conditions at the same time including blindness, dementia, and cancer and were no longer able to care for each other. Please modify the "Family Circumstances" category at new subsection (b)(3) from "parent is" to "parents are." According to AARP, 1 in 3 seniors will need long term care over the course of their lifetime. Recognizing there are other family members besides children with other special needs like long term care and end-of-life care for aged and infirmed family members demonstrates that the Commission understands the gravity and financial impact on families. Thank you!

What Ms. Barrett proposed, to change the wording of the guidance in 1B1.13. Subsection (b)(1)(C) from "adequate" to "effective" is critical. My own family member does not have adequate treatment for his chronic condition. In fact, he gets no treatment at all, and has a letter that states his facility does not provide the medical treatment he needs (and was receiving for multiple traumatic brain injuries [TBIs] before he went into custody). Without treatment his prognosis is dire, and he could get Alzheimer's, Parkinson's disease or even become like Bruce Willis (Frontal Temporal Dementia and Aphasia) except in his early 40s instead of at 67 like Mr. Willis.

Mary Graw Leary, representing the Victim's Advisory Group (VAG) stated in her testimony that Compassionate Release has a recidivism rate of 10% and is a major reason Compassionate Release should not be expanded. I would argue just the opposite, that with such a low recidivism rate, Compassionate Release is a rousing success! I have read the Commission's own reports on recidivism rates. I believe the Department of Justice and the Executive Branch would be extremely pleased, and the public would feel very safe if those rates could be duplicated by the Federal Bureau of Prisons and other reentry programs.

I disagree with the assessments by Department of Justice, especially with regard to extending the time an incarcerated victim of sexual or physical abuse, including rape, must spend in the institution where the event occurred, or in a Special Housing Unit (SHU), by insisting on a hearing. The victim has already suffered unimaginable trauma, and keeping that victim in the place where he/she was assaulted, or punishing even more by putting them in the SHU, does not improve their acceptance of victimization. It may actually extend the recovery time from the trauma, and exacerbate conditions the victim has developed from the assault, such as Post Traumatic Stress (PTS).

In conclusion, as Leslie Scott so eloquently stated in her testimony on 7 March, "We cannot incarcerate ourselves out of crime problems." I would add that we cannot over legislate ourselves out of mass incarceration problems. Our nation makes up only 4% of the global population, yet we have 25% of the global incarcerated population.(https://www.hamiltonproject.org/... /incarceration_rates...) We, as a nation, should be ashamed of this statistic, which displays our

utter failure to humane treatment of United States constituents. We are the United States of America, not the Communist Party of China, and we must hold ourselves to a higher standard. We must make common sense changes to laws like expanding §1B1.13 under The First Step Act and encourage our state legislators and departments of corrections to follow suit. We must expand not only compassionate release, but the offenses that qualify for participation and programming in the First Step Act. Congress and the Department of Justice must make decisions based on statistics from academia and the Commission concerning topics such as recidivism, instead of relying on fear, hysteria, discredited research, and agencies that spin the statistics to fit a narrative instead of presenting true, verifiable facts and information.
Thank you for reading my letter.
Respectfully,

Jennifer Lee

Submitted on: March 14, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

UV4SOR Mar. 14, 2023

Topics:

9. Sexual Abuse of a Ward Offenses

Comments:

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Dear Judge Reeves:

Thank you, your honor and Commission members for the opportunity to respond to the Commission's proposed amendment changes to Compassionate Release. I submit my response, not as an attorney, but as an affected family member of an adult in Federal custody.
Proposed Amendment: Sexual Abuse Offenses
2. In response to the Violence Against Women Act Reauthorization Act of 2022, Part A of the proposed amendment would reference 18 U.S.C. § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), I want to state that I do not condone sexual abuse of any kind. I deplore it. However, I do feel the need to address enhancements for technology. Many of these statutes were written decades ago before widespread use of the internet and social media. Some were even written before personal computers were widely available to the public.
I disagree with enhancements for technology use for that reason. Internet and social media are the primary and virtually exclusive way these offenses are committed. Isn't it time to rewrite these guidelines to reflect the use of technology as the standard and not as an extraordinary effort? Enhancements should be added against charges to the social media and internet services that profit from, and enable the user to easily commit these offenses, all while these internet "hosts" look the other way. Furthermore, as discussed throughout the public hearings, research has shown that long sentences do not rehabilitate nor do they reduce recidivism, so why add enhancements to a standard?

For example, §2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts states…

"2) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels."

99% of Child Sex Abuse Material (CSAM) is accessed via computer, laptops, and mobile phones across the internet. The offenses specified in 2) are predominantly conducted this way, almost exclusively. These enhancements suggest that using a computer or computer service is somehow exotic and extra effort.

Please update these statutes to 21st century technology, instead of lengthening sentences through obsolete enhancements.

Regarding increasing the Base Level Offense for Federal employees listed in the proposed amendment, they should have the same base level and serve equivalent sentences to adults in federal custody convicted of the same offenses and no less. Although they have abused their positions of trust, long sentences are not rehabilitative for these convictions. Adults in custody convicted of these same type offenses should be eligible for and receive the same therapy, mental health treatments, and other programs that the federal employees will receive.

Thank you for reading my comment.

Submitted on: March 14, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

The VOICES Foundation

Topics:

1. Compassionate Release

Comments:

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you,

Submitted on: March 11, 2023

The Peter L.
Zimroth Center
on the Administration
of Criminal Law
NYU SCHOOL OF LAW

March 14, 2023

Dear Judge Reeves:

We the undersigned are a coalition of researchers, policymakers, lawyers, and advocates who focus on gun violence prevention, federal sentencing reform, or have experience prosecuting federal firearms offenses (the "Working Group"). The Working Group consists of researchers, policymakers, lawyers, former prosecutors, and advocates who focus on gun violence prevention, federal sentencing reform, and the prosecution of federal firearms offenses. Our members include former United States Attorneys, Brady United, Everytown for Gun Safety, Giffords Law Center, Community Justice Action Fund, the Johns Hopkins Center for Gun Violence Solutions, and Loyola University of Chicago's Center for Criminal Justice Research. Collectively, we have extensive experience researching solutions to reduce and prevent gun violence in a fair and equitable way, and many of us were involved in public debate and internal discussions that led to the drafting and passage of the Bipartisan Safer Communities Act (the "BSCA" or "the Act").

We write to provide comments on the United States Sentencing Commission's Proposed Amendments for the 2022-2023 amendment cycle regarding § 2K2.1 of the United States Sentencing Guidelines ("USSG") and the Commission's duty to implement the Bipartisan Safer Communities Act ("BSCA").

Gun Trafficking and Straw Purchasing: the Major Drivers of Gun Violence

The importance of the BSCA in the fight against gun violence cannot be understated. The BSCA has created several new tools and programs whose goals are to keep firearms out of the hands of those who would do harm to themselves or others. For instance, the BSCA contains a provision targeting unlicensed gun sellers and creates enhanced background checks for prospective firearms purchasers. While these provisions are not the subject of the Commission's work, they are important because they suggest that Congress intended to focus on sellers and purchasers of firearms.

Likewise, by creating two new federal offenses that explicitly prohibit straw purchasing and gun trafficking, the BSCA has deliberately sought to shift federal enforcement further upstream in the illegal trafficking pipeline. The BSCA's focus is on gun suppliers and inter-state trafficking networks. The Act's focus on straw purchasing and gun trafficking reflects what data has long shown: the diversion of guns into illegal markets is what enables gun violence. Indeed, straw purchasing is the most common channel for guns entering the

trafficking pipeline, and corrupt gun retailers account for a higher volume of guns diverted into the illegal market than any other single trafficking channel.[1]

Illegal gun trafficking fueled by straw purchasing, rogue gun dealers and firearm sales made without a background check affects every state. The states with weaker gun laws often are the source of illegal guns recovered in states with stronger gun laws.[2] For example, the Iron Pipeline—a "well documented" interstate trafficking pathway—transports guns purchased in southeastern states to states in the mid-Atlantic and Northeast, where gun dealers and guns are subject to greater regulation.[3] This is not, however, a problem without a solution: research suggests that when gun dealers are held accountable, the flow of guns into the illegal market often decreases "significantly."[4]

New ATF Data Reveals Trafficking Patterns

Gun trace data demonstrates the existence of clearly identifiable gun traffickers and straw purchasers who are responsible for the flood of guns into our communities. Historically, the Tiahrt Amendments[5] have limited the public's ability to obtain and understand data on crime guns and gun dealers. These Amendments, which were passed in 2000, have chilled ATF from sharing information about the guns it has traced. The last time ATF shared information about gun dealers was in 2000, when it issued a report showing that a small percent of licensed firearms dealers was responsible for most guns recovered by law enforcement.[6]

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[1] Giffords Law Center to Prevent Gun Violence, *Trafficking and Straw Purchasing*, available at https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/ (last visited Oct. 11, 2022).
[2] Everytown Research and Policy, "Five Things to Know About Crime Guns, Gun Trafficking, and Background Checks" Oct. 10, 2022, available at https://everytownresearch.org/report/five-things-to-know-about-crime-guns/ (last visited Mar. 14, 2023).
[3] Garen J. Wintemute, "Where Guns Come From: The Gun Industry and Gun Commerce," available at https://issuelab.org/resources/499/499.pdf (last visited Feb. 19, 2023).
[4] *Id.* (citing research). *See also* Johns Hopkins University Bloomberg School of Public Health, *Reforms to Sales Practices of Licensed Gun Dealers Reduced Supply of New Guns to Criminals,* Sept. 27, 2006, available at https://publichealth.jhu.edu/2006/webster-gun-dealer (last visited Oct. 15, 2022).
[5] The Tiahrt Amendments, named after Representative Todd Tiahrt (R-KS), are provisions that have attached to DOJ appropriation bills since 2003. The Tiahrt Amendments prohibit ATF from releasing firearm trace data for use by cities, states, researchers, litigants, and members of the public (subject to certain limited exceptions), and they require the FBI to destroy gun purchaser records within 24 hours of approval, making it difficult for ATF to retrieve firearms from prohibited persons. *See* Giffords Law Center, "Tiahrt Amendments," available online at https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/tiahrt-amendments/#footnote_0_5675 (last visited Feb. 19, 2023).
[6] Brady United, *Combating Crime Guns: A Supply-Side Approach* at 2, available at https://brady-static.s3.amazonaws.com/SUPPLYSIDEv5.pdf (last visited Oct. 10, 2022). *See*

The current Administration has taken steps to fill this information gap by directing ATF to undertake its first study of criminal gun trafficking since 2000.[7] In February 2023, ATF issued the second volume of this study. Volume two presents and analyzes data on crime guns recovered between 2017 and 2021. The data provide important information on the origins of crime guns and reported some alarming facts. First, many crime guns moved quickly from purchase to recovery in a crime ("time-to-crime"): 46 percent of guns were recovered less than 3 years after purchase, including 25 percent recovered within a year[8] and 9 percent recovered in under 3 months.[9] Moreover, the percentage of crime guns recovered within 3 years of purchase increased by 12 percentage points from 2019 to 2021—a 28 percent increase in the share of traced guns with a time-to-crime of less than 3 years that was driven almost entirely by an increase in traced guns with a time-to-crime of less than one year.[10] These findings are important because ATF considers a "time-to-crime" of 3 years or less as a potential indicator of gun trafficking.[11]

Data also revealed geographical patterns in firearms trafficking. 72 percent of traced crime guns were recovered within the state they were sourced from, and 28 percent were recovered from a different state.[12] Notably, the data suggest that the strength of state gun laws may influence trafficking patterns. Nearly 75 percent of likely-trafficked crime guns that crossed state lines came from states without background check laws.[13] For instance, New Jersey had the highest percentage of recovered crime guns originally acquired at federal firearms licensees ("FFLs") in other states (82 percent), followed by New York (80 percent), Massachusetts (67 percent), Hawaii (54 percent) and Maryland

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also Remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy, *supra* note 9 (citing this statistic).

[7] Dep't of Justice, Office of Public Affairs, "Justice Department Announces Publication of Second Volume of National Firearms Commerce and Trafficking Assessment," Feb. 1, 2023, available at https://www.justice.gov/opa/pr/justice-department-announces-publication-second-volume-national-firearms-commerce-and (last visited Feb. 17, 2023).

[8] *Id.*

[9] Press Release, Everytown for Gun Safety, "New ATF Report on Gun Trafficking Highlights Need for Gun Industry Accountability," Feb. 2, 2023, available at https://www.everytown.org/press/new-atf-report-on-gun-trafficking-highlights-need-for-gun-industry-accountability/ (last visited Feb. 17, 2023).

[10] National Firearms Commerce and Trafficking Assessment: Crime Guns – Volume Two ("NFCTA"), "Crime Guns Recovered and Traced Within the United States and its Territories," at 25, available at https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download (last visited Feb. 17, 2023).

[11] Brady United, Frequently Asked Questions, "What is 'Time to Crime'?", available at https://www.bradyunited.org/program/combating-crime-guns/faqs (last visited Feb. 17, 2023).

[12] NFCTA at 38, *supra* note 10.

[13] *See* Everytown Research and Policy, *supra* note 2.

(53 percent).[14] All these states regulate firearms dealers, suggesting that gun trafficking flows from states with weak regulations into states with strong gun laws.

Finally, data also revealed demographic information about the purchasers of crime guns. While men purchased a larger share of traced crime guns than women during the study period, the percentage of traced crime guns purchased by women increased 5 percentage points from 2017 (17 percent) to 2021 (22 percent), representing a 31 percent increase in the share of traced crime guns purchased by women.[15] Shorter time-to-crime periods for recovered guns were also associated with a number of factors, including the gun being purchased by a woman.[16]

Federal Enforcement Priorities Have Ignored Straw Purchasing and Gun Trafficking

Despite what the data have shown, federal enforcement priorities have not historically focused on straw purchasing or gun trafficking and have instead focused nearly exclusively on prosecuting "prohibited persons," *i.e.*, people whose status prohibits them from possessing a firearm. For fiscal year 2021, only 11 percent of people who were convicted and sentenced under § 2K2.1 were convicted of non-"prohibited persons" offenses.[17] Of this 11 percent, most persons were convicted for straw purchases/making a false statement in the purchase of a firearm, followed by offenses involving stolen firearms, firearms trafficking and/or exporting, and offenses involving prohibited weapons.[18] In other words, less than 11 percent of sentences pursuant to § 2K2.1 involved the two main drivers of gun violence: straw purchasing and gun trafficking. Moreover, sentencing outcomes in this 11 percent of cases were shorter than for those sentenced for being a "prohibited person"—the average guideline minimum was 30 months, compared to 49 months for prohibited persons.[19] Sentencing courts were also more willing to sentence people below the Guideline range at a higher rate for offenses involving firearms trafficking and straw purchases or false statements.[20]

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[14] NFCTA at 39, *supra* note 10.
[15] *Id.* at 11.
[16] *Id.* at 35-36.
[17] Matthew J. Iaconetti, *et al.*, United States Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?* at 28, (July 2022), available at https://www.ussc.gov/research/research-reports/what-do-federal-firearms-offenses-really-look (last visited Feb. 17, 2023).
[18] *Id.*
[19] *Id.*
[20] *Id.* at 27.

This mismatch between the drivers of gun violence and the people targeted for federal prosecution suggests the need to realign enforcement priorities. This has been a consistent focus of this Administration as it seeks to address the source of illegal firearms by targeting "rogue gun dealers" and establishing gun trafficking strike forces. [21] The Administration has balanced this upstream enforcement approach with increasing funding and support for proven effective community violence intervention programs that focus on intervening prior to an act of violence that necessitates a criminal justice response.[22] In fact, DOJ has indicated one of its performance goals is to increase the percentage of firearms cases that target traffickers and other large-scale enterprises.[23] The BSCA is a good starting point for advancing the Administration's agenda because it provides federal prosecutors with new statutory offenses to target the source of illegal guns while also providing $250 million for community violence intervention. However, as discussed herein, the Commission has an important role to play: the Guideline range arguably influences whether DOJ and ATF will expend resources on prosecuting these offenses.

Option One is Preferable

The Commission's proposed Amendments can help fulfill Congress' intent when it passed the BSCA. Congress sought to impose harsher penalties on straw purchasers and gun traffickers *without* exacerbating race disparities. Enhancing penalties for these two new federal offenses reflects the fact that these bad acts fuel and enable gun violence. Enhanced penalties will also incentivize DOJ and ATF[24] to shift their enforcement focus from "end users" to people further up the pipeline: gun dealers, straw purchasers, and the network of people and organizations who facilitate the flow of guns across state lines.

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[21] The White House, Press Release, "Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety," June 23, 2021, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/ (last visited Feb. 27, 2023).

[22] *Id.*

[23] Anne Gannon, U.S. Dep't of Justice, "Reduce Gun-Related Violence," available at https://www.performance.gov/agencies/DOJ/apg/goal-2/ (last visited Feb. 27 2023).

[24] Prior to the BSCA's passage, there was no comprehensive gun-trafficking statute, and penalties were minimal. As a result, federal prosecutors were "less likely to accept and prosecute" these cases. *See* Alan Berlow, The Center for Public Integrity, "Current Gun Debate May Not Help Beleaguered ATF," Feb. 11, 2013, available at https://publicintegrity.org/national-security/current-gun-debate-may-not-help-beleaguered-atf/ (last visited Feb. 16, 2023). *See also* Fox Butterfield, "Are Gun Laws, and Agency that Enforces Them, Equal to the Task?" The New York Times, July 22, 1999, available at https://archive.nytimes.com/www.nytimes.com/library/national/072299guns-atf.html (last visited Feb. 16, 2023).

[24] 18 U.S.C. § 932(b)(1)-(3) (2023) (emphasis added

We believe that Option One can properly fulfill Congressional intent, subject to additional revisions to ensure that sentences more accurately reflect culpability. As a starting point, Option One's proposal to enhance straw purchasing and gun trafficking sentences via creation of new Specific Offense Characteristics ("SOC") is preferable, because it requires findings to be made by a sentencing judge regarding whether the SOC applies. We also respectfully submit that the Commission further amend Option One by creating tiered SOCs to reflect the different *mens rea* of the person being sentenced.

As a starting point, 18 U.S.C. §§ 932 and 933 criminalize conduct that is either "knowing" or based on "reasonable cause to believe." For instance, the straw purchasing statute makes it unlawful for any person to purchase or conspire to purchase any firearm for any other person, "*knowing or having reasonable cause to believe*" that such other person is (1) a prohibited person; (2) intends to use the firearm in a felony; a federal crime of terrorism or a drug trafficking crime; or (3) intends to sell or dispose of the gun to persons in categories (1) or (2).[25] The gun trafficking statute contains similar language: it is unlawful for any person to ship, transfer, otherwise dispose of, or receive, or conspire to ship, transfer, otherwise dispose of, or receive, any firearm for any other person, if such person "*knows or has reasonable cause to believe*" that the use, carrying, possession, or receipt of the firearm would constitute a felony.[26]

The Commission's Option One amendment adopts this statutory language by creating SOCs for people who engage in straw purchasing and/or gun trafficking, "knowing or having reason to believe" that their conduct would result in the receipt of a firearm by a person who was prohibited from having it or was going to use or dispose of it unlawfully. In sum, Option One's SOCs will increase the sentencing calculation equally for people who *knew* they were straw purchasing or gun trafficking and for people who may not have known but who had *reasonable cause to believe.* The Commission should consider revising Option One to create tiered SOCs that increase the sentencing calculation based on the different *mens rea* levels in the statute. In other words, people who "knew" they were engaged in straw purchasing or gun trafficking would receive a greater enhancement than those persons who had "reasonable cause to believe" they were engaged in such misconduct. By tailoring SOCs in this manner, the Commission can ensure that sentences more accurately reflect culpability.

The Commission should also make clear how FFLs fit in the SOC. FFLs occupy a position of public trust, as they are solely authorized to engage in the

[25] 18 U.S.C. § 932(b)(1)-(3) (2023) (emphasis added).
[26] 18 U.S.C. 933 (2023) (emphasis added).

business of selling firearms to the public. The BSCA expressly contemplated that FFLs can be charged with gun trafficking, and the Commission should consider defining the appropriate SOC for FFLs that know or have reasonable cause to believe they are selling firearms to a gun trafficker, straw purchaser or other individual unlawfully "engaged in the business" of selling firearms that reflects the increased culpability of an FFL being the initial source or illegal firearms and the abuse of the federal license. The Commission should also consider how individuals unlawfully "engaged in the business" of selling firearms[27] are reflected in the SOC, as one provision of the BSCA addressed a lack of clarity in the law and showed Congress's intent to focus on the unlicensed sellers making no background sales who are a source of illegally possessed guns.[28]

Lastly, the Commission notes that Option One raises proportionality concerns, because the Guideline range for straw purchasing and gun trafficking are higher than the Guideline range for most "prohibited persons" offenses.[29] However, this does not mean that Option One is inherently problematic or disqualifying. The higher penalties for gun trafficking and straw purchasing are appropriate because they reflect the fact that these offenses are major drivers of gun violence that have historically been ignored in favor of other enforcement priorities. The comparative difference in sentences is also consistent with Congress' intent to target these twin drivers of gun violence through the BSCA. Indeed, Option One might incentivize DOJ and ATF to investigate and charge these offenses, whereas they previously declined to do so due to prosecutors' views that the penalties were insufficient relative to the resources expended.[30]

The Bipartisan Safer Communities Act and Race Disparities

As previously noted, the BSCA seeks to increase gun trafficking and straw purchasing prosecutions without exacerbating race disparities. This is an important goal because gun violence is a racial justice issue. Statistics show that the costs of gun violence are not borne equally across the United States. Black people are twice as likely as White people to die from gun violence and 14 times more likely to be wounded,[31] while Black children and teens are 14 times

[27] *See* 18 U.S.C. § 922(a)(1)(A); 18 U.S.C. § 921(a)(21)(C).
[28] Congressional Research Focus "Firearms Dealers 'Engaged in the Business'", Aug. 19, 2022, available at https://sgp.fas.org/crs/misc/IF12197.pdf (last visited Feb. 26, 2023).
[29] If the Commission accepts our suggestion to amend Option One to create tiered SOCs that correspond to different *mens rea* levels, this can potentially address proportionality concerns.
[30] *See supra* footnote 24.
[31] Brady United, *Gun Violence is a Racial Justice Issue*, available at https://www.bradyunited.org/issue/gun-violence-is-a-racial-justice-issue (last visited Oct. 10, 2022).

more likely to die from gun violence than their White counterparts.[32] In 2020, Black Americans were the victims in 61 percent of gun homicides, despite making up only 12.5 percent of the United States population.[33] Gun violence is also not geographically constant: roughly half of all gun homicides occur in 127 cities totaling less than a quarter of the United States population.[34]

Recent public comments from Senators Cory Booker (D-New Jersey) and Chris Murphy (D-Connecticut) expand on the BSCA's focus on racial disparities. In their letter, the Senators wrote that the BSCA seeks to "end the flow of illegal guns into communities and reduce gun violence," and that *both* enhanced penalties and mitigating factors reflect this focus, because the Act seeks to punish suppliers while avoiding unnecessarily long sentences for people "with less culpability *or* without significant criminal histories."[35] The Senators also note that excessive sentences for people who are relatively less culpable in the firearm trafficking chain "could disproportionately impact low-income people and people of color."[36] Finally, the Senators stated the Commission should interpret the BSCA's directive to consider "other mitigating factors" broadly, so as to ensure that past racial disparities do not "compound" or "persist" in future sentencing trends.[37]

In ignoring straw purchasing and gun trafficking in favor of prosecuting "prohibited persons," federal enforcement also reflects race disparities. The Commission's 2022 report showed stark contrasts in people sentenced under § 2K2.1 when compared to the general population of people sentenced under the other guidelines: 54.5 percent of those sentenced for firearms offenses were Black compared to 16.9 percent of "other offenders," *i.e.,* those sentenced pursuant to 18 U.S.C. 924(c), the career offender guideline, and the Armed Career Criminal Act.[38] The Commission also noted existing race disparities in the arrests that led to these federal sentences. In its study, the Commission found that 27.5 percent of people charged with federal firearms offenses were

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[32] *Id.*
[33] Marissa Edmund, Center for American Progress, *Gun Violence Disproportionately and Overwhelmingly Affects Communities of Color* (June 30, 2022), available at https://www.americanprogress.org/article/gun-violence-disproportionately-and-overwhelmingly-hurts-communities-of-color/ (last visited Oct. 10, 2022).
[34] Giffords Law Center to Prevent Gun Violence, *Statistics*, available at https://giffords.org/lawcenter/gun-violence-statistics/ (last visited Oct. 10. 2022).
[35] Letter from Senator Cory S. Booker and Senator Chris S. Murphy to The Hon. Carlton W. Reeves, Chair, United States Sentencing Commission at 2, Dec. 5, 2022, available at https://www.booker.senate.gov/imo/media/doc/bipartisan_safer_communities_act_letter.pdf (last visited Feb. 17, 2023) (emphasis supplied).
[36] *Id.*
[37] *Id.*
[38] *What Do Federal Firearms Offenses Really Look Like?* at 10, *supra* note 17.

initially arrested during a routine patrol or traffic stop.[39] For firearms offenses stemming from a routine street patrol, 73 percent of those sentenced were Black. For firearms offenses stemming from a traffic stop, 66.9 percent of those sentenced were Black.[40]

The BSCA has potential to ameliorate these race disparities.[41] By shifting enforcement further upstream to dealers and those who divert guns into the illegal market, this potentially changes the population of people who are eligible to be charged with federal offenses. Data shows that most licensed gun dealers are White. For instance, data obtained from ATF shows that the "vast majority of responsible persons transferring guns at licensed dealers in California, Illinois, Michigan, New Jersey, and Wisconsin" are White.[42] A similar pattern is seen in Chicago. Despite having no gun stores within the city limits, guns flow into Chicago from elsewhere in suburban Cook County.[43] Of the 137 federal firearms licensees ("FFLs") in Cook County, 97 percent of them are White—only one FFL is Black.[44] Racial disparities are similarly seen in the FFLs who operate in DuPage, Lake, and Will Counties, all of which also surround Chicago.[45] These surrounding counties play a role in Chicago's gun violence, because roughly 40 percent of guns recovered in the city and traced during the study period came from these neighboring counties.[46] We cite these statistics on FFLs not to suggest that White firearms dealers intend to traffic guns into cities that are predominantly Black, but rather to show that *where* in the pipeline federal enforcement occurs matters for purposes of addressing racial disparities.

Straw Purchasing and Reduced Culpability

The Commission's proposed Amendment offers a reduction to people convicted of straw purchasing who meet certain criteria, including (i) having 1 criminal history point or less, (ii) being motivated to commit the offense due to an intimate or familial relationship or by threat or fear, (iii) receiving little to no compensation, (iv) having minimal knowledge of the scope and structure of the

[39] *Id.* at 32.
[40] *Id.*
[41] As previously noted, the BSCA and the current Administration have emphasized and sought to invest in community violence intervention programs. Taken together, these actions show that Congress and the Executive's goal is to invest in downstream prevention solutions while increasing upstream enforcement actions, including federal prosecutions.
[42] Brady United, *Racial Inequities and Demographics*, available at https://www.bradyunited.org/program/combating-crime-guns/gun-dealers-racial-demographics (last visited Feb. 15, 2023).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

organization or that the firearm would be used in future criminal activity.

As a starting point, we respectfully submit that the first factor is redundant for purposes of calculating mitigation for straw purchasers. The proposed Amendment requiring 0-1 Criminal History points is unnecessary, because the offense of straw purchasing is predicated on a person having no criminal history that would prohibit them from purchasing or possessing a firearm. Put differently, straw purchasers are sought out to buy guns for others precisely because they lack criminal history and can thus help others evade background checks. For instance, both DOJ and ATF define straw purchasers as people without a criminal record who purchase firearms for others who are otherwise prohibited from making the purchase.[47] Because having a minor criminal record is a feature of the offense of straw purchasing, the Commission does not need to include the criminal history factor.

The Commission's mitigation amendment contemplates whether a person must meet all the factors or *any* of the factors listed above to qualify for a reduction in sentence. For instance, the proposed amendment lists factors (ii)-(iv) and contains both "and" and "or" language. The Commission should not require "and" language and should make mitigation available to straw purchasers so long as they can show that they were motivated to commit the offense due to an intimate or familial or relationship or threat or fear. The BSCA states that straw purchasers' sentences should reflect consideration of their "role and culpability," as well as any "coercion, domestic violence survivor history, or other mitigating factors." Nothing in this directive suggests that a straw purchaser must meet all these factors before they can qualify for a reduction. In fact, bundling these exceptions together undermines Congress's clear directive.

Moreover, as noted in our previous comment letter and herein, the data on straw purchasers indicates that they are likely to be women and are often recruited to purchase guns for boyfriends or family members. This factor is important, because it suggests the role that women play in the larger gun trafficking pipeline and how they risk being exploited due to domestic violence or other fears. The Commission correctly recognizes this, but it should make this an independent factor that, if met, enables a person to get a reduction in their sentence.

Finally, the Commission has asked for comment on how the proposed

[47] *See* DOJ White Paper, "Deliberative and Pre-Decisional," Chapter 9, Reduction of Crime, available at https://www.justice.gov/file/1353601/download; Jim Nelson, CNN.com, "Feds in Cleveland Suggest Legal Guns are Purchased For Convicted Felons Every Day," May 31, 2022, available at https://www.cleveland19.com/2022/06/01/feds-cleveland-suggest-legal-guns-are-purchased-convicted-felons-every-day/ (last visited Feb. 17, 2023).

mitigation amendment should related to Application Note 15 of § 2K2.1, which advises that mitigation may be considered for certain convictions related to straw purchasing. We urge the Commission to revise the Guideline to include mitigation as part of the sentencing calculation for § 2K2.1. As a starting point, a public search of Westlaw case databases suggests that Application Note 15 has not been the subject of many contested sentencings. When publicly available court filings were searched, this did not provide more clarity on how sentencing courts were applying or Application Note 15. It did, however, shed some light on how federal prosecutors approached this advisory note: they tended to oppose downward departures, even when a person met certain criteria, and they argued that Note 15 was discretionary, such that a sentencing court could still decline to grant a downward departure.[48]

Admittedly, the dearth of case law discussing Application Note 15 could be because the Note is only available for certain offenses of conviction. But this proves our point: Application Note 15's limited applicability means that most persons sentenced under § 2K2.1 are not entitled to argue for downward departures. Considering Senators Booker and Murphy's statement that the Commission "interprets the instruction to consider 'other mitigating factors' broadly," the Commission should delete Application Note 15 in favor of a broader adjustment provision available to all qualifying persons (discussed below). If it declines to make mitigating factors broadly available, the Commission should include mitigation for straw purchasers in the body of the Guideline.

Amend the Guideline to Offer An Adjustment to All Qualifying Persons

The Commission has also sought comment on whether to offer a downward departure or adjustment applicable to all persons who meet the reduction criteria in Option One. We respectfully submit that the Commission should make mitigation broadly available through an adjustment in § 2K2.1, both to address past racial disparities in sentences and to ensure that these disparities do not persist going forward. As noted previously, persons convicted of offenses pursuant to § 2K2.1 are predominantly Black, and their sentences tend to be longer. Providing mitigation within the Guideline calculation to all qualifying persons would potentially ameliorate the race disparities seen in the Commission's report.

In our prior public comment, our working group has cited data showing that straw purchasers tend to be women, and that they may have been pressured, coerced, or threatened into becoming straw purchasers due to a familial or

[48] *See* Gov't Ltr. re: Mot. for Upward/Downward Departure from Sentencing Guidelines, *United States v. Latoya Smith,* No. 17-cr-15 (D. Del. 2018).

intimate relationship. The logic underlying the proposed reduction for these straw purchasers applies equally to those who traffic firearms on behalf of someone else: in both cases, the person being sentenced may have been coerced or pressured into the illegal act. In both cases, the fear, coercion, or pressure from these relationships was a material factor in the wrongdoing. To draw an analogy to federal drug prosecutions, public discourse has recognized the problem of holding everyone equally liable for the full scale of wrongdoing in a drug trafficking organization when some people—often, women who dated men in the organization—had little to no personal involvement.[49] The Commission can avoid repeating this "girlfriend problem" in gun-trafficking prosecutions by amending the Guideline to make mitigating factors broadly available to all persons who are sentenced pursuant to § 2K2.1.

Making mitigation more broadly available is consistent with Congress' intent when it passed the BSCA. The BSCA directive states that the Commission "shall consider" an appropriate amendment to reflect Congress' intent that (i) straw purchasers without significant criminal histories receive sentences "sufficient to deter participation in such activities," *and* (ii) the defendant's role and culpability, and any coercion, domestic violence survivor history, *or* other mitigating factors are considered.[50] The Directive thus makes clear that Congress contemplated mitigation for two groups of defendants: straw purchasers *and* other defendants facing sentencing under § 2K2.1. In addition, subpart two is disjunctive: it refers to coercion, domestic violence survivor history, *or* other mitigating factors. The Commission should not require all these mitigating factors to be met for an adjustment to apply, given the use of "or" and the fact that these factors do not rely on each other. Moreover, Congress' reference to "other mitigating factors" contemplates the addition of other, unenumerated factors that the Commission must identify. In short, the Commission should parse the Directive to give full weight to Congress' intent to create mitigating factors that are not conjunctive and that are meant to be applied broadly.

This interpretation of the BSCA is also consistent with Senators Booker and Murphy's interpretation: in their letter to the Commission, they state that the

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[49] Press Release, ACLU, "'Girlfriend Problem' Harms Women and Children, Impacted Families Call Mandatory Sentences Unfair and Destructive," June 14, 2005, available at https://www.aclu.org/press-releases/girlfriend-problem-harms-women-and-children-impacted-families-call-mandatory (last visited Feb. 17, 2023); Matt Alston, "Mandatory Minimum Sentencing Might Have a 'Girlfriend Problem'", Rolling Stone, Nov. 18, 2018, available at https://www.rollingstone.com/culture/culture-features/mandatory-minimum-sentencing-girlfriend-problem-757690/ (last visited Feb. 17, 2023).

[50] Bipartisan Safer Communities Act, "Directive to Sentencing Commission," available at https://www.congress.gov/bill/117th-congress/senate-bill/2938/text (last visited Mar. 7, 2023) (quotations omitted and emphasis supplied).

BSCA's mitigation directive should be read expansively, to ensure that racial disparities are not perpetuated, and to ensure that mitigation is properly considered *in every sentence*.[51] Indeed, the mitigation language in the directive is both novel and deliberate: Congress intended for the Commission to strike the appropriate balance between holding gun traffickers accountable and recognizing that gun trafficking is a nuanced crime, and that not all persons involved are equally culpable and that sentences should be carefully tailored to reflect this fact.

Collect Data About Race Disparities and Federal Sentences Under § 2K2.1

We are cognizant that prosecutorial discretion can lead to race disparities in sentencing.[52] We are similarly aware that federal prosecutors retain discretion (i) in deciding what charges to bring, which in turn influences what the Guideline range for a defendant will likely be, and (ii) in negotiating plea agreements that may contain stipulations as to Guideline calculations. This discretion can lead to unintended race disparities. Given that straw purchasing and gun trafficking prosecutions have comprised less than 10 percent of federal sentences under § 2K2.1, we urge the Commission to collect data on sentences imposed for these two new federal offenses to determine whether racial disparities arise. Studying this issue is consistent with the BSCA's mandate to avoid exacerbating racial disparities, and it will also complement the research that is forthcoming from ATF on crime guns and trace data.

Conclusion

We appreciate the opportunity to share these views with you today, and we look forward to providing more input as the Commission considers amendments to § 2K2.1.

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[51] Letter from Senator Cory S. Booker and Senator Chris S. Murphy to The Hon. Carlton W. Reeves, *supra* note 27.

[52] *See, e.g.,* Lynn D. Lu, "Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys," 19 Fed. Sentencing Rept'r 3 (Feb. 2007), available at https://www.brennancenter.org/sites/default/files/legacy/Justice/10%20Prosecutorial%20Discretion%20and%20Racial%20Disparities%20in%20Federal%20Sentencing.pdf (last visited Feb. 19, 2023); ACLU Written Testimony, Hearing on Reports of Racism in the Justice System of the United States, Submitted to the Inter-American Commission on Human Rights, Oct. 27, 2014, available at https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf (last visited Feb. 17, 2023); Robert J. Smith and Justin D. Levinson, "The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion," 795 Seattle U. L. Rev. 35 (2012) available at https://scholarspace.manoa.hawaii.edu/server/api/core/bitstreams/f201faa4-ad58-46be-b4d6-0a5434fe7210/content (last visited Feb. 27, 2023).

The Peter L.
Zimroth Center
on the Administration
of Criminal Law
NYU SCHOOL OF LAW

Sincerely,

Brady United

Everytown for Gun Safety

Giffords Law Center to Prevent Gun Violence

Center for Criminal Justice
Loyola University Chicago

Community Justice Action Fund

James Santelle, former U.S. Attorney for the Eastern District of Wisconsin

Carter Stewart, former U.S. Attorney for the Southern District of Ohio

Timothy J. Daly

Joshua Horwitz

Quinton Williams

Peter L. Zimroth Center on the Administration of Criminal Law,
NYU School of Law

LETTER IN SUPPORT OF COMPASSIONATE RELEASE GUIDELINE AMENDMENTS

March 14, 2023

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Proposed Amendments

Re: Comments Regarding Proposed Amendments to the
U.S. Sentencing Guidelines for Compassionate Release

To the Commission:

We write as former federal judges with extensive experience imposing and reviewing sentences in criminal cases.

Judges have an absolute duty to follow applicable law at sentencing. We also understand and respect the principles of finality and consistency that are the hallmarks of the federal sentencing system. But we also understand that a prison term imposed at sentencing may not always stand the test of time because of changed circumstances that might provide extraordinary and compelling reasons to revisit it. We believe the Commission's thoughtful approach – expressed in the proposed amendments to § 1B1.13 of the Sentencing Guidelines – to providing judges with reasonable guidance and authority to reduce prison terms for truly extraordinary and compelling reasons fully comports with the framework for sentencing modification set forth by Congress in 18 U.S.C. § 3852(c)(1).

For example, a defendant's need for essential medical care is sensibly the kind of circumstance that may, in a particular case, provide extraordinary and compelling reasons for sentence reduction. In the proposed amendment, the Commission soundly recognizes that such relief should be available when the BOP is unable to provide essential medical care to those in its custody and the lack of timely and adequate medical care puts the defendant's health or life in serious jeopardy. Similarly, the Commission has appropriately proposed that if a defendant in custody is sexually assaulted or physically abused by correctional staff, this too may constitute a basis for a sentence reduction.

The proposed amendment wisely expands the family circumstances that could qualify as extraordinary and compelling reasons for potential release by recognizing the importance of needed caregiving not only for a defendant's spouse or minor child, but also for an adult child, parent, or other individual whose relationship with the defendant "is similar in kind to that of an immediate family member" – and if another caregiver is unavailable to provide that care.

The proposed amendments also correctly recognize that a post-sentencing change in the law that renders a defendant's sentence inequitable may, in appropriate cases, qualify as an extraordinary and compelling reason for a sentence reduction or release. This proposed amendment would help effectuate Congressional intent upon enactment of the statutory

compassionate release provision, which was to make compassionate release available under circumstances in which (in the words of the Senate Report) "the defendant's circumstances are so changed" that it would be "inequitable to continue the confinement of the prisoner."

We are aware that there are differing views about whether and when a post-sentencing change in law can provide the basis for a sentence reduction under § 1B1.13, and we appreciate the strength of the arguments on both sides of the debate. But we support the Commission's proposal to allow a change in the law that renders a defendant's sentence inequitable to serve, in appropriate cases and depending on all of the facts and circumstances of a defendant's case, as a possible extraordinary and compelling reason for a sentence reduction. This position is based on our ultimate concern for sentencing consistency and fairness, and the need for sentences "to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2). We encourage the Commission to provide appropriate guidance so that judges will understand in what specific circumstances this provision should or should not be applied.

We also support the provision recognizing that other, unspecified grounds might also constitute an extraordinary and compelling reason for potential release. No one can predict entirely each and every circumstance that may arise that would qualify. Certainly, in 2019 few would have predicted that in 2020 a global pandemic would threaten the health and lives of us all – and in particular, those in custody who could not avail themselves of the same preventive measures as the rest of our population. Thus, we support the adoption of this amendment, with the recommendation that it also make clear that use of this provision should be limited to the rare case in which an unspecified ground nevertheless meets all of the legal requirements for compassionate release.

We also believe that judges can and will apply these amendments in a manner that is consistent not only with the needs of the defendant, but also the safety of the community and the overarching purposes of sentencing. The law requires it, and we have every reason to believe that the judiciary will conscientiously and faithfully apply that law – just as they have done with the many compassionate release motions filed over the last several years.

In closing, we fully support the Commission's hard work in the area of compassionate release and believe the proposed amendments will, if adopted, allow judges to exercise their discretion and judgment to provide for sentencing relief in the relatively unusual circumstances where a defendant can satisfy the stringent standards set forth in Guideline § 1B1.13.

Respectfully,

Wayne Andersen
United States District Court Judge, Northern District of Illinois 1991-2010

Rosemary Barkett
United States Circuit Court Judge, Eleventh Circuit Court of Appeals 1994-2013

Rubén Castillo
United States District Court Judge, Northern District of Illinois 2013-2019

David H. Coar
United States District Court Judge, Northern District of Illinois 1994-2010
United States Bankruptcy Court Judge, Northern District of Illinois 1986-1994

Raymond J. Dearie
Senior United States District Court Judge, Southern District of New York 1986-Present

Morton Denlow
United States Magistrate Judge, Northern District of Illinois 1996-2012

Louis J. Freeh
Director, Federal Bureau of Investigation 1993-2001
United States District Court Judge, Southern District of New York 1991-1993

Jeremy Fogel
United States District Court Judge, Northern District of California 1998-2018

Katherine B. Forrest
United States District Court Judge, Southern District of New York 2011-2018

William Royal Furgeson Jr.
United States District Court Judge, Western District of Texas 1994-2013

Faith S. Hochberg
United States District Court Judge, District of New Jersey 1999-2015
United States Attorney, District of New Jersey 1994-1999

John E. Jones III
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Walter D. Kelley Jr.
United States District Court Judge, Eastern District of Virginia 2004-2008

Alex Kozinski
United States Circuit Court Judge, Ninth Circuit Court of Appeals 1985-2017

Timothy K. Lewis
United States Circuit Court Judge, Third Circuit Court of Appeals 1992-1999
United States District Court Judge, Western District of Pennsylvania 1991-1992

Beverly B. Martin
United States Circuit Court Judge, Eleventh Circuit Court of Appeals 2010-2021
United States District Court Judge, Northern District of Georgia 2000-2010

John S. Martin Jr.
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United States Attorney, Southern District of New York 1980-1983

Howard A. Matz
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THE U.S. SENTENCING COMMISSION SHOULD SOLVE THE §3E1.1 CIRCUIT SPLIT BY ELIMINATING THE POSSIBILITY OF PUNISHING DEFENDANTS FOR EXERCISING THEIR CONSTITUTIONAL RIGHTS

Sami Azhari[1] and Aliza Hochman Bloom[2]

The newly reformed U.S. Sentencing Commission is preparing to make the first amendments to the criminal sentencing guidelines in five years. In January, the Commission published proposed guideline amendments on various topics, subject to a 60-day period of notice and comment. These proposed amendments include: alleviating the procedure for defendants to move for compassionate release from the Bureau of Prisons, expanding the "safety valve" eligibility for relief from mandatory minimum penalties for drug offenders, reconsidering certain prior offenses as they relate to criminal history rules, and revising §1B1.3 to remove consideration of acquitted conduct when determining a defendant's guideline range unless it was admitted by the defendant during a guilty plea or found by a fact-finder beyond a reasonable doubt.

The Commission's proposed amendment to §3E1.1, the most common downward departure available to defendants who plead guilty, does not resolve the existing circuit split and eliminate suppression hearings as a basis for withholding a reduction to a defendant's offense level at sentencing. We urge the Commission to clearly revise this guideline, such that the government, in any federal circuit, cannot withhold the third-level reduction to functionally punish criminal defendants seeking to vindicate their constitutional rights.

Background

The sentencing guidelines are the driving force in sentencing federal criminal defendants and provide an anchor for judges before fashioning a sentence. Although no longer mandatory, they provide the "lodestone" and starting point for every federal carceral sentence.[3] These guidelines are a mathematical formula, created by the Sentencing Commission, for district courts to calculate federal criminal sentences.[4] There are many factors that can enhance a defendant's sentence upward, and these possible enhancements greatly outnumber the available downward departures that reduce a potential sentence.

Nevertheless, the two most widely used downward departures are provided pursuant to §3E1.1,[5] which encourages a defendant to accept responsibility for their conduct and avoid the risk and uncertainty involved with a trial. If the defendant accepts responsibility, 3E1.1 allows for a

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[3] *Peugh v. United States*, 133 S. Ct. 2072, 2084 (2007); *see Molina-Martinez v. United States,* 136 S. Ct. 1338, 1349 (2016).

[4] U.S. Sentencing Guidelines Manual § 1B1.1 (U.S. Sentencing Comm'n 2015) (instructions for calculating the Guidelines).

[5] USSG §3E1.1

two-point reduction of the offense level. It also allows for an additional 1-point reduction if the defendant accepts responsibility for the conduct in a timely manner that spares the Government from having to prepare for trial. Thus, 3E1.1(a) affects every criminal defendant who pleads guilty, as 97-98% of them do, and is one of the very few downward adjustments in the guidelines.

According to 3E1.1(b), if a defendant timely notifies the prosecution of their intent to plead guilty, "thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently," they receive a one-level reduction to their applicable sentencing guidelines. The federal courts of appeal are split on the interpretation of "preparing for trial," and whether the timely notification departure can be withheld by the government when defendants have filed motions to suppress to which the government has responded.

The U.S. Supreme Court had a chance to address this "an important and longstanding split," in *Longoria v. United States,* but declined, punting the responsibility to the Commission to address what constitutes "preparing for a trial.[6] Although abstaining from a chance to resolve the question, Justice Sotomayor recognized the significance to criminal defendants of withholding the 1-level reduction, acknowledging that for serious offenses, that extra level translates into a major difference in defendant's length of incarceration. Indeed, Justice Sotomayor acknowledged that "[t]he present disagreement among the Courts of Appeals means that similarly situated defendants may receive substantially different sentences depending on the jurisdiction in which they are sentenced."[7] Moreover, the Court's abstention during the time that the Commission lacked a quorum revealed an abdication of its responsibility to resolve circuit conflicts.[8]

Now that the Commission can resolve this longstanding circuit split on a guideline that affects every federal defendant who pleads guilty, it has proposed a revision that does not go far enough.

Proposed Language

The text of the guideline is as follows:

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
(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

[6]At the time the Supreme Court denied cert and entrusted the Sentencing Commission to address the issue, 6 of the 7 voting members seats were vacant. The votes of at least 4 members are required for the Commission to promulgate amendments to the Guidelines. Longoria v. United States, 591 U.S. _____ (2021) citing U. S. Sentencing Commission, Organization (Mar. 18, 2021), https://www.ussc.gov/about/who-we- are/organization.
[7] *Id.*
[8] *See* Aliza Hochman Bloom, *Misplaced Abstention: How the Supreme Court's Deference to an Incapacitated Sentencing Commission Hurts Criminal Defendants*, N.Y.U. L. REV. FORUM, (May 2022).

authorities in the investigation or prosecution of his own misconduct 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, decrease the offense level by **1** additional level.

For the purposes of this guideline, the term "***preparing for trial***" means 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. "Preparing for trial" is ordinarily indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. 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. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

The proposed amendment adds the highlighted text as an effort to resolve the circuit conflict. It is too complicated and does not eliminate the split.

Why A Motion to Suppress Should Never Be Considered "Preparing for Trial"

The Second and Fifth Circuits have permitted the government to withhold the reduction based on a defendant filing a suppression motion. For over 25 years, the Fifth Circuit has held that the government can deny the one-level reduction delineated in §3E1.1(b) when it has had to prepare for a suppression hearing.[9] In *Longoria*, for example, the court accepted the government's refusal to move for a one-point reduction and its explanation that its preparation for a one-day suppression hearing was tantamount to a trial.[10] Similarly, the Second Circuit has affirmed the Government's denial of this one-point reduction on the basis that it had to litigate a suppression hearing, explaining that "in terms of preparation by the government and the investment of judicial time, the suppression hearing was the main proceeding in this case."[11] More recently, the Second Circuit has required the government to make some showing of extensive preparation when seeking to withhold the benefit of the third point reduction pursuant to § 3E1.1(b).[12]

How And Why to Fix the Circuit Split

[9] *United States v. Gonzales*, 19 F.3d 982, 984 (5th Cir. 1994).
[10] *United States v. Longoria*, 958 F.3d 372, 378 (5th Cir. 2020).
[11] *United States v. Rogers*, 129 F.3d 76, 80-81 (2d Cir. 1997). *Id.* at 80 ("As the district court observed, 'the case was effectively tried with the motion to suppress.' Once that motion was denied, conviction [the defendant' became child's play for the prosecution.").
[12] *United States v. Vargas*, 961 F.3d 566, 584 (2nd Cir. 2020) ("where a defendant has filed a non-frivolous motion to suppress, and there is no evidence that the government engaged in preparation beyond that which was required for the motion, a district court may not rely on the fact that the defendant filed a motion to suppress requiring a lengthy suppression hearing to justify a denial of the third level reduction[.]").

The Commission should amend the language to ***never*** consider a motion to suppress as "trial preparation." Instead, the proposed amendment does not provide a bright line rule for what is "preparing for trial," and instead provides the "ordinary" definition.

> 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.

This proposal leaves two ambiguities, including "early" suppression motions and limiting the phrase with "ordinarily," which provides ample room for government attorneys to withhold the downward departure. This proposal also allows judges the flexibility to decide that suppression motions brought later are not entitled to the timely notification credit if they were not filed or argued "early." There are many reasons why it would take an attorney representing a criminal defendant, particularly one detained pretrial awaiting adjudication, to amass the facts and interviews needed to file a complete motion to suppress evidence or statements, which is prepared in anticipation of an evidentiary hearing. And even if these motions are filed "early," in the adjudicative process, the proposed revisions uses the word "ordinarily," inviting the possibility of exceptions. A judge can find that while suppression motions are not "ordinarily" considered trial prep, they are still entitled to reach that conclusion in particular cases, leaving us right back where we started.

From a policy standpoint, the failure to give defendants this 1-level departure because they have filed a suppression motion is deeply problematic. First, it penalizes the defendant for the decision of the attorney. The attorney may be filing the motion to preserve an issue for appeal, to get a preview of the government's case in chief, or to dispel any notion of ineffectiveness. A motion to suppress is almost always an attorney's strategic decision to make a legal argument for excluding evidence or statements.

Second, the filing of the motion to suppress has nothing to do with a defendant's admission of her own guilt, or acceptance of responsibility for having violated the law. Motions to suppress involve constitutional arguments of search and seizure or the right to be free from compelled testimony against oneself. They have to do with police and investigative conduct, not a defendant's admission of responsibility. When a motion to suppress is filed, a defendant is argument that the government violated the defendant's constitutional right and, as a result, evidence seized, or statements made should be suppressed. Indeed, denials of motions to suppress are often quickly followed by guilty pleas because the motion was unrelated to a defendant's claims of innocence or acceptance of responsibility.

In the circuits that permit the government to withhold the one level departure if based on the filing of a suppression motion, even the threat of a prosecutor doing so can have a chilling effect. A typical Fourth Amendment motion to suppress will argue that law enforcement either obtained evidence without a warrant, when no exceptions to the warrant requirement applied, or without sufficient particularized suspicion as required by the Constitution.[13] And a typical Fifth

[13] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

Amendment motion will argue that a defendant's statements to police were obtained in violation of *Miranda*, and therefore should be suppressed.[14] The district court's resolution of suppression motions determines what evidence the government will be permitted to present at trial, and therefore it is critical to the decision of whether a defendant should plead guilty.

As it presently stands, this guideline is being applied in certain circuits to functionally punish criminal defendants seeking to vindicate their constitutional rights. By including "ordinarily" as a caveat, the proposed amendment does not solve this split.

Moreover, what is an "early" motion to suppress? This proposal does not define a length of time before trial after which a defendant's (attorney's) decision to file a suppression motion can be a basis for his more severe carceral sentence. What is early? Is it a specific length of time? Does the "early" stage of the case terminate after Rule 16 discovery? Rule 16 discovery can take drastically varying times to complete. It depends on the district, the resources of the office, and the complexity of the case. Using an ambiguous word like "early" would fail to capture the nuances of each case and how "early" in one case may mean late in another. Moreover, discovery can often come late due to prosecutors failing to tender something when they should have, through the fault of the agents investigating the case, or just because it is newly discovered. The rule is silent on whether such disclosure will revert the case from being late procedurally to now being "early" given that discovery disclosures have not yet been satisfied.

***We Proposed the Following Amendment to the Guideline*:**

> For the purpose of this guideline, the term "***preparing for trial***" means 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. "Preparing for trial" shall only be indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparation for early pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) shall never be considered "preparing for trial" under this subsection. A motion regarding a constitutional right of the defendant made prior to empanelling a jury shall never be considered "preparing for trial." Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

Conclusion

In *Longoria,* the Supreme Court abstained from resolving a quarter-century circuit split in interpreting a guideline that affects thousands of criminal defendants pleading guilty every month

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supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[14] The Fifth Amendment prohibits self-incrimination. And since 1966, any statements made by a defendant during custodial interrogation by the police are precluded from use in the prosecutor's case-in-chief, unless the state can prove that the defendant understood his right against self-incrimination and knowingly, voluntarily, and intelligently waived those rights. *Miranda v. Arizona*, 384 U.S. at 444 (1966).

in federal courts. The Commission's proposed revision, while seemingly trying to end the practice of punishing defendants for filing suppression motions, does not go far enough. Guideline 3E1.1 offers a benefit to defendants who accept responsibility for their criminal conduct and save the government's resources by avoiding a trial. Instead of disputing their guilt, they admit to it and thereby relieve the government of its burden. Suppression motions have nothing to do with a defendant's guilt, and no matter how complicated they can be, filing such motions should not subject criminal defendants to losing the benefits intended for their acceptance of responsibility of the criminal conduct.

Commentary on the Proposed Amendments to the Sentencing Guidelines published on January 12, 2023.

Proposed Amendments to First Step Act—Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A).

The nature of our commentary is to share evidence from our 2022 study, *Recidivism Risk and Medical Frailty*, which examined the recidivism events for incarcerated persons in the Michigan Department of Corrections (MDOC) who were either (a) released to parole following physician-assessed classifications of medical frailty or (b) had their sentences commuted due to consideration of their medical condition. We found very low felony recidivism rates among these individuals.

Non-violent and violent felony offense (non-VFO and VFO) recidivism outcomes for the two groups of persons were studied separately. The purpose of the study was to ascertain the felony recidivism rates of people within MDOC who were classified as medically frail and released to the community, with or without supervision. Previously, Michigan granted compassionate release through a long and complex commutation process. In 2019, Michigan House Bills 4129-4132 were signed into law, creating a new path to compassionate release for the medically frail. However, only one person has been able to take advantage of the law since it requires an assessment of low risk of recidivism, in addition to medical need. The 2022 study was to determine whether the recidivism risk of persons classified as medically frail is "low." The MDOC Reentry Non-VFO conviction-based risk models identify men as low risk of non-violent felony arrest recidivism within three years of community start when their risk is calculated by the model to fall below 8%, and women as low risk when their risk calculation falls below 7%. Similarly, the MDOC Reentry VFO conviction-based risk models identify men as low risk of violent felony arrest recidivism within three years of community start when their calculated risk falls below 6%, and women as low risk when their calculated risk falls below 3%. We found lower rates of both non-VFO and VFO recidivism for released individuals classified as medically frail.

The Michigan Department of Corrections provided information on every person who received a commutation or D48 medical frailty release between February 2001 and December 2021. While

similar, the population sampled were not classified as "medically frail" per the Michigan House Bills 4129-4132. To compile a sample, a close proximity was used, as they were determined to be suitable for commutation by the Parole Board or they were classified as D48 by MDOC medical staff. Per the contract language, those classified as D48 requiring assistance had:

> *"… chronic and/or progressive physical disorders, which affect their activities of daily living in a negative manner. This population may need adult foster care, nursing home, or medical room and board placements. For these offenders, Contractors would need to ensure the continuity of physical health services and promote successful community transition."*

Per the statute, those released as medically frail shall reside in a medical facility, defined as; a hospital, nursing home, or other housing accommodation providing medical treatment suitable to the condition or conditions rendering the parolee medically frail. This was not a requirement for those whose sentence was commuted, or they were released as a D48. Some offenders were able to return home to friends/family for home care or home hospice.

Table 1 summarizes the final sample sizes with release and end dates. The final samples consisted of cases that could be verified with other MDOC data such as movement and sentencing files.

Table 1. Sample sizes and start and end dates for the Commutations and D48 samples.

Sample	***n***	**Start date range**	**Discharge date range**
Commutations			
	66	Feb 2001 – Feb 2014	May 2001 – Jan 2015
	2	Feb 2019	*Open*
	n	**Start date range**	**End date range**
D48			
	549	Aug 2009 – Oct 2021	Feb 2010 – Dec 2021
	12	Feb 2020 – Oct 2021	*Open*

Outcomes: Among the 68 persons in the Commutations sample, there were no felony offense arrests prior to either (a) final discharge (b) other failure event (misdemeanor, absconding, or

parole technical violation), or (c) death. There were five "other" failure events (7.4%) and there were two cases that were still open by the end of the study in late 2021. The rate of death prior to final discharge was 54.4%. We do not supply a table summarizing the Commutations sample outcomes in this commentary.

Table 2. Non-Violent and Violent Felony Offense arrests for the individuals with D48 medical frailty classification. The rows labeled "Any Felony" combine the information for the Non-VFO and VFO rows, counting arrests events that included both violent and non-violent charges as single events. "Other Failure" refers to a non-felony offense such as parole technical violation, absconding, or misdemeanor that preceded a felony offense.

Arrest Category	Event Sequence	Count	Rate	95% CI
Non-VFO	First	5	0.90%	(0.3%, 2.2%)
	First or After Other Failure	7	1.20%	(0.5%, 2.7%)
VFO	First	4	0.70%	(0.2%, 2%)
	First or After Other Failure	4	0.70%	(0.2%, 2%)
Any Felony (Non-VFO and VFO combined)	First	6	1.10%	(0.4%, 2.4%)
	First or After Other Failure	8	1.40%	(0.7%, 2.9%)

Among the 561 persons in the D48 sample, there were six felony offense arrests (1.10%) prior to either (a) final discharge (b) other failure event (misdemeanor, absconding, or parole technical violation), or (c) death. There were 25 "other" failure events (4.5%) and there were 12 cases that were still open by the end of the study in late 2021. The rate of death prior to final discharge was only 5.9%, starkly different than the 54.4% seen in the Commutations sample. **Table 2** provides a closer look at the types of felony offense arrests that occurred during the supervised release period. Note that the last two rows, labeled "Any Felony," combine the information for the non-VFO and VFO rows, counting arrests events that included both violent and non-violent charges as single events. So, although the table shows that there were five arrests for non-VFO and four arrests for VFO, there were actually only six arrests for felony offenses in total: three of the arrests included both non-VFO and VFO charges.

It should be noted that of the 561 persons in the D48 sample, 133 were placed in a nursing home facility. Of those 133, there were no arrests for non-VFO or VFO offenses. Additionally, there were no "other" failure events for this population. The 95% confidence interval for the recidivism

rate of this group is 0 – 2.7% and their mean release time was 150 days. Of those six arrested for felony offense, all were initially placed in a group (Adult Foster Care) home and therefore would have not technically qualified for medical frailty under the statute.

Study results may have limited applicability to the broad uses discussed in the USSC proposed amendments:

1) Recidivism rates generally specify a fixed time period such as three years from the date of starting in the community. Most D48 cases were on supervised release for less than a year. If a felony arrest occurred, the mean number of days to that event in the D48 group was about half a year (176 days).
2) There were no felony arrests within the smaller Commutations group. Because of the small sample size, this yielded a 95% confidence interval of (0%, 6.7%); the mean length of release before death was 247 days, and the mean length of release before final discharge for those who did not die or experience non-felony failure was 1394 days, almost four years.
3) Most persons with a D48 medical frailty classification were released to some form of supervised care, either a group home, hospital, or family.
4) The D48 cases were approved for parole release before being classified as medically frail. Going forward, not all medically frail cases within MDOC will be required to complete this same parole process before receiving the D48 classification and release to a supervised facility or family care, since the legislature has created a separate, but similar type of parole for those meeting a specific definition of medical frailty, per the statute. Regardless of the qualifications, the medically frail classification will continue to be made only by approved medical professionals, in accordance with state statute which requires a permanent or terminal physical disability that impacts an individual's ability to walk, stand, or sit without personal assistance or a permanent or terminal disabling mental disorder that impairs two or more activities of daily living.

Conclusion: As stated in paragraph two of our commentary, the MDOC considers men to be low risk of non-VFO recidivism when their non-VFO risk is calculated to fall below 8%, and women to

be low risk when their non-VFO risk is calculated to fall below 7%. Similarly, the MDOC considers men to be low risk of VFO recidivism when their VFO risk is calculated to fall below 6%, and women to be low risk when their VFO risk is calculated to fall below 3%. Non-VFO and VFO recidivism rates for individuals within the Commutations and the D48 samples were very low, well below the bounds established by MDOC and equivant as low risk. There were no felony events in the Commutations sample. **Table 2** summarizes the recidivism rates for the D48 sample. More details are available within the report produced for MDOC.

Signed by *Eugenie Jackson* *February 28, 2023*

Eugenie Jackson
Research Team Lead
equivant Supervision

Date

Kenneth Dimoff *February 28, 2023*

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February 15, 2023

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

Re: Legality of proposed USSG § 1B1.13(b)(6)

Dear Judge Reeves:

Along with Professor Laurence H. Tribe of Harvard Law School, as well as my colleagues Sean Hecker and Amit Jain of Kaplan Hecker & Fink LLP, I am grateful for the opportunity you have afforded to comment on the United States Sentencing Commission's proposed amendments to USSG § 1B1.13. This letter responds specifically to the Commission's invitation for comment on whether proposed § 1B1.13(b)(6) "exceeds the Commission's authority under 28 U.S.C. § 994(a) and (t), or any other provision of federal law." We have carefully studied the issue. In our view, all three versions of proposed subsection (b)(6) are fully consistent with 28 U.S.C. § 994(a) and (t), and we do not discern any other applicable statutory or constitutional limitation.

To explain that conclusion, we first consider the statutory text and structure of § 994(t). We conclude that § 994(t) requires the Commission to issue general policy statements that offer meaningful guidance about the characteristic or significant qualities of what ought to satisfy the "extraordinary and compelling reasons" standard under 18 U.S.C. § 3582(c)(1)(A). That guidance, in turn, must reflect principles by which a defendant's circumstances may be judged and a list of specific examples that meet or demonstrate the standard (and it may also include other provisions). However, the Commission is not required to attempt any comprehensive or preclusive accounting of what reasons may conceivably qualify; instead, it can provide the meaningful guidance just described and rely upon courts to exercise reasoned judgment in assessing the facts of each case. This is precisely what proposed subsection (b)(6) accomplishes, as we establish through a detailed analysis of the text and structure of each of the options proposed for this subsection.

The remainder of our comment—Parts II through IV—surveys judicial precedent, legislative history, and prior practice by the Commission itself. We demonstrate that each of these sources of authority supports our plain-text interpretation of § 994(t). We further demonstrate that these sources are fully consistent with the adoption of any version of proposed subsection (b)(6), and that they confirm the importance and wisdom of incorporating such language into § 1B1.13(b).

I. Proposed Subsection (b)(6) Is Consistent with the Text of 28 U.S.C. § 994

Under 28 U.S.C. § 994(a)(2)(C), the Commission is authorized to promulgate general policy statements regarding "the appropriate use" of certain sentence modification provisions, including 18 U.S.C. § 3582(c)(1)(A). As amended by the First Step Act of 2018, § 3582(c)(1)(A) allows a defendant to seek a sentence reduction based on "extraordinary and compelling reasons" if he meets certain other requirements. In promulgating policy statements to address the appropriate use of such sentence reductions under § 3582(c)(1)(A), the Commission must adhere to 28 U.S.C. § 994(t), which provides (in part) that the Commission "shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." Historically, the Commission's policy statements concerning sentence reductions under § 3582(c)(1)(A) have appeared at § 1B1.13.

Accordingly, any potential amendments to § 1B1.13 must comply with § 994(t). That is the standard against which proposed subsection (b)(6) must be tested.

On its face, § 994(t) suggests breadth rather than narrowness: it uses words like "describe," "should," "including," and "criteria." But even a broad statute must have its limits. So the question is really one of degree: in carrying out its obligations under § 994(t), how precisely must the Commission itself describe "the criteria to be applied" and the "list of specific examples"?

One potential interpretation—we'll call it the *restrictive view*—is that the Commission is statutorily obligated to provide highly explicit criteria and examples, leaving hardly any room for courts applying § 1B1.13 to exercise judgment or discretion in identifying where "extraordinary and compelling reasons" exist under § 3582(c)(1)(A). Another potential interpretation—we'll call this one the *moderate view*—is that the Commission must provide meaningful criteria and specific examples, but it can properly leave a measure of reasoned judgment and discretion to courts in identifying where "extraordinary and compelling reasons" exist. A final potential reading—the *permissive view*—is that the Commission need not provide any significant interpretive guidance, leaving courts to essentially decide on their own whether "extraordinary and compelling reasons" exist under § 3582(c)(1)(A).

Based on our careful study, we believe the *moderate view* is the best reading of § 994(t), and we believe that proposed subsection (b)(6) reflects a statutorily permissible exercise of the Commission's authority to describe extraordinary and compelling reasons for sentence reduction.

A. Section 994(t) requires the Commission to provide meaningful criteria and specific examples, but permits it to vest courts with a measure of reasoned judgment in identifying "extraordinary and compelling reasons"

As in all questions of statutory construction, "we begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (internal quotation marks and alteration omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."). We will first consider separately each of the key words and phrases in § 994(t). We will then consider the statute as a whole, guided by our

understanding of its component parts. As we will show, the best reading of § 994(t) is the *moderate view*: it does not allow the Commission to effectuate a complete transfer of interpretive authority to courts (the *permissive view*), nor does it require the Commission to provide highly explicit and unduly rigid criteria and examples that preclude judicial discretion (the *restrictive view*).

The first key term in § 994(t) is "describe." Specifically, § 994(t) directs the Commission to "describe" what should be considered extraordinary and compelling reasons for sentence reduction. The ordinary meaning of "describe" is "to use words to convey a mental image or impression of [a thing] by referring to characteristic or significant qualities, features, or details."[1] Thus, the statutory language describing the Commission's role contemplates that the Commission must guide courts in assessing sentence reduction motions by conveying an impression of the characteristic or significant qualities of "extraordinary and compelling reasons." Of course, that role is most consistent with general policy statements that describe criteria and examples while still contemplating a reasoned, structured role for federal courts to play in reducing sentences.

This understanding is confirmed by context. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (cleaned up). Section 994 elsewhere directs the Commission to "establish" or "specify" certain sentencing ranges or outcomes.[2] Unlike the word "describe," the words "specify" and "establish" strongly indicate that the Commission's role is meant to be conclusive and definite.[3] Yet § 994(t) conspicuously refrains from directing the Commission to act in such a fixed or categorical manner and instead directs it only to "describe" what should qualify as extraordinary and compelling reasons. Because differences in language presumptively convey differences in meaning, the word "describe" should not be read as imposing an unduly restrictive obligation on the Commission to specify *ex ante* every possible "extraordinary and compelling reason[]." Rather, the word "describe" suggests the Commission is required only to offer *description* or *guidance*.

That conclusion is bolstered by application of the separate interpretive principle that courts and agencies should not rewrite statutes. Here, interpreting "describe" as though it means "define" or "specify" or "establish"—terms connoting a more rigid and preclusive understanding of the role the Commission is meant to play—would defeat Congress's choice of language. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 534 (2011) (rejecting interpretation that "would depart from the statute's text by replacing" one word with another). Indeed, the Tenth Circuit applied that very principle while holding that the restrictive interpretation of § 994 is mistaken: "Turning first to § 994(t), we note that Congress, in outlining the Sentencing Commission's duties, chose to employ the word

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[1] *Describe*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/50732 (last accessed Feb. 3, 2023).

[2] *See, e.g.*, § 994(b)(1) (directing Commission to "establish" sentencing ranges "for each category of offense involving each category of defendant"); § 994(h) (directing Commission to ensure that guidelines "specify" a prison sentence near the maximum term under certain enumerated circumstances); § 994(u) (directing Commission to "specify in what circumstances and by what amount" reductions in sentencing guidelines may apply retroactively).

[3] To "establish" something is "[t]o fix, settle, institute or ordain [it] permanently," whereas to "specify" is "[t]o mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly." See *Establish*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/64530 (last accessed Feb. 3, 2023); *Specify*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/186017 (last accessed Feb. 3, 2023).

'describe' rather than the word 'define.' . . . We presume that Congress was aware of the difference between these two words and knowingly chose to use the word 'describe,' rather than the word 'define,' in setting forth its statutory directive to the Sentencing Commission in § 994(t)." *United States v. McGee*, 992 F.3d 1035, 1044 (10th Cir. 2021) (concluding that "Congress intended to afford district courts with discretion . . . to independently determine the existence of 'extraordinary and compelling reasons'" when analyzing motions under § 3582(c)(1)(A)).[4]

This leads us to the next key phrase: the Commission shall describe "what *should* be considered" as "extraordinary and compelling reasons" (emphasis added). Use of the word "should" is important. Rather than direct the Commission to say what "shall" or "must" qualify as "extraordinary and compelling reasons," § 994 directs it to say what "should" qualify. "[T]he common meaning of 'should' suggests or recommends a course of action, while the ordinary understanding of 'shall' describes a course of action that is mandatory." *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999). The contrast is especially stark here because § 994(t) uses both words: In the sentence immediately following the Commission's charge to describe "what *should* be considered" as extraordinary and compelling reasons, the statute more pointedly specifies that "rehabilitation alone *shall* not be considered" such a reason. § 994(t) (emphasis added). Thus, the statute not only directs the Commission to "describe" rather than "define" what reasons qualify as "extraordinary and compelling," but it also directs the Commission to describe what "should" rather than what "shall" qualify. Here, too, Congress used language suggesting a more moderate view of the Commission's role: the Commission is required to describe "extraordinary and compelling reasons," and its description must cover what "should" qualify, but there is no textual indication that it is expected to offer a comprehensive or preclusive accounting of such reasons.

That reading is bolstered by the next (and most important) statutory phrase: "extraordinary and compelling reasons." By definition, this term refers to reasons that are "[o]ut of the usual or regular course of order" or "[o]f a kind not usually met with; exceptional; unusual; singular" and "irresistible; demanding attention, respect, etc."[5] Courts have characterized this language—as used in both § 994(t) and 18 U.S.C. § 3582(c)(1)(A)(i)—as "open-ended . . . to capture the truly exceptional cases that fall within no other statutory category,"[6] "flexible,"[7] "amorphous,"[8] and "broad."[9] Given these characteristics, it would be quite strange for Congress to require that the Commission conclusively define or account for every conceivable such reason: by their nature, "extraordinary and compelling reasons" necessarily resist any such advance enumeration. It is

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[4] Other subsections of § 994 refer to items "described in" specific federal statutes. *See, e.g.*, § 994(h) (referring twice to "an offense described in" certain statutes). In context, that is a more restrictive usage of the word "described." But whereas in these other subsections it was Congress that "described" the relevant items, here alone it is the Commission itself that must "describe" what ranks as "extraordinary and compelling reasons," and the prospective obligation to "describe" is very different in context than a reference to what has already elsewhere been "described."

[5] *Extraordinary*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/67124 (last accessed Feb. 3, 2023); *Compelling*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/37525 (last accessed Feb. 3, 2023).

[6] *United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020).

[7] *United States v. Bridgewater*, 995 F.3d 591, 601 (7th Cir. 2021).

[8] *United States v. Andrews*, 12 F.4th 255, 260 (3d Cir. 2021).

[9] *United States v. Johnson*, ___ F. Supp. 3d ___, 2022 WL 2866722, at *6 (D.D.C. July 21, 2022).

more natural to conclude that Congress charged the Commission with providing meaningful guidance but also permitted the Commission to leave a measure of reasoned judgment and discretion for courts in ascertaining where extraordinary and compelling reasons exist.

Indeed, this inference is further supported by the final key phrase: "including the criteria to be applied and a list of specific examples." Absent evidence to the contrary, "[t]he verb *to include* introduces examples, not an exhaustive list." Scalia & Garner 132; *see also, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 317 n.10 (2010) ("The word 'includes' is usually a term of enlargement, and not of limitation." (quoting 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47.7, p. 305 (7th ed. 2007)) (cleaned up)). Here, § 994(t) mandates that the Commission's description must include (1) "criteria," meaning "test[s], principle[s], rule[s], canon[s], or standard[s], by which" extraordinary and compelling reasons are to be "judged or estimated," and (2) a list of specific examples, meaning "thing[s] which [are] typical or characteristic of" the "category" or "class."[10] Read in combination, this language makes clear that the Commission's core obligation—namely, to "describe" what "should" qualify as "extraordinary and compelling reasons"—expansively includes broad principles, canons, and standards, as well as more specific examples that may illuminate or represent the application of those criteria.

Pulling this all together, the plain language of § 994(t) is inconsistent with any restrictive view of the Commission's authority, which would treat the statute as requiring the Commission to provide a highly detailed specification of reasons that rank as "extraordinary and compelling." Instead, the statutory language suggests breadth rather than narrowness: the Commission's obligation under § 994(t) contemplates that it must offer meaningful guidance about what reasons qualify as "extraordinary and compelling," and that it may also properly describe such reasons in ways that leave room for a measure of reasoned judgment by courts in applying that standard. *See Consumer Elecs. Ass'n v. F.C.C.*, 347 F.3d 291, 298 (D.C. Cir. 2003) ("[T]he Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application."). This approach makes perfect sense here. "[I]t is possible and useful to formulate categories . . . without knowing all the items that may fit—or may later, once invented, come to fit—within those categories." Scalia & Garner 101. Recognizing the need for such categories here, Congress required the Commission to describe what reasons should qualify, but did so in broad language allowing the Commission itself to establish frameworks and guidance that will structure judicial discretion in truly unusual cases. *See, e.g.*, *United States v. Ruvalcaba*, 26 F.4th 14, 27 (1st Cir. 2022) ("Judges do not have crystal balls, and courts cannot predict how th[e] mix of factors . . . will play out in every [compassionate release] case."); *McCoy*, 981 F.3d at 287 ("[T]he very purpose of § 3582(c)(1)(A) is to provide a 'safety valve' that allows for sentence reductions when there is *not* a specific statute that already affords relief but 'extraordinary and compelling reasons' nevertheless justify a reduction." (emphasis in original)); *cf. United States v. Kappes*, 782 F.3d 828, 838 (7th Cir. 2015) ("A defendant may change substantially during a long prison sentence, and the world outside the prison walls may change even more.").

Simply put, § 994(t) requires the Commission to issue general policy statements that offer meaningful guidance about the characteristic or significant qualities of what ought to satisfy an inherently forward-looking "extraordinary and compelling reasons" standard. That guidance, in

[10] *Criterion*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/44581 (last accessed Feb. 3, 2023); *Example*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/65593 (last accessed Feb. 10, 2023).

turn, must reflect principles by which a defendant's circumstances may be judged and a list of specific examples that meet or demonstrate the standard (and it may also include other provisions). The Commission is not required to attempt a comprehensive or highly specific accounting of what reasons may qualify; instead, it can provide the meaningful guidance that we have just described and rely upon courts to exercise reasoned judgment in assessing the facts of each case.

B. Each of the proposed versions of subsection (b)(6) complies with Section 994(t)

Under the interpretation of § 994(t) set forth above, each of the proposed versions of subsection (b)(6) is consistent with the statute's requirements for the Commission.

For ease of reference, here are the three options for proposed subsection (b)(6):

> **Option 1**: (6) OTHER CIRCUMSTANCES.—The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)].
>
> **Option 2**: (6) OTHER CIRCUMSTANCES.—As a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.
>
> **Option 3**: (6) OTHER CIRCUMSTANCES.—The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].

Option 1 satisfies § 994(t) because it expressly provides meaningful criteria in describing what should qualify as extraordinary and compelling reasons: namely, circumstances "similar in nature and consequence" to the other circumstances described in § 1B1.13(b). In applying this criterion, courts would operate with reasoned and well-structured judgment in identifying whether the circumstances of a particular case fall within the guidance provided by the Commission, which (if the rest of the proposed amendment is adopted) would ask it to reason by analogy to specified medical, age-related, family, victim-based, and legal circumstances. Indeed, it is commonplace for courts to assess whether one set of factual circumstances is analogous to another in "nature and consequence"—that is inherent in the task of common law judging, it often occurs in sentencing proceedings, and it is the basis on which cases are cited and distinguished in many areas of law. *See, e.g.*, Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 741 (1993) ("Reasoning by analogy is the most familiar form of legal reasoning."); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 501 (1948) ("The basic pattern of legal reasoning is reasoning by example."); *see also* 18 U.S.C. § 3553(a)(6) (directing sentencing courts to avoid unwarranted disparities "among defendants with similar records who have been found guilty of similar conduct"); USSG § 2X5.1 ("If the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline.").

Options 2 and 3 also satisfy § 994(t), though the analysis here is different. Unlike Option 1, neither of these options provides an explicit meaningful criterion for sentence reductions: Option 2 refers broadly to changed circumstances or intervening events that would make the original sentence "inequitable," and Option 3 simply restates the underlying "extraordinary and compelling reason[s]" standard. On their face, Options 2 and 3 may thus appear objectionable under § 994(t), since it could be asserted that they fail to provide any criteria or guidance to courts, and that they instead amount to a total delegation of unstructured discretion in sentence reduction proceedings.

Any such argument, however, would lack merit because ordinary interpretive methods confirm that Options 2 and 3 do provide meaningful criteria. This conclusion follows from the whole-text canon, which "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner 167; *accord K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, proposed Options 2 and 3 would not appear in a vacuum, but rather would appear as part of the broader framework of § 1B1.13(b). As a result, their meaning would be informed by the structure and relation of the provisions within that section, and it would be clear to any reasonable interpreter that they encompass "extraordinary and compelling reasons" of similar gravity to those set forth in the preceding subsections of § 1B1.13(b). In that respect, Options 2 and 3 are similar to Option 1, and they would provide meaningful guidance to courts while properly structuring judicial discretion in this field. *See, e.g.*, *United States v. Pinto-Thomaz*, 454 F. Supp. 3d 327, 329 (S.D.N.Y. 2020) (collecting cases and reasoning that current Application Note 1(D), which is materially identical to proposed Option 3, necessarily authorizes a finding of extraordinary and compelling reasons "on grounds that are distinct from, but of similar magnitude and importance to, those specifically enumerated").

Indeed, there is another interpretive canon that speaks directly to this situation: *ejusdem generis*, which provides that "[w]here general words follow an enumeration of two or more things, they apply only to . . . things of the same general kind or class specifically mentioned." Scalia & Garner 199. Put differently, where a legal provision sets forth a list of things and then includes a catch-all provision at the end, the catch-all is understood to cover things like those elsewhere on the list. Here, § 1B1.13(b) sets forth a list meant to describe circumstances that should qualify as "extraordinary and compelling reasons," and Options 2 and 3 would be interpreted as covering only additional circumstances similar in kind to the rest of the list. (Indeed, reading Options 2 and 3 without that limitation would make a mess of § 1B1.13(b), since the rest of the provision could be rendered superfluous if proposed § 1B1.13(b)(6) were not properly limited.)

Accordingly, Options 2 and 3 would be understood in the full context of § 1B1.13(b). And each of them—with different emphasis—would capture only circumstances that reasonably rank alongside the other enumerated criteria and examples as "extraordinary and compelling reasons" for sentence reductions. In applying these options if subsection (b)(6) were adopted, a district court that "strikes off on a different path" by finding extraordinary and compelling circumstances in situations wholly unlike the enumerated examples would "risk[] an appellate holding that judicial discretion has been abused." *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

For these reasons, all three versions of proposed subsection (b)(6) are consistent with the requirements of § 994(t). Each of them would satisfy the Commission's statutory obligation to describe what should qualify as "extraordinary and compelling reasons" for a sentence reduction (since each of them would provide meaningful criteria to courts engaged in such analysis), and

each of them would appropriately vest courts with a measure of reasoned judgment in identifying "extraordinary and compelling reasons" based on the diverse factual records they encounter.

There are two separate potential objections to proposed subsection (b)(6) that bear mention, though we believe that both are mistaken. *First*, it may be argued that if this proposed subsection gives courts *carte blanche* to define "extraordinary and compelling reasons," then there will be no independent force to the separate statutory requirement in § 3582(c)(1)(A) that a sentence reduction also be "consistent with applicable policy statements issued by the . . . Commission." This is essentially an anti-superfluity point: the concern is that if the Commission's policy statement achieves a complete delegation of decision-making power to courts, then there is no real meaning to the requirement that courts must act consistent with the Commission's policy statement, since the policy statement will necessarily allow anything that a court chooses to do. But that concern has no force here because all three versions of proposed subsection (b)(6) in fact constrain judicial discretion when it comes to identifying "extraordinary and compelling reasons." As a result, the requirements under § 3582(c)(1)(A) each do separate work under the proposed subsection—and so § 3582(c)(1)(A) can be read harmoniously with itself and § 994(t).

Second, along similar lines, it may be objected that proposed subsection (b)(6) wrongly delegates the Commission's policymaking authority to the federal courts. *See* 28 U.S.C. § 995(b) (authorizing Commission to "delegate . . . such powers as may be appropriate *other than* the power to establish general policy statements and guidelines" (emphasis added)). Here, too, the essential concern is that the Commission cannot abdicate its role to the courts in describing "extraordinary and compelling reasons." But that concern hinges entirely on the meaning of § 994(t). And as we have demonstrated, the best reading of that statute—which defines the proper role of courts and the Commission—is that the Commission is fully authorized to describe what should qualify as "extraordinary and compelling" in ways that leave room for courts to make reasoned judgments. Because Congress has written a statute that contemplates precisely this dynamic, there is nothing improper about adopting the proposed subsection to effectuate that legitimate judicial role.

Therefore, we conclude that all three options for proposed subsection (b)(6) are consistent with the requirements of § 994(t), and we believe that adopting a version of this proposed subsection is both statutorily authorized and most consistent with the evident statutory plan.

II. Judicial Precedent Supports This Interpretation of Section 994(t)

The textual analysis set forth above is supported by opinions from the Sixth and Tenth Circuits, which have held that § 994(t)'s text does not direct the Sentencing Commission "to prescribe an *exhaustive* list of examples of extraordinary and compelling reasons." *United States v. Jones*, 980 F.3d 1098, 1111 n.18 (6th Cir. 2020) (emphasis in original); *accord McGee*, 992 F.3d at 1045 ("[W]e conclude that Congress did not, by way of § 994(t), intend for the Sentencing Commission to exclusively define the phrase 'extraordinary and compelling reasons' . . . .").

Jones and *McGee* both arose in a similar and familiar context: disputes over whether § 1B1.13 was "applicable" under § 3582(c)(1)(A) to compassionate release motions filed by defendants. The Commission is undoubtedly aware of this background, so we will not reprise it.

In *Jones*, the Sixth Circuit reasoned that in view of the policy statement's textual focus on motions filed by the Bureau of Prisons—as well as Congress's intent to expand compassionate release in the First Step Act and the Commission's own efforts to broaden the range of circumstances that could constitute extraordinary and compelling reasons—the policy statement was "inapplicable" to defendant-filed motions. *See* 980 F.3d at 1108–11. The court further held that district courts had discretion to find "extraordinary and compelling reasons" beyond the specific examples therein. *See id.* In support of this conclusion, the court explained that § 994(t)'s text "commands the Sentencing Commission to provide a 'list of specific examples' of 'what should be considered extraordinary and compelling circumstances'" but does not "allow[] the Sentencing Commission to prescribe an *exhaustive* list of examples," as would effectively result if § 1B1.13 were deemed applicable to defendant-filed motions. *Id.* at 1110 n.18.

The Tenth Circuit followed a similar path in *McGee* and a related case, *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021), where it held that courts may determine "extraordinary and compelling reasons" in defendant-filed motions. In *Maumau*, the Government had argued that under § 994 and § 3582(c)(1)(A), "it is the . . . Commission, not the courts, that is empowered to determine what qualifies as an 'extraordinary and compelling reason.'"[11] But the Tenth Circuit disagreed. It noted that "Congress, in outlining the . . . Commission's duties [in § 994(t)], chose to employ the word 'describe' rather than the word 'define.'" *McGee*, 992 F.3d at 1044; *Maumau*, 993 F.3d at 832–33. And it found further support in the fact that § 994 directed the Commission to issue its description by means of a general policy statement. *McGee*, 992 F.3d at 1044–45; *Maumau*, 993 F.3d at 833–34. The court also looked to the structure of § 3582(c)(1)(A), noting that if the Commission had total control over defining "extraordinary and compelling reasons," then the separate requirement that courts consider "applicable" policy statements would truly be superfluous. *See id.* The Tenth Circuit therefore held that § 994(t) directed the Commission only "to describe those characteristic or significant qualities or features that typically constitute 'extraordinary and compelling reasons,' and for those guideposts . . . to be considered by district courts under . . . § 3582(c)(1)(A)." *McGee*, 992 F.3d at 1045; *Maumau*, 993 F.3d at 834.

No court of appeals has disagreed with the Sixth or Tenth Circuits on this interpretation of § 994(t), which most clearly aligns with the moderate view we have described rather than the restrictive view, and which supports the Commission's authority to adopt proposed subsection (b)(6). The absence of contrary appellate authority is particularly notable in light of the extraordinary amount of litigation over these provisions since 2018: while courts, defendants, and Government lawyers have vigorously debated the bounds of § 1B1.13 and the meaning of § 994(t) since Congress enacted the First Step Act, no appellate court has embraced the Government's view in *Maumau* that § 994(t) requires the Commission to promulgate an exclusive prior definition of extraordinary and compelling reasons. Nor has any court of appeals found anything inherently improper about courts retaining some discretion to identify extraordinary and compelling reasons. To the contrary, courts have emphasized the propriety and importance of such measured discretion.

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[11] Brief for the United States at 17–18, *Maumau*, 993 F.3d 821 (No. 20-4056), 2020 WL 3447848, at *17–*18; *see also* Reply for the United States at 5, *Maumau*, 993 F.3d 821 (No. 20-4056), 2020 WL 4932465, at *5 (Section 994(t) "delegates th[e] authority" to "ultimately decide what kind of reason can legally qualify . . . to the Commission," not to courts); *Maumau*, 993 F.3d at 831–32 ("The premise of the government's first argument is that . . . the Sentencing Commission possesses the exclusive authority to define what constitutes 'extraordinary and compelling reasons.'").

The court that has come closest to suggesting otherwise is the Eleventh Circuit, though even that court has never interpreted § 994(t) in a manner at odds with our analysis. Instead, in a divided opinion that split from other circuits and held that § 1B1.13 was "applicable" to defendant-filed motions, the Eleventh Circuit raised a policy concern about allowing too much judicial discretion in this field. *See United States v. Bryant*, 996 F.3d 1243, 1257, 1262 (11th Cir. 2021). In the view of that panel majority, the Sentencing Reform Act's "purpose was to limit discretion and to bring certainty and uniformity to sentencing," and allowing courts too much discretion to define extraordinary and compelling reasons would undercut that purpose, causing "[d]isparity and uncertainty." *Id.* at 1257.

Bryant's policy concerns do not support adopting a restrictive interpretation of § 994(t) meant to effectively limit judicial discretion. That is true, first and foremost, because the best reading of the statutory text (as shown above) supports a more moderate reading of the statute.

Moreover, *Bryant*'s discussion betrays an unduly cramped understanding of the SRA, which sought "to increase transparency, uniformity, and proportionality in sentencing." *Dorsey v. United States*, 567 U.S. 260, 265 (2012). These goals are sometimes in conflict: there is an inherent "tension . . . between the mandate of uniformity and the mandate of proportionality." USSG ch. 1, pt. A, intro. cmt.; *see also Concepcion v. United States*, 142 S. Ct. 2389, 2403 n.8 (2022) ("[I]t is a feature of our sentencing law that different judges may respond differently to the same sentencing arguments."). But the norm in our sentencing scheme is to seek to accommodate both principles, rather than to allow either of them to drive us to an extreme.

In any event, four years of experience under the First Step Act have largely put the Eleventh Circuit's uniformity concerns to rest. As the Commission found last year, even after most courts of appeals held that judges could ascertain "extraordinary and compelling reasons" independent of § 1B1.13 in cases involving defendant-filed motions, "the overwhelming majority of grants of compassionate release were based on a reason specifically described in the policy statement or a reason comparable to those specifically described reasons."[12] Thus, there is a substantial basis to believe that when the Commission provides meaningful guidance about the characteristic or significant qualities of what ought to satisfy the "extraordinary and compelling reasons" standard, courts can be trusted to exercise reasoned judgment in ascertaining additional cases that rank as comparably "extraordinary and compelling" with reference to the Commission's policy.

This is unsurprising. As Judge Easterbrook remarked in concluding that courts could look beyond the examples enumerated in § 1B1.13, "[W]e do not see the absence of an applicable policy statement as creating a sort of Wild West in court, with every district judge having an idiosyncratic release policy. The statute itself sets the standard: only 'extraordinary and compelling reasons' justify the release of a prisoner who is outside the scope of § 3582(c)(1)(A)(ii). The substantive aspects of the Sentencing Commission's analysis in § 1B1.13 and its Application Notes provide a working definition of 'extraordinary and compelling reasons'; a judge who strikes off on a different path risks an appellate holding that judicial discretion has been abused. In this way the Commission's analysis can guide discretion without being conclusive." *Gunn*, 980 F.3d at 1180.

[12] U.S. Sent'g Comm'n, *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic* at 2 (Mar. 2022).

Of course, in the unusual cases over the past few years when judges departed from the Commission's policy as set forth in § 1B1.13, their discretion proved pivotal to appropriately effectuating compassionate release's purpose as a safety valve. For example, courts exercised their newly-recognized discretion to find that "extraordinary and compelling reasons" existed where (a) defendants' health conditions, the conditions of their confinement, and any COVID-19 outbreaks at their prisons rendered them exceptionally vulnerable to death or severe illness;[13] (b) defendants' individualized circumstances, combined with non-retroactive changes in law, rendered their continued incarceration inequitable;[14] or (c) defendants raised certain compelling family or medical concerns beyond those expressly specified in § 1B1.13.[15] The Commission seems to agree that these types of reasons, though unforeseen when the Commission amended § 1B1.13 in 2016, satisfy the statutory standard; thus, the Commission now proposes incorporating them into the policy statement. *See* proposed § 1B1.13(b)(1)(C), (b)(1)(D), (b)(3)(C), (b)(5). But were it not for district courts' discretion, not one of these defendants, despite their extraordinary and compelling reasons for sentence reduction, would have been granted compassionate release in a timely

[13] *See, e.g.*, *United States v. Jackson*, No. 2:18-cr-86-PPS, 2020 WL 3396901, at *6 (N.D. Ind. June 19, 2020) ("In sum, Jackson's medical risk factors, combined with the continued and widespread presence of COVID-19 in FCI Elkton, create[] a circumstance that is extraordinary and compelling."); *United States v. Cardena*, 461 F. Supp. 3d 798, 803 (N.D. Ill. 2020) ("Here, Cardena's diagnosed medical conditions combined with the real threat of exposure to COVID-19 and the fact that he is close to the end of his sentence create extraordinary and compelling circumstances."); *see also* U.S. Sent'g Comm'n, *supra* note 12, at 3 (in FY 2020, "[c]ourts cited the health risks associated with COVID-19 as at least one reason for granting relief for 71.5 percent of Offenders Granted Relief").

[14] *See, e.g.*, *United States v. Ledezma-Rodriguez*, 472 F. Supp. 3d 498, 504–06 (S.D. Iowa 2020) (holding that defendant who had received "life sentence for low-level, non-violent drug trafficking" demonstrated exceptional and compelling reasons for sentence reduction in view of "drastic changes to the law," "objectiv[e] inhuman[ity]" of life sentence, and defendant's rehabilitation); *United States v. Haynes*, 456 F. Supp. 3d 496, 514 (E.D.N.Y. 2020) ("readily conclud[ing]" that "brutal impact" of defendant's original sentence, "drastic severity" as compared to codefendant's sentence, "extent to which that brutal sentence was a" trial penalty, and First Step Act's elimination of § 924(c) stacking that enabled original sentence constituted extraordinary and compelling reasons); *United States v. Hope*, No. 90-cr-06108-KMW-2, 2020 WL 2477523, at *3–*4 (S.D. Fla. Apr. 10, 2020) (finding that combination of defendant's "serious medical issue requiring surgery," his "original, mandatory life sentence [that] represents the type of sentencing disparity that the First Step Act was enacted to redress," and his "impressive record of rehabilitation and good behavior" combined to constitute extraordinary and compelling reasons); *United States v. Young*, 458 F. Supp. 3d 838, 848 (M.D. Tenn. 2020) (finding extraordinary and compelling reasons where defendant had been subject to 92-year mandatory minimum on stacked § 924(c) counts, but would have been subject to 25-year minimum under current law, and was 72 years old and had served nineteen years with several health issues); *United States v. Owens*, 996 F.3d 755, 762–63 (6th Cir. 2021) (collecting similar district court decisions), *abrogated by United States v. McCall*, 56 F.4th 1048, 1066 (6th Cir. 2022) (en banc).

[15] *See, e.g.*, *United States v. McCauley*, No. 07-cr-04009-SRB-1, 2021 WL 2584383, at *2–*3 & n.7 (W.D. Mo. June 23, 2021) (holding that although existing § 1B1.13's "family circumstances provision is not directly on point," defendant nevertheless showed extraordinary and compelling reasons because his elderly parents "ha[d] various debilitating and progressive health conditions" that required his caretaking assistance, in combination with defendant's rehabilitation); *United States v. Walker*, No. 1:11 CR 270, 2019 WL 5268752, at *2–*3 (N.D. Ohio Oct. 17, 2019) (finding that defendant's mother's failing health and need for caregiving—in combination with defendant's veteran status and mental health history, circumstances of his crime, acceptance of responsibility, extraordinary job opportunity, and limited time remaining on his sentence—constituted extraordinary and compelling reasons); *United States v. Beck*, 425 F. Supp. 3d 573, 583 (M.D.N.C. 2019) (holding that although "a standard case of properly-treated breast cancer may not qualify as a 'terminal illness'" under existing § 1B1.13, defendant nevertheless showed extraordinary and compelling reasons because she "ha[d] not received proper treatment, and it is questionable that BoP will provide appropriate medical care for this life-threatening disease going forward").

manner.[16] That result is simply irreconcilable with the statutory text and framework and speaks to the importance and wisdom of allowing a measure of reasoned judicial discretion in this context.

Finally, any concerns about such an approach are further mitigated by the Commission's ability to revise its description in § 1B1.13 and promote greater uniformity where appropriate. Circuit splits may well arise. *See, e.g.*, *McCall*, 56 F.4th at 1065 (citing conflicting circuit authority over whether changes in law may be considered in the extraordinary-and-compelling-reasons analysis). If that occurs, the Commission may well step in to resolve them. *See, e.g.*, proposed § 1B1.13(b)(5) (permitting consideration of changes in law). Similarly, if courts unexpectedly depart from an appropriate understanding of "extraordinary and compelling reasons," the Commission can refine its policy statement within statutory and constitutional bounds. *See, e.g.*, *Rita v. United States*, 551 U.S. 338, 350 (2007) ("The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals . . . ."). This interbranch engagement is a bedrock principle of the Commission's work and is fully applicable here, particularly now that the Commission has a quorum and is able to fulfill the crucial role envisioned for it. *See* USSG ch. 1, pt. A, intro. cmt. (Commission's mandate "rest[s] on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies[] in light of application experience").

III. Legislative History Supports This Interpretation of Section 994(t)

Statutory text must be interpreted "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski v. United States*, 573 U.S. 169, 179 (2014). Here, indicators of the purpose underlying § 3582(c)(1)(A) and § 994(t) confirm our conclusion that the Commission must issue general policy statements that offer meaningful guidance about the characteristic or significant qualities of "extraordinary and compelling reasons," and that in so doing it may leave room for reasoned judicial discretion in addressing the facts of each case.

Start with the Sentencing Reform Act, in which Congress enacted both § 3582(c)(1)(A) and § 994(t).[17] The Senate Judiciary Committee report on the Act described § 3582(c)(1)(A) as a "safety valve" for "unusual case[s]."[18] The report continued: "The value of the forms of 'safety valves' contained in this subsection lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for 'extraordinary and compelling reasons' . . . ."[19] Congress thus enacted the relevant statutory provisions to remedy potentially serious injustices that might not be anticipated in advance—and it sought to ensure the availability of a "safety valve" achieved through "specific review" in unusual cases. These purposes would not be well served by a requirement that the Commission define "extraordinary and compelling reasons" *ex ante* in

[16] *See, e.g.*, *United States v. Saldana*, No. 95-cr-00605, 2021 WL 9828395, at *1 n.2 (S.D. Fla. Dec. 23, 2021) ("The Court would have been inclined to find sentence reduction appropriate . . . based upon changes in the law since [defendant's] sentencing under unduly severe sentence enhancements that required a life sentence," but Eleventh Circuit's ruling in *Bryant*, which held that § 1B1.13's list of examples is binding and exhaustive as to defendant-filed motions, required denial of motion).

[17] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984).

[18] S. Rep. No. 98-225, at 121 (1983); *see also, e.g.*, *United States v. Chen*, 48 F.4th 1092, 1098–99 (9th Cir. 2022); *Ruvalcaba*, 26 F.4th at 26; *McCoy*, 981 F.3d at 286 n.8, 287.

[19] S. Rep. No. 98-225, at 121.

comprehensive and preclusive terms (or with highly explicit, rigid criteria), leaving hardly any room for courts applying § 1B1.13 to exercise judgment or discretion in identifying where "extraordinary and compelling reasons" require use of the safety valve in § 3582(c)(1)(A). *See Shapiro v. United States*, 335 U.S. 1, 31 (1948) (invoking the "well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen").

Since 1984, the trend has been clear: Congress has only broadened the scope of permissible sentence modifications under § 3582(c)(1)(A) and moved toward a more expansive and context-sensitive view of sentence reductions. In 1994, it enacted the Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, § 70002, 108 Stat. 1796, 1984, which established § 3582(c)(1)(A)(ii) as an alternative ground for compassionate release. Then, in 2002, it enacted the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 3006, 116 Stat. 1758, 1806, which added language to § 3582(c)(1)(A)(i) expressly authorizing courts to impose probation or supervised release in lieu of imprisonment.

Most recently, Congress fundamentally transformed the sentence reduction framework in 2018 by authorizing defendants to file compassionate release motions.[20] Restoring a measure of judicial discretion in sentencing was central to the First Step Act.[21] And the First Step Act's changes to compassionate release reflected deep concern—fully shared by the Commission—that compassionate release was being grossly underutilized. One year before the Act's passage, several of its eventual co-sponsors signed a bipartisan letter to the Acting Director of the Bureau of Prisons, agreeing with the Commission's view that "it is the appropriate purview of the sentencing court to determine if a defendant's circumstances warrant" compassionate release and urging the Acting Director "to take a hard look at expanding the use of compassionate release."[22] The following year, after the Bureau of Prisons failed to take initiative on the issue, a dissatisfied Congress authorized defendant-filed motions in a section of the First Step Act entitled "Increasing the Use and Transparency of Compassionate Release." § 603(b), 132 Stat. at 5239. A Senate co-sponsor described this provision as "expand[ing] compassionate release . . . and expedit[ing] compassionate release applications"; similarly, a House member explained that it "improv[ed]

[20] First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239.

[21] *See, e.g.*, 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker, co-sponsor: "[T]his bill includes critical sentencing reforms that will reduce mandatory minimums and give judges discretion back—not legislators but judges who sit and see the totality of the facts."); 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Chuck Grassley, sponsor: "The bill also makes sentencing fairer by returning some discretion to judges during sentencing.").

[22] Letter from Brian Schatz et al., U.S. Senators, to Thomas R. Kane, Acting Dir., Bureau of Prisons, and Rod Rosenstein, Deputy Att'y General, U.S. Dep't of Justice (Aug. 3, 2017), available at https://www.schatz.senate.gov/imo/media/doc/2017.08.03%20Letter%20to%20BOP%20and%20DAG%20re.%20Compassionate%20Release%20FINAL.pdf.

application of compassionate release."[23] Since the Act's passage, too, at least one of its authors has urged a broad understanding of the extraordinary-and-compelling-reasons standard.[24]

The plain lesson from this history is that Congress has sought to broaden the availability of (and grounds for) compassionate release; it has sought to ensure that this safety valve is *in fact* available where needed; it has authorized defendants to seek relief in order to avoid the injustices that occurred when extraordinary and compelling reasons went unaddressed under the historical sentence reduction framework; and it has thereby expressly recognized the importance of the judicial role (and judicial discretion) in sentence reductions. Given this background, it is difficult to credit any suggestion that § 994(t) requires the Commission to set forth a highly comprehensive account of "extraordinary and compelling reasons" that would preemptively eliminate judicial discretion to address new injustices that may arise (even if those injustices are of equal force and severity to those separately addressed by § 1B1.13(b)). The far more natural conclusion—which also squares with the statutory text and judicial precedent—is that the Commission must provide meaningful guidance in its description of "extraordinary and compelling reasons" and, in so doing, may fairly rely upon courts to exercise reasoned judgment in assessing the facts of each case.

IV. The Commission's Prior Practice in Describing "Extraordinary and Compelling Reasons" Supports This Interpretation of Section 994(t)

The Commission's own longstanding practice in this field is consistent with the moderate view (rather than the restrictive view) of § 994(t). *See, e.g.*, *Council Tree Commc'ns, Inc. v. F.C.C.*, 503 F.3d 284, 289 (3d Cir. 2007) ("[C]ourts give considerable weight to a consistent and longstanding interpretation by the agency responsible for administering a statute." (cleaned up)).

That story begins in 2006, when the Commission set forth its initial proposal for this policy statement. That proposal included no examples and no specifics; instead, it provided only that a defendant could not pose a danger to the community and that "[a] determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such."[25] Commenters from a wide range of backgrounds rightly objected that this "d[id] not comply with the statutory directives to describe what should be considered extraordinary and compelling reasons."[26] Since 2018, moreover, numerous courts

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[23] 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin); 164 Cong. Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

[24] *See* Dick Durbin, *Durbin Meets with U.S. Sentencing Commission on Implementing Provisions in First Step Act into Sentencing Guidelines* (Dec. 7, 2022) ("Durbin . . . advocated for the Commission to ensure that" extraordinary and compelling reasons "are defined broadly enough to include post-sentencing changes to the law."), https://www.durbin.senate.gov/newsroom/press-releases/durbin-meets-with-us-sentencing-commission-on-implementing-provisions-in-first-step-act-into-sentencing-guidelines.

[25] USSG § 1B1.13 cmt. n.1(A) (2006); U.S. Sent'g Comm'n, Notice of Proposed Amendments, Request for Public Comment, Notice of Public Hearings at 128 (Jan. 2006), available at https://www.ussc.gov/sites/default/files/Fedreg0106.pdf.

[26] U.S. Sent'g Comm'n, Comment from Federal Public and Community Defenders (Mar. 13, 2006), at 96, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200603/200603_PCpt2.pdf; *see also* U.S. Sent'g Comm'n, Comment from Practitioners' Advisory Group (Mar. 15, 2006), at 46, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200603/200603_PCpt2.pdf ("[T]he Commission's new policy statement . . . does not respond to the directive in § 994(t) that the Commission

have similarly deemed the 2006 version of § 1B1.13 to be deficient.[27] Simply put, it was widely agreed that the Commission cannot merely declare that "extraordinary and compelling reasons" are whatever the Bureau of Prison decides. Instead, § 994(t) requires the Commission to actually describe—and provide meaningful guidance about—the meaning of this standard. Importantly, unlike the 2006 proposal, proposed subsection (b)(6) meets this requirement because it has not been suggested as a standalone policy statement, but rather as part of an overarching plan, and so (for the reasons given above) it in fact provides meaningful guidance for courts to apply.

In 2007, the Commission announced that implementation of § 994(t) would remain a priority and invited comment on (among other things) whether § 1B1.13 should "provide that the Bureau of Prisons may determine that, in any particular defendant's case, an extraordinary and compelling reason *other than a reason identified by the Commission* warrants a reduction" (emphasis added).[28] Stakeholders from varied backgrounds expressed their support for such a catch-all in testimony and comments.[29] Ultimately, the Commission voted to adopt an amendment to § 1B1.13 featuring a structure much like the one currently under consideration: a list of examples followed by a catch-all provision. Indeed, that catch-all used language identical to that proposed in Option 3, providing that the Director of the Bureau of Prisons could identify "an extraordinary and compelling reason other than, or in combination with, the reasons described" in the Commission's enumerated list.[30] Upon adopting the 2007 amendment with this language, Vice

describe what should be considered extraordinary and compelling reasons."); U.S. Sent'g Comm'n, Public Hearing Testimony (Mar. 20, 2007), at 247, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20070320/20070320_Testimony.pdf (American Bar Association: "USSG § 1B1.13 does little more than recite the statutory bases for reduction of sentence . . . and does not include 'the criteria to be applied and a list of specific examples' that are required by § 994(t).").

[27] *See Jones*, 980 F.3d at 1104 ("Despite the command of Congress in 1984, the 2006 policy statement did not define 'extraordinary and compelling reasons.'"); *United States v. Brooker*, 976 F.3d 228, 232 (2d Cir. 2020) ("Despite the seeming statutory command, this policy statement did not define 'extraordinary and compelling reasons.'").

[28] U.S. Sent'g Comm'n, Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary (Jan. 2007), at 150, available at https://www.ussc.gov/sites/default/files/JanFRPropAmd2007.pdf.

[29] *See, e.g.*, U.S. Sent'g Comm'n, Public Hearing Testimony (Mar. 20, 2007), at 237–38, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20070320/20070320_Testimony.pdf (Families Against Mandatory Minimums: "The Commission should not limit the Bureau to the reasons identified by the Commission in its policy statement. A condition that is extraordinary and compelling may also not be apparent to the Commission at this time, and the better course would be to ensure that the Bureau and the courts have flexibility to address such circumstances."); U.S. Sent'g Comm'n, Comment from Federal Public and Community Defenders (Mar. 13, 2007), at 186, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200703/200703_PCpt10.pdf ("[T]he policy statement should allow a BOP motion based on an extraordinary and compelling reason not specifically identified by the Commission. This is an area which, by its nature, does not allow listing of all possible reasons. Any list of examples is necessarily non-exclusive and should so state."); U.S. Sent'g Comm'n, Index to Public Comment (Apr. 6, 2007), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200703/200703_PCpt5.pdf (summarizing Practitioners' Advisory Group's comment in support of "permit[ting] the BOP to determine, in a particular case, that an extraordinary and compelling reason exists for reducing the defendant's sentence, even if the reason is not covered by the examples provided").

[30] USSG § 1B1.13 cmt. n.1(A)(iv) (2007).

Chair Judge Ruben Castillo voiced the Commission's determination "that the Commission has met its statutory mandate."[31]

Two aspects of the 2007 policy statement merit special emphasis. *First*, the structure that the Commission adopted in 2007 (and that it has maintained through its current proposal) was no accident; rather, it resulted from a considered process. And stakeholders in that process broadly agreed on the propriety and importance of preserving a measure of reasoned discretion to allow for the identification of "extraordinary and compelling reasons" apart from those enumerated by the Commission. As Judge Harris has aptly explained, "the Commission included a catch-all provision" in § 1B1.13 specifically because it recognized "that it could not definitively predict every 'extraordinary and compelling' reason that might arise," given the "open-ended" nature of the statutory standard. *McCoy*, 981 F.3d at 283, 287.

Second, in contrast to the widespread recognition that the 2006 policy statement was too indeterminate in describing "extraordinary and compelling reasons," virtually nobody has opined that the 2007 version suffered from such a flaw or violated § 994(t). Our research does not disclose any appellate opinion or authoritative commentary that treats the 2007 version of the policy statement (or any subsequent version) as deficient in this respect, even though that version included a catch-all provision much like Option 3 for proposed subsection (b)(6). The absence of any such concern is notable because the policy statement has since been studied and amended three times—most notably in 2016, when the Commission "broaden[ed] certain eligibility criteria," "encourage[d] the Director of the Bureau of Prisons to file" more motions for compassionate release, and stressed that the sentencing court was "in a unique position to determine whether the circumstances warrant" compassionate release.[32] Yet appellate criticisms of the post-2007 policy statement have questioned mainly its placement of examples in commentary and its overreliance on the Bureau of Prisons in derogation of the judicial role—flaws that are both corrected in the Commission's pending proposal. *See, e.g.*, *Jones*, 980 F.3d at 1111 n.21 (noting that § 1B1.13's placement of its examples "only in the . . . application notes . . . raises sundry administrative-law questions about deference"); *United States v. Ruffin*, 978 F.3d 1000, 1008 (6th Cir. 2020) (questioning wisdom of current catch-all, but only as applied to Director of Bureau of Prisons: "Yet where does the text of the statute or the policy statement give the *Bureau of Prisons* . . . authority to identify other reasons? Both § 3582(c)(1)(A) and § 1B1.13 instead indicate that *courts* should 'find[]' or 'determine[]' that those reasons exist." (emphasis and alterations in original)). The fact that the 2007 policy statement included a catch-all highly analogous to proposed subsection (b)(6)—a choice that did not attract any notable criticism—is itself revealing of how the Commission and its stakeholders have understood the requirements set forth in § 994(t).

Most recently, Congress fundamentally transformed the compassionate release framework in 2018 by authorizing defendants to file motions. In doing so, it did not reject the Commission's prior practice in describing "extraordinary and compelling reasons" with a policy statement that included a catch-all provision. Courts have explained that because the First Step Act "did not

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[31] U.S. Sent'g Comm'n, Public Meeting Minutes (Apr. 18, 2007), https://www.ussc.gov/policymaking/meetings-hearings/notice-april-18-2007 (last visited Feb. 4, 2023).

[32] USSG App. C, amend. 799 (effective Nov. 1, 2016); USSG § 1B1.13 cmt. n.4; *see also* USSG App. C, amends. 746 (effective Nov. 1, 2010), 813 (effective Nov. 1, 2018).

undermine the Commission's interpretation of" the "extraordinary-and-compelling-reasons standard," *United States v. Jenkins*, 50 F.4th 1185, 1196 (D.C. Cir. 2022), it is "reasonable . . . to conclude that the phrase largely retain[s] the meaning it had under the previous version of the statute," *Andrews*, 12 F.4th at 260; *see* Scalia & Garner 322 ("If a word or phrase . . . has been given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation."). As discussed above, that meaning has (from the very outset) included a broad catch-all provision designed to allow reasoned discretion for identifying additional circumstances not covered by the enumerated examples set forth by the Commission itself. That position thus remains on firm footing.[33]

Finally, as described in Part II, experience since enactment of the First Step Act has only underscored the importance of affording district courts reasoned discretion to ascertain "extraordinary and compelling reasons" for compassionate release. Following enactment of the Act, the Commission was unable to amend § 1B1.13 because it lacked a quorum. In the interim, the equivalent of the Commission's post-2007 approach—providing a list of non-exclusive examples but allowing courts to identify reasons of comparable gravity—proved not only workable but also vitally necessary. Notably, several courts framed this approach as applying the Bureau of Prisons catch-all in current Application Note 1(D) to the courts, in effect implementing what has now been proposed for subsection (b)(6) as Option 3.[34] As the years went on, and the courts of appeals weighed in, many courts described the scope of judicial discretion in this field even more broadly. *See, e.g.*, *Brooker*, 976 F.3d at 237 ("Neither Application Note 1(D), nor anything else in the now-outdated version of Guideline § 1B1.13, limits the district court's discretion."). Yet as noted above, this discretion did not result in untoward consequences. Instead,

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[33] In *McCall*, a majority of the Sixth Circuit cited this prior-construction canon in support of its view that the extraordinary-and-compelling-reasons standard "never covered nonretroactive changes in sentencing law." 56 F.4th at 1060. The court's logic appeared to be that because the catch-all in § 1B1.13 applied to "other circumstances approved by the Bureau of Prisons," *id.*, and the Bureau of Prisons program statement on compassionate release did not cover non-retroactive changes in law, Congress carried forward the *Bureau of Prisons'* view of extraordinary and compelling reasons in the First Step Act. But that does not follow. Congress tasked the Commission, not the Bureau of Prisons, with describing extraordinary and compelling reasons. *See* § 994(t); *United States v. Rodriguez*, 451 F. Supp. 3d 392, 400 n.12 (E.D. Pa. 2020) ("Congress never delegated any authority to the BOP to define the term 'extraordinary and compelling,' nor did it ever instruct courts to act consistently with the BOP's internal guidance."); *cf. Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) (noting that courts "do not generally accord deference to one agency's interpretation of a regulation issued and administered by another agency"). And when the Commission last substantively amended § 1B1.13, it rejected the Department of Justice's explicit invitation to align the policy statement with the narrower grounds in the Bureau of Prisons program statement, *see* U.S. Dep't of Justice, Comment on Proposed Amendments at 3–4, 8 (Feb. 12, 2016), and instead expressed concern that the Bureau of Prisons was defining extraordinary and compelling reasons much too narrowly, *see, e.g.*, USSG § 1B1.13 cmt. n.4 ("encourag[ing] the Director of the Bureau of Prisons to file" a compassionate release motion "if the defendant meets any of the circumstances set forth" by the Commission, not just those in the Bureau of Prisons program statement).

[34] *See, e.g.*, *Pinto-Thomaz*, 454 F. Supp. 3d at 329 (holding that under Application Note 1(D)'s "residual category," courts have "discretion to grant compassionate release motions on grounds that are distinct from . . . those specifically enumerated"); *United States v. Rodriguez*, 424 F. Supp. 3d 674, 682 (N.D. Cal. 2019) (evaluating defendant-filed motion for compassionate release "under the 'other reasons' catch-all provision in Subdivision (D)"); *United States v. Garcia Aguirre*, No. 10-cr-10169-KHV, 2021 WL 843239, at *3 (D. Kan. Mar. 5, 2021) ("[T]he district court, rather than the BOP exclusively (as the commentary suggests), can determine under the catchall provision[] whether 'other' extraordinary and compelling reasons exist."); *United States v. Fox*, No. 2:14-cr-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) ("I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts.").

as courts interpreted the relevant statutes amid a public health crisis and looked to § 1B1.13 as non-binding guidance, the result was a model of measured and responsive judicial engagement.

The Commission could draw one of two diametrically opposed lessons from this post-2018 experience. On the one hand, it could conclude that the Commission alone should define "extraordinary and compelling reasons" (and should do so with criteria and examples that all but preclude any judicial discretion in sentence modification proceedings). Under this view, revisiting the Commission's definition every decade or so—if and when there is a quorum present—could be seen as sufficient to address any new injustices that may arise. Alternatively, the Commission might conclude from the post-2018 experience that a more moderate position is both authorized and desirable. On this view, it remains important for the Commission to offer meaningful guidance and specific examples concerning "extraordinary and compelling reasons," but it remains equally important to recognize that courts may identify unforeseen circumstances of comparable gravity warranting a sentence reduction to avoid injustice. In that vision, federal courts (with their vast range of case-by-case experiences) could help to effectuate the Commission's goals and identify new circumstances that warrant express inclusion in § 1B1.13; the Commission, in turn, could respond with approval or disapproval to trends in judicial practice; and the Commission's potential inability to act in the absence of a quorum (or to respond with sufficient alacrity to developments like the recent pandemic) would not risk the perpetuation of widespread injustice, since courts would remain properly available to continue effectuating Congress's "safety valve."

We think the better lesson is the latter one—and we hope the Commission agrees.

* * *

In conclusion, following our careful study of the issue, we are confident that any of the Commission's proposed versions of § 1B1.13(b)(6) complies with the applicable statutory requirements under § 994.

We appreciate the opportunity to comment.

Sincerely,

Joshua Matz
Partner | Kaplan Hecker & Fink LLP
Adjunct Professor | Georgetown Law

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March 14, 2023

Judge Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Cir., N.E., Ste. 2-500
Washington, D.C. 20002-8002

Dear Judge Reeves and United States Sentencing Commission (USSC):

This Comment is respectfully submitted in response to the USSC's 2023 Notice of Proposed Amendments to the Sentencing Guidelines (Feb. 2, 2023), Proposed Amendment No. 8: Prohibiting the Use of Acquitted Conduct in the Application of the Guidelines.

The proposed amendment to prohibit the use of acquitted conduct in sentencing is absolutely necessary to safeguard our Constitutional rights and the integrity of our justice system. The proposed amendment should be clarified to both limit the consideration of overlapping conduct and include a prohibition on the use of acquitted conduct resulting from procedural as well as substantive grounds for acquittal.

Overlapping conduct should only be considered if it clearly and definitively comprises the evidentiary basis substantiating the elements of a defendant's counts of conviction. If the trial court considers "overlapping" conduct, there is a real danger that the direct or inferential application of the acquitted conduct would lead the Judge to determine a guidelines range that ultimately punishes a defendant for a crime that the jury found him not guilty of. Any consideration of acquitted conduct is unconstitutional and creating a gray area to leave Judges with the discretion to consider acquitted conduct beyond the scope that such conduct was considered by the jury presents a hazardous violation of our right to a jury trial and our right to be free of double jeopardy. No person should be sentenced based on crimes that they were not convicted of.

In practice, the use of overlapping conduct can lead to devastatingly disproportional sentences such as the one that was rendered in the case of Fred Davis Clark, Jr.'s case ("Dave Clark" or "Mr. Clark") in the Southern District of Florida. Mr. Clark was a first time, nonviolent offender sentenced to forty (40) years of imprisonment, effectively a life sentence, based on conduct

that the jury never found him guilty of. He was convicted of bank fraud counts where the underlying conduct specifically related to the disclosures related to loans procured by his wife, mother and father, sister and brother-in-law. Mr. Clark was acquitted of the Conspiracy to Commit Bank Fraud count. The "relevant conduct" considered by the trial court that led to an astounding forty (40) year sentence could only have related to the Conspiracy count that the jury acquitted him of. Because the bank fraud count allegations included a "scheme" the Judge sentenced Mr. Clark as if he had been convicted of the Conspiracy count, effectively overriding the Not Guilty finding by the jury of his peers. The trial court rendered the jury's findings meaningless.

In Mr. Clark's case, for the bank fraud counts there was one victim, the bank (JP Morgan Chase, "Chase") found by jury beyond a reasonable doubt. However, by a preponderance of the evidence standard, the trial court found that there were over 1400 victims when it determined the sentencing guidelines range. The jury never made that factual determination. Where the counts of conviction had a zero ($0) loss amount (because Chase immediately sold the loans at issue and made a profit), a $2.8 million possible "intended" loss amount (the value of the actual loan transactions underlying the counts of conviction), the trial court instead considered a $300 million intended loss figure and an unjust gain value derived thereof to determine that the "appropriate" guidelines range Offense Level was 49, a life sentence.

Mr. Clark is grateful that he was granted a Presidential clemency in the form of a commutation of his sentence and is now home with his seven children today. He is contributing to society and promoting the greater good in his work with Promising People, which provides innovate virtual reality educational and vocational training programs and humanitarian support services for inmates and their families to reduce recidivism. His petition for clemency is attached hereto for the sentencing commission's consideration of further legal analysis on the unconstitutional use of acquitted conduct for sentencing[1] as well as the human element of the damaging impact that unconstitutionally enhanced sentences can have on families and communities.[2]

A compelling video showing the tragic impact of Mr. Clark's excessive sentence is available at https://vimeo.com/477600959/66dbdcc944 . See also a discussion of Mr. Clark's commutation in GARY APFEL, PRO BONO

[1] **See Petition for Clemency (attached hereto), Exhibit C.** p. 21-23, Expert Opinion Letter Re: Excessive Sentencing, an analysis by sentencing consultant Michael Berg of Mr. Clark's Sentencing Guidelines range without acquitted conduct; **Exhibit D**, Expert Opinion Re: Sentencing Disparity by SentencingStats Mark Allenbaugh; and, **Section III,** p. 5-15, Discussion of case facts and analysis of the "Disproportionate Impact of the Trial Penalty, Acquitted Conduct, and Other 'Relevant Conduct' at Mr. Clark's Sentencing" by Mr. Clark's clemency petition counsel.

[2] **See Petition for Clemency, Exhibits F, G, K & L**, Letters of Support from family & community members; and, **Exhibit H**, Letters of Support from "Victim" Investors.

COUNSEL FOR ALEPH INSTITUTE, available at https://youtu.be/KtoDvR7ZtHM (at 20:36).

Nearly ten years after his real estate development company had collapsed and after the Securities & Exchange Commission ("SEC") had failed to prove securities violations in a civil case, Mr. Clark was indicted for what was alleged to be an investor/mail fraud case. However, the prosecution had to re-frame the case as a bank fraud case because the statute of limitations had expired for mail fraud. The prosecution also indicted Mr. Clark's wife, Cristal Clark, leaving his seven children orphans while they were both incarcerated for 14 months pending trial. Mrs. Clark's prosecution was unwarranted and unjust as evidenced by the jury finding her Not Guilty on all counts in the Clarks' first trial. There was a hung jury on all counts for Mr. Clark. In a second superseding indictment, the prosecution further reconfigured their unproven allegations of widespread investor fraud into a narrower case of bank fraud against Mr. Clark, alleging that he provided down payments for his family's loans without proper disclosures. Nonetheless, even in the second trial, with a whole separate second jury of his peers, Mr. Clark was still acquitted of the government's overreaching conspiracy allegations. Where the government failed, and the jury disagreed, the Judge was still able to sentence Mr. Clark to 40 years on the basis of the government's unproven allegations and acquitted conduct. The Sentencing Guidelines must stop permitting such a travesty of justice.

Mr. Clark's case illustrates how the broad and ambiguous nature of evidence that the trial court could consider as "overlapping conduct" due to being considered part of a "scheme" is a particular concern in the amendments of §1B1.3, §1B1.4, and §6A1.3. The same conduct could be open to multiple interpretations, leading to sentencing "facts" that the jury disagreed with. There should be a bright line for the trial court to eliminate any consideration of acquitted conduct when the consequential application of the overlapping conduct would lead to a higher number of victims, an increased loss amount, a determination that a defendant was a leader or organizer, and any other unconstitutional enhancement of a defendant's sentence than were established for the direct counts of conviction. It is necessary for the sentencing commission to provide guidance that demands a strict construction of the proposed limitation on the use of acquitted conduct at sentencing. Otherwise, the use of overlapping conduct could permit trial courts to sidestep the prohibition of considering acquitted conduct and defeat the purpose of the proposed amendments.

In the same vein, the prohibition on the use of acquitted conduct at sentencing should definitively include conduct that was subject to acquittal on procedural as well as substantive grounds. To provide otherwise opens the door to a *de facto* violation of the due process rights of a defendant after the same has been eliminated as a basis of conviction. No matter the form or context, acquitted conduct must never be used to unconstitutionally enhance

a sentence. Moreover, because the prior use of acquitted conduct at sentencing was unconstitutional, the proposed amendments should be retroactively applied as consistent with §1B1.10.

Thank you for your consideration of this Comment in consideration of an amendment that will—safeguard our constitutional rights and vastly increase true justice in the sentencing process.

Respectfully Submitted,

/s/ Fred Davis Clark, Jr.,
by and through undersigned counsel,
—and—
/s/Claudia T. Pastorius, Esq.
Claudia T. Pastorius, P.A.

I. Dave Clark Fact Sheet

In the photo, Dave Clark, father of seven, with his three youngest boys.

Age: 62
Date of Birth: April 6, 1958
Conviction Counts: Bank Fraud, False Statements, Obstruction of SEC Proceeding
Acquittal Count: Conspiracy to Commit Bank Fraud (Found *Not Guilty* of alleged $300 million scheme)
Pre-Trial Plea Offer: 48 months (4 years)
Sentence: 480 months (40 years)
BOP Facility: FCI Coleman Medium (previously at USP1)
[redacted]
Time Served so far: nearly 7 years
Release Date: August 14, 2048
Family Status: ***Father of Seven Children*** - [redacted]

Key Points of Interest:

- **Tenfold Trial Penalty**: The government offered Dave a plea agreement with an advisory sentencing guideline range of **48 months**, but Dave elected to go to trial and was sentenced to ten times that amount--**40 years**.
- **Sentenced on Acquitted Conduct**: Dave's excessive sentence length was based on acquitted conduct. The Judge overruled the jury's Not Guilty decision on the conspiracy count and enhanced the sentence length based on a $300 million scheme even though **two distinct juries rejected the government's allegations on that count**, and the actual loss amount on the counts of conviction was $0.
- **A Devastated Family**: Cristal Clark was also arrested and incarcerated pending trial. At Dave's first trial, she was found Not Guilty on all counts. Their three youngest children (9, 11, 17) were deprived of a mother and a father for fourteen months and are still psychologically traumatized.
- **Cruel and Unusual Punishment**: Despite being a non-violent, first time, white collar offender, Dave was initially designated to serve his sentence at a maximum security penitentiary due to the sentence length. He was housed with dangerous murderers amidst gang wars. He narrowly escaped being killed by Aryans for praying with a black man.
- **A Deep Faith**: Dave has been changed to the core by this experience and helps his fellow inmates through faith and fellowship programs. Through the experience he has deepened his faith, guided other inmates in prayer groups and focused on how to reform the prison and criminal justice system.
- **A Promising Person for Our Society**: Dave designed a program for vocational rehabilitation for inmates utilizing virtual reality technology that he hopes will help give others a real second chance upon their release from prison and reduce the rate of recidivism. Dave aims to dedicate his time after release to expanding this "Promising People" program.

II. Dave Clark Executive Summary

Dave Clark is a loving and dedicated 62-year-old husband and father to his 7 children – a beautiful blend of his foster, biological and step children – all of whom he loves and cherishes with all his life. In addition to being a father and husband, Dave was always known as being a compassionate community leader, kind-hearted employer, and a driven and innovative entrepreneur and businessman. As the numerous support letters on behalf of Dave attest, the people who were fortunate to have known Dave, witnessed firsthand what genuine compassion and kindness truly is.[1]

Dave was born and raised to be an honest, hardworking and devout Christian. From childhood, Dave was instilled with values of faith, compassion, and honesty. Dave's father, Fred Clark Sr., was a prominent man in the community. He served in the US Army before earning a degree in industrial engineering, and later founded the Orange County Christian Prison Ministry, devoting many evenings and weekends to working with inmates, giving them classes and leading services. Observing his parents' dedication to these former inmates planted the seeds that Dave would later cultivate in his own efforts on behalf of prison reform.[2]

By the time he was married in 2009 to the love of his life, Cristal, Dave already had a large blended family that included his four daughters and Cristal's son. The family continued to grow with the addition of two more children. Notwithstanding the loving chaos that comes with a large blended family, Dave opened his heart and home to children that needed a safe home, including three additional children whose parents were struggling with drug addiction, and a friend of his son and his sister who were about to be placed in a shelter, who Dave took in *without hesitation*. Dave made sure his foster children had every need met as his own biological kids received, and was committed to give all his children a safe and nurturing home.[3]

Dave was also a tremendously compassionate employer. In an extraordinary act, Dave took in to his home, the child of an employee, Didi Womack, who suffered serious health problems.[4] Another example of Dave's compassion can be seen when one of Dave's executives became addicted to drugs. Dave declined to terminate his employment and rather chose to counsel the executive to seek treatment and get clean, while continuing to pay the man's salary. Further, one of Dave's employees, Les Cowie, recounts a time where Dave and other investors of a gold exploration company lost close to $4 million. Rather than arraign the engineer, Dave decided to let the matter go when he found out the engineer was dying of AIDS.[5]

To support his family, Dave worked throughout his life in the real estate business and eventually came to acquire a large resort development in the Florida Keys. Unfortunately, after the crisis hit in 2007, Dave's business was heavily affected and he was forced to close down, losing millions in investor

[1] See App. K, Sentencing Letters of Support, p. 68 & App. L, Clemency Letters of Support, p.102.
[2] See App. I, Promising People Program, p.62.
[3] See App. F, Letter from Cristal Clark, p.39.
[4] See App. K, Sentencing Letters of Support, Letter from Didi Womack, p.95-96.
[5] See App. F, Letter from Cristal Clark, p.39.

ventures. In 2014, Dave and his wife Cristal were charged with multiple criminal charges, including bank fraud. Dave was initially offered a 4-year plea deal,[6] but as Dave legitimately believed in his business, he went to trial. **After fourteen excruciating months in prison, Cristal was acquitted completely, and the jury acquitted Mr. Clark of the most serious and far-reaching charge against him, for conspiracy**.

After spending two of the most difficult years of her life in prison – separated from Dave and her youngest children – Cristal was finally able to return home and begin to pick up the pieces of her broken family – all alone – without Dave by her side. The effect on the children from their mother's absence has been traumatizing to say the least, and as one can imagine, the children have been extremely affected by the absence of both of their parents. For Cristal, it was the sheer guilt and desperation she felt, being away from her children and knowing she couldn't be there for them.[7]

While initially, Dave's trial ended in a deadlocked jury, in the government's superseding indictment which narrowed in on individual loans he had made, Dave was convicted and **at sentencing, Dave was sentenced as if there had been no acquitted conduct –an incredulous 40-year life sentence – *ten times* the length offered at his plea deal**, even though the jury acquitted him of the most serious charge.[8] Senior elected officials from both sides of the aisle and many current and former United States Supreme Court Justices (ranging from Justice Ginsburg on the left to Justices Scalia, Thomas, Gorsuch, and Kavanaugh on the right) have expressed concerns about the unconstitutionality of using acquitted conduct for sentencing purposes, yet the practice persists in cases like this one, where it had a massive impact on the length of Dave's sentence.

Due to the extreme length of his sentence, and despite being a non-violent, first time offender, Dave was placed in a maximum-security penitentiary, where his life was in grave danger every day. Dave discusses the daily perils of living in a penitentiary: "*Violence is an everyday occurrence with concussion grenades and lethal force warnings nearly every day… Racism and predatory activity is rampant along with drug use…"*[9]

As the eye-opening **letters from some of the victims** demonstrate, Dave is worthy of compassion and forgiveness. As Jeff Aeder of JDI Realty writes:

> "*I would estimate that JDI and its entities lost close to $15 million through its investments with Dave …While I have not spoken with Dave in over a decade, I have followed his legal travails, including the hung jury in the first trial, the acquittal of his wife, and the lengthy sentence he was given. I have always believed the length of his sentence was excessive in light of his alleged conduct and convictions, and that the concept that he was sentenced for acquitted conduct was outrageous...Nothing would be gained by having him die in jail…*"[10]

Notwithstanding the immense hardship and tremendously dangerous environment Dave faces in prison, rather than give in to feelings of bitterness or anger, Dave has channeled his inner strength to persevere with hope and faith and leads prayer groups with other prisoners "*to equip inmates with a faith that will help them to focus on how their faith will help them endure through incarceration and survive after release*."[11] During his nearly seven years he has been a model inmate with no issues other than one

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[6] See App. B, Attorney Correspondence Re: Plea Offer, p.19.
[7] See App. F, Letter from Cristal Clark, p.41 & App. G, Letters from Dave's 7 Children, Skyler Clark, p.50.
[8] See Section III, Discussion, p.13-14 & App. B, Attorney Correspondence Re: Plea Offer, p.19.
[9] See App. A, Letter from Dave Clark to the President, p. 17.
[10] See App. H, Letters of Support from Victims, p.53.
[11] See App. I, Promising People Program, p.60.

incident of using a cell phone at a moment of weakness and desperation for wanting to speak to his family during the Covid-19 crisis lockdowns.[12]

In the 7 years he has been in prison – and with his distinctive entrepreneurial approach – Dave has even created a multi-pronged plan that offers real solutions to the multitude of problems inmates face when attempting to re-enter society. It has already undergone a successful testing phase which provided a sense of how it will function if and when it goes live.[13]

Dave is horrified at the devastation the collapse of his business has had on so many people. Although the pain of what happened torments him daily, Dave tries to remain positive and focus instead on how he can help improve the lives of his family and those around him. In his 7 year-long absence, Dave's family is suffering tremendously without him, and Dave spends every day of his life praying for a second chance to make a difference in the world and return to his family where he can begin to repair the trauma his family faced over the past 7 years.[14]

For more information on Dave's clemency petition,
Please see link to Video: TinyUrl.com/DaveClarkClemency

[12] See Section III, Discussion, p.3.
[13] See App. I, Promising People Program, p.61.
[14] See App. A, Letter from Dave Clark to the President, p.17.

Fred Davis Clark, Jr.
Request for Executive Clemency

III. DISCUSSION

I. Overview.

Fred Davis Clark is a 62-year-old father and husband, first-time offender, and devout Evangelical Christian who has served nearly seven years of a 40-year sentence of imprisonment for a non-violent, white collar offense. Despite the lengthy pursuit of charges against him, the **jury acquitted Mr. Clark on the most serious charges against him**, including the conspiracy charges. Notwithstanding, at sentencing, Mr. Clark was sentenced as if there had been no acquitted conduct. Mr. Clark was sentenced to an incredulous 40-year life sentence, 10 times greater than the 4 years he was offered as a plea deal.[1] Senior elected officials from both sides of the aisle and many current and former United States Supreme Court Justices (ranging from Justice Ginsburg on the left to Justices Scalia, Thomas, Gorsuch, and Kavanaugh on the right) have expressed concerns about the unconstitutionality of using acquitted conduct for sentencing purposes, yet the practice persists in cases like this one, where it had a massive impact on the length of Mr. Clark's sentence.[2]

Due to the extreme length of his sentence, and despite being a non-violent, first time offender, Mr. Clark was placed in a maximum-security penitentiary, where his life was in grave danger every day[3]. Dave discusses the perils he lived through daily:

> "*Violence is an everyday occurrence with concussion grenades and lethal force warnings nearly every day… Racism and predatory activity is rampant along with drug use…. Mental health*

[1] See App. B, Attorney Todd Foster's Correspondence Re: Plea Deal, p.19.
[2] See DURBIN, GRASSLEY INTRODUCE BIPARTISAN CRIMINAL JUSTICE REFORM BILL, *available at* https://www.grassley.senate.gov/news/news-releases/durbin-grassley-introduce-bipartisan-criminal-justice-reform-bill#:~:text=and%20Chuck%20Grassley%20(R-Iowa,been%20acquitted%20by%20a%20jury (last visited Dec. 4, 2020).
[3] See App. E., Forbes Article on Clark's Penitentiary Designation, p.35; Walt Pavlo, MAXIMUM SECURITY FEDERAL PRISONS HAVE 'MINIMUM' SECURITY INMATES, *available at* https://www.forbes.com/sites/walterpavlo/2016/07/14/maximum-security-federal-prisons-have-minimum-security-inmates/?sh=78e844355b2b (last visited Dec. 4, 2020)(Clark has served most of his time in a penitentiary and was transferred to a Medium facility in July 2019).

issues are also commonplace, and you can't find a room where weapons were not cut from the beds or lockers."[4]

Mr. Clark participates and leads prayer groups with other prisoners "to equip inmates with a faith that will help them to focus on how their faith will help them endure through incarceration and survive after release."[5] Mr. Clark writes: "When I was transferred to the medium facility, the atmosphere was much less threatening. To make clear where I stood on the race issues, I sought out a black man for a roommate...my current cellmate, Justin Richardson. He and I both stand for social justice and it has been a blessing to have his support here."[6] Clark stands out as a leader among the inmates because of his deep faith. During his nearly seven years he has been a model inmate with no issues other than one incident of using a cell phone at a moment of weakness and desperation for wanting to speak to his family during the Covid-19 crisis lockdowns.

In his prolonged seven-year long absence, Mr. Clark's family is suffering tremendously without him. Each of Mr. Clark's children has experienced the tragic deprivation of their father differently. Brooke, who didn't have her father at her wedding writes:

"*Growing up, my father was always there for me. My memory of my childhood and teenage years reflects his presence because he taught me so much and is such a great influence in my life.* ***He wasn't at my wedding and that will always be a wrench in my heart***."[7]

His other daughter, Caysee, is terrified her dad will die in prison:

"*Throughout your life you hear certain phrases- one being daughters need their fathers.* [redacted] *My dad being there for me turned me into the person I am today.* ***My dad is not someone that deserves to die in jail***."[8]

Adrienne writes of the living hell the family has gone through over the past 7 years:

"*It's been a* ***living hell having him there and the worst kind of emotional and mental pain and torture for our huge family. This living nightmare has no end in sight*** *for us. My dad is a kind man who is humble and generous. He has melanoma skin cancer and cannot get treatment. He almost died of an infected abscessed tooth because the infection spread, and he was almost septic. It's a never-ending torture for my family*."[9]

Cristal Clark struggles to maintain her family as a 'single' mother and to help her teenage sons navigate through the hardships and confusion caused by their father's incarceration. She is eager for the nightmare that has affected each and every member of the Clark family to finally end:

"*My husband has always lived his life with kindness, generosity, and a heart for helping others. He is well-loved and respected by many, including and especially his children and me. He is a good man, and I pray you will use your presidential authority and power to help us in this injustice. I would be so grateful if you would help him come home to us*."[10]

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[4] See App. A, Letter from Dave Clark to the President, p.17.
[5] See App. I Promising People Program, p.60.
[6] See App. I, Promising People Program, p.62, n.1.
[7] See App. G, Letters from Dave's 7 Children, Brooke Powell, p. 44.
[8] See App. G, Letters from Dave's 7 Children, Caysee Parker (Clark), p.46.
[9] See App. G, Letters from Dave's 7 Children, Adrienne Clark, p.43.
[10] See App. F, Letter from Cristal Clark, p.41.

All Mr. Clark wishes for is to be given a second chance at life to make a difference in the world, and return to his family where he can start picking up the pieces of their shattered lives. He wants to be able to use his innovative mind and entrepreneurial skillset to provide help to those who need it. As Mr. Clark writes:

> *I would like to give back to the world and take something positive into it from what I have learned from the challenging circumstances of living in a penitentiary. I feel deep remorse for my conduct that led to these circumstances and look back with extreme regret for decisions that I made…I sank with the ship along with everyone I loved and cared for in business. Like many people, my family ended up broke… I pray that the people who lost money will one day forgive me for my role in their losses. Although I never ever intended to harm anyone, the stories of hardship that people endured plague me like recurring nightmares that just don't go away.*[11]

Even setting aside the issue of acquitted conduct, Mr. Clark's 40-year sentence is far longer than necessary to satisfy any reasonable goal of the criminal justice system. Further, notwithstanding Judge Martinez's observations that the sentencing guidelines applicable in this case were "**ridiculous**", he nevertheless imposed a draconian sentence of 40 years (480 months). Mr. Clark has learned his lesson the hard way, and in what would be entirely compassionate grounds, Mr. Clark humbly pleads the President to grant him executive clemency either commuting his sentence to time served (which, again, is nearly seven years) or granting him a full pardon.

Mr. Clark's request is supported by the many support letters written on his behalf, which uniquely includes support letters from some of the *victims* of his offense, who recognize that the punishment is overly harsh and does not fit the crime.[12] Just as importantly, these supporters recognize the remarkable transformation Mr. Clark has made since charges were filed against him seven years ago. During his incarceration, Mr. Clark has turned his attention away from for-profit business and enterprise and toward the creation and development of a remarkable offender reentry program called "Promising People" designed to help all inmates, from all backgrounds, find employment upon release. If allowed to flourish, this program will substantially reduce the risk of recidivism among even the most at-risk offenders. Mr. Clark prays and hopes for a chance to bring the program to its fullest potential, and should Mr. Clark – who himself has <u>virtually no</u> chance of recidivism – be granted clemency, he would make it his life's mission to bring about change and prison reform, especially in lowering rates of recidivism with his unique and practical program.[13]

II. Mr. Clark's Background and Compassionate Nature

Dave Clark is a loving and dedicated 62-year-old husband and father to his 7 children – a beautiful blend of his biological and stepchildren – all of whom he loves and cherishes unconditionally. In addition to being a father and husband, Dave is also a compassionate community leader, kind-hearted employer, and a driven and innovative entrepreneur and businessman. As the numerous support letters on behalf of Dave attest, the people who were fortunate to have known Dave, witnessed firsthand what genuine compassion and kindness truly is.[14]

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[11] See App. A, Letter from Dave Clark to the President, p.17.
[12] See App. H, Letters of Support from Victim Investors, p.53.
[13] See App. I, Promising People Program, p.60-61.
[14] See App. K, Sentencing Letters of Support, p.66, & App. L, Clemency Letters of Support, p.102.

Dave was born and raised to be an honest, hardworking and upstanding Christian. From childhood, Dave was instilled with values of faith, compassion and honesty, attributes apparent to anyone fortunate enough to be a part of Dave's life. By the time he was married in 2009 to the love of his life, Cristal, Dave already had a large blended family that included his four daughters and Cristal's son. The family continued to grow with the addition of two more children. Notwithstanding the loving chaos that comes with a large blended family, and in line with his giving and loving nature, Dave opened his heart and home to many more children that needed a safe home.[15]

Dave took in their three additional children whose parents were struggling with drug addiction to come to live with them. These children stayed with the Clarks off and on over 14 years. Another example is when their son Skyler befriended a boy named Aaron Hollis. After realizing that Aaron was in foster care and about to be placed in a shelter, Dave took him and his sister in without hesitation. Dave made sure his foster children had every need and care met as their own biological kids received. They were not only clothed and well fed, they showered all the children in their home, with love and kindness. Dave and Cristal were committed to do anything to give their children a safe and nurturing home. As Aaron Hollis explains:

> *"We had nothing…They gave me opportunities to play sports, go to regular school, and a safe family. They bought us clothes [and] school stuff… They love me and my sister Victoria so much. We are their family… We miss him so much, it hurts every day. The world needs more people like him."*[16]

Dave was also a tremendously compassionate employer. In an extraordinary act, Dave also took in the child of an employee, Didi Womack, who suffered serious health problems. Didi writes:

> *"In August of 2007, I broke my back and had major surgery which left my 9-year-old daughter without her mother to take care of her. Of all the people I had come to know in the Keys, it was my new friends, Dave and Cristal Clark, who immediately offered to take my daughter into their home… Dave restructured my work duties to enable me to work from my bed with projects that I could participate in via phone and internet."*[17]

Another example of Dave's compassion can be seen when one of Dave's executives became addicted to drugs. Dave declined to terminate his employment and rather chose to counsel the executive to seek treatment and get clean, while continuing to pay the man's salary. Cristal Clark recounts a time where Dave and other investors of a gold exploration company lost close to $4 million. Rather than arraign the engineer, Dave decided to let the matter go when he found out the engineer was dying of AIDS.[18]

III. Mr. Clark's Criminal Case

To support his family, Dave worked throughout his life in the real estate business and eventually came to acquire majority shareholding of a large resort development in the Florida Keys. Mr. Clark was a successful Florida-based real estate developer who, like many others in the industry, was hit hard by the Great Recession starting in 2006.

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[15] See App. F, Letter from Cristal Clark, p.39.
[16] See App. K, Sentencing Letters of Support, p.71.
[17] See App. K, Sentencing Letters of Support, p.95-96.
[18] See App. F, Letter from Cristal Clark, p.39.

At the time, Mr. Clark was the majority owner of a real estate development and hospitality venture known as Cay Clubs Resorts and Marinas, which he launched in 2004. Cay Clubs featured mixed-use developments, with many of them having marinas, golf course access, property management features, resort amenities and more. Cay Clubs was the largest owner of marinas in the Florida Keys and also owned restaurants, charter boat and fishing expedition companies, charter flight and refueling companies, scuba diving, jet skiing, snorkeling, and collaborative sports program opportunities with IMG Academy. Cay Clubs generated $750 million in revenue and had condominium sales totaling $300 million.

Despite his many successes, Mr. Clark was never concerned with material things. This was affirmed during sentencing, when the court made a factual finding that there was no evidence that Mr. Clark engaged in personal spending on items such as luxury vehicles and yachts as alleged by the government.[19] Mr. Clark has stated that his prior success was never about greed or the accumulation of wealth – Mr. Clark enjoyed the challenges of building something from the ground up.

Cay Clubs fell into financial distress in late 2007 when lenders changed their financing terms at the onset of the Recession. These changes made the sale of condominium units infeasible and left Cay Clubs without sufficient cash flow to meet obligations to investors. Mr. Clark did what he could to try to make these investors whole, but ultimately it became impossible and losses piled up. Disgruntled investors in dire financial straits due to their investments in Cay Clubs sued the company in state courts for claims like breach of contract and alleged misrepresentations. The state civil claims did not get very far, however, likely because the plaintiffs' contracts with Cay Clubs were clearly investor-beware contracts with "As-Is" clauses and had no financing contingency at all. Cay Clubs did not sell primary or secondary homes for buyers, Cay Clubs mainly sold multiple units at a time to a sophisticated investor base. Nonetheless, Clark feels deep remorse that his ambitions with the Cay Clubs company backfired and caused hardships to so many people.[20] He wanted to help people live their dreams and instead he came to be hated, blamed, and villainized in the media. His deep sorrow on the failure of his business and how it affected the lives of those who believed in him haunts him every day.

The Securities and Exchange Commission ("SEC") opened an investigation into Cay Clubs and Mr. Clark in October 2007, focusing on whether Mr. Clark and others affiliated with Cay Clubs made false or misleading statements in connection with the sale of condominiums or otherwise violated federal securities laws. The SEC did not, however, file a formal civil enforcement action against Mr. Clark and other Cay Clubs executives until January 30, 2013. The United States District Court for the Southern District of Florida dismissed the case on statute of limitations grounds, concluding the SEC "failed to meet its serious duty to timely bring [its] enforcement action."[21]

While the SEC civil case was pending, the government pursued a parallel criminal investigation into Mr. Clark and his wife Cristal, resulting in an indictment against them in November 2013. As with the civil case, however, the government faced a statute of limitations problem in the criminal case because the limitations period for mail and wire fraud is five years. The November 2013 indictment therefore alleged: (1) a relatively narrow fraudulent scheme from late 2010 to early 2013 involving the

[19] United States of America v. Clark, Case No. 13010034-CR-MARTINEZ, Reg. No. 05441-104, Docket Entry 532, Sentencing Transcript, at 62-63.
[20] See App. A, Letter from Dave Clark to the President, p.17.
[21] *S.E.C. v. Graham*, 21 F.Supp.3d 1300, 1316 (S.D. Fla. 2014) *aff'd in part, rev'd in part, and remanded sub nom. Sec. & Exch. Comm'n v. Graham*, 823 F.3d 1357 (11th Cir. 2016).

alleged misappropriation of funds from an entity called CMZ Group, LTD and its affiliates (collectively, "CMZ"); and (2) obstruction of the SEC investigation.

The scope of the criminal charges dramatically changed following dismissal of the SEC civil case in May 2014. A few months later, in September 2014, the government obtained a superseding indictment against Mr. Clark and his wife alleging, for the first time, a vast criminal conspiracy arising out of the operation of Cay Clubs starting in November 2004. The timing of the conduct alleged in the superseding indictment overlapped almost entirely with the conduct in the now-dismissed SEC civil petition to the point where, in context, it seems clear the dismissal of the civil case motivated the filing of the superseding criminal charges.

There was one noticeable difference, however, between the SEC's civil petition and the criminal superseding indictment. Despite being 23 pages and 105 paragraphs in length, the civil petition barely said anything about banks—the word "bank" appears just once (in reference to a "bank account" allegedly controlled by Mr. Clark and others) and the word "lender" just twice. By contrast, the superseding indictment, despite addressing events from the very same four-year timeframe as the civil petition, was littered with references to "banks," "lenders," and "financial institutions." Almost every paragraph mentions at least one of them, and the first five substantive counts alleged conspiracy to commit bank fraud (Count 1) or substantive bank fraud (Counts 2-5).

The sudden interest in banks and financial institutions was not accidental. The government recognized the five-year statute of limitations had expired for mail and wire fraud charges relating to Cay Clubs, just as the SEC missed the statute in the civil petition. The statute of limitations for bank fraud, however, is *ten* years, so the government artfully crafted the superseding indictment to characterize Mr. Clark's and his wife's alleged conduct, for the first time, as a scheme to defraud banks. In essence, the government alleged that Mr. Clark, his wife, and others lied to, or concealed information from, banks for the purpose of obtaining loans on Cay Clubs condominiums. The government also alleged that Mr. Clark and others diverted loan proceeds for their personal use and did not to disclose the existence of a large judgment against him.

On August 14, 2015, following 28 days of trial, the jury acquitted Mr. Clark's wife of all charges against her and declared itself unable to render a verdict of conviction or acquittal as to Mr. Clark. A mistrial therefore was declared.

The government filed a second superseding indictment against Mr. Clark in early October 2015 adding two new counts (labeled as Counts 6 and 7) for allegedly making false statements in connection with federally insured loans. The second superseding indictment also continued to allege claims for conspiracy to commit bank fraud (Count 1), bank fraud (Counts 2-5), conspiracy to commit mail and wire fraud (Count 8), mail fraud (Counts 9-11), and obstruction of an official proceeding—i.e., the SEC investigation (Count 12). Counts 8-11 were later dismissed by the government, and a second trial (this one lasting 20 days) was held in November and December 2015 on Counts 1-7 and 12. In the second trial, the jury voted unanimously to acquit Mr. Clark on the main charge of conspiracy to commit bank fraud. The jury did, however, convict him on the individual counts of bank fraud (Counts 2-5), false statements to a financial institution (Counts 6 and 7), and obstruction of the SEC investigation. (Count 12).

IV. The Disproportionate Impact of the Trial Penalty, Acquitted Conduct, and "Other Relevant Conduct" at Mr. Clark's Sentencing.

At Mr. Clark's sentencing, the government faced two overlapping challenges. *First*, to obtain convictions and avoid the statute of limitations, prosecutors had to characterize his conduct as a bank fraud scheme directed primarily at financial institutions rather than a wire and mail fraud scheme directed at individual investors (although at trial the government presented substantial trial evidence as to both). *Second*, even as to the narrow bank fraud charges, the jury **acquitted** Mr. Clark of the most serious and far-reaching charge against him, for conspiracy.

With the support of United States District Court Judge Jose E. Martinez, who is known for taking pro-government positions and making aggressive sentencing decisions, the government used two legal loopholes at sentencing to overcome these problems. *First*, it successfully asserted that the alleged investor fraud was sufficiently intertwined with the bank fraud to be one-and-the-same scheme. In other words, the government convinced the Judge Martinez that there were hundreds of individual victims of a scheme to defraud banks and that those investors lost hundreds of millions of dollars. It bears repeating, investor fraud could not have been pursued as a standalone charge due to the statute of limitations.

Second, and relatedly, the government convinced Judge Martinez that Mr. Clark's acquittal on the bank fraud conspiracy charge did not prevent the use of acquitted conduct to enhance Mr. Clark's sentence under the United States Sentencing Guidelines. For example, although the jury's acquittal necessarily means there was no proof beyond a reasonable doubt that Mr. Clark conspired with others to execute a scheme to defraud, they did hold that Mr. Clark should be held responsible for sentencing purposes for the alleged use of false marketing materials by others to convince investors to purchase Cay Clubs units.

The use of acquitted conduct to enhance a defendant's sentence is highly controversial and has been criticized by Supreme Court Justices across the ideological spectrum. In 2014, for example, Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg collectively dissented from a decision denying an application for writ of *certiorari* in a case involving defendants whose sentences were enhanced as a result of acquitted conduct. *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting) (explaining that the use of judicial factfinding to increase sentences, even for acquitted conduct, "has gone on long enough" and "disregard[s] the Sixth Amendment"). The following year, now-Justice Brett Kavanaugh explained that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (*per curiam*) (Kavanugh, J., concurring in denial of rehearing *en banc*); *see also United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.)(use of judicial factfinding to increase sentences rests on "questionable foundation").

Elected officials – again, from both sides of the aisle – have expressed the same concerns. In 2019, a bipartisan group of Senators, including Republicans Charles Grassley, Thom Tillis, and Mike Lee and Defendants Richard Durbin, Patrick Leahy, and Cory Booker introduced the Prohibiting Punishment of Acquitted Conduct Act of 2019. As Senator Grassley explained, "If any American is

acquitted of charges by a jury of their peers, then some sentencing judge shouldn't be able to find them guilty anyway and add to their punishment . . . That's not acceptable and it's not American."[22]

Judge Martinez, unfortunately, disagreed with this diverse group of Justices and Senators and accepted the government's use of the acquitted conduct loophole. The effect was massive. Thanks to enhancements for loss amount, number of victims, and role in the offense, among others, Mr. Clark ended up facing a Sentencing Guidelines range of 2,400 months' (200 years') imprisonment. By contrast, had he been sentenced solely on the basis of loss to the victim-banks from the counts of conviction, his range would have been considerably lower—possibly as little as 12-18 month.

The lower Guidelines range at sentencing would have comported with the plea offer prosecutors made to Mr. Clark prior to trial, in which they asked him to plead guilty to offenses that would have resulted in an expected sentence of approximately four years. He is now serving a **sentence of *ten times* that length of the plea deal** even though the jury acquitted him of the most serious charge.

V. Mr. Clark's Victims Support His Request for Clemency.

None of the discussion above is meant to minimize the seriousness of the charged offenses against Mr. Clark or the severity of the losses suffered by investors – whether through fraud or not. Indeed, Mr. Clark himself is deeply remorseful for those losses and wishes he could have done more to prevent them. Even the victim-investors believe, however, that Mr. Clark's sentence is unnecessarily harsh and therefore support his request for clemency. A group of Cay Clubs investors, filled with compassion and forgiveness, have come forward to support Dave's petition for clemency. Even though their losses range from hundreds of thousands of dollars to millions of dollars, they do not attribute their losses to Dave's conduct and believe his 40-year sentence is profoundly unjust.

As David Smith of LG Capital Partners writes :

> "*I was shocked when [Dave] received such a lengthy sentence, which seemed then—and still seems now—to be beyond punitive and far too excessive.* ***Despite the fact that I incurred a financial loss on the Cay Clubs loan that was not repaid, I do support a commutation of Dave's prison sentence.*** *I think of Dave as a gentle soul and a dedicated father of seven. I don't see how justice is served by having him spend the rest of his life incarcerated*."[23]

Jeff Aeder of JDI Realty writes :

> "*I would estimate that JDI and its entities lost close to $15 million through its investments with Dave Clark.* ***While these losses were extremely painful to my investors, and to me and my reputation, I never blamed Dave****. At a time when the real estate market was extremely volatile, I made a poor business decision by investing in such speculative investments... While I have not spoken with Dave in over a decade, I have followed his legal travails, including the hung jury in the first trial, the acquittal of his wife, and the lengthy sentence he was given. I have always believed that* ***the length of his sentence was excessive in light of his alleged conduct and convictions, and that the concept that he was sentenced for acquitted conduct was outrageous...***

[22] See DURBIN, GRASSLEY INTRODUCE BIPARTISAN CRIMINAL JUSTICE REFORM BILL, *available at* https://www.grassley.senate.gov/news/news-releases/durbin-grassley-introduce-bipartisan-criminal-justice-reform-bill#:~:text=and%20Chuck%20Grassley%20(R-Iowa,been%20acquitted%20by%20a%20jury (last visited Dec. 4, 2020).
[23] See App. H, Letters of Support from Victim Investors, p.54.

Nothing would be gained by having him die in jail, especially given that he is serving an unfair and excessive sentence."[24]

Although the pain of what happened torments him daily, Dave tries to remain positive and focus instead on how he can help improve the lives of his family and those he unintentionally wronged.

V. Granting Clemency Will Allow Mr. Clark to Continue Developing the Promising People Program and Help Inmates Transition Back to Society and Avoid Recidivism.

In addition to having the support of his alleged victims, the use of executive clemency for Mr. Clark will serve the interests of society because it will allow him to continue his work with on the Promising People Program, which he created to provide educational and training opportunities for inmates that will help them, upon release, reenter society and avoid recidivism.

Since he was first incarcerated, Mr. Clark's faith has only increased. His Christian convictions imparted by his parents kept him strong through the difficulties he has faced during the trial and subsequent sentencing. Mr. Clark's faith and memories of his father's devotion to prison ministry inspired him to develop a highly creative and innovative proposal[25] that will help inmates succeed at re-entering society. As he writes,

> *"After my conviction in my second trial... I began earnestly praying for guidance and talking with the men I was now housed with about their lives. [I wanted to] see if I could make a difference in some way."*[26]

After going through the prison's educational course offerings and completing 85 hours of college credits, Dave realized firsthand that the educational opportunities are limited in content, participation and their ability to effectuate lasting charges for inmates. As Mr. Clark writes:

> *"During these seven years of incarceration I have had plenty of time to ask what the Lord wants me to learn about our legal and prison system – and what he expects me to do about it. In this time I have focused on what I can contribute to people who have been punished, often excessively, and those who, on release, need a second chance at life with their families."*[27]

The Promising People Project was soon born. The plan takes into account President Trump's First Step Act and the National Council for American Workers initiative, offering a practical, feasible solution to turn these prison reform goals into reality. The aim of the Project is to provide pre-apprentice trade learning opportunities using cutting-edge virtual technology. Inmates will be given special headsets to complete the training during their final three months in prison. This plan delivers a high-quality solution at significantly lower cost than building technical schools for nearly 7,000 prisons. The Project also functions as an employee placement program that will significantly increase its chances of success. Upon completion, graduates of the virtual training program will receive certificates through an affiliated technical college or training center. Students will then be tested on their knowledge and ability prior to starting work in their industry of choice. The Adopt a Promising Person Project is a network of support

[24] See App. H, Letters of Support from Victim Investors, p.53.
[25] See App. I, Promising People Program, p.60.
[26] See App. I, Promising People Program, p.62.
[27] See App. I, Promising People Program, p.60.

groups located around the country. They will provide phone support and when needed, financial support, to help a released person start earning an income.

The Project has already undergone a successful testing phase which provided a sense of how it will function if and when it goes live. Using his distinctive entrepreneurial approach, he created a multi-pronged plan that offers real solutions to the multitude of problems inmates face when attempting to re-enter society.[28]

VI. Conclusion

Notwithstanding the immense hardship Dave faces in prison, rather than give in to feelings of bitterness or anger, Dave has channeled his inner strength to persevere with hope and faith and innovation through *The Promising People Project* he created. In the 7 years he has been in prison – and with his distinctive entrepreneurial approach – Dave has even created a multi-pronged plan that offers real solutions to the multitude of problems inmates face when attempting to re-enter society. It has already undergone a successful testing phase which provided a sense of how it will function if and when it goes live. Dave deeply regrets his actions and is horrified at the devastation the collapse of his business has had on so many people:

> *"The hardest part was the horror of seeing the devastation wrought on those who bought into the dream. I look back with extreme regret for some of the decisions that I made…"*[29]

Although the pain of what happened torments him daily, Dave tries to remain positive and focus instead on how he can help improve the lives of his family and those around him. In his 7 year-long absence, Dave's family is suffering immensely, and Dave spends every day of his life praying to be given another chance to make the world a better place, and help his family heal the heart wrenching trauma of the past seven years. We want to thank the President for his unending compassion to social justice and would be happy to provide any further information required to help the President in his kind consideration of Dave's very worthy case.

Sincerely,

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[28] See App. I, Promising People Program, p.60.
[29] See App. A, Letter from Dave Clark to the President, p.17.

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March 14, 2023

Re: Public Comment on U.S. Sentencing Commission's Proposed Amendments

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
1 Columbus Circle, NE, Suite 2-500 South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

We write on behalf of the Pro Bono Department of Davis Polk & Wardwell LLP in response to the U.S. Sentencing Commission's (Commission) invitation for public comment on its proposed amendments to the U.S. Sentencing Guidelines (Guidelines), policy statements and commentary, as outlined in its February 2, 2023 notice. We applaud the Commission's consideration of these proposed amendments, and specifically write in response to the Commission's proposed amendment that would revise the list of "extraordinary and compelling reasons" to include a new category: "(5) *Changes in Law*. – The defendant is serving a sentence that is inequitable in light of changes in the law." We respectfully advocate for this amendment's adoption as we believe it will make our criminal legal system more fair and just.

In addition, the Commission asked whether it should provide additional criteria or examples of circumstances that constitute "extraordinary and compelling reasons," and, if yes, what specific criteria or examples it should give. We answer in the affirmative and respectfully advocate that the Commission provide the following example: "*a situation where a change in law has resulted in a defendant's existing sentence being grossly disproportionate to the sentence that a defendant would now receive for the same crime as a result of the change in law*."

As you are aware, by adopting the First Step Act (FSA) in December 2018, Congress eliminated the practice of "stacking" enhanced 18 U.S.C. § 924(c) sentences by removing the government's ability to invoke a 25-year enhanced mandatory consecutive sentence for "second or successive" § 924(c) convictions in the same case in which the first such conviction is obtained. A byproduct of this monumental legislation is an unjust disparity in sentences between those sentenced before the passing of the FSA, and those sentenced under the new law.

Our firm's Pro Bono Department is committed to litigating issues that implicate systemic racism and injustice. Given the stark racial disparities in sentencing decisions in the United States,[1] we have several compassionate release cases on our Pro Bono Racial Justice Initiatives docket as a critical component of our firm's efforts to advance racial justice. This includes pro bono representation of clients incarcerated under long stacked § 924(c) sentences who seek to file compassionate release motions under 18 U.S.C. § 3582 on the basis that their sentences are inequitable in light of the change in law. The practice of stacking § 924(c) sentences disproportionately impacted black men, who are the vast majority of

[1] *See* U.S. Sent'g Comm'n, *Demographic Differences in Sentencing: An Update to the 2012* Booker *Report* 6 (2017) (reviewing Commission's findings on racial disparities in sentencing).

defendants serving stacked § 924(c) sentences, as recognized by members of Congress during the First Step Act's debate and enactment.[2]

We offer four primary reasons why the Commission should adopt these proposed amendments to the Guidelines:

1. Justice necessitates taking this common-sense approach.

First, the proposed amendments could help rectify the gross discrepancies that persist between sentences rendered for the same offense before and after the passage of the FSA. The practice of stacking enhanced § 924(c) sentences in a defendant's first § 924(c) case has been condemned for years by both the Commission and the Judicial Conference of the United States, among others, because of the excessive enhanced sentences mandated by "second or successive" convictions.[3] As noted above, Congress finally eliminated this practice by amending § 924(c) through § 403 of the FSA.

The discrepancy between the sentences received for the same offense before and after the passage of the FSA can be enormous. In our practice, we have encountered disparities between 18 and 50+ years. Condemning an individual to additional decades in prison simply because their case happened to occur before a certain point in time (i.e., before the FSA came into effect) defies logic, senses of fairness, and notions of equality. Indeed, stacked § 924(c) sentences not only dwarf the current regime's sentencing provisions, but also dwarf the average federal sentence for murder. According to the Federal Sentencing Commission's 2021 Annual Report, the average sentence length for murder was 244 months (or roughly 20.3 years).[4] By comparison, the stacked § 924(c) sentences our clients have received for robbery where no one was physically injured range from 42 to 105 years. If sentenced today, our clients' sentences would decrease by 50% or more. We believe that a change in law that creates a sentencing disparity greater than the average sentence for murder should constitute an "extraordinary and compelling reason" for relief under 18 U.S.C. § 3582.

2. Despite a circuit split on the issue, significant support and momentum exists in U.S. courts in support of reducing harsh sentences.

After the passage of the FSA, courts began to grapple with the question of whether these gross disparities in sentences constitute "extraordinary and compelling reason[s]" for relief under § 3582(c)(1)(A). Unfortunately, the lack of specificity in the Guidelines has led to a circuit split on whether nonretroactive legal developments leading to a disparity in sentences can constitute "extraordinary and compelling reasons" for relief. The First, Ninth, and Tenth Circuits have held that nonretroactive legal developments can contribute to a finding of "extraordinary and compelling reasons." The Fourth Circuit went one step further and specifically found that "the severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an 'extraordinary and compelling' reason for relief under § 3582(c)(1)(A)." *United States v. McCoy,* 981 F.3d 271, 285 (4th Cir. 2020). The legislative history of compassionate release supports the Fourth Circuit's conclusion. The Senate Report accompanying the original compassionate release statute explicitly noted that relief would be appropriate when "extraordinary and compelling circumstances justify a reduction of an

[2] *See, e.g.*, Press Release, Senator Chuck Grassley, Q&A: First Step Act (Dec. 20, 2018), https://www.grassley.senate.gov/news/news-releases/qa-first-step-act-0 (explaining how the First Step Act would "restore fairness and justice to a system" with a "racial disparity in sentencing"); 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker) (arguing that the First Step Act would "address[] some of the racial disparities in our [criminal justice] system").

[3] U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 359–61, n.904 (2011); *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 60–61 (2009) (statement of C.J. Julie E. Carnes on behalf of the Judicial Conference of the United States).

[4] U.S. Sent'g Comm'n, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics* 64 tbl.15 (2022).

unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment." S. Rep. No. 98-225, at 55–56 (1983).

The Sixth and Seventh Circuits, however, have thus far taken a different view. In coming to its conclusion, the Sixth Circuit specifically looked to the Guidelines to determine what constitutes "extraordinary and compelling reasons." It noted that because "those reasons never included nonretroactive legal developments," *United States v. McCall*, 56 F.4th 1048, 1060 (6th Cir. 2022), it was unable to find that particular meaning within the definition of "extraordinary and compelling." *McCall* confirms that courts do rely on the Guidelines to understand what amounts to an "extraordinary and compelling reason." Had the Guidelines been worded differently, or, had the Guidelines been updated to expressly state that a change in law which results in disproportionate sentencing can be considered an "extraordinary and compelling reason," a different outcome may have resulted. By amending the Guidelines, the Commission can provide courts with the guidance and clarity they have been seeking.

Despite the circuit split, more and more district courts across the country are employing their statutory discretion to reduce harsh § 924(c) sentences imposed on defendants. According to a recent Sentencing Commission Report, for the fiscal years 2020-2022, district courts granted 288 motions for compassionate release due to "multiple 18 U.S.C. 924(c) penalties."[5] It is for good reason that the number of judges opting to use their discretion continues to grow. Congress's decision to amend § 924(c) through the FSA was not "just any sentencing change, but an exceptionally dramatic one." *McCoy*, 981 F.3d at 285. The amendment amounted to a "legislative rejection" of the excessive sentences being delivered pursuant to § 924(c), and indicated that Congress believed that many of the § 924(c) sentences had become "unfair and unnecessary." *Id.* (quoting *United States v. Redd*, 444 F. Supp. 3d 717, 723 (E.D. Va. 2020)). By adopting these amendments, the Commission can further empower courts seeking to address the disparities in sentencing caused by the dramatic changes of the FSA.

3. These amendments would allow courts to address the significant racial disparities in stacked § 924(c) sentences.

Adopting these amendments would enable courts to help remedy the great racial disparity in stacked § 924(c) sentences. As the Commission has repeatedly reported since as far back as 2004, black defendants have been disproportionately subjected to the "stacking" of § 924(c) charges.[6] The Commission's 2004 Fifteen-Year Report stated that black defendants accounted for 48% of offenders who qualified for a charge under § 924(c), but represented 56% of those actually charged and 64% of those ultimately convicted under the statute.[7] Even after controlling for factors such as arrest offense, district, age, criminal history category and education level, black men are twice as likely as white men to be charged with an offense carrying a mandatory minimum sentence.[8] In its 2011 report to Congress, the Commission reported that black men continued to be "convicted of multiple counts of an offense under section 924(c) . . . at higher rates than offenders with other demographic characteristics."[9] Noting the "excessively severe and disproportionate" sentences in these cases,[10] the Commission acknowledged that

[5] U.S. Sent'g Comm'n, *Compassionate Release Data Report Fiscal Years 2020 to 2022* at tbls.10, 12 & 14 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf. The report notes that courts may cite multiple reasons for granting motions; consequently, the total number of granted reasons cited generally exceeds the total number of cases. For example, in fiscal year 2020, 2,117 reasons were cited for the 1,819 cases identified. *Id.* at tbl.10 n.1.
[6] *See* U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 363 (2011) (stating that black offenders are disproportionately convicted under § 924(c), subject to mandatory minimums at sentencing, and convicted of multiple § 924(c) counts).
[7] U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing* 90 (2004).
[8] Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 Yale L.J. 1, 28–29 (2013).
[9] U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 274 (2011).
[10] *Id.* at 359.

the effects of mandatory minimum penalties "fall on Black offenders to a greater degree than on offenders in other racial groups."[11] In 2018, the Commission again reported on the extreme racial disparity in the use of § 924(c) stacking, explaining that, in fiscal year 2016, black offenders accounted for more than 70% of offenders convicted of multiple counts under section 924(c) compared to just over half (52.6%) for § 924(c) offenders overall. In contrast, the percentage of white offenders convicted of multiple counts under § 924(c) (6.4%) was far smaller than for § 924(c) offenders overall (15.7%).[12]

Adopting these changes in the Guidelines would help rectify the gross racial injustices that have long plagued defendants facing stacked § 924(c) sentences, a disproportionate number of whom are black men, by giving them an opportunity to receive a sentence more in line with what they would receive if convicted today.

4. These changes would relieve the cost burden on the Bureau of Prisons of unnecessarily imprisoning individuals on stacked § 924(c) sentences for decades.

Implementing these changes would also help reduce the significant burden individuals unnecessarily imprisoned on decades-long stacked § 924(c) sentences place on the Bureau of Prisons (BOP). The average individual incarcerated in a federal facility costs taxpayers approximately $35,000 every year.[13] The reduced sentences resulting from the FSA's amendments to § 924(c) have already begun to save the BOP, and taxpayers, significant amounts of money. Directing courts to recognize the sentencing disparity created by the FSA as "extraordinary and compelling" will only further allow the BOP, and taxpayers, to avoid this unnecessary financial burden.

Because individuals serving stacked § 924(c) sentences often receive de facto life sentences, the cost associated with their incarceration is especially significant. As incarcerated individuals age, they require additional housing accommodations and expensive healthcare services. Incarcerated individuals are especially susceptible to chronic medical conditions, and are more likely to experience dementia and vision and hearing loss.[14] These older incarcerated individuals continue to receive expensive care in prison despite the overwhelming evidence that they are substantially less likely to recidivate following release.[15] As the Department of Justice's Office of Inspector General recognized, aging inmates are "viable candidates for early release," a move which would result in "significant cost savings" for the BOP.[16]

These amendments will enable rehabilitated incarcerated individuals to seek early release at a time when the BOP desperately needs to reduce its aging prison population. The BOP is in the middle of an unprecedented staffing shortage,[17] and there is no clear end in sight.[18] In addition, BOP's facilities, many of which remain overcrowded,[19] are aging and deteriorating.[20] BOP officials have acknowledged that the bureau's infrastructure is not equipped to support an increasingly elderly inmate population.[21] Yet, the

[11] *Id.* at 363.
[12] U.S. Sent'g Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 24 (2018).
[13] Annual Determination of Average Cost of Incarceration Fee (COIF), 86 Fed. Reg. 49060 (Sept. 1, 2021).
[14] Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, Pew (Feb. 20, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs.
[15] *See* U.S. Sent'g Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders* 3 (2017).
[16] Off. of the Inspector Gen., U.S. Dep't of Just., *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* 41 (2016).
[17] Jory Heckman, *Bureau of Prisons Understaffing Leads to 'Unprecedented Exodus' of Employees, Union Warns*, Fed. News Network (Sept. 30, 2022), https://federalnewsnetwork.com/hiring-retention/2022/09/bureau-of-prisons-understaffing-leads-to-unprecedented-exodus-of-employees-union-warns/.
[18] *See id.* (noting BOP union representative warned "another 3,000 [BOP] employees are expected to retire or leave the bureau by the end of this year").
[19] U.S. Dep't of Just., *FY 2022 Performance Budget Congressional Submission: Federal Prison System Buildings and Facilities* 3 (2021), https://www.justice.gov/jmd/page/file/1398296/download (visually depicting overcrowded conditions at BOP medium and high security prisons).
[20] *Id.* at 1–2, 8 (describing BOP facilities as "aged," "undersized," "over utilized," and "deteriorating").
[21] *See* Off. of Inspector Gen., U.S. Dep't of Just., *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* 23–24, 27 (2016).

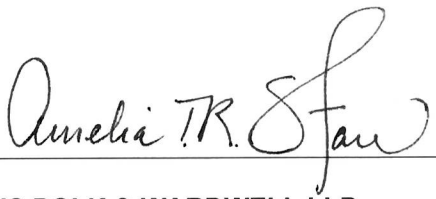
number of incarcerated individuals over the age of 55 has grown dramatically in recent decades.[22] These amendments represent small steps towards reducing the federal prison system's aging population.

Stacked § 924(c) sentences unnecessarily burden incarcerated individuals, their families and communities, and the prison systems that care for them. The direct costs imposed on the BOP represent only one part of the equation. There are also many indirect costs associated with these unnecessarily punitive sentences, such as lost earnings, negative health consequences, and the emotional and financial harm done to the families of the incarcerated.[23] Forcing these individuals to grow old in prison does nothing but burden the BOP and the taxpayers that pay for it. These amendments would empower judges to release individuals who have been rehabilitated, but are languishing with disproportionately long sentences, and permit them to reenter society as productive members of the community.

* * * *

We strongly believe that the Commission's adoption of these changes is necessary to create an avenue for compassionate release for defendants unjustly languishing with disproportionately long sentences, but no ability to meet the existing "extraordinary and compelling" criteria. As we have articulated, our firm views this as an important step in attempting to address a stark racial injustice. We greatly appreciate your consideration of these comments in finalizing your proposed amendments to the Guidelines. If you have any questions about these comments or need more information, we would be happy to speak with you. Please contact Amelia Starr, Chief Pro Bono Counsel at Davis Polk & Wardwell LLP.

Sincerely,

By: 

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[22] *See* Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, Pew (Feb. 20, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs (noting 280 percent increase in inmates 55 or older from 1999 to 2016).
[23] Stuart John Wilson & Jocelyne Lemoine, *Methods of Calculating the Marginal Cost of Incarceration: A Scoping Review*, 33 Crim. J. Pol'y Rev. 639, 641–42 (2022).

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March 13, 2023

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
Attention: Public Affairs – Priorities Comment
Via Public Comment Portal

Re: Amendments to the Compassionate Release Policy Statement (U.S.S.G. § 1B1.13)

Dear Chair Reeves, Vice Chairs, and Commissioners:

Thank you again for the opportunity to testify before this Commission. Professor Zunkel's prior written and oral testimony addressed several of the Commission's "issues for comment" on its proposed amendments to the compassionate release policy statement (U.S.S.G. § 1B1.13), in particular those relating to Proposals (b)(4), (b)(5), and (b)(6). We submit this public comment to address issues raised during this Commission's February 23, 2023, hearing.

We are a Clinical Professor of Law and four law students in the Federal Criminal Justice Clinic at the University of Chicago Law School. We submit this comment in our individual capacities, not on behalf of the Clinic or the University of Chicago Law School.

I. Introduction

> Each of us is more than the worst thing we've ever done. . . . [T]he true measure of our commitment to justice, the character of our society, our commitment to the rule of law, fairness, and equality cannot be measured by how we treat the rich, the powerful, the privileged, and the respected among us. The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned. . . . An absence of compassion can corrupt the decency of a community, a state, a nation.[1]

This Commission has the historic opportunity to realign compassionate release with what Congress intended in 1984, allowing 18 U.S.C. § 3582(c)(1)(A) to function as a "safety valve" that provides relief when "it would be inequitable to

[1] BRYAN STEVENSON, JUST MERCY 17–18 (2014).

continue the confinement of the prisoner."[2] Past Commissions have been at the forefront of some of the most important issues in federal sentencing, ultimately paving the way for widespread reform—such as remedying the crack/powder disparity.[3] In the compassionate release context, Congress has given this Commission the primary responsibility to chart a path forward for increasing the use and transparency of § 3582(c)(1)(A).[4] This Commission has taken that responsibility seriously: the proposed amendments reflect careful attention to the circumstances that may warrant a reduction of a previously-imposed sentence. Although we suggest some modest linguistic revisions, the proposals strike at the very heart of "extraordinary and compelling" circumstances and importantly preserve judicial discretion to identify unenumerated reasons for release.[5]

Against the tide of agreement—and a Congressional mandate—that compassionate release be expanded, the Department of Justice's (DOJ or Department) suggestion to eliminate (b)(5) and adopt Option 1 for the catch-all would move us backward, contrary to Congress's intent and, quite frankly, the ends of justice. The DOJ's reticence is expected (but no less disappointing): "there are structural features of the Department that inexorably push it towards . . . fighting to maintain the status quo."[6] That is especially true in the sentencing context, where prosecutors often believe that later review of a person's sentence "impl[ies] a failure of their present or past decisions."[7]

But the status quo is broken, and this Commission has thoughtfully proposed amendments that "assure the availability of specific review and reduction

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[2] S. REP. NO. 98-225, at 121 (1983).

[3] *See Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the United States Sentencing Commission* (Feb. 23, 2023) [hereinafter Public Hearings] (oral statement of Mary Price, Gen. Counsel, FAMM). Hereinafter, oral statements of witnesses at the Sentencing Commission's Public Hearings on § 1B1.13 will be denoted as "[Witness Name] Oral Statement," available at the following recording: https://youtu.be/ELmrnESRMm4. The written testimony of witnesses submitted to the Commission prior to their live testimony will be denoted as "[Witness Name] Written Statement at [Page]," all of which are available for download at the following link: https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-february-23-24-2023.

[4] *See* 28 U.S.C. § 994(t); First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 § 603(b) (2018) ("Increasing the Use and Transparency of Compassionate Release.").

[5] 28 U.S.C. § 994(t).

[6] Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 399 (2017).

[7] *Id.*

of a term of imprisonment for 'extraordinary and compelling reasons'"—exactly as Congress intended.[8]

This post-hearing comment will cover the following: Part II discusses why the proposed amendments align with Congress's intent vis-à-vis the Sentencing Reform Act of 1984 (SRA) and the First Step Act of 2018 (FSA). Part III elaborates why Proposal (b)(5) is a necessary and administrable enumerated category, and it suggests some narrowing principles if this Commission wants to provide additional guidance for judges. Part IV explains why Option 3 is the best catch-all; it also identifies some further limiting criteria that this Commission can adopt if necessary. Part V addresses why the DOJ's proposed "administrative and legal findings" requirement under (b)(4) is dangerous and inconsistent with Congress's intent. Part VI concludes by discussing the administrability of the proposed amendments, showing why concerns about a flood of motions—meritorious or otherwise—are overblown and unsupported by data.

II. The Proposed Amendments Give Effect to Congress's Intent that Compassionate Release Serve as a "Safety Valve" for "Inequitable Sentences."

During this Commission's hearing, nearly every witness and commentor appeared to agree that compassionate release was intended to be more than just a safety valve for people facing terminal illnesses.[9] This Commission's proposed amendments correctly recognize that § 3582(c)(1)(A) was never meant to be cabined to medical circumstances. In fact, for the last sixteen years, the Commission's policy statement has been broader, encompassing family circumstances and any "[o]ther" reason in the Bureau of Prisons' (BOP) discretion.[10]

Others queried whether Congress intended to allow this Commission to recognize sentence-related issues as extraordinary and compelling, suggesting that

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[8] S. REP. NO. 98-225, at 121.

[9] Paul Larkin of the Heritage Foundation was the sole outlier in suggesting that Congress's amendments to 18 U.S.C. § 3582(c)(1)(A) in the FSA were not meant to expand the scope of compassionate release beyond the medical context. *See* Paul J. Larkin Oral Statement (Panel VIII: Academic Perspectives). His position finds no support in the legislative history, prior policy statements, or the text of § 3582(c)(1)(A) or 28 U.S.C. § 994(t). *See* Part II.A–B, *infra*. Even the Department agrees that non-medical compassionate release aligns with Congress's intent. *See, e.g.*, Jonathan J. Wroblewski Written Statement at 5–6 (expressing support for Proposal (b)(4) for victims of sexual assault).

[10] U.S.S.G. § 1B1.13.

Congress would not have expanded compassionate release through the FSA's technical revisions to § 3582(c)(1)(A). This "elephants in mouseholes" argument is wrong for three principal reasons. First, it places speculation as to Congress's intent above the text, artificially reading into § 994(t) a limitation that simply is not supported by the explicit language.[11] Congress in no way contracted the scope of § 994(t) when it passed the FSA. Second, the argument misidentifies the relevant time period for inferring Congress's intent, focusing primarily on the FSA of 2018 rather than assessing what Congress intended in 1984 when it first enacted § 3582(c)(1)(A). Third, when the FSA allowed petitioners to file motions directly with courts rather than retaining the BOP as a gatekeeper, Congress contemplated and recognized the need to expand the substance of compassionate release beyond the BOP's unnecessarily constrained vision.

A. The text of § 994(t) and § 3582(c)(1)(A) confirms that sentence-related reasons can be extraordinary and compelling.

This Commission's proposals are in complete alignment with the most probative and clear evidence of Congress's intent: the statute's language. Section 994(t) directs this Commission to "describe what should be considered extraordinary and compelling reasons for a sentence reduction[.]"[12] Congress did not hide an elephant in a mousehole; the text explicitly contemplates that the Commission could describe any number of non-medical reasons, save for rehabilitation alone.[13] It is axiomatic that "[t]he expression of one thing implies the exclusion of others."[14] Congress placed off-limits only rehabilitation on its own—not sentencing-related circumstances or other non-medical reasons.

B. The SRA's legislative history makes clear that Congress intended compassionate release to address sentence-related circumstances.

The SRA's simultaneous elimination of parole and enactment of § 3582(c)(1)(A) confirms what the statutory text makes clear: Congress never intended to foreclose non-medical circumstances, including those related to a sentence, from consideration in compassionate release. Section 3582(c)(1)(A) was effectively a compromise in the elimination of parole: although Congress extinguished the primary exception to sentence finality by ending the parole

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[11] *See* Magwood v. Patterson, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent.").
[12] 28 U.S.C. § 994(t).
[13] *Id.*
[14] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 107 (2012).

system, it retained a much more limited exception in cases involving extraordinary and compelling circumstances. That is why Congress termed § 3582(c)(1)(A) a "safety valve."[15] But if that safety valve is overly constrained, it cannot address the myriad circumstances that might render it "inequitable to continue the confinement of the prisoner."[16]

The SRA's legislative history unambiguously contemplates that compassionate release was intended to go beyond terminal illnesses and reach changes in the law. Although Congress recognized that § 3582(c)(1)(A) "would include cases of severe illness," it also confirmed that compassionate release would cover "cases in which *other* extraordinary and compelling circumstances justify a reduction of an unusually long sentence[.]"[17] For example, it recognized that the safety valve might "include . . . cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment."[18] And Congress expressly contemplated that extraordinary and compelling circumstances might "include 'unusually long sentence[s]'. . . . Though Congress did not end up expressly permitting the consideration of unusually long sentences or changes in sentencing, law, it also did not expressly prohibit it."[19]

That is why § 994(t) makes no reference at all to medical conditions, instead noting this Commission's power "to describe the 'extraordinary and compelling reasons' that would justify a reduction of a particularly long sentence[.]"[20] That is why § 3582(c)(1)(A) uses the language "extraordinary and compelling reasons,"[21] not "cases involving terminal illness or other serious medical circumstances." And that is why § 994(t) takes off the table only rehabilitation as a standalone reason—not sentence-related changes.

C. The FSA's context shows that this Commission's proposals are in line with Congress's intent.

Congress's changes to § 3582(c)(1)(A) in the FSA—as well as its choice not to revise § 994(t)—illuminate why the proposed amendments further Congress's intent. Before addressing the FSA itself, though, it is first necessary to explain the

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[15] S. REP. NO. 98-225, at 121.
[16] *Id.*
[17] *Id.* at 55 (emphasis added).
[18] *Id.*
[19] United States v. Chen, 48 F.4th 1092, 1099 (9th Cir. 2022) (quoting S. REP. NO. 98-225, at 55).
[20] S. REP. NO. 98-225, at 179.
[21] 18 U.S.C. § 3582(c)(1)(A).

post-SRA compassionate release landscape. Although the SRA understood "extraordinary and compelling reasons" to be quite broad, Congress made the mistake of entrusting compassionate release to the BOP.[22] In so doing, Congress assumed that the BOP would seek reductions in extraordinary and compelling cases—not just cases involving terminal illness.[23] As long as the Commission's § 1B1.13 policy statement has existed, the BOP has had broad discretion to identify any "[o]ther reason" for a reduction—and the Commission imposed no limits on its ability to do so (other than the rehabilitation alone condition).

The 2013 Office of Inspector General's (OIG) Report on the BOP's failed implementation of § 3582(c)(1)(A) confirms that *even the BOP* recognized that the SRA conferred the authority to seek compassionate release for non-medical reasons.[24] The Report acknowledged that under the SRA, the BOP can seek release "based on either medical or non-medical conditions"[25] and that that BOP's own "regulations and Program Statement permit non-medical circumstances to be considered as a basis for compassionate release," but "the BOP routinely rejects such requests[.]"[26] This "resulted in potentially eligible inmates not being considered for release."[27] The OIG recommended that the BOP "expand[ ] the use of the compassionate release program *as authorized by Congress* and as described in the BOP's regulations and Program Statement to cover *both medical and non-medical conditions*[.]"[28]

Congress had no need to overhaul the substance of § 3582(c)(1)(A) in the FSA because the SRA already codified a broad compassionate release provision—Congress merely needed to remove the BOP gatekeeper that had obstructed the expansive compassionate release envisioned by the SRA. The FSA's revisions to § 3582(c)(1)(A) did nothing to alter the SRA's expansive understanding of compassionate release. Congress did not revise or cabin in any way § 994(t), the provision governing the substantive scope of "extraordinary and compelling reasons." Moreover, nothing in the FSA's text or legislative history suggests that Congress intended to significantly narrow the compassionate release standard to medical cases or otherwise exclude sentence-related reasons from consideration.

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[22] Erica Zunkel Written Statement at 4–5.
[23] *See* S. REP. NO. 98-225, at 121.
[24] OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., I-2013-006, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM ii (2013) [hereinafter OIG Report].
[25] *Id.* at i.
[26] *Id.* at ii.
[27] *Id.*
[28] *Id.* at 55 (emphasis added). In fact, in December 2006, the BOP proposed a rule that would have limited compassionate release to only two categories of medical cases, but the rule was not adopted. *See id.* at 19–20.

Although the FSA changed the *process* for seeking compassionate release, Congress left the substantive scope of § 994(t) untouched, choosing not to add constraints beyond the rehabilitation limitation.

D. There are no separation of powers concerns with the proposed amendments.

For all of the reasons described above, this Commission's proposals further, rather than infringe upon, separation of powers. Again, Congress limited this Commission's authority to identify extraordinary and compelling circumstances in just one way: by clarifying that rehabilitation alone cannot serve as the basis for a sentence reduction.[29] The proposed amendments do just that. They describe extraordinary and compelling circumstances, and do not suggest that rehabilitation alone is sufficient.

Although the amendments align precisely with Congress's intent, Congress clearly intended to give this Commission leeway in describing extraordinary and compelling circumstances. Had Congress wanted § 3582(c)(1)(A) to be limited to only a very particular class of cases, it would not have used such malleable language—instead, it would have simply listed the specific extraordinary and compelling circumstances it intended § 3582(c)(1)(A) to cover.

The simple reality is that, even if the proposed amendments did not align identically with Congress's intent, that is by design. Congress entrusted that latitude to the Commission precisely because the Commission is the body with the most expertise about how to manage the federal sentencing system. Indeed, a core purpose of the Commission is to seek consistency in federal sentencing, which sometimes requires it to make decisions that conflict with judicial opinions. Again, this is by design, as the Supreme Court has emphasized.[30]

It would be *inconsistent* with separation of powers if this Commission were to limit its proposals and fail to address emerging circuit splits in this area. When the Guidelines were binding pre-*Booker*, the Court explained that "in charging the Commission periodically to review and revise the Guidelines, Congress necessarily contemplated that this Commission would periodically review the work of the courts and would make whatever clarifying revisions to the Guidelines conflicting

[29] 28 U.S.C. § 994(t).
[30] *See* Stinson v. United States, 508 U.S. 36, 46 (1993) ("[P]rior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation.")

judicial decisions might suggest."[31] Failing to adopt provisions like (b)(5)[32] would shirk this Commission's responsibility and invite judicial interference into compassionate release in a way not intended by Congress or consistent with separation of powers principles.

E. This Commission should avoid significantly narrowing its proposals.

Two final factors counsel against narrowing the proposed amendments. First, *Brand X* deference means that even if there is some textual ambiguity about the scope of a statute, "it is for agencies, not courts, to fill statutory gaps."[33] Courts defer to agencies tasked with implementing flexible statutory language. That is especially true here, where § 994(t) expressly instructs the Commission to describe what should be considered extraordinary and compelling. So long as this Commission's proposals reflect a reasonable interpretation of the statute, they will be granted deference by courts. Second, and most importantly, this Commission's role is iterative, so it is best not to adopt an overly restrictive policy statement at the front end. Congress intended the FSA to expand the "Use and Transparency of Compassionate Release."[34] A restrictive policy would diminish the quality and accuracy of information this Commission might consider in future amendments to § 1B1.13, inhibiting the transparency of compassionate release. In contrast, adopting a more expansive policy statement will allow this Commission to consider the efficacy of such an approach with concrete data, allowing this Commission to fulfill its iterative role in managing compassionate release.

III. This Commission Should Retain Proposal (b)(5).

Cases involving core changes in law resulting in a sentence that is "inequitable" present extraordinary and compelling reasons for a sentence reduction. This Commission did not pull the "inequitable" limitation out of thin air—instead, it reflects Congress's intent that § 3582(c)(1)(A) respond to "case[s] in which the defendant's circumstances are so changed," such as by changes in the law, "that it would be *inequitable* to continue the confinement of the prisoner."[35] As discussed below and in Professor Zunkel's written testimony, that limiting

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[31] Braxton v. United States, 500 U.S. 344, 348 (1991).
[32] For a discussion of why (b)(5) specifically does not run afoul of separation of powers principles, see Erica Zunkel Written Statement at 13–16.
[33] Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).
[34] First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 § 603(b) (2018).
[35] S. REP. NO. 98-225, at 121 (emphasis added).

principle has real substance, demonstrated by the current approach in circuits that allow changes in the law to support a sentence reduction.

But should this Commission want further limitations on (b)(5), we suggest clarification about the scope of changes in the law that are covered by (b)(5), and those that could be beyond a court's consideration. We then discuss why failing to adopt (b)(5) aggravates the existing circuit split without providing clarity—contrary to this Commission's responsibility to promote uniformity in federal sentencing and compassionate release. We conclude this section by describing why (b)(5) will not lead to a flood of § 3582(c)(1)(A) motions.

A. The current iteration of (b)(5) already supplies a strong limiting principle.

This Commission's proposed "changes in law" amendment already supplies a strong limiting principle that guides district courts and forecloses run-of-the-mill legal changes from supporting relief. For a change in law to justify a sentence reduction under (b)(5), it must lead to a sentence that is "inequitable." That gets at the very heart of what § 3582(c)(1)(A) is supposed to address—changed circumstances where "it would be inequitable to continue the confinement of the prisoner."[36]

Most objectors to (b)(5) simply assume that *all* changes in the law can constitute extraordinary and compelling circumstances—but those commentors (like the Department) at no point mention the "inequitable" requirement. We described at length in Professor Zunkel's written testimony why that limitation is not vague or standardless; instead, it provides a familiar and workable baseline for judges.[37] Most importantly, district judges in more permissive circuits *already* contemplate whether a change in the law renders a person's sentence inequitable.[38] Judges consider many circumstances in reaching this determination, such as the length of original sentence, the amount by which a person's sentence would be reduced if he were sentenced today, the nature of the crime of conviction, the person's rehabilitation, and so on.[39]

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[36] *Id.*
[37] Erica Zunkel Written Statement at 11–16.
[38] *See id.* at 16.
[39] *See generally, e.g.*, United States v. Liscano, No. 02-CR-719-16, 2021 WL 4413320 (N.D. Ill. Sept. 27, 2021); United States v. Hamilton, No. CR1600268001PHXJJT, 2023 WL 183671 (D. Ariz. Jan. 13, 2023); United States v. Ortiz, No. 17CR2283-MMA-1, 2023 WL 2229262 (S.D. Cal. Feb. 24, 2023); United States v. Burleson, No. 2:16-CR-00046-GMN-NJK-16, 2022 WL 17343788, at *7 (D. Nev. Nov. 29, 2022).

Consider the Fourth Circuit, which allows judges to consider changes in the law as extraordinary and compelling circumstances. The Fourth Circuit's seminal opinion on this issue emphasizes the "individualized assessment of each defendant's circumstances"[40] that must be undertaken when considering a change in the law.[41] District courts applying the Fourth Circuit's guidance emphasize that a "disparity alone . . . . does not automatically give rise to a compelling reason for a reduction in sentence."[42] In fact, district courts routinely deny compassionate release based on changes in law after conducting this individualized review.[43]

But creating too much rigidity, such as by categorically excluding certain classes of legal changes, goes too far and would foreclose relief in truly extraordinary cases where Congress intended § 3582(c)(1)(A) to be a safety valve. For example, Professor Zunkel's written testimony described the case of Steve Liscano, who was originally sentenced to life in prison based on § 851 enhancements that could not be imposed today.[44] Many individuals seeking compassionate release for changes to § 851 present nothing more than the mere fact of the change in law itself, and as a result, judges often deny those motions. But in Mr. Liscano's case, the judge recognized that this change in the law rendered Mr. Liscano's sentence inequitable given the unique factual circumstances of his case: "Changes in the law do occur with some frequency. . . . But that does not preclude a finding that Liscano's particular circumstances are extraordinary."[45]

B. If necessary, this Commission can adopt additional language clarifying the scope of (b)(5).

Should this Commission conclude that (b)(5) requires additional limiting principles beyond the "inequitable" requirement, an application note (or the policy statement itself) could clarify the scope of (b)(5) by distinguishing between changes in the law that directly affect a person's sentence, and changes in the law that impact a person's conviction. This would address the concerns of the Judicial Conference's Criminal Law Committee (CLC), which queried whether legal

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[40] United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020).
[41] *Id.* at 279.
[42] United States v. Davis 581 F.Supp.3d 759, 770 (E.D. Va. 2022).
[43] *See, e.g.*, *id.* at 773; United States v. Crenshaw, No. 2-90-CR-117, 2022 WL 1046371, at *4–5 (E.D. Va. Apr. 7, 2022) ("[N]ot all defendants convicted under § 924(c) should receive new sentences; rather individual relief is appropriate in the most grievous cases." (citation omitted)).
[44] *See* Erica Zunkel Written Statement at 24–25.
[45] *Liscano*, 2021 WL 4413320, at *8.

changes in evidentiary standards that would have been material to a defendant's criminal trial would qualify.[46] Such examples are on the outer end of the spectrum and are unlikely to affect the overwhelming majority of § 3582(c)(1)(A) motions involving changes in the law. The data corroborate that arguments about the legality of a conviction or sentencing errors are uncommon. In FY 2021, only *seven* grants of a sentence reduction referenced the movant's underlying conviction or an error in their sentence—just three-tenths of one percent of all granted motions.[47] Moreover, judges could easily determine that such changes in law are too attenuated to render the ultimate sentence "inequitable."

Nevertheless, this Commission could provide additional guidance:

> **Changes in Law**—For the purposes of § 1B1.13(b)(5), a "change in the law" is a legal development, whether by statute or binding judicial decision, that would have affected the defendant's sentence had it occurred prior to their initial sentencing. Legal developments that primarily would have affected a defendant's conviction rather than sentence are not covered by this subsection. However, such changes may be considered, along with other individualized factors, by judges exercising their discretion under § 1B1.13(b)(6).

This proposed guidance captures the core "changes in the law" cases by focusing on the connection between the change in law and the individual's sentencing. Changes in law should include legal developments that, if they existed at the time, would have impacted the individual's sentence. Changes in statutory mandatory minimum penalties, such as the FSA's nonretroactive changes, are very relevant to a judge's initial sentencing decision, so they would be clearly covered by this language if they render the ultimate sentence "inequitable." On the other hand, changes in law concerning an evidentiary requirement likely would not impact the judge's original sentencing decision and are thus excluded. The Tenth Circuit, which allows changes in the law to support a § 3582(c)(1)(A) motion, uses nearly identical language to our proposal: "We have held that changes in the law that would have reduced the defendant's sentence if they had been available at his sentencing are properly considered as supporting a motion for compassionate release[.]"[48]

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[46] Hon. Randolph D. Moss Written Statement at 5–6.
[47] U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT FISCAL YEARS 2020 TO 2022 19 tbl.12 (Dec. 2020).
[48] United States v. Vann, No. 22-2111, 2023 WL 2360495, at *1 (10th Cir. Mar. 6, 2023).

Relatedly, this Commission queried whether (b)(5) was in tension with § 1B1.10. It is not, as we explained previously, and any overlap between the remedies could be addressed by judges in their discretion.[49] If a change to a guideline is not retroactive under § 1B1.10, it is exceedingly unlikely that a judge will find under (b)(5) that the change in the guideline results in an "inequitable" sentence. But for administrability purposes, this Commission could add a limitation on considering changes in the Guidelines as "changes in law" cognizable in (b)(5). That said, it is crucial that this Commission simultaneously recognize that changes in the Guidelines *can* be considered by judges in evaluating the totality of a person's circumstances under (b)(6), as a change to a guideline might be one of many reasons that are cumulatively extraordinary and compelling.

C. Proposal (b)(5) is not in tension with 28 U.S.C. § 2255.

Some Commissioners and commentors expressed concern about allowing (b)(5) to authorize a sentence reduction when the reason could be raised through other avenues, such as § 2255. That concern is misguided, and the Commission should not exclude from (b)(5) those rare claims that are cognizable under § 2255 and are also "changes in the law."

Section 3582(c)(1)(A) and Proposal (b)(5) will not supplant § 2255 because the two remedies apply in different situations and serve different purposes.[50] To begin, § 3582(c)(1)(A) is an explicit exception to finality in the case of extraordinary and compelling circumstances. By its very nature, compassionate release is intended to sweep away the procedural limits and deference to finality that animates federal habeas. The "changes in the law" proposal offers relief that is qualitatively different from the relief cognizable under § 2255. Proposal (b)(5) would provide an individual with the *possibility* of a *sentence reduction* based on a change in law that results in an inequitable sentence, especially considering the totality of a person's individualized circumstances. And relief is not available under § 3582(c)(1)(A) unless the movant shows that a reduction is consistent with the § 3553(a) sentencing factors.[51]

Section 2255, on the other hand, addresses illegal or unconstitutional convictions and sentences and offers immediate relief upon this finding and compliance with procedural requirements. Beyond straightforward constitutional violations, federal habeas applies primarily when the existing law is *clarified* (such as *Johnson* claims) such that a petitioner is legally innocent of the underlying

[49] Erica Zunkel Written Statement at 32–34.
[50] *See* Brief for Amicus Curia FAMM in Support of Defendant-Appellee and Affirmance at 14–26, United States v. Trenkler, 47 F.4th 42 (1st. Cir. Apr. 22, 2022).
[51] 18 U.S.C. § 3582(c)(1)(A); Erica Zunkel Written Statement at 34–36.

criminal conviction or factual predicate for sentencing enhancements. Those situations are different from those in which the substantive law is *changed*.[52]

Judges are equipped to consider the differences between § 3582(c)(1)(A) and § 2255 and determine whether an individual's "changes in the law" claims are properly brought under § 2255. In the Fourth Circuit, which allows changes in the law to support a sentence reduction, judges have rejected claims for compassionate release after finding § 2255 is a more appropriate mechanism for relief. *United States v. Ferguson*[53] is a good example:

> The arguments Appellant makes in his § 3582(c)(1)(A) motion constitute quintessential collateral attacks on his convictions and sentence that must be brought via § 2255. Appellant's arguments are clearly different in kind from the arguments made by the defendants in *McCoy* and *Zullo* [regarding nonretroactive amendments to sentencing statutes] because they would require the district court, in determining whether "extraordinary and compelling reasons" for compassionate release exist, to evaluate whether Appellant's convictions . . . were valid.[54]

Even in those rare cases where a change in the law that would have reduced a defendant's sentence could also be raised under § 2255, judges must still evaluate whether that change in the law is "inequitable." The "inequitable" touchstone is key. Judges can consider whether a defendant tried to obtain § 2255 relief, and if so, whether they were denied relief on substantive or procedural grounds.

Regardless, some residual overlap between § 3582(c)(1)(A) and § 2255 (and other remedies for that matter) is a necessary feature of compassionate release because § 3582(c)(1)(A) is an *explicit exception* to sentence finality. The value of compassionate release is that other remedies are often underinclusive to address truly extraordinary and compelling situations. Rather than tinkering with some of the categorical limitations on remedies like § 2255, compassionate release allows for an individualized consideration that ensures relief is available to those who need it most.

Moreover, overlapping remedies already exist in this area and contribute to the credibility of our federal system. Clemency, § 2255, and Rule 35 all offer defendants a mechanism to correct and reduce a sentence. In fact, the Advisory Committee's notes on the 1991 amendment to Rule 35(c) explicitly recognized and

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[52] United States v. Ferguson, 55 F.4th 262, 270 (4th Cir. 2022).
[53] *Id.*
[54] *Id.* at 271.

affirmed the overlap between § 2255 relief and Rule 35(c): "[T]his subdivision is not intended to preclude a defendant from obtaining statutory relief from a plainly illegal sentence. . . . [A] defendant detained pursuant to such a sentence could seek relief under 28 U.S.C. § 2255 if the seven day period provided in Rule 35(c) has elapsed."[55]

For these reasons, this Commission should not carve out *all* changes in the law that would have reduced a person's sentence even when they might be cognizable in § 2255. Indeed, the inability to obtain § 2255 relief may be highly relevant to an assessment of the totality of a person's extraordinary and compelling circumstances, as illustrated by our client, Chris Blitch.

As we explained in our written testimony, Mr. Blitch was one of the victims of the government's now-disavowed stash house sting operations.[56] Mr. Blitch's sentence was in part predicated on an *illegally imposed* § 851 enhancement based on the Supreme Court's *Mathis v. United States* decision.[57] This argument was entirely separate from the FSA's nonretroactive changes to § 851. Mr. Blitch, acting pro se, diligently pursued relief under § 2255. The district court initially rejected that motion, but the judge later recognized that Mr. Blitch had presented a cognizable § 851 argument that it had not ruled on. The judge granted a certificate of appealability on this issue.[58] Although both the district court and the Seventh Circuit recognized the merits of Mr. Blitch's claim, he was denied relief on procedural grounds.[59]

Mr. Blitch's compassionate release motion was not a bad faith attempt to circumvent § 2255's procedural bars. He had sought § 2255 relief diligently. But because of restrictive Seventh Circuit case law, the district court considering Mr. Blitch's compassionate release motion was unable to consider as part of the constellation of extraordinary and compelling reasons that a substantial portion of Mr. Blitch's sentence was *illegal*. Mr. Blitch's § 3582(c)(1)(A) motion was successful for other reasons, but the judge should have been able to consider that factor in conjunction with other circumstances because it rendered Mr. Blitch's sentence inequitable (Mr. Blitch actually overserved his lawful sentence).[60]

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[55] Fed. R. Crim. P. 35(c) advisory committee's note to the 1991 amendment.
[56] *See* Erica Zunkel Written Statement at 21–23.
[57] *Id.* at 21; *see also* Brief and Required Short Appendix of Petitioner-Appellant Christopher Blitch, Jr. at 16–21, Blitch v. United States, 39 F.4th 827 (7th Cir. 2022), Dkt. 16; Order Issuing Certificate of Appealability at 4, United States v. Blitch, No. 16-CV-7813 (N.D. Ill. Nov. 8, 2020), Dkt. 58 ("Despite the perceived merit of Blitch's § 841(b) enhancement claim, the case's procedural posture bars relief in this Court.").
[58] *See* Order Issuing Certificate of Appealability, *supra* note 57, at 4.
[59] *Blitch*, 39 F.4th at 833–34.
[60] United States v. Blitch, No. 06-CR-586-2, slip op. (N.D. Ill. Apr. 13, 2022).

All in all, (b)(5)'s current limiting principle—"inequitable" sentences—as well as those proposed above ensure that judges can use their discretion to reject motions for compassionate release that are squarely addressed by other forms of relief, or where changes in law are too attenuated to provide a basis for a sentencing reduction. As we mentioned above, this is exactly what the Fourth Circuit is already doing with respect to cases judges deem require § 2255 relief.[61]

D. Proposal (b)(5) is administrable and will not open the floodgates.

Some Commissioners and witnesses commented on their concern that changes in law will open the floodgates for compassionate release motions. Proposal (b)(5) will be administrable. We address the bulk of this issue at length *infra*, including by showing how these concerns are misplaced in light of the data on the number of compassionate release motions filed. *See* Part VI, *infra*.

Beyond the fact that the number of motions *filed* will not swell uncontrollably, the number of motions *granted* under (b)(5) will likely remain limited as well. The Commission's own data make that abundantly clear. In FY 2022, only 4.1% of orders granting a reduction cited changes to § 851. Just over 10% of grants cited multiple § 924(c) penalties. All told, sentence-related reasons were cited in less than a quarter of compassionate release grants—even though almost half of the circuits allow changes in the law to serve as a basis for relief.[62]

Perhaps most importantly, only 1.9% of grants cited "[c]onviction/sentencing errors."[63] These are the cases where there may be some overlap with other remedies. These 1.9% of cases are likely those in which the movant had established several other reasons for relief, and the conviction or sentence error contributed to a cumulative finding that the defendant had presented extraordinary and compelling circumstances. That demonstrates the importance of allowing judges in exercising their discretion to consider factors that might be cognizable in § 2255. In short not only are changes in the law administrable, but judges can use their discretion to determine when compassionate release is an appropriate form of relief.

E. Failing to adopt (b)(5) will aggravate the existing circuit split.

Adopting Proposal (b)(5) is necessary to address the existing circuit split.[64] The DOJ has suggested that "the proposal will lead to widespread sentencing disparities, as the Commission's proposal will exacerbate the conflict about the

[61] *Ferguson*, 55 F.4th at 270.
[62] *See* U.S. SENT'G COMM'N, *supra* note 47, at 21 tbl.14.
[63] *Id.*
[64] Erica Zunkel Written Statement at 11–16.

courts of appeals on the statutory scope of Section 3582(c)(1)(A)(i)."[65] That gets the problem entirely backwards. The *status quo* has created severe sentencing disparities given the deep circuit split.[66] A person's ability to obtain relief based on changes in the law is entirely dependent on the luck of their jurisdiction of conviction. If the Commission fails to adopt (b)(5), existing circuit case law—and thus, the circuit split—would populate the (b)(6) catch all, leading to even greater disparity in how judges may exercise their discretion.

But adopting (b)(5) would resolve the circuit split—and resolve it correctly.[67] Weighing in on the circuit split is a necessary facet of this Commission's statutory responsibility.[68] The Commission's policy statement will bind judges, including those in circuits with conflicting case law, and it would therefore resolve the diverging case law.[69] Indeed, the DOJ's litigating position before the Supreme Court has been that this Commission can render obsolete any circuit split. In opposing certiorari on the changes in the law issue, the DOJ explained, "[T]he practical importance of the disagreement [among the circuits] is limited, and the Sentencing Commission could promulgate a new policy statement that deprives a decision by [the courts] of any practical significance."[70]

Moreover, the *Brand X* doctrine requires courts to defer to this Commission's interpretation, which would mitigate the circuit split by wiping the slate clean.[71] The Department's response is that *Brand X* does not apply when the statutory language is unambiguous.[72] That has absolutely zero bearing on the issue here because the phrase "extraordinary and compelling" does not unambiguously exclude changes in the law. The DOJ's response mangles the text of § 994(t), which literally (and intentionally) codifies an interpretive gap that this Commission has the responsibility to fill.[73] If the phrase were susceptible to only one interpretation, this Commission would have no role to play, and Congress would not have asked the Commission to describe and define the circumstances that may be extraordinary and compelling. In addition, the depth of the circuit split demonstrates that the phrase "extraordinary and compelling" is not unambiguous.

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[65] Jonathan J. Wroblewski Written Statement at 8.
[66] *See* Erica Zunkel Written Statement at 11–16.
[67] *See id.* at 13–16.
[68] *Id.* at 11–13 (describing this Commission's obligation to resolve circuit splits, even to the extent that doing so might conflict with certain courts' interpretations).
[69] *Id.* at 12; *see also Braxton*, 500 U.S. at 348; *Stinson*, 508 U.S. at 46.
[70] Memorandum for the United States in Opposition at 2, Thacker v. United States, 142 S.Ct. 1363 (2022) (Mem) (No. 21-877), 2022 WL 467984 (Feb. 14, 2022).
[71] *See* Erica Zunkel Written Statement at 13.
[72] Jonathan J. Wroblewski Written Statement at 7.
[73] *See* 28 U.S.C. § 994(t).

This is not a case where the overwhelming majority of circuits are in agreement. Instead, the circuit split is evenly balanced, illustrating that this Commission's interpretation would be owed deference.

Finally, as the Judicial Conference's CLC recognizes, resolving the circuit split will aid in the administrability of compassionate release. "Th[at] clarity would make it easier for the district judges to address the cases when they do come in the door. It would minimize circuit splits and the uncertainty that comes with circuit splits, and it would minimize inconsistencies around the country."[74] The CLC has asked for a resolution of the circuit split and agrees that (b)(5) would resolve it: "this revision would address the circuit split over whether changes in sentencing law can provide grounds for compassionate release."[75]

F. Without (b)(5), the catch-all will be inadequate to capture changes in the law that result in extraordinary and compelling circumstances.

Those who are hesitant to adopt (b)(5) might suppose that the catch-all will allow judges to exercise their discretion to consider changes in the law on a more limited basis. Although the catch-all is a necessary component of effective compassionate release, any (b)(6) option will be ineffective without the clarity provided by (b)(5). First, without clarifying that changes in the law that result in an inequitable sentence can be extraordinary and compelling, the existing circuit split will populate post-policy statement case law on the catch-all category. In restrictive circuits, district judges will be unable to consider changes in the law in determining whether a person has presented circumstances that in aggregate are extraordinary and compelling. Second, even in permissive circuits, there may be uncertainty as to whether some changes in the law might be "similar in gravity" to the enumerated categories. That will create even greater uncertainty and may lead to the emergence of new circuit splits.

The best course is to adopt both (b)(5) and (b)(6). Their efficacy is largely codependent, so if this Commission fails to adopt one or the other, compassionate release will be significantly underinclusive and exacerbate the existing circuit splits, creating unwarranted disparities.

[74] Hon. Randolph D. Moss Oral Statement (Panel IV: Judicial Branch Perspective).
[75] Hon. Randolph D. Moss Written Statement at 5.

IV. This Commission Should Adopt Option 3 for the Catch-All Provision.

A. Option 3, with modest revisions, is the best way to capture "other" extraordinary and compelling circumstances.

There is overwhelming support for a catch-all category that preserves judicial discretion to identify unenumerated extraordinary and compelling reasons. During the hearing, several Commissioners sought further guidance on how to draft a catch-all provision that gives district judges discretion to respond to the "unknown-unknowns"[76] of the future, while simultaneously providing guidance to courts in exercising that discretion. Or as Vice Chair Claire Murray succinctly posed the question, "Is there a way to draft a catch-all that captures one-offs but doesn't open the floodgates?"[77]

As discussed in detail in Professor Zunkel's initial written and oral testimony, we believe that Option 3, with minor revisions, properly walks this line.[78] Our previously proposed language is:

> **OTHER CIRCUMSTANCES.**—The Defendant presents any other extraordinary and compelling circumstance, or a combination of circumstances that are cumulatively extraordinary and compelling, other than, similar to, or in conjunction with the circumstances described in paragraphs (1) through (5).

Our proposal provides guidance to judges without unnecessarily constraining flexibility. First, it expressly allows judges to identify circumstances that are different in kind from the enumerated reasons. Without this discretion, judges would be unable to recognize "unknown-unknowns" as extraordinary and compelling reasons, which would defeat the purpose of the catch-all. Joshua Matz explained this well during his oral testimony: Option 1 would limit relief to circumstances similar in nature to the enumerated category; it would be odd to be incredibly precise about those categories, and then require the catch-all "to be limited to only versions of the same thing. . . . [The catch-all is meant to] capture [ ] circumstances of a *different* nature. . . . That's why Option 1 may end up being confusing."[79] Second, our proposal makes clear that judges may exercise their discretion for reasons that are similar, but not identical, to the enumerated

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[76] Public Hearings (comments of Claire Murray, Vice Chair, U.S. Sent'g Comm'n) (Panel VIII: Academic Perspectives).
[77] *Id.*
[78] *See* Erica Zunkel Written Statement at 17–28.
[79] Joshua Matz Oral Statement (Panel II: Practitioners' Perspectives).

categories. And finally, it allows for judges to consider a person's circumstances cumulatively—i.e., a "constellation" of circumstances.[80]

The laboratory of the past four years demonstrates that a compassionate release regime with a broad catch-all provision is administrable. In the circuits that currently allow judicial discretion to identify unenumerated reasons, district judges have relied on the language of the current catch-all provision, which mirrors Option 3 and also closely mirrors the language of our proposal. There have not been a glut of motions and district judges have been able to identify cases that raise "other" reasons that are truly extraordinary and compelling.[81]

Should this Commission find our initial revisions insufficient and if the Commission adopts (b)(5),[82] we propose the following language:

> **OTHER CIRCUMSTANCES.**—The defendant presents any other circumstance or a combination of circumstances that, in the district court's discretion, are of a comparable or greater gravity to the circumstances described in paragraphs (1) through (5). Such other circumstances may, but need not be, of the same kind or nature as those enumerated in paragraphs (1) through (5).

This language has several benefits over Option 1, which the DOJ has urged this Commission to adopt.

First, it would provide an administrable standard—a circumstance or circumstances that are "of a comparable or greater gravity" to the enumerated

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[80] Public Hearings (comments of *Ex-Officio* Commissioner Jonathan J. Wroblewski) (Panel II: Practitioners' Perspectives).

[81] *See e.g.*, United States v. Brice, 2022 WL 17721031, at *3–4 (E.D. Pa. Dec. 15, 2022) (granting a sentence reduction on the basis of sexual violence suffered while incarcerated); United States v. Price, 496 F. Supp. 3d. 83, 87 (D.D.C. 2020) (exercising discretion to identify "other reasons" when granting compassionate release on the basis of sentencing disparities among codefendants); United States v. Duncan, 478 F. Supp. 3d 669, 672 (M.D. Tenn. 2020) (relying on the discretion conferred by "other reasons" to grant relief in a COVID case); United States v. Quinn, 467 F. Supp. 3d 824, 829 (N.D. Cal. 2020) (granting relief based on non-retroactive changes to § 924(c) stacking as "other reasons" for a sentence reduction); United States v. Maumau, 993 F.3d 821, 837 (10th Cir. 2021) (relying on the "other reasons" language to affirm a grant of compassionate based, in part, on the individual's youth at the time of the crime).

[82] As we discuss elsewhere, Proposal (b)(5) is essential. Without it, the circuit split will remain. If the Commission does not adopt Proposal (b)(5) in some form, Option 3 with no revisions—the existing catch-all language—is the best path forward.

categories—against which judges can exercise their discretion.[83] When presented with a § 3582(c)(1)(A) motion based on an unenumerated reason, judges would not decide the case based on their own understanding of "extraordinary and compelling," but would rather compare the offered unenumerated reason to those this Commission enumerated in its policy statement and ask if the motion presents circumstances "of a comparable or greater gravity." Over time, courts would build a body of precedent explicating the "gravity" of the enumerated circumstances and identifying unenumerated circumstances of similar or greater gravity; indeed, such a body of law already exists from motions granted *and* denied over the past four years. True, there may be disagreement as to what constitutes similar gravity—but that is by design; adopting a rule that is too categorical would dangerously shackle judicial discretion and result in the denial of relief in the cases where it is most warranted.

Second, our proposal allows judges to consider a "constellation" of circumstances which individually may not justify a sentence reduction, but when aggregated "are of a comparable or greater gravity than" the enumerated categories. *Ex-Officio* Commissioner Wroblewski emphasized the importance of such an analysis at the public hearing; indeed, this totality of the circumstances analysis was central to the just result in our client Dwayne White's case.[84]

Third, our proposal makes clear to judges that the enumerated list, although illustrative of the sorts of circumstances that are extraordinary and compelling, is *not* an exhaustive list and that "other" reasons may be *different in kind* than the enumerated categories. Without this specific language, judges may mistakenly assume that this Commission intended to foreclose relief unless the reasons are similar in nature to those that are enumerated—inadvertently extinguishing relief for those who need it most.[85]

Fourth, our revised language heeds the lessons of the past four years, including those from the COVID-19 pandemic. As we and others emphasized during the public hearing, no matter how hard this Commission tries, it is simply impossible to identify and enumerate every possible extraordinary and compelling reason that may exist in the future.[86] Likewise, it would be a fool's errand to try to

[83] This would therefore satisfy this Commission's statutory mandate to provide "the criteria to be applied." 28 U.S.C. § 994(t).
[84] *See* Erica Zunkel Written Statement at 18–23.
[85] *See id.* at 27–28.
[86] *See id.* at 17–18; Erica Zunkel Oral Statement (Panel VIII: Academic Perspectives).

enumerate every idiosyncratic extraordinary and compelling circumstance.[87] Judges must retain discretion to fill these gaps. Failing to do so will unnecessarily constrain compassionate release's ability to address unforeseen and unique circumstances.

Fifth, our proposal addresses administrability concerns, including those raised by the CLC about the potential impact "expanded eligibility criteria" will have on "scarce judicial resources."[88] (We address these concerns more thoroughly in Part VI, *infra*.) Much of the strain discussed by the CLC was related to the COVID-19 pandemic and does not reflect current trends.[89] That said, as Chair Reeves expressed several times during the hearing, the courthouse doors remain open to all, and judges must rule on motions filed. That is the core of a district judge's job and, with respect to § 3582(c)(1)(A) in particular, Congress decided that district judges should be in charge.[90] Adopting our new language would lessen any future burden by arming judges with clear standards on how to exercise their discretion so that they can identify truly extraordinary cases and deny meritless motions.

All in all, it is essential that this Commission's final amendments include a catch-all provision that is flexible. Without broad judicial discretion, Dwayne White, Adam Clausen, Bryant Brim, and Gwen Levi would still be behind bars. Further, without broad discretion, in many cases, judges would have been unable to grant compassionate release to incarcerated individuals at a heightened risk of contracting and getting very sick from COVID-19. Judges needed discretion in those life-or-death situations and will surely need discretion going forward. Our new modifications to Option 3 would codify a catch-all provision that preserves the benefits of judicial discretion while effectively addressing the concerns raised during the hearing.

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[87] *See* Kelly Barrett Written Statement at 13 ("And beyond our inability to predict the future, it would not make sense for the Commission to include every conceivable occurrence that might, in an individual case, warrant a sentence reduction.").
[88] *See* Hon. Randolph D. Moss Oral Statement (Panel IV: Judicial Branch Perspective).
[89] U.S. SENT'G COMM'N, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT 5 (Mar. 2022) (illustrating a peak in compassionate release motions during the height of the COVID-19 pandemic).
[90] This was Congress's express intent in amending § 3582(c)(1)(A) in the FSA.

B. The Commission should adopt an application note clarifying the relationship between (b)(5) and (b)(6), especially if (b)(5) is adopted with further limitations.

This Commission should clarify in an application note that a judge's discretion to consider a person's individualized circumstances under (b)(6) is not cabined by limitations on the enumerated categories, such as (b)(5). For example, if the Commission decides to limit "changes in the law" under (b)(5) to only those legal developments that would have been relevant at a person's *sentencing* (rather than those more relevant to a *conviction*), judges should still be permitted to consider changes in the law that go to a person's *conviction* under (b)(6)—even if those changes alone are not extraordinary and compelling. We described at length above why judges at minimum need discretion under (b)(6) to consider a totality of the circumstances a person might raise, even when some of those reasons might be independently cognizable in habeas.[91] To that end, we propose the following application note for (b)(6):

> In exercising their discretion to assess a totality of circumstances under § 1B1.13(b)(6), judges may consider circumstances that are foreclosed from consideration under an enumerated category, but those circumstances may not be the sole basis for granting a sentence reduction. For example, judges may consider legal developments that primarily would have affected a defendant's guilt rather than sentence in deciding whether the circumstances presented by the movant are in aggregate extraordinary and compelling.

This ensures that the catch-all category can capture the truly extraordinary, one-off cases, even when those circumstances may not categorically be extraordinary and compelling. At the hearing, the DOJ objected to this approach as a "logical fallacy."[92] But this objection evades the plain meaning of § 994(t). As § 994(t) clearly recognizes, the whole can be greater than the sum of its parts. Section 994(t) instructs that rehabilitation *alone* cannot be extraordinary or compelling. That means rehabilitation can bolster other reasons for release such that they cumulatively become extraordinary and compelling, even when those reasons alone would be inadequate. The logical fallacy objection would counsel that rehabilitation could not transform other reasons into extraordinary and compelling reasons. That creates superfluity problems: either the other reasons alone would be

[91] *See* Part III.C, *supra*.
[92] *See* Robert Parker Oral Statement (Panel I: Executive Branch Perspectives).

sufficient (and § 994(t) would be superfluous), or the other reasons alone would be *insufficient* even with rehabilitation (and again, § 994(t) would be superfluous). The provision has meaning only if rehabilitation can transform circumstances that alone would be inadequate into extraordinary and compelling reasons.[93]

Other areas of law further belie the logical fallacy objection. For example, the cumulative error doctrine for harmless error review applies when a district court may have committed multiple procedural errors, none of which alone is reversible. As the Seventh Circuit has explained, "Cumulative errors, while individually harmless, when taken together can prejudice a defendant as much as a single reversible error[.]"[94] That logic applies equally here: even when circumstances taken alone may not be extraordinary or compelling, their cumulative effect is equivalent to that of a single extraordinary and compelling reason for a sentence reduction.

V. This Commission Should Not Impose an Administrative or Legal Findings Requirement Under Proposal (b)(4).

If the FSA meant anything, it is that the BOP should no longer be a gatekeeper to compassionate release. But the Department's proposed limitation on (b)(4) does just that, by permitting a petitioner to raise sexual assault as an extraordinary and compelling reason "*only after* the completion of other administrative or legal proceedings."[95] There are many reasons why the Commission should not adopt such a requirement, including the BOP's repeated failures to take corrective action addressing sexual abuse in prisons.

First, as the recent Senate report on sexual abuse in federal prisons made clear, the BOP is unlikely to vigorously investigate sexual abuse reports when they are made given misaligned incentives. The BOP has a vested interest in the outcome of administrative proceedings pertaining to sexual abuse committed by its own employees. That is part of why the Senate Subcommittee on Investigations concluded: "BOP failed to take agency-wide action to address sexual abuse of female inmates by male BOP employees."[96] For example, women who blew the

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[93] *See* United States v. Rollins, 540 F. Supp. 3d 804, 811 (N.D. Ill. 2021) ("Given their use of the qualifiers 'alone' and 'by itself,' those provisions plainly indicate that while rehabilitation cannot stand *on its own* as an extraordinary reason for a reduced sentence, it can play a *supporting* role in the analysis." (emphasis in original)).
[94] United States v. Allen, 269 F.3d 842, 847 (7th Cir. 2001).
[95] Jonathan J. Wroblewski Written Statement at 6 (emphasis added).
[96] STAFF OF PERMANENT S. SUBCOMM. ON INVESTIGATIONS, 117TH CONG., REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS 28 (Comm. Print 2022) [hereinafter Report on Sexual Abuse].

whistle at FCI Dublin were not taken seriously because the BOP has an institutional incentive to sweep reports of abusive employees under the rug. Even though this abuse has since been publicized, "BOP appears to have made no changes to its policies or practices across its network of 122 prisons."[97] This shortcoming is not recent. Instead, "for a decade, BOP failed to respond to this abuse or implement agency-wide reforms."[98]

This apathy infects not only administrative proceedings, but *legal* proceedings as well. Indeed, BOP employees are part of the DOJ itself, because the BOP is a DOJ agency. The Senate report found that the BOP's failures often foreclosed legal avenues for relief: "BOP's internal affairs practices have failed to hold employees accountable, and multiple admitted sexual abusers *were not criminally prosecuted as a result*."[99] This is not to suggest that the BOP or DOJ will act in bad faith. It is simply an observation that there will likely be a substantial subset of sexual abuse survivors who will be flatly ineligible for compassionate release simply because of the diverging incentives the BOP has to investigate sexual assault.

Second, even if the BOP were incentivized to investigate reports of sexual abuse committed by its employees, it is simply unable to handle these complaints given the crushing backlog of misconduct claims it currently faces. Currently, the BOP's Office of Internal Affairs has "a backlog of approximately 8,000 cases, with some cases pending for more than five years."[100] Of the 554 reports of sexual abuse in FY 2020, more than 300 of them were still pending in December of 2022.[101] The Senate report detailed the countless ways in which the BOP failed to hold wrongdoers accountable, from wholly inadequate reporting mechanisms to a critical lack of resources to investigate claims.[102] The bottom line: "BOP failed to take agency-wide action to address sexual abuse of female inmates[.]"[103] And as described above, these failures resulted in sexual abusers escaping criminal prosecution.[104]

Third, even if the BOP had the resources (and will) to investigate misconduct, women may not even come forward in the first place out of fear of retaliation. That is precisely why it took so long for women to begin reporting the

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[97] *Id.*
[98] *Id.* at 30.
[99] *Id.* (emphasis added)
[100] *Id.* at 25. Note that not all of these cases involve sexual misconduct.
[101] *Id.*
[102] *Id.* at 26–27.
[103] *Id.* at 28.
[104] *Id.* at 30.

abuse at FCI Dublin. Women who blow the whistle, for example, empirically face retaliation from other BOP employees.[105] For example, my clinic's client Aimee Chavira—herself a survivor of sexual abuse at FCI Dublin—has faced backlash from BOP employees because she dared to report the guards who abused her.

The DOJ suggested during oral testimony that it is committed to weeding out sexual abuse in federal prisons. That is surely true, but closer scrutiny of the BOP's recent remedial steps reveals that those reforms are likely to be ineffective. Indeed, the Senate report emphasized that the BOP's Working Group "did not discuss the scope of sexual abuse in BOP facilities, whether it viewed the problem as specific to particular institutions or systemic across BOP facilities, or how long these issues may have persisted."[106]

The cautionary tale of pre-FSA compassionate release is that placing the BOP as a gatekeeper to § 3582(c)(1)(A) motions will prevent compassionate release from functioning as intended. Requiring a final adjudication as recommended by the Department would reintroduce the very defect that Congress addressed in the FSA.

Even if the BOP were capable and likely to initiate administrative proceedings, adding such a precondition to seeking compassionate release based on sexual abuse is misguided because it both adds a counter-textual exhaustion requirement that is overbroad. That will result in the delay or denial of claims raised by people who face truly extraordinary and compelling reasons for a sentence reduction.

First, requiring an administrative or legal finding would introduce into the compassionate release inquiry an additional exhaustion requirement that is not in § 3582(c)(1)(A). Even in the rare cases where there will be an administrative or legal proceeding, those proceedings often take *years*—years during which a survivor of sexual abuse will be unable to seek a sentence reduction. These particular motions are especially time sensitive, and one of the reasons Congress chose to excise the BOP as a gatekeeper was to allow judges to act expeditiously on motions involving extraordinary and compelling circumstances. The current 30-day exhaustion requirement imposes only a modest burden on defendants and ensures that movants can seek compassionate release even when the BOP refuses to act. The DOJ's proposal fundamentally contravenes Congress's intent by giving the BOP *dispositive* gatekeeping authority.

Second, the Department's proposal will also dangerously foreclose relief for other survivors who face extraordinary and compelling circumstances but who are

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[105] Lisa Fernandez, *Dozens of Women Detail Rape and Retaliation at Dublin Prison, Real Reform is Questioned*, FOX KTVU (Sept. 23, 2022) https://perma.cc/Y5UW-MMYK.
[106] Report on Sexual Abuse, *supra* note 96, at 30.

unable to seek redress through a legal or administrative proceeding. For example, in Ms. Chavira's case, the DOJ had opened a criminal investigation into one of her abusers. But before the guard was brought to justice, he took his own life.[107] He will never be held legally accountable. As a consequence, if he were Ms. Chavira's only abuser (he is not), Ms. Chavira would never be able to seek a sentence reduction unless the BOP decides to open an administrative proceeding despite the death of Ms. Chavira's abuser.

Third, judges do not need to wait for an administrative or legal finding to assess the validity of a person's reasons for compassionate release. Those sorts of determinations are a core function of the judicial role—especially in sentencing. For example, judges routinely consider evidence in aggravation or mitigation, even when there is dispute among the parties about the underlying validity of the facts. Judges are good at identifying when a particular claim is wholly unsubstantiated, and they will not grant compassionate release simply because a person raises a mere allegation, without more, of sexual abuse. That is especially true given the prevalence of retaliation against women who do report sexual abuse. This pervasive chilling effect means that women are less likely to file *meritorious* motions, rather than being likely to file *frivolous* motions alleging sexual abuse.

Finally, the issues described above illustrate the need to adopt a broad catch-all that recognizes the authority of judges to grant a sentence reduction for reasons similar—but not necessarily identical—in kind to the enumerated categories. Without that direction, judges may inadvertently deny relief in the *most* extraordinary and compelling cases because a person does not meet the technical requirements of one of the enumerated categories.

Ms. Chavira's case is a poignant example. There is no dispute that Ms. Chavira did in fact suffer several instances of abuse; BOP officials concede that "they do not dispute her allegations" and that she does not "pose a public safety threat if freed."[108] If the policy statement's catch-all category does not clarify that courts can grant relief for reasons that are *similar but not identical* to the enumerated categories, a judge may decline to exercise her discretion under (b)(6) simply because Ms. Chavira would be barred from relief under the DOJ's limitation on (b)(4). Judges should be able to grant relief for reasons similar in kind to those in the enumerated categories, even if a person does not meet all of the technical requirements within an enumerated category.

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[107] *See* Erica Zunkel Written Statement at 30.

[108] Glenn Thrush, *Justice Dept. Struggles to Carry Out Early Release Program for Abused Inmates*, N.Y. TIMES (Feb. 22, 2023), https://www.nytimes.com/2023/02/22/us/politics/federal-prisons-inmate-abuse.html.

VI. The Proposed Amendments Are Administrable.

The proposed amendments would not pose an administrability problem for courts. First, the empirical data show that courts will be able to deal efficiently with an increase in compassionate release motions. Moreover, that data suggest that any increase in § 3582(c)(1)(A) motions would be modest, and a concern about a floodgates problem is overblown and unsubstantiated by any concrete evidence. Second, the proposed amendments will streamline compassionate release in several ways, especially through the enumeration of more categories of extraordinary and compelling reasons. Third, several guardrails—from the § 3553(a) factors to other systemic actors—will mitigate the effect of any increase in motions.

A. Comprehensive data make clear that the proposed amendments are administrable.

Although the pandemic imposed its own set of truly unique pressures on district courts across the country, data from the last three years show that courts were not inundated with an unmanageable amount of § 3582(c)(1)(A) motions—even in circuits with the broadest compassionate release precedent. Between September 2021 and September 2022 (after the peak of COVID-19), an average of 435 motions were filed per month across the country.[109] That is an average of 4.6 motions per month per federal district. That number is far more probative of the post-adoption landscape than extrapolating from data at the peak of a global pandemic.

Crucially, those numbers exist despite the fact that roughly half of the circuits recognize that changes in the law can support a finding of extraordinary and compelling circumstances. Even if the number of motions filed doubled, tripled, or quadrupled (a far-fetched scenario), district courts would not have to sift through a great volume of motions. If motions filed *quadrupled*, districts would still deal with fewer than 20 motions per month. And that number includes motions that might be easily denied. Even that unlikely scenario would not overly burden courts.

Consider the circuits that allow changes in the law to support extraordinary and compelling circumstances.[110] From between October 1, 2019, and

[109] U.S. SENT'G COMM'N, *supra* note 47, at 3 tbl.1.

[110] The circuits are the First, Fourth, Ninth, and Tenth. For the following calculations, we excluded the Second Circuit, which has not yet formally held, one way or another, whether changes in the law can be extraordinary and compelling circumstances, although district

September 30, 2022, districts in those circuits dealt with just seven compassionate release motions—for any reason—per month.[111] Because that average includes COVID-based motions filed during the pandemic, it likely *overstates* the number of motions courts would face if this Commission adopted proposed amendment (b)(5).

By comparison, courts decided 50,676 motions for retroactive application of the Drugs Minus Two Amendment between November 2014 and July 2020.[112] In the 69 months between those dates, there were an average of 7.8 motions filed per district per month—a greater number of average motions than those filed in the permissive compassionate release districts over the last three years. Like compassionate release motions, § 3582(c)(2) motions require judges to consider the § 3553(a) factors as well. Nobody suggests in hindsight that the Drugs Minus Two Amendment was not administrable or was overly burdensome on the courts.

Regardless, as Hon. Chair Reeves and Judge Moss aptly recognized, many motions will be filed regardless of what amendments this Commission adopts because access to the courts is a fundamental tenet of our justice system. Chair Reeves elaborated:

> Even with all of the clarity we might have, that will not stop a prisoner from filing something. Our courthouses are always open to receive petitions from anyone, and sometimes prisoners file motions that they are not entitled to file, for example, a motion to set aside their guilty plea. . . . Even with all of the clarity that we may give them, that really might not impact the number of cases that might be filed[.][113]

Judge Moss agreed that "there will always be filings that are not well-taken, and [Chairperson Reeves is] absolutely right that the courthouses are open, and people are entitled to file them[.]"[114] That said, although there may be an initial increase in motions regardless of the amendments adopted, it will level off as the law develops in the district and appellate courts.

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courts in that circuit generally treat changes in the law as a permissible consideration in that analysis.

[111] U.S. SENT'G COMM'N, *supra* note 47, at 7–9 tbl.3 (extrapolation from data). There were 9,494 motions filed in those circuits in that time, divided by 37 districts within those circuits, divided by the 36 months between October 1, 2019, and September 30, 2022.

[112] U.S. SENT'G COMM'N, RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT 5 (July 2020).

[113] Public Hearings (comments of Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n) (Panel IV: Judicial Branch Perspective).

[114] Hon. Randolph D. Moss Oral Statement (Panel IV: Judicial Branch Perspective).

In sum, the data simply do not show that district courts will be flooded by motions. To the contrary, any increase in the number of filed motions is likely to be modest and is well within the competence of the courts to address. People should not be denied the ability to seek justice simply because district judges might have to resolve more motions.

B. The proposed amendments will streamline resolution of § 3582(c)(1)(A) motions.

Compared to the uncertainty and confusion that has manifested in the absence of an applicable compassionate release policy statement, adopting the proposed amendments will streamline the system in several ways.

First, judges will be able to resolve motions more expediently given the elevated floor created by the expansion of the enumerated categories. For example, rather than having to wade into the threshold question of whether changes in the law can constitute extraordinary and compelling reasons, judges can rely on this Commission's determination of the issue. True, judges will inevitably need to scrutinize the unique circumstances of each case. But the proposed expansion of the enumerated categories will create needed clarity. As Judge Moss testified, "Th[at] clarity would make it easier for the district judges to address the cases when they do come in the door. It would minimize circuit splits and the uncertainty that comes with circuit splits, and it would minimize inconsistencies around the country."[115]

Second, and relatedly, the amendments should promote more agreement between the parties as to what constitutes extraordinary and compelling circumstances, which would aid in the resolution of cases and relieve pressure on district judges. During the pandemic, for example, the government often stipulated to the fact that the defendant had presented extraordinary and compelling circumstances based on the person's underlying comorbidities.[116] That allowed judges to consider only the § 3553(a) factors without needing to wade into a factual and legal dispute about whether a person had presented extraordinary and compelling reasons for a sentence reduction.

Similarly, in cases where the government has objected to a sentence reduction primarily on the basis of the extraordinary and compelling reasons prong, expanding the enumerated categories might produce agreement as to the ultimate disposition of the motion where there is minimal disagreement that the § 3553(a) factors support a reduction. The Chicago stash house compassionate

[115] *Id.*

[116] *See generally, e.g.*, United States v. Miller, No. 17-CR-404, 2020 WL 7641289 (N.D. Ill. Dec. 22, 2020).

release cases illustrate this point well.[117] The government has pushed back most on the extraordinary and compelling reasons prong, arguing that the stash house defendants have not presented circumstances parallel to those found in § 1B1.13.[118] Although the government also superficially has argued that the § 3553(a) factors do not support release, it often highlights that the stash house defendants have "demonstrated efforts at rehabilitation [that] are extensive and commendable."[119] With greater clarity from the policy statement, the U.S. Attorney's Office may be considerably more likely to agree to the motions altogether or, at worst, stipulate to the presence of extraordinary and compelling circumstances, allowing the judge to focus almost exclusively on the § 3553(a) factors.

In short, by creating greater clarity as to what constitutes extraordinary and compelling circumstances, judges will be more efficient at resolving § 3582(c)(1)(A) motions. That will offset any resulting increase in motions filed, which as the data show is likely to be modest anyway.

C. Other backstops and guardrails will ensure that compassionate release remains manageable.

Finally, there are other statutory and institutional constraints that will preserve the administrability of compassionate release. Judges can choose to start with the § 3553(a) inquiry, allowing them to resolve motions expediently if relief is plainly inconsistent with the § 3553(a) factors.[120] As the Seventh Circuit, for example, has recognized, "when denying a motion for compassionate release, even 'one good reason . . . is enough,'" such as the § 3553(a) factors.[121] In addition, if necessary, institutional safeguards like staff attorneys could mitigate any increase in workload. In most circuits, staff attorneys are responsible for reviewing and drafting recommendations on *pro se* postconviction motions (among others), like § 2255 petitions. Staff attorneys are experts at identifying meritorious motions, ensuring that judges are not overburdened by filings. Of course, access to counsel

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[117] *See* Erica Zunkel Written Statement at 18–23.
[118] *See* Government's Response to Defendant Rashad Logan's Motion for Compassionate Release at 8, United States v. Logan, No. 07-CR-270-2 (N.D. Ill. Jan. 12, 2023), Dkt. 241.
[119] *Id.* at 14.
[120] *See, e.g.*, United States v. Bowlson, No. 21-2746, 2022 WL 2913645, at *2 (6th Cir. June 29, 2022) (affirming the district court's denial where "district court declined to evaluate whether Bowlson had established extraordinary and compelling reasons for his release because the factors under 18 U.S.C. § 3553(a) did not warrant a sentence reduction.").
[121] United States v. Sullivan, No. 20-2647, 2021 WL 3578621, at *3 (7th Cir. Aug. 13, 2021) (quoting United States v. Ugbah, 4 F.4th 595, 597–98 (7th Cir. 2021)).

through Federal Defender and Criminal Justice Act appointments will be crucial to ensuring quality representation and that arguments are well presented to judges.

CONCLUSION

The federal criminal system can be harsh and inflexible. As history demonstrates, it is easy to ratchet up sentences and very hard to ratchet them down.[122] During this amendment cycle, Congress has once again mandated that the Commission ratchet up sentences—this time for firearms offenses.[123] These one-way ratchets often result in racial disparities and fail to promote public safety.[124] At the same time that the Commission considers Congress's directive to elevate the firearms guidelines, it has an opportunity to broaden § 3582(c)(1)(A)—Congress's "safety valve" for "inequitable sentences."[125] As sentences become longer for certain offenses, it becomes more likely that a person will face changed circumstances during their term of imprisonment—including serious health complications, sexual abuse, and significant legal developments that cause their sentence to be viewed in a new light. That makes a robust safety valve even more indispensable. Further, as it did in the FSA for drug and gun enhancements, Congress may well conclude down the line that the BSCA's penalties are too harsh. Again, if history is a guide, we will need § 3582(c)(1)(A)'s safety valve.

Thank you for considering our views on the Commission's proposed amendments to §1B1.13. Please do not hesitate to contact Professor Zunkel with any questions or concerns.

Sincerely,

Erica Zunkel, Clinical Professor of Law

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[122] *See, e.g.*, Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 OHIO ST. J. CRIM. L. 283, 285–86, 295–97 (2020); *see also generally, e.g.*, Rachel Barkow, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

[123] *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159 § 12004(1)(a)(5) (2022) [hereinafter BSCA].

[124] *See Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the United States Sentencing Commission* (Mar. 7, 2023) (written statement of Michael Carter, Fed. Pub. Def. for E.D. Mich.).

[125] S. REP. NO. 98-225, at 121.

Jaden Lessnick, University of Chicago Law School, Class of 2023
Nathaniel Berry, University of Chicago Law School, Class of 2024
Juliana Steward, University of Chicago Law School, Class of 2024
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Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Bassey Akpaffiong, Attorney

Topics:

1. Compassionate Release

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

7. Criminal History

8. Acquitted Conduct

10. Alternatives-to-Incarceration Programs

11. Fake Pills

Comments:

This commission should limit Judge's ability to use acquitted conduct to enhance sentencing.

Submitted on: March 2, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Dennis Alba, Kirby Law

Topics:

1. Compassionate Release

Comments:

I believe that making Compassionate Release a Sentencing Guideline, it will make it easier for a judge to grant such relief. It appears that most circuits do not favor granting this form of a sentence reduction.

Submitted on: March 2, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Clayton Beaty, Community leader, chef, board of drug recovery center

Topics:

1. Compassionate Release

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

4. Circuit Conflicts Concerning §3E1.1(b) and §4B1.2(b)

5. Crime Legislation

6. Categorical Approach and Other Career Offender Issues

7. Criminal History

8. Acquitted Conduct

9. Sexual Abuse of a Ward Offenses

10. Alternatives-to-Incarceration Programs

12. Miscellaneous Issues

13. Technical Amendment

Comments:

Penalizing people for small amounts of marijuana have led to more broken families and real drug addictions than any other misjudgements in America. I'd like to please be proven wrong. Marijuana is a safe alternative to opioid pain medicine. I myself,a recovering addict and alcoholic 15 years clean and sober, have recently used marijuana extracts in lue of opioid pain medicine. To great success. The medical systems in our state is expensive and hard to navigate. We do not have any laxed laws towards it in Florida, which leads to patients being harassed by police and HOAs which in most cases violates the ADA, putting these entities in a liable position. It's a domino effect wherever you push it. It's time to legalize recreational marijuana, and allow cultivation under guidance for medical patients. I've worked for the biggest medical marijuana company in the US. I can tell you after using theirs and the products of others, they do not care about the health of their patients or customers, just the bottom line. For that reason and others I also think that smaller craft farms should be able to shoot a boost in the arm of local economic circles. If a small farm doesn't produce quality at a quality price, they don't survive. It's almost self regulation. You guys are missing BIG tax revenue from multiple inputs, that would

result form legalization and regulation. I was caught at my job, which the police were busting my boss because he cultivated marijuana. I was there to get my tools and had a half of a joint. I lost a business license, drivers license, and my ability to support myself living in a rural area. This and other things done by the local sheriffs that traumatized me, and no treatment, pushed me into a decade of alcohol and drug addiction. Which I thankfully pulled out of. I, being sober for over a decade, am representative of less than 1% of people who enter recovery. With other numbers just falling in the categories of jails, institutions, or death. This is mostly a direct result of how we treat our mentally ill, wounded, and addicted. These people need help up front. They need less violence from those who are supposed to protect them and More help. We should and have to do more. Want to end half of the Fent deaths? Legalize and regulate the production of cocaine and maybe heroin. Like half of our population uses it. Make it prescription or something? Needs further thoughts. Thank you for even considering our opinions. This is refreshing. I have much more to say. So many inequities. So many repercussions. So many possible solutions.

I also think there should be much harsher offences for sexual crimes and the grooming of underage partners, as well as polygamy. These offences if left unpunished, destroy communities, homes, and people.

Again,

Thank you for your time and consideration.

Submitted on: January 27, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Margaret Boyce-Furey, Doctor

Topics:

1. Compassionate Release

Comments:

When the incarcerated are sick, old or both compassionate release requires their release. Further punishment accomplishes nothing.

Submitted on: March 2, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Mark Campetti, Pennsylvania, Middle

Topics:

12. Miscellaneous Issues

Comments:

2D1.1(a) is still not clear whether the offense of conviction must establish that the defendant has a prior serious drug felony or violent felony

(i.e. an 851 Information of prior conviction; a reference to the prior conviction in the Indictment; or at least a plea agreement stipulation that the defendant has a prior serious drug felony)

Submitted on: January 13, 2023

MICHAEL S. CARONA
SHERIFF, ORANGE COUNTY SHERIFF'S DEPARTMENT (RETIRED)

Judge Carlton W Reeves, Chair
United States Sentencing Commission
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March 8, 2023

Position in support of the Commission's proposed amendment of Section 1B1.3 of the sentencing guidelines and support for incorporating that same language in amending Section 6A1.3.

Dear Judge Reeves,

I want to commend the Commission for their bold proposal to prohibit sentencing individuals for their acquitted conduct. The proposed amendment is concise and unambiguous. The unanimity of the Commissioners in proposing this amendment, given the Commission's Rules of Practices and Procedures, clearly demonstrates the Commission's desire to adopt this amendment and submit it to Congress.

If a random poll were taken of American citizens and the question posed to them was "*could they be sentenced to federal prison for crimes for which they were acquitted*" resoundingly the response would be – *Absolutely Not!*

What is even more astounding is that after a 32-year law enforcement career including nearly a decade as the elected Sheriff of the Orange County Sheriff's Department, California where I commanded the 5th largest Sheriff's Department in America as well as the 8th largest jail system in America[1], I had *never* heard of a procedure where a defendant could be sentenced to prison for their acquitted conduct.

For nearly a decade, I served as the *Chairman of the California Council on Criminal Justice*[2] and as a board member for the *National Institute of Corrections*[3]. Additionally, I served on numerous County, State and Federal boards, commissions and task forces that were focused on addressing similar issues. All of my colleagues and I diligently sought ways to keep dangerous criminals incarcerated and victims protected, yet never was there a consideration that an individual could or should be sent to our jails/prisons because of their acquitted conduct. For all of us the idea that anyone could be incarcerated for their acquitted conduct would have been an anathema.

As the Commission stated, "in fiscal year 2021, nearly all offenders (56,324; **98.3%**) **were convicted through a guilty plea**. The remaining 963 offenders (**1.7%** of all offenders) **were convicted and sentenced after trial**, and of those offenders, 157 offenders (**0.3%** of all offenders) **were acquitted of at least one offense**.[4] [Emphasis Added]

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[1] 1999-2008 Sheriff, *Orange County Sheriff's Department*, Orange County, California.
[2] 1999-2008 Chairman, *California Council on Criminal Justice*. Appointed by Governor Davis (D); reappointed by Governor Schwarzenegger (R).
[3] 2004-2008 Board Member, *National Institute of Corrections Advisory Board*. Appointed by United States Attorney General Ashcroft; reappointed by United States Attorney General Gonzalez.
[4] January 12, 2023 *United States Sentencing Commission, Proposed Amendments to the Sentencing Guidelines*, page 216. *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, pp 8, 30, 56 and 103.

Apparently, of the *1.7%* of the federal criminal defendants who went to trial – *None* – were acquitted of *ALL* of the charges against them. And, only ***.3%*** of federal criminal defendants were acquitted of at least one offense. These data speak volumes in support of the Commission's recommendation to prohibit the use of sentencing a defendant for their acquitted conduct.

Being charged with a federal crime is, at best, a terrifying experience. Given these statistics, with the probability of being acquitted of any of the charges against you being to the *right* of the decimal point, choosing to go to trial is truly a courageous as well as quixotic act. Those of the ***.3%*** who are fortunate enough to be acquitted of *any* of the charges against them should not punished for having availed themselves of their 6th amendment right.

Much like I can speak to the problems of acquitted conduct sentencing as a law enforcement executive, I can also speak to this issue as someone who has *personally experienced* the pain and frustration of having been the recipient of an enhanced sentencing for my acquitted conduct.

In 2007, as the Sheriff of Orange County, I was a defendant in federal court. The charges against me included *3 counts of Honest Services Mail Fraud*, *one count of Conspiracy to commit Honest Services Mail Fraud* (including *64 overt acts*), and *2 counts of Obstruction of Justice*.[5] With every fiber of my being, I believed in my innocence, as I do to this day, and I made the courageous decision to go to trial. My trial lasted *2 ½ months*. 12 jurors (and 6 alternates) dutifully listened for months to *all* of the evidence that was presented.

At the conclusion of my trial, after short deliberations, the jury *ACQUITTED* me of *every* charge against me *except one count* of obstruction of justice[6]. Despite being acquitted of all but this single charge the trial court judge chose to cross reference my acquitted conduct for Honest Services Mail Fraud and substantially enhance my sentence to *5 ½ years* in federal prison. As I stated previously, I never knew that an American citizen could be sent to federal prison for their acquitted conduct, but now I was living proof that, in fact, that can and does happen.

Unfortunately, this was not the end of my education about the punitive complexities that exist with acquitted conduct sentencing. As a members of this Commission know full well in 2010 the United States Supreme Court in *US v. Skilling* (*Weyhrauch, Black*)[7] found Honest Services Mail Fraud vague and limited the application of the statute to bribery and/or kickbacks. The Supreme Court's decision had no direct impact on my case *as I had been acquitted of all charges of Honest Services Mail Fraud*.

However, after the Supreme Court denied certiorari in the appeal of my single count of conviction my attorneys filed a 2255 motion with the trial court and subsequently an appeal of that motion in the Ninth Circuit Court of Appeals citing *Skilling*, the dismissal of a companion case for lack of proof of bribery[8], and of course, the *jury verdicts* of *acquittal* on *all* Honest Services Mail Fraud charges.

[5] *United States v. Michael S Carona*, Case Number SA CR 06-224.
[6] January 16, 2009, *Jury Acquits Ex-Sheriff of All but One Count*, NBC News.com.
[7] *Skilling v. United States*, 561 U.S. 358 (2010); *Black v. United State*s, 561 U.S. 465 (2010); *Weyhrauch v. United States*, No. 08-1196, 561 (2010).
[8] *United States v. Jaramillo*, Ninth Circuit Court of Appeals, No. 09-50480.

Ultimately, the Ninth Circuit ***denied*** my appeal ***not*** because they believed to a ***preponderance*** of the evidence that bribery had occurred rather, they opined that "*Because the district court did not clearly err in finding that bribery was one of the crimes being* ***investigated****, it was appropriate to sentence Carona accordingly*." "*The* ***investigation*** *was looking into possible bribery. Whether Carona* ***actually committed*** *or* ***was convicted of bribery is immaterial***."[9] [Emphasis added] Here, there was no discussion as to the need to find bribery at even a preponderance of the evidence. Now, the mere fact that bribery was one of the charges *being investigated,* was sufficient to impose an enhanced sentence.

It is in fact this interpretation by the appellate court, given the latitude permitted it by the vagaries of the sentencing guidelines with respect to acquitted conduct, that motivates me to respectfully recommend that the Commission adopt the ***exact*** same concise and unambiguous language it recommends to section 1B1.3 in its amendment to Section 6A1.3. Unless this Commission makes ***absolutely clear*** its intention to prohibit the use of acquitted conduct sentencing in federal courts the doctrine of unintended consequences foretells that trial judges and appellate judges, even with the best of intentions, may once again use acquitted conduct as punishment in their sentencing/appellate decisions.

It would be easy to be angered by the punitive decisions that were made throughout my case with respect to acquitted conduct sentencing. However, that behavior was permissible because Congress, the Supreme Court, and even prior iterations of the United States Sentencing Commission, created ambiguity in the law, and as a result acquitted conduct sentencing enhancements were acceptable. Prior Justices of the Supreme Court *Scalia*[10] and *Ginsburg*[11], as well as current Justices *Thomas*[12], *Kavanaugh*[13] and *Gorsuch*[14] have railed against this type of sentencing even going so far as to call into question its constitutionality. Congress has tried for years to abolish this practice coming extremely close to doing so in the *117th Congress*[15].

But here and now *this* United States Sentencing Commission is doing what no other entity has had the unanimity and courage to do. So, rather than complaining about the past injustices, I choose rather to thank and congratulate the members of this Commission. I respectfully ask that you adopt the proposed amendment to Section 1B1.3 and the *same language* as amendment for Section 6A1.3, thereby eliminating the current ambiguity and *guaranteeing* that future defendants will not have to experience the suffering which many of us who have come before them have had to endure.

Respectfully submitted,

Michael S. Carona

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[9] *United States v. Carona*, Ninth Circuit Court of Appeals, No. 13-55597.
[10] *Jones v. United States*, 574 U.S. 948, 949, 135 S. Ct. 8, 9 (2014).
[11] Ibid.
[12] Ibid.
[13] *United States v. Bell*, 808 F.3d 926 (2015) and *United States v. Brown*, 892 F.3d 385, 415 (2018) and; *also see* Judge Millet's opinions in both cases.
[14] *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (2014).
[15] March 28, 2022, Roll Call Vote No. 83, *HR 1621*, 117th Congress, 2nd Sess. – Office of the Clerk, U.S. House of Representatives – 405 votes in favor, 12 votes in opposition.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Sandra Collins, Attorney

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

I support proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal regarding changes in the law that would make the sentence fair. It is paramount that people who are serving long sentences (that could be different today) have a chance to make their case to the Court and to let the Court decide whether to reduce the person's sentence.

Additionally, I support other proposed changes to compassionate release, including public health, adequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Will you consider giving judges the authority to expand compassionate release on grounds that may not be enumerated in the amendments?

Thank you for your kindness, your willingness to address compassionate release and for considering my views.

Sincerely and with heartfelt gratitude,

Sandra Couch Colllins, Esq. 68169

Submitted on: March 4, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Susan Conforti, Jewish

Topics:

1. Compassionate Release

Comments:

I support proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Submitted on: March 10, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

John Dorsey, Independent

Topics:

7. Criminal History

12. Miscellaneous Issues

Comments:

I have read that the Sentencing Commission has published proposed amendments and requested for feedback to said amendments. As a friend of an incarcerated individual, I would like to see the proposed change for Zero Criminal History point reduction be made retroactive as well. There are countless incarcerated individuals who received no benefit for being first time offenders and to change this status without addressing their sentences does not seem fair from a standpoint of rights. I am hoping you will take this into consideration.

As well, I would like to address a sentencing enhancement that has affected offenders since its implementation decades past, one that involves a 2 point enhancement for the use of a computer in the commission of a crime. While this enhancement generally applies to sexual offenders (I have yet to read of a drug dealer being given this enhancement despite phones being used as evidence for drugs deals), it does not change the fact that it is an outdated concept applied when the use of computers in criminal activity was a rarer occurrence. Now, anything from a tablet, phone, or video game console can be considered a computer by said definition.

This enhancement has been addressed as outdated by federal judges and is being applied less and less in PSR reviews, which makes it even more unfair for those who did receive it, resulting in upwards of a year to a sentence, simply for using a computer (which is what makes most of said charges federal jurisdiction to begin with). After the two point enhancement for drug charges being applied, there is no reason this cannot be adapted as well, and I pray you consider doing so.

(if you want to add this, you can, up to you. it is another issue but this one is probably harder to swing)

Finally, there is the issue of the five point Pattern of Behavior, which can be applied to sex

offenders based on the belief they have other instances of offense, without any actual charge or criminal history. A person with Zero Criminal History can receive multiple years extra based on this enhancement, one of the largest in the sentencing guidelines. It is no different than giving a drug dealer with no criminal history four more years because he might have sold drugs at some point in the past, but no charge was ever filed against him. I he had two charges of possession, one was dropped, but he still received five more years tacked on. If this was done for such crimes, the public outcry would be unprecedented.

Submitted on: February 18, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Pamela Douglas, Christian

Topics:

1. Compassionate Release

Comments:

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Submitted on: March 10, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

David Ferguson, AME Church

Topics:

1. Compassionate Release

Comments:

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.
I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.
Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Submitted on: March 10, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Ruben Garcia, CJA panel attorney

Topics:

2. First Step Act: Safety Valve and Conforming Changes to §2D1.1

10. Alternatives-to-Incarceration Programs

Comments:

By now we should have learned that excessive sentences are counterproductive.
The longer a defendant is in prison the les he/she is likely to become a productive member of the community. In our world Events and technology move too fast for a person to catch up when released after a long sentence.

Submitted on: January 12, 2023

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March 14, 2023

Judge Carlton Reeves
Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, D.C. 20002-8002

Re: Proposed amendments for the amendment cycle ending May 1, 2023

Dear Chairman Reeves:

I write to offer my comments with regard to the proposed amendments concerning compassionate release and acquitted conduct. I do so as a former judge and criminal defense lawyer, and as someone who has taught sentencing courses at both Harvard Law School and Yale Law School for over two decades.[1]

Proposed Amendment No. 1: First Step Act – Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(A) – Compassionate Release

The proposed amendment would redesignate the provision currently listed under Application Note 1(D) of §1B1.13 as "Other Circumstances" and expand it to apply to all motions filed under 18 U.S.C. § 3582(c)(1)(A), including motions filed by defendants directly.

I write specifically to support the "Other Circumstances" residual category for compassionate release, after the listed categories. I would also recommend that the provision listing categories of release be prefaced with "include but are not limited to." I support the other amendments proposed by the Commission to this section but wish to focus my comments only on the need for a non-exhaustive list of factors that could give rise to compassionate release.[2]

I address the comments of the Criminal Law Committee (CLC) and the Department of Justice (DOJ), specifically their concerns that such a residual, unenumerated category would trigger "unwarranted disparities." I could not disagree more. The past several years, after the passage of the First Step Act and before the Sentencing Commission was reconstituted, have demonstrated that the written judicial opinions granting compassionate release, carefully analyzed and subject

[1] I would like to acknowledge two of my students, Sarah Leadem and Suzanne Van Arsdall, for their input in the process of writing these comments.
[2] I also propose that the Commission not limit relief to assaults committed by BOP employees and personnel, but expand it to include sexual and physical assaults committed by other inmates.

to appeal, produced "warranted" differences among defendants. They bear no resemblance to the chaotic pre-1985 decision-making that produced the Sentencing Reform Act. Nor would such a category flood the federal courts, as the CLC has warned. Federal caseloads are at historic lows; the COVID-19 pandemic era upswing in compassionate release applications has slowed. Finally, even if the Commission wishes to cabin judicial discretion by limiting compassionate release to listed categories (with which I disagree), it should do so after more time has passed, thereby enabling the further development of a judicially developed common law of compassionate release applied to situations which cannot now be anticipated. This is precisely the sort of judicial feedback that the drafters of the Guidelines anticipated.[3]

History of the Federal Sentencing Guidelines

The history of the application of the Federal Sentencing Guidelines is relevant both to the dire need for "compassionate release" and its breadth. The Guidelines were enacted four decades ago. That was before their impact on mass incarceration was fully appreciated; before it was known how guidelines focused on criminal record mirrored aggressive policing in communities of color; before developments in neuroscience and psychology suggested rehabilitation was possible; before diversion programs showed promise. Indeed, they were promulgated at a time of moral panic, when crime was on the upswing, just before it declined over the next several decades (including in jurisdictions without Guidelines or mandatory minimum sentences). Guideline sentences have largely been based on what the crime consisted of and the defendant's criminal record, devaluing or wholly ignoring the role of addiction, trauma, and adverse childhood experiences, among other factors, as well as the new insights from neuroscience and psychology that support themt.

While the Guidelines have been amended in important ways and while they are now advisory, giving judges the leeway to vary from them, it is not remotely sufficient to ameliorate the impact of the past forty years. In prison today are men and women whose sentences are disproportionate, unfair, and even illegal, who would never have been sentenced as they were under new guidelines and new standards. Put simply, as the great Judge Jack Weinstein noted, reflecting on a 327-month Guideline sentence that he had imposed years before, that sentence was simply "an unjust artifact of a crueler period."[4]

American Law Institute: Second Look

The American Law Institute (ALI) recognized as much with its Model Penal Code (MPC) for sentencing, providing for an automatic "second look" at sentences after fifteen years,[5] in an otherwise determinate sentencing system. The commentary was incisive: "The fact that American prison rates remain high after nearly two decades of falling crime rates is due in part to the nation's exceptional use of long confinement terms that make no allowance for changes in the crime policy environment." And it added, pointing to empirical data unavailable at an earlier time: "On utilitarian premises, lengthy sentences may also fail to age gracefully" as "[a]dvancements in empirical knowledge may demonstrate that sentences thought to be well

[3] Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 7-8 (1988).
[4] *Alli-Balogun v. United States*, 071515 NYEDC 92 Cr. 1108-597624926.
[5] In 2017, the ALI approved a Model Penal Code (MPC) for sentencing. American Law Institute, Model Penal Code: Sentencing § 11. 02 (Black Letter version).

founded in one era were in fact misconceived." Likewise, "with ongoing research and investment, new and effective rehabilitative or reintegrative interventions may be discovered for long-term inmates who previously were thought resistant to change."[6] While the ALI called generally for a sentencing commission to generate Guidelines for that "second look," the commentary strongly implies that guidelines can never fully anticipate all future circumstances, hence the need for something like an "Other Circumstance" category. The risk that sentencing outcomes may diverge when judges exercise discretion pales before the risk of keeping in place unfair and wildly disproportionate sentences.[7]

1984 Sentencing Reform Act

The First Step Act of 2018 created a much-needed safety valve to federal sentencing, fully consistent with the Sentencing Reform Act (SRA) of 1984. Indeed, the SRA included a provision for release based on "extraordinary and compelling" reasons.[8] Legislators stated their desire for compassionate release to act as "'safety valves' for modification of sentences… [to] assure the availability of specific review and reduction to a term of imprisonment for 'extraordinary and compelling reasons' [to allow courts] to respond to changes in the Guidelines." Its legislative history made clear that a reduction in the length of the term of imprisonment may well be justified by "changed circumstances" such as "severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and… cases in which the sentencing guidelines have been 'later amended to provide a shorter term of imprisonment.'"[9] But the list of potential release reasons offered by Congress was obviously not exhaustive precisely because they could not be forecast in advance.

As the Commission knows, the 1984 "extraordinary and compelling" provision was infrequently enforced because the Bureau of Prisons (BOP) was the gatekeeper. To the BOP, prisoners were hardly ever sick enough to meet the medical standard or indeed, any other. Scholars and oversight agencies derided their overly narrow interpretation of the compassionate release system that Congress envisioned. And this continued even after the 2016 Sentencing Commission urged the BOP to bring more cases to the court so that judges could decide whether to release a prisoner and on what terms.

Judicial Decision-making: A Common Law of Compassionate Release

With the First Step Act, prisoners could go directly to court, bypassing the BOP, and they did. The Act could not have been more critical during the pandemic, which ripped off the band-aid to reveal real suffering in the Petri dish of prisons.

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[6] Sarah French Russell, "Second Looks at Sentences Under the First Step Act," 32 Fed.Sent.R. 76, 77, 2019 WL 7766108 (Vera Inst.Just.) (citing to American Law Institute, Model Penal Code: Sentencing § 305.6, cmt. at 568 (Proposed Final Draft).

[7] One part of the commentary was especially compelling given the extraordinarily long sentences imposed in federal courts. As Professor Russell noted: "The 'second look' provision 'is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives.' The provision 'reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still' and is 'meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.'" *Id.* at 77.

[8] 18 U.S.C. §3582(c)(1)(A).

[9] S.Rep. No. 225, 98th Cong., 1st Sess., at 55 (1984).

When the Sentencing Commission, which had no quorum, was not authorized to issue Guidelines under the new Act, judges across the country rose to the challenge with reasoned decisions, subject to appellate review. A transparent and careful common law of sentencing evolved and *is still evolving*. Given the unfairness of Guideline sentencing and the changes in approach over the past several years, it was no surprise that courts dealt with a variety of circumstances beyond compelling medical conditions, cases that would be at risk going forward were the approaches of the DOJ or CRC adopted. To provide a few examples: In *United States v. White*,[10] the Court cited to the "injustice and unfairness of a prosecution and resultant sentence" where the defendant received a mandatory minimum of 25 years after Alcohol, Tobacco and Firearms (AFT) set up a fake stash house. The court based his sentence on the quantity of drugs ATF concocted, so-called "imaginary weight," though the defendant was the "least culpable" of his co-defendants. In *United States v. Lopez,*[11] the defendant was sentenced more harshly as a career offender based on an error in the presentence report which should have been obvious at the time of sentencing; it was an "extraordinary and compelling" case in part because there was no other avenue by which the error could be corrected. Another example is *United States v. Fenner*,[12] in which the court granted release where the defendant's sentence was calculated based on drug quantity amounts that were not found by the jury and was enhanced by "a murder for which [he] was not convicted," a sentence that "would be unconstitutional today" as well as a disparity between the sentence of his co-defendant, who was determined to be culpable for the killing (this disparity was a product of pre-Booker Guidelines). And in *United States v. Williams,*[13] the court granted relief to a defendant who was a juvenile at the time of the offense and had an intellectual disability, who was sentenced to a mandatory life sentence because of a judge-determined, conspiracy-wide drug quantity.

The question for which the newly reconstituted Sentencing Commission now seeks comment is whether Guidelines on compassionate release should include only very specific categories – such medical conditions, advanced age, family circumstances such as an ailing parent or spouse for whom the prisoner was the sole caretaker, prisoners who have been sexually assaulted, severe sentences under Guidelines that have been significantly lowered – or whether there should also be an "other circumstances" category, a residual category for unforeseen "extraordinary and compelling" circumstances. Others have offered commentary on the specific categories; I choose to focus on the "other circumstances" category.

<u>The Criminal Law Committee and the Department of Justice: A Throwback Position</u>

The CLC would restrict the safety value, narrow all categories of compassionate release, and reject the residual "Other Circumstances" category. While not identical, the Committee's comments align with those of the DOJ. Significantly, if adopted, many of the circumstances that judges found "extraordinary and compelling" and warranting release – including those described above – would no longer be included.

[10] No. 09 CR 687-4, 2021 WL 3418854 (N.D. Ill. Aug. 5, 2021). (Similar *United States* v. Conley, No. 11 CR 0779-6, 2021 WL 825669, (N.D. Ill. Mar. 4, 2021).
[11] 523 F. Supp. 3d 432 (S.D.N.Y. 2021).

[12] No. CR RDB-95-095, 2022 WL 1062021 (D. Md. Apr. 8, 2022).
[13] No. CR 91-559-6 (TFH), 2021 WL 5206206 (D.D.C. Nov. 9, 2021).

Above all, the CLC and the DOJ are concerned with what Professor Kate Stith and Judge Jose Cabranes have described as "the battle cry" of unwarranted disparity.[14] In addition, the Committee believes that leaving the door open to "extraordinary and compelling" releases will overload the federal district courts.

None of these reasons apply. Years ago, that "battle cry of disparity" made some sense. Before Guidelines, there were no sentencing standards. Worse, in the federal system and many states, there was no appellate review of sentencing. Sentencing judges did not give reasons because they did not have to; sentencing decisions were often idiosyncratic and rarely transparent.[15] But today judges have released individuals with reasoned written opinions, carefully justifying why a release or sentence reduction qualifies as "extraordinary and compelling." Their decisions have been subject to critical evaluation on appeal. *This is the very definition of differential treatment of defendants that is "warranted," in addition to being justified, transparent, and fair.*

As for the CLC's belief that leaving the door open to "extraordinary and compelling" releases will overload the federal district courts, that too is misplaced. Compassionate release applications peaked during the COVID-19 pandemic and have been steadily declining. In any event, as Chief Justice Roberts' annual report has shown,[16] the federal criminal case load itself is declining, with a 26 percent drop from FY 2019. Judges have time to be more fair.

Indeed, allowing a common law of sentencing to evolve over time will produce exactly the kind of feedback for future changes in the compassionate release guidelines that the SRA anticipated. After all, it has only been four years since the passage of the First Step Act, much of that time occupied by a deadly pandemic. The Commission should have confidence that federal judges will look carefully at "other circumstances" warranting relief.

That is not to say that judicial decision-making on compassionate release is perfect. It is not. But the antidote is not to shut down discretion and stanch the development of the law. The definition must be open-ended precisely because… it is *extraordinary (and compelling)* relief.

Proposed Amendment No. 8: Acquitted Conduct

The Sentencing Commission proposes to amend the Federal Sentencing Guidelines with the intent to "prohibit the use of acquitted conduct in applying the guidelines." The Commission has presented three primary proposed amendments: First, it adds a subsection to §1B1.3 providing that acquitted conduct is not relevant conduct for purposes of determining the guideline range with two exceptions: (1) if the conduct was admitted during a guilty plea colloquy or (2) if the conduct was found by the trier of fact beyond a reasonable doubt to establish conviction. Second, it provides a definition of acquitted conduct.[17] Third, it amends the "Commentary" to §6A1.3 providing that while acquitted conduct should not be considered relevant conduct (see §1B1.3), it

[14] *See* Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (U.Chi.Press).
[15] *See generally* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691 (2010).
[16] 2022 Year-End Report on the Federal Judiciary, https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf.
[17] Defined as "conduct (*i.e.*, any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction." *See* U.S. Sentencing Commission, Proposed Amendments to the Sentencing Guidelines, February 2, 2023, 214.

can be used to determine a sentence *within* the Guideline range or whether a departure is warranted.

I write in favor of eliminating any reliance on acquitted conduct in sentencing.

Rationale for Considering Acquitted Conduct

Currently, judges have broad latitude to consider acquitted conduct in sentencing. 18 U.S.C. §3661 prohibits any limitations to be placed on information that may be used by a sentencing judge related to the "background, character, and conduct" of a defendant. The landmark case *United States v. Watts*[18] has been interpreted as providing that judges may consider acquitted conduct proven by a preponderance of the evidence. To many judges, "may consider" was transformed to "must consider" in evaluating relevant conduct under the Guidelines.[19] Many reviewing courts have expressed skepticism as to the use of acquitted conduct, but have largely preserved lower court's sentencing decisions in light of the permission granted by *Watts*.[20]

Raising the Evidentiary Standard

I will focus on the proposed Guideline which raises the evidentiary standard for acquitted conduct from a preponderance of the evidence to reasonable doubt. This reform redresses important fairness concerns long raised by critics of acquitted conduct that judges should not be able to sentence a defendant for conduct for which they were acquitted under a lower evidentiary standard than that used by the jury. This reform aims to prohibit the use of acquitted conduct by means of *equalizing* the evidentiary burdens between the jury—the ultimate trier of fact in our judicial system—and the judge—the sentencer.

This amendment does however raise two new concerns: First, it continues to delegitimize the role of the jury in the criminal justice system and may, in fact, be an even more direct affront to the authority of the jury. Second, it exacerbates preexisting constitutional concerns related to the Fifth Amendment's prohibition against Double Jeopardy.

Delegitimizing the Jury; Double Jeopardy

The constitutional status of the current use of acquitted conduct is contested. Many scholars and jurists argue that current use of acquitted conduct raises constitutional concerns under the Fifth Amendment.[21] However, at this point, courts interpret *Watts* to support the holding that acquitted

[18] 519 U.S. 148, 156-57 (1997).
[19] *See e.g.* Clare McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's Law Review 1415, 1420 (2011).
[20] *See* U.S. Sentencing Commission, Results of Survey of United States District Judges January 2010 through March 2010, Question 5 (finding that 84% of over 600 federal district judges surveyed do not believe acquitted conduct should be considered relevant conduct for purposes of sentencing); *see also* Brief of 17 Former Federal Judges as Amicus Curiae on Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit), p. 2-3, *McClinton v. United States,* 23 F.4th 732 (7th Cir. 2022) (urging a prohibition on the use of acquitted conduct in sentencing).
[21] *See* Erica K. Beutler, A Look at the Use of Acquitted Conduct in Sentencing, 88 J. CRIM. L. & CRIMINOLOGY 809 (1998) ("The use of acquitted conduct in sentencing raises due process and double jeopardy concerns that deserve far more careful analysis than they received."); *see also* Acquitted-conduct sentencing and "offended observer" standing, SCOTUSBlog, https://www.scotusblog.com/2023/01/acquitted-conduct-sentencing-and-

conduct proven by preponderance of the evidence does not violate the Double Jeopardy Clause. Still others—I among them—dispute this interpretation and urge that *Booker* casts "substantial doubt on the continued vitality" of *Watts*. [22]

The proposed amendments may put existing constitutional concerns on even more solid legal footing. It could be argued that raising the standard of proof to a reasonable doubt edges sentencing judges closer to effectively retrying a defendant for the same conduct for which he was acquitted based on an identical evidentiary standard as used by the jury. To be sure, this argument may face opposition from the Supreme Court; based on its opinion in *Watts*, the Court does not consider sentencing enhancements based on acquitted conduct to constitute increased punishment. ("[S]entencing enhancements [based on acquitted conduct] do not punish a defendant for crimes of which he was not convicted but rather increase his sentence because of the manner in which he was committed the crime of conviction.")[23]

Alternative Proposal: Eliminate Acquitted Conduct

As an alternative to the current proposed amendments, the U.S. Sentencing Commission could eliminate acquitted conduct all together. This bright-line rule prohibiting the consideration of acquitted conduct in sentencing is justified by many of the critiques of acquitted conduct. The arguments against acquitted conduct are numerous: acquitted conduct enjoys limited historical support;[24] usurps and trivializes the fact-finding function of the jury; enhances prosecutorial power and incentivizes overcharging;[25] gives "extraordinary power" to the probation officer who drafts the presentence report and shapes the information relied on by a judge;[26] violates core constitutional rights to a trial by jury and due process under the Fifth and Sixth Amendments; upsets public notions of fairness given that the general public equates acquittal with a finding of innocence; is not mandated by *Watts* as modified by *Booker* (see above); runs counter to the animating goal of the Guidelines to reduce unwarranted disparity by treating defendants with like convictions differently; and ultimately harms the public legitimacy of the criminal justice system. These concerns are not fully redressed by the proposed amendments given that acquitted conduct can still be used, albeit with restrictions.

There is widespread support for prohibiting acquitted conduct in sentencing without exceptions. There is increasing Congressional support for eliminating acquitted conduct.[27] Recent members

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offended-observer-standing/ (five newly listed SCOTUS petitions currently seek to challenge acquitted conduct on the basis that it violates the Fifth and Sixth Amendments).

[22] *U.S. v. Pimental*, 367 F. Supp.2d 143, 146 (D.Mass. 2005). *See also* Ngov, *Judicial Nullification of Juries*, 241 (arguing that the merits opinion of *Booker* held that acquitted conduct infringed on the Sixth Amendment rights and federal courts' "reliance on *Booker* to support consideration of acquitted conduct at sentencing is an exercise of selective interpretation that ignores the substance of the merits opinion").

[23] *Watts, 519* U.S. 148, 154 (1997).

[24] *See* Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual Hi-tory of Prior Acquittal Sentencing*, 82 St. John's L. Rev. 1415 (2011).

[25] *See* Federal Defender Sentencing Guidelines Committee, "Re: Proposed Priorities for the 2022-2023 Amendment Cycle," September 14, 2022, 5-6.

[26] McCusker, *Hard Cases Make Good Law*, 1460.

[27] *See* H.R. 1621, Prohibiting Punishment of Acquitted Conduct Act of 2021 (passed 405 to 12). Vote Details, Roll Call 83, Bill Number: H.R. 1621, Off. of the Clerk, U.S. House of Reps., (Mar. 2022).

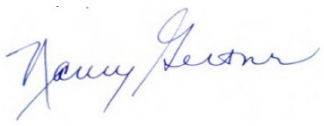
of the Supreme Court have voiced opposition to acquitted conduct.[28] District Courts and Circuit Courts have also expressed opposition to acquitted conduct.[29] Concerns with acquitted conduct, particularly based in public opinion and fundamental notions of fairness and respect for the jury, animated the U.S. Sentencing Commission itself in putting forward its proposed amendments.[30]

The primary argument against a complete prohibition on acquitted conduct would be that judges should be able to consider acquitted conduct in very narrow circumstances in order vindicate the "truth-seeking function of sentencing."[31] Some may argue that the proposed amendments strike the right balance: they impose a baseline prohibition against acquitted conduct while allowing its consideration in the limited class of cases where acquittal did not equate with innocence. Proponents of the proposed amendments may argue that acquitted conduct in this narrow class of cases best comports with a sentencing regime keyed to actual wrongdoing and most advances the punitive goals of ensuring public safety and promoting deterrence.

The counterargument to this is that the criminal justice system is based on *legal* guilt and innocence. As I have noted: "Actual innocence or actual guilt is less significant in a constitutional criminal justice system than legal guilt or legal innocence, adjudicated by a jury."[32] As such, conduct for which a defendant has been acquitted by a jury of his peers should be barred from consideration in sentencing in alignment with the design of our criminal justice trial system that is centered on *legal*, not *actual* guilt and innocence. Further, strong public opinion against acquitted conduct and intractable concerns with fundamental notions of fairness and respect for the jury demand a full prohibition on acquitted conduct in sentencing.

Thank you for your consideration.

Sincerely,



[28] *See Jones v. United States*, 574 U.S. 948 (2014) (dissenting from denial of *certiorari*) (Justices Scalia, Ginsberg, and Thomas criticizing an enhanced sentence based on acquitted conduct and proclaiming that the Supreme Court should "put an end to the unbroken string of cases disregarding the Sixth Amendment" when it comes to acquitted conduct); *Watts*, 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting) ("increas[ing] a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal."); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurrence) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (dissenting in part) ("[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness").

[29] *See also* Megan Sterback, Getting Time for an Acquitted Crime: The Unconstitutional Use of Acquitted Conduct at Sentencing and New York's Call for Change, 26 Touro L. Rev. 1223, 1224 (2011) ("Although the federal circuits generally adhere to the federal rule as proscribed by Watts, "there is a growing chorus--from the bench and bar--calling into question the constitutionality and fundamental fairness of this rule, which has been called a 'repugnant' and [a] 'uniquely malevolent' aspect of the current federal sentencing regime."").

[30] *See generally, U.S. Sentencing Commission, "Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines," Thursday February 24, 2023, https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-february-23-24-2023.*

[31] McCusker, *Hard Cases Make Good Law*, 1460.

[32] Nancy Gertner. *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 424 (1999).

Nancy Gertner
U.S.D.Ct. Judge (Ret.)
Senior Lecturer, Harvard Law School
Managing Director, Center for Law, Brain & Behavior

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Susan K Griggs, United Methodist Church

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I believe that persons who are serving long sentences should not be sentenced for periods of time longer than they would be if they were being sentenced now. I thus urge you to adopt the proposal about changes in the law that would make the sentence unfair. Those persons sentenced to long sentences should have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Submitted on: March 9, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Handlin Patricia, Esquire

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Patricia Handlin

Submitted on: March 14, 2023

Creaghan Harry[1]
Racial Justice Reform Movement
354 Doremus Ave.
Newark, NJ 07105
www.TheTerrible10.com
=THE RACIAL JUSTICE REFORM MOVEMENT 2023=
EVEN IF CRIMINAL JUSTICE REFORM CAN WAIT, THE TIME FOR RACIAL JUSTICE REFORM IS NOW

February 28, 2023

Hon. Judge Carlton Reeves
United States Sentencing Commission
One Columbus Circle NE, Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Hon. Judge Reeves,

We are contacting you regarding one specific item that is on the 2023 USSC agenda, which is to determine what the definition of "controlled substance offense" means under 4B1.2. Their decision on **this will directly and substantially affect millions of families within the urban minority community**. Our mutual desire to protect society from dangerous criminals causes "tough of crime" advocates to improperly advocate laws with excessive sentences for **non-violent** violations of the law. We implore you to look and consider the factors we are presenting below.

The Racial Justice Reform Movement created **"TheTerrible10.com of Racial Justice Reform."** See: www.theterrible10.com. Tens of thousands of White, Black and Hispanic citizens have already signed the e-petition at: www.theterrible10.com. Below is our position on this one specific item.

I. PETTY "CONTROLLED SUBSTANCE OFFENSES" CREATE 20+ YEAR SENTENCES UNDER THE FEDERAL "3 STRIKES" LAW 4B1.1

There are urgent *"racial equity"* considerations that must be considered related to this matter. Due to the broad application of this term "controlled substance offense", common petty street level drug priors that many urban citizens have on their record are being penalized to the same degree as "crimes of violence." The current definition of "controlled substance offense" includes even state charges (like a $5 drug sale) that may have created even as little as a state "probation only" sentence. **This current definition creates significant "racial inequity" which improperly targets non-violent offenders by creating a sentence of 210 to 262 months (17-22 years)!**

I recently worked on a case where the defendant had two prior state *probation only* drug offenses that qualify under the current definition as "controlled substance offenses." From this, **the defendant was classified as a Career Offender under 4b1.1. At the same time this defendant was also classified as a "first time offender"**, under a rule called 3553(f). This simultaneous designation

[1] Creaghan Harry is the author of an Amazon Law Top 10 Bestselling Self Help book that is used by defendants and attorneys nationwide to assist them in fighting their cases. See: Amazon.com – "Warriors Guide for Defendants – Fighting and Winning your State or Federal Criminal Case."

occurred because the definition of "controlled substance offense" is so broad that even the smallest $5 drug sale fits within the current definition.

A crime of violence can be very serious. This may include rape, murder, strong arm robbery, Hobbs Act robbery, carjacking, etc. We oppose violent crime. However, it makes no logical sense that a petty street level **non-violent** drug charge should equal a "strike" under 4b1.1, equal to that of a crime of violence. What this does is create a sentence exposure of **210-262 months** for a non-violent person who clearly should not be imprisoned for 20+ years.

II. PETTY "CONTROLLED SUBSTANCE OFFENSES" CREATE DECADE LONG SENTENCES FOR MERE NON-VIOLENT GUN POSSESSIONS WHERE THE GUN HAS NOT BEEN VIOLENTLY USED OR EVEN FIRED.

The definition of this term, "controlled substance offense", also equally affects those charged with possessing a gun. Law abiding citizens in urban communities with a prior conviction should have the right to defend themselves and their family and sometimes have guns in their homes. Many states restore a person's right to bear arms after they have served their sentence. Nonetheless, if they are found to possess a gun, they can be charged federally under a statute called "922(g)".

The sentencing statute for this federal charge is 2k2.1. 2k2.1 uses the same definitions set above under 4b1.2 for "controlled substance offenses". In a 922(g) charge, the first petty street level drug prior under 2k2.1's current definition of "controlled substance offense" increases the defendant's offense level from a 14 to a 20 and a second one increases it all the way to a 24, bringing them up to a possible 10 years for a simple **non-violent** gun possession. Again, the non-violent urban minority ends up with an extreme and excessive decade long sentence, similar to what a violent person would get who has a history of violent crimes. This explodes the jail population with non-violent offenders while destroying more urban minority families.

III. THE CURRENT DEFINITION OF "CONTROLLED SUBSTANCE OFFENSES" IMBEDS "SYSTEMIC RACISM" WITHIN THE LAW AND NEEDLESSLY ROBS BLACK AND HISPANIC FAMILIES FROM GENERATIONS OF FATHERS.

The current definition of "controlled substance offense" targets the very petty street charges that urban minorities tend to have. The incarceration of urban minorities continues to perpetuate poverty by creating more generations of fatherless children. **Certainly a person should not go to jail for 20+ years for $5 worth of drugs.** When people say that the justice system is imbedded with "systemic racism", they often do not know exactly how. **One of the biggest federal incarcerators of urban minorities is this veiled and seemingly meaningless term "controlled substance offense" within 4b1.2.** It has disguised the source of the most common sentence range doled out in federal court, 188-262 months[2]. Silence = Consent. Thank you for your time.

Sincerely,

Creaghan A. Harry - **"I AM NO LONGER ACCEPTING THE THINGS I CANNOT CHANGE, I AM CHANGING THE THINGS I CANNOT ACCEPT"**

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[2] **USSC 2021 Annual Report** – 3729 defendants sentenced to 151 months to 262 months in 2021. 1246 defendants sentenced under career offender (4b1.1) in 2021. 7732 defendants sentenced under 2k2.1. 6190 of the 8154 (76%) charged under firearms offenses in 2021 are minorities. 96% are male. 82% have never attended college.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Sandra Joy, Rowan University

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Submitted on: March 9, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Shannon Lawson, ULC

Topics:

1. Compassionate Release

Comments:

Dear Sirs/Madams
I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Please give judges the ability to recognize individual cases, not as statistics, but as unique as they will always appear. My family member has two septuagenarian parents on hospice, and due to her current confinement and the rigid restraints of the halfway house, she is not allowed to visit her mother in the nursing home. The compassionate release policy needs to include a unique structure for each case.

Kindest and most sincere regards,
Rev Shannon Lawson, PhD

Submitted on: March 10, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Deborah Newman, Christian

Topics:

1. Compassionate Release

Comments:

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Submitted on: March 10, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Deborah Patterson, FCI Victorsville Medium

Topics:

1. Compassionate Release

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

Comments:

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

We are not talking about violent criminals who have hurt others. We are talking about good souls who made a bad choice and deserve counseling and another chance..

Submitted on: March 10, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Tom Pearson, Mr. Tom Pearson Esq

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

As a citizen and attorney, I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

All the best,

Tom Pearson Esq

Submitted on: March 9, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Steven Salky, Steven Salky, Attorney

Topics:

1. Compassionate Release

Comments:

I am an attorney who has long supported the creation of the US Sentencing Commission and its role of bringing greater fairness and justice to sentencing in the United States. The current sentencing guidelines regime has helped reduce unwarranted disparity while also granting judges the necessary discretion to appropriately sentence those convicted of crime. A central feature of a just and fair sentencing system is the recognition that human beings and their circumstances change, thereby requiring a system for compassionate release. Currently, the guidelines concerning compassionate release only partially recognizes that humans and circumstances are subject to change. I believe that a fairer and more just sentencing system can be obtained by expanding the grounds for judges to consider individuals for compassionate release. I therefore encourage the Commission to not only expand the specific circumstances for which it believes compassionate release may be warranted, but to grant judges the flexibility, so long as they articulate grounds that can be reviewed, to grant compassionate release on any ground they find warranted.

Sincerely,

Steven M. Salky
Former Chairman of the ABA Sentencing Guidelines Committee.

Submitted on: March 9, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Glenda Simms, Retired Law Enforcement/parent of Virginia State incarcerated

Topics:

1. Compassionate Release

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Submitted on: March 2, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Brent Turner, Alameda County Probation

Topics:

1. Compassionate Release

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Submitted on: March 2, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Shauna Wooten, Real life ministry

Topics:

1. Compassionate Release

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

3. Firearms Offenses

7. Criminal History

10. Alternatives-to-Incarceration Programs

Comments:

Dear Judge Reeves,

I support the proposed amendments to the compassionate release policy statement. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. It is important that people who are serving long sentences that could be different today have a chance to make their case to the court and let the court decide whether to reduce the person's sentence.

I also support the other proposed changes to compassionate release, including for public health, for inadequate medical care, for parents or adult children with disabilities who need someone to care for them, and for survivors of abuse.

Finally, please give judges the authority to identify compassionate release grounds other than those you end up describing. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur.

Thank you for addressing compassionate release and, thank you for considering my views.

Shauna Wooten

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Judith Van Wyk, Volunteer in Reentry

Topics:

1. Compassionate Release

Comments:

I see there ravages of prison every day - people who have developed chronic physical and psychological problems as a result of their years of incarceration. The statistics show that people who have been imprisoned since their youth grow out of any desire to reoffend. Let's truly give them a second chance by releasing people with illnesses that need to be addressed and children who need a parent. Nothing is accomplished by continuing to hold these people in prison. You are throwing these people away as if they are so much garbage. Keeping people locked up for a mistake they made years ago and have long since paid for does not promote public safety. Instead, it harms society in a multitude of ways.

Submitted on: March 2, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Michael Rummel

Topics:

1. Compassionate Release

Comments:

My wife went in to Carswell FMC in November or 2021. She was sent there after a bad accident and being diagnosed with FND or Functional Neurological Disorder. Prior to self surrender, She was receiving treatment at home (occupational and physical therapy as she was confined to using a walker after the injury. She also was set to complete a program at the Mayo Clinic in Jacksonville that specialized in this rare disorder.

Once at Carswell she received no specialized treatment for her disorder. She also had a lump removed from her breast prior to incarceration and was due to have a mammogram to follow up to keep an eye on it. She began bleeding daily out of her nipple and she was dismissed. Finally she was taken for a PETSCAN after many copouts were filed. The test showed several glowing areas of concern (armpit, neck, abdomen and breast). Also found lesions on her renal glands. She was told she needed an MRI. This was back in May of last year. The pea-sized lump in her armpit is now the size of three marbles. As we approach a year waiting on a MRI, she was told they haven't scheduled her one.

All of this along with her having a stroke inside due to them not giving her blood pressure medication has her now confined to a wheel chair FULL TIME and needing assistance with everything. She stopped receiving therapy for her stroke as they said there's nothing more they can do for her.

So my wife, a non-violent offender who would be in a camp for financial crimes is now way worse than what she was when she went in. She had a stroke and looks to have cancer spreading not being addressed at all. They are allowing her to suffer. She had filed for a compassionate release and was denied on her pro se attempt. Since that attempt she had her stroke and lost ability to complete any self care. She meets the criteria for a CR, yet, we wait on a judge to decide her fate.

How long must she suffer and possibly deteriorate further before she is allowed to be sent home for real medical attention as stated in her medical records by contracted BOP docs and those on the inside as well as medical professionals on the outside?

My wife meets set criteria, yet here we are waiting…. I beg of you to consider helping her and any others in dire straits behind the walls. She has been punished as her life is worse than it has ever been. The fact she gets no care, been allowed to have a stroke and go almost an entire year without seeing a medical doctor at a care level three medical facility is proof they cannot handler her situation and needs to be allowed a compassionate release.
Thank you for your time.

Her husband, son, parents and grandparents

Michael J Rummel
Terrell Holland
Lisa Zisk
Steve Zisk
Barbara Longo
Tom Longo

Submitted on: March 10, 2023

From: ~^! ADAMS, ~^!ERICK LEVAR
Subject: [External] ***Request to Staff*** ADAMS, ERICK, [redacted]
Date: Thursday, January 19, 2023 2:19:41 PM

To: U.S. Sentencing Commission
Inmate Work Assignment: pm rec

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

please do away wiyh the practice of using aquitted conduct to enhance sentences, as well unknown conduct and the use of cases that do not qualify for the A.C.C.A-C.C.A OR $$ 4B1.1 AND 4B1.4.

Thank you.

From: ~^! AIPOALANI, ~^!HANALEI
Subject: [External] ***Request to Staff*** AIPOALANI, HANALEI, [redacted]
Date: Thursday, January 26, 2023 2:07:33 PM

To: USSC Chair Reeves and Members
Inmate Work Assignment: Recycling Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear U.S.S.C. Chair Reeves and Members:

Below please find my public comments, 1 of 2, to the January 12, 2023 "Proposed Amendments to the Sentencing Guidelines (Preliminary)." Comments are supplementary to previously submitted letter (via USPS first-class mail and electronic message submission via family member(s)).

I am in STRONG SUPPORT of Proposed Amendment 1, First Step Act - Reduction in term of imprisonment, and SUPPORT all other Proposed Amendments 2 - 13 and offer specific comments and recommendations to Proposed Amendments 1, 2, 3, 4, and 6, as follows:

Proposed Amendment 1, First Step Act - Reduction in term of imprisonment:
* New (b)(4) should be expanded to include defendants who have been victims of sexual assault or physical abuse resulting in serious bodily, including mental health, injury committed by another inmate or correctional officer or other employee or contractor of the BOP while in custody.
* As it relates to new (b)(6), I STRONGLY recommend OPTION 1.

Proposed Amendment 2, Drug Offense:
* As it relates to 5C1.2, Safety Valve, I recommend amending (a)(4) to replace "the sentencing guidelines" with "section 3B1.1 (Aggravating Role)."
* As it relates to 2D1.1, (b) Specific Offense Characteristics, I support OPTION 1 and encourage the Commission to provide guidance on what constitutes a "1-point," "2-point," or "3-point" offense, "as determined under the sentencing guidelines," for purposes of 5C1.2.
* As it relates to 2D1.11, (b) Specific Offense Characteristics, I support OPTION 1.

Proposed Amendment 3, Firearms Offenses:
* As it relates to 2K2.1, (b) Base Offense Level Revised SOC Enhancement for Straw Purchase and Trafficking Offenses, I support OPTION 1 and recommend increases accordingly: 1 level increase for (b)(5)(A), 1 level increase for (b)(5)(B), and 5 levels increase for (b)(5)(C); further recommend SECOND BRACKET only for (b)(8)(A) with increase by 2 levels; further recommend FIRST BRACKET and decrease by 2 levels for (b)(9)(A); and further recommend "or," "or," and [of the scope and structure of the enterprise] for (b)(9)(C).

Proposed Amendment 4, Circuit Conflicts:
* As it relates to 4B1.2(b), I support OPTION 1 and recommend that the Commission amend Application Note 2 to 2L1.2 to include same definition of "controller substance" for purposes of the "drug trafficking offense" definition.

Proposed Amendment 6, Career Offender:

* As it relates to 4B1.2, I recommend amending (a)(2) bullet points 12 and 13 by removing "possession" as it does not meet categorical approach.

* As it relates to 4B1.2(c), Inchoate Offenses, I support OPTION 1 and recommend that the Commission amend Application Note 1 to include definition of "substantive offense."

* As it relates to 4B1.2(b), Offer to Sell, I recommend that 2L1.2 definition of "controlled substance offense" be revised accordingly.

Due to time constraints (30-minutes), additional comments are forthcoming under separate email cover.

Respectfully submitted,
/s/ Hanalei Aipoalani, [redacted]
FDC Honolulu
P.O. Box 30080
Honolulu, HI 96820

P.S. Please send a Confirmation Receipt email to my wife at [redacted]. Thank you!

From: ~^! AKWUBA, ~^!LILLIAN
Subject: [External] ***Request to Staff*** AKWUBA, LILLIAN, [redacted]
Date: Sunday, March 5, 2023 9:05:49 AM

To: inmatemessage@ussc.gov
Inmate Work Assignment: none

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Judge Reeves,
I am writing to tell you that I support the proposed amendments to the compassionate release policy statement. We need the changes you are considering. I especially urge you to adopt the proposal about changes in the law that would make the sentence unfair. I know compassionate release is rarely used, but i think that it is important that people who are serving long sentences that could be different today have a chance to make their case to the court. I know compassionate Release is not automatic, but a court should have the authority to take a look and decide whether a person deserves to go home.
Let me tell you why this matters to me. I was indicted and convicted by Jury and sentenced to 10 years imprisonment while all my co-defendants were given probation. I am being penalized for exercising my Sixth amendment rights. I was offered a plea deal for 15 months to 21 months and when i refused i was naive and without good counsel was tried and got 120 months for what everyone else got probation. The kingpin of the case got 145 months which put me on almost same level as him. I did not understand how the law works and end up being enhanced to get my points during sentencing 10 to life sentence. I was appalled after i schooled myself in the legal matters at the injustice applied to me. I was horrified and with the new substantive law that recently came out on similar case to mine, i am praying that it could be applied to me. With compassionate release, i could have benefitted from better health care and not be insulin dependent at this time. I have uncontrolled diabetes mellitus, hypertension, and asthma. COVID-19 nearly killed me and i am still in prison. Th eating habit here is appalling and has not helped my cause. My health is deteriorating instead of stable and with compassionate release changes that is been proposed, i could benefit from it and save me from complications of diabetes mellitus which is cardiac arrest from coronary artery disease. I have 5 children and a husband and they need their mother alive and well.
I also support the other proposed changes to compassionate release, including for public health, for medical care the BOP cannot provide, for the parents or adult children with disabilities who need us home to care for them. and for survivors of sexual abuse or physical assault resulting in serious bodily injury.
I also ask that you take in consideration rehabilitation for those with long sentences that could have benefitted with alternate to imprisonment. I am a minimum security, with minimum recidivism who is housed in a camp since i self-surrender and have maintained clean and good conduct. I have been here 42 months and it would have save the tax payer much money to be released on work furlough as long as i m maintained good legal employment. As an out custody, i have supervision monitoring and this could be achieved by use of GPS and home confinement. The economy crisis in the world and all over the nation has caused undue burdens to family and it is severely affecting my family. My husband is unable to as many other family meet up the inflation demands. I have 5 children and all are adults except for my baby boy that is 14 years old. My husband is a truck driver and could not drive full-time because of his care. Our other children are in college and in different states. It is a big challenge for a truck driver to be on the road all over the country while a minor child is at home. I could be at home taking care of him while my husband get the much needed income. Our home is been foreclosed on and he is struggling to meet our needs while i am here in prison doing nothing. There is no job in the prison and i have to meet my financial responsibility being

taken quarterly by the BOP making my husband responsible for it also as well as the upkeep of my family.
Finally, please give judges the authority to identify compassionate release grounds other than those they have now. We learned during the pandemic that it is impossible for you to describe everything that might move the court to consider lowering a sentence. Those things will be rare, but they will occur. Thank you so much for addressing this important issues with a set of proposed changes that could bring relief to people whose sentences no longer fit the crime. And thank you for making it easy for incarcerated people like me to tell you what we think.
Sincerely
Lilian Akwuba

From: ~^! ALLUMS, ~^!YONELL
Subject: [External] ***Request to Staff*** ALLUMS, YONELL, [redacted]
Date: Thursday, January 19, 2023 8:34:23 PM

To: Sentence Committee
Inmate Work Assignment: Facilities

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I agree with the proposed amendment 1b1.3 relevant and or acquitted conduct should only be applied if defendant plead guilty to charges or found guilty by jury. I agree as many others why would the government or any attorney allow a defendant to go to trial and knowing if they are acquitted but,convicted on a lesser included offense the government gets another bite at the apple and still apply what the defendant was acquitted to enhance there sentence. If the proposed amendment is accepted it she be Retroactive to defendants that proceeded to trial. thank you for you time

From: ~^! ANDREWS, ~^!ANTHONY
Subject: [External] ***Request to Staff*** ANDREWS, ANTHONY, [redacted]
Date: Friday, January 13, 2023 12:50:33 PM

To: Sentencing Commission
Inmate Work Assignment: Orderly Hatteras East

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I agree with all proposal's. I would request in proposal # 3 that the status point found in U.S.S.G. 4A1.1(d) be eliminated and made retroactive. Thanks

From: ~^! ANTOINE, ~^!AMANZE
Subject: [External] ***Request to Staff*** ANTOINE, AMANZE, [redacted]
Date: Saturday, February 25, 2023 5:49:14 PM

To: Everyone
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Message 2:

I also wanted to bring to your attention the issue that is currently being spoke about, acquitted conduct.

Acquitted conduct is totally not fair. Please explain how is it fair. Let me again use me as the example. I went to trial for allegedly transporting firearms from West Virginia to New York which is insane because I was never caught transporting any firearms. Just someone word of mouth got me indicted and convicted after a 3 day trial. After trial i was found not guilty for transporting 3 firearms to New York from West Virginia but I was still given points towards my sentence guidelines as if I transported these firearms to New York which is not fair because I was found not guilty of that charge after trial.

That is like saying someone goes to trial for murder and get found not guilty after trial on all counts but the judge still say "NO I AM STILL GOING TO SENTENCE YOU FOR THESE MURDER CHARGE YOUI WAS JUST FOUND NOT GUILTY OF". Is that fair to you?

What people need to do is ask yourself if you was in my shoes would you think I was treated fairly for being sentence for a crime I was found not guilty of? One of the problems is no one ever put themselves in the other person's shoes and just make laws that has no logically reasoning and make laws that do not effect them but effect others. So with that type of mindset unfair laws will be made because it does not effect the lawmaker nor anyone he is close to so they do not care if it make sense or not.

From: ~^! ARBAUGH, ~^!JAMES DANIEL
Subject: [External] ***Request to Staff*** ARBAUGH, JAMES, [redacted]
Date: Tuesday, February 28, 2023 10:05:36 AM

To: Sentencing Commission Comments
Inmate Work Assignment: FPI ASMBL1 / Unicor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Here are a few additional comments requested by the Commission: 88 FR 7180:

Item 1, First Step Act - Reduction in Term of Imprisonment Under 18 U.S.C. 3582(c)(1)(A) at 7182:

I fully agree with the inclusion of all of the enumerated reasons for extraordinary and compelling reasons. I am especially in favor of the inclusion of (b)(5) - Changes in Law and (b)(6) Other Circumstances [Option 2] is my preferred wording.

Issues for Comment (Item 3) - The guidelines should allow for the BOP and the Court to determine, on an individual case-by-case basis, if the defendant's circumstances are extraordinary and compelling, when not explicitly enumerated in the sentencing guidelines.

Issues for Comment (Item 4) - The provision for sexual assault or physical abuse should be expanded to include those committed by another inmate. When the BOP allows such conduct to occur, they are culpable for failing to provide reasonable security, in violation of the inmate's 8th Amendment right to reasonable security and freedom from cruel and unusual treatment. The BOP should be held responsible by the potential release of the victim through compassionate release.

Item 8, Acquitted Conduct at 7224:

At the very heart of this issue are the protections guaranteed under the 5th and 6th Amendments to the United States Constitution; that of due process and one's indefeasible right to trial. While a guarantee of "beyond a reasonable doubt" is required for a conviction at trial, a lower bar of "preponderance of the evidence" has been held to be the minimum standard to be applied at sentencing proceedings.

As acknowledged in the Request for Comment, Acquitted Conduct is not specifically addressed within the Sentencing Guidelines, however, the commentary to USSG 6A1.3 instructs that "in determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial." and, "[A]ny information may be considered" so long as it has sufficient indicia of reliability to support its probable accuracy. This standard of "probable accuracy" runs afoul of the United States Constitution, F.R.Crim.P. Rule 32 and USSG 6A1.3 when the loss of life, liberty or property are at stake.

The Commission seeks comment (item 2 in this section) on whether the limitation on the use of acquitted conduct is too broad or too narrow. Even with these proposed changes, the use of acquitted conduct is still too broad. The only permitted use of acquitted conduct should be when it is included as part of a plea agreement or if it is admitted

by the defendant during a guilty plea colloquy. Acquittals for any reason (e.g.. jurisdiction, venue, or statute of limitations) should still be considered acquitted conduct and not used. Investigators and the Government must be held accountable for inferior work that leads to acquitted conduct.

I would ask that this proposed change be made retroactive or, in the alternative, this guideline change be included within the definition of Extraordinary and Compelling reasons for Compassionate Release under USSG 1B1.13.

Respectfully submitted,

James Arbaugh
[redacted]
FCI Fort Dix
P.O. Box 2000
Joint Base MDL, NJ 08640

From: ~^! BALLARD, ~^!BRAHEIM
Subject: [External] ***Request to Staff*** BALLARD, BRAHEIM, [redacted]
Date: Saturday, March 4, 2023 8:06:06 PM

To: N/A
Inmate Work Assignment: ORDERLY

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I believe and have also my self have experienced Acquitted Conduct and which it's unfair and unconstitutional. The U.S. Constintution states as u being an American. You have the right to go to trial and to be judged by an Jury of ur peers. if a Jury of ur peers find u not guilty of changes at such trial, why should those same charges or other enhancements be held and used against u at sentencing when you were not for guilty of such by Jury? somethings that were never even presented to the Jury even used to enhance u at sentencing. it's unfair for such to be done as being an American under The U.S. Constintution. Acquitted Conduct is unconstintutional/unfair and should no longer be allowed to be used. should be made retroactive for those who it has affected as well.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

George Barter

Topics:

3. Firearms Offenses

7. Criminal History

9. Sexual Abuse of a Ward Offenses

Comments:

Violent Crime reduction has a very simple first step. Limit violent offenders ability to repeat offend. You can limit a violent offenders ability to offend by keeping them in prison.

Criminal history is a simple way to predict future criminal activity. Let us, please, put common sense back into use.

Submitted on: January 27, 2023

From: ~^! BAUER, ~^!MICHAEL
Subject: [External] ***Request to Staff*** BAUER, MICHAEL, [redacted]
Date: Saturday, January 28, 2023 9:06:32 PM

To: U.S. Sentencing Commission
Inmate Work Assignment: Yard 6-10

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I agree with the department that the imposition of a Zero-Point Offender scheme would be beneficial and comports with the findings. However, given that America's federal prisons are already full and that America issues the longest sentences (but does not have the lowest rate of recidivism) there obviously needs to be a shift from incarceration to rehabilitation, especially for first time offenders. I believe the commission should implement Option 2, in that those with juvenile offenses would qualify and those with misdemeanors already identified by the Commission to not count towards criminal history. People can not be held to the same standard for; having a history of extremely petty crimes, for being a minor who has not been fully brain developed, or being a first time offender especially when said person have led otherwise healthy, wholesome, and productive lives. I believe such persons deserve a chance at rehabilitation and correction through clinical support. America has more than adequate resources in both public and private sectors to address the needs of these individuals, without subjecting these largely productive and benign citizens to lengthy periods of incarceration, which impact not only their lives but those of their families, businesses, and communities.
(To be continued)
(1 of 2)

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Julie Bernstein

Topics:

1. Compassionate Release

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

3. Firearms Offenses

4. Circuit Conflicts Concerning §3E1.1(b) and §4B1.2(b)

5. Crime Legislation

7. Criminal History

9. Sexual Abuse of a Ward Offenses

11. Fake Pills

Comments:

I endorse the proposed amendment to revise the policy statement to reflect that 18 U.S.C. § 3582 (c)(1)(A), as amended by the First Step Act, authorizes a defendant to a file a motion seeking a sentence reduction. Moving "extraordinary and compelling reasons" for re-sentencing from the Commentary to the guidelines makes sense as does the addition of new subcategories to the "Medical Condition of the Defendant" and the additions to the "family circumstances" that would support release of a defendant. I think that it is necessary to bracket the possibility of adding a more general subcategory that could encompass another immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member because in American society today we have a range of "family-like relationships, including for example, individuals often living with aunts, uncles or grandparents. Also, people whose gender and/or sexual identity results in their rejection by their birth family causes them to "adopt family" who are not biologically related to them.

It is imperative to consider a defendant's serious injury from the assault or abuse by corrections officers as a reason for early release. First, these abuses are criminal and the defendant is entitled to redress or at least to protection from future injury. The barrier of qualified immunity is substantial so many abuses go unassuaged. Second, incarceration must be rehabilitative. Abuse by the system that is supposed to facilitate rehabilitation is highly destructive mentally to the

victim and impedes their rehabilitation.

Changes in the law must prompt reconsideration of prison terms, this was the intention of the First Step Act with respect to cocaine sentencing and must apply to all laws.

The options provided to address the consideration of the above enlargements of categories for reconsideration of sentences are somewhat confusing. It appears that Option 2 is the one that offers the broadest possibility for reconsideration of sentencing. Assuming that is correct I support this option. As defendants age, their risk of recidivism decreases. Coupled with the important considerations outlined above there is important justification to take every opportunity to reevaluate an incarcerated person's situation and to do it in a timely manner.

With respect to amendments responsive to directives in the Bipartisan Safer Communities Act, I have two concerns with both Options 1 and 2. While I fully support enhancements for gun-trafficking, purchases I am concerned about the grounds for establishing that the defendants knowingly transferred guns to either known terrorists or gang members. There have been several recent cases where FBI informants encouraged and facilitated plans to commit terrorism. One informant instructed a BLM activist to make a gun purchase on their behalf for which the activist was convicted. I do not believe that someone purchasing a gun under these circumstances should be given an enhancement based on their knowledge of purchasing it for a terrorist because it may be highly likely that they would never have done this were it not for the pressure from the over-zealous informant. Second, many individuals included in gang databases maintained by fusion centers have been listed for highly dubious reasons such as wearing colors associated with a gang or having a conversation with a known gang member(s). There have been cases of charges being overturned in court in this type of situation and recently many people(over a thousand in some cities) have been removed form gang databases because of a lack of evidence of membership.(Please see: https://theintercept.com/2021/06/18/dc-police-gang-database-hacked-emails/, https://www.latimes.com/california/story/2020-07-10/3-lapd-officers-charged-with-falsifying-records-to-claim-people-were-gang-members-associates, https://www.techdirt.com/articles/20220123/19535248344/first-circuit-tears-into-boston-pds-bullshit-gang-database-while-overturning-deportation-decision.shtml

Whereas I understand that your recommendations must comport with the Safe Communities Act, I am concerned about dismissing any concerns over a 5 year-old misdemeanor domestic violence conviction in a dating relationship. My concern comes from the fact that half of women victims do not report domestic violence (https://usafacts.org/articles/data-says-domestic-violence-incidents-are-down-but-half-of-all-victims-dont-report-to-police/) so the fact that the conviction is 5 years old may have little bearing on whether the defendant has committed domestic violence in a more recent relationship.

Part A of the proposed amendment to §4B1.2, designed to supplant categorical approach and modified categorical approaches applied by courts in the context of §4B1.1 with guidelines to define "crime of violence" and "controlled substance offense" makes sense but each of the

guidelines must be carefully considered.

With respect to Part A of the proposed amendment expanding the applicability of the safety valve provision, Option 1 is preferable because it leaves the door open to the more generous (to the defendant) interpretation of
the criminal history criteria in §5C1.2 and I believe that erring on the side of freedom is foundational to our justice system. revise
I support Part B of the proposed amendment to §4B1.2 clarifying the definition of robbery. However, I think that all threatened uses of force should be considered equal regardless of "intention to overcome a victim's resistance" because the latter is too subjective to properly evaluate and intentions are irrelevant to the injured person.

I see no reason to insert into §2K2.1(b)(4) a mental state (mens rea) requirement that the defendant knew, or had reason to believe, that the firearm was stolen, had an altered or obliterated serial number, or was not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C.
§ 921(a)(16)). Gun owners must be responsible and both they and any gun sellers must be held culpable for ghost gun purchases.

Pertaining to recidivism requirements for §2K2.1(a, the Commission should increase the penalties if the defendant committed the instant offense subsequent to sustaining one or more convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm and these should be treated similarly to prior convictions for a crime of violence or a controlled substance offense.

The amendment of §3E1.1 in Part A properly supports the Constitutional rights of a defendant and credits them for substantial time saved in trial preparation. Suppression of illegally obtained evidence serves not just the individual but reinforces the rules that protect Constitutional Rights for all. An individual who pleads guilty should not be denied the right to appeal for a shorter sentence.

To resolve Circuit Conflicts Concerning §4B1.2(b), I believe that Part B, Option 1 is appropriate. It is concerning to me that in an era when physicians deliver care across borders via Telehealth that could face federal charges based in state definitions of controlled substances. If the Commission were to amend §4B1.2(b) to include a definition of "controlled substance," it should also amend Application Note 2 to §2L1.2 to include the same definition of "controlled substance" for purposes of the "drug trafficking offense"

Amending the Commentary to §§4B1.5 and 5D1.2 to exclude offenses under 18 U.S.C. § 2421A from the definitions of "covered sex offense" and "sex offense." is important. Transmission of non-sexual information should not be regarded as a sex crime.

The Commission should amend the definition of "firearms" in Application Note 1 of §2K2.1 to include devices which are "firearms" under section 5845(a) but not section 921(a)(3). We need strong deterrents against converting a weapon into a machine gun. The Commission should amend §2K2.1 to increase penalties for defendants who transfer a firearm to a minor.

With respect to amending §4B1.2(b)regarding how inchoate offenses involving a crime of violence or controlled substance offense should be reviewed, I support Option 2 or any option that compels more review of the details of the original offense. The current propensities to plea bargain and to list people with relatively thin evidence on gang databases can lead to false confessions for aiding, abetting and conspiracy and before enhancing sentences, more rather than less attention should be paid to the details supporting aiding, abetting and conspiracy convictions.

I am in favor of Part B of the proposed amendment to change the Commentary to §5C1.1 because despite some evidence that having one prior one point conviction makes recidivism somewhat more likely than having no criminal history, the evidence that lengthier incarceration increases recidivism(https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220621_Recidivsm-SentLength.pdf)strongly suggests that sentencing someone with even one prior non-violent and non-serious offense to alternatives to incarceration is more likely to lead to rehabilitation than incarceration.

I support Part C of the proposed amendment to the Commentary of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to suggest that a downward departure may be warranted if the defendant received criminal history points from a sentence for possession of marijuana for personal use, without an intent to sell or distribute it to another person. In 39 of 50 states, marijuana has been legalized and there is no logical justification for using past marijuana convictions to enhance someone's sentence.

Submitted on: February 26, 2023

From: ~^! BISHOP, ~^!NICHOLAS
Subject: [External] ***Request to Staff*** BISHOP, NICHOLAS, [redacted]
Date: Tuesday, February 28, 2023 6:50:03 PM

To: USSC
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear USSC,

Please find my comments below regarding the implementation of USSC Section 4C1.1.

The commission's proposed guideline addition of 4C1.1 is an opportunity to partially rectify issues of "routine" sentencing enhancements for sexual offense guidelines. As the commission's 2021 report, Federal Sentencing on Child Pornography: Non-Production Offenses, has found, the current sentencing guidelines for certain sexual offenses includes enhancements that are applied in 95% of all cases.

This overwhelming application of certain enhancements negates the purpose of specific offense characteristics. The guidelines contemplated by the commission, and others with similar issues, fail to distinguish between offenders based on culpability and dangerousness by having standard penalties. For example, the 2-point enhancement for use of a computer in the offense is nearly ubiquitous for every case over a whole range of sexual offenses and their corresponding guidelines.

A 2-point reduction for sexual offenders with a zero point criminal history will ameliorate this issue. However, the commission should select the option to exclude only repeat and dangerous sexual offenders, as doing otherwise would permit a problem the commission acknowledged in 2021 to continue unabated.

Thank you for your consideration.

From: ~^! BONILLA, ~^!JUAN CARLOS
Subject: [External] ***Request to Staff*** BONILLA, JUAN, [redacted]
Date: Wednesday, February 15, 2023 12:20:05 PM

To: sentencing commission
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The Sentencing Commission has considered that Acquitted Conduct no longer can be consider for relevant conduct.
The Sentencing Commission should add Uncharged Conduct.
The Sentencing Commission should consider adding that Dismissed Conduct can be used only for enhancements with prior written notice that the increase by levels whether its 2 levels or more.
The Sentencing Commission should also consider if a person has not been charged with an offense that is chargeable and did not charge the offense but, increase the base offense by using enhancement 2 levels or more.
(Example) If a fireman was found in the commission of offense, but never charged the enhancement should not apply.
The Sentencing Commission should consider the Methamphetamine Mixture and Methamphetamine Actual or Ice should be considered the same whether its 10 percent or 99 percent purity. Why? This is the same sentencing disparity we have experienced for the last 30 years a grave miscarriage of justice. We should not kick this can down the road.

Thank you for your time and consideration, any changes will be highly appreciated.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Joy Bradford, Friend/Advocate for Reform

Topics:

1. Compassionate Release

Comments:

I am writing this correspondence in reference to a federal inmate. This inmate was in federal custody at Big Sandy in Martin County, Kentucky where he sustained a brutal beat down by employees of the facility. These are the same employees with whom his well-being and safety were entrusted.

Correctional officers participate in in-depth classroom-based instruction in corrections principles, concepts and procedures with practical skills related to defensive tactics, subduing violent inmates and riot control. Further, correctional officers participate in training programs that potentially introduce basic legal concepts necessary to serve the population. These training programs include constitutional law, civil rights law, and use of force. A strong sense of purpose, professionalism, and teamwork remain essential dynamics to effectively manage the population and the institution.

But what happens when correctional officers defer from their training and effective methodology practices? What kind of impact can this have on the population they serve, specifically this inmate?

I'm reminded of an interview the Director of The Bureau of Federal Prisons, Colette Peters gave to the AP in 2022. Listed below are some pertinent and factual statements she made.

- ….wants to reorient the agency's recruiting and hiring practices to find candidates who want to "change hearts and minds" and end systemic abuse and corruption.
- ….her ideal prison worker is as interested in preparing inmates for returning to society after their sentences as they are in keeping order while those inmates are still locked within the prison walls.
- ….vowed to have zero tolerance for any employee who abuses their position or sexually abuses

inmates in their care. "We need to continue to hold people accountable, let people see and understand that if you engage in this type of egregious activity, you're going to prison," she said.

The correctional officers employed at Big Sandy made conscious decisions to brutalize this inmate, thus violating his rights as well as numerous breeches in policy. Although they may potentially be held accountable for their actions, the inmate has to live with the repercussions of their unprovoked attack on him.

I believe a consideration for compassionate release or similar should be considered in this case. What he endured cannot be undone, but some good can come of this. I'm a believer in second chances, and potentially more chances.

Currently, I'm enrolled in college majoring in criminal justice with concentrations in corrections and substance abuse. On my academic journey, I've learned that the system we have in place is not conducive to necessarily reforming inmates who will re-enter society. Often, recidivism occurs and the door is revolving. I also believe we have to start somewhere in making small changes that can lead to bigger changes. The aforementioned is implementing reform measures.

In conclusion, I ask that you consider compassionate release or similar for this inmate. At the hands of those who were entrusted with his safety and well-being, he suffered greatly. He will live with the psychological impact of the beat down for the duration of his life. No one is deserving of the mistreatment he sustained, and this includes individuals incarcerated. We can't right a wrong, but we can acknowledge it, implement preventive ensures, hold employees accountable, and offer an opportunity to an inmate to reintegrate back into society and make every effort to flourish.

In this instance, I am advocating for compassionate release on behalf of this inmate. If what we are doing is not working, we return to the drawing board and make changes accordingly. Why not return to that same board per se and change course offering this young man this opportunity? Doing so is implementing "right-ing a wrong" as best we can. Don't we have to start somewhere?

Respectfully submitted,

Joy Bradford

Submitted on: February 28, 2023

2/8/23

Hello Carton Reeves,

First off I hope all is well with you. Most inmates dont have access to your proposed amendments. So they dont even know what to comment on. My family sent me most of the 290 pages. In my comments I talk about how should a "controlled substance" be defined. When a plea, found guilty, or sentencing in State Court they do not inform the defendant that it could be used against them in another jurisdiction such as federal court. I think its unfair to propose that the definition would include "applicable under state law." I not only hope but pray you decided to propose "substances that are specifically included in the CSA." Thank you in advance and have a blessed day.

Sincerely
Brad Bradley

Dear Sentencing Commission,

In your amendments for Circuit Conflicts states:

"Part B would amend 4B1.2 by adding a definition of the term "controlled substance offense" in 4B1.2 (b) only covers offenses involving substances controlled by federal law."

"Opinion 1 would set forth a definition of "controlled substance" that adopts the approach of the Second and Ninth Circuits. It would limit the definition of the term substances that are specifically included in the CSA."

"Opinion 2 would set forth a definition of "controlled substance" that adopts the approach of the Fourth, Seventh, Eighth, and Tenth Circuits. It would provide the term "controlled substance" refers to substances either included in the CSA or otherwise controlled under applicable state law."

I noticed in this caselaw that there are more Circuits then the Second and Ninth Circuits that sided together. It is the Majority of Circuits sided with the Second and Ninth Circuits. Recently the Tenth, Fourth, and First Circuits have joined the Second and Ninth Circuits. See, (United States v Williams, 48 F. 4th 1125 September 8, 2022 Tenth Circuit); (United States v Hope, 28 F. 4th 482 March 9, 2022 Fourth Circuit); (United States v Abdulaziz 998 F. 3d 519 June 2, 2021 First Circuit).

There is a highlighted caselaw attached to this letter. Where it states the Circuits in conflict over the issue you proposed in the amendment I refered to on the first page of this letter. See, (United States v Miller 480 F. Supp. 3d 619) on down. You have Second, Fifth, Eighth, Ninth, Tenth, First, and the Fourh Circuits on one side. And the Sixth, Seventh, Eleventh Circuits on the other side. The Majority of the Circuits beleive that it should be substances that are specifically included in the CSA.

page 2

Siding with those Circuits that oppose the Majority of the Circuits would create unwarranted sentence disparities among defendants with similar records. See 28 USC §991 (b) (1) (B) (stating that the Sentencing Commission must set policies to avoid unwarranted sentencing disparities among defendants with similar records.) By siding with the Majority of Circuits and proposing "Opinion 1" you would avoid the sentencing disparities and create uniformity where it is needed in federal sentencing. It makes a lot of sense to make this retroactive so those who suffered a harsher sentence have their sentence corrected since the courts cant go back and give those defendants who got a lesser sentence more time. Thanks for hearing me out. I hope to hear back from you regarding this letter.

Sincerely
Brad Bradley

Brad Bradley [redacted]
FCI Hazeltol
P.O Box 5000
Bruceton Mills, WV 26525

{480 F. Supp. 3d 619} such plant, its seeds or resin; but shall not include tetrahydrocannabinols, the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, cake, or the sterilized seed of such plant which is incapable of germination.35 Pa. Stat. and Cons. Stat. § 780-102(b) (2007); id. (2008); id. (2019). This definition contains no mention of tetrahydrocannabinol or "THC" concentration.

We then compare this element to the corresponding element in the federal offense. See Singh v. Attorney Gen., 839 F.3d 273, 284 (3d Cir. 2016). The federal "offense" here is a "controlled substance offense" as defined by Section 4B1.2(b) of the Guidelines. That section states,

> the term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance){2020 U.S. Dist. LEXIS 9} or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.U.S.S.G. § 4B1.2(b). Of particular relevance for Miller's case is the final clause: "possession of a *controlled substance* . . . with intent to . . . distribute[] or dispense." Id. (emphasis added). Whether Miller's **marijuana** conviction qualifies as a controlled-substance offense turns on the meaning of the term "controlled substance" as used in Section 4B1.2(b).

1. ***Federal CSA Definition of "Controlled Substance"***

Courts are divided on whether "controlled substance" in Section 4B1.2(b) is governed by the federal CSA schedules.4 On one side of the split stand the Second, Fifth, Eighth, Ninth, and possibly Tenth Circuits. The Second Circuit has directly held that a "controlled substance" under Section 4B1.2(b) must be one that is contained in the federal CSA's schedules.5 See United States v. Townsend, 897 F.3d 66, 68, 71 (2d Cir. 2018). In a thoughtful and well-reasoned opinion, the Townsend court emphasized the "need for uniform application" of the federal Guidelines, as well as the presumption that "application of a federal law does not depend on state law unless Congress plainly indicates otherwise." Id. (citing Jerome v. United States, 318 U.S. 101, 104, 63 S. Ct. 483, 87 L. Ed. 640 (1943)). The Fifth, Eighth, and Ninth Circuits have employed similar{2020 U.S. Dist. LEXIS 10} reasoning in finding that the term "drug trafficking offense" in Section 2L1.2-with a definition nearly identical to Section 4B1.2(b)'s "controlled substance offense"-is defined by the federal CSA and its schedules. See United States v. Gomez-Alvarez, 781 F.3d 787, 793 (5th Cir. 2015); United States v. Leal-Vega, 680 F.3d 1160, 1166 (9th Cir. 2012); United States v. Sanchez-Garcia, 642 F.3d 658, 661 (8th Cir. 2011); see also United States v. Walker, 858 F.3d 196, 200 n.4 (4th Cir. 2017) (noting that "drug trafficking offense" under Section 2L1.2 is "substantively identical" to Section 4B1.2(b)). {480 F. Supp. 3d 620} The Tenth Circuit has signaled its agreement with the Ninth Circuit in an unpublished decision. See United States v. Abdeljawad, 794 F. App'x 745, 748 (10th Cir. 2019) (nonprecedential) (quoting Leal-Vega, 680 F.3d at 1167).

On the other side of the divide are the Sixth, Seventh, and Eleventh Circuits, although it appears that only the Seventh Circuit has issued a precedential opinion on the matter. See generally United States v. Ruth, 966 F.3d 642 (7th Cir. 2020) (relying on United States v. Hudson, 618 F.3d 700, 701 (7th Cir. 2010)); United States v. Peraza, 754 F. App'x 908 (11th Cir. 2018) (nonprecedential) (relying on, *inter alia*, United States v. Smith, 775 F.3d 1262 (11th Cir. 2014)); United States v. Sheffey, 818 Fed. Appx. 513, 2020 U.S. App. LEXIS 20423, 2020 WL 3495944 (6th Cir. June 29, 2020) (nonprecedential); United States v. Smith, 681 F. App'x 483, 488 (6th Cir. 2017) (nonprecedential). The gist of the Seventh Circuit's reasoning in Ruth is that Section 4B1.2(b) does

not explicitly cross-reference or import the federal CSA, whereas other definitions in the career-offender guideline and Section 2D1.1 specifically incorporate federal statutes. See Ruth, 966 F.3d at 651-52. Ruth also relies on a prior Seventh Circuit decision which determined that "counterfeit substance" in Section 4B1.2(b) should be defined by how it "is commonly understood" and should be given "its natural meaning" rather than cabining it "to{2020 U.S. Dist. LEXIS 11} a particular state's concept of what is meant by that term." Id. at 652 (quoting Hudson, 618 F.3d at 703); see also id. at 654.6

We are persuaded by the *ratio decidendi* of the Second, Fifth, Eighth, and Ninth Circuits. We agree that uniformity in federal sentencing is paramount, particularly with respect to application of the career-offender enhancement. Indeed, it is one of the primary goals of the Guidelines. See U.S.S.G. Ch. One, Pt. A(1)(3) (explaining that Congress sought "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders"). The severe consequences of career-offender classification should not be contingent on a particular state's decision regarding which substances to control. See Townsend, 897 F.3d at 71; Leal-Vega, 680 F.3d at 1166 (quoting Taylor, 495 U.S. at 589). We likewise concur with Leal-Vega that "controlled substance"-unlike "counterfeit {480 F. Supp. 3d 621} substance"-is a term of art that simply is not susceptible to an ordinary, commonly understood meaning untethered to a statute; rather, whether a substance is in fact "controlled" necessarily depends on the existence of a local, state, or federal law deeming it so. Leal-Vega, 680 F.3d at 1166-67.

We are further influenced{2020 U.S. Dist. LEXIS 12} by our court of appeals' analysis in Glass dealing with closely related issues. In discussing the defendant's argument concerning Section 780-113(a)(30)'s term "deliver" as defined by Section 780-102(b), the Glass court *sua sponte* identified the federal CSA as the "federal counterpart" to the Pennsylvania CSA for purposes of the career-offender challenge under review. See Glass, 904 F.3d at 322 (citing 21 U.S.C. § 802(8) (defining "deliver")). The panel could have used an ordinary, generic meaning of the term "deliver" when addressing the defendant's argument, but it did not. Instead, the court looked to the federal CSA's definitions to inform whether "deliver" under Pennsylvania law swept more broadly than Section 4B1.2(b)'s language. See id. We see no reason why the federal CSA's definition of "controlled substance," see 21 U.S.C. § 802(6), should not also be the "federal counterpart" that is looked to when determining the meaning of the term "controlled substance" in Section 4B1.2(b).

To be abundantly clear, we hold that, for purposes of career-offender classification, the term "controlled substance" in Section 4B1.2(b) "must refer exclusively to those drugs listed under federal law-that is, the [federal] CSA." Townsend, 897 F.3d at 71.

From: ~^! BROWN, ~^!SHORELL
Subject: [External] ***Request to Staff*** BROWN, SHORELL, [redacted]
Date: Monday, February 27, 2023 3:06:09 PM

To: U.S. Sentencing Commission
Inmate Work Assignment: unicor7

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

This is inregards to the eliminating the use of acquitted conduct at sentencing. I believe it is very important because alot of times.The arresting agency who passes certain charges off to the federal government wouldnt get say 10 yrs for resisting arrest an poss of a firearm by a convicted felon whose prior conviction was not even a crime of violence.But by passing these charges off to the higher agency who then uses acquitted conduct as an inhancement tool isnt only unjust, unfair to the defendant it is another tool that the judicial system uses biasly to otherwise give out more time to than is nessasary, Alot of cases involving the minority groups who suffer mostly ,Due to this disregard an misconduct of not receiving a just sentence for an otherwise harmless infraction. A person needs not sit 10 years in a penal system for a minor poss of a 922g for instance.Its obsessive an it shows lack of proper logical overseeing judgement by the court appointed officials.Who in any case main objective is to weigh the charges on one hand an give a just an fair sentence fit for the crime an its nature on the other, instead of just giving out harsh hardtime sentences to defendants.The federal goverment who leads the way of justice must stipulate in all an not just some cases programs an counseling to help rehibilate an lower the residivisim, This must be incorporaterd in the hope that by taking an indept look into the persons life an history, that the system can help to detour that person from repeating such behavior.. But just callously handing out harsh an obsessive sentences isnt the solution..Because just going by a set manual as if everyone who does this or that is the same is unjust an it is a machine that can be used to greatly undermine any form of justice ..

From: ~^! BUDDEN, ~^!LEANDRE
Subject: [External] ***Request to Staff*** BUDDEN, LEANDRE, [redacted]
Date: Friday, March 3, 2023 1:20:40 PM

To: judge reeves
Inmate Work Assignment: food service

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Please make it retroactive to not sentence defendants for conduct they are acquitted of by a jury of their peers!What is the purpose of a jury trial if the judge has the power to disregard their findings??That's an injustice to the jury as well' for them to take time away from their jobs and families to hear cases and the judge over rides their decision!

Thanks!

From: ~^! CALIX, ~^!ANDRE
Subject: [External] ***Request to Staff*** CALIX, ANDRE, [redacted]
Date: Friday, January 20, 2023 8:19:55 AM

To: U.S. Sentencing Commission
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

With regards to the proposal pertaining to 1B1. inchoate offenses, I think the language in which the judge shall not consider inchoate offenses when determining career enhancement is appropriate given the fact that it seems fundamentally unfair to provide further punishment for offenses that are not complete offenses or carried through with for one reason or the other whatever that reason may be.

From: ~^! CARTER, ~^!DENNIS
Subject: [External] ***Request to Staff*** CARTER, DENNIS, [redacted]
Date: Thursday, January 19, 2023 9:20:09 AM

To: whom
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

how yall doing we thought that yall were goin to make things better concerning people doing a long sentence for non-violent crimes i dont understand why yall would get rid of the categorical approach when the career offender guideline and the 851 enhancement is the worst unjust of them all i dont understand why yall will try to rid that when it saved thousands of people including me from serving a sentence way more than necesary i think yall should not get rid of the categorical approach and leave that part the way it is cause its not fair that people have to do 12 to 15 minimum for crimes they already did in the past yall need to work on mandatory minimums its way to many people doing 15 20 yrs for non-violent crimes its not fair its seems to me u guys trying to make things worse in my opinion

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Brian Keith Casper, Inmate

Topics:

8. Acquitted Conduct

Comments:

Acquitted Conduct Guideline Amendment

I am requesting that the Acquitted Conduct Sentencing Guideline Amendment be made retroactive.

The United Stated legal system is based on Due Process. Everything from the way people are arrested, charged, and taken to trial has to fall under specific guideline to maintain Due Process, however the Supreme Court case, U.S. vs Watts, 1997, has gone beyond the Due Process standard by allowing a judge to determine guilt (judge found fact) after a jury has found someone not guilty during a trial.

This lack of Due Process has placed defendants in an unfair position. Even if they are to get acquitted they are still have the possibility of an enhanced sentence.

By making this amendment retroactive, it would correct the mistake that was made 25 years ago and allow the very small percentage of defendant still incarcerated that went to trial to get some relief from an enhanced sentenced.

The Supreme Court in currently weighing whether or not to hear several cases that pertain to the use of Acquitted Conduct, however they have been "RELISTING" these cases pending the decision of the Sentencing Commissions final drafts of the proposed amendments.

Making this amendment retroactive would also not be a burden on the courts due to the very low number of cases that go to trial, the even fewer number of those cases that get an acquittal and an even a fewer number of those acquittals that can be used to enhance a sentence based on that acquitted conduct.

From: ~^! CHAMBERS, ~^!ZACHARY
Subject: [External] ***Request to Staff*** CHAMBERS, ZACHARY, [redacted]
Date: Friday, February 17, 2023 10:05:44 AM

To:
Inmate Work Assignment: CCS SH1

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To whom it may concern,

The commission's proposed guidelines amendments for the impact of status points should be changed. The impact of option 2 and option 3 for criminal history points added under 4A1.1(d) would be significant in determining defendant's criminal history. With the current guidelines calculations, criminal history points added under 4A1.1(d) can be used to substantially over represent the seriousness of a defendant's criminal history, placing a defendant in criminal history categories reflective of typical defendant's who have adult criminal history.

From: ~^! CHAPMAN, ~^!STEVEN M
Subject: [External] ***Request to Staff*** CHAPMAN, STEVEN, [redacted]
Date: Monday, January 23, 2023 8:20:15 PM

To: USSC
Inmate Work Assignment: UNICOR

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Re: Nondiscriminatory Point Reductions for ALL Zero Criminal History Defendants
Dear USSC,

In response to your invitation for public comment to the proposed sentencing amendments, I ask the commission to consider my input regarding Zero Criminal History defendants. While I applaud the slight breakaway from the ruthless sentencing practices, I am requesting fairness and productive function to be integrated into these adjustments. A one to two point reduction should fairly and retroactively apply to ALL Zero Criminal History defendants, regardless of violent, sexual, or death resulting offenses.

In light of recent studies on recidivism and risk assessment data, DOJ's statistics clearly proves that the offenders that are precluded from receiving the point reductions are the less likely ones that will return to prison. Meanwhile, career offenders out of the District of Columbia are routinely being released following murder and rape convictions while having ceased criminal activity. The reasons that they are NOT returning to prison is simply because they age-out of violence and crime. These are the defendants that were convicted under the same statutes and housed in the same prisons as non-D.C. defendants, yet they are given hope and the results are successful. The effects of maturity and incarceration will be even more likely for Zero Criminal History defendants, yet the proposed point reductions are not applicable to defendants with convictions of violent, sexual, and death resulting offenses.

Please reform sentencing by revising point reductions to include ALL first time offenders to restore hope, fairness, safety, and correction to the federal correctional institutions.

Respectfully, Steven Chapman

From: ~^! CIAVARELLA, ~^!MARK A JR
Subject: [External] ***Request to Staff*** CIAVARELLA, MARK, [redacted]
Date: Thursday, January 19, 2023 9:49:41 AM

To: Commission Members
Inmate Work Assignment: A.M. Compound Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am asking for the Sentencing Commission to make the proposed acquitted conduct amendment retroactive. Since approximately 98% of all convictions are obtained by guilty pleas and most trials end with guilty verdicts on all counts, the affect of making the acquitted conduct retroactive will apply to a minimal number of inmates. It makes no sense not to. If the use of acquitted conduct is considered to be unfair now, it was just as unfair when it was used in August of 2011 at my sentencing. Your consideration to this request will be appreciated. Inmate Ciavarella

From: ~^! COLEMAN, ~^!STANFORD RAY
Subject: [External] ***Request to Staff*** COLEMAN, STANFORD, [redacted]
Date: Saturday, February 11, 2023 6:20:10 PM

To: commissioner
Inmate Work Assignment: its

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Comments: Because the Guidelines do not define "conspiracy" in 4B1.2, it should be defined by the "generic, contemporary meaning" of the crime. The generic definition of "conspiracy" includes an overt act as an element, and since the conviction of conspiracy under 21 U.S.C. 846 "does not" require an overt--Thus, "criminalizing broader conduct" than that of the generic offenses. 846 drug conspiracy under 21 U.S.C. 846 no longer qualifies as a "controlled substance offense.

Comments: The fact that Commentary [adds] the offenses of aiding and abetting, conspiring and attempt to the Guidelines should be deemed a [separation of power].

From: ~^! COLEMAN, ~^!STANFORD RAY
Subject: [External] ***Request to Staff*** COLEMAN, STANFORD, [redacted]
Date: Saturday, February 11, 2023 6:35:09 PM

To: Commissioner
Inmate Work Assignment: ITS

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Comments: Rule 10 Considerations Governing Review of Certiorari---A petition for a writ of certiorari should be granted to resolve [All], and any "conflict decision" between the Circuits, and State Court['s] decisions that [conflicts] with other State Courts or United States Court of Appeal.

Comments: The "categorical approach" should be used to determine whether the [instant offense], or prior conviction qualifies as a "controlled substance offense."

From: ~^! COPE, ~^!RANDALL E
Subject: [External] ***Request to Staff*** COPE, RANDALL, [redacted]
Date: Thursday, January 19, 2023 7:05:58 PM

To: Request for Comments on Draft Proposals
Inmate Work Assignment: UNICOR 1

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Please consider the following as you evaluate your draft proposals:
1. Make all the changes in the First Step Act, such as the stacking of 924(c) charges retroactive to inmates already in prison.
2. Under the compassionate release provision of the First Step Act, make stacking of 924(c) charges one of the reasons for granting it under Extraordinary and Compelling Circumstances.
3. Under the compassionate release provision of the First Step Act, make sentence disparity one of the reasons for granting it under Extraordinary and Compelling Circumstances.
4. Under the compassionate release provision of the First Step Act, make post-sentencing behavior (including programming and behavioral changes while in prison) one of the reasons for granting it under Extraordinary and Compelling Circumstances.
5. Under the compassionate release provision of the First Step Act, make having served over 20 years or being over 65 years old one of the reasons for granting it under Extraordinary and Compelling Circumstances.
6. Under the compassionate release provision of the First Step Act, make it so that if you have currently served more time for an offense than courts are currently giving for that offense that is a reason to grant it under Extraordinary and Compelling Circumstances.

Thank you for your consideration.

Randall Cope [redacted], FCI-Greenville, P.O. Box 5000, Greenville, IL 62246-5000

From: ~^! CORNISH, ~^!KOREY KASCHIEF
Subject: [External] ***Request to Staff*** CORNISH, KOREY, [redacted]
Date: Thursday, January 19, 2023 4:49:41 PM

To:
Inmate Work Assignment: food service

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I would like for the safety valve to be more broaden and inclusive to accommodate individuals who qualify for relief under the stature. For instance if you have one of the disqualifying conditions such as a prior 3 point criminal history conviction one shouldn't be disqualified for the relief under the safety valve. You shouldn't have to meet every condition to get relief. Mandatory minimum sentences have over populated the prison system and are causing to much money to the American tax payer. IN order to save Americans money the sentence commission should give relief under mandatory minimums and make all changes retroactive.

From: ~^! CRAWFORD, ~^!RICKY DOUGLAS JR
Subject: [External] ***Request to Staff*** CRAWFORD, RICKY, [redacted]
Date: Tuesday, February 14, 2023 7:50:52 PM

To: Panel
Inmate Work Assignment: Education Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Inchoate Crimes
Conspiracy, Attempt, and Aiding and Abetting
Conspiracy has been interpretated as merely an agreement to commit a crime. Attempt has been classified as not being a crime of violence. Aiding and Abetting has been summarized as an alternative Theory of guilt.
None of these inchoate crimes require "The Defendant" him or herself "Per Se" to commit a Crime none the less a crime of violence or a drug trafficking crime.
What it does, is makes it a lot easier for the prosecutors to convict defendants of crimes they did not personally commit, while also promoting government assistance by those who actually committed the crimes, resulting in the actual criminal recieving a lesser sentence, if any sentence at all. Is this what our American justice system was designed for? There is no way inchoate crimes should be included or even considered for the designation of Career Offenders or Armed Career Criminals, 924(c)'s or anything to do with a crime of violence. In fact, Inchoate offenses should be a lesser included offense with Mitigating factors and sentencing ranges.

From: ~^! CROSBY, ~^!PHILLIP
Subject: [External] ***Request to Staff*** CROSBY, PHILLIP, [redacted]
Date: Saturday, January 21, 2023 6:49:48 PM

To: Board of Commissioners
Inmate Work Assignment: General Maintenance

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Regarding the Commission's proposed priorities for amendment of the Career Offender section of the Sentencing Guidelines at 4B1.2. Option 1 is the preferred option where the elements of inchoate offenses will not be considered because it is in harmony with the governing statute's exclusion of inchoate offenses such as conspiracy and and attempt. Any option that attempts to add to, modify, or rewrite the statute and any form is a violation of the separation of powers principle of the Constitution because only Congress has the power to write legislature. The Commission's authority to promulgate Congress' Federal statutes is not the power to make, modify, or add to the statute drafted by Congress. Rather, it is the power to adopt into regulation Congress' intent as it is expressed by the statute. See Ernst & Ernst v. Hochfelder, 425 US 185, 213-214(1976). 28 USC 994(h) explicitly states for the "controlled substance offense" definition found at 4B1.2(b) to be "an offense described in section 401 of the Controlled Substance Act(21 USC 841), sections 1002(a), 1005, and 1009 of the Controlled Substance Import and Export Act(21 USC 952(a), 955, and 959, and chapter 705 of title 46[46 USCS 70501 et. seq]. Adding any other sections of statutes to 994(h) or elements not found in 994(h) is an abuse of authority and in violation of the Constitution's principles of separation of powers and due process. "The words of the Act are the law... Its clear meaning cannot be so altered. Nor can anything be thus added to it. Nor can putting an example into [Administrative] Regulation add to or change the law as passed." United States v. Ogilvie Hardware Co., 155 F.2d 577, 580(5th Cir, 1946)

Because the guidelines are to be the sentencing court's "starting point and initial benchmark," Gall v. United States, 552 US 38, 49(2007), the Commission must ensure that the guideline provisions the Commission promulgates properly reflect its governing Federal statute. The elimination of inchoate offenses as option 1 proposes is a significant step in that direction on bringing the guidelines in harmony with its pertinent Federal statute pursuant to 28 USC 994(a) and its subsequent sections outlining the duties of the Commission to fulfill the objectives of the Sentencing Reform Act of 1984. It is important that society's criminal process "satisfy the appearance of justice,"... and the appearance of justice can best be provided by allowing people to observe it. See Richmond Newspapers Inc. v. Virginia, 488 US 555(1980) Thank you for you time!

From: ~^! DANIELS, ~^!KRISTOPHER OWEN
Subject: [External] ***Request to Staff*** DANIELS, KRISTOPHER, [redacted]
Date: Sunday, January 22, 2023 2:34:53 PM

To:
Inmate Work Assignment: electrician

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

simple possesion of marijiana !! i was given 3 points on my sentencing crime history level , these cases were from soveriegn North caolina but still counted as a federal conviction ,this is now pardoned by president on federal level only but how and why was it used from the begining to extend my sentence 2-4 extra years from the seperate soveriegn fifty state system convictions if the president cant pardon those state convictions . there needs to be clearer guidence to probation officers and lawyers when counting history levels with taking into consideration that there scope is limited to the federal convictions unless relevent because of a notorious crime that wasnt considered by congress as explained in 4.2 sentencing guide . The purpose of the authority enumerated by congress to the commision is to be surgicaly exercised with in the powers of the law to keep sentencing from being unequal and these low level -soveriegn- out of jurisdiction cases have no relative use in federal sentencings other than holding in custody a individual longer than there present crime calls for justice for our communities .. i was sentenced with a criminal history level of six and never done over 8 months in custody plus both parties at sentencing agreed that i was a first time offender ,so how do i have historty .

From: ~^! DEFOGGI, ~^!TIMOTHY RAY
Subject: [External] ***Request to Staff*** DEFOGGI, TIMOTHY, [redacted]
Date: Friday, February 24, 2023 10:05:29 AM

To: Proposed Sentencing Guidelines, 88 FR 7180
Inmate Work Assignment: Chapel

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Response to Proposed Sentencing Guideline, 88 FR 7180, Item 5, Acquitted Conduct:

At the very heart of this issue are the protections guaranteed under the 5th and 6th Amendments to the United States Constitution; that of due process and one's indefeasible right to trial. While a guarantee of "beyond a reasonable doubt" is required for a conviction at trial, a lower bar of "preponderance of the evidence" has been held to be the minimum standard to be applied at sentencing proceedings. As an example, I was wrongly convicted of a child exploitation enterprise at trial. Upon direct appeal the 8th Circuit Court of Appeals overturned the sanctity of a jury verdict, vacating the child exploitation enterprise stating, "The evidence was insufficient to convict defendant of engaging in a child exploitation enterprise under 18 U.S.C.S. Section 2252A(g) because defendant did not access child pornography 'in concert with' anyone else." (See 839 F. 3d 701 (8th Cir. 2016)) On remand, the sentencing court unbundled the only remaining crimes of "access with intent to view child pornography" and instead stacked them, giving me the same sentence of (25) years in prison followed by a lifetime term of supervised release; this time citing "fantasy" comments that never posed a real or credible threat as defined under 18 U.S.C.S. section 875(c).

As acknowledged in the Request for Comment, Acquitted Conduct is not specifically addressed within the Sentencing Guidelines, however, the commentary to USSG 6A1.3 instructs that "in determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial." and, "[A]ny information may be considered" so long as it has sufficient indicia of reliability to support its probable accuracy. This standard of "probable accuracy" runs afoul of the United States Constitution, F.R.Crim.P. Rule 32 and USSG 6A1.3 when the loss of life, liberty or property are at stake. It is therefore requested that the Sentencing Commission provide a new guideline or clarify within existing guidelines that there are constraints on what information may be used when determining an appropriate sentence. A review for the "preponderance of the evidence" standard must apply when considering the use of acquitted conduct as the defendant was already found to be innocent of the alleged crime(s). No court should be permitted to usurp the sanctity of a jury verdict.

I would ask that this proposed change be made retroactive or, in the alternative, this guideline change be included within the definition of Extraordinary and Compelling reasons for Compassionate Release under USSG 1B1.13.

** A hard copy is being forwarded via U.S. mail **

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Tim Ehrmann

Topics:

2. First Step Act: Safety Valve and Conforming Changes to §2D1.1

7. Criminal History

Comments:

I support the lowering the 2D1.1 drug guidelines and lowering the guidelines for defendants with zero criminal history points. Drug sentences have become draconian in comparision with sentences of direct harm. I also think increasing punishment should be geared toward repeat offenders if violence is involved. It seems to me that drug laws are being used as cudgel to individuals who didn't intend to harm anyone other than themselves.

Submitted on: January 14, 2023

From: ~^! FADL, ~^!ABDEL MAGEED
Subject: [External] ***Request to Staff*** FADL, ABDEL, [redacted]
Date: Sunday, January 22, 2023 8:49:55 AM

To: Comments
Inmate Work Assignment: Psych

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

My comment is in relation to the "Criminal History" section:
Zero-Point offenders should get at least 2 point decrease with "no exception" for the following reasons:
1) Its is all about 2nd chances. Many learn their lesson once they get in trouble. This decrease should be for them.
2) Even those who may have repeated their crime before they were caught (and there by have points from chapter 4, etc,) once they are caught for the first time and get punished, many of them learn from that and never return to crime.
For example, a person may have robbed a bank or even committed a sex crime more than once. He may not be thinking of the gravity of his crime at the time. Once he is caught, he may have learn his lesson and repented. Thus, he shouldn't be deprived this opportunity for a "second chance". This is different from a person who was punished for his crime, yet still insists on returning to crime.
As a result, I believe that "zero-point" offenders, should get at least the 2 point decrease regardless to the crime being "repeated" before they were charged for their very first time.
Thanks

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Sandra Farley, My son

Topics:

1. Compassionate Release

Comments:

My son was a victim of an assault by officers in USP Big Sandy. I will never forget the day I received a phone call from another inmate that I did not know telling me about what happened to my son. I called Big Sandy a total of 162 times and no one ever picked up the phone. I emailed asking for a wellness check and what happened to my son they told me he was fine. I then sent another email explaining what had happened and they replied 3 days later it was under investigation. I was not able to speak to my son for 10 days after the incident occurred, and being his mother it was the most heartbreaking, stressful, of not knowing anything really for 10 days. It made me really sit and think if my son would have been murdered would I even be contacted. My son has made mistakes and bad choices but he does not deserve to be in a maximum federal prison with officers there to beat him down for no apparent reason. I was told what the reasoning was and it was a very racial reason . I couldn't sleep at night with the stories he would tell me what the so-called white inmate politics in Big Sandy were all about... Hurt somebody or you get hurt... And then to receive a phone call that he in fact was hurt but not by another inmate. My child is a human being. I had hopes that he would be able to do a lot of programs to help him, for him to want to help himself, but there was nothing there but a whole bunch of violence. My son did not commit a violent crime my son did not murder anyone. My world is definitely not the same without him in it, and he has a long enough sentence to where I think about if I will even be alive when he gets out, but now, most days all I can think about is if he will make it out alive. And it is not the inmates I am fearing at this point. I am fearing the officers that are supposed to protect my child to keep him safe not the exact opposite. My son told me he has never been so scared in all of his life, he was terrified his life was going to end. When those words came out of his mouth I just became very nauseous. The betrayal I feel is unreal most everyday. He did what was asked for him before he was sentenced, not one federal agent took that into consideration, and instead, gave him an inhumane sentence for his crime, then was sent somewhere and was beat by the federal workers. I'm an every possible emotion on a daily basis. Angry, sad, scared, you name it, my son is a good man, who got caught up with wrong people, his potential is endless and I don't need these people shattering whatever he has left in him. Please, please,

consider helping my son. He's my only boy that I need to be okay. I need to be able to rest. But I can't rest and won't until he comes home away from harm. Thank you

Submitted on: January 19, 2023

February 6, 2023

Garlin R. Farris
[redacted]
FCI Ashland
P.O. Box 6001
Ashland, KY 41105-6001

U.S. Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Comments for 2022-2023 Amendment Year

Dear Commission,

First, thank you for an opportunity to respond to a vibrant array of proposed amendments. There are 3 proposed amendments that I offer comment on.

First Step Act-Reduction In Term of Imprisonment Under 18 U.S.C. §3582(c)(1)(A): The Commission should seek guidance from the CDC in defining what constitutes extraordinary and compelling reasons. The Department of Justice ("DOJ") adopted the position that an inmate who presents with one of the risk factors identified by the CDC should be considered as having an "extraordinary and compelling reason" warranting a sentence reduction. Federal and State Courts across America all followed most of the CDC guidelines at the height of the pandemic. These were the experts that America relied upon and still relies upon.

Criminal History: Option B. The Commission should incorporate language pertaining to defendants who went to trial, and were given a subjective leadership role through the enhancement process in order to effectuate the trial penalty which nearly all inmates receive for exercising their constitutional right to trial by jury .

Acquitted Conduct: The Commission should give the courts guidance on overlapping conduct in order to create equity across the federal system. The Acquitted conduct definition is narrow and should incorporate the trial penalty phase that happens to a defendant when exercising their constitutional right to a trial by jury. Why the punishment to the defendant? This is not what the Framers had in mind.

The trial by jury is the most sacred function of American jurisprudence and should be treated as such. The trial by jury is the only right that appears both in the Constitution and the Bill of Rights. A person opting to exercise this sacred right ought not be punished for exercising this check on the judiciary. Yet the person is penalized beyond measure in choosing this sacred option. Acquitted Conduct should be abolished from the judiciary and any person that suffered as a consequence should be given a 2 level deduction.

Most sincerely,

Garlin R. Farris

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Kelby Franklin

Topics:

1. Compassionate Release

Comments:

I would like to thank the Sentencing Commission for the proposed changes to the U.S.S.G. Section 1B1.13. I sincerely urge the Commission to pass the proposed amendment and select option 2 to be incorporated into the amendment.

I further urge the Commission to consider the profound and compassionate words by late Supreme Court Justice Paul J. Stevens in his concurring opinion in Graham v. Florida, 560 U.S. 48 (2010) ("Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time..."). We should also remember that not only does society change but that people change.

Respectfully submitted,
Kelby R. Franklin

Submitted on: February 5, 2023

From: ~^! GABRIEL, ~^!JOHN
Subject: [External] ***Request to Staff*** GABRIEL, JOHN, [redacted]
Date: Monday, February 6, 2023 2:20:14 PM

To:
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Regularly, I assist men who request that I consider what they believe is improper about their case. I do not charge and if I do not believe there is an issue I won't file folly. At Devens (ayer, MA) a man, Emilio Fusco requested help, He had been convicted of a RICO charge and acquitted of complicity in two murders. PSI report recommended 6 to 7 years. A son of one of the murder victims spoke at the hearing and declared Fusco was not a partaker in the murders. The judge, devoting 66% of the sentencing to murders of which he was acquitted said that by a preponderance of the evidence (which the jury had heard) he was finding Fusco guilty of taking part in the murders. He sentenced Fusco to 20 years based on the murders. That was wrong because the guidelines ought not allow a man to punished for something he was found not guilty of. I was transferred before I could file on his behalf but it still plays on my mind. The 5th Amendment is explicit on double jeopardy and the guidelines have no authority to override the Constitution. See Marbury v. Madison, 1 Cranch 137, 165-168, 2 L ed 60 (1803). Please feel free to contact me if you wish to carry on the conversation. Thank for this opportunity to have an input. John Gabriel, [redacted] [redacted] Medical Center for Federal Prisoners, PO Box 4000, Springfield, MO 65901- 4000.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Sonia Gainer

Topics:

6. Categorical Approach and Other Career Offender Issues

7. Criminal History

Comments:

It's been a long time coming thank you so much for addressing the circuit conflict in favor of the majority. the problem with how mainly the 11th circuit is interpreting a controlled substance is in conflict with the intent of a career criminal enhancement. a career criminal enhancement's main purpose is to deter a person from making similar crimes that were used for the enhancement. if the prior crime used to enhance is a drug crime and the drug has been decriminalized or removed from the federal controlled substance act than the deterrence affect has been nullified. if the drug has been removed from the CSA than that means its no longer considered a federal crime therefore its impossible to deter anyone because it would be impossible to commit a similar or like crime that the enhancement is intended to deter. with that said your proposed amendment adding the definition controlled substance offense in 4b1.2(b) will clear ...

Submitted on: March 7, 2023

U.S. Sentencing Commission
Attn: Public Affairs Priorities Committee, Jennifer Dukes
One Columbus Circle, NE.
Suite 2-500 South Lobby
Washington, DC 20002-8002

Re: Nondiscriminatory Point Reductions for ALL Zero Criminal History Defendants

Dear USSC,

In response to your invitation for public comment to the proposed sentencing amendments, I ask This Commission to consider my input regarding Zero Criminal History defendants. While I applaud the slight breakaway from the ruthless sentencing practices, I am requesting fairness and productive function to be integrated into these adjustments. A one to two point reduction should fairly and retroactively apply to ALL Zero Criminal History defendants, regardless of violent, sexual, or death resulting offenses.

In light of recent studies on recidivism and risk assessment data, DOJ's statistics clearly proves that the offenders that are precluded from receiving the point reductions are the less likely ones that will return to prison. Meanwhile, career offenders out of the District of Columbia are routinely being released following murder and rape convictions while having ceased criminal activity. The reasons that they are NOT returning to prison is simply because that they age-out of violence and crime. These are defendants that were convicted under the same statutes and housed in the same prisons as non-D.C. defendants, yet they are given hope and the results are successful. The effects of maturity and incarceration will be even more likely for Zero Criminal History defendants, yet the proposed point reductions are not applicable to defendants with convictions of violent, sexual, and death resulting offenses.

Please reform sentencing by revising point reductions to include ALL first time offenders to restore hope, fairness, safety, and correction to the federal correctional institutions.

Thank you kindly,

1-31-22

Carmen Garrison

[redacted]

From: ~^! GIOELI, ~^!THOMAS
Subject: [External] ***Request to Staff*** GIOELI, THOMAS, [redacted]
Date: Thursday, January 19, 2023 9:20:11 AM

To:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Being sentenced on acquitted conduct and uncharged crimes defeats the intent to achieve justice. If you are not charged with a crime then you do not mount a defense. It is the equivalent of being attacked and not fighting back so you can NOT win. Using Acquitted Conduct as a sentencing factor takes all of the power from the foundation of our justice system (A jury of our peers') and renders said jury obsolete. It gives all of the power away from the citizens' and gives it to the government.
thank you

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Antonio Gipson

Topics:

4. Circuit Conflicts Concerning §3E1.1(b) and §4B1.2(b)

Comments:

My name is Antonio Gipson and I am currently incarcerated at Oxford FCI. I am currently serving a 17 1/2 year sentence for possession with intent to manufacture and distribute. They sentenced me as a Career Criminal. I am voicing my opinion on the proposal to vote for option 1. I'm not going to get into the details on my case but I'm writing to the judges who are going to be voting on this proposal. I am a father, a son, and brother. My family is in disbelief that I could be classified as a career offender because of my conviction for .4 grams of cocaine. I put my trust first and foremost in God and I pray that this proposal will help inmates and families get sentences that are fair according to the 3553 rules. My daughter is 17 now and she will be 32 when I am eligible to be in her life again. I'm speaking on behalf of myself and a lot of inmates that are not drug dealers but addicts. By passing option 1 you will give low level offenders a chance for rehabilitation and to get treatment for our addictions.
Thank you for your time in this matter,
Antonio Gipson

Submitted on: March 14, 2023

From: ~^! GOLDBERG, ~^!GARY JAY
Subject: [External] ***Request to Staff*** GOLDBERG, GARY, [redacted]
Date: Tuesday, February 28, 2023 7:06:17 PM

To: USSC
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear USSC,

Please find my comments below regarding the implementation of USSC Section 4C1.1.

The commission's proposed guideline addition of 4C1.1 is an opportunity to partially rectify issues of "routine" sentencing enhancements for sexual offense guidelines. As the commission's 2021 report, Federal Sentencing on Child Pornography: Non-Production Offenses, has found, the current sentencing guidelines for certain sexual offenses includes enhancements that are applied in 95% of all cases.

This overwhelming application of certain enhancements negates the purpose of specific offense characteristics. The guidelines contemplated by the commission, and others with similar issues, fail to distinguish between offenders based on culpability and dangerousness by having standard penalties. For example, the 2-point enhancement for use of a computer in the offense is nearly ubiquitous for every case over a range of sexual offenses and their corresponding guidelines.

A 2-point reduction for sexual offenses with a zero point criminal history will ameliorate this issue. However, the commission should select the option to exclude only repeat and dangerous sexual offenders, as doing otherwise would permit a problem the commission acknowledged in 2021 to continue unabated.

Thank you for your consideration.

From: ~^! GOOLSBY, ~^!IAN D
Subject: [External] ***Request to Staff*** GOOLSBY, IAN, [redacted]
Date: Thursday, February 9, 2023 8:20:11 AM

To:
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The enhancement for possessing a firearm with an altered or obliterated serial number should not apply to those convicted of the same offense. the base offense level for the crime is 14 (for a prohibited person). The another 4 points for the firearm being obliterated? That appears to be double counting particularly in my case

From: ~^! GORDON, ~^!MARKWANN LEMEL
Subject: [External] ***Request to Staff*** GORDON, MARKWANN, [redacted]
Date: Monday, January 23, 2023 3:06:16 PM

To: Public Comment
Inmate Work Assignment: Skills Program Mentor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

My name is Markwann L. Gordon B.O.P.[redacted], I have been in prison for nearly 27 years with Good-time-credit, I am serving a 140 years prison sentence due to my participation in 7 Armen Bank Robberies in the 1990's when I was 21-23 years old. In February of 2022 Eastern District Of Pennsylvania Judge Harvey Bartle III denied my petition for a sentence reduction reasoning that "rarely has the court seen as a compelling a case for sentence reduction...the 3rd Circuit Court of Appeals has forbidden non-retroactive intervening changes in law to be considered in these petitions....I regrettably deny this petition for sentence reduction". Were I sentenced today for these same charges I would not be subject to the mandatory 25 year consecutive sentences. Also submitted with my petition was over 4000 hours of over 135 completions for B.O.P. courses, letters of support from 8 Bureau of Prisons officials, a letter of support from the FBI agent who originally investigated my crimes and my original sentencing Judge now deceased recounting the tremendous rehabilitation he has seen in me. I also serve as a live-in Mental Health Companion for special needs inmates. Other Circuits across the country have ruled in the opposite when considering sentence reduction petitions, they are 1st, 2nd, 4th, 5th, 9th, 11th, D.C., It is my hope this commission provides guidance and consistency for Judges when considering these petitions granting the discretion to give relief to prisoners to whom they feel has earned and deserves it.

Thank you, respectfully submitted
Markwann L. Gordon

Feb 27, 2023

Dear Sentencing Commission,

Greetings and blessings to you and your roles as servant-leaders and decision makers. Thank you for all your diligent efforts in bringing forth proposed ammendments to the U.S.S.G. I am interested in the aspects which focus upon zero-point offenders — those who have no previous criminal record — and the ammendments on this topic. Here, I fully support the §4C1.1 reduction of at least 2 levels for all fallen humanity that are zero-point offenders. I don't believe there needs to be any exclusions for this adjustment because the guideline enhancements already are punishing certain offenders more harshly based off the severity of their crime. Therefore the just and righteous way to apply this would be all zero-point offenders receiving a level reduction. This is in line with God's grace and mercy and their softer hearts as zero-point offenders. They are <u>not</u> repeat offenders.

Also, this level reduction for men and women who are truly zero-point offenders should be graciously applied retroactively to those already behind bars. The Lord Jesus commands us to remember those in prison and to care so much for them that it is as if we ourselves were suffering with them (see Hebrews 13:3). The greatest tragedy would to pass a law active today which forgets about those already behind bars and having them feel heartbroken and forgotten — therefore

the only fair way to implement §4C1.1 is to apply it retroactively to all zero-point offenders.

In my heart, other ammendments were similar in scope such as the 2-level drug reduction ammendment which was applied retroactively. In the same gracious way, all current prisoners who were previously convicted and sentences as zero-point offenders should also be able to get such an important reduction with the ranges under the new guidelines.

Just as the commentary proposal in §5C1.1n.4 which indicates a departure to a sentence of imprisonment is "generally appropriate" for every single zero-point offender without exclusion. The most effective ways to lower crime and to strengthen and heal communities is to provide key interventions for many offenders such as mental health treatment, counseling, sex offender treatment, drug and alcohol treatment, computer literacy, money management, GRE and tutoring opportunities, wholesome books and prison ministries.

The authority for determining if a more minimal intervention can be available that could help both the community and incarcerated individuals should be the judge. Only the judge has seen the trial and the specifics of the case and the heart of the convict, etc. Therefore judges should have this

God-given authority as they judge. An extended period of supervised release or even a suspended sentence would be appropriate and sufficient as safety measures in situations where other attempts at interventions or treatments are less effective than hoped. Of coure judges should be free to review zero-point offenders individually for successful interventions and see if other treatments are available, so this too should be applied retroactively. It is important for these cases to be reviewed.

The USSC should enthusiastically investigate and help encourage Courts to try for alternatives to incarceration to utilize the ministries and community helps available as quickly as possible and under as many circumstances as possible. Truly religious, educational, family and parenting, job training and therapeutic restorative justice programs can be part of God's solution to our over over crowded prison systems and to help promote true justice and make society safer and more blessed. I believe these proposed ammendments that address zero-point offenders will be a great way of helping our communities, imparting knowledge and truly equipping this generation to thrive in a healthy way that promotes the rule of law and the rule of God's mercy and interventions. Sincerely, Carolyn Gu

P.S. Thank you so much God bless you!

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Dear Judge Reeves:

Thank you, your Honor and Commission members, for the opportunity to respond to the Commission's proposed amendment changes to Compassionate Release. I submit my response, not as an attorney, but as an affected family member of a young adult in Federal custody.

The Commission's transparency, efforts to include the public, and provide live streamed testimony from such a wide range of stakeholders is greatly appreciated.

We don't want to see exclusions. As a criminal justice reform advocate by circumstance, I have met so many families who have lost hope and faith in our national justice system. We have become disheartened because of carve-outs, especially those who have loved ones domiciled in low security with convictions that research has documented as having low recidivism rates, yet these loved ones cannot participate in programming for early release, nor receive even minimally adequate medical treatment for chronic conditions, if they receive any at all. Because of your and the Commission's actions, we see sincere heartfelt efforts to fix a very broken system. We have a glimmer of hope now and are counting on the Commission to push through these much-needed reforms.

I would like to thank the Commission for proposing these thoughtful and expanded amendments "to revise and expand §1B1.13, broadening the Commission's guidance on what should be considered "extraordinary and compelling reasons" for compassionate release: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons" while also granting courts discretion to consider the entire collection of circumstances that might warrant a sentence reduction in a particular case." With these changes, § 3582(c)(1)(A) Motion of Sentence reduction would be able to serve as a meaningful safety valve.

Instead of addressing point by point, I completely agree with Ms. Kelly Barrett, Federal Public Defender's testimony and her entire compelling written statement. I appreciate the Commission recognizes the need for Eldercare. In addition to all the positive benefits, like lowering recidivism by expanding the compassionate release to include other family members that Ms. Barrett wrote and testified about, and the testimony from those who were granted compassionate release, there will be significant financial benefits to the government by keeping the family member at home instead of in assisted living or skilled care. Please modify the "Family Circumstances" category in new subsection (b)(3) from "parent is" to "parents are." According to AARP, 1 in 3 seniors will need long-term care over the course of their lifetime. Recognizing there are other family members besides children with other special needs like long-term care and end-of-life care for aged and infirmed family members demonstrates that the Commission understands the gravity and financial impact on families. Thank you!

What Ms. Barrett proposed, is to change the wording of the guidance in 1B1.13. Subsection (b)(1)(C) from "adequate" to "effective" is critical. My own family member had a hard time getting the care he needed and by the time he received care, his condition worsened. In fact, the medical professional did not give him adequate treatment which created more complications. There are so many stories about the lack of healthcare for our loved ones.

Mary Graw Leary, representing the Victim's Advisory Group (VAG) stated in her testimony that Compassionate Release has a recidivism rate of 10% and is a major reason Compassionate Release should not be expanded. I would argue just the opposite, that with such a low recidivism rate, Compassionate Release is a rousing success! I have read the Commission's own reports on recidivism rates. I believe the Department of Justice and the Executive Branch would be extremely pleased, and the public would feel very safe if those rates could be duplicated by the Federal Bureau of Prisons and other reentry programs.

I disagree with the assessments by the Department of Justice, especially about extending the time an incarcerated victim of sexual or physical abuse, including rape, must spend in the institution where the event occurred, or in a Special Housing Unit (SHU), by insisting on a hearing. The victim has already suffered an unimaginable trauma and keeping that victim in the place where he/she was assaulted, or punishing even more by putting them in the SHU, does not improve their acceptance of victimization. It may actually extend the recovery time from the trauma and exacerbate conditions the victim has developed from the assault, such as Post Traumatic Stress (PTS).

In conclusion, as Leslie Scott so eloquently stated in her testimony on 7 March, "We cannot incarcerate ourselves out of crime problems." I would add that we cannot over-legislate ourselves out of mass incarceration problems. Our nation makes up only 4% of the global population, yet we have 25% of the global incarcerated population, (https://www.hamiltonproject.org/.../incarceration_rates...) We, as a nation, should be ashamed of this statistic, which displays our utter failure to the humane treatment of United States constituents. We are the United States of America, not the Communist Party of China, and we must hold ourselves to a higher standard. We must make common sense changes to laws like expanding §1B1.13 under The First Step Act and encourage our state legislators and departments of corrections to follow suit. We must expand not only compassionate release but the offenses that qualify for participation and programming in the First Step Act. Congress and the Department of Justice must make decisions based on statistics from academia and the Commission concerning topics such as recidivism, instead of relying on fear, hysteria, discredited research, and agencies that spin the statistics to fit a narrative instead of presenting true, verifiable facts and information.

Thank you for reading my letter.

Respectfully,
Kimberly Hall

https://www.ussc.gov/policymaking/public-comment
USSC.GOV

From: ~^! HARRIS, ~^!TRACY SCHONDEL
Subject: [External] ***Request to Staff*** HARRIS, TRACY, [redacted]
Date: Wednesday, March 1, 2023 9:20:09 PM

To: Honorable Judge Reeves
Inmate Work Assignment: Education

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Your Honor:

I would first like to thank you for taking the time out of your busy schedule to read emails and messages from people like me. It renews the faith that has long sence been lost in the "justice system". I know that you probably have thousands of messages like this and I know that each one is different so thank you once again.

I would like to pledge my full support for the proposed changes to the sentencing guidlines and compassionate release amendments. Specifically the portion of the compassionate release amendment that deals with staff to inmate physical abuse. On June 14 - 2022 I was assaulted by a group of FCI #2 Victorville senior staff including a high ranking officer. I was intentionally assaulted in a confined space out of sight from the camera system. After the assault I was placed in the SHU and when the staff doctor came to examine me he immediately sent me to Arrowhead Emergency Hospital. The medical staff at the hospital deemed my injuries to be from a "battery" that resulted in blunt forced trauma to the face/head. Since this date I have had no further medical attention even though I have put in sick calls to see the doctor about my blurred vision and deteriorating mental state. I have followed all possible institutional remedies processes to no avail. To date I am still targeted and singled out by the staff involved in the incident and all parties involved are still on the compound working like nothing ever happened. I do not feel safe at this institution at this time. I feel like there has been no investigation into this matter. I do not sleep at night. I need help. This issue is not something that I suffer alone. This type of crime should not be allowed to take place. I am suppose to be protected according to my rights.

That being said please allow judges the authority to take into consideration the things that are special in all circumstances. Once again thank you for taking your time to consider these changes.

Thank You and God Bless!

Tracy S Harris

From: ~^! HERRERA, ~^!KARILIE
Subject: [External] ***Request to Staff*** HERRERA, KARILIE, [redacted]
Date: Sunday, January 22, 2023 10:49:34 PM

To: Sentencing Commission
Inmate Work Assignment: law library clerk

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hello My name is Karilie Herrera and I am writing to you hoping that you will read my story and use this as a reason to change the guidelines. I started my incarceration In MCC New York , I was housed there for 2 1/2 years before I received a 10 year sentence. For 1 1/2 year I had an officer wake me up out of my sleep to sexually abuse me 2-3 times a day 4 times a week , He made me also have sex with my cellmate and he will masturbate watching us. Later on he was arrested and he plead guilty. I have lived in constant fear my whole incarceration, the other officers retaliated against me and gave me incident reports for the smallest things that are not even against policy. Psychology department has not provided any one to even help me cope or deal with this. I am still in constant fear that I will be woken up out of my sleep being abused. I am asking to please change the guidelines give us light and get us home to our families

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Melanie Hirst

Topics:

9. Sexual Abuse of a Ward Offenses

Comments:

Anyone acting in their capacity as a federal law enforcement officer that knowingly engages in any type of sexual and or physical abuse of an incarcerated individual needs to be finally held accountable. They should also be held accountable for bringing in drugs.

Submitted on: March 12, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Chandira Holman-Bey

Topics:

7. Criminal History

Comments:

With respect to sentencing guidelines chapter 4-Criminal History, using misdemeanor convictions cause unwarranted sentenced time.
For example, using traffic violations, past low level misdemeanor marijuana charges, result to an increase in sentencing point system; causing additional unwarranted time when sentencing a defendant, using past low level arrest-criminal history
that has nothing to do with the defendant's current case.
The sentencing guidelines are in need of amending to ensure a defendant's criminal is irrelevant to charge they are currently being sentenced for; and should not consider items Not relevant to the current case as that unlawfully & incorrectly increases the sentence points used to determine how long the
offender will be incarcerated.

Submitted on: January 23, 2023

From: ~^! HORTON, ~^!CARLOUS S
Subject: [External] ***Request to Staff*** HORTON, CARLOUS, [redacted]
Date: Thursday, January 19, 2023 9:49:43 AM

To: Judge Carlton Reeves
Inmate Work Assignment: Stages Companion

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Im advocating for all amendments to be retroactive under 3582(c)(2). And for the new provision 3582(c)(1)(a)b,5.,to be included. Any new change in law. For it is a great injustice for prisoners with similar (especially non violent drug offenses) convictions to have vastly different sentences. I have 3 life sentences,for non violent 841(b)(1)(a) cocaine and crack offenses,and a 922g. if sentence today,my prior Illinois gun conviction has since been invalidated but I have no avenue back in court that the 8th circuit will allow. Also my prior Illinois cocaine convictions no longer qualify for enhancement under Oliver(8th) and Ruth(7th cir). My only avenue is the Equal act to be incorperated into the guidelines,with Garland's new 1-1 ratio memo and for all new amendments to be fully retroactive. For I know you are full aware of the disparity in sentences that will continue if theses amendment are not retroactive. also im suggesting that the constrolled substance definition must match the CSA for career offender just like it must for $851 or the ACCA. And status points to be completely eliminated. thank you

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Rickey Howell

Topics:

6. Categorical Approach and Other Career Offender Issues

7. Criminal History

Comments:

It's been a long time coming thank you so much for addressing the circuit conflict in favor of the majority. the problem with how mainly the 11th circuit is interpreting a controlled substance is in conflict with the intent of a career criminal enhancement. a career criminal enhancement's main purpose is to deter a person from making similar crimes that were used for the enhancement. if the prior crime used to enhance is a drug crime and the drug has been decriminalized or removed from the federal controlled substance act than the deterrence affect has been nullified. if the drug has been removed from the CSA than that means its no longer considered a federal crime therefore its impossible to deter anyone because it would be impossible to commit a similar or like crime that the enhancement is intended to deter. with that said your proposed amendment adding the definition controlled
 substance offense in 4b1.2(b) will clear ...

Submitted on: March 13, 2023

From: ~^! IRAHETA, ~^!VLADIMIR ALEXANDE
Subject: [External] ***Request to Staff*** IRAHETA, VLADIMIR, [redacted]
Date: Thursday, January 19, 2023 3:05:52 PM

To: All Commissioners
Inmate Work Assignment: NA

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

PROPOSITION REGARDING AMENDING U.S.S.G. 4B1.1-CAREER OFFENDER

If the Sentencing Commission intends to propose an "alternative" to the "categorical approach", however, it does not mean that it should NOT employ the categorical approach to determine what is (will be) a "drug trafficking crime" or "control substance offense." This is, likwise, even more crucial for Section 846-Drug Conspiracy since the Government has so misinterpreted and misapplied the statute's language simply because Section 846 provides that a conspiratory "shall be subject to the same penalties of the offense..."

what is even more compelling--and I respectfully (and solemnly) submit is that Congress has already provided the quintessential language/phrase that the Supreme Court has relied upon (as its corner-stone) to determine what is a crime of violence in Johnson, Dimaya, and Davis. Since 1970, not only did Congress enacted 18 USC Section 16, which provides, in part, that an offense "which has as an element the use, attempted use, or threatened use of physical force..."; in 21 USC Section 862(a)-(Denial of Federal Assistance and Benefits), Congress, likewise, provides: "An individual convicted (under federal or State law) of any offense...WHICH HAS AS AN ELEMENT the possession, use, or distribution of a controlled substance (emphasis added). This phrase unequivocally and persuasively resolves the long standing split of what is or is not a "drug trafficking crime" or "controlled substance offense."

What is also quite compelliing is that the Sentencing Commission, 1987--the year the Guidelines were promulgated--wsa clearly aware of 21 USC Section 862(a)'s explicit language: It promulgated USSG 5F1.6, which is the relevant Guideline to Section 862(a). But what is mind-boggling and defies all logic and common sense is that the Sentencing Commissiion of 1987 deliberately OMITTED the crucial determinating phrase: WHICH HAS AS AN ELEMENT from the USSG 5F1.6.

This whole time since 1987 the Courts have utilized USSG 4B1.2(b)'s definition to determine what is a controlled substance offense. However, that still leaves the unanswered crucial question of what is a "drug trafficking crime"? Since 1970, Congress all along enacted the key phrase--WHICH HAS AS AN ELEMENT--to determine what is a "controlled substance offense" and "drug trafficking crime." The Sentencing Commission should finally accord that statute's text "its ordinary meaning by reference to specific context in which that language is used, and the broader context of the statute as whole." Mulane v Chambers 333 f3d 322 (1st Cir. 2003)

Lastly, it does not matter what the Sentencing Commission does--whether it explicitly provides that all drug trafficking crimes and/or controlled substance offenses must be an offense "which has as an element..." or explicitly lists what is to be a drug trafficking crime and/or controlled substance offense--the pertinent qualifying Guideline must be based on the categorical approach. This will unequivocally and persuasively, once and for all, finally END

what should have never been such a legal dilemma: SECTION 846 IS NOT A DRUG TRAFFICKING CRIME OR CONTROLLED SUBSTANCE OFFENSE BECAUSE IT IS NOT AN OFFENSE WHICH HAS AS AN ELEMENT DISTRIBUTION OR MANUFACTURING (OR DRUG QUANTITY)--THE ELEMENTS EXPLICITLY LISTED THAT QUALIFY AS SUCH.

Ladies and gentlemen, I respectfully submit that it is time to come to terms and finally acknowledge that Section 846 is not a "drug trafficking crime" or "controlled substance offense." Please end this long ongoing legal barbarity. American citizens lives are presently languishing in prison because of that. Thank you

From: ~^! JACQUES, ~^!GARY
Subject: [External] ***Request to Staff*** JACQUES, GARY, [redacted]
Date: Tuesday, January 24, 2023 2:20:15 PM

To: Judges
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

My Name is Gary Jacques. I was sentenced in 2011 to 235 months via acquitted conduct sentencing. I received a enhancement of 14 years due the judge disregarding the jury's verdict. This proposed amendment is vital to my release if passed and made retroactive.

Thank you,
Gary Jacques

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Amanda Jaramillo

Topics:

8. Acquitted Conduct

Comments:

I am in support of the proposed amendment to prohibit the use of acquitted conduct. The use of this practice is offensive, unjust, and not trustworthy.

Let's break down the Department of Justice. Justice by definition is: Just behavior or treatment; the maintenance or administration of what is just, especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments; the quality of being just, impartial, or fair. The Department of JUSTICE is not being just or fair by using or allowing this type of practice. I am positive that if more of the public knew of this practice, they would agree.

The Department of Justice states that the following are their values:

Independence and Impartiality. We work each day to earn the public's trust by following the facts and the law wherever they may lead, without prejudice or improper influence.

Honesty and Integrity. Our employees adhere to the highest standards of ethical behavior, mindful that, as public servants, we must work to earn the trust of, and inspire confidence in, the public we serve.

The department is not earning the public's trust or confidence by keeping this practice. To an average citizen like myself, when I hear of this practice, the following thoughts enter my mind immediately. If a jury acquits a defendant, a judge's thoughts trump that jury's verdict, their time, their energy, their efforts, and quite frankly, that is offensive. For a judge to sentence and/or use acquitted conduct defeats the purpose of going to trial, and exercising that right. It says "Well, the jury may have acquitted this defendant, but I know better". This creates an environment that can make a citizen feel powerless, set up to fail, and unable to trust the system. I imagine that this feels like a person being railroaded by the judge and prosecutor, after already utilizing legal representation and doing the work to prove their innocence, just to be punished anyway. Once again, defeating the purpose of exercising the right to go to trial, because the judge has already made up their mind.

Passing this amendment is a step in the right direction for the department.

From: ~^! JOHNSON, ~^!JAMAA I
Subject: [External] ***Request to Staff*** JOHNSON, JAMAA, [redacted]
Date: Thursday, January 19, 2023 1:19:39 PM

To: US Sentencing Commission
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

My name is Jamaa Johnson [redacted] and I am currently housed at FCI Petersburg. I have been incarcerated since October 2013. Nearly 5 years ago I underwent a 3 week jury trial in which I was found not guilty of 2 counts of Hobbs Act Robbery (and aiding and abetting each count). I was also not found guilty of 2 counts of use of firearms in crimes of violence, possession of a firearm while being a felon and the Pinkerton Liability for discharging a firearm. At sentencing I was enhanced 11 points for discharging a firearm that by the juries verdict I never possessed, the jury found that I was never actually at the robbery nor did the jury feel that I even aided helping the alleged robbery.

Under the Hobbs Act Conspiracy the judge over doubled my time from 8.5 years to 19.7 years. A judge going completely against the jury's findings and doubling my time via "Acquitted Conduct" has caused me and my family to lose hope in the system that was enacted to protect us from 1 person with too much power. I do completely understand where the judge is coming from because for him to do anything else would mean that he allowed himself to lose control of his courtroom even if only in theory. This isn't just a judges flaw, it is human flaw. Daily our world sacrifices the very nature of the constitution in hopes of obtaining more power. One should look no further than the lack of humility in congress. Eliminating acquitted conduct may just be a necessary catalyst in starting a movement of giving back to the constitution and the people what it has forcefully and cunningly taken away.

Thank you for reading.

Jamaa Johnson
[redacted]

From: ~^! JOHNSON, ~^!COLEMAN LEAKE JR
Subject: [External] ***Request to Staff*** JOHNSON, COLEMAN, [redacted]
Date: Sunday, February 26, 2023 11:34:16 AM

To: U.S.S.C. Ms. Jennifer Dukes
Inmate Work Assignment: Unicor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Re: Zero Criminal History Point Reductions

Dear U.S.S.C.,
I am contacting you to offer productive suggestions and comments to the proposed sentencing amendments this cycle.
It is my understanding that defendants with cases of violence, sexual, and/or death resulting offenses are excluded from the (one-to-two) point reduction proposals. On behalf of myself and thousands of other first time offenders, we ask this commission to additionally implement a nondiscriminatory (one) point reduction for ALL offenders that don't meet that criteria of the current proposals for Zero Criminal History defendants. A recalibration of this sort will greatly restore safety and hope within the BOP without posing any threat to society while also restoring "Corrections" to the Federal Correctional Institutions. Please bring a real "Second Chance" to Americans that made their only criminal mistake.
Thank you kindly, Coleman Johnson

From: ~^! JOHNSTON, ~^!ANDREW J
Subject: [External] ***Request to Staff*** JOHNSTON, ANDREW, [redacted]
Date: Thursday, January 19, 2023 2:05:52 PM

To: Mr. John Gleeson, USSC
Inmate Work Assignment: Trust Fund VR Photography

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Mr. Gleeson,

Although I agree with the implementation of Stokeling's definition of robbery in Part B of the proposed amendments, I disagree with completely abandoning the categorical approach in Part A.

Abandoning the categorical approach would be "not in accordance with law", 5 U.S.C. Section 706, because it would be contrary to United States v. Taylor, 142 S. Ct. 2015, 2020 (2022), which reaffirmed Mathis v. United States, 136 S. Ct. 2243, 2251 (2016)'s holdings in the context of an instant offense.

In my view, Part A's abandonment of the categorical approach should be the backstop or front stop to the inquiry of whether a crime qualifies as a crime of violence.

For example, as a frontstop: the court looks at the Stokeling definition and then compares that with the facts pled to in the plea agreement and change of plea hearing transcript and/or the evidence in the trial transcript to determine if the facts/evidence warrant application of USSG Section 4B1.2.

Yet, in a situation like mine where the court changed the jury instructions over objection after I cross-examined the bank tellers to include an Attempt/Substantial Step instruction, along with a heavily diluted instruction on intimidation (divorced from the context of "force and violence or intimidation") the categorical approach would be appropriate.

That is because the substantive intimidation and attempt/substantial step jury instructions lessened the culpability that the jury could find beyond a reasonable doubt. Stokeling's definition wouldn't account for that because they would distinguish attempted robbery from robbery unless you clarified that all attempted robberies were predicates either.

Or, as a backstop: the categorical approach should be employed first, if the crime is divisible, then the modified categorical approach, if that fails then Part A gets invoked and courts resort to an evidence-based comparison with Stokeling's definition. Other than that input, Part A and Part B, if made retroactive under 18 U.S.C. Section 3582(c)(2) are excellent to justice.

Respectfully,

Mr. Andrew James Johnston

From: ~^! JORDAN, ~^!MICHAEL JOHN
Subject: [External] ***Request to Staff*** JORDAN, MICHAEL, [redacted]
Date: Wednesday, January 25, 2023 10:35:21 AM

To: To Whom It May Concern
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Sir or Ma'am

I see that the sentencing commission is considering even stiffer penalties on firearm related charges while at the same time some Federal Judges are coming to their senses and ruling that 922. related crimes are Un-Constitutional. I would like to break down the Second Amendment of the Bill of Rights. Which if you are unaware is part of the Constitution of the United States of America. The Supreme Law of the Land.

This is paraphrased because I do not have the document in front of me but I guarantee it is darn close.

A militia being necessary for the security of a free state, the Right of the People, to Keep and Bare Arms, Shall Not Be Infringed.

The militia is "every able bodied male" "the people is every U.S. citizen" The Right to Keep and Bare Arms Shall Not Be Infringed" well to me that is pretty clear.

"Oh how the tools of a tyrant pervert the plain meaning of words"

If anything you should be debating the constitutionality of 922.g

Very Respectfully
Michael Jordan

From: ~^! JOSEY, ~^!NATHANIEL
Subject: [External] ***Request to Staff*** JOSEY, NATHANIEL, [redacted]
Date: Thursday, January 19, 2023 5:49:23 PM

To: The Commissioners
Inmate Work Assignment: Unicor Whse

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

One of my concerns is the Aquitted Conduct. I have never heard of this until i got this charge. Fedreral judges have been given the ability to be judge and jury. There is no reason for the court to waste taxpayers money going to trial if the judge has the last rule over a jury. The Constitution states that you will be tried by a jury of your peers. How will you know if a judge has a personal interest in a particular case. That is the reason for these citizens to see this case from twelve different viewpoints instead of a judge pressured by unkown forces to be ready to make a decision that he deems appropriate. This is so unfair to the person on trial and the jurors that performed their patriotic duty as a citizen of the United States. Imagine how they felt making what they feel is the right decision, only to have the judge look at it different and impose a sentence upon a not guilty verdict. This is one of the biggest miscarriage of justice in the federal system.

From: ~^! KINDLEY, ~^!ERIC SCOTT
Subject: [External] ***Request to Staff*** KINDLEY, ERIC, [redacted]
Date: Monday, January 23, 2023 9:06:07 PM

To: USSG
Inmate Work Assignment: UNICOR

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Re: Nondiscriminatory Point Reductions for ALL Zero Criminal History Defendants
Dear USSG,

In response to your invitation for public comment to the proposed sentencing amendments, I ask the commission to consider my input regarding Zero Criminal History defendants. While I applaud the slight breakaway from the ruthless sentencing practices, I am requesting fairness and productive to be integrated into these adjustments. A one to two point reduction should fairly and retroactively apply to ALL Zero Criminal History defendants, regardless of violent, sexual, or death resulting defendants.

In light of recent studies on recidivism and risk assessment data, DOJ's statistics clearly proves that the offenders that are precluded from receiving the point reductions are the less likely ones that will return to prison. Meanwhile, career offenders out of the District of Columbia are routinely being released following murder and rape convictions while having ceased criminal activity. The reasons that they are NOT returning to prison is simply because they age-out of violence and crime. These are defendants that were convicted under the same statutes and housed in the same prisons as non-D.C. defendants, yet they are given hope and the results are successful. The effects of maturity and incarceration will be even more likely for Zero Criminal History defendants, yet the proposed point reductions are not applicable to defendants with convictions of violent, sexual, and death resulting offenses.

Please reform sentencing by revising point reductions to include ALL first time offenders to restore hope, fairness, safety, and correction to the federal correctional institutions. give first time offenders a second chance.
Respectfully, Eric Kindley

From: ~^! LEDOUX, ~^!JONATHAN RYAN
Subject: [External] ***Request to Staff*** LEDOUX, JONATHAN, [redacted]
Date: Wednesday, February 1, 2023 5:05:29 PM

To:
Inmate Work Assignment: NAO

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I agree that the Department should implement a Zero-Point offender guideline. This would be beneficial and comports with the findings of the Department. However, seeing as America's Federal Prisons are already over capacity and that America hands out the longest sentences (while keeping a high rate of recidivism), there must be a change in focus towards rehabilitation over incarceration, especially for first time offenders. I believe Option 2 to be the Commissions best choice. Juvenile cases and misdemeanors should not bar access, as crimes committed before an individual's brain can mature and petty and insignificant crimes should not be measured on the same level as most federal charges. I support the five or more victims option for 4C1.1(a)(4), as it is both fair and appropriate, and reflects the best option for justice to be meted out. For 4C1.1(6), I recommend the criteria for "repeat and dangerous" sex offenders to be the only barring factor. It is no secret sex offenders face much harsher times in prison than non-sex offenders, and are at the lowest part of the pecking order in that culture. This along with severe and long sentences already encourages most to never repeat their offense or commit other crimes. Lastly, I believe the two-level reduction is reasonable. As the study as already shown, the largest difference in recidivism levels is between first and second timers. As such, the largest variance should be reflected here to continue the Commissions goal to use empirical evidence in maintaining the guidelines. Also, I agree that the "pandemic" clause be added to compassionate release, and "Family circumstances" be updated. Most inmates with ten, fifteen and longer sentences have aging parents and loved ones. Many things can change in that time, and if there is no one else available to care for their family member, then a system of release to home confinement (as has already been done many times) should be considered the definition of compassion. Add the factors that the inmate will be burdened with caring for his family member while being monitored and the risk of recidivism falls drastically. I also agree with the Commission that changes in law warrant an inmate being able to file for compassionate release. Congress recognized the BoP never opened the door for compassionate release to, effectively, replace the abolished parole system. All these factors could have been considered in the old parole system, and would impact not just inmates, but the familie who have lost someone to COVID in prison. This will also help inmates who need access to medical care, something the BoP lacks in good quality and quantity. These changes are sensible and should help officials treat inmates humanely. If they fail in this, it cannot be just to keep an inmate in prison, as it violates the 8th Amendment.

Finally, I would like to suggest a further alteration to 2422(b) to be considered. Under this offense is a 2 point aggravating factor for the use of a computer or computerized device in aid of committing the crime. Given the nature of the crime, one can argue that (i) it is practically impossible to commit with out a computer, phone or other computerized device; and (ii) that the idea that the use of a computerized device somehow warrants an increase in punishment is unnecessary. With how connected we are in 2023, it is simply unfeasible that anyone would be able to commit a 2422(b) without at some point using a computerized device. As such, I would ask the board to consider removing, or at least, reducing this penalty, as it is draconian and exists only to further punish sex offenders with longer sentences. Thank you for taking the time to read this and consider my suggestions.

Sentencing Commission,

Thank you for your hard work in bringing the proposed amendments to the USSG. I would like to make comments particularly on the amendments which address zero-point offenders.

I am in support of all amendments which reflect the significantly lower recidivism risk demonstrated by zero-point offenders including lower guideline ranges and alternatives to incarceration.

I support the §4C1.1 reduction of at least two levels for all zero-point offenders. No exclusions are needed for this adjustment, as severity of crime and guideline enhancements already punish certain offenders more harshly. All zero-point offenders should receive a level reduction.

The level reduction for zero-point offenders should be applied retroactively. The implementation of this amendment should be similar in scope to the previous 2-level drug reduction amendment, which was retroactively applied. All current prisoners who were previously sentenced as zero-point offenders should be able to receive a reduction under the new guideline ranges.

I agree with the commentary proposal in §5C1.1 n. 4.(B) that a departure to a sentence of imprisonment "is generally appropriate" for all zero-point offenders without exclusions. For many offenders intervention such as counseling, drug treatment, mental health treatment, sex offender treatment, or therapy would be much more effective in lowering crime and giving us healthier communities. Judges should have the authority to determine if a more minimal intervention is available that may help the individual and community. A suspended sentence or extended period of supervised release would be sufficient as a safety measure in case the other attempts at intervention and treatment do not prove effective.

This too should be applied retroactively, freeing judges to review zero-point offenders individually and see if other treatment options are available.

I agree that the USSC should investigate and encourage Courts to utilize alternatives to incarceration as quickly as possible and

whenever possible. Religious, therapeutic, educational, job skills, family/parenting skills, and restorative justice programs should be utilized as much as possible to help our society be safer and more just.

I believe these proposed amendments addressing zero-point offenders are a great start down a path toward a healthier and safer community. Thank you for your time and consideration.

Sincerely,

James W. Lewis

February 6, 2023

From: ~^! LOGAN, ~^!BENJAMIN MATTHEW
Subject: [External] ***Request to Staff*** LOGAN, BENJAMIN, [redacted]
Date: Thursday, January 19, 2023 7:05:59 PM

To: U.S. Sentencing Commission
Inmate Work Assignment: Commissary

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am asking that you end the use of Acquitted Conduct as a sentencing factor for Judges and prosecutors around the country. It may not be considered Double Jeopardy because of how the law is structured, But it surely is. The late Supreme Court Justice Antoine Scalia fought tooth and nail to get the court to hear a case on the issue, but could never get the votes to end the practice. I have been incarcerated for the last 26 years because of conduct that I was acquitted of. What would have been a 120 month sentence at the most as a first time offender ended up being a 540 month sentence. Please help end this practice and make it retroactively applicable so that all the people who were wrongly sentenced with the use of acquitted conduct can receive the benefit of the change in law if you choose to help us.....

Subject: Letter to Sentencing Commission

To Whom it May Concern:

I am writing in response to your request for comments on the proposed Sentencing Guideline amendments for the 2023 cycle. These comments are in response to Proposed Amendment #7, "Criminal History," and the proposed changes to SS4C1.1 - Adjustments for Certain Zero-Point offenders. I am voicing my support for either version of the amendment, as well as the following options:

- 4C1(a)(6) - The first option
- 4C1.1(a) - Decrease by 2 levels
- That the amendment should be added to SS1B1.10, making it retroactive, and therefore able to affect people who are already sentenced.

Using your own statistics from the proposed amendments document, the zero-point amendment would have applied to over 75% of the zero-point offenders sentenced in 2021. From your report on recidivism of offenders released in 2010, zero-point offenders were 15.5% less likely to recidivate, and is the largest variation within a single criminal history category. This statistic alone gives empirical evidence that supports lower sentences for those who have no criminal history.

In fairness to those who have been sentenced already, the guidelines change should be made retroactive. If zero-point offenders are less likely to return to prison, every offender, including ones already sentenced, should benefit from the reduced sentences made available through retroactive application of this amendment.

Often, the reason cited for supporting a return to court for resentencing is that the penalty has declined for the offense in question. In this case, the decline would include most offense categories, for anyone who has no criminal history. This is also how the so-called "drugs minus 2" amendment was handled, by including those who had already been sentenced through retroactivity. With this amendment, offenders who have already been sentenced should be afforded a similar opportunity. In both the "drugs minus 2" amendment and this "zero-point offender" amendment, a judge makes the final decision on applicability to any given case and offender. Please give them this opportunity to sentence or resentence more in line with the statistics you cited in your 2010 and 2021 reports.

Thank you for your consideration in this matter.

From: ~^! MAGLUTA, ~^!SALVADOR
Subject: [External] ***Request to Staff*** MAGLUTA, SALVADOR, [redacted]
Date: Thursday, February 2, 2023 12:35:29 PM

To: commission
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

greetings
first i would like to thank you and god for the wisdom used in the disallowing of the use of acquitted conduct --i am sentenced for conduct that an anonymous and sequestered jury rejected and 8 checks to pay counsel for the exercise of my 6th amendment totaling 730.000 dollars i received 180 years as such thank you for your consideration making the request to congress
i would pray that once the issue is made law which seems to be predictable after seeing congress had already addressed the issue in an overwhelming bipartisan vote i would ask it be applied retroactively as in fairness to all we are not requesting lower sentence for the crimes but RATHER THAT A JURYS VERDICT BE FINAL ON THOSE ISSUES ALREADY ADJUDICATED this is not a request for lower sentence on crimes with guilty findings

2] i would also like the sentencing commission to consider the Blakely booker type of issue revisited by the sentencing commission themselves

may gods wisdom guide your decisions as they impact on many lives from both sides
respectfully
Salvador Magluta
[redacted]

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Carol Mcgrath

Topics:

1. Compassionate Release

Comments:

I would like to see the possibility of compassionate release be removed for violent offenders. This opportunity places an unfair burden on the families of the victims in these cases by forcing them to repeatedly return to court to again fight to keep the offenders behind bars. For these families, that fight should be over after sentencing. In addition to that obvious point, is another- returning these violent offenders to the streets, gives them the opportunity to add more violence into the lives of innocent people. Please trust that the sentence they were given after proven guilty is appropriate and keep our families safe from those who have proven they are dangerous when free.

Submitted on: February 7, 2023

From: ~^! MONDS, ~^!SAMORY AZIKIWE
Subject: [External] ***Request to Staff*** MONDS, SAMORY, [redacted]
Date: Wednesday, March 1, 2023 2:20:05 PM

To: panel
Inmate Work Assignment: 1/a orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Please do something with the carrer offender where the state drug offenes dont qualify if they are more broad.In my circuit they say they do but in other circuits they dont. Thank you

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Jermaine Montgomery

Topics:

1. Compassionate Release

2. First Step Act- Safety Valve and Conforming Changes to §2D1.1

5. Crime Legislation

6. Categorical Approach and Other Career Offender Issues

7. Criminal History

Comments:

I feel like it is long overdue for first step act conforming changes. The law has not been applied equally to people of color. I also feel ike compassionate release should be alot more compassionate towards non-violent offenders and marijuana and small amount felony possessions. An individual's criminal history should play more of a major role in deciding sentencing for non violent and first time offenders.

Submitted on: January 26, 2023

From: ~^! MOORE, ~^!TARA JO
Subject: [External] ***Request to Staff*** MOORE, TARA, [redacted]
Date: Wednesday, March 1, 2023 2:20:02 PM

To:
Inmate Work Assignment: Laundry

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing about the changes that were proposed to be made to the sentencing guidelines and the additions to both expanding compassionate release as well as giving the District Judges the discretion to define what constitutes as "extraordinary and compelling" circumstances. I have been incarcerated for ten years now. I went to trial in 2014 and obviously lost.. I just recently filed a compassionate release motion about 30 days ago with the ground being me having been sexually assulted, sexually abused, and harassed by a F.B.O.P employee. I did note if my understanding is correct that that will be one of the new grounds for compassionate release and I am writing to show my support for this.. The B.O.P Under its policy does not treat Trauma within the Psychology department. This incident had taken a toll on my mental health that would take to long to explain in the short writing. with that being said I am in need of being properly treated for this which once again the BOP does not offer I have been a model inmate for the past ten years and have not once been in trouble and within my compassionate release I explained that keeping my incarcerated any longer would only deter me from furthering my rehabilitation which I have worked very hard on in the past ten years.. As far as giving the District Judges the discretion to deem what is and what is not and "Extraordinary and compelling" reason or circumstance would be extremely helpful due to the fact the the compassionate release almost always goes back to the defendants sentencing Judge which on some type of level knows the defendant and their character and would be able to make more of an apprioate decision as to where if left up to the FBOP they do not know the defendant and the background and history except what is on paper.. Perfect ensample being I went to trial and a lot of my past history of being sexually abused and physically abused my District Judge is well aware of. With all this being said I am definitely in favor of not only changing the sentencing guidelines to reflect more fair sentencing but also to expand the compassionate release criteria as well as giving the District Judges full discretion to make rulings as to compassionate releases.. Thank you for your consideration

From: ~^! NEWELL, ~^!CARLOS
Subject: [External] ***Request to Staff*** NEWELL, CARLOS, [redacted]
Date: Sunday, January 22, 2023 8:19:55 PM

To: Judge Reeves
Inmate Work Assignment: Unicor 4

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing to comment on the stricter gun control policies for convicted felons that are being put in place by your committee. It is already unfair that we have been sentenced and some "over sentenced" for mere possession of a firearm when it is not defiantly clear that convicted felons lost their Second Amendment right as a result of their felony conviction, according to the Supreme Courts opinion in United States Pistol & Rifle Association vs. Bruen. Also, mass shootings and multiple shootings are mostly committed by those who have no criminal record and are able to buy guns from stores. I myself have been locked up for almost 7 years, and gun violence has risen each and every year. That therefore lead me to believe that me being in here now after rehabilitating myself is a waste of taxpayers dollars. Will you please look into what can be done to change things for those who merely possess a firearm versus those who use them in criminal activity. Specifically violent offences.

From: ~^! NIXON, ~^!JOHNNY LEE JR
Subject: [External] ***Request to Staff*** NIXON, JOHNNY, [redacted]
Date: Friday, January 27, 2023 3:20:04 PM

To:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

PROPOSED AMENDMENT: Acquitted Conduct

This is long over due. I have an issue with this. I went to trial and was acquitted on two counts; however, at sentencing, those charges were grouped to convicted counts, raising my level by three. See U.S. v. Nixon, Case no. 1:18-cr-10042 (W.D.Tenn).

My lawyer didn't see the changes in the Supreme Court by it becoming more conservative; therefore, he didn't raise this issue. however, a jailhouse attorney did and raised it on my 2255, which is still pending. the using of acquitted conduct is a blatant disregard of the constitution.

If you do not make this retroactive, how many people will it effect? How many prisoners will it actually effect anyway? hardly no one. The amendment appears to be substantive; therefore, it would not be retroactive as a clarifying amendment.

Simply, we need this to be retroactive. Thank you

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Sue Norton

Topics:

1. Compassionate Release

Comments:

Unless you've lost a loved one due to a violent act, it may be hard for you to understand the significant hole left in one's heart. We don't get a compassionate second chance at living our lives with the loved one we lost. Please, please do not pass this amendment. Our lives have been an emotional disaster since losing our loved one….what if this was you? Think about it, please. Please do the right thing!!!

Submitted on: February 4, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Kristie Norwood

Topics:

1. Compassionate Release

Comments:

Do not make changes to the current law to allow for more lenient "compassionate release" for criminals, especially those convicted of murder. Please think of the victims and their families, who continue to suffer. Sometimes the only peace those families have us knowing the murderer is in jail. With the increase in violent crimes, the last thing we need are more criminals back on the street.

Submitted on: February 3, 2023

From: ~^! PANZO, ~^!WINDY LYNN
Subject: [External] ***Request to Staff*** PANZO, WINDY, [redacted]
Date: Thursday, January 19, 2023 9:19:58 PM

To: SENTENCING COMMISSION
Inmate Work Assignment: na

ATTENTION

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Inmate Message Below

Lady's and gentleman,

I would like to address the proposed changes to the Guidelines for the sexual assault survivors as I an a Sexual Assault survivor of DUBLIN, CALIF. FCI. I was assaulted by the Chaplin and have been in custody suffering from PTSD and Depression and trying to put my life back together again while incarcerated. I went through the rape crisis Center here in Texas. I want you all to know just how hard it is to try and heal in this environment that i was raped in... I feel like my life has been forever changed, when i get one foot in front of the other i get kicked in the teeth by something or some trigger here that sets me back and makes me shut down and not want to even come out of my room. I struggle on a daily basis and cant get healing when i see and hear and smell everything that triggers me everyday... I cant get his smell off me, his voice rings in my head and i am always looking over my shoulder for the next guard to try and hurt me... living like this every single day is hard and not a way to life anywhere. I don't think that i will ever heal and i have been told that i will never heal in prison as it is a trigger that will never end as long as i am in here. Thank you for making an effort for those of us who have been harmed and raped in prison. We are suffering deeply and hurting... I hope that by speaking up that you know that this change i pray will give us our safety back and healing for the ones who cant find the peace they need like me who is here and terrified everyday of getting attacked again.... I now am sick and on a medical floor here in Carswell, there is a problem here with the sexual assaults' as well, and cover ups... if you ask me if i am safe here... the answer is NO... so i am no better off then sitting in Dublin....

we need you help to get safe

thank you
windy panzo
[redacted]
FMC Carswell Texas

From: ~^! PANZO, ~^!WINDY LYNN
Subject: [External] ***Request to Staff*** PANZO, WINDY [redacted]
Date: Friday, February 3, 2023 10:20:27 PM

To: COMMISSION
Inmate Work Assignment: NA

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Inmate Message Below

i JUST HAVE ONE MORE THING TO ADD... I WAS A VICTIM OF DUBLIN AND I AM NOW IN FMC CARSWELL AND NOT DOING WELL MEDICALY OR MENTALLY... I AM DAMAGED AND I CANT FIX TIS HEE AND THE LONGER IT TAKES TO GO INTO AFFECT THE LONGER THAT I HAVE TO STAY IN MY PAIN AND FEARS AND TRAMA'S... I AM LIVING OUT MY TRAMAS EVERY DAY AND I CANT GET AWAY FROM IT... I AM BEING HARRASSED BY A GURAD AS I WRITE THIS ... EVERYDAY... PLEASE I BEGG YOU ALL THE HELP US TO FIND PEACE AND SAFTEY AS WE WERE NOT SAFE THEN, NOR ARE WE NOW...

ALOHA
WINDY PANZO
[redacted]

From: ~^! PAPPA, ~^!JOHN
Subject: [External] ***Request to Staff*** PAPPA, JOHN, [redacted]
Date: Thursday, February 2, 2023 11:08:18 AM

To: The Honorable Judge Gleeson
Inmate Work Assignment: Trulincs

ATTENTION

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Inmate Message Below

In Craig Williams's brief for case 2022 U.S. Dist. LEXIS 85307, the brief cited a study by the Department of Justice stating that, "Adolescents and young adults simply do not have the physiological capacity of adults over the age of 25 to exercise judgement of control impulses" and concluded that policymakers should implement a "categorical rule of youthfulness as a mitigating factor in sentencing". The Sentencing Commission has an opportunity to include youth as a factor in Compassionate Release/Reduction in Sentence Motions; provided that the Judge could not consider youth at the time of sentencing. This is in line with prior decisions already made by the U.S. Sentencing Commission:

In November of 2010 the Sentencing Commission added to section 5H1.1 of the guidelines. "Age(including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines,"

And, in 2017, the Sentencing Commission produced its first report on "youthful offenders." See. U.S. Sentencing Commission, Youthful Offenders in The Federal System. They explained that the brain continues to develop until the age of 25, and that developmental differences relevant to sentencing generally persist until around that age.

Since this is already in line with how the Sentencing Commission has ruled in the past, Age at the time of the offense should be included in the "Other Factors" section of 3582(c)(1)(A)(i).

I believe that Rehabilitation, "by itself" should be able to be considered, but only after a certain period of years i.e.., for sentences of 15 years or less, the defendant would have to have two thirds of their sentence in, and anyone over 15 years would have to have two thirds in, or have served 15 years straight. If denied they could not resubmit for at least another five years. This would bring humanity back into the system, showing the world that we reward people who have changed their lives after they have served enough time to satisfy the requirement of retribution and incapacitation and are no longer a danger to the public.

Thank you for your time and consideration,

Respectfully,
John Pappa

February 3, 2023

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

Re- Comment on The Commission's proposed amendments to compassionate release

Dear Judge Reeves and members of the United States Sentencing Commission,

I was able to catch the last few minutes of The Commission's online hearing regarding compassionate release, and I was struck by Judge Carlton's call to action that he needed witnesses…
I would like to do just that by providing details that will explain my support of the proposed amendments to compassionate release.

My husband's health has continued to deteriorate since he was transferred into BOP custody. The BOP has continuously displayed reckless indifference to the medical needs of Vernon Stiff [redacted]. This past weekend Vernon almost lost his life because of the BOP's failure to provide adequate, effective and timely medical care to him.

On Saturday February 18, 2023 Vernon began coughing up blood. The correctional officer phoned medical to come and assist Vernon with going to the infirmary, but no one showed up. Vernon was then directed to just go on his own. Vernon arrived at the infirmary bloody, which was observed by the night duty nurse. The nurse then contacted the BOP doctor by telephone asking for permission to transport Vernon to the hospital for medical treatment, because he was very concerned by the amount of blood that Vernon was coughing up out of his mouth and through his nose. The BOP doctor stated that Vernon would be fine by just giving him an asthma/COPD breathing treatment and steroid injection. These instructions were given despite the medical staffer's concerns and the BOP doctor having not even laid eyes on Vernon. He was then sent back to his unit without receiving proper medical treatment.
I'd like to point out that Vernon was not having an asthma/COPD attack, and as such a nebulizer treatment and steroid injection did nothing to address the hemoptysis (coughing up blood) that Vernon was experiencing. In fact, as any doctor worth his medical degree can attest to, steroids lowers the body's ability to fight off infection so at that time the BOP doctor was causing more harm to Vernon's undiagnosed medical problem. Hemoptysis of any kind, but specifically the amount that Vernon displayed with his current medical conditions, warranted immediate physical examination by a doctor. The BOP doctor was intentionally indifferent to Vernon's need for a proper medical assessment and treatment.

Vernon's health continued to deteriorate overnight since he was denied proper medical treatment and the next morning, Sunday February 19, Vernon lost consciousness in the chow hall. The fall caused him to hit his head, neck and shoulder on the floor. He was then picked up and transported to the infirmary by other concerned inmates. After Vernon regained consciousness another nurse again telephoned the BOP doctor about treatment for Vernon. The BOP doctor stated that Vernon was not compromised and would be fine, and offered no further medical attention or treatment to help Vernon. Vernon then asked for the lieutenant on duty to come to the infirmary in hopes that he would help him get emergency medical treatment. The lieutenant arrived and refused to intervene to help Vernon. The lieutenant would then go on to assisted another inmate with using a cart to transport Vernon, who was unable to stand or walk and struggling to breathe, back to his unit.
Now up to this point Vernon had been coughing up blood, had lost consciousness, couldn't stand or walk and was still refused proper medical treatment from the BOP.

After Vernon was returned to his unit the lieutenant directed the other inmates to take him inside his unit. The inmates then took Vernon into his cubicle and placed him in his bunk. Vernon eventually began coughing up even more blood with other inmates helping Vernon to the toilet as his blood began to spill

out onto the floor. Vernon hovered in and out of consciousness, as another concerned inmate(s) was eventually successful in getting the case manager, Mr. Hinkle, to come out of his office to see about Vernon. Mr. Hinkle saw Vernon's condition and made a statement to the effect of not wanting to be responsible for Vernon's death, so he intervened to finally get Vernon medical treatment with transport to the hospital.
Vernon was admitted to the hospital for 6 days with a diagnosis of a pulmonary embolism, sepsis, dyspnea, pneumonia and hemoptysis. If not for the case manager intervening right when he did and having Vernon transported to the hospital, per the emergency room physician, Vernon would have died from the pulmonary embolism and ultimately the sepsis.
This hospitalization for sepsis was a direct result of the inadequately treated pneumonia that Vernon was originally diagnosed with on October 5, 2022. Vernon was also diagnosed with staphylococcus infection in his lung on the same day. Vernon received inadequate/ineffective treatment for **both** of these lung infections, so these infections were allowed to fester for more than four months.
Vernon is now on blood thinners and at further risk of harm to his health because the hospital's treating physician advised Vernon that blood thinners present a catch-22, as they come with their own risks when taken daily…

Unfortunately, the BOP's reckless indifference to the medical needs of Vernon started well before this inhumane treatment.

The BOP has allowed Vernon's health and well-being to continuously deteriorate.
Kaufman County Jail put forth an effort to keep Vernon's existing health problems stable by appropriately assessing his medical needs, providing him with all his stabilizing medications, and using better infection control measures. Once Vernon was taken into custody by the Bureau of Prisons his health increasingly deteriorated. The medications that were stabilizing his health conditions were both taken away and changed. He was placed into an over crowded prison that lacks infection control measures, thus suffering multiple damaging infections and refused proper medical care time and time again at both Seagoville FCI and Beaumont FCI Low.

The BOP are fully aware of Vernon's medical problems, which consist of **severe asthma (and now COPD), stage 3 kidney disease AKA chronic kidney disease, anemia, chronic rhinosinusitis, erythema nodosum, abnormal prostate and hypokalemia. In addition to these conditions Vernon has only one functional lung that is compromised by scarring. Vernon's lower left lung was removed in 2014. The upper left piece of his lung that remains has limited function due to cavities, inadequate blood flow as some blood veins are occluded, and inadequate air flow. All this has been shown on CT scans and pulmonary function testing.**
Vernon's team of doctors (pulmonologist, immunologist, nephrologist, infectious disease doctor and primary care physician) had stabilized his medical conditions with timely, adequate and effective medical treatment prior to his incarceration, so again Vernon was placed into custody of the BOP in stable condition.

Shortly after Vernon was transferred to Beaumont FCI Low, he contracted COVID-19 and was not properly treated. While suffering with symptoms, the BOP refused to give Vernon any medication other than Tylenol and he was not taken to the hospital. This intentional medical negligence has caused irreparable harm to Vernon's already compromised lungs.
BOP medical staff has confirmed to Vernon that the damage from his COVID-19 infection has now lead to a new diagnosis of COPD (chronic obstructive pulmonary disease). The BOP nurse stated that Vernon's lung(s) now appear so scarred on an X-ray that the imaging needed to be sent out to a 3rd party for reading.
Vernon has now lost more lung capacity and has to rely on breathing treatments using a nebulizer. He now requires treatments multiple times a day in order to help him breathe. As the COPD progresses, Vernon is having difficulty carrying out normal daily activities due to breathlessness. These breathing treatments are in addition to Vernon already taking the highest dose of corticosteroids available, which underscores how damaged the BOP has allowed his remaining lungs to become. The additional damage to Vernon's lungs

from COPD can't be reversed and he is now at an increased risk of developing heart disease, lung cancer and a variety of other conditions. Due to the BOP's reckless indifference to his medical needs,Vernon is now faced with this additional chronic lung disease that gets worse over time and is the third leading cause of death worldwide. Patients diagnosed with Asthma-COPD Overlap Syndrome (ACOS) have symptoms of both asthma and COPD, which can be more serious than having either of the conditions alone, so without adequate, effective and timely medical treatment Vernon's life expectancy will continue to be shortened.

Prior to receiving the nebulizer unit, Vernon almost passed out while trying to walk to the infirmary to get a breathing treatment during and for an ACOS attack. Thankfully a correctional officer provided him with literal life saving assistance in reaching the building. The medical staffer on duty refused to provide Vernon with immediate medical treatment because she thought he was faking- until she saw the pulse oximeter reading that indicated his oxygen level was dangerously low…

Vernon has had the nebulizer taken away from him and has been refused treatment for the ACOS attacks during power outages, and thus had to rely on and empty his rescue inhaler just to stay alive…

Vernon had to plead with multiple staff members for a short cut pass because he could no longer make the long walks to the chow hall, as it caused him to have ACOS attacks. Vernon was essentially being forced to make a choice between eating and being able to breath…

During one sick call visit a medical staffer told Vernon "that he gets on her nerves and why does he have to come down when she is on duty". On another visit he was told he would not be seen right now because his problem list is too much to deal with…

Vernon's increasing deterioration of health did not happened in a vacuum. Each lung infection increased in severity and Vernon was left to suffer with symptoms. Multiple other requests for medical treatment were not even documented because BOP medical staffers refused to see Vernon for assessment and treatment.

The BOP's doctor has essentially made the decision to be intentionally indifferent to Vernon's medical needs after Vernon's filed an administrative remedy complaint against his for this very same thing. The BOP doctor now refuses to even physically see Vernon for medical assessments or speak with him, and instead communicates with Vernon only through the medical staffers on duty.

This is just a portion of the BOP's reckless indifference to Vernon's medical needs, but I wanted to highlight some of the most egregious incidents to share with you, as you consider the proposed amendments.

The BOP has repeatedly shown that they cannot or will not provide inmates with the adequate, effective or timely medical care, so the proposed Section 1B1.13(b)(1)(C) expansion of the medical circumstances constituting extraordinary and compelling reasons is a reasonable amendment. It would allow inmates like Vernon to bring their urgent and inadequately treated medical needs to the attention of the court. I cannot stress enough the importance of adopting this expansion, because inmates such as Vernon were sentenced to a specified term of imprisonment, not the death penalty. Therefore, the inadequate medical care from the BOP changes the terms of the inmates' sentence and renders the sentence fundamentally inequitable.

It's worth mentioning that the administrative remedy process, which is run by the BOP, is not an effective vehicle for inmates to file a medical complaint against the very same people they are complaining about. This is tantamount to the fox guarding the hen house. The process is long and drawn out and in Vernon's case his medical complaints are falling on deaf ears with dismissal of said complaints, all the while his health continues to deteriorate. This is one of the reason I also support the proposed amendment to add Section 1B1.13(b)(1)(D) (infectious disease outbreak or public health emergency).

I further support Section 1B1.13(b)(1)(D), because the BOP continues to intentionally engage in deceptive practices regarding home confinement. Vernon is FULLY eligible for placement in home confinement, but the BOP has willfully chosen not to follow former Attorney General Bill Barr's directive to protect vulnerable inmates like Vernon. The BOP has deemed Vernon's medical problems stated above, as *not* meeting the CDC's definition of being a COVID-19 at risk inmate… Vernon's outgoing mail that contained his appeal for home confinement was intentionally held back, then eventually returned to him with his stamps torn off the envelope, thus having never left the institution… They have intentionally **misapplied the criteria and added criteria that does not exist in the memorandum, which continues to lead to the *deaths of inmates and cause severe harm to Vernon and other inmates… This is why it is crucial to add Section 1B1.13(b)(1)(D), because when the BOP refuses to use it's authority to protect vulnerable inmates, the court needs to be able to act quickly in the event of a similar outbreak of infectious disease or ongoing public health emergency that places vulnerable inmates at risk of severe injury, irreparable harm or death.

In closing I would like to add a personal note. There will always be people of a certain ideology who will find various reasons to oppose these common sense amendments, but The Commission should do what all judges, such as Judge Reeves, do everyday in their courtrooms: base the decision on the evidence, the law, judicial discretion and common sense.

With the evidence that the COVID-19 pandemic has presented, the law that ensures all US citizens their Eight Amendment right against cruel and unusual punishment, The Commission's authority granted by Congress to define extraordinary and compelling and the common sense proposals, I implore The Commission to adopt ALL of the proposed amendments. Otherwise, there will continue to be unnecessary deaths of inmates - our fellow citizens who are also human beings.

Respectfully submitted,

Shanta Paris

cc- mail copy

**https://www.politico.com/news/2020/04/21/trump-administration-reverses-prisoner-release-policy-198648

**https://www.forbes.com/sites/walterpavlo/2022/06/25/department-of-justice-proposes-final-rule-to-end-cares-act-for-home-confinement-for-federal-prisoners/amp/

** https://lisa-legalinfo.com/2023/01/26/bop-delegates-cares-act-home-confinement-decision-to-prosecutor-update-for-january-26-2023/

** https://www.forbes.com/sites/walterpavlo/2023/01/24/federal-prosecutors-have-increased-role-in-cares-act-home-confinement-transfers/?sh=5f7a28427c5d

*https://www.bop.gov/mobile/news/press_releases.jsp

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Tracylyn Patterson

Topics:

1. Compassionate Release

Comments:

I am writing today because I believe that the USSC needs to be more suggestive to someone who is of a young age be eligible for compassionate release.

Not even 16 months ago my son was in Williamsburg FCI after being sentenced to 240 months. My son wasn't even in the facility for 30 days when he suffered a massive heart attack at just 28 YOA. He never had any diagnosis of heart illness prior to being incarcerated. He died 4 times and had a lack of oxygen for a minimum of 30 minutes. He was intubated, admitted to CCU and in an Alpha Comma for 10 days. Doctor's at the hospital where seconds away from pronouncing my brain dead due to no frontal brain activity. There were also highly concerned that he may suffer from anoxic encephalopathy. He has since been suffering from loss of memory; an example being when he first wakes up he cannot remember my name, his daughter's name or his wife's name. His brain has to reboot as he says. He also has weakness on his left side. While my son is considered a miracle due to surviving something that should have ultimately killed him, he fights every day with the BOP to be released under Compassionate Release. Their reason for denial is his age. My son is now soon to be a 30 year old male with a defibrillator in which to control his heart rhythm and in hopes that he won't have another heart attack.

My son can not afford to catch Covid-19, the flu or any illness that his body is now less likely to be able to fight and could be highly detrimental to his survival, as he is now diagnosed with cardiomyopathy by the cardiac doctor at the the hospital. He is not getting the medical treatment he needs while inside the BOP walls. It has recently be discovered (via the defibrillator) that his resting heart rate is increasing into the 90's instead of being in the 60's which is a healthy RHR.

I beg you to please consider who is eligible for Compassionate release! I fear every night when I close my eyes that I will get a call that my son is gone. Please I am begging from the bottom of my heart that you can place great consideration for inmates like my son who are young yet terminally ill.

Respectfully;
Tracylyn Patterson

Submitted on: February 2, 2023

From: ~^! PEOPLES, ~^!ROBIN L
Subject: [External] ***Request to Staff*** PEOPLES, ROBIN, [redacted]
Date: Tuesday, February 7, 2023 7:50:25 PM

To: Honorable John Gleeson, Sentencing Commissioner
Inmate Work Assignment: Unicor Cut & Sew

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Honorable John Gleeson:

Hello, my name is Robin Peoples and I humbly submit my comments to the US Sentencing Commission regarding the proposed changes to what may be considered as an "extraordinary and compelling" circumstance. It is my concern that if the policy statement does not specifically state that changes in law (specifically, non-retroactive changes) can be considered as an extraordinary and compelling circumstance -- then the courts will do what they have in the past -- deny motions. I hope the language is clearly stated with no room for the courts to interpret it any other way. Yes, a sentence maybe inequitable because the law has changed, but I fear that if it is not clearly stated the courts will ignore the changes and stay their course (specifically the Seventh Circuit Court of Appeals and the lower courts in the circuit). Justice is not served when the location of your court decides whether or not you will receive relief.

I was granted compassionate release in June of 2021 after serving 22.5 years with no incident reports. My original sentence was 110 years. I used my time in prison to better myself and when I was released I immediately found employment with Forest River INC., located in Elkhart Indiana. However, the government filed a motion to reconsider and the Seventh ruled in United States v. Thacker, that District Courts in that circuit could not rely on the First Step Act amendment to 924 (c) as an extraordinary and compelling circumstance. Unfortunately, my Judge had to follow the Circuit Court of Appeals and ordered me to report back to prison. After being free for roughly two months I had to return to prison. I have over 70 years remaining on my sentence. I pray that your work will provide a path for myself and others like me to receive relief from the courts.

Please know that the work you and the other Commissioners do is greatly appreciated.

Thank you for your time and consideration of my comments.

Best regards,

Robin L. Peoples
[redacted]
P. O. Box 33
Terre Haute, IN 47808

From: ~^! PISTILLO, ~^!MICHAEL ANTHONY
Subject: [External] ***Request to Staff*** PISTILLO, MICHAEL, [redacted]
Date: Tuesday, February 14, 2023 6:50:23 PM

To: To Whom It May Concern
Inmate Work Assignment: Facilties

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing in response to your request for commentsd on the proposed Sentecing Guideline amendments for the 2023 cycle. These comments are in response to Proposed Amendment #7, "Criminal History," and the proposed changes to SS4C1.1-Adjustments for Certain Zero-Point offenders. I am voicing my support for either version of the amendment, as well as the following options:
-4C1(a)(6)-The first option
-4C1.1(a)-Decrease by 2 levels
-That the amendment should be added to SS1B1.10, making it retroactive, and therefore able to affect people who are already sentenced.
Using your own statistics from the proposed amendments document, the zero-point amendment would have applied to over 75% of the zero-point offenders sentenced in 2021. From your report on recidivism of offenders released in 2010, zero-point offenders were 15.5% less likely to recidivate, and is the largest variation whithin a single criminal history category. This alone is evidence that supports lower sentences for those with no criminal history.
In fairness to those already sentenced, these changes should be made retroactive. If zero-point offenders are less likely to return to prison, every offender, those already sentenced and those awaiting sentence should benefit from this reduction from the application of this amendment.
This decline would include most offense categories for those who do not have any criminal history. Please give them this opportunity to sentence or resentence more in line with the statistics cited in your 2010 and 2021 reports.
Thank you,
Michael Pistillo

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Susan Pistillo, Inmate

Topics:

7. Criminal History

Comments:

I am writing in response to the proposed Sentencing Guideline Amendments for the 2023 cycle. These comments are in response to proposed amendment 7. "Criminal History Part (B) Zero Point Offenders" and proposed changes to Chapter 4 "Criminal History Category" of USSC Guidelines Manual to include Part C Adjustments for Certain Zero Point Offenders. I am supporting either version of the amendment and the following options.

Although both Options warrant a reduction in sentences, Option 1 would make adjustment applicable to zero-point offenders with no prior convictions. Therefore, I support Option 1 first. I support a 2-level decrease in the offense level for both Option 1 and Option 2. Part B of the proposed amendment would set forth a new Chapter Four guideline, at 4C1.1 (Adjustment for Certain Zero Point Offenders). The amendment should be added to 1B1.10 in the USSC Guidelines Manual and making it retroactive therefore able to affect people who have already been sentenced.

From your report on recidivism released in 2010, zero-point offenders were 15.5% less likely to recidivate, and is the largest variation with a single criminal history category. That statistic alone gives empirical evidence that supports lower sentences for those who have no criminal history. Your own statistics from the proposed amendments show that the zero-point amendment would have applied to over 75% of the zero-point offenders in 2021.

In fairness to all who have already been sentenced, the guidelines should be made retroactive. If zero-point offenders are less likely to return to prison, every offender, including ones already sentenced, should benefit from the reduced sentences made available through retroactive application of this amendment.

Often, the reason cited for supporting a return to court for resentencing is that the penalty has declined for the offense in question. In this case, the decline would most include most offense

categories, for anyone who has no criminal history. This is also how the so-called "drugs minus 2" amendment was handled, by including those who had already been sentenced through retroactivity. With this amendment, offenders who have already been sentenced should be afforded a similar opportunity. In both the "drugs minus 2" amendment and this "zero-point offender" amendment, a judge makes the final decision on applicability to any given case and offender. Please give them this opportunity to sentence or resentence more in line with the statistics cited in your 2010 and 2021 reports.

Thank you for your consideration in this matter.

Submitted on: February 24, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Angela Powell

Topics:

2. First Step Act: Safety Valve and Conforming Changes to §2D1.1

1. Compassionate Release

7. Criminal History

10. Alternatives-to-Incarceration Programs

Comments:

My spouse was sentenced to 4 years after spending almost 4 years pre conviction on electronic tag. His conduct during that time was not taken into consideration as he moved in with me, his long term partner. Got married. Had to abide by a strict curfew which prevented him from visiting his family in the next state, he was unable to apply for work due to internet restrictions and subsequently could not attend the few interviews we did secure because of his restrictions all pre conviction. This put him under extreme financial hardship and stress. He attended all psychiatric counselling and was signed off as no danger or risk as his charge was viewing indecent images online. His sentence may have been 8 years not the 4 he got and this needs considering when sentencing because low level 'sex crimes' are excluded from FSA credits. Someone who looked at images is treated at the same level as someone who groomed a minor or even raped. The FSA eligibility needs reviewing for this reason on a case by case basis. For someone who is not a career criminal without a long record and who has shown great conduct on probation and between arrest to sentencing there should be more leniency. Also, in our case, my husband was housed almost 500 miles away from me and we have had our move request denied because i have had a cancer diagnosis a month after his sentencing and between finances, my health and my mental state due to the stress I cannot travel 5.5 hours each way to visit my husband despite the BOP saying how important it is to have family visits. There is also no video calling.
In the case of my husband while locations are over populated and still getting hit with covid, and where he was no danger or caused any issues on electronic tag this could easily have been an alternative to incarceration. He could be on home confinement or ongoing monitoring with probation rather than taking up space in a low security where he cannot even take courses he is interested in to return to his profession in IT. I am happy for you to contact me to discuss this

further.

Submitted on: January 15, 2023

From: ~^! REDIFER, ~^!MICHAEL C
Subject: [External] ***Request to Staff*** REDIFER, MICHAEL, [redacted]
Date: Monday, February 6, 2023 8:06:02 PM

To: USSC
Inmate Work Assignment: Rec. worker

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I. Booker/Alleyne issues that still need fixed.

Apprendi and its progeny (especially Alleyne) control how the USSC "guidelines" can be written and interpreted. 18 USCS 3553(b)(1); see also 28 USCS 994(a)(2). This means that any guideline or precedent in "conflict with" the Constitutional Provisions in these rulings have "no further force or effect", 28 USCS 2072(b); because they unquestionably "abridge ... or modify ... substantive right[s]", Id; and would also abolish or modify "evidentiary privilege[s]". 28 USCS 2074(b). So "Trial" specific statutes and/or Supreme Court precedents, United States Constitution, Article III, Section 2, Clause 3; are the determining factor for when evidence can be used to sentence a defendant, United States v. Redifer, 12-CR-20003-JAR, (Doc. #638, at 10-12 (D. Kan); see also Id at (Doc. 667, PSR OBJECTIONS, at 6-9); and the guidelines cannot be written or interpreted in a way that deprives a defendant of these Constitutional and "statutory defense[s]". Wal-Mart Stores, Inc. v. Dukes, 180 L. Ed. 2d 374, 400 (2011).

II. Proposed rules changes.

5C1.2 must be written exactly like 18 USCS 3553(f) and the three criteria enumerated in the statute are "conjunctive", United States v. Palomer-Santiago, 209 L. Ed. 2d 703, 709 (2021); because "and" means and, not or. 18 USCS 3553(f)(1)(B).

The circuit conflicts in connection to 2D1.1(b)(18) and 2D1.11(b)(6) are irrelevant because the enhancements under 2D1.1(b) and 2D1.11(b) are absurdly Unconstitutional. For example, a defendant that could be sentenced for possessing a firearm must be Constitutionally indicted and convicted and then sentenced under a sentencing table for 18 USCS 924, not Unconstitutionally enhanced under 2D1.1(b)(1), and these same Constitutional Provisions apply to the other aggravating and mitigating circumstances. For example, if a defendant has gotten Constitutionally indicted and convicted for being a member of a conspiracy, but is still a minor participant, then this means the defendant's guideline range in the statutory specific sentencing table will be lower than the other members of the conspiracy, not a lower guideline range and then Unconstitutionally reduced again. See Supra I

One of the main issues (there are a lot) concerning how prior convictions apply to the guidelines is the fact that the USSC's "Powers", United States Constitution, Article I, Section 8, Clause 18; have been limited to using only prior felony convictions when making guidelines, 28 USCS 994(h)-(i); so the use of misdemeanor convictions for any purpose is "repugnant" to the Constitution. Marbury v. Madison, 1 Cranch 137, 180 (1803).

3E1.1's definition for preparing for trial must include a rule requiring that the only time that a defendant's motion to suppress evidence will still make them eligible under 3E1.1 is when the motion is based on Congressional Legislation and/or Supreme Court precedents. See Supra I.

4B1.2's definition for the term controlled substances can include state statutes definitions but only in circumstances where the defendant was Constitutionally indicted and convicted under 18 USCS 13 and a relevant state statute. See Supra I.

Respectfully submitted,
Michael Caine Redifer Sr.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Jean Rella Mar. 13, 2023

Topics:

7. Criminal History

Comments:

I support the proposed amendments to the criminal history calculations. My comments are as follows:

Topic 7, Part A: I support Option 3, eliminating status points. I believe, however, that status points should still apply for violent prior offenses.

Topic 7, Part B: I support Option 1, as, in my opinion, the Mandatory Minimum Sentencing is already excessive in many cases, particularly with first offenses.

Topic 7, Part C: I support Option 3, exclusion of all sentences for possession of marihuana offenses from the criminal history score calculator.

Submitted on: March 13, 2023

From: ~^! RHEA, ~^!GREGORY ALLEN
Subject: [External] ***Request to Staff*** RHEA, GREGORY, [redacted]
Date: Sunday, January 22, 2023 3:49:52 PM

To: Sentencing Commission
Inmate Work Assignment: Compound

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Greetings -

Having been allowed to give input regarding the Sentencing Guidelines and the Commission I would like to bring forth the following issue: Acceptance of Responsibility

By signing a Plea Agreement the costs to the government will be significantly lowered by not having to prepare for and completing a trial. Anyone that signs a plea agreement should be given the 3 points reduction for Acceptance of Responsibility, regardless of the issues listed below.

I believe that an individual should be given the Acceptance of Responsibility 3 point reduction to anyone that signs and accepts a plea agreement in a timely manner. Regardless, if the individual objects to part or parts of the PSI, or attempt to withdraw the plea agreement. So long as the individual is not allowed to withdraw the plea agreement in it's entirety. If the government does allow the withdrawal of the agreement, then the court should still allow the Acceptance of Responsibility.

This will save the government the expense of preparing and completing trial.

From: ~^! RHODES, ~^!JERRY JABBARI
Subject: [External] ***Request to Staff*** RHODES, JERRY, [redacted]
Date: Thursday, March 2, 2023 7:35:26 PM

To: Sentencing Commission
Inmate Work Assignment: Am rec

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Honorable Carlton W. Reeves

My name is Jerry J Rhodes and this letter is a humble request for the Sentencing Commission to not only amend excluding acquitted conduct sentencing, but to also make it retroactive.

Brief history of my issue:

In 2015 I was arrested and indicted in a federal drug conspiracy in columbia S.C. and my charge was Possession With Intent to Distribute 280 grams or more of Crack Cocaine and 500 grams or more of Powder Cocaine. Being that I was a drug user since 1993 (age 18) and never possessed such large amounts ever, I exercised my right to a Jury trial to prove I wasn't guilty of those indicted amounts. The Jury agreed and found me guilty of less than 28 grams of Crack and less than 500 grams of Powder Cocaine. My advisory guidelines range sentence should not have exceeded 51-63 months. However, Judge Joseph Anderson held me responsible for 3,500 grams of Powder and sentenced me to 205 months.

Sir, Please correct this wrong completely, by giving retroactive Justice to all who are affected by this unjust practice.

Your Truly

Jerry Jabbari Rhodes

From: ~^! RICH, ~^!MICHAEL KENNETH
Subject: [External] ***Request to Staff*** RICH, MICHAEL, [redacted]
Date: Wednesday, February 22, 2023 12:24:08 PM

To: Commissioners
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hello all,
On the subject of acquitted conduct I wanted to say, in my sentencing the charges I was acquitted of were the basis for my entire sentence. With obstruction as my only conviction other than the RICO conspiracy the trial judge used his discretion (as in my transcripts) to claim that there was no doubt in his mind that I was in fact guilty of all the charges that the jury found me not innocent of. This raised my sentencing guide lines from three years to twenty to life. In fact he gave me a 30 year sentence which is a numerical life term for me. Since he overruled the jury's findings of acquittal on these other charges I was in fact not awarded a proper jury trial. Hence my request that you disallow use of acquitted conduct at sentencing.
Thank You

From: ~^! SAMS, ~^!MAXIMILLIAN
Subject: [External] ***Request to Staff*** SAMS, MAXIMILLIAN, [redacted]
Date: Wednesday, January 25, 2023 9:06:25 AM

To: U.S. Sentencing Commission public comments
Inmate Work Assignment: DB Unit Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

This is a comment on the Sentencing Commission's most recent Proposed Amendments to Sentencing Guidelines.

I would like to respectfully disagree with the proposal to increase the penalties for "fake pills' made with fentanyl. I believe the proposed increase is well-intentioned, but ultimately misguided in its goal to to battle opioid epidemic fueled overdoses, deaths, and the proliferation of dangerous fentanyl.

First, many sellers of these illicit pills are, like many users of these "fake pills", unaware of their counterfeit nature and increased danger. Many (sellers and users) assume they are transacting in pills from a legitimate pharmaceutical source, albeit in a restricted, non-prescribed (and therefore) illegal manner.

Secondly, the motivations of the manufacturers of illicit pills containing fentanyl are minimally affected by legal ramifications. Many pills are manufactured with fentanyl analogues that are not even scheduled as controlled substances yet. This is an attempt to skirt the already existing illegality of analogues that have been scheduled as illegal controlled substances.

Essentially, manufacturers of "fake pills" containing fentanyl many times assume they are taking advantage of a legal loophole in the way we schedule drugs and their analogues- and thus will not be sensitive to laws on the books that increase penalties, however severe.

But also, countless studies have concluded, as a massive analysis by criminologists Anthony Doob and Cheryl Marie Webster has, that "a reasonable assessment of the research to date- with a particular focus on studies conducted in the past decade- is that sentence severity has NO EFFECT on the level of crime in society....No consistent body of literature has developed over the last 25-30 years indicating that harsh sanctions deter."

While the Commission's proposal regarding increased sentences for fake pills containing fentanyl is aimed at stemming the supply of the dangerous pills, I believe a more effective deterrent is to decrease the demand for pills containing fentanyl.

One way to do this would be to give better access to free fentanyl tests for users, so they can decline this type of pill when presented, thus making the pills less profitable to manufacture and sell. Word spreads surprisingly fast in local networks, and this type of knowledge can render this type pf product worthless (similar to warnings from the Secret Service about counterfeit bills/currency in an area).

That said, while I think stopping demand for the pills is more effective in battling this crisis, I think the most effective way of stemming the SUPPLY of pills containing fentanyl would be to create a better system to monitor

the pill presses used in the manufacture of the pills that are widely available for sale online on websites like eBay and Amazon. Time and again, proliferation of these types of pills can be tracked back to a single local manufacturer (and a single purchase of one of these presses). While there are many valid legal uses for these presses, a better scrutinizing of their sale would go a long way in stemming the tide of fentanyl pills.

Thank you in advance for your thoughtful consideration of this comment.

Respectfully,

Maximillian C. Sams

From: ~^! SEPULVEDA, ~^!JOSE ELIAS
Subject: [External] ***Request to Staff*** SEPULVEDA, JOSE, [redacted]
Date: Friday, February 3, 2023 11:50:12 AM

To: U.S. Sentencing Commission
Inmate Work Assignment: Skills Program Mentor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

My name is Jose Elias Sepulveda. I was born in Brooklyn, NY. I am 68 years old and a first-time non-violent drug offender sentenced to life under the marijuana sentencing guidelines for a marijuana conspiracy. I have served over 25 years of my draconian sentence, with no possibility of coming home to my four adult children and my eleven grandchildren.

There is no doubt that over a quarter century in prison as a first-time non-violent drug offender is more than sufficient to achieve the objective the objective of my sentence and incarceration. Am I considered irreparable damage without hope of redemption?

My comment to the Sentencing Commission is that it is necessary that the U.S. Sentencing Commission takes into account that in U.S.S.G. Section 1B1.13, the Section 3553(a) factors should still be included. Also, "changes in law" for a reduction of sentence should be applied retroactively. I am serving a sentence that is inequitable, in light of changes in the laws.

Also, please make the First Step Act of 2018 retroactive so that people with life sentences and first-time non-violent offenders can receive relief.

Last, it is necessary to differentiate between 1(A) medical condition(s) with 2(B) age of the defendant. The government and the courts continue to mix subdivision 1(A) with subdivision 2(B). Please also implement the three compassionate release alternatives to cover unforeseen circumstances, which the Commission already posed.

I thank you very much for any help you can provide.

Jamal Shehadeh
[redacted]
Christian County Jail
301 West Franklin St.
Taylorville, IL 62568

Sent Via Certified Mail
Return Receipt Number
7020 1290 0000 6563 4715

01 February 2023

USSC Public Comment
One Columbus Circle NE
Suite 2-500
Washington, D.C. 20002

Re: 12 January 2023 Proposed Amendments

Dear Commissioners:

These public comments are to item number four Circuit Conflicts, part B Concerning §4B1.2(b). For the reasons stated below I urge the Commission to recommend to Congress [Option 1 (Controlled Substance under Federal Law)] and to make this amendment apply retroactively pursuant to 18 USC 3582(c)(2) and 28 USC 944(u).

Currently I am pending sentencing on a single count indictment charging violation of 21 USC 841(b)(1)(C). See U.S. v. Shehadeh, 21cr30022 (C.D. Ill). I was convicted by jury on 06 October 2022. The total weight attributed is 2½ grams of methamphetamine, §2D1.1(a)(5), and a CHC IV, for 27-33 months.

The USPO, however, has determined that I qualify under §4B1.1(b)(2) based on a 2016 conviction in 14cr30046 (C.D.Ill.) that also involved less than 5 grams of methamphetamine, §2D1.1(a)(5), and a 2010 Illinois conviction for delivery of 7 grams of cocaine (2 counts). See www.judici.com, Christian County, People v. Shehadeh, 2009-CF-66. Under U.S. v. Ruth, 966 F.3d 642 (7th Cir. 2020), my Illinois conviction qualifies under §4B1.2(b) despite the overbreadth of the Illinois cocaine definition. As such, my guidelines range is 262-327 months, a 1,000% increase over §2D1.1(a)(5). An 851 notice was filed.

My current and prior controlled substance offenses are the lowest-level crimes contemplated by the USSG's. Both Federal convictions (14cr30046 and 21cr30022 (C.D.Ill.)) are covered by §2D1.1(a)(5) and §2D1.1(c)(14) and the 2010 Illinois conviction involving 7 grams of cocaine would also be an offense level 12 (less than 50 grams). Offense level 12, §2D1.1(c)(14), is the lowest offense level of methamphetamine and cocaine.

Congress and the Commission intended §4B1.1 to ensure that high-level recidivist drug traffickers are sentenced at or near the statutory maximum, not that low-level offenders involved in personal-use quantities of controlled substances, like myself, are given the equivalent of a life sentence.

The burden on the Courts to apply the proposed [Option 1] amendment retroactively under 18 USC 3582 (c)(2) and 28 USC 944(u) is minimal when balanced against the severe sentencing disparities among the Circuits. Those defendants who would no longer qualify under §4B1.1 have already had their non-Career Offender guideline ranges computed by the USPO. All the Courts need do on resentencing is follow the simple instructions of §1B1.10.

As shown by the facts of this author's case, the extreme magnitude of the guidelines range variation results in a Miscarriage of justice should the Commission not allow for retroactivity. For the sake of uniformity, the amendment should apply to §2L1.2, n.2.

Truly yours,

Jamal Shehadeh

From: ~^! SIMPSON, ~^!RICHARD
Subject: [External] ***Request to Staff*** SIMPSON, RICHARD, [redacted]
Date: Monday, January 30, 2023 2:50:04 PM

To:
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sentencing Commission,
The Enhancement for defacing a firearm and the enhancement for possessing a stolen firearm go hand in hand. The reason for defacing a firearm is due to the firearm being stolen.
Therefor it is a double punishment.
Having a Firearm with a defaced serial Number is no longer a crime
(see United States vs. Randy Price case number 2:22-cr-00097) S.D.WV
a 922 G charge should never recieve a possession of firearm during commission of a felony enhancement if that felony is narcotics, thus being what a 924 C is for and represent's.
Also, Simple low quantity possession's of narcotic's like Heroin and meth should be lowered on the guide line scale.
(Anything under 28 grams is clearly someone who just trying to maintain they're addiction and keep gas in the car.)
Please make all of your changes Retro-active.
Thank you for your time and patience and the opportunity for my opinion and request to be stated.
Respectfully Submitted,
Richard Simpson [redacted]
FCI Berlin

From: ~^! SNEED, ~^!JERIMY C
Subject: [External] ***Request to Staff*** SNEED, JERIMY [redacted]
Date: Thursday, January 19, 2023 7:19:52 PM

To: Public Comments
Inmate Work Assignment: Challenge Peer

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The proposed 1B1.13 compassionate release guideline's "Other Grounds" or "Other Reasons" was listed as three possible choices. One of them is too restrictive. There are countless deserving cases that have been granted since the passage of the First Step Act that would be inelligible for relief had the most restrive of the three suggested "Other Grounds" been in place as policy at the time they were decided. A quick look through all of the men and women who, though hard work towards rehabilitation, along with other things like long sentences, youth, changes in law etc. received relief that would be excluded from receiving mercy and compassion under the most restrictive wording. The wording that most closely reflects the original discretion afforded the BOP is the ideal choice. It leaves the District Courts, the people who decide appropriate punishment in the first place, with the discretion needed to alter those sentences if the circumstances change. To give the BOP director the ability to choose grounds when she has no experience with determining appropriate punishment just to turn around and limit what a District Court judge can consider seems illogical and will inevitably create situations in which deserving parties are prevented from getting relief, something very much in opposition with the intent of the statute.

From: ~^! SOTIS, ~^!PETER
Subject: [External] ***Request to Staff*** SOTIS, PETER, [redacted]
Date: Tuesday, February 28, 2023 5:49:28 PM

To: U.S.S.C.
Inmate Work Assignment: Recreation

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear U.S.S.C.,

I have the following comments regarding U.S.S.C. Section 4C1.1.

The commission's proposed changes to include a reduction for zero point offenders (U.S.S.G. Section 4C1.1, Option 2) is sound commonsense policy. It rewards an offender for, prior to instant offense, living a lawful life. However, the commission's proposed exclusion of leaders/supervisors is not appropriate.

All other exclusion criteria concerns, violence, sexual offenses, or serious financial harm to individuals. This is warranted. These offenses and acts should be excluded for the safety of the community. But offenders with a leadership role designation for crimes where specific victims play no part in the charges should not be further punished by depriving them of the 4C1.1 reduction. This is particularly true when considering that the leadership designation can be a low bar; all that needs to be shown is an offender having influence over one other person in the commission of the offense.

Broadly equating influence with dangerous or predatory acts is neither logical or cohesive with respect to the 4C1.1 guideline. I respectfully request the commission select Option 2, and strike the provision excluding leaders/supervisors from receiving the 4C1.1 reduction.

Thank you

From: ~^! STAPLETON, ~^!JERMAINE D
Subject: [External] ***Request to Staff*** STAPLETON, JERMAINE, [redacted]
Date: Thursday, January 19, 2023 11:06:10 AM

To: commisson
Inmate Work Assignment: fs

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I think there should be changes made to the safety valve in terms of the criminal history level being cut off at level 4. I think it should not have a level limit but instead a judges determination. In my case i have a level 6 criminal history but my history is very minor including 4 DUI's and receiving stolen proper. Furthermore i think there should be a cap on what crimes should count towards applying points to your score. The criminal history issue affect us in alot of ways from security levels,fsa credits, dap credits,classfiction level,etc. Having minor charges on your record and then being repunsihed for them afterwards isn't fair.

I also think the USSC should refer to congress to clarify the FSA credits. The bop is putting all these hurdles on us making it hard to apply the credit we earn. I think all eligble immates should be able to apply time as they earn. Applying the first year off the front of our sentence like the laws says. Instead they make us have to wait two assmesment periods(which is a year). In alot of cases immates waiting that long lose there abilty to apply the credit off the front end. Futhermore the BOP saying the medium and high immates cannot apply there year off the front is also unfair. This all goess aganist what the intent was when the first step act was passed.

Another issue is the so called "Warden Exception". This rule is suppose to be for helping immates like med and high immates with a avenue to seek relief from the warden. However in all cases here in Lexingtion the warden hasnt reviewed a single case and is not responding to bp-9 request as immates try to exshute there remedies. There should be a blanket approach to this. Immates that earn credits should be able to simply apply them without all the hurdles. When the first step act was passed, alot of the interpetation was left to the BOP and there are simply abusing it. Countless immates could be released right not but for these unfair policies.

From: ~^! SUMMONS, ~^!SHAHIED
Subject: [External] ***Request to Staff*** SUMMONS, SHAHIED, [redacted]
Date: Saturday, January 21, 2023 8:19:33 AM

To: commissioner
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I think the status points are unconstitutional and should be eliminated all together. I should not be subject to more time because of my "status" at the time of the instant offense especially since I would be subject to a violation as well as time for a new offense.

From: ~^! SWIFT, ~^!RICKY
Subject: [External] ***Request to Staff*** SWIFT, RICKY, [redacted]
Date: Wednesday, March 8, 2023 8:35:21 PM

To: Letter In Support
Inmate Work Assignment: Education Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Judge Reeves and Fellow Sentencing Commission,

Not only do I write in support of the proposed amendments to the guidelines (especially in regards to compassionate release and non-retroactive changes to the law that create sentencing disparities), but to personally tell you WHY and HOW those proposed amendments can, and will, change my life in the near future, for better or for worse.

I am a 61 year old black man who has spent the majority of his life incarcerated. My current sentence has kept me in the BOP for over a quarter-century. No one, including myself, would argue that I led a virtuous life as a young man, but that is not the same man that writes to you today.

With a 56 and 1/2 year sentence, I still have more than two decades to go before I am eligible for some type of release. I am not going to attempt to try and convince you as to the reasons why I should be released from prison. That is for my sentencing Judge. Instead, I want to write and tell you why my sentencing Court felt it lacked the authority to grant compassionate release in 2021-2022, without the much-needed intervention from the sentencing commission and the proposed amendments you are making today.

I suffer from advanced heart disease, stage-3 chronic kidney failure, high cholesterol, hypertension, atrial fibrillation, sleep apnea and cardiomyopathy. I nightly use a BiPAP machine to sleep and have an implanted defibrillator. I am a very sick man with only about a quarter of my heart function. Without a heart transplant (which the BOP cannot provide per policy), I am unlikely to live much longer. Surely, I will not survive the next 20+ years until I am projected to be released at age 87.While this is not an end-of-life "date", it should be construed as an end-of-life "trajectory". Unfortunately, even after my Judge said at sentencing 25 years ago that he was "not sentencing me to prison to die", he denied compassionate release or a reduction in sentence because he did not feel he had the authority to grant me relief, and the Seventh Circuit concurred.

As it measurably pertains to the currently proposed guideline changes, the "changes in law" and "non-retroactive" treatment of unconstitutional statutory provisions is what keeps me in prison today.

If sentenced today, I would not be designated a "career offender", nor would I receive a "stacked" 924(c) mandatory, consecutive, 25-year sentence. Either of these significant issues is enough to constitute the remainder of the time on my sentence. Combined, I may have been released years ago. Both apply to me, yet I am procedurally barred on one issue due to the ineffective assistance of counsel in a post-conviction proceeding after Johnson (and therefore not cognizable), and statutorily barred on the stacked 924(c).

While some Courts and Circuits have granted compassionate release based on changes in the law, the issue is

decisively foreclosed within the Seventh Circuit (mine). While the legal framework in US v. BLACK allowed my sentencing Judge to release Robin Peoples (US v. PEOPLES), US v. THATCHER forced Mr. Peoples to self-surrender back to the BOP to die in prison. Even after CONCEPCION, the Seventh Circuit has been unpersuaded to reverse course, leaving my sentencing Judge without the legal means to justify compassionate release. My life, without your proposed guideline changes, hangs in the balance waiting on the Supreme Court to decide JONES v. HENDRIX. With your changes, I have a meaningful opportunity at release.

Judge Gleason has been talking about these issues since 2014 and US v. HOLLOWAY was a prime example why this commission NEEDS to not only consider, but ensure that these changes in law and sentencing disparities is included in the NEW USSG's for district court judges and appellate courts. This country needs uniformity on these issues. People such as myself that continue to languish in prison for the remainder of their life, even after discovering conclusive evidence that they would not be in prison today were it not for the procedural bars in the criminal justice system, need a way to address them in Court. You can bring about that change and truly grant compassion and mercy to people such as myself.

My three frown daughters, my grown son, my grandchildren, and the remainder of my family who have never known me as a free man (some only for a quarter of a century), will also be writing to you in my behalf, and in behalf of all incarcerated men and women suffering from these injustices. I pray that you will listen to them, and hopefully to me, and help people like me, to present our extraordinary and compelling circumstances to a system that remains deaf to the interest of justice.

I thank you, in advance, for your time, consideration and compassion in all that you do.

Sincerely,

Rickey Swift [redacted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CAUSE NUMBER 3:99-CR-44 RLM
	)	
RICKY SWIFT	)	

ORDER DENYING MOTION FOR COMPASSIONATE RELEASE

Ricky Swift is serving a 679-month sentence (56.5 years) for two armed robberies committed within a three-day span in the summer of 1999. He has moved the court for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(ii). The district's Federal Community Defender volunteered to represent him on this motion, and the court thanks Scott Frankel for his work on Mr. Swift's behalf.

A court can grant compassionate release if, but only if, the inmate has exhausted his remedies within the Bureau of Prisons, the inmate demonstrates extraordinary and compelling reasons for immediate release, and relief would be consistent with the sentencing factors set forth in 18 U.S.C. § 3553(a). United States v. Gunn, 980 F.3d 1178 (7th Cir. 2020). The government agrees that Mr. Swift exhausted his remedies with the Bureau of Prisons, as he must do, United States v. Sanford, 986 F.3d 779 (7th Cir. Jan. 25, 2021), but otherwise opposes Mr. Swift's motion.

Mr. Swift is 60 years old. He suffers from advanced heart disease, stage-3 chronic kidney failure, high cholesterol, hypertension, atrial fibrilation, and cardiomyopathy. Mr. Swift has had no disciplinary write-ups in his 20+ years in

the Bureau of Prisons, and has taken advantage of several opportunities to earn his high school diploma and broaden his skills and education.

Mr. Swift raises two arguments in support of compassionate release. First, he argues that significant sentencing disparities provide extraordinary and compelling reason for relief. When he was sentenced in 1999, courts were required to "stack" sentences under 18 U.S.C. § 924(c) by treating a second § 924(c) count as a second offense requiring a longer consecutive sentence. Congress eliminated the requirement of stacking in Section 403 of the First Step Act: to trigger the enhanced penalty under § 924(c), the second offense now must have occurred after conviction for the first. So if Mr. Swift were sentenced for his crimes today, the § 924(c) counts would add 14 years to his sentence, not the 32 that were required in 1999.

But Congress specified that the "anti-stacking" provision didn't apply retroactively. As the law is now understood in this circuit, a sentence's unreasonableness when considering the anti-stacking provisions of the First Step Act, alone or in combination with other factors, isn't an extraordinary or compelling reason to grant a compassionate release petition. United States v. Thacker, 4 F.4th 569, 576 (7th Cir. 2021). Mr. Swift's sentence might well be seen as disproportionate or unreasonable by contemporary sentencing practices and law, but a district court in this circuit can't consider the First Step Act's anti-stacking provision in finding extraordinary and compelling reason for

compassionate release. To the extent Mr. Swift argues that the disproportionality of his sentence (in comparison to modern standards) is a ground for compassionate release because modern law doesn't stack § 924(c) standards, the court must disagree.

Mr. Swift also relies on his age and the co-morbidities that make it more likely that he will suffer more severely than most people should he contract COVID-19. This would have been a strong argument earlier in the pandemic. Mr. Swift wasn't sentenced to prison until he dies, and prison is far more dangerous for Mr. Swift because of his health, his age, and circumstances that the Centers for Disease Control recognized as making COVID-19 very perilous. These factors are exacerbated by any prison's inability to provide such safety measures as social distancing and alcohol-based sanitizers. Compassionate release served as a vehicle to release prisoners who faced a high risk of COVID-19 but posed a low risk of future crime.

But times have changed. Vaccines against COVID-19 are now, at least for the most part, available to prisoners as well as non-prisoners in the United States. Indeed, Mr. Swift has been vaccinated. His situation is much better than it was a few months ago.

> Vaccinated prisoners are not at greater risk of COVID-19 than other vaccinated persons. (A more cautious statement would be that published data do not establish or imply an incremental risk for prisoners — either a risk of contracting the disease after vaccination or a risk of a severe outcome if a vaccinated person does contract the disease.).

United States v. Broadfield, 5 F.4th 801, 802-803 (7th Cir. 2021).

In light of Broadfield, Mr. Swift's health and age can't support a grant of compassionate release. The court must disagree with his argument on this basis as well.

The court of appeals has rejected both of the grounds on which Mr. Swift's motion for compassionate release is based, so the court DENIES his motion for compassionate release [Doc. No. 296].

ENTERED: August 25, 2021

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

From: ~^! TEASLEY, ~^!MICHAEL LINDELL
Subject: [External] ***Request to Staff*** TEASLEY, MICHAEL, [redacted]
Date: Monday, January 23, 2023 5:34:21 PM

To:
Inmate Work Assignment: Unicor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

On average,career offenders receive "long terms of incarceration"(147 months).We account for 11% of the BOP population.
USSG 4B1.1 has been primarily applied in drud offenses (74% of career offenders were convicted of a drug offense).Career offenders whose perdicate offenses do not include violent felonies are being sentenced to terms which are "nearly identical"tothe sentences that would be determined "through the nomal operation of the guidliness."The career offender directive should be amended to differentiate between career offenders with different types of criminal records,andis best foucsed on those offenders who have committed at least one "crime of violence."Career offenders who have committed a violent instant offense or a violent prior offense generally have a more serous and extensive criminal history,recidivate at a higher rate than drug trafficking only career offenders,and are more likely to commit another violent offense in the future.
Drug Trafficking only career offenders are not meaningfully differentfrom other federal drug trafficking offendersand should not categorically be subject to singificant increases in penalties reqired by the career offenders directive.A single definition or the terms "crimes of violence"in the Guidelines and other federal recidivist provisions is necessary to address increasing compexity and to avoid unnecessary confusion and inefficient use of the court resources.

From: ~^! TEW, ~^!ZACHARY LOGAN
Subject: [External] ***Request to Staff*** TEW, ZACHARY, [redacted]
Date: Wednesday, March 1, 2023 12:20:16 PM

To: Mr. Reeves
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing you about the proposed amendenmants & the Compassionate Release. I pray that these laws actually take ahold of the unfair sentencing that soooooo many non-violent drug offenders are receiving. Also my main purpose and focus is on the new Compassionate release motions for inadaqute medical/mental health treatment. So heres my issue.

Sept.12th 2022, I was then @ FCI EDGEFEILD in Edgefeild, South Carolina. Where on this date i underwent what was suppose to be a routine no down time easy surgery for "Kidney Stone removal/Urinary Tract Strictures" plus the Specilist was going to use the scope to get a look at my prostate etc. Well due to whatever complications during surgery. I had to get a "Super Pubic insicion" Which cuts directly into the bladder. And for a long story short. There was soooo much trama done from the surgeon going into my bladder & urinary tract that it caused me to be with a "Foley Catherder" being placed into me permently or until i can get another surgery to replace the damaged tissue... My physical health has deterated and so is my mental health. And im NOT receiving proper medical care. Im currently in the admin. remedy process. FCI Hazelton is understaffed in medical and my issue is more than they can handle. I currently have what is now my 7th infection. And im afraid i'll die in here b4 i ever recieve what i need to be a normal man and survive prison. i dont know what more to do. I walk around with this in me and hanging out of my penis 24/7 and im afraid i really am at risk and i really need help. Please and thank you

From: ~^! TILLMAN, ~^!MARKETTE
Subject: [External] ***Request to Staff*** TILLMAN, MARKETTE, [redacted]
Date: Thursday, January 19, 2023 10:50:17 AM

To: To who it may concern.
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing in regards to the proposal, especially regarding the Acquitted conduct provision. I must say that I am a bit disappointed because what you propose does little to help myself and the other's I know who have issues pertaining to Acquitted conduct. I think you all should do more regarding it and make it retroactive at soon as possible. Like in my situation, I was Acquitted in state of a murder, found not guilty. The Feds charged me again with the exact same murder along with a RICO. I plead out to the RICO but they used the murder as an overt act and to adjust my guidelines ultimately giving me 20 years for it. Now neither of those charges are considered violent crimes so I'm wondering if the RICO can even stand at this point. Without the murder, in which I was acquitted of and later plead to aid and abetting said murder in the plea agreement, I wouldn't have got 20 years and only time for the drugs like my other co-defendants who didn't have VICAR's. This proposal still gives the Federal government to much latitude to abuse it's power and in essence violate our constitutional right. My situation in double jeopardy, free and clear but the FED's are allowed to manipulate the constitution to it's benefit. This is a miscarriage of justice and unfair, especially to someone who is innocent of a crime, found not guilty of it yet still given 20 years for it. I hope this email doesn't fall on deaf ear, or should I say blind eye's. Thank you for your time and consideration but PLEASE do more to address the acquitted conduct issues.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Vikram Valame

Topics:

8. Acquitted Conduct

Comments:

I strongly urge the Commission to adopt (as a bare minimum) the proposed changes to the definition of relevant conduct.

Allowing judges to take into account acquitted conduct may be convenient to the government, and it may be a great boon for prosecutors who want to put insurmountable pressure on defendants to plea out instead of going before a jury of their peers.

But in a larger sense, every person, living or dead, who has been sentenced based on acquitted conduct, has reduced the dignity of our justice system far beyond any judge or prosecutor's power to add or detract from.
Seeing someone sent to the cages for conduct that their peers have said they did not do corrupts my views of the criminal justice system. How can I be confident in any governmental institution which is backed up by force deployed in such a manner?

I urge the Commission, after a long hiatus, to do the right thing.

Submitted on: February 23, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Richard Vigers

Topics:

1. Compassionate Release

Comments:

Please do not approve these amendments. I cannot believe that someone submitted these amendments. The criminals that committed these crimes had NO Compassion for the victims. Please use Compassion for the surviving families of these crimes and reject these amendments. Thank you

Submitted on: February 3, 2023

From: ~^! VOELZ, ~^!MICHAEL ALLEN
Subject: [External] ***Request to Staff*** VOELZ, MICHAEL, [redacted]
Date: Thursday, January 19, 2023 11:20:08 AM

To:
Inmate Work Assignment: recycling out/ gatepass

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Im writing to express my concern to the indifference of districts and the way they determine criteria for the safety valve, I feel that this is a great issue and I feel that the safety valve affects such a small number off people. I dont understand how there can be so much desparity among the districts on who or how they determine eligability. I speak of this first hand, because if i was not in the 8th dirstict and in one of the southern districts I would be eligible for relief. I have filed for appeal on this issue also but one would think that the sentancing commission could put together something that would hold all the districts to hold to and rule in the same manner and leave this whithout the desparity. I also think that the mandatory minimum sentances need to be re visited and revised, I say this because the time for meth, doesnt obiously fit the crime and people are being sentanced way beyond the crime in comparison to many other crimes especially for non-violent offenders. I feel that looking into these issues would definitly add relief where its needed and would be a great place to start to depopulate some of the burden on the prison system. I feel that creating a program for first time offenders to receive lesser sentances and hold major stipulations over thier heads as far as re offending would be a great avenue to approach. Thankyou for you time and consideration.

From: ~^! WATERS, ~^!SARAH MARIE
Subject: [External] ***Request to Staff*** WATERS, SARAH, [redacted]
Date: Sunday, February 5, 2023 2:34:58 PM

To: US Sentencing Commission
Inmate Work Assignment: GM5/CMS

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am asking you to please say yes to the compassionate release, abuse award when this issue takes the floor. Please say yes and give the additional victims a chance to get relief for the ongoing abuse that is still happening here at FCI Dublin women's federal correctional institute in Dublin California. I have been incarcerated the whole time before and after Warden Garcia and the safety staff that first started this sexual, verbal and mental abuse here in this facility. Some of the victims went home and are now waiting on more compensation while all of us that are still here are still enduring abuse. On a daily basis we are being called "sniches" by the cops. We are getting written up and time taken away for minor things and most of the time those minor things didn't even occur. Our R-Dap program recently got shut down amongst everything going on because of all of the verbal abuse. I have been talked down to repededly because of the direct victim's and them calling out the guards and the warden, I have been called names, I have been verbally and mental abused and there is no one i can go to to help me through this whole time. The trials and the sentencing makes everything worse. Our councilor called us all "snitching bi*ches" and that we all should get our a*sses beat. That our families should be ashamed of us and that our kids shouldn't be able to call us moms. I cant live my prison life every day worried if I am going to end each day hating my life and myself more and more because these cops cant just do their job, they have to twist the knife in deeper and deeper. My case manager said to me a couple of days ago "why didn't you come to me before this, why are you so scared to talk to staff?" I replied that "I don't want to be torn down to nothing anymore for no reason, at this point I'm trying to make it out of prison breathing and with some sort of dignity as to this point I'm afraid to even ask a guard a question without being made a fool of because to them I am a worthless piece of "sh*t" as they would say. I am asking you as a human, as one person with a heart beating to another, please give me this chance to do my time in peace and at least be at home to regain some of the love I have lost. I will do my time I have no problems with that but please don't make me do my time like this. Please say yes to compassionate release, THE ABUSE AWARD.

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Philip Wentzel, Prisoner

Topics:

1. Compassionate Release

Comments:

I submit the following comments regarding the U.S. Sentencing Commission's proposed Sentencing Guidelines amendments.

The following will help the Commission provide the greater "clarity" for the courts desperately needed from the Commission.

First, the section regarding extra "points" off for zero criminal history score should be" 1. Made to apply to ALL offender types, within no one excluded. And, B. Made RETROACTIVE via the Commission's separate process for such. Far too many first-time offenders and their families are suffering from Draconian sentences not giving proper consideration for being a true first-time offender.

The remainder of my comments pertain to the proposed amendment to Sect. 1B1.13 regarding Sect. 3582(c) sentence reduction motions.

The new proposed subsection (b)(1) should DELETE the third "circumstance" regarding risk mitigation. The risk is the risk. The BOP puts "mitigation strategies" on paper and argues such in courts in regards to Sect. 3582(c) motions, but the reality is that they do not actually implement most of those strategies and any "mitigation" at the institution level is very little to none. Let a risk be a risk.

The proposed new category qualifying "Victim of Assault" for Sect. 3582(c) relief should NOT include the requirement of "serious bodily injury." This is far too subjective a term and would most likely never be found in a prisoner's favor. An assault is an assault and should never happen. "Serious injury" only tells staff it's ok to assault inmates as long as they don't hurt them too badly. This subsection should also include ANY physical or sexual assault, committed by staff AND/OR other inmates. No staff should ever assault any inmate in any way. Ever.

Regardless of "injury." Nor should that same staff be allowed to continue the current practice in the BOP of allowing inmates to physically and sexually assault other inmates without consequence. An assault is an assault and should be considered as such objectively, not subjectively.

The second proposed addition to 1b1.13, "Changes In Law," should specify that sentencing errors and other valid legal reasons developing since sentencing MUST qualify as "extraordinary and compelling reasons." The same clarity regarding legal challenges and sentencing errors should also be spelled out [as it is obvious Congress intended to include these things when Sect. 3582(c) was enacted] in the changes to Application Note 1(D) of 1B1.13.

All three "options" here should be adopted as "Other Circumstances." Option 2 should include "sentencing errors" and other valid legal challenges (See U.S. v. Concepcion and U.S. v. Trenkler for recent guidance on this from the First Circuit). Option 3 should also include valid legal reasons and sentencing errors not otherwise appealable or developing since the time for appeals expired or passed (See again U.S. v. Trenkler, 1st Cir., for recent guidance on this as well).

There currently exists a circuit split in the federal courts regarding these very issues. For example, legal issues are "extraordinary and compelling reasons" in the First Circuit (one example), but not the Seventh (as one example). Specifically as to legal issues and sentencing errors qualifying as extraordinary and compelling as Congress originally intended in the 1980's when Sect. 3582(c) became law, and again in 2018 with the passage of the First Step Act, greater clarity is needed from the Commission here. It should not happen that a prisoner not receive consideration in Milwaukee for a sentencing error, yet somehow be permitted consideration in Boston for the same error or issue. Consideration for sentencing errors/legal issues as extraordinary and compelling should be mandatory regardless of where a person happens to have been sentenced.

Finally, regarding Application Note 3 concerning application of Section 994(t) and the 18 U.S. C. Sect. 3553(a) factors, the Commission should ADD and UNDERSCORE that Sect. 3553(a) factors MUST be considered IN LIGHT OF the extraordinary and compelling reason(s) presented - not in spite of, or in a vacuum as if nothing has changed. Far too many district courts (but not all) are doing just that, creating another circuit split. The Commission should clarify the importance of the changed circumstances AND proper consideration of post-sentencing rehabilitation and prison conduct (good or bad).

All other proposed amendments should be adopted as is. Thank you for your time and consideration.

Sincerely,

Philip Wentzel

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Morff Yvonne

Topics:

3. Firearms Offenses

7. Criminal History

Comments:

I really think that felons with guns punishment is ridiculously steep I see if they have violent backgrounds but people trying to do the right thing and happens to get stoped in a car with a gun is now looking at ten years is absolutely insane and I'm just also the criminal background is silly to go by when ten years have passed people change with time these need to be re evaluated.

Submitted on: February 5, 2023

Public Comment - Proposed 2022-2023 Amendments and Issues for Comment

Submitter:

Kenneth Zipf

Topics:

7. Criminal History

Comments:

I am writing in response to the proposed Sentencing Guideline Amendments for the 2023 cycle. These comments are in response to proposed amendment 7. "Criminal History Part (B) Zero Point Offenders" and proposed changes to Chapter 4 "Criminal History Category" of USSC Guidelines Manual to include Part C Adjustments for Certain Zero Point Offenders. I am supporting either version of the amendment and the following options.

Although both Options warrant a reduction in sentences, Option 1 would make adjustment applicable to zero-point offenders with no prior convictions. Therefore, I support Option 1 first. I support a 2-level decrease in the offense level for both Option 1 and Option 2. Part B of the proposed amendment would set forth a new Chapter Four guideline, at 4C1.1 (Adjustment for Certain Zero Point Offenders). The amendment should be added to 1B1.10 in the USSC Guidelines Manual and making it retroactive therefore able to affect people who have already been sentenced.

From your report on recidivism released in 2010, zero-point offenders were 15.5% less likely to recidivate and is the largest variation with a single criminal history category. That statistic alone gives empirical evidence that supports lower sentences for those who have no criminal history. Your own statistics from the proposed amendments show that the zero-point amendment would have applied to over 75% of the zero-point offenders in 2021.

In fairness to all who have already been sentenced, the guidelines should be made retroactive. If zero-point offenders are less likely to return to prison, every offender, including ones already sentenced, should benefit from the reduced sentences made available through retroactive application of this amendment.

Often, the reason cited for supporting a return to court for resentencing is that the penalty has declined for the offense in question. In this case, the decline would most include most offense

categories, for anyone who has no criminal history. This is also how the so-called "drugs minus 2" amendment was handled, by including those who had already been sentenced through retroactivity. With this amendment, offenders who have already been sentenced should be afforded a similar opportunity. In both the "drugs minus 2" amendment and this "zero-point offender" amendment, a judge makes the final decision on applicability to any given case and offender. Please give them this opportunity to sentence or resentence more in line with the statistics cited in your 2010 and 2021 reports.

Thank you for your consideration in this matter.

Submitted on: March 3, 2023

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