United States Sentencing Commission

2025-2026 Amendment Cycle

Public Comment on Proposed Priorities

90 FR 24710



UNITED STATES SENTENCING COMMISSION



2025-2026 PUBLIC COMMENT ON PROPOSED PRIORITIES 90 FR 24710

UNITED STATES SENTENCING COMMISSION

Proposed Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice; Request for public comment.

SUMMARY: As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, and in accordance with its Rules of Practice and Procedure, the United States Sentencing Commission is seeking comment on possible policy priorities for the amendment cycle ending May 1, 2026.

DATES: Public comment should be received by the Commission on or before **July 18, 2025**. Any public comment received after the close of the comment period may not be considered.

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 – Priorities Comment.

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).

The Commission provides this notice to identify possible policy priorities for the amendment cycle ending May 1, 2026. Other factors, such as legislation requiring Commission action, may affect the Commission's ability to complete work on any or all identified priorities by May 1, 2026. Accordingly, the Commission may continue work

on any or all identified priorities after that date or may decide not to pursue one or more identified priorities.

Pursuant to 28 U.S.C. 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

The Commission invites comment on the following proposed priorities for the amendment cycle ending May 1, 2026, including comment on any additional priorities commenters believe the Commission should consider in the upcoming amendment cycle and beyond, and comment proposing specific amendment text or research agendas that would address a given priority:

(1) Examination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option (*e.g.*, imprisonment, probation, or fine), and possible consideration of amendments that might be appropriate.

(2) Further examination of the penalty structure for certain drug trafficking offenses under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), including
(A) consideration of possible amendments addressing the purity distinctions for methamphetamine provided in the Drug Quantity Table and related application notes; and
(B) consideration of other miscellaneous issues pertaining to drug trafficking offenses

coming to the Commission's attention, such as possible statutory changes relating to fentanyl.

(3) Examination of §2B1.1 (Theft, Property Destruction, and Fraud) and related guidelines to ensure the guidelines appropriately reflect the culpability of the individual and the harm to the victim, including (A) reassessing the role of actual loss, intended loss, and gain; (B) considering whether the loss table in §2B1.1 should be revised to simplify application or to adjust for inflation; (C) considering the application and impact of the victims table in §2B1.1 and adjustments in Chapter Three, Part A (Victim-Related Adjustments), relating to victims; (D) considering the application and impact of adjustments in Chapter Three, Part B (Role in the Offense) relating to role in the offense; and (E) possible consideration of amendments that might be appropriate.

(4) Continued examination of the career offender guidelines, including (A) evaluating the impact, feasibility, and uniformity in application of alternative approaches to the "categorical approach" through workshops, field testing, and updating the data analyses set forth in the Commission's 2016 report to Congress, titled *Career Offender Sentencing Enhancements*; and (B) possible consideration of amendments that might be appropriate.

(5) Examination of whether the guidelines provide appropriate adjustments for good behavior, including examination of whether §3E1.1 (Acceptance of Responsibility) and §5K1.1 (Substantial Assistance to Authorities) fully account for the variety of ways

in which an individual may manifest acceptance of responsibility and provide substantial assistance, and possible consideration of amendments that might be appropriate.

(6) Continued exploration of ways to simplify the *Guidelines Manual*, including (A) examining the operation of the grouping rules in Chapter Three, Part D (Multiple Counts); (B) examining the operation of specific provisions of Chapter Four, Part A (Criminal History); (C) examining the operation of §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment); (D) evaluating infrequently applied specific offense characteristics and adjustments provisions throughout the *Guidelines Manual*; and (E) possible consideration of amendments that might be appropriate.

(7) Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.

(8) Implementation of any legislation warranting Commission action.

(9) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991).

(10) Consideration of other miscellaneous issues coming to the Commission's attention.

Public comment should be sent to the Commission as indicated in the ADDRESSES section above.

AUTHORITY: 28 U.S.C. 994(a), (o); USSC Rules of Practice and Procedure 2.2, 5.2.

Carlton W. Reeves,

Chair.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 18, 2025

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002
Attention: Public Affairs

Dear Chair Reeves:

I write in response to the Sentencing Commission's request for comment on its Proposed 2025-2026 Priorities.

Proposed Priority: Bureau of Prisons practices and effectiveness in meeting the purposes of sentencing.

In the federal criminal justice system, district courts must seek to achieve the purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—when deciding upon a defendant's sentence,[1] by imposing one that is "sufficient, but not greater than necessary" to:

> (A) 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; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[2]

The United States Sentencing Commission, too, must strive to ensure the Sentencing Guidelines meet these purposes.[3] Though no longer binding, the Sentencing Guidelines nevertheless "serve an important role" by providing courts with "'a meaningful benchmark' in the initial determination of a sentence" and guidance "throughout the sentencing process."[4] Indeed, in Fiscal Year 2024, 28,038 sentences—or 45.7 percent—were imposed within the recommended range, not including cases where a departure applied, evidencing the central role that the Guidelines play in guiding thousands of federal criminal justice outcomes annually.[5]

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[1] Tapia v. United States, 564 U.S. 319, 325 (2011). The Supreme Court explained in *Tapia*, however, that "a particular purpose may apply differently, or even not at all, depending on the kind of sentence under consideration." *Id.* at 326. Retribution, § 3553(a)(2)(A), for example, cannot be considered for imposing supervised release terms, *id.*, and rehabilitative needs, § 3553(a)(2)(D), cannot be used to impose or lengthen a prison term, *id.* at 335.
[2] 18 U.S.C. 3553(a)(2).
[3] 28 U.S.C. § 994(g).
[4] Rosales-Mireles v. United States, 585 U.S. 129, 133 (2018) (quoting Peugh v. United States, 569 U.S. 530, 541, (2013)).
[5] U.S. SENT'G COMM'N, DATAFILE (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Table29.pdf.

Of course, the relevance to the goals of sentencing of the type and length of a recommended sentence under the Guidelines will necessarily vary depending on *how* that sentence is executed. For years, the Bureau of Prisons (BOP) has faced significant challenges in the performance of its mandate, undermining the Commission's intent to tailor recommended sentences to anticipated outcomes for incarcerated individuals. I therefore urge the Commission to prioritize "[a]ssessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments" in the upcoming amendment cycle.[6]

Chronically underfunded and understaffed, BOP has struggled to maintain safe and effective carceral settings for nearly 156,000 federal inmates, over 143,000 of whom are in BOP custody.[7] Currently, BOP is authorized to have 14,900 correctional officer positions, with 12,766 active officers in pay status.[8] Authorized "other" full time positions were recently reduced from 27,498 to 23,949, and there are 23,896 active employees in pay status.[9] The resulting challenges BOP faces are both longstanding and pervasive:

- Infrastructure. In May 2023, the Department of Justice's Office of the Inspector General (OIG) released the results of an audit of BOP's "aging and failing infrastructure," finding issues such as buckling concrete, crumbling façades, water leaks, poor ventilation, and energy inefficiencies.[10] Late last year, BOP announced plans to permanently close one facility and idle six others due in part to "crumbling infrastructure."[11] That BOP would need to close facilities as a result of unsustainable cost is not new—just three years prior, BOP closed Metropolitan Correctional Center (MCC) New York "after an in-depth conditions assessment found that substantial building deficiencies jeopardized the safety and security of the staff and inmates who occupied the building."[12] As of February 2024, then-BOP Director Colette Peters estimated that BOP had a maintenance and repair backlog of approximately $3 billion.[13]

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[6] *Federal Register Notice of Proposed 2025-2026 Priorities*, U.S. SENT'G COMM'N, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2025-2026-priorities (last visited July 9, 2025).

[7] *Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp#:~:text=155%2C933%20Total%20Federal%20Inmates&text=Last%20Updated%20July%203%2C%202025,Thursday%20at%2012%3A00%20A.M (last visited July 9, 2025). An additional nearly 12,800 federal inmates are reported to be in "other types of facilities." *Id.*

[8] FED. BUREAU OF PRISONS, FED. BUREAU OF PRISONS FACT SHEET (2025), https://www.bop.gov/about/statistics/docs/fbop_fact_sheet.pdf.

[9] *Id.*; FED. BUREAU OF PRISONS, FED. BUREAU OF PRISONS FACT SHEET (2024), https://web.archive.org/web/20250226151445/https://www.bop.gov/about/statistics/docs/fbop_fact_sheet.pdf.

[10] U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., NO. 23-064, AUDIT OF THE FEDERAL BUREAU OF PRISONS' EFFORTS TO MAINTAIN AND CONSTRUCT INSTITUTIONS 6 (2023), https://oig.justice.gov/sites/default/files/reports/23-064_1.pdf.

[11] Michael R. Sisak & Michael Balsamo, *The US government is closing a women's prison and other facilities after years of abuse and decay*, ASSOCIATED PRESS (Dec. 5, 2024), https://apnews.com/article/federal-prisons-closing-ap-investigation-abuse-decay-c02c96b6f6a3c5535cc3e3025d5d2585.

[12] U.S. DEP'T OF JUST., *supra* note 10 at 5.

[13] Senate Judiciary Committee Hearing, *Examining and Preventing Deaths of Incarcerated Individuals in Federal Prisons* (Feb. 28, 2024), at 00:30:45.

- Medical Care. In 2023, *NPR* reported on severely inadequate medical care within BOP facilities.[14] One common complaint among sources was the agency's failure to timely screen and treat inmates with serious illnesses, and the report found "[m]ore than a dozen waited months or even years for treatment, including inmates with obviously concerning symptoms: unexplained bleeding, a suspicious lump, intense pain."[15] Many suffered worsened conditions; some lost their lives.[16] These problems persist.[17] In a series of unannounced site inspections, OIG has identified several concerning medical practices and failures across various institutions.[18] Most recently, OIG released an inspection last December of Federal Medical Center (FMC) Devens, finding "serious issues with . . . provision of healthcare" even at this *dedicated medical facility*, including "potentially dangerous medication distribution, lack of preventive healthcare screening, inappropriate placement of inmates in the Memory Disorder Unit (MDU), and inconsistent processes for requesting and accessing care."[19] Like other BOP institutions across the nation, FMC Devens suffers from a substantial employee shortage, "substantially affect[ing] the health, welfare, and safety of . . . inmates."[20] It is perhaps unsurprising that in Fiscal Year 2024, district court judges granted compassionate release requests under 18 U.S.C. § 3582(c)(1)(A) on the basis, at least in part, of medical-related concerns in a notable

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[14] Meg Anderson, *1 in 4 inmate deaths happens in the same federal prison. Why?*, NPR (Sept. 23, 2023), https://www.npr.org/2023/09/23/1200626103/federal-prison-deaths-butner-medical-center-sick-inmates.

[15] *Id.*

[16] *Id.*

[17] *See* Walter Pavlo, *Cases Show Medical Care Under Scrutiny At Federal Bureau Of Prisons*, FORBES (Mar. 13, 2025), https://www.forbes.com/sites/walterpavlo/2025/03/13/cases-show-medical-care-under-scrutiny-at-federal-bureau-of-prisons/.

[18] To date, OIG has released the results of five inspections. In the first four inspections, OIG found, in part: at FCI Waseca, inmates with higher care levels than the institutions at which they were housed, significant delays in nonemergency medical care, and limited ability to provide psychology services beyond "crisis focused" care, U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., 23-068, INSPECTION OF THE FED. BUREAU OF PRISONS' FED. CORR. INST. WASECA 1, 26–29 (2023), https://oig.justice.gov/sites/default/files/reports/23-068.pdf; at FCI Tallahassee, suboptimal timing of medication dispensation, such as insulin and psychiatric medication, which can negatively affect drug efficacy, insufficient availability of bilingual staff to communicate with patients, and incomplete health care screenings at intake, U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., 24-005, INSPECTION OF THE FED. BUREAU OF PRISONS' FED. CORR. INST. TALLAHASSEE 1, 34–35 (2023), https://oig.justice.gov/sites/default/files/reports/24-005.pdf; at FCI Sheridan, a longstanding phlebotomist vacancy that, while eventually filled, led to a backlog at one point of over 700 laboratory orders, barriers to inmates requesting and accessing care for routine conditions, delays in medical and dental care due to lack of medical equipment and supplies, a backlog of outside medical visits, and potentially dangerous medication distribution practices, U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., 24-070, INSPECTION OF THE FED. BUREAU OF PRISONS' FED. CORR. INST. SHERIDAN 1, 8–13 (2024), https://oig.justice.gov/sites/default/files/reports/24-070_0.pdf; and at FCI Lewisburg, intake screening errors, certain prescription medication discontinuation decisions made without speaking with or examining the patients in advance and without tapering as recommended by BOP clinical guidance, colorectal cancer screenings provided to less than half of inmates within the recommended risk range and significant delays in providing colonoscopies to those for whom it was ordered, and failure to provide A1C tests to the majority of qualifying inmates within recommended time frames, U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., 24-113, INSPECTION OF THE FED. BUREAU OF PRISONS' FED. CORR. INST. LEWISBURG 1, 10–14 (2024), https://oig.justice.gov/sites/default/files/reports/24-113.pdf.

[19] U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., 25-009, INSPECTION OF THE FED. BUREAU OF PRISONS' FED. CORR. INST. DEVENS i (2024), https://oig.justice.gov/sites/default/files/reports/25-009.pdf.

[20] *Id.*

number of cases.[21] In one recent order granting compassionate release, a district court judge found BOP's failure to provide necessary and "relatively straightforward" treatment to the petitioner "incomprehensible and very far below the standards that I expect for anyone held in custody."[22]

- Safety and Security. Several factors undermine BOP's ability to ensure the safety of those in its custody. For example, in 2022, the union representing BOP employees condemned a deadly fight at United States Penitentiary (USP) Beaumont, decrying the "chronic understaffing" that "is jeopardizing the lives of both workers and inmates."[23] Indeed, in a February 2024 OIG report evaluating issues surrounding inmate deaths, "BOP specifically identified insufficient staffing as an issue in at least 30 of the inmate deaths in [OIG's] scope."[24] Correctional staff shortages hinder efforts to prevent and respond to immediate threats, while medical staff shortages limit the ability to provide risk-mitigation treatments and programming.[25] In addition to other challenges, BOP also faces longstanding obstacles to effective interdiction of contraband drugs and weapons, overreliance on mandated staff overtime and augmentation, and "fundamentally ineffective" staff discipline processes—each compounding the serious risk to institutional safety.[26]

While these concerns significantly limit BOP's ability to effectively meet the purposes of sentencing, they are by no means exhaustive. Inadequate funding and staffing levels affect all aspects of BOP's ability to discharge its mission. We have asked the agency to do far too much with far too little for far too long—and the ripple effects of severe BOP under resourcing are apparent across facilities nationwide.[27] Despite these limitations, the Administration has now asked BOP to add an additional mission by accepting and processing Department of Homeland

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[21] Sentencing courts listed serious physical or medical condition in 12.5 percent of cases, ongoing COVID-19 pandemic concerns unable to be timely mitigated in 3.3 percent of cases, and BOP failure to provide treatment in 1.7 percent of cases, among other reasons. U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT 1, 17 (2025), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY24-Compassionate-Release.pdf.

[22] Order for Immediate Release of Defendant Bovis, United States v. Bovis, No. 20-cr-00204, Dkt. 100 (N.D. Cal. Mar. 6, 2025); *see also* United States v. Diggs, No. 02-CR-1129, 2025 WL 1371367, at *8 (N.D. Ill. May 12, 2025) (granting compassionate release after finding "BOP has shown no intention and/or ability to provide the necessary care [to the petitioner], despite its doctors' recommendations").

[23] Angel San Juan, *Prison Pay: Low Pay Rates for Correctional Officers is Creating a Staffing Crisis*, 6KFDM (May 19, 2023), https://kfdm.com/news/local/prison-pay-low-pay-rates-for-correctional-officers-is-creating-a-staffing-crisis.

[24] U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., 24-041, EVALUATION OF ISSUES SURROUNDING INMATE DEATHS IN FED. BUREAU OF PRISONS INST. 1, 65 (2024), https://oig.justice.gov/sites/default/files/reports/24-041.pdf.

[25] *Id.*

[26] *Id.* at 54, 67, 70.

[27] Though Congress recently provided $5 billion in additional funding to BOP, *see* Act of July 4, 2025, Pub. L. No. 119-21, this appropriation represents just the first small step needed to begin to correct the institutional problems caused by underfunding BOP. Commission consideration in this area remains imminently necessary given the longstanding and ongoing impacts of BOP challenges on effectuating the purposes of sentencing.

Security (DHS) detainees.[28] As I have previously written to the Attorney General, this decision further threatens the safety and well-being of incarcerated individuals.[29]

Given the myriad difficulties facing our federal prison system, I respectfully urge the Commission to consider possible recommendations or amendments in the upcoming amendment cycle that account for the limited "nature and capacity of . . . facilities and services available"[30] to incarcerated individuals.

Sincerely,

Richard J. Durbin
Ranking Member

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[28] Letter from Richard J. Durbin, U.S. Senator, Adam B. Schiff, U.S. Senator, Sheldon Whitehouse, U.S. Senator, Mazie K. Hirono, U.S. Senator, Cory A. Booker, U.S. Senator, Alex Padilla, U.S. Senator, and Peter Welch, U.S. Senator, to Pam Bondi, U.S. Att'y Gen. (Feb. 25, 2025), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20AG%20Bondi%20re%20BOP%20facilities%20for%20ICE.pdf.

[29] *Id.*

[30] 28 U.S.C. § 994(g).

From: Stephen Higginson
To: Chair
Subject: RE: A Request from Judge Reeves
Date: Monday, June 23, 2025 10:53:44 AM

Dear Carlton,

Thanks, again, for being so proactive. You've injected such contributory spirit into the Commission. Now that I sit on the Standing Committee, I appreciate how participatory the rules committees are. Your Commission invitations similarly will help the growth of the law.

District judges have far better insight into and constant use of the Guidelines. Also, the Commission's own list of priorities is impressive. Still, if I were to try to contribute this year, as I did last year, four come to mind:

1. Hearings into whether and how Guidelines errors can be rendered harmless by a simple 3553 catchall comment by sentencing judges. I think circuits are split as to how much must be said to inoculate error. It might be valuable for the Commission to study whether that development undermines the deeper feedback purpose of the Guidelines endeavor.

2. Relatedly, study/hearings into DOJ's practices inserting, and sometimes requiring, sentencing appeal waivers in plea agreements, even though PSRs which govern sentencings, especially if they identify uncharged conduct, often can't be known/discussed at the time of the guilty plea is submitted, accepted and becomes binding. Here too, I think there is a circuit split as to whether, at least, there must be a "miscarriage of justice" exception to appeal waivers of sentencing issues.

3. There's a fair bit of developing and consequential law relating to supervised release conditions, and when and how they must be described orally at sentencing, and what happens when they aren't yet appear in a J&C. This is the oral statement versus J&C sentencing problem. The larger significance is the bail-to-jail phenomenon and how it can be reduced.

4. A final point, but perhaps too consequential or controversial, would be one I mentioned last year, and whether the Commission might benefit from study/hearings into what "indicia of reliability" means for PSR-discovered enhancements. I wonder if there should be disclosure not just of PSRs themselves but also of any underlying material which gave rise to a finding in the PSR that is material to a sentence.

Steve Higginson

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
JANE B. STRANCH
CIRCUIT JUDGE

[redacted]

July 7, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attention: Public Affairs – Priorities Comment

Re: 2025-2026 Call for Comment

Dear Members of the Sentencing Commission,

Thank you for your invitation to offer suggestions for how the Commission might create a fairer, more just sentencing system. My Chambers and I well understand the importance of continually striving to improve our sentencing system and appreciate the Commission's central role in realizing this goal. These suggestions are based on our collective experience, the current state of empirical research, and our judgment regarding pressing issues suitable for the Commission to address. We would be pleased to respond to any questions the Commission might have.

Explore the Feasibility of Decreasing the Base Offense Level for New Forms of Post Offense Conduct

Acceptance of responsibility presents the only real opportunity to decrease a defendant's base offense level under the Guidelines based on post-offense conduct. The existence of this single opportunity reflects a recognition that a defendant's response to the crime after the fact may bear on the need for a long sentence. But acceptance of responsibility is not the only way that a defendant can demonstrate that the goals of sentencing may not be served by a lengthy sentence. In particular, a defendant may attempt to address and/or remedy the drivers of crime that led to the offense (for example, a defendant may undergo treatment for an addiction). Such efforts should be recognized and factored into the court's decision at sentencing. Although the 18 U.S.C. § 3553(a) sentencing factors provide courts with the opportunity to vary a sentence based on mitigating circumstances (including post-offense conduct), the general tendency of some district courts to remain within the Guidelines suggests that it would be helpful to provide guideline reductions based on the types of post-offense conduct that dramatically reduce the rate of recidivism. Creating a specific reduction for such behavior would promote rehabilitative efforts

and would allow courts to reward behavior specifically targeted at addressing the issues that lead to a specific defendant's criminal activity in a manner that goes above and beyond the usual § 3553 considerations.

Mirror the 2025 Mitigating Role Changes to § 2D1.1 in § 2B1.1

Last cycle the Commission amended § 2D1.1 to recognize that, while the Guidelines measure controlled substance offenses based on the quantity of controlled substances possessed or trafficked, when an individual takes a minor role in a large-scale conspiracy, the quantity of drugs with which the full conspiracy was involved may not accurately capture that individual's culpability in the conduct of a much larger organization. As I noted in my last letter to this Commission, I believe those changes provided an important safety valve for individuals who become involved in a scheme much larger than they are. As the Application Notes to § 3B1.2 recognize, there is another area where the Guidelines are liable to find a minor participant liable for the aggregate conduct of a much larger enterprise: fraud and theft. Section 2B1.1 holds a participant in a conspiracy liable for the total monetary value lost by victims of a large-scale conspiracy even if the individual participant played a small role and personally gained very little. The Commission should explore making changes to § 2B1.1 mirroring last year's changes to § 2D1.1 to provide a safety valve for minor participants in theft or fraud conspiracies who personally contributed very little.

Add a Federal Defender Ex Officio Member to the Sentencing Commission

Federal defenders ensure that persons accused of federal crimes receive representation, even if they cannot afford an attorney. This role provides defenders with a unique perspective on our criminal legal system, including sentencing. The U.S. Attorney General (or designee) and the Chair of the U.S. Parole Commission serve as ex officio, nonvoting members of the Sentencing Commission, ensuring that federal prosecutors and probation officers enjoy a seat at the Commission's table. Federal defenders, however, hold no comparable position. Although there may be public defenders on the Commission at any given time (as there are now), there is no guaranteed representation on the Commission as there is for other stakeholders. The perspective of federal defenders is critical—they are often the ones who have worked most closely with those sentenced. To ensure that sentencing functions fairly, the Commission's composition should account for the perspective of defendants sentenced for federal offenses, which can also aid in designing more effective research on defendants' sentencing. Adding a federal defender ex officio member to the Sentencing Commission would be an important step toward realizing this goal.

Thank you for creating an opportunity for those of us who deal with these issues regularly to provide input into the work of the Sentencing Commission. I thank each member of the Commission for giving their time and effort to this work and for modeling to the public the important role of our third branch of governmnet.

Sincerely,

Jane B. Stranch

JBS:sl

From: Jon Newman
To: Chair
Subject: Re: A Request from Judge Reeves
Date: Monday, June 23, 2025 10:12:01 AM

Simplify.

Sent from my iPhone

Public Comment - Proposed 2025-2026 Priorities

Submitter:

District Judge Stephen Bough, Missouri, Western Jun. 23, 2025

Topics:

8. Legislation

Comments:

Because the Commission drives the conversation on sentencing, I would like to see 18 USC 3553 (f) amended so that the US Attorney does not have sole discretion in the application of the safety valve. We has seen the government refuse to even sit down with an otherwise safety valve eligible defendant.

Submitted on: June 23, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

District Judge Stephen Bough, Missouri, Western

Topics:

10. Miscellaneous

Comments:

Specialty courts have been wonderfully successful. Finding a way to officially put front side (before going to the BOP) into the guidelines may be a helpful way to see an expansion of this courts.

Submitted on: June 23, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

District Judge James Cain, Louisiana, Western

Topics:

1. Sentencing Options (Chapter Five)

7. Federal Bureau of Prisons Issues

10. Miscellaneous

Comments:

I think when the sentencing guidelines are changed it should only in rare occasions be made retroactive. It seems that most changes to the guidelines are made retroactive. I gave the sentence that I thought was fair and just based on the facts and circumstances of the offense and the personal characteristics of the defendant and considering the 3553 (a) factors. The retroactive change leads to very little relief to the offender and creates tremendous work for the Probation offices and the courts.

It appears many of the past changes and the proposed changes are a move is to water down sentencing. This limits the courts flexibility in sentencing and is a disservice to public safety.

I also cannot understand after many inquires how the Bureau of Prisons calculates time served. I also cannot understanding why the BOP gives credit to an defendant for a class or some other program if at the time he applies it is full. So the defendant gets credit for a program he didn't even attend. This does not serve the needs of the defendant and undermines the purpose of sentencing.

Submitted on: June 25, 2025

Comment ref. USSC Priorities 2026

(1) Examination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option (e.g., imprisonment, probation, or fine), and possible consideration of amendments that might be appropriate.

With the removal of departures, it would be helpful to provide guidance on how conduct may warrant a variance outside of the applicable guideline range with respect to §3553 (with examples).

(2) Further examination of the penalty structure for certain drug trafficking offenses under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), including (A) consideration of possible amendments addressing the purity distinctions for methamphetamine provided in the Drug Quantity Table and related application notes; and (B) consideration of other miscellaneous issues pertaining to drug trafficking offenses coming to the Commission's attention, such as possible statutory changes relating to fentanyl.

It seems like it's past time for an enhancement or another amendment to address the purity distinctions for methamphetamine. In the alternative, the Commission should pursue its previously proposed amendment and eliminate purity distinction altogether. All methamphetamine should be treated as actual since purity is consistently near or at 100%.

If the purity distinction is removed, there should be a conversion for liquid methamphetamine to powder or an enhancement.

Clearly there should be increased base offense level for fentanyl. The near consensus of judges, attorneys and probation officers I have spoken with is that the guidelines remain entirely too low as they concern fentanyl and do not effectively address the seriousness of possessing/distributing fentanyl.

Further guidance with respect to the possession of a firearm and how that impacts safety valve and relevant conduct should be considered. Specifically, guidance could be provided in the commentary to §2D1.1 to explain the difference between constructive possession (possession by the defendant) and vicarious possession (possession by a codefendant). Such guidance should provide examples. Additionally, guidance should be provided in §5C1.2 with respect to the vicarious possession of a weapon and its impact on safety valve eligibility. Currently, §5C1.2 contains some guidance on this matter, explaining that the defendant's accountability is limited to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused. A defendant who receives an adjustment under §2D1.1(b)(1) for the possession of a weapon may not be

ineligible for safety valve if that adjustment was applied based on vicarious possession. Perhaps clarifying the application note in §5C1.2 to specifically state that if the firearm was possessed by the codefendant and the specific offense characteristic (SOC) under §2D1.1(b)(1) was applied based on this vicarious possession, this will not preclude the defendant from safety valve eligibility.

(3) Examination of §2B1.1 (Theft, Property Destruction, and Fraud) and related guidelines to ensure the guidelines appropriately reflect the culpability of the individual and the harm to the victim, including (A) reassessing the role of actual loss, intended loss, and gain; (B) considering whether the loss table in §2B1.1 should be revised to simplify application or to adjust for inflation; (C) considering the application and impact of the victims table in §2B1.1 and adjustments in Chapter Three, Part A (Victim-Related Adjustments), relating to victims; (D) considering the application and impact of adjustments in Chapter Three, Part B (Role in the Offense) relating to role in the offense; and (E) possible consideration of amendments that might be appropriate.

I encourage the Commission to focus on simplifying §2B1.1, which serves as a "catch all" for a number of offenses. Simplifying this guideline may involve the creation of new guidelines to address specific offenses currently lumped into §2B1.1. This could involve a long-term study, but the sooner we get started, the better.

I hope he USSC will reassess the role of actual loss, intended loss, and gain to ensure those guidelines adequately reflect harm to victims. The loss table may need revising, perhaps realigning the thresholds, but it is concerning that adjusting for inflation would actually lower the guidelines by increasing the threshold for an adjustment to apply.

I suggest the USSC examine §2B1.1, specifically, 2B1.1(b)(2) and "substantial financial hardship." While some victims may suffer what Courts may feel is substantial loss, at times there is no true clarity as to how that differs between victims. In other words, while losing $100,000 versus $1,000,000 is quite a difference, the financial stability of each victim should be considered. While $100,000 may not be substantial to a multimillion-dollar business, it may be for another victim.

I support an enhancement to address the duration of criminal activity (how long the defendant engaged in the conduct) as well as an adjustment for not filing a tax return.

For victims, those that suffer collateral damage should be considered (they are not considered victims because they did not suffer an actual loss).

Vulnerable victims need to be re-assessed (there are victims that do not meet the definition of vulnerable but need to be considered.)

(4) Continued examination of the career offender guidelines, including (A) evaluating the impact, feasibility, and uniformity in application of alternative approaches to the "categorical approach" through workshops, field testing, and updating the data analyses set forth in the Commission's 2016 report to Congress, titled Career Offender Sentencing Enhancements; and (B) possible consideration of amendments that might be appropriate.

I believe there remains overwhelming support for the elimination of the categorical approach with respect to career offender. The Commission should revive its previous proposed amendment to career offender which removed/simplified this process.

(5) Examination of whether the guidelines provide appropriate adjustments for good behavior, including examination of whether §3E1.1 (Acceptance of Responsibility) and §5K1.1 (Substantial Assistance to Authorities) fully account for the variety of ways in which an individual may manifest acceptance of responsibility and provide substantial assistance, and possible consideration of amendments that might be appropriate.

Rewarding an individual for "good behavior" seems at odds with the §3553 factors. How does providing a reduction for good behavior support just punishment, protect the community, or promote respect for the law? I realize there will be disagreements and counter-arguments to the previous sentence. But instead of providing reduction for good behavior, the Commission should consider loss of acceptance points for anything short of good behavior. §3E1.1 should be amended to expand the behavior that would result in loss of acceptance. Perhaps even an adjustment should be added in addition to the loss of acceptance depending on the conduct that resulted in the loss of reduction for acceptance. Further, §3E1.1 and §5K1.1 already adequately address the ways an individual may manifest acceptance and provide substantial assistance. Further, Rule 35 provides an additional avenue for the Government to address substantial assistance.

(6) Continued exploration of ways to simplify the Guidelines Manual, including (A) examining the operation of the grouping rules in Chapter Three, Part D (Multiple Counts); (B) examining the operation of specific provisions of Chapter Four, Part A (Criminal History); (C) examining the operation of §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment); (D) evaluating infrequently applied specific offense characteristics and adjustments provisions throughout the Guidelines Manual; and (E) possible consideration of amendments that might be appropriate.

I and others I've spoken with support the simplification of grouping rules. I certainly find them to be exceedingly complicated. How that is achieved needs further study. I believe the

Commission will find widespread support for eliminating grouping altogether and relying on units.

Regarding Chapter 4, commentary/application notes should be moved from the commentary to the guidelines themselves.

Additional CH categories should be added to the custody table to provide appropriate guideline ranges for those individuals with a subtotal of CH points which exceeds 13. For example, expand the categories to include Category VII for those with 16-18 points, Category VIII for those with 19-21 points, and so on.

§5G1.3 needs to be clarified and made easier to read/understand.

I further support evaluating infrequently used SOCs throughout the manual. Some may need to be deleted.

(7) Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.

A study to assess the effectiveness of BOP practices would be useful, perhaps, but until such a study is conducted, published, and thoroughly considered, it seems the Commission should refrain from proposing any amendments with respect to BOP practices.

(8) Implementation of any legislation warranting Commission action.

No response.

(9) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991).

No response.

(10) Consideration of other miscellaneous issues coming to the Commission's attention.

In border districts like mine, there continues to be strong support for increasing the guidelines for human smuggling (§2L1.1) which remain low for such serious offenses. §2L1.1 does not fully address the dangers inherent to human smuggling. The Commission should examine this section.

Public Comment - Proposed 2025-2026 Priorities

Submitter:

District Judge Iain Johnston, Illinois, Northern

Topics:

10. Miscellaneous

Comments:

Chairman Reeves,

Thank you for once again seeking input from the public about the work of the Sentencing Commission. And thank you for making the process easy and user friendly. Nobody can bellyache that the Commission doesn't seek input and make the process convenient.

This is my suggested topic for the Commission to study. It might seem minor, but it caused me concern.

The vast majority of the defendants I see charged with violations of Title 18, Section 922(a)(6) are female. And the circumstances in which they end up as straw purchasers are common. They are often the wives or girlfriends of a person prohibited from possessing a firearm and are convinced to make the purchase. Of course, unlike their significant other, the defendant has essentially no criminal history. Additionally, these defendants are often mothers who are the main source of support for children. In fact, in several of my cases, the defendant has often just given birth or is pregnant. Having said that, Section 5H1.6 teaches that family responsibilities are not ordinarily relevant for determining a departure (variance). Of course, this fact can be considered under Section 3553(a). But in the less common case in which the defendant is male, it seems that those family responsibilities are rarely even mentioned. And, of course, these male defendants likewise have essentially no criminal history. Other than sex, the defendants are very similar.

This leads me to wonder if there is a disparity in the sentencing between male and female defendants charged with violating Section 922(a)(6). Obviously, we must avoid unwarranted sentencing disparities, and Section 5H1.10 rightfully instructs us that sex is not relevant in determining a sentence. Courts should not be incarcerating fathers but sentencing similarly situated mothers to probation.

I would be very curious to see what an analysis of the data shows.

I fully recognize that the premise of this inquiry might be wrong. Perhaps, there is not a significant difference between the number of males and females charged with violating Section 922(a)(6). If that's true, then forget I even wrote this.

Thank you, the Commission, and the Commission staff for your time and consideration of this possible research topic.

Submitted on: June 29, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

District Judge Judith Levy, Michigan, Eastern

Topics:

10. Miscellaneous

Comments:

I would like to see an examination of the sex offender-related Guidelines to determine the impact of the current sentencing regime on recidivism (the sentences are often mandatory minimums and are exceptionally long) and victim well-being and recovery. I worry that many of these crimes originate from a severe mental health disability where punishment is a part of the sentencing calculation, of course, but treatment may be far more important. I also query whether the current sentencing regime is working in terms of general deterrence? Is there data on this?

Submitted on: June 23, 2025

Submitted by: District Judge Reed O'Connor
Northern District of Texas
Submitting in support of District Judge David Counts comments

Comment ref. USSC Priorities 2026

(1) Examination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option (e.g., imprisonment, probation, or fine), and possible consideration of amendments that might be appropriate.

With the removal of departures, it would be helpful to provide guidance on how conduct may warrant a variance outside of the applicable guideline range with respect to §3553 (with examples).

(2) Further examination of the penalty structure for certain drug trafficking offenses under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), including (A) consideration of possible amendments addressing the purity distinctions for methamphetamine provided in the Drug Quantity Table and related application notes; and (B) consideration of other miscellaneous issues pertaining to drug trafficking offenses coming to the Commission's attention, such as possible statutory changes relating to fentanyl.

It seems like it's past time for an enhancement or another amendment to address the purity distinctions for methamphetamine. In the alternative, the Commission should pursue its previously proposed amendment and eliminate purity distinction altogether. All methamphetamine should be treated as actual since purity is consistently near or at 100%.

If the purity distinction is removed, there should be a conversion for liquid methamphetamine to powder or an enhancement.

Clearly there should be increased base offense level for fentanyl. The near consensus of judges, attorneys and probation officers I have spoken with is that the guidelines remain entirely too low as they concern fentanyl and do not effectively address the seriousness of possessing/distributing fentanyl.

Further guidance with respect to the possession of a firearm and how that impacts safety valve and relevant conduct should be considered. Specifically, guidance could be provided in the commentary to §2D1.1 to explain the difference between constructive possession (possession by the defendant) and vicarious possession (possession by a codefendant). Such guidance should provide examples. Additionally, guidance should be provided in §5C1.2 with respect to the vicarious possession of a weapon and its impact on safety valve eligibility. Currently, §5C1.2 contains some guidance on this matter, explaining that the defendant's accountability is limited to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused. A defendant who receives an adjustment under §2D1.1(b)(1) for the possession of a weapon may not be

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A study to assess the effectiveness of BOP practices would be useful, perhaps, but until such a study is conducted, published, and thoroughly considered, it seems the Commission should refrain from proposing any amendments with respect to BOP practices.

(8) Implementation of any legislation warranting Commission action.

No response.

(9) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991).

No response.

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Public Comment - Proposed 2025-2026 Priorities

Submitter:

District Judge William Ray, Georgia, Northern

Topics:

10. Miscellaneous

Comments:

The provision that advises that Defendants who are sentenced for illegal re-entey shouldn't be placed on Supervised Release is not logical. They are coming back. They always do. They should
Be on Supervised Release as a deterrent.

Submitted on: June 23, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

District Judge Jennifer Thurston, California, Eastern

Topics:

10. Miscellaneous

Comments:

Please re-work 2E1.2(a)(2). Often the offense does not involve travel or transportation but instead uses facilities of interstate commerce. Section (a)(2) seems to imply that it applies only if the defendant was involved in the travel. Section (a)(2) should be amended to read, "the offense level applicable to the underlying crime of violence or other unlawful activity" and omitting the final phrase.

Submitted on: June 25, 2025

From: William Haskell Alsup
To: Chair
Subject: Re: A Request from Judge Reeves
Date: Monday, June 23, 2025 10:46:19 AM

Carlton,

My most important recommendation is to expand greatly vocational training for nonviolent offenders and to sentence them long enough to benefit from vocational training. This would be like the GI Bill in a way. Free education at federal expense. But it would help them become productive once they leave the BOP.

Bill

Sent from my iPhone

UNITED STATES DISTRICT COURT
Southern District of Mississippi
Post Office Box 928
Natchez, Mississippi 39121

DAVID C. BRAMLETTE
Judge

[redacted]

June 23, 2025

The Honorable Carlton Reeves
United States District Court Judge
Southern District of Mississippi
501 E. Court Street, Suite 5.550
Jackson, Mississippi 39201

Dear Judge Reeves:

As I mentioned when you made the same inquiry many months ago, education, in creative ways, can deter more crime than prolonged incarceration or the prospect of such. I recognize that there have been programs in various states with this objective, and I am unknowledgeable about the conclusions that have been reached. I have a friend, Darrel Vannoy, who is Warden at the Louisiana State Prison at Angola, and he and his staff have a program where qualified inmates administer to students on a regular basis at the prison.

Warden Vannoy has forwarded me a large volume of information, most of which involves rehabilitation of inmates. I am enclosing one letter which deals with the education of those on the outside. I spoke to Darrel, and he is of the opinion that the education of students and young people, by way of a program where they are mentored by inmates, is a very worthwhile approach, especially as to the possession and distribution of drugs.

I am sure that the Sentencing Commission and others in authority are familiar with the effectiveness or lack thereof regarding the educational approach, but this is the best I can do in response to your inquiry.

I hope all is well with you.

Warmest Regards,

David

DCB/lda

Enclosure

DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS
STATE OF LOUISIANA
LOUISIANA STATE PENITENTIARY

JEFF M. LANDRY
GOVERNOR

GARY E. WESTCOTT
SECRETARY

July 23, 2025

TO: Darrel Vannoy
Warden

FROM: Anne-Marie Easley
Assistant Warden IV

RE: Inmate Speakers For At Risk Youth

Our criteria for inmate speakers that speak to At-Risk-Youth is the following:

A minimum or medium custody level inmate who has had no disciplinary infractions for one year that has completed a Department-Approved Training Program. Speakers shall exhibit honesty and diplomacy, have the ability and the willingness to communicate knowledge, and display adequate social and communication skills. Speakers are chosen by their ability to deliver a message that is applicable to the group they are speaking to and must be approved by the Warden, Deputy Warden, or Assistant Warden.

Examples of Department Approved Training Programs

A Moral Compass: A Department-approved course for tutors and mentors designed to develop skills in mentoring, leadership, interpersonal relationship skills, lay counseling, and conflict prevention. This program was developed in house and we'd be glad to share it.

TYRO Leadership: is a program focused on developing leadership skills and personal growth, emphasizing empowerment and positive impact. It offers various courses, workbooks, and training programs designed to help individuals become leaders in their homes, communities, and workplaces.

https://tyro.thinkific.com/courses/tyro-leadership

CHAMBERS OF
THOMAS M. DURKIN
JUDGE

[redacted]

June 23, 2025

The Honorable Carlton W. Reeves
United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500 South Lobby
Washington, DC 20002

Re: Submission for 2025-2026 Priorities

Dear Judge Reeves,

The Commission has listed, as one of its proposed 2025-2026 priorities:

Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.

I write regarding an issue of particular concern related to a Bureau of Prisons ("BOP") policy that arose in a recent criminal case before me. In *United States v. Rishi Shah et al.* (19-cr-00864), Rishi Shah, Shradha Agarwal, and Brad Purdy, former executives at a company called Outcome Health, were found guilty of mail, wire, and bank fraud in connection with a one billion dollar fraudulent scheme. I sentenced Mr. Shah to 90 months imprisonment and Mr. Purdy to 27 months imprisonment. For Ms. Agarwal, however, I imposed a sentence of one day imprisonment and three years of supervised release to be served in a halfway house. I did not sentence Ms. Agarwal to a similar term of imprisonment as her co-defendants because of the BOP policy on the designation of non-citizens. As I stated at her sentencing, but for this policy, I would have sentenced her to a period of incarceration similar to the sentence imposed on Mr. Shah.

Each of the three defendants were convicted of non-violent offenses. Each of the three defendants had no prior criminal record, no history of violence, and no outstanding detainers. Yet while Mr. Shah and Mr. Purdy were eligible for designation to a minimum-security prison camp, Ms. Agarwal was not. The sole reason for this differential treatment was Ms. Agarwal's status as a legal permanent resident.

BOP policy requires that non-citizen inmates be housed in a low security level institution. More specifically, BOP designators use Public Safety Factors ("PSF") to account for security considerations not included in their numerical point system, and BOP treats alien-status as a PSF. P.S. 5100.08 defines a deportable alien as "[a] male or female inmate who is not a citizen of the United States." *See Inmate Security Designation & Custody Classification* (P.S. 5100.08, September 4, 2019), Ch. 5, p. 9 (CODE H). When this PSF is applied, "the inmate or

the long-term detainee shall be housed in at least a Low security level institution." *Id.*

This was not always the policy. P.S. 5100.07, which was rescinded and replaced with P.S. 5100.08 on September 12, 2006, provided that the "deportable alien" PSF would not be applied if a non-citizen met the following criteria: (1) documented and/or independently verified history of stable employment in the United States for at least three years immediately prior to incarceration; (2) verified history of domicile in the United States for five or more consecutive years immediately preceding the inmate's incarceration for the current term of confinement; and verified strong family ties in the United States. Ms. Agarwal would have met that criteria. But that commonsense approach is no longer. Under current BOP policy, if I had imposed a sentence of imprisonment, BOP would classify and assign Ms. Agarwal to a Federal Correctional Institution ("FCI"), not a minimum-security Federal Prison Camp ("FCP").

As you well know, FCIs are much harsher environments than FCPs. While FCIs use physical security measures and monitoring to prevent inmate escape and restrict inmate movement throughout a facility, FCPs are fenceless compounds with no controlled movements at designated times. FCIs are also five to ten times larger than FCPs, and thus feature overcrowded, loud living spaces. With only four FCIs for women, overcrowding is particularly prevalent for female inmates. FCIs house inmates serving sentences greater than 10 years, who often have prior criminal records, may be gang-affiliated, and are otherwise security or flight risks. In contrast, inmates at FCPs are generally first-time offenders who committed non-violent crimes, have little or no criminal history, and pose no public safety threat or flight risk. Critically, inmates at FCIs face higher risks of assault and victimization than inmates at FCPs. Declarations submitted by Joel Sickler of Justice Advocacy Group LLC and former corrections professional Janet Perdue in *United States v. Rishi Shah et al.* describe these differences in greater detail.

If not for BOP policy, and as noted earlier, I would have sentenced Ms. Agarwal to a term of imprisonment. She deserved it. But I could not, in good faith, apply what is indisputably a more severe punishment to her because of where she would have been required to serve her sentence than her co-defendants. This fundamental unfairness calls out for a remedy. I am also sending a letter to the BOP with these concerns.

Thank you for your consideration of this matter.

Sincerely,



Thomas M. Durkin
United States District Judge

THE HONORABLE THOMAS M. DURKIN

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA v. SHRADHA AGARWAL, Defendant.	CASE NO. 1:19CR00864-2 (TMD) DECLARATION OF JOEL A. SICKLER IN SUPPORT OF DEFENDANT SHRADHA AGARWAL'S SENTENCING MEMORANDUM

I, Joel A. Sickler, hereby declare under penalty of perjury the following:

Introduction & Expertise

1. I have worked in the field of sentencing and prisoner advocacy for over 40 years and currently head the Justice Advocacy Group, LLC, a criminal justice consulting firm based in Alexandria, Virginia. I have worked consistently since 1980 on federal sentencing and federal prison-related matters. I have worked as a correctional counselor in the District of Columbia's Department of Corrections (1978 to 1981) and previously served as the Director of Client Services at the National Center on Institutions & Alternatives in Washington, D.C. (1991 to 2003).

2. I have visited 52 federal prisons and have advised clients with inmate matters in 89 of the Bureau of Prisons' ("BOP") 122 institutions. Prior to the abolishment of parole, I

Exhibit Q

represented hundreds of federal inmates before the U.S. Parole Commission. Based on more than four decades of experience assisting thousands of clients who have been committed to the care and custody of the BOP, I have extensive knowledge of the BOP and its stated mission, services, policies, program statements, regulations, institutions, and standard practices.

3. I have dealt with inmates and officials who have worked with or been confined in BOP facilities at every level of the federal prison system. I have worked with both staff and inmates at corrections facilities from the most severe (penitentiaries) to the least restrictive (minimum-security camps). I have worked with inmates and staff at detention facilities utilized by the BOP and the U.S. Immigration and Customs Enforcement ("ICE") facilities for deportable aliens who are either detained pre-trial or awaiting deportation back to their country of citizenship.

4. I have reviewed and am thoroughly familiar with the following Program Statement of the BOP: *Inmate Security Designation & Custody Classification* (P.S. 5100.08, September 4, 2019). I have spoken on numerous occasions with personnel at the BOP's Designation and Sentence Computation Center ("DSCC")[1] and regional and central office officials in the correctional programs administration when seeking clarification about a specific policy/program statement.

5. I have additionally conferred with defense counsel for the Defendant, Shradha Agarwal, in the above captioned matter. I have reviewed relevant case materials regarding the charges, the Presentence Investigation Report ("PSR"), and potential sentencing guidelines.

6. I have prepared this declaration to provide the Court with information regarding the impact of Ms. Agarwal's status as a noncitizen should she be sentenced to a term of imprisonment. First, due to Ms. Agarwal's status as a sentenced alien, BOP will classify and assign her to a Federal Correctional Institution (a low-security, secure prison) and not to a minimum-security camp. Second, she will likely serve a period beyond her actual sentence in ICE custody as she

[1] The DSCC is an office within the BOP's Office Complex located in Grand Prairie, Texas. All facility designations (the term used for selecting a location of placement) or assignments and inter-facility transfers are processed and made by the DSCC.

Exhibit Q

awaits deportation. And third, she will be denied the opportunity to be pre-released to the community (to a community-based option such as a residential reentry and home confinement, like most U.S. citizen prisoners who pose no public safety risk) toward the end of her sentence, including early pre-release to the community as a result of the First Step Act.

Ramifications of Ms. Agarwal's Status as a Noncitizen

7. As a non-citizen of the United States, if Ms. Agarwal is sentenced to a term of imprisonment, she will be classified as a "Deportable Alien" which will have significant, and unwarranted, ramifications for her time incarcerated. Even though Ms. Agarwal is a lawful permanent resident of the United States, and not for example an illegal alien, she will nevertheless be classified as a "Deportable Alien."

8. The BOP defines "Deportable Aliens" as follows: "Deportable Alien. A male or female inmate who is not a citizen of the United States. . . . When applied, the inmate . . . shall be housed in at least a Low security level institution."[2]

9. Ordinarily, after the imposition of a sentence of imprisonment, a U.S. citizen defendant with Ms. Agarwal's (non-violent) offense, who has no history of violence, no prior criminal record, and no outstanding detainers would be eligible to be designated by the BOP to a minimum-security prison camp.

10. However, BOP designators also use Management Variables ("MGTV") and Public Safety Factors ("PSF") to account for security considerations not included in their numeric security point system. In Ms. Agarwal's case, although she will have a total of only two (2) security level points,[3] a PSF of "Deportable Alien" will be assigned to her security classification which will

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[2] *Inmate Security Designation & Custody Classification* (P.S. 5100.08, September 4, 2019), Ch. 5, p. 9 (CODE H).

[3] Ms. Agarwal's BOP security level scoring utilizing the BP-A337.051 (Inmate Load and Security Designation Form) is estimated to be as follows: she will be allowed to surrender voluntarily (-3 pts.); her offense (property offense > $250,000) severity will be rated "Moderate" (3 pts.); she has no prior criminal history (0 pts.); no history of prior violence (0 pts.); no history of escape (0 pts.); no outstanding detainers (0 pts.); she is 38-years old (2 pts.); she has graduated high school (0 pts.); and she has no history of substance abuse within the last five years (0 pts.). Therefore, her total security designation points are *two* (2) yielding a security level of "**Minimum**." Per BOP P.S. 5100.08 (September 4, 2019) at Table 5-2, Security Point Totals of 0-11 equate to an Inmate Security Level of Minimum.

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necessarily result in a prison assignment above the "minimum" (or camp) range.

11. The application of the PSF of Deportable Alien is not discretionary – it will be applied in Ms. Agarwal's case. Ms. Agarwal will be designated as a low-security inmate, rather than as a minimum-security one. Low-security prisons generally have security protocols and living conditions far different than what exists at the minimum-security, camp level.

12. There are four main differences between a minimum-security camp versus a low-security prison.

13. The first difference is the perimeter security and other forms of heightened security. Federal Prison Camps ("FPCs") are fenceless compounds that have the appearance and feel of an austere college campus. Camps do not have "controlled movements." A Federal Correctional Institution ("FCI"), on the other hand, is surrounded by barriers to prevent escape: walls, fencing with concertina wire, secured and defensible main gates, security lighting, motion sensors, and roving patrols. Remotely controlled doors, CCTV monitoring, alarms, and physical segregation of units are used within the facility. Inmate movement throughout the facility is highly controlled, with access from one location to another allowed only for ten minutes at the top of each hour. Mass body checks where groups of inmates are strip searched so officers can inspect their bodies for bruises or lacerations indicating violence, or fresh tattoos indicating gang involvement, are sometimes conducted for cause. Such assembly searches are not ordinarily done at the camp level. Housing units are searched far more frequently than at the camp level.

14. The second difference is the institution's size, mindset and crowding: FCIs are five to ten times larger than camps. As a rule, the bigger the institution, the more stressful it is on the general population in the prison. Large FCIs have cramped housing quarters where 90-100 inmates sleep in small cubicles with four or more bunk beds and compete for use of the dozen or so showers, sinks, and toilets. Most BOP facilities house more inmates than they are designed for; however, the camps are less crowded than the low-security FCIs.

15. For women, they not only face more crowded conditions, but because there are

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fewer facilities, they are more likely than men to be assigned to a facility a great distance from their family. Of the 98 institutions, only 12 are designed to hold only women. In total, there are only four low-security FCIs for women in the country.[4]

16. Ms. Agarwal and her husband live in Austin, Texas. The closest low-security FCIs to Austin, TX are FCI Aliceville, AL (723 miles from Ms. Agarwal's home) whose current population is 1,478[5], 3.7% under the rated capacity of 1,536[6], and FCI Tallahassee, FL (877 miles from Ms. Agarwal's home) whose current population is 1,083, 72.5% over the rated capacity of 628. In contrast, the two camps located in nearby Texas, Bryan (located 107 miles from Ms. Agarwal's home) currently houses 664 women (capacity of 720), and Carswell (located 202 miles from Ms. Agarwal's home) currently houses 139 women – well under the capacity of 314.

17. Overcrowding in FCIs results in cubicles that are quadruple bunked, and in some facilities, inmates are placed on mattresses on the floor in "overflow units." Sleep disturbances (resulting from sleeping on thin mattresses, snoring, constant light, and movement) are common. Noise is incessant in a secure correctional facility, and in some (those that have cubicles, for example), there is little to absorb or otherwise block nighttime noise. Inmates may be awakened repeatedly for late night head counts.

18. Other problems exist in the more crowded FCIs. For instance, there are longer lines to use the telephone, to see a member of your unit team, for medications and checkups, or to use the library. During mealtime, the busy, noisy cafeteria serves institutional food, pre-packaged, pre-made, sometimes days before it is served. Inmates eat in shifts (each housing unit is called in an ever-changing rotation), and if your unit is called last, most of the edible food is gone (this may be especially difficult for Ms. Agarwal given her strict religious diet coupled with a number of serious food allergies). Naturally there are also long lines to use toilets, sinks, and showers.

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[4] The four low-security FCIs for women are: Aliceville, AL; Danbury, CT; Tallahassee, FL; and Waseca, MN.

[5] All population figures are from https://www.bop.gov/about/statistics/population_statistics.jsp updated weekly on Thursday. Last visited May 16, 2024.

[6] All Capacity figures are current as of March 2019. BOP FOIA Request #2017-06299.

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19. The third difference between an FPC and an FCI is the type of inmate. The camps house offenders convicted who are serving short sentences (less than 10 years) and have often cooperated with the government. These inmates generally are first-time offenders who have committed nonviolent crimes, have minor to no criminal history, and pose no public safety or flight risk. Camps also house low-level drug offenders. They tend to generally behave well out of fear they will end up in a higher security institution (infractions can penalize a camp inmate with a transfer to a low-security facility, although, Ms. Agarwal will automatically end up in a facility above her security risk). Otherwise, camps house white-collar, property offenders. Inmates at low-security facilities (which also house drug offenders, but those of the more serious kind) are serving sentences greater than 10 years, likely have a prior record involving a gun or violent offenses, may be gang-affiliated, or are otherwise security or flight risks. FCIs also house all deportable aliens, members of organized crime, drug cartel leaders, and all serious sexual offenders. Statistically, there is a 143 percent greater chance of being assaulted at an FCI as opposed to a camp.[7] Furthermore, the rate of "serious assault" is 553 percent higher in low-security institutions than minimum-security camps.[8]

20. The last difference is about visitation. At a camp, an inmate's family can drive up to the compound, park in a lot next to the visiting hall, walk in unescorted, show ID and then their incarcerated loved one appears. At an FCI, visitors must proceed to a guarded gate to access the facilities parking area. They are observed by officers on patrol in the parking lot. Once inside the prison, they pass through metal detectors, are subjected to random pat down searches (with vehicles on the property also subject to inspection), their hands are tested for drug use, they are escorted through several checkpoints, and they wait interminably for their friend or family member

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[7] This percentage is based on the average rate per month (per 5,000 inmates) of "inmate on inmate" assault (serious and less serious) from 2008-2017. *See* Federal Bureau of Prisons, Office of Research and Evaluation (data files on assault from 2008-2017) (on file with the affiant).

[8] *Id.* Serious assault is defined in the *Inmate Discipline Program* (P.S. 5270.09, August 1, 2011), page 44, Table 1 (CODE 101 – "Assaulting any person, or an armed assault on the institution's secure perimeter (a charge for assaulting any person at this level is to be used only when serious physical injury has been attempted or accomplished).").

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to be brought to the visiting room (a crowded indoor environment). Meanwhile, the average camp has an outdoor picnic area for visitation during warm months, which means a great deal to the family of someone inside.

21. The unfortunate result in Ms. Agarwal's case is that rather than be designated to a minimum-security camp, she will instead, based solely on her citizenship status, now be housed in a significantly harsher institution, likely next door or in a bed adjacent to someone with a much more serious criminal background. Prison is hard enough for even the toughest of souls. Ms. Agarwal is 38 years old and has no prior criminal history or experience with criminal activity. And she will be imprisoned in a crowded, noisy prison, which employs security measures far beyond what is required for her care and custody.

Ms. Agarwal's Ineligibility for Pre-Release and Re-Entry Transitioning

22. Ms. Agarwal's access to pre-release re-entry transitioning and a productively structured return to her community will also be compromised because of her immigration status as a non-U.S. citizen. Normally, an inmate would be accorded a portion of their sentence for community re-entry through one of the BOP's Residential Re-Entry Centers ("RRC"). If Ms. Agarwal were a citizen, toward the end of her sentence she would be pre-released to an RRC for a period determined as required by her transitional needs—likely between six and twelve months before her release date.[9] Further, most minimum- and low-security inmates are also pre-released (in addition to their RRC or halfway house time) to home confinement for the last 10 percent of their sentence, up to a maximum of six months.[10] Instead of any normal transitional benefits afforded other inmates via pre-release, Ms. Agarwal would be held beyond the length of her sentence when she would be transferred to the custody of ICE officials upon formal BOP release. In effect, this could add *over a year* to her sentence.

23. During any sentence of incarceration, Ms. Agarwal – provided a Final Order of

[9] 18 U.S.C. § 3624.

[10] *Id.*

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Removal (deportation) is not filed against her -- will be able to participate in the rehabilitative programming and related incentives afforded to inmates via the First Step Act ("FSA"). This will slowly allow her to reduce her sentence by ten days a month for the first six months and 15 days a month thereafter until she reaches the maximum number of days available via the FSA which is 365 days. Upon reaching that threshold most inmates continue to earn FSA credits toward their period of reentry in the community - meaning an early release from prison to either an RRC or home confinement. However, these incentives are not available to non-U.S. citizens. While Ms. Agarwal can conceivably "earn" these FSA time credits until such time as a Judicial or Final Removal Order is in place, they will not avail her of any pre-release relief. [11]

24. How much time of pre-release will be lost due to Ms. Agarwal's non-citizenship? Let us take the example of Senior Probation Officer Kelly Kwong's "Sentencing Recommendation" in this case of 78-months of imprisonment. As long as Ms. Agarwal served her time without incurring an infraction of the rules which caused her to lose Good Time Credits (GTC), her sentence of 78 months would be reduced by 15 percent, or 351 days, which leaves 66.5 months remaining to serve.

25. Assuming a final order of deportation is not entered, after serving 26 months, with persistent work and programming at her designated facility, she would earn the maximum Reduction in Sentence (RIS) via the First Step Act's Federal Time Credits (FTC) of 365 days, or one year. The remaining sentence of 66.5 months has now been reduced by twelve months via RIS, leaving 54.5 months of time actually served in prison.

26. It is at this point as a noncitizen that Ms. Agarwal will no longer earn meaningful FTCs. As previously noted, noncitizens are not permitted to serve any part of their sentence in the community, either at an RRC or at home on home confinement. However, for US citizens, all FTCs earned after a full year of RIS credits can be applied to advanced pre-release to a community-

[11] If a final order of deportation is issued, then Ms. Agarwal cannot earn any FSA credit, including the one year reduction.

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based halfway house (Residential Reentry Center or RRC) or home confinement.

27. At this point, after serving 26 months, Ms. Agarwal must finish out the remaining 28.5 months at the low-security facility to which she is assigned. She will have served a total of 54.5 months in prison.

28. In contrast, a US citizen, after serving 26 months, would continue to earn FTCs that can be applied to advanced pre-release. After serving another 11 months, this person could earn 5.5 months of FTCs towards pre-release. Inmates may be awarded up to a year in prerelease to a halfway house. Given a recommendation from their Unit Team along with 5.5 months earned time credits, they could be referred for almost a year of halfway house time followed by 6 months (10 percent of sentence imposed up to a maximum of 6 months) of home confinement.

29. This US citizen would have served 37 months in prison. The difference is stark. A US citizen would serve less than half (47%) of their sentence in prison (in a camp). In the best case scenario a non US citizen like Ms. Agarwal would serve 54.5 months in prison (in an FCI).

30. Again, if a final order of deportation is lodged, prior to Ms. Agarwal earning FSA credits, she will serve 85% of her sentence in prison.

Ms. Agarwal Will Face an Extended Sentence During ICE Detention and Removal Proceedings

31. Ms. Agarwal's post-incarceration release will be further complicated by the difficulty of an ICE detainer that will be placed on her (upon incarceration) to eventually accommodate the process of deporting a foreign national at the completion of their sentence. ICE's Criminal Alien Program ("CAP") is responsible for identifying, processing, and removing criminal aliens incarcerated in federal, state, and local prisons and jails. The enforcement of removal is overseen by ICE's Office of Detention and Removal Operations ("DRO"). When a prisoner's sentence is complete, they are placed in ICE custody and their status is changed from "prisoner" to "detainee." Armed ICE agents would transport Ms. Agarwal (probably by bus) to a detention center once she is formally released from BOP custody to await the process of being physically

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removed from the U.S. Unfortunately, this involves further incarceration at what are typically county jails (contracted by ICE) or privately owned detention centers (ICE detention Centers) to wait on processing to finally be sent back to their county of citizenship. Moreover, Ms. Agarwal's status as a deportable alien means that her confinement will likely extend long beyond whatever sentence the Court imposes for two separate, but related reasons. *First*, as noted, at the conclusion of her sentence, she will be turned over to U.S. Immigration and Customs Enforcement ("ICE") custody to face deportation proceedings. The deportation process can take months or longer. On top of the time spent being transferred to ICE custody, the Office of Inspector General ("OIG") recently found that "only 29 percent" of inmates who received a final order of removal after entering ICE detention were removed within a month, and that, on average, they spent an additional *three months* in ICE detention at the conclusion of their sentence. *Review of the Institutional Hearing and Removal Program Expansion for Federal Inmates* at 20-21, DOJ, OIG (Sept. 2021), https://oig.justice.gov/sites/default/files/reports/21-123.pdf. *Second*, while Ms. Agarwal could seek to have her removal order issued before the conclusion of her sentence, which might allow her to be deported more promptly following the end of her sentence, doing so would render her ineligible for First Step Act credits discussed above. 18 U.S.C. § 3632(d)(4)(E) (deportable noncitizens may receive First Step Act credits only if they have not received a final order of removal).

32. ICE detention centers, which are privately owned, house deportable aliens and offer no rehabilitative and release preparedness programs. These detention facilities hold detainees of all security levels and offense types. Privately-run and operated prisons have consistently been under investigation over previous decades for poor management, lack of programming, lower-level of medical care and heightened rates of assaults. These deficiencies in privately-run correctional facilities caused President Biden to order the closing of all privately-owned BOP

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facilities in January 2021.[12] Unfortunately, this order did not affect ICE's use of privately owned detention centers.

33. As previously noted, the two closest low-security facilities to Ms. Agarwal's residence are FCI Tallahassee, Florida, and FCI Aliceville, Alabama. Regardless of the location, following the completion of her sentence, Ms. Agarwal will be picked up by armed ICE agents and transported to a local detention center. The trip will be long and arduous, as Ms. Agarwal will be placed in handcuffs and leg irons throughout the transfer process.

34. If the BOP designates her to FCI Aliceville, Ms. Agarwal will most likely be held at the Central Louisiana Detention Center (also known as the LaSalle ICE Processing Center). LaSalle is operated by a private company, the GEO Group, Inc.

35. The LaSalle facility came under fire after three deaths occurred between 2016 to 2017 accompanied by numerous allegations of abuse and medical neglect which prompted an investigation by the Department of Homeland Security in 2017. Findings included "insufficient medical professional staffing" and "suicide preventions training . . . was found to be problematic at several levels."[13] Most recently, in June 2023, an inmate held at LaSalle died after suffering a heart attack following numerous seizures and lack of appropriate medical care.[14]

36. If assigned to FCI Tallahassee, Ms. Agarwal would most likely be held either at the Robert A. Deyton Detention Facility in Lovejoy, Georgia or the Stewart Detention Center in Lumpkin, Georgia. The Physicians for Human Rights noted this year regarding all Georgia ICE detention facilities: "What the Georgia detention centers lack in fiscal responsibility, they make up for in immorality and indecency." Also noting a level of "abuse and neglect" that's resulted in "178 reported deaths in immigration centers between 2003 and 2018" (almost 12 deaths per

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[12] Executive Order 14006, officially titled "Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities," is an executive order signed by U.S. President Joe Biden on January 26, 2021.

[13] https://www.documentcloud.org/documents/23873568-23-lasalle-detention-facility

[14] https://lailluminator.com/2023/07/13/immigrant-who-died-in-louisiana-ice-detention-center-had-filed-at-least-29-grievances/

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year).[15]

37. A representative sampling of reporting on the Stewart Detention Center over the past four years reveals the following issues. In October 2020 - reporting indicated Stewart Detention Center medical mismanagement/negligence and recent pandemic related circumstances crippling their healthcare administration (with no oversight or accountability as to its medical care for inmates).[16] In January 2021 - accountings of the Stewart facility reported inmate deaths, an overuse of solitary confinement, pending lawsuits, and severe physical abuse by facility guards in order to quiet inmate complaints.[17] And more recently, in August 2023, the Atlantic Journal Constitution report on Stewart Detention Center's audit/inspection by DHS Inspectors found very serious medical deficiencies with inmate healthcare provision and incredibly irresponsible facility medical staff shortages were found to be substantive and alarming.[18] [19]

38. Another disturbing result of the formal ICE deportation process is the length of time one can be held after their sentence has been satisfied. It can take up to six months for arrangements (internally within the U.S. and with officials of one's country of citizenship) to finalize the details necessary to complete this process. All the while an individual who should have been released from custody continues to languish in a strange and dangerous place while bureaucratic paperwork is half-heartedly shuffled between U.S. government agencies. Then there is the paperwork processed by the country of citizenship in coordination with the U.S. All of this is very time-consuming and illustrates how an incarceratory sentence would impose a more substantial hardship on Ms. Agarwal than it would upon a similarly situated U.S. individual.

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[15] https://www.phrstudents.com/single-post/nightmare-on-peach-street-the-horrendous-state-of-georgia-s-detention-centers

[16] https://thehill.com/opinion/immigration/519589-ice-is-guilty-of-unsafe-practices-in-detention-centers-causing-covid-19/

[17] https://qcnerve.com/ice-detention-facilities-covid-19/

[18] https://www.ajc.com/news/georgia-news/federal-investigation-documents-barbaric-conditions-in-ice-facilities/Q4BGHWDOGBHBJEJCFJOCBG64DA/

[19] https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions

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Summary

39. In summary, if Ms. Agarwal is sentenced to a term of incarceration, she would be assigned to a prison facility beyond her security needs solely because of her immigration status. She will be placed at unnecessary risk. At a low-security assigned facility, she will be subjected to a more hostile environment and more unsanitary conditions than she would be subjected to in a minimum-security facility. The daily personal stress of incarceration in a higher than necessary security level will be palpable for Ms. Agarwal, who is has never spent any time in prison. Because she is ineligible for full FSA credits, she will serve a significantly higher percentage of her sentence than a US citizen. Finally, she will also serve a period significantly beyond her actual sentence in ICE custody as she awaits deportation—and she will be denied an otherwise standard transfer to a community re-entry opportunity at the end of her sentence.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this ____ of June 2024 at Alexandria, Virginia.

/s/ Joel A. Sickler

Joel A. Sickler, Founder
Justice Advocacy Group, LLC

Exhibit Q

Exhibit R
Declaration of
Janet Perdue

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES		
Plaintiff	:	Case No**: 19 CR 864-2**
	:	
v.	:	
	:	
SHRADHA AGARWAL	:	
Defendant	:	

I , Janet M. Perdue, declare that the following statements are true:

BACKGROUND OF DECLARANT PERDUE

1. I am an independent prison consultant. From May 1988 through May 2022, over 34 years, I was employed by the Department of Justice, Federal Bureau of Prisons (BOP), and served in many capacities. I most recently began work as a corrections consultant in matters related to federal confinement following my retirement in May 2022. My last four positions held were: Residential Reentry Manager, Chicago, Illinois; Associate Warden, Metropolitan Correctional Center, Chicago, Illinois; Executive Assistant, North Central Regional Office, Kansas City, Kansas; and Assistant Correctional Programs Administrator, North Central Regional Office, Kansas City, Kansas. These assignments gave me a broad experience and expertise from the moment a defendant is indicted, throughout the service of sentence, and eventually placement in

a residential reentry center. In my capacity as Associate Warden, I was generally responsible for the overall operation and all components throughout the facility. My professional experience of working in federal corrections includes many areas. While assigned to a BOP Regional Office, one of my duties included the classification and designation of newly committed inmates, as well as reviewing and approving inmate transfers to other federal prisons. Initial designations and subsequent transfers required a thorough review of the inmate's complete pre and post commitment record, to ensure accurate placement at an appropriate security level prison. Another one of my duties when I was assigned to the Regional Office, was to review and respond to inmate grievances, regarding all topics pertaining to correctional programs, including appeals related to the discipline policy. Throughout the course of my career, in many of my positions, I was required to assess an inmate's risk formally and informally. This risk assessment was especially critical when an inmate was being considered for a lesser security prison transfer or a community program.

2. Since my retirement from the Bureau of Prisons, I have maintained contact with many former colleagues. Since February 2023, I have worked as an independent prison consultant. I have kept abreast of new policies and laws that directly impact the Bureau of Prisons.

3. Most recently, I have been preparing reports for filing in various United States District Courts throughout the country. These reports are prepared for the purpose of Compassionate Release consideration or for inmates who are being considered for release under the Incarceration Reduction Amendment Act (IRAA). In preparation for these reports, I am required to review all the prison records of each inmate so I can provide a concise and thorough report for the Court.

4. I have previously been qualified as an expert government witness in federal courts in the areas of prison management, prison practices, and prison adjustment.

5. A copy of my resume which includes my relevant work experience is attached to this report as Exhibit A.

STATEMENT OF WORK

6. Baird Perdue & Associates, LLC, was contacted by Patrick Blegen, an attorney representing Shradha Agarwal, who is pending sentencing in the Northern District of Illinois on June 26, 2024. Baird Perdue & Associates, was asked to review various documents and provide an opinion on how a sentence of imprisonment would impact Ms. Agarwal, considering she is an Indian citizen, who has been living in the United States since she was 18 years of age. Due to her non-US citizenship status, a period of incarceration for her will be much different and onerous than her co-defendants who are US citizens. Information will also be provided on the numerous challenges the Bureau of Prisons (BOP) is currently facing with respect to abuses of female federal offenders throughout the BOP.

7. Some of the documents I have reviewed in preparing this declaration include:

- PSR for Shradha Agarwal including the government's Versions of the Offense
- Letter dated October 9, 2023, to Kelly Kwong, US Probation Officer authored by Patrick Blegen
- Sentencing Mitigation Report by Kelly Rice

- Numerous letters of Support for Shradha Agarwal

POST SENTENCING PROCESS

8. The BOP classifies facilities into four categories which are Minimum (Camp), Low, Medium, and High security. There are also administrative facilities such as Metropolitan Correctional Centers (MCC), Metropolitan Detention Centers (MDC) and Federal Medical Centers (FMC), which house all security levels. After sentencing, defendants are assigned an initial Security Classification by the BOP to determine the appropriate institution for housing during a term of incarceration. Some of the factors used in this classification are age, history of violence, previous escapes, criminal history, and severity of the instant offense. Each factor has a corresponding point value. Once the points are totaled, the sum is matched to a point matrix associated with differing security levels. This process is guided by the BOP classification manual (CPD/CPB, Number P5100.08, Inmate Security Designation and Custody Classification).

9. The Presentence Investigation Report and Judgment in a Criminal Case are the main tools utilized to calculate an individual's security classification. This BOP classification process begins after sentencing in cases where a custodial sentence is imposed. Based on my knowledge and experience with the BOP's security classification and designation process and my understanding of Ms. Agarwal's background, which includes no prior criminal convictions and her current non-violent offense, I believe her numeric point score would be that of minimum security. However, point scores alone do not determine security classification, as the BOP also relies on Public Safety Factors (PSF) when determining security levels. The PSF of "Deportable Criminal Alien" is applied to any non-U.S. citizen, who has been ordered deported, who is likely to be deported, or who is likely to have an immigration detainer placed, pending or upon

completion of their prison sentence. This PSF requires placement in at least a low security level prison. Because Ms. Agarwal is not a citizen of the United States, the BOP's 500-miles within the offender's legal residence rule would not apply, resulting in her designation to any of the BOP facilities across the country if a sentence of incarceration is imposed.

INELIGIBLE FOR VARIOUS PRE-RELEASE TRANSITIONAL PROGRAMS AND OTHER NEWER TYPE OF EARLY RELEASE PROGRAMS AND INITIATIVES

10. I have reviewed a declaration provided by Joel Sickler related to the impact of the First Step Act (FSA) on actual time served for a U.S. citizen as compared to a non-citizen like Ms. Agarwal. I agree with Mr. Sickler's assessment. I would add a few other negative impacts on Ms. Agarwal in light of her status as a non-citizen.

11. One additional impact relates to social furloughs. Social furloughs are available to qualified inmates, who are within 24 months of release, and who have demonstrated responsible behavior within the prison environment. These types of social outings with their families and loved ones provide inmates with a positive incentive for following prison rules and acting responsibly. Furloughs can last 8 hours, overnight, or for several days. These programs provide inmates with an opportunity to reestablish family and community ties, secure employment prior to release and complete various tasks necessary for successful reentry into the community where they intend to reside upon release. There are also instances where furloughs are utilized to allow offenders to assist in the care of an infirm family member or, in the very unfortunate alternative, visit a bedside of a dying family member or attend the funeral of a family member. Furloughs would not be accessible to Ms. Agarwal based on her status as a deportable alien. This could be of considerable concern as her mother is in poor health. My understanding from documents I have reviewed is that her mother suffers from congestive heart failure and diabetes. Her mother needs

surgery, to note a triple bypass procedure. Ms. Agarwal has traditionally been responsible for arranging all the care and medical appointments for her mother. While a citizen may be able to obtain a social furlough to assist a parent with these medial concerns, or to attend services in the unfortunate passing of a loved one, that option is not available to Ms. Agarwal.

12. Another impact is that the BOP will not have the discretion to transfer Ms. Agarwal to home confinement even in response to a serious medical situation within the BOP. For example, when the BOP was responding to COVID-19 concerns in prisons, the BOP transferred over 11,000 health-vulnerable inmates to home confinement to complete their sentence, some having years remaining on their sentence. The allowance to transfer these inmates came about because of provisions in the CARES Act. Because Ms. Agarwal is not a United States citizen, she would not have been eligible for transfer to home confinement under the CARES Act.

13. Non-citizens like Ms. Agarwal are also not eligible for the one year reduction that many inmates receive for participating in RDAP, the BOP's Residential Drug Abuse Program.

DIFFERENCES IN CONFINEMENT FOR U.S. CITIZENS VERSUS NON- NON-U.S. CITIZEN INMATES

14. In the federal prison system, there are stark differences when comparing a non-U.S. citizen inmate and an offender who is a U.S. citizen. These differences are evident when reviewing prison conditions and available programs.

15. Ordinarily, after the imposition of a sentence of imprisonment, a defendant with Ms. Agarwal's offense (non-violent), who has no history of violence, no prior criminal record, and no outstanding detainers, would very likely receive an assignment by the BOP to a minimum-

security level prison camp, near family and her legal residence. Based on my experience and review of her case, if Ms. Agarwal were a U.S. citizen she would qualify and be placed in a minimum-security level federal prison camp. However, because she will be assigned a PSF of "Deportable Criminal Alien," she will be assigned a higher security classification, which will result in a prison assignment above the "minimum" (or camp) range – meaning that a low-security prison is the least restrictive facility to which she can be designated.

16. In addition, the BOP ordinarily attempts to house inmates within 500 miles of their legal residence to facilitate family visits; however, this provision is not applicable to non-U.S. citizens. As a result, Ms. Agarwal will be placed in any low-security federal prison nationwide, with no consideration of where her family resides or proximity to a major airport. This will likely significantly impact the number of social and family visits she will receive.

17. Low-security prisons generally have security protocols and living conditions far different than what exists at the minimum-security, camp facilities. There are six main differences between a minimum-security camp versus a low-security prison.

(a) The first difference is the perimeter security and other forms of heightened security. Federal Prison Camps (FPCs) are largely fenceless compounds that have the appearance and feel of an austere college campus. Camps do not have controlled movements at certain designated times. By contrast, all low and medium-security prisons are located at a Federal Correctional Institution (FCI), which is surrounded by physical barriers to prevent escape: walls; fencing with concertina wire; secured and defensible main entrances; security lighting; motion sensors; and roving patrols. Within the institution; remotely controlled doors; CCTV monitoring; alarms; cages; restraints; nonlethal and

lethal weapons; riot-control gear; and physical segregation of units are used to maintain security. In an FCI, inmate movement throughout the facility is highly controlled, with access from one location to another allowed only for 10 minutes at the top of each hour. Mass body checks, where groups of inmates are strip searched so officers can inspect their bodies for contraband; bruises or lacerations indicating violence; or fresh tattoos indicating gang involvement, are routinely conducted. Such assembly searches are not done at the camp level.

(b) The second difference is the institution's size, mindset, and overcrowding: FCIs are five to ten times larger than camps. As a rule, the bigger the institution, the more stressful it is on the general population in the prison. Larger, low-security FCIs have cramped housing quarters where 90-100 inmates sleep in small cubicles with four or more bunk beds and compete for use of the dozen or so showers, sinks, and toilets. Most BOP facilities house more inmates than they are designed for. However, the camps are far less crowded than the low-security FCIs.

(c) Third, overcrowding results in cells and cubicles that are, at times, triple bunked, and I have witnessed some facilities utilizing mattresses on the floor to accommodate overflow within the housing units. Sleep disturbances (resulting from sleeping on thin mattresses, snoring, constant light, and movement) are common. Noise is incessant in a secure correctional facility, and in some (those that have cubicles, for example), there is little to absorb or otherwise block nighttime noise. Inmates may be awakened repeatedly for late night head counts.

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(d) Fourth, other problems exist in the more crowded FCIs. For instance, there are longer lines to use the telephone; to see a member of your unit team; for medications and checkups; or to use the library.

(e) The fifth difference between an FPC and an FCI is the type of inmate. Camp inmates generally are first-time offenders who have committed non-violent crimes, have minor to no criminal history, and pose no public safety or flight risk. They tend to generally behave well out of fear they will end up in a higher security institution (infractions can penalize a camp inmate with a transfer to a low-security facility). Otherwise, camps house non-violent offenders who are usually serving time for fraud and other non-violent offenses. By contrast, inmates at low-security FCIs (which also house more serious offenders) are generally serving sentences with more than 10 years to serve, likely have a prior record involving a gun or violent offense, may be gang-affiliated, or are otherwise security or flight risks.

(g) The last difference concerns visitation. At a camp, an inmate's family can drive up to the compound, park in a lot next to the visiting hall, walk in unescorted, show ID and then visit with their incarcerated family member. In addition, the average camp has an outdoor picnic area for visitation during warm months, which means a great deal to the family of someone inside. By contrast at an FCI visitors are met with imposing walls or razor wire. They are observed by officers on patrol in the parking lot. Once inside the prison, they pass through metal detectors, and are subjected to random pat down searches. Their hands are tested for drug use, they are escorted through several check points, and

they wait, sometimes for long periods, for their friend or family member to be escorted to the visiting room (a crowded indoor environment).

18. Notably, the BOP utilizes a security level classification system which also allows for former high-security/maximum custody inmates, who commenced their sentences in a high-security facility, to potentially work their way through the federal penal system to eventually be housed in low -security prisons. If sentenced to a term of imprisonment, Ms. Agarwal would encounter these types of offenders and be vulnerable to predators due to her naivety regarding prison experiences and her perceived financial resources. In my experience, defendants like Ms. Agarwal, who held professional jobs and have higher education levels, are perceived by other inmates as having access to outside funds and have a higher likelihood of victimization by other inmates. It is not uncommon for more dominant inmates to threaten violence when extorting weaker, less prison-savvy offenders. These types of predatory inmates make demands from other inmates, requiring, under the threat of physical harm, to have family members transfer funds to their commissary accounts. Ms. Agarwal will be susceptible to this kind of extortion and at risk of theft of personal effects and commissary items. While she may attempt to keep the details of her crime private, this information is easily accessible to the general population of the facility. Inmates routinely seek out details of other offender's crimes and can simply ask someone in the community to complete an internet search on Ms. Agarwal. One quick Google search regarding her crime will easily lead other inmates to believe she is a person of considerable wealth. This will be problematic for her in dealing with inmates who may be attempting to extort money or material items.

THE ADDED PUNISHMENT OF ICE DETENTION AND DEPORTATION

19. I have reviewed the declaration of Mr. Sickler related to ICE detention at the end of Ms. Agarwal's BOP sentence. I agree with his conclusions.

THE CURRENT STATE OF FEDERAL WOMEN'S PRISONS

20. There are very real dangers that currently exist in federal women's prisons throughout the BOP that are occurring in real time.

21. Over the last 18 months, the OIG has been making on-site inspection visits to various federal prisons, some of which have been announced and other inspections unannounced. Some of these visits have uncovered deplorable, and some would say inhumane, conditions at the federal prisons. Until recently there were a total of five low security Federal Correctional Institutions for female offenders operated by the BOP; however, in the last month, the decision was made to close the women's prison in Dublin, California, following intense public scrutiny after the criminal sexual abuse of female detainees at that facility was uncovered. These horrendous abuses and subsequent arrest and conviction of BOP employees will be discussed in detail further in this report.

22. There are numerous recent OIG reports providing damning rebukes to the BOP for a myriad of operational deficiencies having real life consequences to federal offenders. For purposes of this report, I will focus on the findings of the OIG's inspections at two of the federal prisons for female offenders. Ms. Agarwal may be designated to one of these two prisons identified.

23. An OIG site visit in February 2023, at the Federal Correctional Institution (FCI) Waseca, Minnesota, yielded all too predictable results[1]. The facility has serious infrastructure issues including an outdated camera system, needing no less than $3.5 million to address. The facility is

experiencing contraband issues in the form of suboxone and synthetic cannabinoids. The "significant shortage of Correctional Officers" was at the center of identified problems at the facility. Long waiting lists for inmate programming exist, which is a foreseen outcome when staff shortages persist.

24. The Federal Correctional Institution (FCI) Tallahassee in Florida was the subject of an unannounced site visit by OIG in May 2023. The OIG released its report on November 7, 2023[2]. Their findings were scathing. Reports indicate a deplorable level of sanitation and repair of basic prison infrastructure, subjecting inmates to an unsafe environment. Moldy bread, rotting vegetables, leaking roofs, outdated camera systems, lack of contraband control, and a shortage of health services staff which negatively impact offenders' medical care was reported[3].

25. The following are extremely troublesome excerpts regarding the primary concerns identified in the investigation at Tallahassee and published in the OIG report[2]:

> · Serious Issues with FCI Tallahassee's Food Service Department Affect the Conditions of Inmate Confinement. We observed moldy bread being served as well as discolored and rotting vegetables in a food preparation refrigerator at the female prison. In the food storage warehouses, we found likely evidence of rodent droppings, as well as bags of cereal with insects in them and warped food containers.
>
> · Significant Facility Issues Affect the Conditions of Inmate Confinement. We found that female housing unit roofs routinely leak and that all five general population housing unit roofs need to be replaced. Many female inmates live in housing units in which water frequently leaks from ceilings and windows on or near their living spaces. Additionally,

we observed worn bedding, rusted inmate storage lockers, issues with showers and toilets, and black substances on walls and ceilings.

· Operational Deficiencies in Core Inmate Management and Security Functions Affect the Overall Safety and Security of the Institution. We identified serious issues affecting inmate safety, including Correctional Officer shortages; a lack of supervisory oversight at the male detention center; and operational deficiencies, such as weaknesses with inmate search procedures and limited security camera coverage, in core inmate management and security functions. Staff and inmates told us that staff do not always enforce rules consistently, and inmates believed that certain staff took retaliatory measures against them. Additionally, inmates reported that some Correctional Officers use offensive language when speaking with them.

· Health Services Department Staff Shortages Negatively Affect Healthcare Treatment. We found that staff shortages have negatively affected healthcare treatment and caused staff to modify the time of day it distributes insulin and drugs to female inmates, which may limit the therapeutic benefit of these drugs for certain inmates. Separately, we observed a healthcare provider failing to ask required questions during inmate intake screenings and omitting guidance on how to access healthcare services.

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26. The most egregious reporting on events in women's federal prisons is the very recent closure of FCI Dublin.

27. In 1974, FCI Dublin, California, was opened. Since 2012, the federal prison has exclusively housed only female offenders. On April 15, 2024, the BOP announced that the Dublin prison would be closing immediately and began the transfer of all female prisoners to other federal prisons scattered throughout the country. The decision to close the institution came on the heels of U.S. District Court Judge Yvonne Gonzalez Rogers' Order to appoint a special master to oversee the operations of the prison[4]. In her Order, Judge Gonzalez Rogers called the prison "a dysfunctional mess." She further indicated that "The situation can no longer be tolerated. The facility is in dire need of immediate change" Judge Rogers concluded that the Bureau of Prisons has "proceeded sluggishly with intentional disregard of the inmates' constitutional rights despite being fully apprised of the situation for years. The repeated installation of BOP leadership who fail to grasp and address the situation strains credulity."[1]

28. As of March 2024, at least eight corrections staff, including the Warden of the prison, have been arrested for sexually abusing female inmates. Seven have been convicted and sentenced, and several others accused of egregious assaults against the women in their charge, are under investigation. It is expected that more arrests will be made in the coming months.

29. Some of the Dublin officers pleaded guilty, and the former Warden was convicted following a jury trial. In 2020, the Office of Inspector General (OIG) and the Federal Bureau of Investigation (FBI), received information regarding illegal sexual assaults which were occurring at Dublin. Following receipt of this information, a criminal investigation commenced. The

[1] "Judge will appoint special master to oversee California federal women's prison after rampant abuse." 2024. AP News. https://apnews.com/article/california-prison-sexual-abuse-special-master-42bb640f681d1d0a83b7b1892fd4a4c5.

investigation uncovered atrocious acts of sexual violence perpetrated by Dublin officers, including the Warden of the facility, against numerous inmates.

30. An investigation of the institution, by the Associated Press, revealed a "permissive and toxic culture" within the walls of the Dublin prison, and its adjacent satellite camp, which enabled "years of sexual misconduct by predatory employees and cover-ups that have largely kept the abuse out of the public eye". The unfathomable conditions within the prison were so egregious that the prison earned its reputation as "The Rape Club."[2]

31. I respect and admire how Department of Justice officials are taking these crimes against female inmates very seriously and the efforts the Department has put forth to prosecute the perpetrators. Because of my many years of experience working with female offenders, however, I realize there are many other women across other facilities who continue to be victims of sexual assaults because of their choice to not report the abuse for fear their claims will not be believed or they fear retaliatory actions will result.

32. Allegations about abuses at Dublin, for example, were made long before the prison was closed. In 1998, for example, three inmates at the Dublin prison alleged in a lawsuit that they were sexually assaulted at the facility by male prisoners. The lawsuit stated in part, "The correctional officers also gave male prisoners access to plaintiffs' cells without their consent in the middle of the night, which resulted in several sexual assaults."[3]

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[2] BALSAMO, MICHAEL, and MICHAEL R. SISAK. 2022. "AP investigation: Women's prison fostered culture of abuse." AP News. https://apnews.com/article/prisons-california-united-states-sexual-abuse-only-on-ap-d321ae51fe93dfd9d6e5754383a95801.

[3] Fernandez, Lisa. 2023. "2 more women sue 3 Dublin prison officers for alleged illegal sexual behavior." KTVU. https://www.ktvu.com/news/2-more-women-sue-3-dublin-prison-officers-for-illegal-sexual-behavior.

"THE BOP IS FAILING SYSTEMICALLY TO PREVENT, DETECT, AND ADDRESS SEXUAL ABUSE OF PRISONERS BY ITS OWN EMPLOYEES"
– SENATOR JON OSSOFF - GEORGIA

33. The recent investigations, criminal charges, and convictions, involving rampant sexual abuse of inmates at Dublin are systemic problems within the BOP, not exclusive to the Dublin prison, and have been ongoing for decades. The investigation conducted by the Associated Press revealed in 2020 that there were 422 staff-on inmate sexual abuse complaints BOP-wide, although the exact number attributed to female offenders was not known. According to the Associated Press, "The agency said it substantiated only four of those complaints and that 290 are still being investigated. It would not say whether the allegations were concentrated in women's prisons or spread throughout the system."[4]

34. According to a Staff Report authored by the United States Senate's Permanent Subcommittee on Investigations, entitled Sexual Abuse of Female Inmates in Federal Prisons. "Over the past decade, female inmates in at least two-thirds (19 of 29) of federal prisons that held women were sexually abused by male BOP employees, including senior prison officials."[8]

35. Regarding the years 2012-2022 the staff Report states, "Specifically, between 2012 and 2022, there were at least 134 instances across 19 female facilities where BOP employees were either prosecuted for sexual abuse of female prisoners or where BOP [Office of Internal Affairs] substantiated allegations that BOP employees sexually abused female prisoners." *Id*.

[4] BALSAMO, MICHAEL, and MICHAEL R. SISAK. 2022. "AP investigation: Women's prison fostered culture of abuse." AP News. https://apnews.com/article/coronavirus-pandemic-health-california-united-states-prisons-00a711766f5f3d2bd3fe6402af1e0ff8.

[8] https://www.ossoff.senate.gov/wp-content/uploads/2022/12/PSI-Embargoed-Staff-Report-re Sexual-Abuse-of-Female-Inmates-in-Federal-Prisons.pdf

36. As outrageous as these numbers are it is even more alarming to consider the number of actual victims, as those familiar with female BOP facilities know that sexual abuse in prison is underreported, especially by female victims.

37. The recent transfer of inmates from Dublin to the remaining four female low-security facilities has resulted in overcrowding at these facilities and increased the severity of the issues they were already experiencing.

CONCLUSION

38. Should the Court sentence Ms. Agarwal to a term of confinement, it is clear she will serve a much longer term of confinement because of her non-US citizen status as compared a citizen. The differences are quite significant. Moreover, as per BOP policy, she will be designated to a low-security facility, a security level that far exceeds her security needs and without regard for the distance from her family and support system. If she were a US citizen, she would score as a minimum-security offender and serve her sentence in a federal prison camp and one likely close to her home.

39. In addition to serving a much longer sentence, and under much more harsh conditions, she will be exempt from numerous program opportunities generally afforded to US citizen offenders and she will likely face potentially lengthy deportation proceedings following her sentence.

40. I also believe Ms. Agarwal is at risk of becoming victimized, especially while serving a term of confinement in a low-security facility. This is a risk that male inmates are not likely to face in a minimum-security prison camp.

41. There are other options available to the Court that could provide much more parity and balance, and certainly reduce the risk of abuse for Ms. Agarwal. For example, Ms. Agarwal could serve out an extended term of community confinement while assigned to a Residential Reentry Center (RRC) under the supervision of the United States Probation Office.

42. RRCs offer strict accountability of offenders, while typically, but not necessarily, allowing them to remain gainfully employed. Offenders assigned to RRCs are subject to similar routine stand-up counts that occur in federal prisons. They share rooms with other offenders. RRCs conduct random pat searches, breathalyzer, and urinalysis testing on offenders. RRCs utilize community monitoring technologies, such as what is commonly referred to as an "ankle bracelet" to provide constant monitoring of offenders who are in the community attending work, scheduled appointments, and/or job searches. Offenders are subject to a wide range of restrictive conditions recommended and/or ordered by the US Probation Office and the Court.

43. Serving a sentence in an RRC is very similar to the rules, regulations, and restrictions an offender would experience if serving a sentence in a federal prison camp. An RRC setting is significantly more appropriately aligned with Ms. Agarwal's security needs than a low-security FCI, given her lack of criminal record, lack of addiction and the non-violent nature of her offense. Many of the same security features exist in an RRC setting as in a camp. An offender in an RRC can also be restricted from being employed and be physically restricted to the RRC, allowing for only religious and medical appointments outside of the RRC setting. This no-employment restriction would make Ms. Agarwal's sentence to an RRC even more akin to a

sentence served at a federal prison camp. Should the Court consider this option, the Salvation Army located in Chicago, is an RRC that can accommodate any myriad of conditions imposed. While I am not a former Court employee, nor did I work for the United States Probation Office, I was aware of extended placements imposed as a term community confinement. I have known the Salvation Army to have housed low-risk offenders in excess of two years while I was employed by the BOP as a Residential Reentry Manager in Chicago.

44. Although I have not worked for ICE, if sentenced to an RRC, Ms. Agarwal may be permitted to self-deport at the conclusion of her sentence, assuming she did not encounter any accountability issues while in the RRC. This would permit Ms. Agarwal to avoid extra and unwarranted punishment via detention in an ICE facility at the conclusion of her sentence. This would also allow for the best use of Government resources, such as is exercised when an offender is permitted to self-surrender.

Executed on this 10th day of June 2024.

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Janet M. Perdue
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Janet M. Perdue

Attachment A

Janet M. Perdue

I currently work as a Corrections Consultant specializing in the area of Federal Corrections. I have provided Expert Witness testimony while employed by the Federal Bureau of Prisons on institutional operational issues and have provided Expert Witness testimony for defense attorneys since I began consulting. As an Independent Consultant I provide consulting services on all aspects of the Federal Prison System for private attorneys, Federal Public Defenders Offices, individuals, and family members of those facing the possibility of serving a federal prison sentence or those individuals who have already been sentenced or incarcerated. Most recently I co-authored an article entitled *Autism and the Prison Experience,* published in the ABA Quarterly Fall 2023 Publication of their Criminal Justice Section.

My career in Adult Corrections/law enforcement began with my appointment as a Probation Officer in the state of Pennsylvania in 1987. I was responsible for supervising Sex Offenders on bail supervision. Shortly thereafter, I embarked on a 34 year career with the Federal Bureau of Prisons. I began as a Correctional Officer, progressed through several positions in the field of case management providing direct services to the inmate population. Following several years working in the field, I was promoted to Assistant Correctional Programs Administrator, and then an Executive Assistant for the Regional Director, working from a regional office in Kansas City, KS.

These positions afforded me with a global perspective of agency operations, to include designations and transfers processes of all levels of federal offenders, auditing processes to include those employed by the American Correctional Association (ACA), of which I am a member. I was appointed to a team of staff to develop execution protocols when the Bureau of Prisons was tasked with the execution of Timothy McVeigh, the Oklahoma City Bomber, and was also appointed to a media management team regarding the same offender. I conducted Control Unit Hearings for offenders being considered for placement in the Bureau of Prison's Supermax facility.

I served as Associate Warden for eight years at the Metropolitan Correctional Center, Chicago, Illinois, housing approximately 750 offenders. I was responsible for the day-to-day activities of ensuring offenders made prompt court appearances while also providing a safe environment for staff and offenders to work while affording programming opportunities for the inmate population. During my tenure, I managed cases with Special Administrative Measures, (SAM), successfully managed several international and domestic terrorists, and drug cartel leaders. I worked closely with our local FBI, US Attorneys office, Federal Judges from the Northern District of Illinois, and the United States Marshals Service.

Most recently my career focused on Residential Reentry Centers. I managed a region encompassing seven federal sentencing districts, over $25 million in contract awards annually, involving bed space of 800+ offenders. I was responsible for designating and managing all placement processes for offenders nearing the end of their sentences, ensuring placement in the most appropriate locations with a wide variety of programming options to afford offenders

with tools for a successful return to their communities. Under my leadership, my staff provided contract oversight of residential reentry centers to ensure the operation of safe and secure facilities while offering cutting edge reentry initiatives to the offender population. Under my leadership, we processed and managed record numbers of offenders throughout the pandemic under the auspices of the CARES Act of 2020.
I retired from the Bureau of Prisons in May 2022.

Professional Experience

Residential Reentry Manager May 2010-May 2022 Chicago Residential Reentry Office, Chicago, IL

- Managed all residential reentry activities for seven federal sentencing districts providing over 800 beds for placement of offenders
- Provided contract oversight management for over 20 residential reentry centers (RRCs) and 10 county jail facilities
- Delivered training and mentoring to new staff
- Provided training to all local institution staff regarding residential reentry matters
- Provided management oversight of day-to-day activities of over 20 residential reentry centers
- Performed and oversaw all designation processes to and from RRC locations
- Determined when to remove offenders from the community for public safety
- Determined when to return offenders to the RRCs to continue on the path of reentry
- Collaborated extensively with US Probation and US Marshals officials
- Routinely inspected all RRCs and detention facilities for policy compliance

Associate Warden July 2002-May 2010 Metropolitan Correctional Center, Chicago, IL

- Second in command in a pre-trial federal prison which employed 350 staff and housed 750 offenders, running the gamut of all security level pre-trial inmates, with a small cadre of designated offenders, and a housing unit of female offenders
- Was assigned both Operations and Programs Associate Warden giving me comprehensive management experience of full facility operations
- Assisted in the management of a $20 million annual budget
- Oversaw staffing, inmate programs, institution security, staff training, both staff and inmate

internal investigations, and discipline

- Implemented new policy and procedural changes
- Developed excellent relationships with federal entities to include the FBI, US Court personnel,

US Attorney’s Office, US Probation, US Marshals Service, and Federal Public Defenders

- Directed the management of high-profile cases to include SAM cases; cartel members and

leaders; and foreign and domestic terrorists

- Prepared facility for American Correctional Association (ACA) reaccreditation

Regional Executive Assistant July 1999-July 2002. Bureau of Prisons, North Central Regional Office - Kansas City, KS

- Worked closely as a member of the Regional Director's management team providing oversight to 21 federal prisons, to include the agency's one Supermax facility, the federal death row unit, two medical facilities for federal offenders, and six penitentiaries
- Conducted Institution Character Profiles of each facility to assess organizational climate of the institution by examining the following areas: staff and inmate morale, professionalism, communication, and community relations
- Was a member of a work group to develop execution protocols which were implemented in the execution of Timothy McVeigh

- Led a media management team to navigate the volume of media interest generated by this execution and others to come
- Conducted Control Unit Hearings for placement of offenders at the Supermax facility in Florence, CO
- Prepared the Regional Director for quarterly agency meetings which included research and review of data relevant to performance indicators for the region
- Provided training to institution executive assistants in the area of data collection and uses of internal agency search engines to generate reports
- Acted as the Senior Deputy Regional Director on numerous occasions
- Served as a quality controller of documents
- Served as a reviewer of Use of Force actions occurring in the region

Regional Assistant Correctional Programs Admin June 1997-July 1999 Bureau of Prisons, North Central Regional Office - Kansas City, KS

- Oversaw 21 federal prisons located in the North Central Region of the United States
- Primarily targeted the development and training of correctional programs staff assigned to the

institutions within the region

- Developed training agendas for on-site training at the institutions with a focus on policy

compliance and guidance

- Coordinated annual conferences with case management coordinators from 21 facilities
- Participated on several Institution Character Profile teams to assess organizational climate
- Routinely prepared institution staff for internal audits
- Performed all designation processes for all levels of offenders

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Additional Work Experience

Unit Manager
Federal Correctional Institution, Fort Dix, NJ

Case Management Coordinator
Federal Correctional Institution, Fort Dix, NJ

Case Manager
Federal Prison Camp, Allenwood, PA

Correctional Officer
Federal Prison Camp, Allenwood, PA

Education

Lycoming College - Williamsport, PA
Bachelor of Arts Criminal Justice and Sociology

Activities

Member of ACA
Work with autistic children
Volunteer for the Meals on Wheels program
Proud mom of two sons

From: Joe Heaton
To: Chair
Subject: RE: A Request from Judge Reeves
Date: Tuesday, July 1, 2025 1:50:12 PM

Judge Reeves: Two general thoughts: (1) avoid getting the Commission/Guidelines into what amounts to micro-managing the sentencing process, e.g. whether the adjustment for acceptance of responsibility should be 3 points or 4, or how much for role in the offense, or things akin to that. Seems to me the usefulness of the Guidelines is (beyond general ranges) a matter of identifying factors for consideration; how much weight to give in a particular circumstance is normally a case-specific matter of judgment for the judge; and (2) keep the bar for retroactivity of amendments set high; some of the recent retroactive ones addressed matters that I would routinely consider anyway.

Thanks for considering my thoughts and for your service on the Commission. JH

Public Comment - Proposed 2025-2026 Priorities

Submitter:

District Judge Brooke Jackson, Colorado

Topics:

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

Comments:

I believe that the adjustment to the offense level for acceptance of responsibility puts undue pressure on defendants to give up their right to trial and enter into plea agreements. Nor does it accept actual acceptance of responsibility in many cases. I likewise don not believe that enabling the prosecution to avoid the time and expense of preparing for trial warrants an additional adjustment of the offense level. These adjustments contribute to the decline of jury trials, which I do not believe is a good thing for our criminal justice system.

Submitted on: June 25, 2025

From: Charles Bruno Kornmann
To: Chair
Subject: RE: A Request from Judge Reeves
Date: Monday, June 23, 2025 10:27:05 AM

I often ignore the criminal history category. We have people who have embezzled sometimes more than 1 million $ over the course of years and have a criminal history category of 1. Of course, I can depart based on inadequate criminal history and I do. Likewise, we have serial sexual offenders with a criminal history category of 1 because they were not caught previously. Perhaps with the ability to depart for inadequate history, we are covered and don't need to fuss with the compilation of what is a person's actual criminal history based on what we learn from the investigation and prosecution. In addition, I always use 3553 to justify a variance.

Public Comment - Proposed 2025-2026 Priorities

Submitter:

District Judge William Orrick, California, Northern

Topics:

1. Sentencing Options (Chapter Five)

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

10. Miscellaneous

Comments:

The Sentencing Commission should study and address the impact on public safety of problem-solving courts (such as the Conviction Alternative Program of the Northern District of California). The Commision should develop metrics for the consideration by judges for the use of such courts instead of incarceration for certain defendants/offenses.

Submitted on: June 23, 2025

Dear Judge Reeves,

Thank you for soliciting input and feedback regarding the Sentencing Commission's priorities. I appreciate all the hard work that goes into amending the sentencing guidelines.

I have four specific comments, three of which are relevant to this year's proposed actions. The first concerns the **Methamphetamine Actual Guidelines**. I believe that the logic behind the methamphetamine actual guidelines is fundamentally flawed. The theory is that drugs are increasingly mixed with other substances as they move lower down the supply chain, so pure substances are only found with leaders of drug trafficking. However, that is no longer the case. According to DEA data, methamphetamine now averages 93% purity. District courts across the country have criticized the methamphetamine actual guidelines and used their criticisms as a basis for a downward variance. *See e.g.*, *Ibarra-Sandoval*, 265 F. Supp. 3d at 1256; *see also United States v. Santillanes*, Doc. 60 (Transcript of Sentencing Proceedings) at 31, Docket No. CR 07-619 (D.N.M., Sept. 19, 2008) (Brack, J.) ("I find that there is no empirical data or study to suggest that actual purity should be punished more severely by an arbitrary increase of the four levels in this case….The table…seems to be black box science, as best I can determine. I probably would not allow it under *Daubert*, based on what I know at present."). This comment relates to Proposed Action 2.

The second concerns **Narrowing the Career Offender Enhancement in U.S.S.G. § 4B1.1 and § 4B1.2**. Currently, both narcotics trafficking and violent crime prior offenses can constitute the basis of a career offender enhancement. Last year, the Commission initially proposed an amendment, which was ultimately left off its final list, to limit qualifying drug offenses to only federal drug convictions. Such an amendment would be an important step toward limiting the extreme punitive nature of the career offender enhancement because currently a defendant can qualify as a career offender and therefore be eligible for a much longer sentence based on only non-violent and relatively low-level drug offenses. This comment relates to Proposed Action 4.

The third concerns **Acceptance of Responsibility Adjustments Pursuant to § 3E1.1**. Currently, the ease with which a defendant can receive an Acceptance of Responsibility adjustment varies greatly depending upon the district. In New Mexico, for instance, it seems that almost anyone who pleads will receive the adjustment, while it is very narrowly available if one goes to trial (it is only potentially available if the trial only involves legal issues). In other districts, many defendants only receive the adjustment if they plea very early on in their case or make an extraordinary showing of acceptance of responsibility. It would be beneficial if the Acceptance of Responsibility adjustment were more liberally construed across the country so everyone accepting plea deals receives the adjustment. However, it also should not function as a trial penalty. An Acceptance of Responsibility adjustment should be more readily available in cases where the defendant goes to trial if they make a certain showing of acknowledging responsibility, like for instance in self-defense cases, where the defendant acknowledges the harm they caused, but still offers an explanation for it. This is relevant to Proposed Action 5.

The fourth concerns the **Child Pornography Guidelines**. Similar to the methamphetamine actual guidelines, the child pornography guidelines are outdated and disproportionate. The current

guidelines do not appreciate how technology has impacted child pornography and should be changed to better account for defendants' degree of involvement in a child pornography community. The current guidelines result in vastly disproportionate sentences for wildly different crimes. While it seems that the Sentencing Commission cannot necessarily change the guidelines because of limitations in the organic statute, any action the Sentencing Commission can take to further call attention to the disparities of the current guidelines would be beneficial. For instance, in its 2012 Report to Congress, the Sentencing Commission called the guidelines "outdated" and stated that they include "disproportionate enhancements."[1]

Sincerely,

Martha Vázquez

[1] United States Sentencing Commission, 2012 Report to the Congress: Federal Child Pornography Offenses: 2012 Report to the Congress: Federal Child Pornography Offenses | United States Sentencing Commission (ussc.gov)

U.S. Department of Justice

Criminal Division

Appellate Section *Washington, DC 20530*

July 18, 2025

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:

The Criminal Division of the U.S. Department of Justice is pleased to submit its annual report to the Sentencing Commission pursuant to 28 U.S.C. § 994(o). Please also consider this report to be the Department's response to the Federal Register notice requesting public comment on the Commission's proposed priorities for 2025-2026.[1]

The Department appreciates the Commission's willingness to consider the views and priorities of the Executive Branch during its recently concluded amendment cycle. We are pleased that the Commission took seriously the ravages of fentanyl by giving more teeth to the misrepresentation and marketing enhancement in §2D1.1(b)(13) and by seeking public comment on the Department's proposals for additional fentanyl-focused enhancements. We are also pleased that, through its amendments to the primary firearm guideline (§2K2.1), the Commission recognized the significant aggravating conduct involved in possessing or trafficking in machinegun conversion devices, which can make ordinary firearms exponentially more dangerous. And we are equally appreciative of the Commission's care in declining to adopt proposals that would have lowered guideline ranges for the offenders responsible for trafficking the largest quantities of the deadly drugs that poison our communities, as well as proposals that would have significantly affected sentences in methamphetamine cases and for career offenders.

The Commission has identified the latter two issues—methamphetamine and the career offender guideline—as two of its potential priorities for its next amendment cycle. The Department welcomes the opportunity to contribute to the Commission's consideration of those issues, along with supporting the Commission's engagement with Congress on them, as warranted. As explained further below, we also support the Commission's proposed examination of the primary fraud guideline to ensure that it appropriately captures the broad, and evolving, range of economic crimes that devastate individual victims and the public fisc alike. And we applaud the Commission's continued efforts at simplifying the Guidelines Manual to reflect the

[1] *Notice of Request for Public Comment*, 90 Fed. Reg. 24710 (June 11, 2025) ("Proposed Priorities 2025"), https://www.govinfo.gov/content/pkg/FR-2025-06-11/pdf/2025-10556.pdf, *see also* U.S. Sent'g Comm'n, *Proposed Priorities for 2025–2026 Amendment Cycle* (June 9, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20250609_fr_proposed-priorities.pdf.

distinct nature of sentencing in the post-*Booker* era, including through the suggested examination of infrequently applied enhancements.

As further discussed below, however, the Department believes that the Commission can and should do more to meet the significant public-safety challenges facing our nation. On drug sentences, we ask the Commission not to limit itself to implementing legislation concerning fentanyl-related substances, but instead to adopt the sentencing enhancements that were subject to public comment in May 2025. To reflect the increasing sophistication of criminal activity and to further efforts to simplify the guidelines, we urge the Commission to create a streamlined sophisticated means adjustment in Chapter Three. We also urge the Commission to revisit the guideline applicable to alien-smuggling cases to ensure that it provides adequate punishment for offenders who smuggle multiple aliens into this country or cause harm to the individuals smuggled. And we recommend that the Commission add an enhancement to address the horrific problems stemming from financially motivated sextortion schemes—and that it conduct further study of the guidelines applicable to the production of child sexual abuse material.

We thank you, the other Commissioners, and Commission staff for all of their efforts over the previous cycle. And we look forward to working with you during the amendment year.

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I. The Commission's Proposed Priorities

A. Examination of the Primary Economic Crime Guideline

Fraud comes in many forms and has far-reaching negative consequences across society. Exploitation of government programs intended to benefit hardworking Americans, for example, pilfers taxpayer money. Complex frauds often target the most vulnerable among us, with devastating consequences to victims and their families. Other fraudulent activities undermine financial markets, harm innovation, curtail economic development, and further transnational criminal activity.

In recognition of this evolving landscape, the Department has adapted and refocused its white-collar enforcement efforts.[2] The efficacy of those efforts, however, depends in part on guidelines that yield, on a consistent basis, advisory ranges that adequately reflect the statutory sentencing factors present across the wide spectrum of cases involving fraud. And the primary fraud guideline (§2B1.1) has been subject to persistent criticism for failing to do so.

The Department therefore supports the Commission's proposal to examine §2B1.1 and related provisions to ensure that the Guidelines are appropriately calibrated to measure offender culpability and seriousness of the offense. Loss tables and other specific offense characteristics may need updating to ensure that they effectively measure the harm of economic crimes without suppressing innovation and bogging down courts. In addition to actual loss, intended loss, and gain, the Commission should consider other metrics for measuring offender culpability, such as

[2] Memorandum from the Head of the Criminal Division Matthew R. Galeotti, *Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime* (May 12, 2025), https://www.justice.gov/criminal/media/1400046/dl?inline.

an offender's exploitation of public programs, victim vulnerability, the scope of the fraud and extent of the damage to victims or markets, and whether the fraud was committed in furtherance of other serious criminal activity. Adding these metrics will help ensure that the Guidelines reflect how crimes are now being committed and point judges toward appropriate sentences.

The Department understands that the Commission's proposal stems in part from renewed stakeholder criticisms of §2B1.1 as producing sentencing ranges that are too harsh. But we note that when similar criticisms were previously voiced, the Commission conducted an analytically rigorous process that involved compiling and studying pertinent data and fair-minded consideration of varying stakeholder views. At the end of that process, "the Commission concluded that available data did not demonstrate that the fraud guideline was 'fundamentally broken' across most loss amounts for most defendants."[3] The Department encourages the Commission to be similarly fair-minded and analytically rigorous in its proposed examination of §2B1.1.

B. Create a Chapter Three Sophisticated Means Adjustment

To ensure that the Guidelines continue to adequately reflect evolving and interconnected criminal activity, the Guidelines should reflect that sophisticated criminal activity extends beyond financial crimes. Currently, only the fraud, tax, and money laundering guidelines contain specific offense characteristics for sophisticated means. Yet the sophistication of criminals and crimes is increasing, and the Guidelines must keep pace. Technological changes—including use of the dark web, encryption, and other anonymizing technologies—have made detecting, identifying, prosecuting, and otherwise disrupting criminal activity more challenging. As the Commission recently noted in its *Cyber Technology in Federal Crime* 2024 report, the dark web includes illicit darknet markets for illegal drugs and child sexual abuse material, and defendants often use it to commit fraud, money laundering, and to facilitate sexual abuse.[4] Illicit actors have used money laundering and unlicensed money transmitting businesses to finance terrorism, evade sanctions to finance weapons programs, and to launder the proceeds of a variety of illicit activity, including drug trafficking, fraud schemes, and romance scams.[5]

As part of its simplification and modernization efforts, and in line with its proposed examination of Chapter Three adjustments in economic crimes cases, the Commission should

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[3] Hon. Patti B. Saris, *The 2015 Economic Crime Guideline Amendments*, 12 N.Y.U. J. L. & BUS. 1, 22 (2015).

[4] U.S. Sent'g Comm'n, *Cyber Technology in Federal Crime,* 13 (Sept. 2024) ("Cyber Technology Report"), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202409_cyber-technology.pdf.

[5] *See, e.g.*, U.S. Dep't of Justice, Press Release, Law Enforcement Seize Record Amounts of Illegal Drugs, Firearms, and Drug Trafficking Proceeds in International Operation Against Darknet Trafficking of Fentanyl and Opioids; 270 Arrested Across Four Continents (May 22, 2025), https://www.justice.gov/opa/pr/law-enforcement-seize-record-amounts-illegal-drugs-firearms-and-drug-trafficking-proceeds; *see also* U.S. Dep't of Justice, Press Release, United States Files Civil Forfeiture Complaint Against $225M in Funds Involved in Cryptocurrency Investment Fraud Money Laundering (June 18, 2025) ("According to the complaint, law enforcement used blockchain analysis and other investigative techniques to determine that the cryptocurrency is connected to the theft and laundering of funds from victims of cryptocurrency investment fraud schemes, commonly referred to as 'cryptocurrency confidence scams'"), https://www.justice.gov/opa/pr/united-states-files-civil-forfeiture-complaint-against-225m-funds-involved-cryptocurrency.

consolidate the various sophisticated means specific offense characteristics into a broader Chapter Three adjustment that adequately accounts for sophistication in the preparation for, commission of, or evasion of detection for criminal activity.[6] Sophistication does not mean the mere use of technology or a computer to commit a crime or evade detection. Instead, the adjustment should capture the heightened culpability for affirmative conduct designed to target and isolate victims, evade detection, and increase the scale and complexity of the criminal conduct. The adjustment should incorporate the enhanced culpability of manipulating and exploiting emerging technologies—such as use of the dark web, encryption, and other anonymizing technologies—without relying on specific terms that can become easily outdated.

In response to the Commission's February 3 issue for comment relating to fentanyl, the Probation Officers Advisory Group indicated support for this type of Chapter Three enhancement.[7] We agree—and also believe that the adjustment should encompass other forms of sophistication that demonstrate enhanced culpability beyond the use of technology. These include the long duration and significant planning or execution of criminal activity, misuse of data or personally identifiable information to target particularly vulnerable victims such as children or teens on social media, abuse of deepfakes to entrap victims, or transnational fraud schemes exploiting older Americans[8] or funding illicit narcotics trafficking.[9]

C. Categorical Approach/Career Offender

The Commission has again stated that resolving the problems associated with the categorical approach, at least as it pertains to the career offender guideline, will be a priority

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[6] We advocated for a specific offense characteristic for using anonymizing technology or direct messaging for fentanyl trafficking in our May 1 letter. Letter from Scott Meisler, U.S. Dept. of Justice, to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, (May 1, 2025) ("DOJ May 1 2025 Letter"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202505/90FR8840_comment.pdf#page=15.We continue to support those proposals as essential to combat synthetic opioid trafficking. But should the Commission consider this broader Chapter Three Adjustment, we recommend incorporating use of anonymizing technology, dark web, or targeting victims through direct messaging as examples of sophisticated means for this adjustment.

[7] Citing the Commission's *Cyber Technology in Federal Crime Report* (Sept. 2024), "POAG discussed the notion of having an enhancement that functions more generally towards a variety of offenses, perhaps in Chapter Three of the Guidelines, as this may better capture this conduct as seen throughout all types of crimes, rather than just limit the enhancements to drug trafficking." Letter from Probation Officers Advisory Group, to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, 2–3 (May 1, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202505/90FR8840_comment.pdf#page=52. The Department does not think that the current enhancement for use of a computer in CSAM offenses adequately covers the type of heightened culpability and sophistication that a Sophisticated Means adjustment would be intended to cover. Should the Commission consider this broader Chapter Three adjustment, we recommend that it consider consolidating the existing specific offense characteristics for use of a computer or mass-marketing throughout the Manual—to the extent consistent with congressional directives—into this new enhancement.

[8] U.S. Dep't of Justice, Press Release, Justice Department Highlights Enforcement Efforts Protecting Older Americans from Transnational Fraud Schemes in Recognition of 2025 World Elder Abuse Awareness Day (June 16, 2025), https://www.justice.gov/opa/pr/justice-department-highlights-enforcement-efforts-protecting-older-americans-transnational.

[9] FBI, Press Release, *Mexican Cartels Targeting Americans in Timeshare Fraud Scams, FBI Warns* (June 7, 2024), https://www.fbi.gov/news/stories/mexican-cartels-targeting-americans-in-timeshare-fraud-scams-fbi-warns.

during the upcoming cycle. That focus is understandable. As the Commission is well aware, the categorical approach regularly produces inconsistent, anomalous, and even absurd results. Accordingly, the Department has for many years supported amendments that would, as warranted, permit the consideration of an offender's actual conduct to ensure consistent and appropriate punishment. Toward that end, we have engaged in extensive conversations with the Commission, its staff, the Federal Defenders, and others in an effort to reach consensus on the issue. And we welcome the opportunity to continue that endeavor.

That said, the Department is concerned that the Commission has phrased its proposed priorities to focus on "the career offender guidelines," rather than application issues across the Guidelines Manual. The Department supports adoption of consistent definitions of the terms "crime of violence" and "controlled substance offense" *throughout* the Guidelines Manual.[10] Indeed, we perceived in last year's stakeholder comments significant consensus that it would be problematic to adopt different definitions in the career offender context than for other more widely applied provisions (such as §2K2.1) that have experienced the problems associated with the categorical approach. In our view, therefore, the Commission should provide for appropriate recidivist enhancements across the Guidelines that are consistent with Congressional directives—not merely a "fix" to the career offender provision in §4B1.1. And for largely the same reasons, the Department questions whether the proposed "workshops, field testing, and updating [of] data" would constitute sound use of limited Commission and stakeholder resources if those extensive efforts are to be focused solely on §4B1.1 and in service of developing a separate analytical framework for that guideline alone.

The Supreme Court recently denied a petition for a writ of certiorari "over the proper definition of a 'controlled substance offense' under 4B1.2(b)" and again encouraged the Commission to resolve the issue. To the extent that the Commission considers the definition of "controlled substance offense" under the Guidelines Manual, the Department will continue to request that the Commission resolve two circuit conflicts in a manner that reflects the need—consistent with Congress's direction—for enhanced punishment for repeat state and federal drug trafficking offenders. The circuit conflicts involve two recurring issues. The first, recently noted by two Members of the Supreme Court,[11] is whether the term "controlled substance" is limited to drugs regulated by the federal Controlled Substances Act (CSA). The second issue is whether courts conducting a categorical analysis consider the version of the CSA in effect at the time the

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[10] DOJ Feb. 2025 Letter at 19–21 (citing to the Department's 2023 and 2015 letters), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf#page=716; Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 28 (Feb. 27, 2023) ("2023 DOJ Letter"), at 34 ("The Department believes that the same definitions of these terms should apply throughout the Guidelines, for ease of application and to promote consistent results."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=457; Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Patti B. Saris, Chair, at 11–14 (Oct. 30, 2015) ("2015 DOJ Letter"), at 4 ("[T]he Department supports a standardized definition of 'crime of violence' throughout the guidelines. We believe that standardization will reduce litigation and foster more consistent decision-making and more equal and just outcomes. We urge the Commission to adopt a single definition of 'crime of violence' in the guidelines.").

[11] *Wiggins v. United States*, 606 U.S. ____ (June 30, 2025) (Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari) (explaining that the Commission has "acknowledged the split" but "has not resolved it," and calling the issue "an important one").

offender committed the prior offense or instead the version in effect at the time of the current federal sentencing, *see Brown v. United States*, 602 U.S. 101 (2024) (resolving the question as presented in the Armed Career Criminal Act by identifying the version of the CSA at the time of the prior offense as the proper point of comparison). As the Department has explained in previous cycles,[12] the Commission should resolve those conflicts by providing, respectively, that the term "controlled substance offense" is *not* limited to drugs regulated under the federal CSA and, consistent with *Brown*, that courts consider the version of the federal CSA in effect at the time of the offender's prior offense when applying the categorical approach.

D. Methamphetamine and Fentanyl

The Commission proposes to further examine the distinction between methamphetamine (mixture) and methamphetamine (actual). As explained in our March 3, 2025 letter,[13] the Department recognizes that a number of judges have concerns about this distinction and have expressed a categorical disagreement with the methamphetamine guidelines.[14] Although the Department is not necessarily opposed to addressing this distinction or eliminating "Ice" from the Guidelines, any such changes must account for the statutory distinction in the Controlled Substances Act and should not establish guideline levels that are below the applicable mandatory minimum sentences. Accordingly, the Department would welcome the opportunity to work with the Commission in engaging with Congress about these concerns prior to making significant changes to the methamphetamine guidelines.

In contrast to methamphetamine, the Commission's proposed priorities make only passing mention of fentanyl, referring to "possible statutory changes relating to fentanyl" as a "miscellaneous issue[]" that could "com[e] to the Commission's attention." To the extent the Commission's language refers solely to implementing new legislation pertaining to fentanyl, the Department disagrees with that approach. Fentanyl and other synthetic opioids[15] are at the heart of our current public safety crisis,[16] which has transformed from an emergent area of concern to a pressing first-order problem. Fentanyl trafficking cases have increased, and fentanyl now comprises the second most common drug type in federal drug trafficking cases.[17] Yet the Guidelines do not adequately account for the unique dangers from synthetic opioids. We

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[12] DOJ Feb. 2025 Letter at 18–19 (citing to 2023 DOJ Letter), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf#page=716.

[13] Letter from Scott Meisler, U.S. Dept. of Justice, to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, 15–20 (March 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202503/90FR8968_public-comment_R.pdf#page=262.

[14] *See, e.g., United States v. Robinson*, 2022 WL 17904534, at *3 (S.D. Miss. Dec. 23, 2022) (Reeves, J.).

[15] We collectively refer to fentanyl, fentanyl analogues, fentanyl-related substances, and other synthetic opioids as "synthetic opioids."

[16] Drug Enforcement Administration, *National Drug Threat Assessment 2024,* 1, 24, (May 9, 2024) ("Fentanyl and other synthetic drugs, like methamphetamine, are responsible for nearly all of the fatal drug overdoses and poisonings in our country."), https://www.dea.gov/sites/default/files/2024-05/5.23.2024%20NDTA-updated.pdf.

[17] U.S. Sent'g Comm'n, *2024 Sourcebook for Federal Sentencing Statistics, 2024 Drug Offenses*, Table 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Drug-Offenses-Section.pdf.

therefore urge the Commission to help combat the grave public-safety threat posed by fentanyl and synthetic opioids by (1) enacting the proposals that we recommended in our letter of May 1, 2025;[18] (2) adding precursor chemicals to §2D1.11; and (3) accounting for emerging synthetic opioids. These changes would provide common-sense targeted increases in the guideline ranges for synthetic opioid traffickers who engage in aggravated conduct.

1. Enact the Department's Fentanyl Proposals in its May 1 Letter

We appreciate the Commission's consideration and publication for public comment of our proposals to add an enhancement for trafficking synthetic opioids to individuals under 21, who use the dark web or other anonymizing technologies, and that are adulterated with xylazine or medetomidine.[19] Although some stakeholders suggest that our proposals could capture lower-level offenders, the aggravated conduct targeted by our proposals is distinct from the lower-level offenders that the Commission addressed in its expansion of the mitigating role adjustment and cap and the new low-level trafficking instruction.

2. Incorporate Halt All Lethal Trafficking of Fentanyl Act ("HALT Fentanyl")

Congress passed, and the President recently signed, this critical, Department-supported legislation to help curb our nation's drug crisis. HALT Fentanyl permanently schedules "fentanyl-related substances" as Schedule I substances under the Controlled Substances Act and sets the quantities triggering the mandatory minimum penalties for trafficking at those for fentanyl analogues.[20] The Commission should incorporate fentanyl-related substances into the Drug Quantity Table at §2D1.1(c) at the levels for fentanyl analogues. Failure to do so may lead some courts to use Application Note 6 in §2D1.1 to determine the most closely related controlled substance, a process that the Commission sought to avoid in promulgating amendment 807 in 2018.[21] As the Commission acknowledged in 2018, this process can be a time-consuming and expensive process and could result in unnecessary litigation and unwarranted sentencing disparities for similarly situated offenders depending on whether courts apply the fentanyl or

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[18] Letter from Scott Meisler, U.S. Dept. of Justice, to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, (May 1, 2025) ("DOJ May 1 2025 Letter"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202505/90FR8840_comment.pdf#page=15.

[19] *Notice of request for public comment*, 90 Fed. Reg. 22, 8840 (Feb. 3, 2025), https://www.govinfo.gov/content/pkg/FR-2025-02-03/pdf/2025-02128.pdf; *see also* U.S. Sent'g Comm'n, *Request for Public Comment* (Jan. 24, 2025), https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-january-2025-issue-comment.

[20] Halt All Lethal Trafficking of Fentanyl ("HALT") Act, Pub. L. 119-026, https://www.congress.gov/bill/119th-congress/senate-bill/331.

[21] U.S. Sent'g Comm'n, Adopted Amendment 807 Reason for Amendment (2018) ("[B]ased on implementation of Application Note 6, many courts have then sentenced such analogue cases at the lower fentanyl ratio rather than the higher ratio applicable to fentanyl analogues in the Drug Quantity Table" and noting that among other goals, the amendment was intended to "clarify the legal confusion that has resulted from the current definition of 'analogue' in §2D1.1."), https://www.ussc.gov/guidelines/amendment/807.

fentanyl analogue quantities.[22] Consistent with its modernization of the Guidelines, the Commission should incorporate fentanyl-related substances into the Guidelines.

3. Incorporate Other Synthetic Opioids

Similarly, other drug threats also continue to emerge—like nitazenes, which can be more powerful than fentanyl.[23] As the Commission recognized in its 2021 report, making slight changes to the chemical structure of synthetic drugs allows manufacturers and traffickers to exploit any delays in scheduling or amending the Guidelines.[24] Although Application Note 6 to §2D1.1 provides some guidance in how to sentence substances not listed in the Guidelines, these determinations can result in unnecessary litigation, expense, and burden. To curb exploitation by traffickers, ease the burdens on courts, and modernize the Guidelines, we also encourage the Commission to add a new classification for other synthetic opioids to the Drug Quantity Table or an application note instructing courts to use the fentanyl analogue guidelines.

4. Add Fentanyl Precursors to §2D1.11

Finally, as part of its continued study of the primary drug guideline and simplification efforts, the Commission should modernize the precursor table in §2D1.11. The Drug Enforcement Administration uses separate lists to schedule controlled substances and the precursor chemicals used to manufacture controlled substances. In the Guidelines, scheduled precursor chemicals are listed in §2D1.11. Although DEA's list continues to evolve, the table in §2D1.11 has not been amended in almost ten years.[25] Fentanyl precursor chemicals and other chemicals used to manufacture synthetic opioids are not included in §2D1.11. As a result, the list fails to reflect how modern drug trafficking has moved towards synthetic drugs manufactured in labs using these chemicals.[26] Currently §2D1.11 does not provide clear direction for courts on

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[22] *Id.* ("The note directs courts to identify the 'most closely related controlled substance referenced in [§2D1.1]' and to then use that drug's ratio to marihuana to calculate the quantity for purposes of determining the base offense level. Commenters advised that this process is a time-consuming, burdensome task that leads to sentencing disparities.").

[23] Deaths involving carfentanil increased 720.7 percent from the first half of 2023 to the first half of 2024. *See* L.J. Tanz, *et al.*, *Detection of Illegally Manufactured Fentanyls and Carfentanil in Drug Overdose Deaths—United States, 2021–2024*, MMWR Morb Mortal Wkly Rep 2024; 73:1099–1105, https://www.cdc.gov/mmwr/volumes/73/wr/mm7348a2.htm; A. Roberts, *et al.*, *Notes from the Field: Nitazene-Related Deaths—Tennessee, 2019–2021*, MMWR Morb Mortal Wkly Rep 2022; 71:1196–1197, https://www.cdc.gov/mmwr/volumes/71/wr/mm7137a5.htm (discussing rise of nitazenes).

[24] *See* U.S. Sent'g Comm'n, *Fentanyl and Fentanyl Analogues Federal Trends and Trafficking Patterns Report*, 7 (Jan. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

[25] When promulgating "drugs minus two" in 2014 in Amendment 782, the Commission made corresponding changes to the quantity tables in §2D1.11, and a minor update in 2018 in Amendment 813. But it does not otherwise appear that the Commission has amended or added precursor chemicals to §2D1.11 in over 15 years.

[26] U.S. Comm'n on Combating Synthetic Opioid Trafficking, *Final Report,* 19–20 (Feb. 2022), https://www.rand.org/content/dam/rand/pubs/external_publications/EP60000/EP68838/RAND_EP68838.pdf; *see also* Drug Enforcement Administration, *Drug Fact Sheet: Synthetic Opioids* (April 2020), https://www.dea.gov/sites/default/files/2020-06/Synthetic%20Opioids-2020.pdf.

how to calculate the guidelines for precursor chemicals not listed in the table in these emerging prosecutions.[27]

E. Continued Simplification Efforts

The Department strongly supports the Commission's proposal to continue exploring "ways to simplify the Guidelines Manual." As the Department has explained in previous years, we view the goal of simplification not necessarily as shortening the Guidelines Manual, but making the application of the Guidelines less complex, so that the results are more consistent, transparent, and anticipated by courts, prosecutors, defense counsel, probation officers, offenders, crime victims, and the public. Shortening the Manual would, though, be one benefit of a principled simplification effort. We are therefore pleased to support the proposed evaluation of "infrequently applied" provisions throughout the Manual, ostensibly with the objective of excising those that no longer warrant inclusion.

The Department also supports the Commission's proposed priority to examine the operation of §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment). We therefore appreciate the Commission's efforts, as part of its recent simplification amendment, to incorporate additional guidance and preserve the concepts animating the previous departure provisions into the application notes in §5G1.3 for undischarged and discharged terms of imprisonment. But we agree with the Commission that more work needs to be done to clarify the application of §5G1.3. We understand that additional problems arise with prior custody credits when a federal sentence is adjusted in anticipation of a state sentence that is ultimately not imposed or is imposed for less time than the federal court anticipated. We support more guidance for courts in these situations to ensure that the Guidelines and 18 U.S.C. § 3585(b) function as intended and that the defendants are serving the time the sentencing court intended. A similar issue arises with probation revocations that are adjusted in anticipation of the Bureau of Prisons (BOP) awarding prior custody credits under § 3585(b). We welcome the opportunity to work with the Commission to craft appropriate guidance for courts and ensure transparency for litigants.

F. Bureau of Prisons Practices

The Commission proposes "[a]ssessing the degree to which certain practices of the [BOP] are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2) and considering any appropriate responses."[28] The Department appreciates the Commission's continued interest in BOP's practices and is committed to supporting BOP as it pursues its dual mission to "foster a humane and secure environment" and "ensure public safety by preparing individuals for successful reentry" into the community.[29]

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[27] Some precursor chemical prosecutions are sentenced using the cross-reference in §2D1.11(c) and may not be listed in the Commission's dataset under §2D1.11, but it is unclear how courts should determine the appropriate base offense level for precursor chemicals not listed in the Drug Quantity Tables.

[28] Proposed Priorities 2025, *supra* n. 1, at 5.

[29] *About Our Agency*, Bureau of Prisons, https://www.bop.gov/about/agency/agency_pillars.jsp.

At the same time, oversight is less effective when it is less focused and requires an agency to expend valuable time and resources responding to multiple overlapping inquiries that it could otherwise dedicate to evaluating and effectuating important changes. While we appreciate the relationship between the Commission and BOP as established by the Sentencing Reform Act, oversight of BOP lies primarily with Congress, which has already conducted multiple hearings on that topic this year;[30] and with Department leadership, including the Department's Inspector General, which has regularly released reports focused on BOP.[31] We also stress that any Commission assessment should take into account that BOP is under new leadership and that under its new director, William K. Marshall III, BOP is working toward full implementation of both the First Step Act of 2018 and the Second Chance Act of 2008.[32] Should the Commission ultimately assess BOP practices during the upcoming amendment cycle, the Department will welcome the opportunity to share more about those ongoing efforts.

II. Department Priorities and Pressing Public Safety Issues

A. CSAM Guideline Exploration

Regrettably, crimes involving child sexual abuse material (CSAM) (referred to in federal law as "child pornography")[33] remain prevalent in the federal system. They are also a subject to which the Commission has dedicated extensive attention over the years. As explained below, the Department recommends that the Commission add an enhancement to §2G2.1 to reflect aggravated conduct associated with sextortion schemes and that the Commission conduct further evaluation of both §2G12.1 and §2G2.2 in service of potential future reforms.

1. Offenses involving Production of Child Sexual Abuse Material (CSAM)

From 2008 to 2024, the number of cases filed by the Department for production of CSAM nearly quadrupled, steadily rising from 218 cases filed in 2008 to 807 cases filed in 2024. The Commission's data corroborate this trend, indicating that the number of offenders sentenced

[30] House Committee on Appropriations, Oversight Hearing—Federal Bureau of Prisons (Feb. 26, 2025), at https://appropriations.house.gov/schedule/hearings/oversight-hearing-federal-bureau-prisons; Joint Hearing: "Federal Corrections in Focus: Oversight of the Bureau of Prisons" (May 6, 2025), at https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=118184.

[31] *See Reports*, Office of the Inspector General, https://oig.justice.gov/reports (filtered by "Federal Bureau of Prisons" as "component").

[32] U.S. Dep't of Justice, Press Release, *Bureau of Prisons Issues Directive to Fully Implement First Step Act and Second Chance Act* (June 17, 2025), https://www.bop.gov/news/pdfs/20250618-fsa-directive-and-sca.pdf.

[33] U.S. Dep't of Justice, *Child Sexual Abuse Material*, https://www.justice.gov/d9/2023-06/child_sexual_abuse_material_2.pdf.

for producing CSAM has grown during the last decade from 207 cases sentenced under §2G2.1 during the fiscal year 2010[34] to 750 defendants during fiscal year 2024.[35]

Not only has the production of CSAM grown, but it has also evolved into different variants. In addition to more traditional means, production of CSAM has expanded to include surreptitious recording of a minor, sextortion, crowdsourced CSAM, live sex shows, commercial livestreamed child sexual abuse, and causing or coercing a minor to "self-generate" CSAM of themselves.[36] In the last two years, the Department has seen an alarming increase in cases involving "financially-motivated sextortion," in which offenders threaten to distribute child sexual abuse material unless the victim pays a ransom;[37] and "sadistic online exploitation," which involves global networks of offenders who target vulnerable children and viciously coerce them into engaging in and committing injurious, degrading, or sexually violent acts against themselves, other children, and pets.[38] In response to these emerging and alarming threats, we urge the Commission to enact two enhancements and conduct a study to determine if more amendments are needed.

First, the Department urges the Commission to add a specific offense characteristic to §2G2.1 to account for situations in which a victim dies by suicide as a direct and proximate result of the offense, when the defendant encourages or instructs a victim to kill herself or himself, or when the defendant recklessly disregards a risk that the victim kill or attempt to kill herself or himself. According to data from the National Center for Missing and Exploited Children, nearly 40 children who were trapped in financially motivated sextortion schemes have died by suicide, sometimes within an hour or two of first contact with the offender.[39] Sadistic online exploitation defendants also have attempted to cause children to kill themselves.[40]

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[34] U.S. Sent'g Comm'n, *Report to Congress: Federal Child Pornography Offenses*, 247 (2012) https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

[35] U.S. Sent'g Comm'n, *Interactive Data Analyzer for Fiscal Year 2024*, https://ida.ussc.gov/analytics/saw.dll?Dashboard.

[36] U.S. Dep't of Justice, *National Strategy for Child Exploitation Prevention and Interdiction*, 17–19 (2023), https://www.justice.gov/d9/2023-06/2023_national_strategy_for_child_exploitation_prevention_interdiction_-_a_report_to_congress.pdf.

[37] U.S. Dep't of Justice, Press Release, *Delaware Man Pleads Guilty to Participation in International Sextortion and Money Laundering Scheme* (Jan. 7, 2025), https://www.justice.gov/archives/opa/pr/delaware-man-pleads-guilty-participation-international-sextortion-and-money-laundering.

[38] U.S. Dep't of Justice, Press Release, *Leaders of 764 Arrested and Charged for Operating Global Child Explitation Enterprise* (April 30, 2025), https://www.justice.gov/usao-dc/pr/leaders-764-arrested-and-charged-operating-global-child-exploitation-enterprise.

[39] National Center for Missing and Exploited Children, *2024 Cyber Tipline Report*, https://ncmec.org/gethelpnow/cybertipline/cybertiplinedata; Julie Jargon, *'Sextortion' Scams Involving Apple Messages Ended in Tragedy for These Boys*, WALL ST. JOURNAL (June 7, 2025), https://www.wsj.com/tech/personal-tech/sextortion-scam-teens-apple-imessage-app-159e82a8?reflink=desktopwebshare_permalink.

[40] Shawn Boburg, Pranshu Verma, and Chris Dehghanpoor, *On Popular Platforms, Predatory Groups Coerce Children into Self-harm*, WASH. POST (March 13, 2024), https://www.washingtonpost.com/investigations/interactive/2024/764-predator-discord-telegram/; Shawn Boburg and Chris Dehghanpoor, *On Social Media, a Bullied Teen Found Fame Among Child Predators Worldwide*, WASH.

Currently, §2G2.1 accounts only for offenses involving the murder of victims, which is too narrow to capture these tragic and terrifying cases.

Second, we urge the Commission to add a specific offense characteristic for threats to distribute CSAM. Currently, §2G2.1 fails to account for threats to distribute CSAM, which can have devastating, or even deadly, consequences. In cases involving sextortion, particularly financially motivated sextortion and sadistic online exploitation, the threat to distribute CSAM is often the leverage that the offenders use to coerce victims to provide more sexually explicit images, payment, or engage in harmful conduct. The Department cannot overstate the fear and panic that victims feel when threatened in this way and the Guidelines need to adequately account for the substantial harm caused by such threats.

Finally, the Department also urges the Commission to conduct a thorough study of offenses sentenced under §2G2.1 to examine whether the guideline adequately accounts for the range of dangerous criminal activity underlying these offenses and the manner in which they are being committed. Such a study should consider the adequacy of the Guidelines in accounting for:

- *Sexual assault of young children, especially prepubescent children, infants, and toddlers.* Crimes against these especially vulnerable victims warrant the most serious penalties.[41] As currently structured, §2G2.1 does not distinguish between defendants who committed a sexual act with a victim, and those who engaged in sexual contact with a victim (which does not involve a penetrative act). The Commission should assess what changes are needed to ensure that the Guidelines adequately account for sexual acts with young children.

- *Offenses involving multiple victims.* Pursuant to §2G2.1(d), a special grouping rule applies in cases involving more than one minor. In the Department's view, the application of this special instruction has decreased in recent years due to a narrowing of the interpretation of when an offense, based on the relevant conduct definition, involves more than one minor. The Commission should study application of this special instruction and what amendments are needed to ensure it accurately applies in cases with multiple victims.[42]

- *Offenses involving distribution.* Currently, §2G2.1(b)(3) provides for a two-level enhancement in cases involving distribution. The Department is concerned that this

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POST (Sept. 9, 2024), https://www.washingtonpost.com/investigations/2024/09/09/social-media-bullied-teen-found-fame-among-child-predators-worldwide/.

[41] The Sentencing Commission published the results of a special coding project and found that among the 512 defendants sentenced for child pornography production during fiscal year 2019, the defendant or an adult co-participant "physically sexually contacted" at least one minor victim in 285 cases. U.S. Sent'g Comm'n, *Federal Sentencing Of Child Pornography Production Offenses,* 47 (Oct. 2021) ("Child Pornography Production Report"), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211013_Production-CP.pdf.

[42] The Commission found that "a substantial minority," specifically 210 (41.0%) of all 512 defendants involved more than one minor victim, and that 58 cases involved more than four victims. *Child Pornography Production Report* at 27, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211013_Production-CP.pdf.

enhancement is inadequate because it fails to distinguish between production defendants who distribute CSAM that they themselves produced, and defendants who re-distribute third-party CSAM obtained through other means. Defendants who distribute CSAM that they produced are especially culpable for engaging in uniquely serious crimes warranting stronger punishment. In addition to victimizing the victim in producing the CSAM, they also distributed it, resulting in the victim having to endure the repeated trauma of being depicted in CSAM being traded online in perpetuity.

2. Non-Production Offenses involving Child Pornography

Courts vary from the non-production child pornography guideline, §2G2.2, perhaps more than any other guideline.[43] The guideline has been the subject of sustained criticism from the judiciary.[44] Both the Department and the Commission have suggested that congressionally mandated provisions, such as the use of a computer at §2G2.2(b)(6), or the number of images at §2G2.2(b)(7), have not kept up with changes in technology since their adoption as part of the PROTECT Act of 2003, and do not distinguish the most culpable offenders.[45] In 2012, the Commission asked Congress to remove the relevant directives related to §2G2.2 so that it could revise the guideline.[46] The Department remains prepared to work with Congress and the Commission to develop a sentencing guideline for cases involving CSAM that accurately and meaningfully captures the most serious aggravating conduct.[47] The Department encourages the Commission to continue documenting the need for legislative reform of §2G2.2.

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[43] U.S. Sent'g Comm'n, *Federal Sentencing of Child Pornography: Non-Production Offenses*, 23 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf ("The non-production child pornography guideline …has one of the lowest rates of within-guideline range sentences each year… Only 39.6 percent of non-production child pornography offenders were sentenced under the Guidelines Manual"); U.S. Sent'g Comm'n, *QuickFacts Child Pornography Offenses*, https://www.ussc.gov/research/quick-facts/child-pornography.

[44] *See, e.g., United States v. Dorvee*, 616 F.3d 174, 187 (2nd Cir. 2010) ("…§2G2.2 eviscerates the fundamental statutory requirement in §3553(a) and violates the principle, reinforced in *Gall,* that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct," and calling §2G2.2 "irrational[]").

[45] U.S. Sent'g Comm'n, *Report to Congress: Federal Child Pornography Offenses,* xviii and 321 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf ("The current sentencing scheme in §2G2.2 places a disproportionate emphasis on outdated measures of culpability regarding offenders' collecting behavior and insufficient emphases on offenders' community involvement and sexual dangerousness.")

[46] *Id*. ("[T]he Commission believes that Congress should enact legislation providing the Commission with express authority to amend the current guideline provisions that were promulgated pursuant to specific congressional directives or legislation directly amending the guidelines. If such legislation were enacted, the Commission would proceed to draft a comprehensive revision of the child pornography guidelines according to the Commission's regular procedures for amendment pursuant to 28 U.S.C. § 994(o).")

[47] U.S. Dep't of Justice, *National Strategy for Child Exploitation Prevention and Interdiction,* 9–11 (2023), https://www.justice.gov/d9/2023-06/unique_resource_and_enforcement_issues_2.pdf ("Congress set several of the guideline's enhancements and, as a result, legislation will be required to change them. As a result, the Sentencing Commission cannot modernize the guideline on its own. The Department of Justice is prepared to work with Congress to develop a sentencing guideline for cases involving CSAM that accurately and meaningfully captures the most serious aggravating conduct."); *see also* U.S. Dep't of Justice, *National Strategy for Child Exploitation Prevention and Interdiction,* 93–94 (2016),

B. Border Security / Alien Smuggling Organizations

Section 1324 of Title 8 prohibits the smuggling of an alien, and punishment applies "for each alien in respect to whom such a violation occurs." Congress was clear that its intent was to provide increased punishment for each additional alien smuggled.[48] The Sentencing Guidelines do not reflect that intent. We continue to urge the Commission to review the guideline for smuggling offenses, §2L1.1, and to amend it to account for both the larger number of illegal aliens smuggled into the country as well as the grave victimization these offenses cause.

The human cost of smuggling operations is enormous. On June 27, 2022, for example 46 aliens were found dead inside a sweltering tractor-trailer vehicle abandoned on the side of a road near San Antonio, Texas.[49] In December 2021, 53 aliens died in a trailer truck accident in Chiapas, Mexico.[50] The Department of Homeland Security recorded 895 alien deaths along the southwest border during Fiscal Year 2022 and 704 alien deaths in Fiscal Year 2023.[51] Section 2L1.1, however, fails to meet the magnitude of this challenge. Specifically, it fails to give consideration at sentencing to each alien smuggled, instead increasing the advisory sentencing range in predetermined ranges (*e.g.*, for one to five aliens smuggled, six to 24, and so on). It also fails to account for the number of aliens harmed in cases involving death or bodily injury and to adequately address offenses involving rape and other forms of sexual assault, which often go unreported.[52] Smugglers need not employ physical violence (and consequently cause physical injury) when they can sexually exploit the emotional, mental, and physical control they have over a vulnerable victim in an inherently coercive setting.

Accordingly, the Department renews our prior request for amendments to §2L1.1 and urges the Commission to make the changes described above and in the Department's June 2024

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https://www.justice.gov/d9/pages/attachments/2016/04/19/2016_natl_strategy_rpt_-_online_version_updated_final_08_16_2016.pdf; *see also U.S. Sent'g Comm'n Hearing on Child Pornography Guidelines* Statement for the Record at 6 (Feb. 15, 2012) (statement of James Forttell, Steve Debrota, and Francey Hakes), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215/Testimony_15_Hakes_DeBrota_Fottrell.pdf.

[48] 8 U.S.C. § 1324(a)(1)(B).

[49] Arelis R. Hernández, Nick Miroff & Maria Sacchetti, *46 Migrants Found Dead in Texas Inside Sweltering Tractor-Trailer*, WASH. POST (June 28, 2022), https://www.washingtonpost.com/nation/2022/06/27/migrants-dead-texas/.

[50] Rosa Sanchez and Kiara Alfonseca, 55 Migrants Dead, 105 Injured After Vehicle Overturns in Chiapas, Mexico: Authorities, ABC NEWS (Dec. 11, 2021), https://abcnews.go.com/International/54-migrants-dead-105-injured-vehicle-overturns-chiapas/story?id=81667494; see also Jacob Garcia, Guatemalan Migrants Make Up Majority of 55 Dead in Mexico Truck Crash, REUTERS (Dec. 10, 2021), Guatemalan migrants make up majority of 55 dead in Mexico truck crash | Reuters.

[51] U.S. Customs and Border Protection, *Border Rescues and Mortality Data for Smuggled Aliens* (updated 2025), https://www.cbp.gov/newsroom/stats/border-rescues-and-mortality-data; *see also* U.S. Customs and Border Protection, *Rescue Beacons and Unidentified Remains: Fiscal Year 2024 Report to Congress* (Apr. 26, 2024).

[52] Aliens are often smuggled by criminal organizations in groups to optimize profit. As a result, it is common for multiple aliens to suffer serious injury or death in a single event. It is not uncommon for the higher-level organizational defendants to be responsible for the smuggling of large numbers of aliens.

legislative proposal, including: (1) provide more gradations in the advisory guideline ranges for the number of aliens smuggled, as well as a higher maximum increase for the most prolific smugglers; (2) provide offense-level increases under §2L1.1(b)(7) for each alien who suffers bodily injury, serious bodily injury, permanent or life-threatening injury, or death as a result of the offense, subject to an appropriate offense-level cap; and (3) ensure that the guideline adequately addresses alien smuggling offenses involving sexual assault.

C. Terrorism

The Department recommends that the Commission amend §2S1.1(b)(1) and §2S1.3(b) to provide for enhanced penalties for money laundering and violations of 18 U.S.C. § 1960 (unlicensed money transmitting business) done to facilitate terrorism offenses. Pursuant to National Security Presidential Memorandum (NSPM-2), *Imposing Maximum Pressure on the Government of the Islamic Republic of Iran* (Feb. 4, 2025) and Executive Order 14157, *Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists* (Jan. 20, 2025), the Department has prioritized the prosecution of transnational criminal organizations (TCOs), foreign terrorist organizations (FTOs), and specially designated global terrorists (SDGTs), and cutting off the flow of funds to and from these organizations.[53] The designation of these criminal entities as FTOs or SDGTs subjects them to U.S. sanctions and allows prosecutors to use additional tools, including material support charges, which can have the effect of targeting the financial networks, resources, and flows that support these criminal actors. These criminal organizations use a panoply of methods to finance their terrorist and other illicit activities and to launder the proceeds of their crimes, including a wide variety of money laundering typologies and unlicensed money transmitting businesses. Section 1960 of Title 18 currently criminalizes operating a money transmitting business that is unlicensed or used to transmit funds derived from or intended to be used for unlawful activity, including terrorism. The guidelines for money laundering and Section 1960 violations, however, lack specific offense characteristics for situations in which the laundering activity or unlicensed money transmitting businesses are used to facilitate terrorism offenses. This proposal would provide an enhanced penalty for such cases.[54]

To strengthen the money-laundering statutes (18 U.S.C. §§ 1956–1957) and Section 1960 as enforcement tools, we propose two related changes. First, for violations of 18 U.S.C. §§ 1956, 1957, and 1960(b)(1)(C), which criminalize money laundering and the operation of an unlicensed money transmitting business that involves transmitting funds either derived from a criminal offense or used to promote or support an unlawful activity, we propose adding the offense of a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5) to the enumerated list of offenses that trigger a six-level enhancement in §2S1.1(b)(1).

Second, for violations of 18 U.S.C. § 1960(b)(1)(A) or (B), which criminalize unlicensed

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[53] *See* Attorney General Memorandum, *Total Elimination of Cartels and Transnational Criminal Organizations* (Feb. 5, 2025) (directing the prioritization of "investigations, prosecutions, and asset forfeiture actions that target activities of Cartels and TCOs"), https://www.justice.gov/ag/media/1388546/dl.

[54] Alternatively, the Commission may wish to consider expanding application of the Chapter Three Terrorism Adjustment to cover such conduct or whether such conduct could appropriately be accounted for under a Chapter Three Sophisticated Means adjustment.

money transmitting businesses operated without an appropriate state license or federal registration, we propose adding a two-level enhancement to §2S1.3(b) when the funds transmitted were related to an offense involving a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5). The proposed enhancement for violations of 18 U.S.C. § 1960(b)(1)(A) or (B) linked to terrorism supports current Department policies.[55]

Together, these enhancements would strengthen the ability to use Sections 1956, 1957, and 1960 as tools to prosecute money laundering and unlicensed money transmitting businesses that are connected to terrorism offenses, and allow Section 1960 to create a further deterrent effect on the misuse of money transmitting businesses.

D. Recidivism Enhancement for Prior Domestic-Violence and Firearm-Related Convictions

Two categories of prior convictions qualify for the recidivism enhancement in §2K2.1– violent felonies and drug-trafficking crimes. Offenders with prior misdemeanor domestic-violence convictions or prior firearm-related convictions who then commit additional firearms offenses do not currently qualify. We recommend that the Commission incorporate these two especially dangerous categories of prior convictions as qualifying predicates for §2K2.1's recidivism enhancement—unless the offender had his firearm rights restored under 18 U.S.C. § 925(c) after the previous conviction—as each represents exactly the type of aggravated conduct that the enhancements should target.

Offenders who unlawfully possess firearms after a previous misdemeanor domestic-violence conviction demonstrate that they are not law abiding and pose an ongoing public-safety risk. Congress enacted 18 U.S.C. § 922(g)(9)—which prohibits gun possession by anyone convicted of a misdemeanor crime of domestic violence—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.'"[56] Regrettably, "most of those who commit family violence are never even prosecuted" and when they are, roughly "one-third of the cases that would be considered felonies if committed by strangers are instead filed as misdemeanors."[57] The presence of a firearm substantially increases the lethality of these offenses.[58] Homicide is a leading cause of death of young women, with intimate-partner violence accounting for half of those murders.[59] Men use a

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[55] *See* Memorandum from the Deputy Attorney General, *Ending Regulation by Prosecution* (Apr. 7, 2025); *see also* Memorandum from the Head of the Criminal Division, *supra* n. 2.

[56] *United States v. Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. S10377-01 (1996) (statement of Sen. Lautenberg)).

[57] 142 Cong. Rec. S10377-78.

[58] DEP'T OF JUSTICE, *Firearms and Domestic Violence: The Intersections* (Dec. 13, 2016), https://www.justice.gov/archives/ovw/blog/firearms-and-domestic-violence-intersections.

[59] Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 MMWR MORBIDITY AND MORTALITY WEEKLY REPORT 741 (2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=mm6628a1_w; *see also* Violence Policy Center, *When Men Murder Women: A Review of 25 Years of Female Homicide Victimization in the United States,* 5 (Oct. 2023), (noting that a review of data from 1996 to 2020 shows that 92% of female homicide victims killed by a

firearm in more than half of intimate partner homicides they commit and studies have shown a correlation between limiting access to firearms for intimate-partner violence offenders and lower rates of intimate partner homicide.[60] And incidents of domestic violence are one of the more frequent circumstances of firearm homicide of children younger than 13 years old.[61] As Senator Lautenberg—the sponsor of what would become Section 922(g)(9)—put it, "all too often, the only difference between a battered woman and a dead woman is the presence of a gun."[62] We urge the Commission to treat those who unlawfully possess firearms after a conviction for misdemeanor crimes of domestic violence equivalently to those convicted of felony crimes of violence for the purposes of the recidivism enhancement as well.

Similarly, firearm offenders with prior firearm-related convictions pose an acute risk to public safety. As the Commission has observed, firearms offenders recidivate at a higher rate than non-firearms offenders. In its recidivism report focusing on firearms offenders, the Commission reported that "[o]ver 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%)."[63] And "nearly half of the §2K2.1 offenders had previously been convicted of a weapons offense (44.2%)."[64] Firearms offenders are not only more likely to reoffend but are also more likely to commit a future violent crime.[65] Section 2K2.1 should reflect the Commission's findings regarding the danger posed by repeat firearms offenders. Accordingly, we agree with the recommendation put forward previously by the Probation Officers Advisory Group to adopt a recidivism enhancement for prior firearm-related convictions,[66] and

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male offender knew their killer, and of those, 61% were killed by an intimate partner*)*, *When Men Murder Women: A Review of 25 years of Female Homicide Victimization in the US*.

[60] Websdale N, Ferraro K, Barger SD., *The domestic violence fatality review clearinghouse: introduction to a new National Data System with a focus on firearms*, INJ EPIDEMIOL. 2019 6:6. doi: 10.1186/s40621-019-0182-2. PMID: 31245255; PMCID: PMC6582678, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6582678/.

[61] Zeoli, A. M., Goldstick, J., Mauri, A., Wallin, M., Goyal, M., Cunningham, R., & FACTS Consortium (2019). The association of firearm laws with firearm outcomes among children and adolescents: a scoping review. *Journal of Behavioral Medicine,* 42(4), 741–762. https://doi.org/10.1007/s10865-019-00063-y; Fowler, K.A., Dahlberg, L.L., Haileyesus, T., Gutierrez, C., & Bacon, S. (2017). Children firearm injuries in the United States. *Pediatrics*, 140, e20162486.

[62] 142 Cong. Rec. S10377. There is also a strong correlation between domestic violence and mass shootings. According to one peer-reviewed study, 59.1% of mass shootings between 2014-19 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, et. al., *The role of domestic violence in fatal mass shootings in the United States, 2014–2019* (2021), https://injepijournal.biomedcentral.com/articles/10.1186/s40621-021-00330-0.

[63] U.S. Sent'g Comm'n, *Recidivism Among Federal Firearm Offenders,* 4 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190627_Recidivism_Firearms.pdf.

[64] U.S. Sent'g Comm'n, *What Do Federal Firearms Offenses Really Look Like?,* 20, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf.

[65] 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. Sent'g Comm'n, *Recidivism Among Federal Firearm Offenders,* 19.

[66] *See, e.g., Sent'g Comm'n Public Meeting on March 7, 2023* (Firearm Offenses Testimony from Joshua Luria) ("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."),

recommend that such an enhancement also incorporate those who unlawfully possess firearms after a conviction for misdemeanor crimes of domestic violence as well. However, this enhancement would not apply if the offender's firearm rights were restored pursuant to 18 U.S.C. § 925(c) subsequent to the prior conviction.

E. Adjustments to the §4C1.1 Exclusions

The Department continues to have concerns about the breadth of the §4C1.1 zero-point offender reduction. We encourage the Commission to revisit the exceptions to ensure that the reduction is carefully calibrated to benefit only those offenders to whom the underlying rationale for adopting the guideline applies. The rationale for making these changes extends beyond the raw numbers and instead lies in the idea of transparency and accuracy in the range dictated by the Guidelines. In particular, it runs counter to the goal of transparency when litigated Chapter Three adjustments are later negated by the zero-point offender reduction.

We therefore recommend that the Commission add the following exclusions or amend existing ones:

- *The offender received an adjustment under §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill).* Offenders who receive an abuse of position of trust enhancement, per the guideline provision itself, are those who abused their position of trust or special skill to facilitate commission or concealment of an offense. The adjustment precludes application if the abuse of trust or skill was already accounted for in the base offense level or specific offense characteristic, ensuring that the adjustment is reserved for offenders who truly merit it. It is such abuse of trust, professional skill, or managerial discretion that sets these offenders apart from a routine criminal. Categories of offenders who receive this adjustment would include a physician who runs a "pill mill," a prison guard who abuses his position to illegally facilitate dangerous contraband entering a facility, a high-ranking government official who creates a scheme to defraud a state or local government out of overtime funds, or a bank president who embezzles millions of dollars. As required to gain the positions of trust that they occupy, these individuals typically do not have criminal histories, and should not benefit from a reduction as a result. The intent of the adjustment is thwarted if they do.

- *The offender received an adjustment under §3C1.1 (obstructing or impeding the Administration of Justice).* Offenders who receive an adjustment for Obstructing or Impeding the Administration of Justice under §3C1.1 necessarily obstructed justice in

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https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/POAG1.pdf; Letter from Probation Officers Advisory Group to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, 4 (Oct. 17, 2022), ("incorporating some form of increase (starting at a higher Base Offense Level or the development of a new Specific Offense Characteristic) for individuals who commit federal crimes that are covered under §2K2.1 who have previous convictions (on the state of federal level) for offenses that are covered under §2K2.1"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/poag.pdf; *see also* Letter from Probation Officers Advisory Group, to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, 9–10 (March 13, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=895.

addition to their other criminal conduct. Such individuals, who willfully obstructed or impeded justice in an attempt to avoid prosecution, should not benefit from a reduction. The Department recommends adding an exclusion for defendants who received the §3C1.1 adjustment.

- *The offender's instant offense of conviction is covered by Chapter 2, Part M (Offenses involving National Defense and Weapons of Mass Destruction).* The Commission should revise the existing exclusion in §4C1.1(a)(2) for offenders who received the terrorism adjustment under §3A1.4 to include defendants whose instant offenses of conviction are covered by Chapter 2, Part M. Offenders convicted of national-security offenses such as treason, espionage, and providing material support to terrorism should not benefit from a reduction.

- *The offender has significant ties to cartels or human smuggling organizations.* It is not uncommon in prosecutions of largely extraterritorial conduct that the offender may be eligible for a two-level decrease because they have no qualifying criminal history. For example, an offender may have only foreign convictions, which are excluded under §4A1.2(h). Or it may be impossible to ascertain whether the offender has a criminal record based on available records. Such offenders should not benefit from a reduction.

F. Implementation of New Laws

In addition to HALT Fentanyl (discussed above), the Department encourages the Commission to implement new important public safety legislation into the Guidelines, including:

- *Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks ("TAKE IT DOWN") Act, Pub. L. No. 119-12.* TAKE IT DOWN criminalizes the publication of non-consensual intimate imagery, including AI-generated "deepfake revenge" imagery, of minors and adults, and requires social media companies to remove such content. Incorporating TAKE IT DOWN will help modernize the Guidelines and ensure that the Guidelines adequately hold offenders to account. The Department supported this important legislation and encourages the Commission to incorporate these offenses into the Guidelines.

- *Fentanyl Eradication and Narcotics Deterrence ("FEND Off Fentanyl") Act, Pub. L. No. 118-50, div. E, 138 Stat. 895 (2024).* FEND Off Fentanyl created a new offense for violations (including attempts and conspiracies) of any regulation, license, or order issued to effectuate sanctions on foreign persons knowingly involved in trafficking of fentanyl, fentanyl precursors, or other related opioids, or activities of transnational organizations related to such trafficking. The legislation also created a new offense to the 2019 Fentanyl Sanctions Act for violations of certain regulations, orders, special measures, or other requirements imposed to combat the money laundering and trafficking of fentanyl and its precursors by transnational criminal organizations. We recommend that the Commission consider incorporating these offenses into the Guidelines.

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission on these and other issues throughout the amendment year.

Sincerely,

Scott Meisler

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July 18, 2025

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 Priorities for the 2025–2026 Amendment Cycle

Dear Judge Reeves:

During the last amendment cycle, after roundtables, extensive public comment, and public hearings, the Commission made bipartisan and commonsense changes to the *Guidelines Manual* that reflect the "advancement in knowledge of human behavior as it relates to the criminal justice process."[1] We applaud these critical policy updates, which arrive momentously on the heels of the Guidelines' fortieth anniversary, and coincide with *Booker's* twentieth anniversary.

We hope to see continued forward momentum on this year's proposed priorities, which we enthusiastically support.[2] Among other topics, we focus this letter on several of these proposals, including:

- Guidance on appropriate sentence types (pp. 2–13)
- Drug trafficking offenses (pp. 13–14)
- Economic offenses (pp. 14–15)
- Career Offender (pp.15–17)

[1] 28 U.S.C. § 991(b)(1)(C).

[2] *See* USSC, Notice of Proposed 2025–2026 Priorities (2025).

- Acknowledging "good behavior" (pp. 17–26)
- Simplification (pp. 26–27)
- The Bureau of Prisons (pp. 27–28)
- Data collection (pp. 28–30)

We encourage the Commission to also revisit our May 2025 Annual Letter, where we addressed some of these (and other) topics.[3] These priorities, along with our suggested reforms, will enable courts to better effectuate the purposes of sentencing. As always, we welcome this opportunity to draw on our unique institutional knowledge and practice experience and to work collaboratively with the Commission to promote empirically based changes that simplify the Guidelines and save taxpayer resources without compromising public safety.

I. Proposed Priority No. 1: Guidance on the Appropriate Sentencing Option

Defenders are excited to see the Commission prioritize how best to provide courts additional guidance on selecting the appropriate sentence type. Regrettably, in designing the Guidelines, the first Commission disregarded past federal sentencing practices of imposing noncustodial sentences in many cases,[4] diverged from the Sentencing Reform Act's (SRA) sentencing options and mandates, and made a series of other choices that solidified prison as the preordained default outcome for federal sentencing.[5]

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[3] *See* Defenders' Annual Letter to the USSC, at 3–14 (May 16, 2025).

[4] *See* Defenders' Comments on the USSC's 2024–2025 Proposed Priorities, at 4 (July 15, 2024) (discussing how the original Commission "prioritized imprisonment over the use of probation, fine-only, or alternative sentences" and how proportions of imprisonment and imprisonment lengths soared after the *Manual*'s introduction); Melissa Hamilton, *Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*, 51 Hous. L. Rev. 1271, 1289 (2014) (noting that the "sentencing table from the very beginning . . . excluded from its recommended 'norms' approximately 50% of all cases—that is, the numerous cases in which judges had believed it appropriate to impose probation or some other nonprison sentence.").

[5] *See* USSG, Ch. 1, Pt. A, p. 1.9 (1987) ("The Commission's solution to this problem [of courts giving probationary sentences] has been to write guidelines that classify as 'serious' (and therefore subject to mandatory prison sentences) many offenses for which probation is

For nearly four decades the Guidelines have failed to heed the SRA's mandate that the Commission provide guidance not just on the appropriate imprisonment length, *but also on whether to impose a prison sentence in the first place*. The result: a mass incarceration crisis that has devastated communities of color, led to wasteful corrections overspending, and compounded the ongoing, unabated disaster at the overcrowded Bureau of Prisons, all while doing little to protect the public.[6]

But things do not have to be this way. This Commission has the power to correct course. As a group of current and former district judges and U.S. attorneys recently urged, the "Guidelines should look to limit the incarceration of low-risk [individuals] to cases in which no viable alternative would meet the system's needs."[7] To do so, we suggest the Commission revisit the *Manual*'s empirically-lacking default recommendation of imprisonment in almost every case. It should remodel the first three parts of Chapter Five and incorporate a new guideline that gives judges guidance on the "in/out" decision and on *all* sentencing options available by statute,[8] without the need for the confusing "zones" on the Sentencing Table—topics we address below.[9]

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now frequently given."); Thomas W. Hillier, II, *Linking Judicial Sentences to Congressional Purposes*, 8 Fed. Sent. Rep. 24, 24–25 (1995) (discussing history of the *Guidelines Manual* and explaining the need for an "in/out" guideline).

[6] *See* Defender Comment on the USSC's 2025 Drug Offenses Proposed Amendments, at 8–13 (Mar. 3, 2025) (discussing the Commission's statutory obligations to address BOP overpopulation crisis fueled by lengthy drug incarceration sentences); *see also* Kent B. Alexander, U.S. Attorney, N.D.Ga. (1994-1997) et. al., Comment to the USSC on the 2024 Proposed Priorities, at 1 (July 15, 2024) ("In addition to negatively impacting the defendant, lengthy periods of incarceration devastate the families and communities left behind and have little if any impact in reducing recidivism."); *see also* Ellen C. Brotman, *Make Probation a Real Option at Sentencing*, 23 Fed. Sent. R. 257, 257 (2011) ("[I]ncarceration has become the default sentence, with disastrous consequences for society at large and for [sentenced] individual[s], . . . their families, and their communities.").

[7] Alexander et al. 2024 Priority Comment, at 1.

[8] The "in/out" decision refers to "the determination as to whether a [person convicted of a federal crime] is sentenced to any term of imprisonment, as compared to some alternative to prison, such as fine-only, probation, or other type of community supervision." Hamilton, at 1274.

[9] As Defenders urged most recently in last year's priority letter, the Commission should tackle this problematic default also by addressing the ever-present problem of "factor creep" by "liberally pruning specific offense characteristics" and recalibrating sentencing ranges

A. The *Guideline Manual*'s failure to address the "in/out" decision and its default to imprisonment provides courts no meaningful guidance on appropriate sentencing options under the SRA.

The *Manual*'s structure, particularly Chapter Five and the Sentencing Table, has created a nearly universal default outcome of imprisonment. Looking at the Table, it is easy to forget that imposing a sentence does not necessarily require imposing a sentence of *imprisonment*. As an initial matter, the Table—prominently placed at the beginning of Chapter Five and reprinted for quick reference on the very last page of the *Manual*—explicitly uses "months of imprisonment" as its unit of measurement, helping to solidify prison terms as the norm.[10] And apart from the few cells in Zone A of the Table, every sentencing range calls for some recommended minimum period of imprisonment above zero, creating a powerful cognitive effect anchored toward prison time.[11] What's more, in every cell in each zone—including Zone A—prison is *always* an option; yet, visually, the Table obscures the statutory availability of probation-only or fine-only sentences.[12] And the "zones," which purport to offer guidance on noncustodial sentences, inject unnecessary complexity and explicitly take noncustodial options off the table for most individuals,

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down by lowering base offense levels and eliminating provisions that double-count criminal history. Defender Comment on Proposed 2024–2025 Priorities, at 8. Doing so would also better reflect the sentences judges already find most appropriate. *See id.*

[10] The choice to begin Chapter Five with the Table as Part A, coming before the Parts discussing terms of probation and imprisonment, also solidifies this default.

[11] *See generally* Mark Bennett, J., *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); Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 Personality & Soc. Psych. Bull. 188, 197 (2006).

[12] Hamilton, at 1287 ("Under the Guidelines, prison sentences dominate. Indeed, alternatives, including straight probation, are never a default in the sense that prison is an option in every case, even for minor misdemeanors . . . ."); *see also* Brotman, at 257 ("[T]he Sentencing Table provides no combination of offense level and criminal history category that creates a heartland of probation-only sentence and excludes the possibility of imprisonment, even in cases involving [people with no criminal history] and nonviolent offenses. Every one of the 258 specific ranges, even the range triggered by an offense level of I and a criminal history score of zero, includes imprisonment as a suggested option.").

regardless of whether statute allows those options.[13] Even the label "alternative" sentence telegraphs to decisionmakers that prison is the sentencing norm.[14] It's no wonder then that in fiscal year 2024, only 7% of federally-sentenced cases received a noncustodial sentence.[15]

Unlike the *Manual*, the SRA contemplates a variety of sentence types (probation, probation with conditions, fines, and imprisonment). And unlike the *Manual*, the SRA does not treat imprisonment as the default sentence. Section 3553(a) instructs judges to consider the "kinds of sentences available," before turning to the guideline range established for the individual's conduct.[16] Likewise, § 3582(a), governing the imposition of prison terms, describes the order of operations for two decisions: first, "whether to impose a term of imprisonment," and *then* "if a term of imprisonment is to be imposed, determining the length of the term."[17]

Largely mirroring § 3582(a), the Commission's organic statute requires it to promulgate guidelines addressing two distinct judicial decisions: (1) the determination of "whether to impose a sentence to probation, a fine, or a term of imprisonment," and (2) the determination of the "the appropriate amount of a fine

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[13] Unless otherwise prohibited by statute, the SRA deems individuals sentenced for offenses other than Class A or B felonies eligible for probation sentences, meaning probation is statutorily available in a wide variety of cases. 18 U.S.C. § 3561(a). Yet, in fiscal year 2024, out of sentenced cases assigned to a zone, 71% fell in Zone D. The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2024. The Commission's "Individual Datafiles" are publicly available for download on its website.

[14] *Cf.* Herbert J. Hoelter, *Sentencing Alternatives—Back to the Future*, 22 Fed. Sent. Rep. 53, 56 (2009) ("The culture of punishment solely through imprisonment has permeated the system for so long that lawmakers, judges, district attorneys, and probation officers think that justice can only be satisfied through a sentence of incarceration.").

[15] USSC, 2024 Sourcebook of Federal Sentencing Statistics, at 35 fig. 6 (2024).

[16] *Compare* 18 U.S.C. § 3553(a)(3) *with* § 3553(a)(4).

[17] § 3582(a); *see also* Terence F. MacCarthy et. al., *Individualized Sentences and Alternatives to Imprisonment*, 5 Fed. Sent. Rep. 211, 212 (1993) (discussing statutory mandate).

or the appropriate length of a term of probation or a term of imprisonment."[18] These requirements are consistent with the SRA's legislative record: Congress admonished the newly-formed Commission to consider, when crafting the Guidelines, what role, if any, certain factors should have on the recommended "in/out" decision.[19] Other factors were not supposed to be used to determine the appropriate sentence length, though they might factor into deciding whether to imprison someone at all.[20]

Similarly, § 994(j)'s mandate that the guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment" for certain individuals with no criminal history contemplates an initial, distinctive "in/out" decisional step.[21] As one sentencing policy expert observed, Congress "was not just

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[18] 28 U.S.C. §§ 994(a)(1)(A), (a)(1)(B); *see also* MacCarthy et. al., at 212; Hamilton, at 1290 ([R]eflecting a prison bias, the Commission has unfortunately chosen not to provide substantive guidance on the "in/out" decision. This continues to be surprising considering Congress expressly directed it to do so in the Reform Act legislation in order to assist judges who are statutorily required to ascertain if a probation sentence is statutorily permissible.").

[19] S. Rep. No. 98-225, at 172–74.

[20] For example, Congress advised the Commission that the need for an educational program "should be an inappropriate consideration in determining the appropriate length of [a prison] term," though it might call for a sentence of probation instead of prison. *Id*. at 172–73; *see also id*. at 174–75 (education, vocational skills, employment record, family ties and responsibilities, and community ties generally should not be used to imprison someone or increase their prison term, though "they may, in an appropriate case, call for the use of a term of probation instead of imprisonment"); Charlie E. Varnon, *Restoring Probation, Parsimony and Purposes to the Sentencing Reform Act*, 5 Fed. Sent. R. 217, 217 (1993) ("Congress appropriately restricted consideration of education, vocational skills, employment, and family and community ties *only when a term of imprisonment is recommended* . . . . But Congress did *not* restrict consideration of personal characteristics when other sentences—like fines and probation—are recommended. The problem is, we do not yet have guidelines that specifically recommend a fine or probation. This situation is in serious conflict with much that was good in the long history of criminal sentencing."); *see also* USSC, Simplification Draft Paper: Departures and Offender Characteristics, at II(E)(3) (last visited July 14, 2025) ("[I]n assessing the flexibility the Commission has to address the offender characteristics enumerated in subsection (e), it appears that Congress's concern was asymmetrical: Congress wanted to ensure that the lack of the enumerated factors would *not increase the likelihood of prison* – not that these factors would have no bearing on the possibility of probation.").

[21] 28 U.S.C. § 994(j); *cf., e.g.*, Alexander et al. 2024 Priority Comment, at 1 ("In 1984, Congress enacted 28 U.S.C. § 994(j) . . . . Yet, over the last 40 years, our federal criminal

focused on the length of prison terms; it expressed concern about the overuse of prison as the typical type of sentence."[22] Perhaps *most* tellingly, the SRA Senate Report states that the "guidelines are required to provide guidance for the judge in determining whether to sentence a convicted defendant to probation, to pay a fine, or to a term of imprisonment. This guidance may prove to be one of the most important parts of the guidelines process . . . ."[23] By not separating the "in/out" decision from the sentencing range determination and obscuring the statutorily available noncustodial sentencing options, §§5A, 5B1, and 5C effectively skip over this logical first step.[24]

Some jurisdictions are ahead of the U.S. federal system in requiring a threshold "in/out" decision. For instance, in Wisconsin and New Jersey—which do not have sentencing guidelines—sentencing courts must first consider (and reject) probation before determining imprisonment length.[25] In Alabama and Utah—states

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justice system has favored a presumption of imprisonment as the default form of punishment, resulting in mass incarceration.").

[22] Hamilton, at 1285 & n.72 (discussing how the "Senate Report underlying the [SRA] represents that committee members actually intended that probation and intermediate sanctions be available more often than they had been before the Guidelines" and criticizes the pre-Guidelines "lack of guidance on nonprison sentences").

[23] S. Rep. No. 98-225, at 163–64; *see also* Hamilton, at 1290 & n.105 (stating that the House Report accompanying the SRA agrees with the Senate Report, referring to the decision whether to imprison as "'the most fundamental sentencing decision'" and criticizing state commissions that focus instead on guiding only the length of prison terms, rather than the kinds of sentences (quoting H.R. Rep. No. 98-1017, at 102 (1986))).

[24] *See* Gerald R. Smith, *A Renewed Call for an "In/Out" Guideline*, 12 Fed. Sent. Rep. 110, 111 (1999) ("The absence of an 'in/out' guideline and the generally binding nature of the guidelines have made a mockery of the statute. . . . The statutory process is ignored as courts proceed directly to the grid."); MacCarthy et. al, at 212 ("The Commission's failure to heed these directives resulted in a system under which the only question is how long."); *see also* Brotman, at 257 ("Despite these clear [Congressional] directives, no chapter, or even section of the Guidelines points the sentencing court to factors that should be considered in answering the threshold question of whether to imprison.").

[25] *See State v. Gallion*, 678 N.W.2d 197, 204 (Wis. 2004) (case law establishes that in Wisconsin sentencing courts should consider probation as "the first alternative" punishment and that a custodial sentence should be imposed only if probation is rejected); *State v. Baylass*, 553 A.2d 326, 328 (N.J. 1989) (when neither a statutory presumption of imprisonment nor non-incarceration applies, courts must weigh statutory aggravating and

with sentencing guidelines—the guidelines incorporate a separate step where courts make an initial "in/out" decision before turning to sentence length.[26] Outside of the United States, England and Wales, which have statutory purposes of sentencing similar to ours, recently updated their Guidelines to offer judges additional detailed guidance on the variety of sentence types available.[27] While England and Wales have a statutory "custody threshold" that discourages custodial sentences unless the offense was serious, and the U.S. statutory scheme has no exact corollary, the SRA's text and legislative history show that Congress intended the Guidelines to give guidance on the types of sentences available. This Commission can, and should, finally bring the *Manual* in line with the SRA's statutory scheme by providing "in/out" guidance on the front end.[28] In addition to being more faithful to the SRA,

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mitigating factors to determine whether to sentence to probation or prison before turning to question of presumptive custodial sentence lengths).

[26] In Alabama, courts use a combination of worksheets, instructions, and tables to determine the sentence. There, sentencing is a two-step process requiring the court to first fill out a "Prison In/Out Worksheet" to determine whether prison is appropriate. If prison is appropriate, the court then determines imprisonment length by filling out a "Prison Sentence Length Worksheet." *See* Robina Inst., Jurisdiction Profile: Alabama, at 4–5 (Aug. 2019); Ala. Sent. Comm'n, Presumptive and Voluntary Sentencing Standards 2024 Manual, at 18 (Oct. 1, 2024). In Utah, sentencing involves five steps, at Step 4 the court determines whether the guidelines presume probation, jail as a condition of probation, or imprisonment and at Step 5 the court calculates the presumed sentence. *See* Utah Sent. Comm'n, Adult Sentencing, Release, & Supervision Guidelines, at 28 (May 7, 2025).

[27] Sentencing Council of England and Wales, Imposition of community and custodial sentences - Effective from 1 September 2025 (eff. Sept. 1, 2025) (discussing guideline and statutory custody threshold and noting that a "custodial sentence must not be imposed unless the offence (or the combination of the offence and one or more offences associated with it) was so serious that neither a fine alone nor a community sentence can be justified"); *see also* UK Sentencing Act 2020, c. 17, § 57 (Eng.).

[28] This critique and suggestion are not new. *See, e.g.,* Brotman, at 257 ("[T]he Commission should . . . draft a new Guidelines chapter that provides the district courts meaningful assistance on the question of when to impose probation."); Smith at 110 (urging "Commission to promulgate an 'in/out' guideline. Such a guideline would permit a sentencing judge to determine whether probation would be appropriate *before* turning to the sentencing grid."); Hillier II, at 24 ("Instead of following the path envisioned by Congress, §1B1.1 of the guidelines requires judges to move directly to the sentencing grid to decide the fate of a defendant. The purposes of sentencing and sentencing options available to a judge are eschewed.").

encouraging probation and other alternative sentences in a broader range of cases would help ameliorate BOP's burgeoning overpopulation and understaffing crises.

Below we discuss why continued adjustment of the Table's sentencing zones does not adequately address the SRA's mandates, then we provide ideas for how the Commission might start to rethink Chapter 5.

B. Tinkering at the margins of the sentencing zones is an unsatisfactory substitute for much-needed Chapter 5 reforms.

On top of defaulting to imprisonment, the *Manual*'s advisory sentencing ranges have drifted ever-upward since 1987, with noncustodial sentences becoming increasingly rare in the federal system after introduction of the Guidelines.[29] Last year, several commenters suggested modifying or expanding the Sentencing Table's zones to help address this problem by encouraging noncustodial and alternative sentences in more cases.[30] Defenders have made similar recommendations in the past.[31] These suggestions show widespread recognition that the Guidelines fail to promote the full range of sentencing options available by statute. But based on the data we have, Defenders worry that tinkering around the edges of the zones will

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[29] *See* Defenders' 2025 Annual Letter, at 9 ("After the Sentencing Reform Act of 1984 and the introduction of the Guidelines, the percentage of noncustodial sentences dropped drastically. This continues on today; in fiscal year 2024, only 7% of sentenced cases received a sentence of probation or fine alone."); Defenders' 2024–2025 Priority Comment, at 4 ("The original Commission actively chose to disregard past practice and it prioritized imprisonment over the use of probation, fine-only, or alternative sentences. . . . [F]or federal convictions terminating in 1985 . . . 34% were sentenced to imprisonment only.").

[30] *See, e.g.*, Center for Justice and Human Dignity & Aleph Institute Comments on the USSC's 2024 Proposed Priorities, at 5 (July 15, 2024); American Bar Association Comments on the USSC's 2024 Proposed Priorities, at 2 (July 15, 2024); Tzedek Association Comments on the USSC's 2024 Proposed Priorities, at 23– 24 (July 15, 2024); Michael O'Hear Comments on the USSC's 2024 Proposed Priorities, at 1 (July 15, 2024); Judge Stefan Underhill Comments on the USSC's Proposed 2024 Priorities, at 4 (July 15, 2024); Alexander et al. 2024 Priority Comment, at 2; *cf., e.g.,* Cecelia Klingele, *What's Missing? The Absence of Probation in Federal Sentencing Reform*, 34 Fed. Sent. R. 322, 324 (2022) (suggesting the Commission "place more offenses within Zones A and B" to increase proportion of cases receiving federal probation).

[31] *See, e.g.*, Defenders' Comments on the USSC's 2017–2018 Proposed Priorities, at 21 (July 31, 2017) (encouraging the Commission to "[e]xpand Zone B by 2 levels to an 18-24 month range rather than simply consolidate Zones B and C.").

accomplish little in the way of encouraging broader use of noncustodial and hybrid sentences, while injecting unnecessary complexity into the sentencing formula and explicitly taking noncustodial options off the table under the guidelines in most cases, even when those alternatives are permitted by statute.[32]

In fact, despite the well-intentioned expansion of Zones B and C over a decade ago, the Commission found a "continued decreasing trend in the imposition of alternative sentences."[33] Even after this expansion, in fiscal year 2024, 71% of sentenced cases assigned to a zone fell into Zone D,[34] where the Guidelines advise "the minimum term shall be satisfied by a sentence of imprisonment."[35] The Commission has also documented racial disparities in who receives alternative sentences under the zone regime.[36] And the zones tend to be a complicating, rather than simplifying, feature of the Guidelines.[37] Compounding these myriad problems

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[32] Unless otherwise prohibited by statute, the SRA deemed individuals sentenced for offenses other than Class A (maximum sentence of life imprisonment or death) or Class B (maximum sentence of 25 years to life) felonies eligible for probation, meaning probation is statutorily available in a wide variety of cases. *See* 18 U.S.C. §§ 3561(a), 3559(a).

[33] *See* USSC, Alternative Sentencing in the Federal Criminal Justice System, at 1 (2015); *cf.* USSC, Sentencing Options Under the Guidelines (Staff Discussion Paper), at 14 (1996) ("These numbers show that judges often do not impose alternative sentences although they are available under the guidelines."). Even today the zones do little to promote noncustodial sentences. In fiscal year 2024, 29% of federally sentenced cases fell within Zones A, B, or C. Yet 77% of those cases received prison-only sentences. And out of U.S. Citizens sentenced in fiscal year 2024, only 16% of sentenced cases fell within Zones A, B, or C. Of those cases falling in the lower zones, 50% still received prison-only sentences. The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2024. The Commission's "Individual Datafiles" are publicly available for download on its website.

[34] The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2024. The Commission's "Individual Datafiles" are publicly available for download on its website.

[35] USSG §5C1.1(f).

[36] USSC, Alternative Sentencing, at 21 ("Eligible White offenders were sentenced to alternative sentences at higher rates than eligible Black, Hispanic, and offenders in the Other race category.").

[37] The zones have long been a point of confusion. *See* USSC, Staff Discussion Paper, at 14 ("In all, 26 (28.9%) of the hotline calls in the sample indicated some uncertainty about when

is the fact that the *Manual* largely skips over what should be a major decision step in the sentencing process—whether to impose a prison term in the first place, as discussed above.

Instead of making small modifications to the zones, the Commission should consider reworking §§5A, 5B, and 5C and removing the zones. In place of zones, the *Manual* should include a guideline providing more meaningful guidance to steer courts toward the broader array of available sentence types, and away from custodial sentences in more cases.[38] This means that, before presenting judges with the prison-centric Sentencing Table or guidance on sentence *length*, the *Manual* should prompt judges to think about the *types* of sentencing options available and whether a noncustodial sentence can further the statutory purposes of sentencing.[39]

C. When considering how to provide courts better guidance on selecting the appropriate sentencing option, the Commission might look to its recent changes to the supervised release policy statements.

What might this "in/out" guidance look like? The new supervised release policy statements offer a potential blueprint. For example, the policy statements in Chapter 5, Part D, offer courts guidance on imposition of a supervised release term and elevate the importance of conducting an individualized assessment.[40] We

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and to what extent the court could substitute an alternative sentence for prison. No other topic appeared to consistently pose a problem.").

[38] Given the low proportion of noncustodial sentences and disparities seen even within cases currently "eligible" for noncustodial sentences under the zones, we have little reason to believe that expanding the zones will provide sufficient guidance. That said, if the Commission is unable to revise chapter 5 to provide adequate guidance on statutorily available sentencing types, we continue to urge it to explore a variety of ways to increase the use of alternatives to incarceration. *See* Defenders' 2022 Annual Letter, at 25 (summarizing past Defender proposals to better encourage alternatives to incarceration).

[39] *See, e.g.*, MacCarthy et. al., at 212 ("The refusal to separate the in-out[] decision from the question of length of sentence is perhaps the single greatest impediment to the imposition of alternative sentences.").

[40] In particular, the amendment removed the previous requirement to impose supervised release in cases involving a prison sentence of over one year in §5D1.1, responding to "widespread concern that supervised release often is ordered reflexively when deciding of the individual before the court." USSC, Amendments to the Sentencing Guidelines, at 32 (April 30, 2025).

understand the supervised release disposition does not serve retributive purposes, but it is striking that §5D1.1 now calls for a careful, individualized assessment of the need for a supervised release term, while §§5A–C do not require this individualized assessment of the need for imprisonment—despite the statutory importance of individualized sentencing.[41]

We urge the Commission, having overhauled the supervised release policy statements and simplified the (former) three-step process,[42] to continue clarifying the sentencing process to give better guidance and promote truly individualized sentencing. Before even arriving at the imprisonment-heavy Sentencing Table, the *Manual* could have a standalone section offering guidance on selecting the appropriate sentence type. This guideline might, for example, instruct judges that, in determining what type of sentence to impose, the court should conduct an individualized assessment applying the §3553(a) factors. It might instruct that, unless otherwise foreclosed by statute, the court should consider whether a probation, fine-only, or other noncustodial/hybrid sentence can fulfill the statutory purposes of punishment.[43] It should provide guidance on when these other sentences might be appropriate, which would assist courts and effectuate the SRA's intent.

Although certainly different from the current structure of the *Manual*, these suggestions are not new. As far back as the mid-1990s, Commission staff exploring sentencing options suggested an alternatives table that sentencers could use to

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[41] Instead, the current §5C1.1 begins by telling judges that a "sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range." And as discussed above, every cell in the table permits a term of imprisonment.

[42] USSC, 2025 Amendments at 80 (new "instructions set forth in §1B1.1 are structured to reflect a two-step process whereby the sentencing court must first correctly calculate the applicable guideline range as the 'starting point and initial benchmark' and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a).").

[43] Similar to the current §5C1.1, note 10, the new guideline should also provide guidance to "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." 18 U.S.C. § 994(j).

determine the length of any noncustodial or alternative sanctions.[44] While providing better guidance on alternative sentences has been recommended by numerous commenters for as long as the Guidelines have existed, it is also likely to be the subject of spirited discussions and debate amongst stakeholders and may be worthy of a roundtable or working group. However the Commission decides to proceed, we wish to be included, along with other stakeholders, early and often as the Commission examines how the Guidelines can provide additional guidance on selecting the sentence type.

II. Proposed Priority No. 2: Drug Trafficking Offenses

Defenders are glad the Commission has tentatively prioritized further examining §2D1.1's penalty structure and the methamphetamine purity distinctions. The 2025 amendment to the mitigating role provisions outlined in §2D1.1 is an important step in recalibrating the drug trafficking guideline to better account for lesser culpability, but we hope it does not mark the end of the Commission's efforts to de-emphasize drug weight as the primary proxy for culpability. And although the Commission considered ways to equalize the methamphetamine guidelines during the last amendment cycle, it ultimately did not change the current 10:1 ratio between meth-mixture and meth-actual.

As Defenders have urged before, the Commission should consider further amendments to §2D1.1 to produce meaningfully lower guideline ranges, and to eliminate the methamphetamine purity distinctions by using the meth-mixture (or lower) thresholds for all meth-related offenses.[45] We encourage the Commission to revisit these letters and comments. The issues we discussed in those comments persisted through fiscal year 2024, with only 26% of individuals sentenced for methamphetamine offenses receiving sentences within the applicable guideline range.[46] Sentences under §2D1.1, including methamphetamine sentences, continue to contribute to racial disparities and mass incarceration, while failing to measure harm or culpability or to improve public safety. While drug sentences have remained high, drug overdose deaths plummeted by more than 26% in 2024—a

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[44] *See* USSC, Staff Discussion Paper, at 24–25.

[45] *See, e.g.*, Defender Comment on USSC's 2025 Drug Offenses Proposed Amendment, at 1–32; Defenders' Annual Letter to the USSC, at 2–10 (May 15, 2024); Defenders' Annual Letter to the USSC, at 3–13 (May 24, 2023).

[46] *See* 2024 Sourcebook at 97.

decrease most experts attribute to public health solutions, such as increased availability of treatment.[47] We hope that the Commission will build on its work from the last amendment cycle and finally eliminate the methamphetamine purity disparity by bringing meth-actual/ice offense levels down to the current meth-mixture levels—or even by equalizing *and lowering* both levels, support for which was provided at the March 2025 hearing by drug policy expert Jonathan Caulkins.[48]

As for fentanyl-related offenses, we continue to oppose any new specific offense characteristics (SOCs) for these cases.[49] There have been no statutory changes that require guideline amendments. Congress passed the HALT Fentanyl Act in June 2025, but the Act simply makes permanent the scheduling of fentanyl-related substances that first went into effect in 2018; it does not change the penalties currently in effect for those substances.[50]

III. Proposed Priority No. 3: Economic Offenses

Defenders support reexamining the economic offenses guideline, §2B1.1. Defenders, academics, and stakeholders have criticized this empirically deficient guideline for decades.[51] This guideline—bloated by the overly punitive loss table,

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[47] CDC, *Provisional Drug Overdose Death Counts* (last reviewed June 11, 2025) (reported number of deaths); *see also* Brian Mann, *Deadliest phase of fentanyl crises eases, as all states see recovery*, NPR (Mar. 10, 2025).

[48] *See* Statement of Jonathan Caulkins to USSC on 2025 Drug Offenses Proposed Amendments, at 4 (Mar. 12, 2025) ("I think a case could be made for equalizing the treatment of methamphetamine mixture and methamphetamine (actual) at the same level as cocaine, but I do not know whether such a large shift is permissible.").

[49] *See* Defenders' Response to USSC Issue for Comment re Offenses Involving Fentanyl, Fentanyl Analogues, and Other Opioids, at 2–18 (May 1, 2025).

[50] S. 331 (Halt All Legal Trafficking of Fentanyl Act, or the HALT Fentanyl Act).

[51] *See, e.g.*, Defenders' 2025 Annual Letter at 7 & n.22 (summarizing critiques); Statement of Daniel Dena on behalf of Defenders to the USSC on 2024 Economic Crimes Proposed Amendments, at 13–14 (Feb. 27, 2024) (summarizing critiques). Last year, several Commenters sounded the alarm on the need for a long-overdue overhaul of this broken guideline. *See, e.g.*, PAG Comments on the USSC's 2024 Proposed Priorities, at 17–18 (July 15, 2024); Ctr. for Just. and Human Dignity & Aleph Inst. Comments on the USSC's 2024 Proposed Priorities, at 10–11 (July 15, 2024); A. Brian Albritton, U.S. Atty, M.D.Fl. (2008-2010), et. al., Comment to the USSC on the 2024 Proposed Priorities, at 1–4 (July 15, 2024). The Department of Justice has, on the other hand, encouraged more factor creep and

notes, and countless SOC enhancements—combined with the overreach of the relevant conduct rules, produces sentencing ranges unmoored from individual culpability and oftentimes from relative harm.[52] That is why judges so often ignore the recommended ranges in economic crimes cases.[53]

As this Commission embarks on its examination of §2B1.1, it must avoid any further factor creep, which would cast the guideline even farther from the sentences judges deem appropriate in these cases and inject more complexity into an already complex and lengthy guideline. As others have pointed out, the *Manual* is "overly reliant on quantifiable factors" that are poor proxies for culpability.[54] This guideline is a prime example: "What started as two separate guidelines with loss tables providing up to 11- (fraud) or 13-level (theft) offense level increases based on loss amount and an additional two (fraud) or five (theft) 'specific offense characteristic' (SOC) enhancements, has morphed into a combined economic crimes guideline with up to a 30-level loss-based offense level increase and 19 other SOCs."[55] The Commission should take its lead from the judges who actually impose sentences under §2B1.1: it should not only eschew increasing §2B1.1's already high guideline ranges, but also recalibrate those ranges down in a meaningful way.

IV. Proposed Priority No. 4: Career Offender

Defenders have written what amount to several short treatises detailing the myriad problems with the career-offender guideline. We will not rehash them all here; but we will take this opportunity to express that last year's proposal to eliminate state drug priors from the "controlled substance offense" definition gave us real hope—and later caused significant disappointment—and to urge Commissioners not to abandon this clear solution to multiple vexing problems.

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suggested additional enhancements to the already bloated guideline. *See* DOJ Comments on the USSC's 2024 Proposed Priorities, at 15–19 (July 15, 2024).

[52] *See* Defenders' 2025 Annual Letter at 7–8.

[53] *Id.*

[54] Jonathan Wroblewski, Douglas Berman & Steven Chanenson Comments on the USSC's 2024 Proposed Priorities, at 4 (July 15, 2024).

[55] Dena 2024 Statement, at 1.

From the start, courts and stakeholders have told the Commission that the career-offender guideline results in sentencing ranges that do not comply with the purposes of sentencing—particularly, but not exclusively, in drug cases.[56] In 2004, the Commission identified the career-offender guideline's application to drug cases as one of two provisions that caused the most profound unwarranted racial disparities, with the other one being the old 100-to-1 crack-to-powder ratio.[57] In 2016, the Commission reported to Congress that, since *Booker*, courts had increasingly departed or varied downward from the career-offender guideline, and by a wide margin—especially (again, not exclusively) in drug cases.[58] The Commission urged Congress to eliminate at least the possibility of the drug-only career offender.[59]

Last year for the first time, the Commission proposed restricting the "controlled substance offense" definition to federal offenses, consistent with the career-offender directive.[60] Defenders and other stakeholders were elated: not only would this address concerns about the "categorical approach," resolve multiple circuit splits, and simplify the career-offender guideline, but it would also finally address underlying concerns about the career-offender guideline that have plagued the career-offender guideline from the start. Indeed, given the very low number of individuals with federal drug priors, it would largely accomplish as a practical matter what the Commission advocated for in 2016: eliminating the drug-only career offender. The proposal got support from many corners, including the

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[56] *See* USSC, Notice of Proposed Amendments, 54 Fed. Reg. 9122, 9161 (Mar. 3, 1989) (describing various early criticisms of the career-offender guideline)*;* Tr. of Public Hearing on Proposed Amendments to the USSG, at 127 (Apr. 7, 1989) (Sentencing Commissioner and Supreme Court Justice Stephen G. Breyer, describing complaints that came not only from defendants but also judges and prosecutors that career-offender guideline ranges were not rational in some cases).

[57] USSC, Fifteen Years of Guidelines Sentencing, at 131–35 (2004).

[58] USSC, Report to the Congress: Career Offender Sentencing Enhancements, at 2, 18, 22–23, 27, 34–37, 44 (2016) ("USSC 2016 Career Offender Report").

[59] *Id.* at 44.

[60] USSC, Proposed Amendments to the USSG, at 2–3, 4 (Dec. 19, 2024); *see also* Defender Comments on the USSC's 2023 Proposed Amendments Re: Controlled Substance Offense and Career Offender, at 22–25 (Mar. 14, 2023) (explaining why § 994(h) does not require the career-offender guideline to reach state drug crimes).

Criminal Law Committee.[61] This came as no surprise: at the career-offender roundtable in 2024, the idea of eliminating state drug priors had generated a great deal of enthusiasm from very different stakeholders.

The proposal, of course, failed. We were, and remain, profoundly disappointed. But we write in the hope that last year's "controlled substance offense" proposal remains on the table. We understand that Commissioners are seeking to resolve multiple concerns about the career-offender guideline at the same time, and the "crime of violence" question is complicated. But the "controlled substance offense" issue is not. Again, by eliminating state drug priors, the Commission would comply with the directive, simplify application of the career-offender guideline, resolve concerns related to the categorical approach, and—importantly—reduce significantly the mismatch between the career-offender guideline and the purposes of sentencing that have plagued the guideline from the start. The Commission can, and should, eliminate state drug priors from the "controlled substance offense" definition even if it needs additional time to deliberate on other potential amendments to the career-offender guideline.

V. Proposed Priority No. 5: Acknowledging "Good Behavior"

We agree that the Commission should examine how the Guidelines fail to provide appropriate adjustments for positive behaviors, such as acceptance of responsibility and substantial assistance. So many of the *Manual*'s provisions target offense conduct (and beyond) and resultant harms; it is essential that the Guidelines also adequately reward accountability, contrition, rehabilitation, and assistance to the government. But as they currently stand, neither §3E1.1 nor §5K1.1 are applied frequently enough to deserving individuals. Moreover, Chapter 3 does not credit post-offense rehabilitation beyond accepting responsibility.

A. Acceptance of Responsibility: The Commission should remove or amend §3E1.1 commentary that courts and prosecutors use to deny the adjustment to deserving individuals.

The Commission should reexamine §3E1.1, focusing on ways some of the commentary inadvertently steers prosecutors and judges away from granting the full (or any) acceptance adjustment to people entitled to it. This commentary has cost people even their 2-level reduction at §3E1.1(a) for reasons unrelated to taking

[61] Statement of Edmond E. Chang on behalf of CLC to USSC, at 3 (Feb. 3, 2025).

accountability for their offense conduct. This is particularly troubling, given concerns that §3E1.1 functions as a penalty on the Sixth Amendment right to trial,[62] especially in a system where over 97% of individuals plead guilty.[63] People who plead guilty give up not only their sacred right to a jury trial, but other constitutional protections as well.[64] Our clients waive these rights at least partly because they know that if they don't, they will likely receive a significantly higher sentence by losing the benefit of §3E1.1's reduction. It is therefore critical that this adjustment—the only one in the guidelines that accounts for guilty pleas—be applied fairly and consistently. Unfortunately, that is not happening.

1. Application Note 1(A): Relevant Conduct

One of the most straightforward and impactful changes the Commission can make to ensure that §3E1.1 fully accounts for a person's acceptance of responsibility is to remove all references to "relevant conduct" from the commentary, so people who accept responsibility for the offense of conviction receive the adjustment even if they contest relevant conduct or other upward adjustments.

Because of application note 1(A), the §3E1.1 reduction has been unfairly withheld from people who purportedly "falsely den[ied]" or "frivolously contest[ed]"[65]

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[62] *See, e.g.*, Michael M. O'Hear, *The Need to Reform the Acceptance of Responsibility Adjustment*, 9 Fed. Sent. Rep. 101, 103 (1996) ("When a reduction that is routinely granted to over eighty percent of defendants is generally denied to defendants who go to trial, one may easily reconceptualize the 'reduction' provision as a penalty imposed for exercising a constitutional right."); Nat'l. Ass'n. of Crim. Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save it* (2018).

[63] USSC, 2024 Sourcebook, at 30. A district judge in New York has even declared the third point under §3E1.1(b) to be "an unconstitutional penalty imposed on a defendant for exercising his right to trial." *United States v. Tavberidze*, 769 F. Supp. 3d 264, 268 (S.D.N.Y. 2025). While the court's constitutional holding was limited to the third point, it found that "section 3E1.1 in its entirety effectively penalizes a defendant who . . . proceeds to trial based on his decision to exercise his Sixth Amendment right to trial." *Id.* at 270. The Court expressly declined to decide whether the initial two-point reduction at §3E1.1(a) violates the Sixth Amendment. *Id.* at 273.

[64] Those protections include the right to confront witnesses and the privilege against self-incrimination. *See* U.S. Const. amends. V, VI.

[65] USSG §3E1.1 N.1(A).

relevant conduct, whether those challenges were factual or legal in nature.[66] This is bad policy. Relevant conduct is proven under the lowest legal standard and often with unreliable evidence.[67] Due process requires an opportunity to contest these enhancements, which can lead to exponentially higher sentences. For these and other reasons, Defenders have repeatedly called on the Commission to reign in the Guidelines' use of unadjudicated conduct under §1B1.3 to increase a person's guideline range.[68]

Requiring sentenced individuals to admit to relevant conduct to benefit from the acceptance reduction chills what little opportunity remains at sentencing for them to exercise their right to due process.[69] It also creates an ethical dilemma for

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[66] *See e.g.*, Defenders' Comments on the USSC's 2017 Proposed Amendments, at 55–57 (Feb. 20, 2017) (discussing "inconsistent application of the acceptance of responsibility reduction"); Defenders' Comments on the USSC's 2017–2018 Proposed Priorities, at 21–22 (July 31, 2017); Defenders' Annual Letter to the USSC, at 7–9 (June 15, 2015) (detailing recent Seventh Circuit case exemplifying the difficulties application note 1(A) poses for defense counsel); *see also, e.g., United States v. Edwards*, 635 F. App'x 186, 196 (6th Cir. 2015) (Merritt, J., dissenting) ("Counsel did not deny any conduct. He only argued that Edwards' conduct did not suggest a leadership role."). *Edwards* involved a challenge to the aggravating role enhancement at §3B1.1(a), rather than relevant conduct; yet the court denied any reduction for acceptance of responsibility, even though the role enhancement is mentioned nowhere in §3E1.1.

[67] *See, e.g., United States v. Slager,* 912 F.3d 224, 233 (4th Cir. 2019) ("When sentencing courts engage in fact finding, preponderance of the evidence is the appropriate standard of proof." (internal citation and quotation omitted)); *United States v. Clark*, 538 F.3d 803, 813 (7th Cir. 2008) ("[A] sentencing court may credit testimony that is totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant.") (Internal quotation and citation omitted)).

[68] *See, e.g.*, Defenders' 2025 Annual Letter, at 5; Defenders' 2024–2025 Priority Letter, at 9–15.

[69] The commentary's statement that a person "may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection," USSG §3E1.1 App. N. 1, does not cure the due process concerns. When the government or PSR recommends an enhancement based on relevant conduct (or any specific offense characteristic), courts typically will impose that enhancement absent defense objection; they often do so even when the defense objects to protect the client but does not support the objection with evidence, fearing loss of the acceptance reduction. *See, e.g.*, *United States v. Cirilo*, 803 F.3d 73, 75 (1st Cir. 2015) (sentencing court can rely on defense's failure to present contrary evidence to uphold allegations in the PSR). Thus, the only way to ensure the acceptance reduction is to stand silent, which almost guarantees the

defense attorneys: do we zealously represent our clients and make all reasonable arguments in their defense, only to forfeit their chance at obtaining a §3E1.1 reduction that would significantly lower their sentence?[70] It serves no legitimate sentencing policy goal to withhold acceptance from a person whose lawyer challenges relevant conduct (to provide counsel's effective assistance) when the sentenced individual has admitted the facts underlying the offense of conviction. Yet that is exactly what §3E1.1 permits.

There is another fundamental problem with the references to relevant conduct in application note 1: determining whether a factual denial is "false," or whether a challenge (legal or factual) is "frivolous," is entirely subjective—leading to unwarranted disparities in how courts apply the adjustment.[71] This compounds the disparities resulting from the uneven application of §3E1.1 to relevant conduct based on district (or judge-by-judge) practice. Some Defenders report that they routinely challenge relevant conduct, with no threat of losing points for acceptance, while others practice in districts where courts regularly withhold the adjustment for those very same challenges, often at the urging of the government and/or the probation office. These disparities would disappear if the Commission permitted individuals to contest relevant conduct and still receive the Chapter 3 reduction.

2. Application Note 1(B): Pre-sentencing Conduct Unrelated to the Offense

Some courts deny the §3E1.1 adjustment based on conduct wholly unrelated to the offense, and that cannot reasonably be construed as reflecting a failure to

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court will enhance the sentence based on the relevant conduct, or to admit the relevant conduct—even when that conduct can itself give rise to new, additional criminal liability, such as the §2K2.1(b)(6)(B) enhancement for possessing a firearm in connection with another felony. This creates yet another constitutional Hobson's choice: a person must sacrifice their 5th Amendment rights and risk a new criminal charge to obtain the §3E1.1 reduction for a different offense to which they already pled guilty.

[70] *See* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2107 (2003) (discussing how §3E1.1 is "the loophole that permits judges to regulate defense attorney conduct with the threat of higher sentences for their clients").

[71] Even judges on the same appellate panel have disagreed about whether a challenge was frivolous. *See, e.g., Edwards*, 635 F. App'x at 196 (Merritt, J., dissenting) (disagreeing with majority regarding whether guideline calculation objection was frivolous).

accept responsibility. Under application note 1(b), among the factors considered in applying the adjustment is a person's "voluntary termination or withdrawal from criminal conduct or associations." Some courts broadly interpret this language to foreclose the reduction for people who have problems on bond or while in pretrial detention. That is, district courts routinely deny the adjustment when a person engages in conduct unrelated to their federal charge but that the court deems "criminal," even when the person has pled guilty and admitted their involvement in the offense, and even though the purportedly criminal activity did not result in criminal charges (or even an arrest).

Defenders report that it is common, for example, for courts in some districts to deny the adjustment to people who test positive for drug use while on pretrial release, based on their theory that drug use shows they have not withdrawn from criminal conduct.[72] And in one case, a court denied acceptance of responsibility to a person who defended himself in a fight with his cellmate while in pretrial custody, even though he was not the aggressor and acted in self-defense.[73]

Importantly, none of this conduct has any connection to whether the individual has accepted responsibility for the offense for which they are being sentenced. And these arbitrary denials create unwarranted disparities based on radically different commentary applications from one district, or even one judge, to the next. We urge the Commission to delete application note 1(B), or to at least

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[72] *See, e.g.*, *United States v. Kirkland*, 28 F.3d 49 (7th Cir. 1994) (affirming denial of §3E1.1 reduction for person convicted of 18 U.S.C. § 922(g) who tested positive several times for THC and missed two drug testing appointments while on pretrial release); *United States v. Hall*, 229 F. App'x 898, 900 (11th Cir. 2007) (no reduction for person who tested positive for marijuana three times). This is particularly problematic given the evidence the Commission received related to its 2025 supervised release proposed amendment that relapse is a recognized and common feature of the addiction recovery process, not a moral failing. *See, e.g.*, Defender Comment on the USSC's 2025 Supervised Release Proposed Amendments, at 29–31 (Mar. 3, 2025) (citing sources).

[73] *See United States v. Bell*, No. 23-50755, 2025 WL 655802, at *1–2 (5th Cir. Feb. 28, 2025) (district court denied §3E1.1 reduction to a person who threw a punch at the tail end of a physical altercation with a cellmate, after the cellmate punched him in the face and hit him in the head with a water cooler). Finding that Bell did not initiate any violence and appeared to have acted in self-defense, "which would negate the criminality of his conduct," the Fifth Circuit ultimately reversed the district court's denial of the reduction. *Id.* at *4. But the *Bell* court impliedly invited Commission clarification, complaining that "the Guidelines do not define [the] phrase ["criminal conduct"], and there is little guidance on what qualifies as 'criminal.'" *Id.* at *3.

clarify that substance use and other conduct unrelated to the offense of conviction is not a basis to deny the adjustment.

3. Application Note 2: Prosecutors' Misuse of the Adjustment

Despite the plain language of the guideline, including the 2023 amendment to §3E1.1(b), prosecutors continue to argue against a reduction for acceptance of responsibility—all three levels in some districts, just the third level in others—based on a person's decision not to waive their right to appeal the denial of pretrial motions, including motions to suppress and motions to dismiss. Defenders across the country report that U.S. Attorney's Offices refuse to consent to conditional pleas under Federal Rule of Criminal Procedure 11(a)(2), which requires the government to consent in writing for a person to plead guilty while retaining the right to appeal a pretrial motion ruling.[74]

This creates yet another Hobsons' choice for the defense: do our clients plead guilty to receive the adjustment and forfeit the right to appeal the court's ruling on the pretrial motion, or go to trial and risk losing the §3E1.1 adjustment? Often, we attempt to preserve at least the 2-level adjustment at §3E1.1(a) by waiving a jury and having a bench trial in which we stipulate to the facts (or to the testimony that the government's witnesses would offer if they were called to testify), sparing the parties and the court the time and resources of a trial with witnesses.[75] Prosecutors in these cases routinely refuse to file a motion for the third level off, and in some districts they object to any adjustment under §3E1.1, despite the Commission's clear statement that the adjustment is appropriate "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)."[76]

The government typically relies on the portion of application note 2 that says that a person who proceeds to trial can receive the adjustment only "[i]n rare

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[74] *See* Fed. R. Crim. Pr. 11(a)(2).

[75] In some courts, stipulating to facts that constitute essential offense elements moots a motion to suppress, as the stipulation itself creates a separate basis for a conviction; therefore, to preserve the issue, the defense must instead stipulate to the evidence or testimony that the government would offer. *See, e.g., United States v. Larson*, 302 F.3d 1016, 1020 (9th Cir. 2002).

[76] USSG §3E1.1 App. N. 2.

situations."[77] But in our experience, these situations are far from rare,[78] as is the government's insistence on flouting the letter and spirit of the guideline. A person who is willing to plead guilty, but who proceeds to a bench "trial" (a trial in name only, at which they contest no facts) because of the *government's* choice to deny consent for a conditional plea, is (and should be) entitled to an adjustment under §3E1.1(a), and if the trial proceeds by stipulated facts, they should receive the third level off under §3E1.1(b) as well. The Commission should amend §3E1.1 to make this clearer, and to remove the commentary language that exercising the right to trial to preserve a legal issue is a "rare" occurrence.

B. Substantial Assistance: To avoid unwarranted disparities and ensure people who assist the government receive an appropriate reduction, the Commission should remove §5K1.1's motion requirement and application note 3.

Defenders are pleased to see the Commission prioritize §5K1.1, which has not been substantively amended since 1989. The significant disparity in percentages of §5K1.1 departures across districts demonstrates that it is time to refine the guideline. For example, in fiscal year 2024, a mere 1% of cases sentenced in the District of South Dakota involved a §5K1.1 substantial assistance departure, yet right across the state line, 36% of cases sentenced in the District of North Dakota during that timeframe involved a §5K1.1 substantial assistance departure.[79] Larger districts show similar disparities: in the District of Arizona, only 2% of sentenced cases involved a §5K1.1 departure, while in the Eastern District of Pennsylvania, the departure was applied in nearly 24% of sentenced cases.[80]

Of course, these statistics do not reflect cases where a person cooperated but the government refused to file a §5K1.1 motion. Defenders in districts with low proportions of §5K1.1 departures report that this is common. Defenders in those

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[77] *Id.*

[78] For example, many firearms charges are subject to legitimate challenges based on the Supreme Court's decision in *New York State Rifle & Pistol Ass'n. v. Bruen*, 597 U.S. 1 (2022). The defense should not have to risk losing acceptance points because they want to raise and preserve these entirely legal challenges, but the government will not consent to a conditional plea.

[79] 2024 Sourcebook, at 62.

[80] 2024 Sourcebook, at 61, 63.

districts report that as a result, fewer people in those districts choose to cooperate. As the Commission is likely aware, cooperation involves substantial risk—not just from the specific targets of the cooperation, but from the larger jail/prison population, which will retaliate on any suspected cooperator who cannot prove through their case paperwork that they did not cooperate.[81] In districts with low §5K1.1 rates, there's little incentive to incur those risks.

One step the Commission should take to address these disparities and to incentivize more cooperation is to require a government motion only when the person being sentenced seeks a sentence below an applicable mandatory minimum, consistent with 18 U.S.C. § 3553(e). Not all cooperation cases involve mandatory minimum sentences, and even in those that do, the law already permits the Court to consider a person's cooperation under § 3553(a) to impose a below-guidelines sentence at or above the mandatory minimum, without any government motion.[82] Section 5K1.1's requirement of a government motion in all cases conflicts with post-*Booker* caselaw, and it should be amended.

The Commission should also delete application note 3 to §5K1.1, which instructs directs courts to give "substantial weight" to the government's evaluation of a person's cooperation. Defenders across the country report that the government is misusing this guideline. Prosecutors are often stingy with the number of levels they will recommend for substantial assistance. In some districts they set a low ceiling applicable to all cooperators, regardless of the nature, extent, and result of a person's cooperation (*e.g.*, limiting recommendations to 4 levels off), which runs afoul of the requirement of individualized sentencing and creates unwarranted similarities. In other districts, prosecutors refuse to file §5K1.1 motions unless the cooperation leads to an arrest—a circumstance beyond the cooperator's control, reflecting law enforcement priorities and resources more than their helpfulness. And despite the guideline's clear instruction to consider the timeliness of a person's

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[81] Defense counsel often receive requests from their incarcerated clients to send them copies of their dockets to prove they did not cooperate. Other incarcerated individuals look for skipped docket numbers or filings under seal to conclude someone did cooperate. The BOP limits a person's access to their own PSR so that other individuals will not demand to inspect if for information about cooperation.

[82] *See, e.g., United States v. Robinson*, 741 F.3d 588, 599 (5th Cir. 2014) ("We now join our sister circuits in holding that a sentencing court has the power to consider a defendant's cooperation under §3553(a), irrespective of whether the Government files a §5K1.1 motion.").

cooperation, prosecutors in some districts will not give credit for cooperation provided before a person is charged. This means people who cooperate upon their arrest, before they're able to discuss the matter with counsel, do not receive credit for that cooperation—even if it leads to an arrest. Unfortunately, because of application note 3, when a prosecutor undervalues a person's cooperation, the court is likely to do so as well.[83] Eliminating this commentary would not preclude the court from considering the government's evaluation; it would simply ensure that it does not receive undue weight, and that a person's substantial assistance is fully accounted for.

C. The Commission should add a Chapter 3 adjustment for post-offense rehabilitation.

As the Commission examines whether the guidelines provide appropriate adjustments for "good behavior," it should look beyond §3E1.1 and §5K1.1 to consider other types of behavior that should be incentivized and rewarded—such as a person's post-offense rehabilitation. For many of our clients, "their arrest and conviction mark the beginning of a process of reckoning with their behavior and transforming their relationship to the law and law-enforcement authorities."[84] Whether detained or released pretrial, our clients often demonstrate significant post-offense rehabilitation, reflected by, among other things: gainful employment; a commitment to sobriety; devotion to family; serving their communities; and compliance with the terms of pretrial supervision (or commitment to self-improvement for people detained pretrial).[85] It is not uncommon for a person who stands before the court for sentencing to be much different from the person who

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[83] *See* USSG §5K1.1 App. N. 3 ("Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance. . . .").

[84] Comment of Judge Leo T. Sorokin on USSC's 2024-2025 Proposed Priorities, at 3 (July 15, 2024).

[85] As Defenders have explained before, 28 U.S.C. § 994(e)'s mandate was meant to ensure that courts did not inappropriately use factors indicating disadvantage to impose or lengthen incarceration, but Congress did not intend the Commission to disregard the mitigating value of factors indicating post-offense rehabilitation. *See* Defenders' 2023 Annual Letter, at 15–16.

committed the offense, which often occurs years before the sentence is imposed.[86] The Commission should follow Judge Sorokin's suggestion and "encourage consideration of changed or transformed behavior at sentencing" by adding a Chapter 3 downward adjustment for post-offense rehabilitation that applies regardless of whether a person exercises their right to trial or provides substantial assistance.[87]

VI. Proposed Priority No. 6: Simplification

Defenders stand ready to continue assisting the Commission with its decades-long effort to simplify the complex and voluminous *Guidelines Manual*. As we have urged in the past, this Commission should revisit the complicated and racially disparate criminal history rules. Among other things, the Commission should revisit Part A of the 2023 Youthful Individuals Amendment.[88] At a minimum, this Commission can publish a report examining the impact of the current criminal history rules and can publish information previously gathered on our updated understanding of youthful culpability.

Defenders are also delighted to see the Commission prioritizing examination of seldom-used SOCs and adjustments. After 38 years, reading the *Manual* can feel like visiting a haunted house, filled with the ghosts of good intentions and news cycles past, which resulted in a variety of upward adjustments addressing only niche or fleeting problems. Stakeholders across the spectrum have long bemoaned the problem of guideline factor creep.[89] This Commission should keep this in mind

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[86] And as we have touched on before, the Guidelines increase punishment based on criminal history, a static (fixed) risk factor, yet fail to consider "dynamic" risk factors, which, unlike static factors, offer more current insights on risk as well as protective factors that can decrease recidivism risk. Recent scholarship has documented the value of such dynamic factors in risk assessment, providing empirical support for what we already know: People can change, especially when given the tools and support needed to do so. *See* Defenders' 2025 Annual Letter, at 6 n.16 (discussing the lack of dynamic risk factors in Chapter Four).

[87] *Id.*; *see also* Defender Comment on USSC's 2023 Proposed Amendments, at 3 (Mar. 14, 2023).

[88] *See* Defenders' 2025 Annual Letter, at 5–7 (urging Commission to revisit scholarship and testimony on youthful individuals).

[89] *See* Defenders' 2024-2025 Priorities Comment, at 6 (documenting factor creep and increases in ranges of five most common guidelines).

the next time a stakeholder asks for a new upward SOC to address a novel concern raised by the media or elsewhere, and it should resist the temptation to increase severity via new SOCs in an attempt to address ever-evolving issues that are better addressed by § 3553(a).[90] Beyond the bloat, the *Manual* is filled with a plethora of ways to increase sentencing ranges, and very few formal ways to account for positive characteristics and behavior. We urge the Commission to prune underutilized or excessive enhancements and, as discussed above, offer guidance to allow consideration of positive attributes to further the statutory purposes of sentencing.[91]

VII. Proposed Priority No. 7: The Bureau of Prisons

Defenders again encourage the Commission to address the very real problems plaguing the Bureau of Prisons. We have written at length about the ongoing crisis in its understaffed and overcrowded institutions.[92] This Commission can be a part of the solution.

Specifically, there are three steps this Commission can, and should, take to carry out its statutory duty under § 994(g) to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." *First*, the Commission should rework Chapter Five to provide guidance on the "in/out" decision in a way that meaningfully promotes noncustodial sentences, as discussed above. *Second*, it should recalibrate guideline ranges down, as Defenders requested in our priority letter last year. And *third*, it should issue an empirical report on how BOP, as an institution, fails to further the statutory purposes of sentencing. Section 994(g)'s overcapacity threshold has been crossed, with overwhelming evidence suggesting that BOP is not, in fact, "effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2)." It is time for this Commission to renew its

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[90] The fast pace of technological advancements has made it clear that offenses will look different over time, and that the answer is not adding a new niche enhancement in response to every new development (such as the outdated "use of a computer" enhancements). *Accord* Wroblewski et. al. 2024 Priority Comment, at 5 (recommending that the Commission "take a holistic look at the entire Guidelines enterprise").

[91] *See supra*, Section V.C.

[92] *See* Defender 2025 Drug Offenses Comment, at 8–13 (discussing the Commission's statutory obligations to address BOP overpopulation crisis fueled by lengthy drug incarceration sentences).

commitment to its statutory obligation to mitigate the crises at BOP, with all the attendant devasting consequences to imprisoned individuals, their families, and their communities.

VIII. Data publication and transparency

We end this letter with requests specific to the Commission's data collection and publication process after the Simplification amendment.

A. Sentence placement relative to guideline range

With the deletion of departures, Defenders urge the Commission to change its variable on sentence placement relative to guideline range such that researchers and stakeholders have more information on sentencing outcomes. As we have noted before,[93] the current placement variable provides only limited information. Because it operates in the disjunctive, it might be obscuring variances and providing an insufficient and incomplete picture of the reasons for a sentencing outcome.

To fix this: (1) the placement variable should be reconfigured to include disjunctive options for sentences "above," "within," "government-sponsored below," or "below" range; and (2) two additional variables should be added: one to indicate whether a case involved a §5K1.1 or substantial assistance adjustment,[94] and one to indicate whether a case involved a §3F1.1 "fast track" adjustment. That way, researchers will be able to see the bigger picture.

B. Mandatory minimums

The current mandatory minimum variables can lead to confusion as to whether a mandatory minimum penalty was *applicable* as opposed to actually *imposed*, particularly in cases involving multiple counts, all carrying a mandatory minimum. It can be difficult to tell which mandatory minimum count was actually

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[93] Defenders' 2025–2026 Annual Letter, at 11–12.

[94] We note that while the terms "§5K1.1" and "substantial assistance" under § 3553(e) are often used interchangeably, they are not the same, as discussed above in Section V.B. Therefore, we urge the Commission to create a variable that accounts for this difference instead of conflating the two. For example, the new 5K/substantial assistance variable could have coding options for whether a case involved a reduction pursuant to a §3553(e) motion, under §5K1.1, both, or neither.

imposed, particularly when multiple counts carried a mandatory minimum penalty. This appears to be in part due to the nature of the current Statement of Reasons form, which allows users to select inconsistent options. However, the Commission can rework its mandatory minimum variables to provide better information on mandatory minimum penalties, which are important sources of sentencing disparity, and we urge it do so to provide stakeholders with a more accurate and complete picture of sentencing practices.

C. Transparency

As we have requested in the past, we urge the Commission to release the "dynamic" dataset underlying its JSIN tool (which we understand to be different than the "Individual Datafiles" dataset released once a year to the public), as well as preserve past versions of the tool. As more courts and stakeholders rely on this tool, it is troubling that its outputs cannot be replicated by outside researchers with access to the public datasets. It is also troubling that previous years' results simply disappear, which can create problems if JSIN was at issue in a case pending on appeal or resentencing.

We were very pleased to see that the Commission's "Individual Datafiles" were released this year in a CSV file, which will make them more accessible to a broader audience of users. This is an important step toward better access to sentencing data. However, with respect to the fiscal year 2024 datafile, we were disappointed to see that the variable indicating what month a case was sentenced (SENTMON) is no longer present, and we hope the Commission will replace that missing information and include it in the future. We also continue to urge the Commission to make public its resentencing and supervised release datasets. Beyond this, to reduce information asymmetry, the Commission should revisit its outdated agreement with the AO and grant Defenders equal access to its datafiles, so we have access on par with the DOJ.[95]

This Commission has pledged to operate in "a deliberative, empirically based, and inclusive manner,"[96] but to do so fully would require it to treat Defenders as an equal stakeholder, on par with the DOJ and the Parole Commission. Beyond the

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[95] *See* Defenders' 2024–2025 Annual Letter, at 16–17 (discussing institutionalized information asymmetries and unequal access to data).

[96] Chair Carlton W. Reeves, Remarks at USSC Public Meeting, at 4 (Oct. 28, 2022).

lack of a Defender Representative member on the Commission, Defenders lack equal access to Commission data. This Commission can fix this.

* * *

Defenders are excited about this amendment cycle's proposed priorities and look forward to working with the Commission to help extend the many successes of the past three years.

Very truly yours,



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

Sentencing Resource Counsel
Federal Public and Community Defenders

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
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July 18, 2025

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RE: Practitioners Advisory Group Comment on Proposed Priorities for the Amendment Cycle Ending May 1, 2026

Dear Judge Reeves:

The Practitioners Advisory Group (PAG) submits the following comments on the Commission's proposed priorities for the upcoming amendment cycle. The PAG supports the priorities that the Commission has identified, and offers additional areas for consideration related to those priorities.

I. Guidance to Courts on Selecting the Appropriate Sentencing Option

The PAG recommends that the Commission take measures to promote and expand the use of non-custodial sentences, including probation.

In response to the Commission's request for comment on its guidance to courts regarding the selection of appropriate sentences, the PAG is mindful of certain relevant statutory mandates. First, among the Commission's longstanding duties is the requirement that the Commission "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."[1] The plain meaning of this provision is clear; the phrase "generally appropriate" is not normally understood to mean exceptional, unusual, or extraordinary. Rather, the term "generally appropriate" typically signifies a default or starting position. The Congressional directive found in 28 U.S.C. § 994(j) requires the starting point for sentencing of statutorily eligible first-time offenders to be a non-custodial sentence, a presumption that should only be overcome for eligible crimes of violence or otherwise serious offenses.

[1] 28 U.S.C. § 994(j).

The second relevant statutory consideration informing the PAG's comment is 18 U.S.C. § 3553(a) which requires courts to "impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection."[2] This parsimony provision directs sentencing courts to impose the minimum sentence necessary to achieve the purposes of sentencing.

Taken together, these statutes reflect Congress's judgment that the district court's starting point for sentencing should be the minimum statutorily authorized sentence for a defendant. In a sentencing regime that hews to the principles set forth in these two statutes, a defendant who is statutorily eligible for a sentence of probation should receive meaningful consideration for a probationary sentence. That is not the reality.

As reflected in the Commission's sentencing data, the vast majority of defendants who are statutorily eligible for non-custodial sentences – U.S. citizens who have not been convicted of a Class A or Class B felony and who are not subject to a mandatory minimum sentence – do not receive one.[3] In Fiscal Year 2024, a total of 5,847 defendants were eligible for a non-custodial sentence, but only 13% received one. The remaining 87% of probation-eligible defendants were sent to prison.[4] The underutilization of either non-custodial sentences or probation is not – in the opinion of the PAG and numerous commentators – consistent with congressional intent.[5]

In the PAG's experience, courts are reluctant to impose non-custodial sentences unless a defendant clearly falls within Zones A or B of the Sentencing Table, even though the guidelines are advisory. Instead, sentences of incarceration are largely the default, even for first-time offenders. The PAG urges the Commission to consider amending the guidelines to expand the use of non-custodial sentencing alternatives, including probation. One way to accomplish this is to expand Zones A and B of the Sentencing Table. The Commission also could provide policy guidance to encourage probation as an alternative to incarceration, clarifying that consideration of a probationary sentence should be the starting point in sentencing any probation-eligible defendant.

The PAG strongly agrees that "what is outrageous what is offensive what is disgraceful is our system's restriction of empathy, mercy, and non-prison sentences to the few, rather than the many."[6] For the PAG, expanding access to non-prison sentencing alternatives is a matter of

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[2] 18 U.S.C. § 3553(a) (emphasis added).

[3] U.S.S.C., Sourcebook of Federal Sentencing Statistics, at Table 19 (2024), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Table19.pdf

[4] *See id.*

[5] *See* Cecilea Klingele, *What's Missing? The Absence of Probation in Federal Sentencing Reform*, 34 Fed. Sent'g Rep. 322 (2022).

[6] Hon. Carlton W. Reeves, *Alternatives to Incarceration and the Sentencing Commission: A Call for Progress through Partnership*, 36 Fed. Sent'g Rep. 130, 131 (2024).

principle. And, such an expansion also would serve the salutary goal of reducing the costs of incarceration and prison overcrowding.[7]

II. Drug Trafficking Offenses Under §2D1.1

The PAG supports the Commission's proposal to further examine the drug guidelines related to methamphetamine and fentanyl, and suggests that the Commission consider an amendment to the dangerous weapons enhancement at §2D1.1(b)(1).

In the last amendment cycle, the PAG commented on the treatment of methamphetamine under the guidelines, and the PAG references those comments here. Specifically, the PAG recommends that "the Commission eliminate all distinctions between methamphetamine, methamphetamine (actual), and Ice" and that it eliminate the 10:1 ratio between methamphetamine and methamphetamine (actual) currently contained in the Drug Quantity Table.[8]

Similarly, the PAG also recently commented on possible changes to the fentanyl guidelines. The PAG believes that additional enhancements to the guidelines for fentanyl distribution are unwarranted and require further study.[9]

In addition, the PAG asks the Commission to consider revising the enhancement for the presence of a dangerous weapon found at §2D1.1(b)(1). The PAG suggests that the Commission limit the application of this enhancement to actual possession of a dangerous weapon or firearm, as opposed to the current burden-shifting requirement in the commentary that "[t]he enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." §2D1.1(b)(1), cmt. 11(A).

Application of the enhancement to members of a drug conspiracy who did not possess a dangerous weapon or firearm in any capacity results in significant sentencing and collateral consequences, including loss of possible safety valve eligibility; a 2-level enhancement; ineligibility for the Bureau of Prison's Residential Drug Abuse Program; and other potential BOP security designation consequences. In at least one PAG member's district, Probation has determined that a defendant is ineligible for the Zero-Point Offender reduction under §4C1.1(a)(7) when a weapon is present. These are unnecessarily harsh consequences for low-level members of drug conspiracies based on the mere presence of a dangerous weapon or firearm.

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[7] *See, e.g.,* 28 U.S.C. § 994(g).

[8] *See* Letter from PAG to U.S.S.C. at 22, 23 (Mar. 3, 2025), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202503/90FR8968_public-comment_R.pdf#page=383

[9] *See generally* Letter from PAG to U.S.S.C. (May 1, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202505/90FR8840_comment.pdf#page=48

III. The Theft Guideline at §2B1.1

The PAG supports the Commission's proposal to consider potential amendments to §2B1.1 to de-emphasize the importance of loss amount, because this often overstates the seriousness of the offense and the culpability of the defendant. The disproportionate and inappropriate impact of the loss table is reflected in the personal experience of the criminal defense bar; below-guideline sentences imposed by sentencing courts; and academic critiques of §2B1.1. Last year, the PAG submitted comments on this guideline, and it incorporates those comments here.[10]

One possible way to remedy the disconnect between the loss table and the culpability/seriousness of the offense is to treat intended loss, actual loss, and gain differently. For example, a defendant who possesses ten fraudulent checks but only cashes two of them should be treated differently under the guidelines than the defendant who possesses and then cashes all ten fraudulent checks. The criminal culpability of the former defendant is less than that of the latter, and the harm to the victim is lower as well. The guidelines should not treat these two defendants alike.

The Commission also should consider incorporating an amendment that recognizes, in conspiracy cases, that individual gain is often a better measure of culpability and role in the offense than overall loss. Just as forfeiture is limited to gain,[11] so too should loss amount for purposes of guideline calculations.

Additionally, the Commission should consider incorporating role-specific deductions in §2B1.1, analogous to the recent amendments in §2D1.1.

The PAG urges the Commission to take the opportunity to publish specific proposed amendments to §2B1.1 similar to those suggested above so that stakeholders can comment and provide feedback regarding the outsized role the loss table currently plays in theft and fraud cases.

IV. Continued Examination of the Career Offender Guideline

The PAG has participated in Commission meetings on amendments to the Career Offender guideline, and it encourages the Commission to continue reviewing this guideline in order to address the racial disparities and disproportionate impact that this guideline has on drug-only defendants. The PAG incorporates its comments from the last amendment cycle, when we recommended that the Commission limit the definition of a controlled substance offense to those

[10] *See* Letter from PAG to U.S.S.C. (PAG 2024 Letter) at 1-5 (Feb. 22, 2024), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=220

[11] *See Honeycutt v. United States*, 581 U.S. 443 (2017).

offenses listed in 28 U.S.C.§ 994(h), and noted the continued need for the categorical approach in defining crimes of violence.[12]

If the Commission is still interested in exploring a non-categorical approach method to defining crime of violence, the Commission could take the opportunity to field test or workshop various alternative definitions of crime of violence proposed by stakeholders in the last amendment cycle. For example, the PAG proposed an alternative definition that combines an elements-based approach with a conduct-based approach.[13]

With respect to drug-only defendants, the Commission should consider promulgating an application note stating that a sentence below the career offender guideline range would be appropriate for drug-only defendants whose prior qualifying controlled substance convictions involved a low amount of drugs or only street-level sales. Such an application note would appropriately reflect the Commission's own study that "[d]rug 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."[14]

Much of the analysis regarding the impact and operation of the Career Offender guideline rests on the Commission's 2016 Report.[15] It has been nearly a decade, and the PAG urges the Commission to update this study to provide more information about how the guideline has been operating since it was last analyzed.

The PAG welcomes the opportunity to continue discussions with the Commission and other stakeholders to address concerns about this guideline and to explore ways to make its application fairer.

V. Whether the Guidelines Appropriately Account for Good Behavior

As discussed in Part I above, the PAG supports efforts to promote and expand the use of non-custodial sentences, including probation. In addition to expanding Zones A and B of the Sentencing Table to increase the number of defendants eligible to receive non-custodial sentences, the PAG proposes that the Commission consider expanding eligibility for both acceptance of responsibility under §3E1.1 and substantial assistance under §5K1.1.

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[12] *See* Letter from PAG to U.S.S.C. at 1-4 (Feb. 3, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf#page=871

[13] *See id.* at 5-8.

[14] U.S.S.C., *Report to the Congress: Career Offender Sentencing Enhancements* at 3 (August 2016) available at: https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf

[15] *See id generally*.

In the PAG's view, the denial of a third point for acceptance of responsibility for defendants with an offense level less than 16 is arbitrary. There is no legitimate empirical or policy basis for denying a defendant with an offense level of 15 a reduction for which a defendant with an offense level of 16 whose conduct is by definition more serious is eligible. The PAG proposes that the Commission consider amending §3E1.1 to grant all defendants eligibility for consideration for the third point for acceptance of responsibility, no matter the starting offense level.

In the same vein, the PAG encourages the Commission to expand §3E1.1 to provide additional reductions for acceptance of responsibility when the defendant's case has been deemed complex and/or trial will be lengthy. The stated criterion for granting a third acceptance point under §3E1.1(b) is that timely entry of a plea "permit[s] the government to avoid preparing for trial and permit[s] the government and the court to allocate their resources efficiently." It is beyond cavil that a timely plea in a case involving a two month trial saves the government and the court more time and resources than a timely plea in a case with a two day trial. The PAG respectfully suggests that the Commission consider increasing the magnitude of the potential reduction for entry of a timely plea in complex or lengthy cases, and that it consider graduated reductions under §3E1.1(b). For example, one additional point for timely entry of a plea in a case of anticipated duration of a week or less; two additional points for timely entry of a plea in a case of anticipated duration of more than a week but less than a month; and three points for timely entry of a plea in a case of anticipated duration of a month or more.

The PAG also suggests that the Commission consider expanding eligibility for a reduction of sentence under §5K1.1. Currently, a defendant is eligible for a sentence reduction under §5K1.1 if the government files a motion attesting that s/he "has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." In the experience of some PAG members, the government will decline to file a motion under §5K1.1 where a defendant has cooperated and provided truthful information regarding another person who has committed an offense, but the information provided was already known to the government or the investigation was complete.

The PAG urges the Commission to consider either amending §5K1.1 or implementing a corollary provision to clarify that a defendant is eligible for a sentencing reduction when s/he has cooperated and provided truthful information regarding another person who has committed an offense, but the information provided was already known to the government or the investigation was complete.

VI. Further Simplification of the Guidelines

In the most recent amendment cycle, the Commission adopted amendments to simplify the three-step sentencing process into a two-step process, "[t]o better align the guidelines to practices under current sentencing law and to acknowledge the growing shift away from the use of

departures."[16] The PAG welcomes this amendment and supports the Commission's efforts to simplify sentencing.

In the PAG's experience, the grouping rules in Chapter Three are particularly vexing and difficult for our clients to comprehend. The PAG recommends that the Commission revisit the entire approach to grouping to arrive at a clearer method of accounting for the overall guidelines range when a defendant has multiple counts of conviction.

During the 2024 amendment cycle, the PAG commented on the treatment of youthful offenders under the guidelines,[17] and it once again urges the Commission to consider how juvenile adjudications are scored for purposes of criminal history. During that amendment cycle, the Commission did not adopt an amendment to reduce or eliminate criminal history points for juvenile adjudications, but it amended §5H1.1 to advise that "[a] downward departure also may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses." In light of the elimination of this policy statement in the Commission's recently adopted amendments,[18] the PAG asks the Commission to revisit the issue of juvenile adjudications in the upcoming amendment cycle.

VII. BOP Practices

The PAG previously spoke with the Commission about BOP practices, including the treatment of our clients in BOP facilities and programs available to our clients. The PAG appreciates the Commission's efforts to create a clearinghouse for information about BOP programs in its facilities.[19] Even with this information, however, there remains a great deal that we do not know after our clients are sentenced and transferred to BOP facilities.

For example, we still have very little information about how the BOP is calculating and implementing First Step Act credits. We know virtually nothing about how the BOP determines which clients are eligible for what programs, and what factors the BOP relies upon to exclude a client from a program. None of this information is readily available, if at all, and as practitioners we welcome greater transparency regarding the BOP and its policies and practices affecting our clients.

Without information regarding the current functioning of the BOP, we are unable to make informed recommendations at this time. We would welcome more information regarding BOP practices so that we can provide relevant comments, but at this juncture the PAG is unable to do so.

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[16] *See* U.S.S.C., Amendments to the Sentencing Guidelines (2025 Amendments) at 80 (April 30, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202505_RF.pdf

[17] *See* PAG 2024 Letter at 5-9.

[18] *See* 2025 Amendments at 478.

[19] *See, e.g.*, U.S.S.C., Prison Issues, available at: https://www.ussc.gov/training-topic/prison-issues

VIII. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's views regarding the Commission's proposed priorities for review in the upcoming amendment cycle. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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July 18, 2025

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Dear Chairman Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (the Commission) regarding the proposed priorities for the amendment cycle ending May 1, 2026.

Additional Guidance to the Court

POAG recommends the Commission re-assess the practicality of the Sentencing Table Zones. POAG has observed that trying to work within some of the zones can be confusing, particularly when the Court has already varied or departed. POAG observes that Zone B and C rarely function as written and are often structured as a variance to ensure that the Court has not run afoul of the guidelines. POAG also observed that intermittent confinement and community confinement are often impractical and may not align well with the purposes of sentencing. POAG suggested the Commission consider having a less structured approach to the sentencing table; it was suggested the Commission may want to establish a bright line above which the Commission believes a term of imprisonment is generally appropriate. POAG believes this bright line should be made in contemplation of the research that suggests a person who is low risk should not be over-supervised. Individuals who are low risk may end up being over-supervised if they are on lengthy terms of home confinement. When someone is on home confinement, as a function of that condition, they have increased contact with their Probation Officer, whereas research also shows that a high number of contacts per month with low-risk defendants increases their likelihood of recidivism. POAG addressed this issue in our written submission on March 10, 2017, when addressing the Commission's proposed amendments related to Alternative to Incarceration. With the

Commission's focus on individual assessments, it may be better to create a structure that works well within the individual assessment approach.

POAG also suggests the Commission consider a study on the imposition of fines, as the majority of POAG finds, anecdotally, they are rarely imposed. POAG noted that fines are rarely imposed in drug, firearm, and immigration cases, which comprise the majority of federal cases. They are also rarely imposed in sex offenses, likely due to restitution obligations and the numerous assessments applicable to those offenses.

Examination of Penalty Structure under USSG § 2D1.1

POAG appreciates the Commission's commitment to further examine USSG §2D1.1 and specifically, to address the penalty structure for certain drug trafficking offenses, the purity distinctions for methamphetamine, as well as possible statutory changes relating to fentanyl, and other miscellaneous issues. On March 3, 2025, POAG provided the Commission with written commentary regarding the proposed amendments issued on January 24, 2025, which included many of these very topics.

Purity Distinctions for Methamphetamine

With regard to methamphetamine purity, POAG has previously emphasized that the availability of laboratory reports, as well as testing practices, vary greatly between districts and even within districts based on which agency is conducting the analysis. Laboratory reports do not consistently reflect the molecular structure of methamphetamine to determine between "Ice" and other forms of methamphetamine. Consequently, the varied testing practices has led to unwarranted sentencing disparity and growing policy disagreement regarding purity as an indication of culpability, which has resulted in inconsistent guideline application.

POAG previously expressed unanimous support for amending the Drug Quantity Table and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to §2D1.1 to delete all reference to "Ice." This support came from observations that the overwhelming majority of "Ice" is uniformly pure, such that there is typically not a significant difference between the calculation of methamphetamine (actual) and "Ice."

POAG unanimously supports reducing the disparity between the treatment of methamphetamine mixture and methamphetamine (actual) for reasons previously outlined in the written commentary submitted March 3, 2025. In order to promote uniformity with how methamphetamine is considered under the guidelines, POAG believes methamphetamine (actual) and methamphetamine mixture should be treated the same. However, POAG is uncertain as to which measure is more appropriate. District feedback was fairly split between the two options and POAG believes the appropriate ratio may lie somewhere in between the current level of methamphetamine mixture and methamphetamine (actual).

Converted Drug Weight

POAG noted that methamphetamine (actual) and "Ice" have a converted drug weight that is one of the highest in the drug table, at 1 gram to 20 kilograms, which is eight times higher than fentanyl, and twice as high as fentanyl's more potent analogues. On the other hand, methamphetamine mixture has a converted drug weight of one gram to two kilograms. Therefore, adopting the methamphetamine mixture conversion rate, which is below that of fentanyl, is too low, while the threshold of methamphetamine (actual) is too high.

The current drug conversion rate for methamphetamine and methamphetamine (actual) or "Ice" compared to fentanyl and fentanyl analogue also supports the reduction for methamphetamine (actual) or "Ice." Currently, there is a 20 percent difference between the drug conversion rate for methamphetamine and fentanyl, both Schedule I Controlled Substances: 1 gram of methamphetamine equals 2 kilograms of converted drug weight, and 1 gram of fentanyl equals 2.5 kilograms of converted drug weight. However, there is a 50 percent difference between the drug conversion rate for methamphetamine (actual) or "Ice" and fentanyl analogue: 1 gram of methamphetamine (actual) or "Ice" equals 20 kilograms of converted drug weight whereas 1 gram of fentanyl analogue equals 10 kilograms of converted drug weight. A comparison of the addictive properties, overdose rates and lethality between methamphetamine (actual), "Ice" and fentanyl analogue, may be helpful to determine if the drug conversion rate for those substances should be more similar. Therefore, POAG would encourage the Commission to seek the opinion of experts to determine an appropriate conversion ratio.

Statutory Changes Relating to Fentanyl

Regarding possible statutory changes relating to fentanyl, POAG is aware that the Halt All Lethal Trafficking of (HALT) Fentanyl Act (2025) has been passed by both the Senate and Congress, and it is likely to be signed into law by the President[1]. If signed into law, the HALT Act would permanently classify fentanyl and fentanyl analogues as Schedule I Controlled Substances, before their temporary Schedule I classification status expires. However, it does not appear that the HALT Act impacts the current penalties associated with fentanyl or fentanyl analogues and POAG is not aware of any other possible statutory changes relating to fentanyl.

Fentanyl and Fentanyl Analogue

In fentanyl cases, laboratory reports are relied upon to determine if the offense involved fentanyl or fentanyl analogue, as that distinction significantly impacts the base offense level. As reflected above, the availability of laboratory reports, as well as testing practices, vary between districts and even within districts, depending on which agency conducted the analysis and the testing methodology/technology being used. While the testing for fentanyl has become routine, it is

[1] S.331 - 119th Congress (2025-2026): HALT Fentanyl Act | Congress.gov | Library of Congress

unknown how many agencies test for fentanyl analogues or to what degree that testing parses out the variety of fentanyl analogues available on the market. Such varied testing practices could lead to unwarranted sentencing disparities.

Cocaine and Cocaine Base

As noted in the response to the proposed amendments that were issued in January 2025, POAG continues to believe the Commission should reassess the disparity between the drug conversion rate of cocaine and cocaine base (crack cocaine). Currently, the drug conversion rate for cocaine and crack cocaine is significantly different: 1 gram of cocaine equals 200 grams of converted drug weight whereas 1 gram of crack cocaine equals 3,571 grams of converted drug weight. While the differences in the conversion rates between cocaine and crack cocaine has historically been even more extreme, the current 1 to 18 ratio, or 94 percent, difference still marks one of the most significant guideline disparities between pharmacologically similar substances. Further, it is noted that in some Districts, in recognition of this disparity, downward variances are being granted in crack cocaine cases and defendants are being sentenced based on cocaine conversion rates rather than crack cocaine. A comparison of the addiction properties, overdose rates, and lethality between cocaine and crack cocaine, as well as the racial, ethnic, socio-economic, and recidivism rate differences between defendants convicted of cocaine offenses and those convicted of crack cocaine offenses, may be helpful to determine the appropriate conversion rates.

Eliminating Certain Specific Offense Characteristics

As referenced below, POAG encourages the Commission to consider eliminating some of the rarely used specific offense characteristics (SOCs) that are listed in USSG §2D1.1. For example, in 2023, there were six SOCs that were never applied: distribution of an anabolic steroid to an athlete, §2D1.1(b)(8); defendant convicted under 21 U.S.C. § 841(g)(1)(A), §2D1.1(b)(10); aggravating role and defendant involved an individual that was 65 or more years of age, §2D1.1(b)(16)(B)(ii); aggravating role and defendant involved a pregnant individual, §2D1.1(b)(16)(B)(iii); and minimal participant and defendant was motivated by familial relationships/coercion, received no compensation, and had minimal knowledge of scope, §2D1.1(b)(17). Further, there were an additional eight SOCs that were used fewer than 5 times.

Additional Consideration

POAG notes that some Districts are seeing an increase in cases involving nitazenes, a synthetic opioid with no medical approval and temporary Schedule I Controlled Substance, and tapentadol, an extended-release opioid pain medication and Schedule II Controlled Substance. The Commission may want to consider a study regarding the prevalence of offenses involving these substances and the harm/potential harm caused by these substances to determine if one or both substances should be added to the drug quantity table or incorporated into a Specific Offense Characteristic.

Examination of USSG § 2B1.1 and Related Guidelines

Actual Loss, Intended Loss, and Gain

POAG unanimously agrees that §2B1.1 should be reviewed by the Commission. POAG discussed that this guideline encompasses a wide variety of cases. As a result, there are several application notes addressing the various types of loss and victims specific to the offenses covered by this guideline.

In the November 1, 2023, edition of the Guidelines, the Commission responded to a flurry of cases regarding the validity and enforceability of the guideline commentary and moved the definition of actual loss, intended loss, and gain from the commentary into the guideline itself. POAG believes, however, the further assessment of the role of actual loss, intended loss, and gain is necessary as courts differ in how they interpret and apply loss. Further, as discussed in the Background to §2B1.1, "loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline."

Nevertheless, it was observed that because of the principles of relevant conduct under §1B1.3, loss does not necessarily reflect the seriousness of the offense and relative culpability as provided in the background commentary. An example of this is when a defendant is involved in a fraud offense and held accountable under §1B1.3 for several million dollars of intended loss which drives up the guideline under the loss table at §2B1.1(b)(1). A defendant may have a limited role and may have only caused an actual loss of tens of thousands of dollars. As a result, Courts account for the lack of actual loss and limited role inconsistently, with some Courts varying downward from the guidelines while other Courts remaining within the range.

To further support this, a search of the U.S. Sentencing Commission's Judiciary Sentencing Information (JSIN) reflects that in §2B1.1 cases, the majority of cases resulted in a downward departure or variance. POAG, therefore, supports the Commission's efforts to further study the data to determine if overstatement of loss is a significant contributing factor for the reduction in sentences.

Loss Table Simplification or Adjustment

POAG was split on the decision to support evaluating the loss table to adjust for inflation. Those that were in favor of adjusting inflation noted that adjusting the Loss Table for inflation every few years is consistent with economic principles. On the other hand, it was acknowledged that the table has been adjusted within the last 10 years.

Victims Table in §2B1.1 and Adjustments in Chapter Three, Part A

POAG unanimously agreed that the Commission should consider the application and impact of the victims table in §2B1.1 and adjustments in Chapter Three, Part A (Victim-Related Adjustments), relating to victims. As previously mentioned, the guideline covers a variety of offenses and there are several Application Notes applying to victims including Application Note 1 (persons who sustained actual loss or bodily injury); Application Note 4(C)(i) (mail recipient);

Application Note 4(C)(ii) (mail receptacles); Application Note 4(D) (vulnerable victim); Application Note 4(E) (means of identification); and Application Note 4(F) (substantial financial hardship). POAG observed that the application of an enhancement for substantial financial hardship has presented difficulties because of the subjective nature of the analysis and the evidentiary issues related to it. POAG is in favor of the Commission reassessing these Application Notes, in conjunction with the adjustments in Chapter Three, Part A, and consider if there is a more simplified way to capture the impact to victims.

Chapter Three, Part B and the Role in the Offense

The majority of POAG was not in favor of the Commission considering the application and impact of adjustments in Chapter Three, Part B (Role in the Offense) relating to role in the offense. POAG discussed the recent amendment to §2D1.1 for drug trafficking crimes which focus on the defendant's primary function. POAG believes that it would be beneficial to see how this new way of looking at role applies in those situations before adopting a similar provision for other types of offenses. As it is a new concept, there will likely be litigation over what circumstances fit the new standard.

Consideration of Amendments that Might be Appropriate

Regarding possible consideration of amendments that might be appropriate, as discussed in POAG's submission on October 17, 2022, POAG requests that the Commission review USSG §2B1.1, comment. (n.3(F)(i)), which addresses the $500-per-card multiplier per access device. There is presently a circuit split on this issue, which has created disparity across circuits. In *United States v. Riccardi*, F.3d 476 (6th Cir. 2021) and *United States v. Kirilyuk*, 29 F.4th 1128 (9th Cir. 2022), the courts determined that USSG §2B1.1, comment. (n.3(F)(i)), which requires mandatory $500-per-card minimum, conflicts with the plain meaning of "loss" under §2B1.1 and is, therefore, non-binding. Therefore, POAG encourages the Commission to review USSG §2B1.1, comment. (n.3(F)(i)) and make necessary changes to provide uniform application in access device cases.

Suggestions included to remove infrequently used specific offender characteristics and to assess if some of the expanded definitions (especially those related to loss), could be compressed to provide a more uniform approach to the guideline application of this section.

Examination of Career Offender Guidelines

POAG has previously written extensively on issues relating to the Career Offender guidelines, the categorical approach, and the sentencing disparities and circuit splits that have resulted from this issue. POAG feels very strongly that the Career Offender guideline is presently the most complicated aspect of federal sentencing. Resolution of this issue will provide for ease of application and reduce the amount of resources needed to apply this guideline.

As reflected in a variety of our previous written submissions to the commission, the Career Offender guideline has created ever-increasing difficulties. POAG believes that many of the past efforts by the Commission have gotten close to a resolution of the problems.

POAG supports the Commission's continued effort to refine the Career Offender guidelines. In our discussions about the previous Career Offender amendment iterations, we encouraged the Commission to seek a solution that simplifies all aspects of the approach. While POAG was against the removal of state offenses within the last proposed amendment, we can see how that could be a part of the solution if paired with a Career Offender guideline that simplifies away from the categorical and modified categorical approach. POAG believes a variation of the amendment from the 2024 Career Offender guideline cycle, wherein a state conviction qualified as a crime of violence because it could be associated to a Chapter Two guideline from a prescribed list of offenses that the Commission deems violent, should be finetuned and integrated into the Commission's considerations on this issue. Alternatively, POAG would suggest exploring how the enumerated clause could be expanded and refined with extreme specificity to accomplish a similar result. Further, while POAG was undecided about using a prior sentenced imposed within the Career Offender guideline; if the Commission were able to develop a way to adequately capture a spectrum of crimes of violence, there are some among POAG who would be open to using the amount of time imposed at sentencing to further delineate Career Offender predicate offenses.

Alternatively, POAG considered the possibility of making Career Offender stratified, thus making outcomes based on a defendant's Career Offender status due to serious drug offenses lower as compared verses one or more crimes of violence. For example, perhaps a specific offence characteristic or application that indicates something like, "if the instant offense and all Career Offender predicates are serious drug offense with no crime of violence predicates, the offense level established by the 4B1.1(b) is reduced by five levels."

POAG would also support the Commission engaging in renewed study of those who receive the Career Offender guideline, focusing on recidivism rates for different predicates, sentencing court adherence to the guideline outcome, the average length of sentence imposed on predicate offenses, and any other related areas of interest. Additionally, POAG would support engaging in roundtables or field testing future prospective Career Offender amendments.

Examination of Good Behavior, Acceptance of Responsibility, and §5K1.1

POAG appreciates the Commission's consideration of the various current means by which a defendant can reduce his or her sentence through good behavior, as well as exploring other new avenues. POAG largely believes that the provisions under USSG §§3E1.1 (Acceptance of Responsibility) and 5K1.1 (Substantial Assistance to Authorities) are operating as intended and without issue. There appears to be a consensus across the circuits that defendants who meet the criteria for the two-level reduction for acceptance of responsibility are receiving it. POAG had some discussions regarding the application of the final one-level reduction and some differences

in how the government may choose to apply it. Overall, the consensus was that defendants deserving of the reduction appear to be receiving it and POAG does not believe any further changes to §3E1.1 are necessary at this time.

Members of POAG also believed that, while there are district-by-district differences in how cooperation is addressed in the presentence report, as well as the reductions recommended by the government for said cooperation, the reduction via departure and soon-to-be via variance, appears to be working well. Some members have observed that a defendant's cooperation may not rise to the level of a 5K1.1 reduction, through no fault of the defendant. Such meaningful attempts, however, are often considered under 18 U.S.C. §3553(a), and receive some consideration. Therefore, the majority of POAG believes that no further amendment to 5K1.1 is necessary at this time.

POAG discussed other means by which the defendant could be credited for his or her good behavior. It was discussed how detained defendants could exhibit good behavior by not receiving any disciplinary violations or completing programming. For defendants on bond, good behavior could be exhibited through a lack of pretrial violation reports, sustained employment, participation in treatment, or completion of a district court rehabilitation program. While POAG members were enthusiastic about these considerations for a further reduction under acceptance in theory, POAG has concerns about the practicality and inherent disparities presented. For instance, some of the pretrial detention facilities do not offer ample access to programming. Many of the contracted county jail facilities used do not allow federal detainees to participate in the programming they offer to their county jail detainees. Even within the Bureau of Prisons, pretrial defendants may not receive priority access to the programming, or routine lockdowns may halt programming. For defendants on bond, depending upon where they reside, there may be greater access to rehabilitative programming. For instance, defendants in more urban and suburban areas, may have access to an array of programs, whereas, in more rural or tribal land areas, there may be little to no programs available. As to completion of a district court sponsored rehabilitation program, such as a re-entry court program, those unfortunately do not exist in every district. Therefore, any further guideline reductions to credit post-offense rehabilitation appear to be subject to an inherent disparity. All of these post-offense rehabilitative considerations can and should be considered in the analysis of the 18 U.S.C. §3553(a) factors and could rightly warrant a reduced sentence.

POAG supports the Commissions further examination and study of the pre-existing reductions for good behavior, as well as continuing to consider other methods by which good behavior can be credited, but which do not result in any further disparity.

Simplification of Guidelines Manual

Grouping Rules

As to Priority Six which addresses possible simplifications to the Guidelines Manual, POAG provides the following feedback on each of the five sections. First, grouping of multiple counts is a hallmark of the Guidelines Manual and used regularly when there are convictions on multiple counts. Members of the group could not cite specific problems or suggestions to this section, but several members believe additional training with scenarios on grouping would be beneficial, especially to inexperienced officers and practitioners.

Examination of Chapter Four, Part A

The section suggesting an examination of Chapter Four, Part A (Criminal History) drew little response from probation representatives from around the country and is seemingly functioning as intended. This section could certainly be simplified, although it seems to keep with its responsibility to, as best as possible, be as fair to defendants with varied criminal history stemming from a wide range of jurisdictions which each have varying laws and legal "personalities."

Examination of the Operation of USSG §5G1.3

The operation of 5G1.3 gathered varied responses from members of POAG, with some seeing this section used infrequently and others having more experience with it. One common complaint was that this section was difficult to read and apply. There also appears to be a reluctance by judges to apply this section in connection with sentences which have yet to be imposed. Previously imposed, but undischarged terms of imprisonment are known to be easier and more common to take into consideration when using this section. POAG does not cite any specific recommendations or issues regarding §5G1.3.

Evaluation of Infrequently Applied Specific Offense Characteristics and Adjustments

As to infrequently applied specific offense characteristics, POAG was unanimous in taking inventory of seldom used enhancements which have outlived their usefulness and removing them from the Guidelines Manual.

Assessing Practices of the Bureau of Prisons

POAG has no comment regarding this subsection.

Implementing Legislation

POAG has no comment regarding this subsection.

Circuit Conflicts

POAG requests that the Commission consider addressing a circuit split regarding USSG §2G2.2(b)(7) and the determination of the number of images in child pornography cases when the offense involves videos, video-clips, movies or similar visual depictions. Currently, USSG §2G2.2(b)(7) only references images and provides an incremental increase to the base offense level depending on the number of images involved. It does not address videos or similar visual depictions. Instead, the conversion of videos and similar visual depictions to images is found in Application Note 6(B)(ii) of USSG §2G2.2, which states that each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. Some circuits have ruled that because the term "image" is genuinely ambiguous, the commentary to the guidelines can be relied upon for guidance and interpretations, resulting in the 1 video to 75 images conversion rate being used (see *United States v. Phillips*, 54 F.4th 374, 379 (6th Cir. 2022); *United States v. Peralta*, 2024 WL 4603297 (11th Cir. 2024) (unpublished)). However, one circuit has ruled that the term "image" is not ambiguous and therefore, the commentary regarding the video to image conversion rate cannot be relied upon, resulting in a conversion rate of 1 video equaling 1 image (*United States v. Haggerty*, 107 F.4th 175 (3rd Cir. 2024)).

Consideration of Miscellaneous Issues

USSG §2M5.3

POAG also encourages the Commission, perhaps in conjunction with Congress, to consider the interplay between the statutory maximum penalties and guideline calculations for Material/Financial Support to Terrorist Organizations statutes (see 18 U.S.C. §§2339B and 2339C). In most cases, the statutory maximum penalty for providing material or financial support to a terrorist organization is twenty years. There are certain specific and more rare circumstances in which the statutory maximum penalty may be life; however, the majority of cases handled at the present time appear to have the twenty-year maximum penalty. As such, in the vast majority of terrorism cases involving material or financial support to terrorist organizations, the calculated advisory guidelines range far exceeds the statutory maximum penalty, and results in an effective guideline range sentence at the statutory maximum penalty. Perhaps this was Congress' intent, or perhaps this is due to the guideline being referenced to USSG §2M5.3, which also covers more serious and harshly penalized terrorism offenses, such as transporting weapons of mass destruction (18 U.S.C. §2283) or transporting terrorists (18 U.S.C. §2284), both of which have statutory maximum penalties of life (or death if death resulted under 18 U.S.C. §2283).

POAG has observed the interplay to reflect convictions under those statutes reference USSG §2M5.3, which has one specific offense characteristic and several cross-reference options. Those offenses trigger an enhancement under USSG §3A1.4, which either results in twelve-levels being added to the calculated offense level or establishes a minimum base offense level of 32. In addition,

USSG §3A1.4 automatically increases the defendant's criminal history category to VI. As such, in the lowest scenario of offense level 29 (assuming a reduction for acceptance) and criminal history category VI, the advisory guidelines range is 151 to 188 months custody. In the alternative (and most commonly seen) scenario, where the base offense level determined under USSG §2M5.3 is 26, and two levels may be added for the specific offense characteristic, and an additional 12 levels are added under §3A1.4, the resulting offense levels are 38 or 40, resulting in advisory guideline ranges of 360 months to life. Even when considering acceptance, the advisory guidelines range is 262 months to 327 months or 360 months to life. As noted, the guideline ranges are so far above the statutory maximum that they do not result in meaningful guidance to the court for those cases that result from material support or financial support to terrorists.

USSG §4B1.5

USSG §4B1.5, Repeat and Dangerous Sex Offender Against Minors, provides an enhancement for offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public. As part of POAG's October 17, 2022, and July 15, 2024, submissions, POAG identified a disparity issue at USSG §4B1.5. Specifically, USSG §4B1.5(a) provides two options for determining the offense level in cases in which the defendant's offense of conviction is a covered sex crime, USSG §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction after sustaining at least one prior sex offense conviction. In these instances, the offense level is the greater of the offense level determined under Chapters Two and Three or the offense level from the listed table; and the criminal history category is the greater of the criminal history category determined under Chapter Four, Part A, or criminal history category V. USSG §4B1.5(b) sets forth the guidelines for determining the offense level for defendants who have committed a covered sex crime, engaged in a pattern of activity involving prohibited sexual conduct and neither USSG §§4B1.1 nor 4B1.5(a) applies. In those instances, the offense level shall be 5 plus the offense level determined under Chapters Two and Three, but not less than 22; and the criminal history category shall be determined under Chapter Four, Part A. This application can result in a disparity in the guideline range between offenders who have a prior sex offense conviction and those who do not.

To illustrate this disparity, POAG previously provided an example of a husband and wife who both molested multiple minors on several occasions and were both convicted of production of child pornography. The husband had one prior sex offense conviction, resulting in the application of USSG §4B1.5(a). Because the offense level determined under Chapters Two and Three was greater than the offense level contained in the table at USSG §4B1.5(a)(1)(B), there was no increase to his total offense level, which was determined to be 37. Conversely, the wife, who had no prior sex offense conviction, received a five-level increase pursuant to USSG §4B1.5(b), which resulted in a total offense level of 42.

To eliminate this disparity, it is recommended that at the beginning of the guideline it is added that the greater of USSG §4B1.5(a) or (b) is applied in determining the offense level. Further, if the defendant has one or more prior sex offense convictions, then the criminal history category is to be determined under USSG §4B1.5(a)(2). Otherwise, the criminal history category is to be determined under USSG §4B1.5(b)(2).

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to share our perspective.

Respectfully,

Probation Officers Advisory Group
July 2025

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
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Washington, D.C. 20002



Voting Members
Honorable Natasha K. Anderson
Manny Atwal
Meghan Bishop
Neil Fulton
Jami Johnson
Honorable Gregory Smith
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July 17, 2025

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
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Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Priorities for the 2025–26 Amendment Cycle announced by the U.S. Sentencing Commission on June 11, 2025.

The Commission has identified a continuing intent to consider the issue of reducing the costs of incarceration and overcapacity of prisons to the extent that it is relevant to any identified priority. TIAG continues to note that the manner in which the current system is administered in Indian Country results in overincarceration, particularly of youthful offenders with limited criminal histories, and that the lack of Bureau of Prison (BOP) resources available near Indian Country often results in remote incarceration with limited follow-on support. This combination often leaves courts with no meaningful opportunity to accomplish the sentencing goals found in 18 U.S.C. § 3553. The failure of the BOP to appropriately establish alternatives to incarceration is particularly egregious with respect to the mandate "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," as set forth in Subsection (a)(2)(D). TIAG appreciates the provisions within the Guidelines that address these issues, but without a greater commitment to making resources available for alternatives to lengthy incarceration, the promise of sentencing reform that

best protects the public and successfully reintegrates formerly incarcerated persons into society remains both elusive and unfulfilled.

(1) Additional Guidance on Sentence Selection

The Commission seeks comment on how the Guidelines may be amended to provide courts with additional guidance on selecting appropriate sentencing options, including what factors should be considered when options of incarceration, probation, and fines are all available.

TIAG believes guidance that directs courts to consider more fully the availability of sentences other than incarceration, including commitment for treatment, home confinement, intermittent confinement, and other options that allow people to remain connected to the community while still protecting the community, would be a significant improvement to the Guidelines manual. As we have noted, in too many places in Indian Country and rural areas of the United States, other options are not meaningfully considered because such alternatives are limited due to the lack of appropriate funding and allocation of appropriate resources. Since many Indian Nations are remote, not densely populated, and lack a sufficient tax base to establish adequate resources and centers for treatment and rehabilitation, the onus is on the Federal Government to adequately fund such resources in recognition of the trust relationship that exists between the United States and the Tribes.

TIAG believes that if the Guidelines are amended to provide a more specific rubric and list of specific factors to be considered in sentence selection, it will incentivize the Department of Justice and the Bureau of Prisons to more meaningfully consider an allocation of resources to sentencing alternatives everywhere, which will necessarily improve the circumstances in Indian Country. These alternatives have the potential to reduce costs, reduce overincarceration, and more successfully reintegrate defendants into the community while still protecting the public from further criminality. If appropriately conceived and well-executed, these Guidelines revisions could meaningfully move the sentencing system forward in a manner that reduces both the number of persons incarcerated and the cost of incarceration.

In addition, TIAG believes that the current Guidelines manual does not do enough to fulfill the statutory mandate found in 28 U.S.C. § 994(j), which directs 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 be convicted of a crime of violence or an otherwise serious offense." Even among crimes of violence, the

statute presumes the appropriateness of incarceration only for those "that result in serious bodily injury." 28 U.S.C. § 944(j).

Lack of guidance from the Commission regarding what constitutes a "serious offense," leaves available argument that any and all felonies are per se "serious offenses," and likely contributes to unnecessary overincarceration of individuals with no prior criminal history, many of whom can be more successfully rehabilitated in a non-custodial setting. In sum, TIAG believes that § 994(j) is underutilized and unnecessarily circumscribed and that there are a significant number of cases in Indian Country that would benefit from a more thorough consideration of alternatives to incarceration that involve work support, chemical dependency treatment, and mental health treatment. TIAG would support an amendment that provides guidance designed to advance the goals of 28 U.S.C. § 994(j).

(2) Sentencing in Drug Trafficking Cases

Consistent with our March 3, 2025, letter to the Commission regarding the then-proposed amendments to the Guidelines related to drug offenses, TIAG continues to support efforts by the Commission to reduce reliance on drug weight as a proxy for culpability, to reduce artificial disparities between actual meth and meth mixtures, and to bring the Guidelines more in line with sentences actually imposed by courts in these cases. TIAG commends the Commission for its recent amendments to the drug Guidelines and encourages the Commission to look for additional ways to mitigate a guideline that remains, on the whole, excessively punitive and out-of-line with how a majority of courts view these cases.

(3) Examination of §2B1.1 (Theft, Property Destruction, and Fraud) and the sentencing loss table

TIAG supports the intention of the Commission to continue to reexamine the Guidelines to ensure that they appropriately reflect both the culpability of the individual defendant, the harm to any identifiable victim, and the harm to the community.

As a general observation, TIAG believes that USSG § 2B1.1 is a good example of a guideline that has accumulated over time so many enhancements that there is a nearly unavoidable risk of having overlapping enhancements apply in a way that brings about a rapid increase of the offense level without a corresponding increase in culpability. The practical effect of the way that § 2B1.1 is constructed creates a genuine risk that the resultant Guidelines

calculation will overrepresent both the harm caused by the criminal conduct and result in overly harsh Guidelines sentencing range. This concern is exacerbated by the application of the loss table, which accelerates the offense level quite rapidly, particularly at lower-value loss amounts.

In Indian Country, we most frequently encounter this guideline in cases that involve misappropriation of tribal funds and fraud in provision of services. In such cases, the rapid acceleration of the loss table can result in long Guidelines sentencing ranges that exceed those for crimes that appear to be more serious, including some homicide convictions.

TIAG supports the Commission's stated intention of making an in-depth review of the loss table and urges the Commission to redraft it to more accurately reflect the magnitude of the harm created by the loss incurred. We also support both revising the table to reflect the passage of time and inflation and to consider an inflation adjustment to make sure that inflation does not negatively impact the fairness of the loss table.

TIAG also supports a systematic review of the specific offense characteristics and how they are applied in any Guidelines calculation. In particular, TIAG urges the Commission to review the application of the specific offense characteristics to undertake an empirical analysis of how Guideline enhancements have been applied to identify any that occur in almost every case, as well as any that almost always occur in tandem with other enhancements, to reduce unnecessary overlap and redundancy that artificially inflates the final Guidelines calculations.

(4) Continued Examination of the Career Offender Guidelines

TIAG continues to generally support a reexamination of ways to revise the categorical approach for purposes of the career offender guideline. That said, we have in the past expressed concerns about proposals that appear to have a disproportionate impact on tribal defendants. These concerns are exacerbated by the difficulty of obtaining reliable data from the Commission regarding the impact on Indians who have committed offenses in Indian Country.

TIAG has, since its earliest iteration, advocated for the collection and publication of better data on Indian Country offenders and offenses so that disparate impact can be better identified and analyzed. As things stand now, we are often left to speculate that when a data report appears to show a significant impact on the racial category of "other," this likely represents a disparate

impact on Native American defendants. Given that Indians in Indian Country are subject to federal jurisdiction for essentially all serious crimes and that a majority of the prosecutions for many of the most serious federal crimes, including assaults and homicides, involve Indian Country defendants, it is important to have high-quality data regarding both Native American defendants as a whole and more specifically Indians in Indian Country.

TIAG continues to urge the Commission to change its data collection and publication processes to break out Native Americans as a separate category for analysis rather than including them as part of "other." TIAG supports revising the appropriate documents that are used to collect sentencing information to specifically identify a category of "Native American" and to specifically collect information regarding which crimes involve Indians who have committed crimes in Indian Country. TIAG would also ask the Commission to request that the DOJ collect this information.

That said, TIAG continues to generally support the Commission's efforts to revise the Guidelines manual to reduce reliance on the categorical approach if it is possible to identify a method that does not result in an unexplained or unjustified disparate impact on Native American defendants.

(5) Good Behavior and its Interrelation with Acceptance of Responsibility and Substantial Assistance

The Commission has identified as a priority consideration of whether the Guidelines provide appropriate adjustments for good behavior, especially in the examination of §§ 3E1.1 and 5K1.1.

TIAG supports this initiative. In particular, TIAG believes the Guidelines should indicate that one of the ways a defendant accepts responsibility is by fully embracing rehabilitative efforts, remaining law-abiding, and complying with facility rules while in custody. While some courts take such things into account (usually during consideration of the § 3553(a) factors), others are reluctant to do so without a specific Guidelines provision. While various sentencing courts may have a difference of opinion on the weight to give these issues, TIAG believes they should be included in the Guidelines, rather than being left exclusively in the province of variances.

In addition, TIAG practitioners have recognized that there is a significant difference in how the obstruction of justice provisions in the Guidelines manual are applied by various courts. In some districts, the bar for finding obstruction of justice is quite low and often results in both the loss of acceptance of

responsibility under § 3E1.1 and a 2-level enhancement for obstruction under § 3C1.1 for conduct that is fairly debatable and/or relatively minor.

For example, a sentencing defendant may contest the application of a sentencing enhancement that is colorable enough to merit an evidentiary hearing to decide the issue. At the close of the hearing, a judge could make a credibility determination that the defendant or his witnesses are less believable than the government's witnesses and withhold acceptance of responsibility and make a finding of obstruction. In some districts, violations of conditions of pretrial release that result in revocation of release—including technical violations stemming from an inability to quit using drugs or alcohol—can result in loss of acceptance of responsibility and/or enhancement for obstruction of justice.

In other districts, such double losses are extremely rare in the absence of a specific finding of perjury or an act of actual obstructive behavior outside of testimony, such as witness or evidence tampering. TIAG believes that an adverse decision on a factually disputed matter should not always result in a finding of perjury and obstruction, and that technical violations of conditions of pretrial release should not ordinarily result in the loss of a reduction for acceptance of responsibility. TIAG supports amendments to the Guidelines or commentary that reflect that loss of acceptance of responsibility or application of obstruction of justice are serious sanctions not ordinarily warranted by fairly debatable objections to Guidelines calculations or technical violations of pretrial release minimally related to the charged offense.

(6) Continued Consideration of Simplification

TIAG supports the Commission's continued interest in simplification of the Guidelines. The current Guidelines manual places offenders on a Sentencing Table that is framed by six criminal history categories and 43 separate offense levels. A defendant is placed, after a complex calculation, into one of 258 sentencing cells on the table. This system is based on a 1980's view of empiricism that is not likely supported by more recent empirical data, or by contemporary insights into the limits of quantitative analysis as a tool for representing the richness of human life and society. TIAG does not question the need for sentencing policy and reform to be well-grounded in evidence-based empirical analysis, but we believe that the current Guidelines Sentencing Table implies far greater scientific certainty about sentencing than is supportable by our current understanding of the scientific data.

TIAG is also concerned that some of the Guidelines may have inadvertently "baked into the process" factors that have unintended consequences on sentencing. We continue to be concerned about provisions within the Guidelines that create sentencing disparity based on behavior that is not significantly different or more empirically harmful or significant than other individuals who are not impacted by the factor identified in a particular guideline.

In the tribal context, the focus in presentence reports on "family support," which stems from a belief that individuals with family support are less likely to recidivate, imports Western notions of "family" into communities where families look very different and where rich, significant kinship structures exist that may not align with Western notions of who is "family." A supportive family may consist of a much broader group of people in many tribal communities and often times includes people unrelated by marriage but who have ties, for example, based on clan, that are familiar in nature. To fail to afford these extended relationships the same deference as more traditional nuclear families can lead to unjust results.

TIAG believes that the sentencing process and manual could be substantially improved by having a grid with fewer criminal history categories and offense levels, which would result in a substantially smaller number of sentencing ranges on the Sentencing Table. While the broader sentencing ranges could theoretically lead to greater sentencing disparity, TIAG believes that a more likely outcome would be a narrowing of sentence disparity. The reason for this would be that a broader range would likely lead to a greatly reduced need for imposing a variance. The broader range would work to cabin the sentences in a way that the current Guidelines do not, and judges would likely find it easier to impose a within-Guidelines sentence. The benefits of this sort of sentencing scheme would be important both in public acceptance of sentencing and in improving the ability of the Commission to capture data, without the need to spend as much effort trying to capture outlier varying sentences.

As to the areas identified by the Commission, TIAG agrees that each of the areas are worthy of further consideration. The grouping provisions should be revisited, as they can create both calculation difficulties and Sentencing Guidelines range variances that are difficult to explain by reviewing the underlying conduct. Criminal history calculations continue to be mechanistic and may create much longer sentences when the prior conduct is really not very aggravated.

TIAG is particularly concerned about Guideline enhancements that are applicable in nearly every case. We are of the opinion that if such enhancements are truly reflective of greater criminality and increased risk, they should be reflected in the base offense level rather than as an enhancement. TIAG is also concerned that the current Guidelines include multiple provisions that seem to always be applied in conjunction with another enhancement. These types of situations may result in an overestimation of criminality and needlessly increase sentencing ranges. If the conjunction is justifiable, TIAG urges a simplification that rolls these sorts of adjustments into a single Guideline enhancement rather than having two or more applied.

(7) Legislation Warranting Commission Action

At this time, TIAG has identified no specific legislation that warrants Commission action beyond those already identified elsewhere in this letter.

(8) Circuit Conflicts

TIAG is aware of a circuit split affecting Indian Country regarding whether an adjustment under § 5G1.3(b) may be applied to a Guidelines range reduced by § 1B1.10. The Court of Appeals for the Eighth Circuit, which includes reservations in Iowa, Minnesota, North Dakota, Nebraska, and South Dakota, has held that § 5G1.3(b) does not operate to lower the sentencing range and therefore defendants who benefited from a § 5G1.3(b) adjustment at the time of sentencing may not be able to seek—or may seek a smaller—reduction of their sentence under § 1B1.10 whenever the Commission votes to make amendments to the Guidelines retroactive. *See United States v. Helm*, 891 F.3d 740 (8th Cir. 2018). On the other hand, the Ninth Circuit, which includes reservations in Arizona, Nevada, Washington, Oregon, and Montana, has generally held that a "term of imprisonment" for § 1B1.10 purposes comprises the combined state and federal sentence, and that individuals are eligible for a sentence reduction when that total term of imprisonment is greater than the amended Guidelines range. *See United States v. Brito*, 868 F.3d 875 (9th Cir. 2017).

The § 5G1.3(b) adjustment is particularly relevant in Indian Country because it is common for Indian Country defendants to be transferred to federal court after being charged in tribal court with conduct that constitutes relevant conduct to the federal offense. Section 5G1.3(b) is therefore regularly applied in Indian Country sentencings to account for time spent in tribal custody. Because the issue divides Indian Country and poses a risk of disparate

treatment of individuals based on where their reservation is located, TIAG encourages the Commission to resolve this issue.

(9) Indian Country Specific Concerns

a. Any sentencing policy that applies in Indian Country should encourage and facilitate cooperation, support, and consultation with Indian Nations. Federal sentencing judges should have a consultative and cooperative relationship with tribal governments and courts.

TIAG observes that there is great disparity throughout Indian Country in the nature of the relationships that exist between the federal courts, federal and state law enforcement authorities, and the tribes. The Commission should encourage supervision schemes that more fully integrate the needs and desires of the tribal communities they serve. The federal courts that operate in Indian Country are often times functioning in the same role in the tribal communities as state and county courts do in the state systems. Because of the inherent isolation of these federal systems from the tribal government, care must be taken by the federal courts, supervising officers, and federal law enforcement authorities to communicate with and cooperate with tribal governments. The Commission ought to consider that the ramifications of poor communication with outside agencies are of greater concern when dealing with tribal communities because they do not have the same access to state agencies and facilities that other communities might have.

Of particular concern to Native communities are the problems arising out of supervision schemes that do not adequately integrate the input of the local community, that do not account for the resources or lack of resources available on tribal land, or that do not consider the risks involved in ignoring the situation on the ground. Certain conditions of supervised release identified as "standard," presumably because of a perception that they are universally appropriate and easy to comply with, fail to account for the lived realities of individuals who reside on reservations. Indian reservations are among the poorest places in the United States. Many have unemployment rates as high as 80%. A requirement that an individual who regularly resides in such a community obtain full-time employment while on supervision is a de facto requirement that he or she leave the community altogether.

"Special" conditions routinely imposed that require participation in various kinds of programming not available within many tribal communities

similarly make it functionally impossible for some Native people to succeed on supervision while continuing to reside in the community of their choice. To comply, they are forced to reside "off reservation." This is troubling not only because it has uncomfortable resonance with historical periods in which the United States forcibly removed natives from their communities, for example, by sending them to far-flung boarding schools under auspices of "improving" or "rehabilitating" them, but also because it is unlikely to lead to long-term success. When these people complete supervision and return to the reservation, they are often required to go back to a place where they have criminogenic peers, high unemployment, no aftercare treatment, and little support. Over time, many people in this situation without resources relapse. To the extent the goal of supervision is to provide people with resources to succeed, that goal can only be accomplished if people are supervised within the communities where they intend to reside after supervision and services are provided to them within these communities. It is not fair to remove people from their communities simply because their community is too remote or too poor to provide adequate programming.

Given the need to improve the quality and quantity of resources in Indian Country, courts should be more actively involved in the crafting of conditions so the conditions can be readily complied with by the persons under supervision.

b. Greater concern with public safety in Indian Country

The federal courts can and should as a convening agent bring state, federal, and tribal groups together with a view towards improving public safety in Indian Country. Among the areas of concern are the general safety of women and children in Indian Country. It is a well-known phenomenon that Native American women disappear in greater numbers and with greater frequency in Indian Country that elsewhere in the United States. Likewise, it appears that Indian children in Indian Country are more frequently exposed to neglect, abuse, and intense poverty than in many other parts of the country. TIAG believes the courts have a role to play in education, consultation, and convening other players in Indian Country to increase the level of cooperation with state, federal, and tribal authorities.

c. Structure of the U.S. Sentencing Commission

TIAG believes that inclusion of *ex officio* members of the Commission brings voices and expertise to the table that is not otherwise readily available. In particular, TIAG believes the power to ask questions that is afforded *ex officio*

members of the Commission is a powerful tool for the development of better sentencing Guidelines. We acknowledge the questions asked by the *ex officio* Department of Justice member is invaluable in the process. That said, we believe that balance would be better if an *ex officio* defender slot was created on the Commission. We believe that the presence of a defender in an *ex officio* capacity would be of great use to the Commission.

* * *

Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's sentencing priorities may impact defendants who are tribal members. As always, we look forward to continuing our collaboration in the future.

Sincerely yours,



Ralph R. Erickson

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

Christopher Quasebarth, Chair
Colleen Clase
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July 18, 2025

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on 2025-2026 Priorities

Dear Chair Reeves, Vice-Chairs, Members of the Commission:

The Victims Advisory Group ("VAG") appreciates this opportunity to provide public comment to the Sentencing Commission ("Commission") on its Proposed Priorities for the 2025-2026 Sentencing Guideline Amendment Cycle. Our advisory group responsibility is to assist you in fulfilling your statutory responsibilities under 28 U.S.C. § 994(o) and to provide our views on how your proposed amendments may and will affect federal crime victims.

VAG's focus for the Commission continues to be that crime victims are major stakeholders in the federal criminal court system and its sentencing procedures. VAG members work directly with victims of crime. We see victim pain, victim trauma, and often victim confusion and frustration with the criminal court process. We have noted previously for the Commission Justice Cardozo's apt statement: "[J]ustice, though due

to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." [1]

From these important foundations, we provide the following comments which we hope you will find useful and practical as you consider the current Sentencing Guidelines.

Priority 1: Examination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option (e.g., imprisonment, probation, or fine), and possible consideration of amendments that might be appropriate.

For these purposes, the VAG finds Priority 1 too broad in scope to provide a specific response other than that crime victims and the community have a strong interest in appropriate sentences that are rooted in the purposes of punishment outlined in the Sentencing Reform Act and the Guidelines Manual: "deterrence, incapacitation, just punishment, and rehabilitation."[2]

Priority 2: Further examination of the penalty structure for certain drug trafficking offenses under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), including (A) consideration of possible amendments addressing the purity distinctions for methamphetamine provided in the Drug Quantity Table and related application notes; and (B) consideration of other miscellaneous issues pertaining to drug trafficking offenses coming to the Commission's attention, such as possible statutory changes relating to fentanyl.

For these purposes, the VAG finds Priority 2 too broad in scope to provide a specific response but refer the Commission generally to VAG's prior public comments on the grave harm that drug trafficking inflicts on victims, both individually and as a

[1] *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

[2] 2024 Sentencing Guidelines Manual, Ch. 1, Part A, 1.2.

community, with methamphetamine and fentanyl continuing to be loud harbingers of that harm.

Priority 3: Examination of §2B1.1 (Theft, Property Destruction, and Fraud) and related guidelines to ensure the guidelines appropriately reflect the culpability of the individual and the harm to the victim, including (A) reassessing the role of actual loss, intended loss, and gain; (B) considering whether the loss table in §2B1.1 should be revised to simplify application or to adjust for inflation; (C) considering the application and impact of the victims table in §2B1.1 and adjustments in Chapter Three, Part A (Victim-Related Adjustments), relating to victims; (D) considering the application and impact of adjustments in Chapter Three, Part B (Role in the Offense) relating to role in the offense; and (E) possible consideration of amendments that might be appropriate.

When a person is victimized as a result of a criminal offense, the federal sentencing guidelines should reflect the intent of the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, "to transform the federal criminal justice system's treatment of crime victims…" Honorable Jon Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, And Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L.R. 581, 593 (2005). Victims' rights are "intended to reestablish the important and central role of victims, to humanize and individualize the victims of crime, and to recognize that victims also have rights to fair treatment and due process in criminal proceedings." Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 Ariz. St. L.J. 421, 424 (2015). The CVRA applies to all federal offenses, even those that are economic in nature.

Technological advancements in recent years have provided offenders a means to commit offenses, especially against vulnerable individuals, with the stroke of a computer

keyboard. Economic offenses are committed with greater ease, yet the impact is devastating and complicated. The current Guidelines do not adequately consider the impact of economic offenses on victims, consequently minimizing both the seriousness of the offense and the impact on victims.

The victim impact is generally financial, both personal and business related, creating great harm. In many instances victims endure an additional negative impact on their emotional health that may include feelings of depression, anxiety, fear, denial, embarrassment, and shame that they were deceived and financially harmed. This may lead to isolation and feelings of despair. Victims experience a loss of trust when the offender is known to them, or when they believe the perpetrator had their best interests in mind or when a person was placed in a position of trust.

Like victims of violent crimes, victims of economic offenses are thrust into a criminal investigation followed by an unfamiliar and complex criminal justice system. To ensure that the right to fairness and due process, guaranteed by the CVRA, are evident in the guidelines, and to better address the harms suffered by victims, the seriousness of the offense and the significance of deterrence, especially when many of these crimes are currently more easily committed, the VAG offers for your consideration the following proposed amendments to §2B1.1, noted by strike-through and underscore.

§2B1.1. Larceny, Embezzlement and Other Forms of Theft; Offense Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States.

[…]

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

[…]

***Notes to Table:**

(A) **Loss.-**Loss is the greater of actual loss or intended loss.

(B) **Gain.-**The court shall use the gain that resulted <u>or was intended</u> from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined. [3]

[…]

(3) If the offense involved a theft from the person of another, increase by **<u>[3][4]</u>** ~~**2**~~ levels. [4]

[…]

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **<u>[3][4]</u>** ~~**2**~~ levels.[5]

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[3] This proposed clause adds clarity and consistency to the fact that the "gain," just as the "loss," includes the intended consequence.

[4] This proposed level increase on a crime committed from the person of another, which may have included an act of force, reflects the seriousness of the offense and provides a deterrent factor.

[5] This proposed level increase on a crime committed on a national cemetery or veteran's memorial, in which the victims may include family members in addition to the federal government, and demonstrates

(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **[3][4]** ~~**2**~~ levels.[6]

(7) If (A) the defendant was convicted of a federal health care offense involving a government health care program; and (B) the loss under subsection (b)(l) to the government health care program was (i) more than $1,000,000, increase by **[3][4]** ~~**2**~~ levels; (ii) more than $7,000,000, increase by **[4][5]** ~~**3**~~ levels; or (iii) more than $20,000,000, increase by **[5][6]** ~~**4**~~ levels.[7]

[…]

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended-

(A) that the trade secret would be transported or transmitted out of the United States, increase by **[3][4]** ~~**2**~~ levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **[5][6]** ~~**4**~~ levels.[8]

[…]

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a grave disrespect for the persons there honored, reflects the seriousness of the offense and provides a deterrent factor.

[6] This proposed level increase reflects the seriousness of the offense and provides a deterrent factor, given the current greater ease of unlawful access to electronic information and the scope of criminal harm victims suffer through the stealing of their electronic email addresses.

[7] These proposed level increases on crimes of substantial financial magnitude on governmental health care programs, reflect the seriousness of the offense and provide a deterrent factor for crimes that not only directly steal taxpayer dollars but deeply undermine the health care of real people in need.

[8] These proposed level increases on crimes that undermine the productivity and effectiveness of the country's economic growth reflect the seriousness of the offense and provide a deterrent factor.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **[3][4]** ~~**2**~~ levels. If the resulting offense level is less than level **14,** increase to level **14.**[9]

[…]

(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **[3][4]** ~~**2**~~ levels.[10]

[…]

Application Notes:

[…]

1. Definitions. -For purposes of this guideline:

[…]

"***Victim***" means (A) any person who sustained any part of the actual or intended loss determined under sub-section (b)(l); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes, but is not limited to, individuals, corporations, companies, associations, firms,

[9] These proposed level increases on crimes directly posing the risk of death or serious bodily injury or potential harm from firearms on people reflect the seriousness of the offense and provide a deterrent factor.

[10] This proposed level increase reflects the seriousness of the offense and provides a deterrent factor, given the current greater ease of unlawful access to computer information and the scope of criminal harm victims suffer from the stealing or disseminating of their personal information.

partnerships, societies, and joint stock companies.[11]

[…]

3. Loss Under Subsection (b)(1).

[…]

(B) **Estimation of Loss.-**The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence, including the views of the victim,[12] and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. *See* 18 U.S.C. § 3742(e) and (t).

[…]

4. Application of Subsection (b)(2).-

[…]

~~**(D) Vulnerable Victims.-**If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.~~[13]

(F) Substantial Financial Hardship. -In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim-

[11] These proposed clauses underscore that "loss" may be actual *or* intended, and that the term "person" includes entities broader than those currently listed.

[12] This proposed clause clarifies that the victim's information of the loss suffered is part of the court's consideration of the evidence.

[13] While §2B1.1(b)(2)(B) and (C) provide increases for crimes involving multiple victims, the fact that the defendant knew or should have known that a large number of those multiple victims were "vulnerable victim[s]," as that term is defined by §3A1.1, App. N. 2, should still warrant the additional level increase of §3A1.1(b)(2). Striking this automatic exclusion from the Application Note, as proposed, will recognize both the seriousness of the offense and provide a deterrent from criminally targeting groups of vulnerable victims.

(i) becoming insolvent;

(ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);

(iii) suffering substantial loss of a retirement, education, or other savings or investment fund;

(iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;

(v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; ~~and~~

(vi) suffering substantial harm to his or her ability to obtain credit~~.~~; and

(vii) resulting in the need for medical or psychological services.[14]

These proposed amendments will help to adequately address victim harms and follow the purpose of sentencing detailed in the Guidelines Manual: "deterrence, incapacitation, just punishment, and rehabilitation."[15]

[14] The stress and trauma from a financial crime may cause a victim medical or psychological health problems resulting in financial hardship as a direct consequence of the offense. The sentencing court should consider these financial hardships in the current non-exhaustive list of factors.

[15] *See* fn. 2, *supra*.

Priority 4: Continued examination of the career offender guidelines, including (A) evaluating the impact, feasibility, and uniformity in application of alternative approaches to the "categorical approach" through workshops, field testing, and updating the data analyses set forth in the Commission's 2016 report to Congress, titled Career Offender Sentencing Enhancements; and (B) possible consideration of amendments that might be appropriate.

Priority 4 speaks of possible amendments but includes only one specific topic: the impact, feasibility, and uniformity in application of alternative approaches to the "categorical approach." The VAG supports the elimination 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 USSG § 4B1.1. The VAG supports a conduct-based approach as more aptly determining the actual or increased risk of physical or psychological injury to crime victims and better assuring the inclusion of violent offenses, such as burglary (§ 2B2.1), sex trafficking (§ 2G1.1), and violent offenses involving the reckless disregard for human life or serious bodily injury.

Regarding the impact, feasibility, and uniformity in application of a conduct-based approach, courts routinely examine conduct to determine enhancements and mitigating factors when making sentencing determinations. A conduct-based approach for prior crimes of violence or controlled substance offense would be a similar analysis, would have a uniform standard of review (e.g., substantial evidence or preponderance of the evidence), and would be based on reliable evidence presented to the court at sentencing.

In determining reliability of such evidence of prior crimes of violence, courts also routinely make evidentiary determinations regarding the reliability of evidence presented at trial, so this would be much the same type of reliability determination. The Sentencing Commission can choose specific types of *per se* reliable evidence for

courts to rely on, such as verdict forms and plea colloquies, as well as factors to consider when determining reliability of other evidence.

Priority 5: Examination of whether the guidelines provide appropriate adjustments for good behavior, including examination of whether §3E1.1 (Acceptance of Responsibility) and §5K1.1 (Substantial Assistance to Authorities) fully account for the variety of ways in which an individual may manifest acceptance of responsibility and provide substantial assistance, and possible consideration of amendments that might be appropriate.

There are numerous ways in which an individual can manifest acceptance of responsibility. VAG asks the Commission to focus on how the sentencing judge should decide whether an individual has truly accepted responsibility.

A year ago, Chair Reeves made a special request in honor of the Commission's 40th anniversary for ideas to create a "fairer, and more just sentencing system." Fairness and justice are often aspirational and not easily attained. A judge may perceive a sentence to be fair, just, and appropriate, but the defendant, the victim, and/or the public may strongly disagree. The fairness and justice of our system is largely a matter of the stakeholders' and the public's perceptions.

Crime victims are important stakeholders in our justice system. Sadly, crime victims are too often left feeling ignored. The Crime Victims' Rights Act, 18 U.S.C. §3771, establishes rights for crime victims in criminal cases, including "[T]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."

The VAG asks the Commission to include in §3E1.1 the sentencing court's consideration of the *victim's perception* of the offender's acceptance of responsibility. Shockingly, neither §3E1.1, entitled "Part E-Acceptance of Responsibility," nor its

Commentary, include the word "victim." The only oblique suggestion of a victim is advising judges to consider as a factor of the acceptance of responsibility the voluntary payment of restitution prior to adjudication of guilt.[16]

Application Note 1 lists a number of factors that may aid sentencing judges when they consider whether a defendant has demonstrated an acceptance of responsibility and thus qualifies for the decreased offense level afforded in §3E1.1(a). The VAG strongly asks the Commission to amend that Application Note 1 non-exhaustive list of factors for sentencing judges to consider when deciding whether a defendant qualifies for a §3E1.1(a) "Acceptance of Responsibility" two-level reduction to include a subparagraph I, that reads:

> *(I) the victim's oral or written statement to the court about the victim's reasons that the defendant demonstrates or does not demonstrate an acceptance of responsibility for the offense.*

As one of a number of factors for the sentencing court to consider, the victim's reasons will not be controlling but will be another piece of useful information for the judge. As a practical matter, many victims know their offenders and will be capable of providing powerful insight into a defendant's acceptance of responsibility. Even when the defendant is a stranger to the victim, the victim will have opportunity through the court process to observe the defendant's conduct and, particularly at sentencing, will have some strong sense of whether the defendant is sincerely accepting responsibility for the offense. Victim input will help sentencing judges weigh not just the defendant's words, but also his or her actions and conduct. Victims can provide judges with insight into whether a defendant has accepted responsibility and is deserving of the decreased sentence that may come with the application of §3E1.1.

[16] §3E1.1, Application Note 1(C).

The VAG believes that taking this step will enhance our sentencing system and will aid in making it more fair and just in the eyes of all stakeholders, victims included. The cathartic impact on victims who hear their own voice in court describing their pains, their suffering, and being allowed to provide their input to the sentencing judge, based upon their experience on whether a defendant demonstrates an acceptance of responsibility, should not be underestimated. Anyone who has worked with victims and stood by them in a court as they address the judge and explain their experience and agony knows the dramatic healing impact it has. And they know the important insight that victims, more than any other, can provide to sentencing judges.

The Constitution quite appropriately provides specific constitutional rights for all defendants. However, as a consequence, victims often feel as though their voices are not heard and that the system favors defendants. But our laws and our system is evolving from that starting point with an eye towards protecting victims' rights also. By including victim input in §3E1.1, Application Note 1, on the defendant's acceptance of responsibility, the Commission will take a large step honoring a victim's statutory right to be heard. Importantly, the Commission will also provide clear guidance to sentencing courts that victim input may help them determine whether a defendant clearly demonstrates an acceptance of responsibility to qualify for a decreased offense level. Doing so honors victims' rights and will increase victims' perception that the judges, in charge of our justice system, are seeking to deliver fairness and justice.

It is worth noting that §3E1.1 Application Note 5 states that "[T]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility." The note adds that as such "the sentencing judge is entitled to a great deference on review." The Commission should take every step possible toward ensuring that sentencing judges deserve such deference. By listening to and considering the victim's input, the judges will earn this deference.

Priority 6: Continued exploration of ways to simplify the Guidelines Manual, including (A) examining the operation of the grouping rules in Chapter Three, Part D (Multiple Counts); (B) examining the operation of specific provisions of Chapter Four, Part A(Criminal History); (C) examining the operation of §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment); (D) evaluating infrequently applied specific offense characteristics and adjustments provisions throughout the Guidelines Manual; and (E) possible consideration of amendments that might be appropriate.

With the massive amendments approved by the Commission on May 1, 2025, and to become effective on November 1, 2025, focused on simplifying the Guidelines Manual, the VAG recommends that the Commission wait until there is significant data available from the consequences of those amendments before undertaking further simplifying amendments.

Priority 7: Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.

Without identifying which Bureau of Prison (BOP) practices the Commission is referencing, the VAG finds this proposal so vague it is difficult for it comment upon it. The Commission offered what appears to be an identical priority in its 2023-2024 Priorities. Please refer to the VAG August 1, 2023, public comment for our comments that were then timely.

Priority 8: Implementation of any legislation warranting Commission action.

The Commission does not identify any implemented legislation warranting Commission action. VAG currently cannot offer any comment on this priority.

Priority 9: Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991).

The Commission does not identify any circuit conflicts warranting Commission action. VAG currently cannot offer any comment on this priority.

Thank you for this opportunity to address proposed priorities for the 2025-2026 cycle.

Respectfully yours,

Christopher C. Quasebarth

The Victims Advisory Group
Christopher Quasebarth, Chair

cc: Victims Advisory Group Members

CJHD Center for Justice and Human Dignity | www.cjhd.org

aleph INSTITUTE

July 18, 2025

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Public Comments on Potential 2025-2026 Priorities of the United States Sentencing Commission

Dear Judge Reeves:

We write this letter in response to the U.S. Sentencing Commission's request for public comments on the recent Notice of Proposed Priorities for the 2025-2026 amendment cycle.

We applaud the Commission's continued efforts—under your outstanding and inspired leadership—to consider how the U.S. Sentencing Guidelines can and should be improved to better serve the goals set forth by Congress and our nation's commitment to liberty, fairness and justice. This letter presents our support for adopting, as priorities, amending Guideline 2B1.1 (Theft, Property Destruction, and Fraud) (Priority 3); ensuring that the Guidelines provide more robust adjustments for good behavior (Priority 5); simplifying the Guidelines Manual (Priority 6); and assessing the degree to which certain Bureau of Prisons practices are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2) (Priority 7).

The Center for Justice and Human Dignity

The Center for Justice and Human Dignity ("CJHD") is a nonprofit organization whose mission is to safely reduce the use of incarceration in the United States while improving conditions for those imprisoned and correctional staff. CJHD promotes human dignity and shared safety while keeping in mind the needs of survivors, system-impacted people, and society at large. Alongside diverse partners, the Center works with judges and prosecutors on ways to expand the use of alternatives to incarceration; with correctional leaders on the conditions of confinement; and with policymakers on legislative reforms to the criminal justice system. At its 2023 Rewriting the Sentence II Summit on Alternatives to Incarceration, CJHD convened nearly 400 key stakeholders to discuss and formulate strategies for implementing innovative sentencing practices in the criminal justice system. We were extremely privileged to have Your Honor appear as a featured speaker at the Summit.

CJHD is closely guided by the expertise of its steering committee, comprised of 20 current and former judges. CJHD's board also lends the guidance of a range of criminal justice experts, including the Honorable Larry D. Thompson, former U.S. Deputy Attorney General; the Honorable Nancy Gertner, Senior Lecturer, Harvard Law School and former U.S. District Judge; the Honorable Jeremy D. Fogel, Executive Director of the Berkeley Judicial Institute, former U.S. District Judge, and former Director of the Federal Judicial Center; and Alan Vinegrad, former U.S. Attorney for the Eastern District of New York.

The Aleph Institute

The Aleph Institute ("Aleph") served as the incubator for CJHD's formation. Aleph was founded in 1981 and has a decades-long history of direct service in prisons around the country, and has worked with judges, legislators, executive branch officials (including prosecutors and prison officials), academics, and legal practitioners on criminal justice reform. Aleph was honored to have been a part of the bipartisan effort resulting in the passage of the First Step Act of 2018, which brought about much-needed reforms to our federal criminal justice system.

Aleph also has submitted alternative sentencing recommendations in dozens of criminal cases around the country. In many of them, the judge imposed a below-Guideline sentence, based at least in part on considerations set forth in Aleph's submissions. Most frequently, courts in these cases rely upon defendants' genuine expressions of remorse and acceptance of responsibility, their prior service to their community, the damage that would be caused to their family members and others were the defendant to be imprisoned, and their willingness to make amends. These are among the very factors that support the government's expanded use of alternatives to incarceration, especially for defendants who do not pose a risk to public safety.

In 2016, Aleph convened an Alternative Sentencing Key Stakeholder summit at the Georgetown Law Center, featuring nearly 200 current and former leaders and senior government officials serving in the criminal justice system. In 2019, Aleph co-hosted (with Columbia Law School) a second summit on alternatives to incarceration—titled Rewriting the Sentence—to examine the significant changes taking place in the alternatives-to-incarceration arena. This summit was attended by approximately 300 criminal justice system stakeholders, including federal and state judges, prosecutors, defense counsel, probation and pretrial officers, individuals directly affected by incarceration, advocacy groups, and other key stakeholders. Aleph also was a co-host of the 2023 Rewriting the Sentence II Summit discussed above.

Priority 3: Examining §2B1.1 (Theft, Property Destruction, and Fraud)

The Commission's proposed focus on 2B1.1 is especially welcomed. The criticism leveled at the unwarranted severity of this Guideline—in particular, the predominant influence of the ever-harsher loss table—is virtually unparalleled in the history of the Guidelines. Indeed, a recent letter to the Commission, co-signed by 75 former federal judges and senior U.S. Department of Justice officials, eloquently describes serious concerns regarding the severity of 2B1.1, including the Guideline's undue emphasis on loss calculations and relative lack of emphasis on other factors that are critical to a fair and just sentence in these cases. (A copy of the letter is enclosed.)

The Guidelines' heavy emphasis on the loss calculation can problematically drive a sentencing court away from focusing on Congress's statutory instruction that a sentence be "sufficient, but not greater than necessary" to comply with the purposes of sentencing, and all of the factors that contribute to that determination. The enclosed letter provides two examples where lengthy sentences, driven primarily by excessive loss calculations, bore little rational relationship to the individual's level of culpability. Similar examples of excessive sentencing, driven by loss calculations divorced from individual culpability, are plentiful. The Commission ought to consider reducing the severity of the loss table to avoid similar injustices and better reflect a defendant's true culpability—which often bears little or no relationship to the magnitude of loss.

Meaningful reform of 2B1.1 also requires reduced emphasis on a purely mathematical calculation of loss in favor of determining culpability using a broad array of additional, non-quantitative factors. These factors should include: the defendant's motive for engaging in the offense conduct; how the defendant came to be involved in the conduct; how long the defendant was involved in the conduct; whether the loss calculation is based in part on conduct that occurred before the defendant's involvement began (as sometimes occurs in conspiracy cases); whether the loss amount is based on actual or intended loss, or an extrapolation based on a subset of conduct; whether the defendant profited from the conduct and, if so, to what extent; whether the defendant recruited or attempted to recruit others; whether the defendant ever questioned others about the propriety of the conduct and/or whether it should continue; how the defendant came to cease involvement in the conduct, even if it did not rise to the level of a legally viable withdrawal defense; whether the defendant was assured (albeit incorrectly) that their conduct was authorized or permissible; whether legal counsel's advice contributed to the defendant's participation, even if it did not rise to the level of a formal advice-of-counsel defense; whether the defendant's conduct was the product of economic, personal or other pressures, even if they did not rise to the level of coercion or duress; and whether the defendant did anything to mitigate any harm caused by their conduct; the defendant's payment or agreement to pay restitution.

Victims also play an important role in the sentencing process. Whether victims of financial offenses support a particular sentence should always be considered. In particular, although infrequent, victims sometimes do support leniency for a variety of reasons, including the importance of providing restitution; the Guidelines should reflect that, in appropriate cases, it may be desirable to impose a sentence that will maximize or increase the chances that the defendant can do so.

We recommend that 2B1.1 be amended to explicitly account for these factors, so that the Guidelines can help courts better determine a sentence that reflects all of the considerations relevant to the offense conduct (among the other 3553(a) factors) and, ultimately, one that is "sufficient, but not greater than necessary" to comply with the purposes of sentencing.

Priority 5: Examining Whether the Guidelines Provide Appropriate Adjustments for Good Behavior

The Commission is on the mark in implicitly recognizing that there are many ways that defendants can demonstrate acceptance of responsibility or assist the authorities. This is true for defendants who plead guilty as well as the small percentage who go to trial (and are convicted). And the Commission is also well-founded in exploring whether the Guidelines properly account for such behavior. For nearly 40 years, such behavior has been largely confined to two discrete provisions: 3E1.1, which provides a relatively modest reduction for defendants who plead guilty (and meet the other 3E1.1 criteria), and 5K1.1, which is limited to defendants who help the government investigate and prosecute others and is dependent upon a government motion. This is too narrow.

For starters, defendants may assist the government in ways other than prosecuting others. A defendant who is responsible for ensuring the health, or saving the lives, of others—by encouraging individuals with substance use disorders to seek appropriate treatment, for example—deserves appropriate credit. Such a defendant not only helps the individuals in question (as well as those individuals' families and communities) but also spares the government the burden and expense of caring for these individuals or addressing the negative consequences of their addictions. A worthy proposal along these lines was submitted to the Commission several years ago by The Honorable Leo Sorokin (D. Mass.); it deserves renewed attention.

Counseling others—before or after a defendant is charged—not to engage in criminal or questionable behavior, also benefits society by potentially reducing crime and redirecting people toward productive endeavors. In a recent case, a defendant voluntarily spoke to hundreds of fellow community members about the perils of unlawful behavior and urging them to avoid such situations. Judges in other cases have imposed sentences with similar provisions.

Providing information to law enforcement that assists in the exoneration of innocent defendants also provides obvious benefits to the criminal justice system. It potentially frees the innocent and also ensures that the actual perpetrators of the crimes in question are investigated and, where warranted, prosecuted. A recent case involved a defendant who voluntarily confessed to falsely implicating someone many years after the fact, leading not only to
the person's exoneration but also to uncovering the improper tactics of a law enforcement official who was responsible for wrongful convictions in that case and many others.

There are other examples. Voluntarily ceasing involvement in a particular business or profession, perhaps accompanied by surrendering applicable licenses or other authorizations, ought to be recognized. Providing restitution beyond the offense of conviction is another tangible indication of good behavior that ought to be rewarded. Undergoing extensive rehabilitation or treatment, or similar conduct reflecting genuine personal transformation, should receive appropriate credit as well.

It bears repeating that each and every one of these scenarios—and presumably others that can be identified—can apply to defendants who deny their guilt and go to trial. Acceptance of responsibility should not be confined to those who admit their guilt—which, Guideline text notwithstanding, is how 3E1.1 operates in practice virtually all of the time. The Commission has the power to change that—and should.

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The Guidelines should also recognize good behavior by incentivizing the defendant's participation in diversion programs—programs that are ideally suited to teaching and encouraging such behavior. Diversion programs enjoy increasing support among judges, prosecutors, and pretrial services and probation officers across the nation. Diversion programs help eligible defendants remain united with their families, positively redirect their lives, access treatment and other resources in their communities, and cost significantly less than incarceration.

Recent data shows that there are 56 federal pretrial diversion programs, with 35 federal districts having one or more of these programs. Available data suggests these programs reduce recidivism. For example, a 2021 study entitled "Expanding the Analysis: Alternatives to Incarceration across 13 Federal Districts" examined recidivism rates and other metrics for approximately 1,000 participants in 13 federal pretrial diversion programs and concluded that individuals were "significantly less likely to be rearrested on supervision" than statistically comparable non-participants—0.068% for successful participants, compared to 11.54% for non-participants. The study also showed higher rates of employment and fewer positive drug tests among participants.

To be sure, the Commission has done an outstanding job in bringing greater visibility to the federal government's "problem-solving courts" through its website, webinars and other means of sharing information. What is now warranted is a more tangible expression of the Commission's support in individual cases where a defendant has successfully participated in such a program—for example, by way of a downward departure or adjustment for defendants who still face sentencing (as some do) at the conclusion of the program.

Restorative justice programs, while far more limited in number, have also been successful. A systematic review of 35 studies assessing the impact of restorative justice programs found there was a "consistent and significant decrease" in victims' post-traumatic stress symptoms after their participation in victim-defendant meetings. Studies have also shown a decrease in recidivism following participation in restorative justice programs. The District of Massachusetts has operated such a program successfully for the last 12 years—the Repair, Invest, Succeed, Emerge (RISE) program, which entails a year-long delay in a defendant's sentence so they can complete an intensive supervision program with a restorative justice component.

We respectfully recommend that 3E1.1 and 5K1.1 be expanded to account for all of these additional mitigating factors, by providing for downward adjustments or, to the extent consistent with the Commission's simplified approach to sentencing, departures under the Guidelines.

Priority 6: Exploring Ways to Simplify the Guidelines Manual

Simplifying the Guidelines is a worthy and long-overdue endeavor. The 2024 Guidelines Manual is over 600 pages long, with another 1,544 pages devoted to the 831 amendments that have been promulgated. As just two examples of their prolixity, 2B1.1 has 20 specific offense characteristics, 14 of which have one or more subparts, and 2D1.1, the principal narcotics offense guideline, has 17 specific offense characteristics, seven of which have one or more subparts. And this does not account for all the other components of computing an advisory Guideline range—such as victim adjustments, role adjustments, obstruction adjustments, multiple-count adjustments, acceptance of responsibility adjustments, and the criminal history category (with its own elaborate complication of intricate rules).

The Commission's recent revision of the pre-existing three-step process utilized in determining a sentence represents a tangible step in the direction of simplification. But it addressed only one narrow aspect of the Guidelines: departures. The Commission should thoroughly review the Guidelines Manual to identify additional opportunities to streamline its contents, consistent with the advisory role the Guidelines now play in the sentencing process and the fact that, in some instances, they are more complicated than is necessary to fulfill that function.

Priority 7: Assessing the Degree to which Certain BOP Practices are Effective in Meeting the Statutory Purposes of Sentencing

Section 3553(a)(2) requires a sentencing court to consider "the need for the sentence imposed…to provide the defendant with … medical care … in the most effective manner[.]" The Commission should recommend that the Bureau of Prisons undertake a balanced, robust and transparent assessment of whether it is truly able to accommodate an individual's medical care needs in specific cases, taking into account available resources both within and outside of the prison environment.

Providing access to medical care is integral to the BOP's mandate of ensuring the health and safety of individuals in its care and comprises a significant portion of its already overly-strained budget. The aging prison population, in particular, places enormous strain on prison medical care, requiring frequent trips for treatment outside of prison facilities. In FY 2024, the BOP spent $473.5 million on overtime, primarily due to an insufficient number of corrections officers and overtime required to take individuals outside prisons for medical care. For medical care alone, the BOP spent $145.5 million on overtime for almost 76,000 outside medical trips and 84,000 hospitalizations—the highest number of hospitalizations in the last eight years.

It is also true that, despite the earnest efforts of recent BOP leadership, defendants in increasing numbers suffer—sometimes severely—due to the BOP's unrealistic and reflexive approach when their capacity to provide adequate medical care is challenged. Court decisions are legion in which the BOP has been proven to be deficient in this critical respect.

We support the introduction of a more rigorous and transparent process to determine whether the BOP can effectively manage the health care requirements of individuals entrusted to its care. The existing presumption is that the BOP, through its four-level medical care level classification system, is well-suited to manage the health care requirements of every individual. This presumption should be re-evaluated to consider the budgetary and other practical limitations of prison health care, in order to determine whether an incarcerated individual may safely be released to their community under the care of their own medical providers, family members or other caregivers.

At the same time, the Commission should encourage sentencing courts to require BOP to explain in detail how they will care for a person with medical needs, what their staffing levels are to ensure adequate care, the type of medical facilities they have access to at a particular institution, and other factors relevant to the particular situation. In other words, courts should be encouraged to do more than ask BOP if they can adequately provide for a defendant's medical needs; they should assess in detail the facts supporting (or refuting) the BOP's position.

An objective and transparent process to evaluate the BOP's ability to accommodate each individual's medical care needs would support the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) and while also alleviating the BOP's current budgetary crisis. We therefore propose that the Commission recommend that the BOP adopt this approach, and that, in the meantime, the Commission (through an appropriate Guideline amendment) direct sentencing courts to examine with particular rigor whether a potential sentence actually will result in providing a defendant with necessary medical care "in the most effective manner."

Conclusion

We commend the Commission for soliciting input on its potential priorities for the 2025-2026 amendment cycle. We stand ready to assist the Commission in any way it sees fit.

Respectfully,

Aaron Lipskar

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Chief Executive Officer
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July 15, 2024

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Attention: Public Affairs – Priorities Comment

Dear Chairman Reeves and Members of the Commission:

This letter responds to the U.S. Sentencing Commission's request for public comments in conjunction with its recent Notice of Proposed Priorities. The undersigned applaud the Commission's efforts to consider how the U.S. Sentencing Guidelines could and should be redesigned to better serve the statutory goals set forth by Congress and our nation's commitments to liberty and justice. To that end, this letter focuses specifically on the need to revise the Guidelines applicable in fraud cases, particularly with respect to the undue emphasis placed on loss amount.

The Widely-Recognized Issue with Guideline 2B1.1

As the Commission knows, modern times have seen a dramatic increase in the severity of authorized and mandated sentencing terms for nonviolent offenders. Not long ago, any sentence of more than a few years of imprisonment for a nonviolent white-collar offender was rare. But sentencing guidelines that were perhaps originally designed to ensure that the most culpable and harmful of white-collar offenders face significant sentences now operate to increase excessively the prison terms recommended for less culpable fraud offenders. The U.S. Sentencing Guidelines can often call for decades in prison even for first-time offenders whose fraud offense may have been driven by dire personal or professional circumstances and who have shown great remorse for their wrongdoing and are eager to make amends for harms caused.

Extreme increases in recommended prison terms for white-collar offenders have largely been driven by the U.S. Sentencing Guidelines placing extraordinary emphasis on loss (and intended loss) calculations and giving too little consideration to those other factors that are most important to a fair and just sentence and that Congress emphasized in 18 U.S.C. §3553(a). As courts and commentators have pointed out, the Guidelines' heavy emphasis on loss calculations can problematically drive a sentencing court away from focusing on Congress's statutory instruction that a sentence be "sufficient, but not greater than necessary" to comply with the purposes of sentencing set out in 18 U.S.C. §3553(a)(2). In Guideline calculations, which still serve as the starting point and initial benchmark for federal sentencing decisions, the loss table too often dwarfs all other factors and can distort the assessment and impact of all other sentencing considerations.

There is no reason to believe Congress intended for loss determinations to overwhelm other considerations set forth in applicable sentencing statutes. Indeed, there is every reason to believe that the Guidelines' undue emphasis on loss can undermine Congress's interest in fair and balanced sentencing decision-making. The considerable tensions between the Guidelines' emphasis on loss

and Congress's statutory sentencing instructions in 18 U.S.C. §3553(a) are manifold because, even if soundly calculated: (1) loss is just one aspect of the "nature and circumstances of the offense" and does not capture other relevant offense factors; (2) loss frequently will not "reflect the seriousness of the offense" or produce "just punishment for the offense" but instead produces advisory Guideline ranges that are excessively high; (3) loss does not help a court decide how "to promote respect for the law" and may undermine respect for the law by suggesting sentences unconnected to true culpability; (4) loss poorly addresses the need "to afford adequate deterrence to criminal conduct" and may undermine deterrence by failing to focus on motivations for, and other considerations affecting, fraudulent conduct; and (5) loss may operate, perversely, to distort efforts "to impose similar punishment on similar offenders" because it can lead to similar Guideline-recommended ranges for different types of fraud offenses involving distinct defendants with disparate motives who produce different sorts of harms. And these myriad problems with the Guidelines' heavy reliance on loss are further compounded in those cases where calculations of loss end up having little or no relationship to either economic realities or an offender's actual personal gain from an offense.

Critically, many of the points stressed here have been stressed frequently by academics and practitioners in various ways for many years. One leading academic (a former prosecutor), for example, has opined that the "rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense." Frank Bowman, *Sacrificial Felon: Life Sentences For Marquee White-Collar Criminals Don't Make Sense*, AMERICAN LAWYER, Jan. 2007, at 63. Others agree. *See, e.g.*, Barry Boss & Kara Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, 18 OHIO STATE JOURNAL OF CRIMINAL LAW 605, 605-06 (2021) ("The economic crimes Guideline, Section 2B1.1 of the United States Sentencing Manual, routinely recommends arbitrary, disproportionate, and often draconian sentences to first-time offenders of economic crimes. These disproportionate sentences are driven primarily by Section 2B1.1's current loss table, which has an outsized role in determining the length of an economic crime offender's sentence."); Alan Ellis, John R. Steer & Mark Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 CRIMINAL JUSTICE 34 (2011) (explaining why "loss" under the Sentencing Guidelines provides a very poor proxy for the true seriousness of an offense and the culpability of a defendant). Indeed, others — including a former federal prosecutor — have long acknowledged that "the current Federal Sentencing Guidelines for fraud and other white-collar offences are too severe" and appear much greater than "necessary to satisfy the traditional sentencing goals of specific and general deterrence — or even retribution." Andrew Weissmann & Joshua Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007), *at* http://yalelawjournal.org/forum/white-collar-defendants-and-white-collar-crimes. *See also generally* Barry Pollack & Addy Schmitt, *Restoring Sentencing Sanity in White-Collar Criminal Cases*, 29 WESTLAW J. WHITE-COLLAR CRIME 6 (Oct. 2014) (noting that "many judges have declined to employ the guidelines in economic crimes cases" because they too often recommend "sentences for first-time nonviolent white collar offenders … substantially higher than for the most heinous violent criminal offenses [which] undermines the fairness and integrity of our judicial system").

Examples of the excesses produced by the loss table abound; two examples of such cases are *United States v. Gozes-Wagner*, 14-cr-637 (S.D. Tex.) (involving the imposition of a 20-year (below-guideline) prison sentence in health care fraud case for mid-level first-time offender/single

mother of two children) and *United States v. Rubashkin*, 08-CR-1324 (N.D. Iowa) (involving a 27-year (within-guideline) sentence in bank fraud case for first-time offender with 10 children).

In the *Rubashkin* case, six former U.S. Attorneys General, two former U.S. Deputy Attorneys General, a former U.S. Solicitor General, and 14 former U.S. Attorneys submitted a letter to the sentencing judge stating their concerns about the severity of the fraud Guideline. They wrote that the "potential absurdity" of the Guidelines was "on full display," as the government's proposed Guideline calculation would have resulted in a recommended life sentence for Mr. Rubashkin – "a 51-year-old, first-time, non-violent offender whose case involved many mitigating factors and whose personal history and extraordinary family circumstances suggested that a sentence of a modest number of years could and would be more than sufficient to serve any and all applicable sentencing purposes." In the *Gozes-Wagner* case, more than 130 former officials, including six U.S. Attorneys General, an FBI director, two U.S. Solicitors General, two state Governors, a Member of Congress, several Deputy, Associate, and Assistant Attorneys General, scores of U.S. Attorneys, and more than three dozen Judges and Justices, submitted an *amicus curiae* brief to the Fifth Circuit Court of Appeals. In their brief, *amici* pointed to "the district court's excessive concern with the Guidelines range" and wrote that "given the effect of the calculated 'loss' on the Guideline range in this case and the lack of a rational relation to Ms. Gozes-Wagner's level of culpability, it was particularly problematic that the district court entirely failed to discharge its obligation to 'filter the Guidelines' general advice through § 3553(a)'s list of factors.' *Rita*, 551 U.S. at 357-58."

Notably, the injustice of such extreme prison terms in these two cases resulting from this problematic Guideline prompted the President of the United States to grant clemency in the form of prison commutations.

More generally, it is a telling and disconcerting reality that, in recent years, sentencing courts are granting downward variances in more than 42% of all fraud/theft cases. *See* U.S. Sentencing Commission, *Quick Facts – Theft, Property Destruction, & Fraud* (August 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY22.pdf. These data document not only how often federal judges consider the fraud guideline unduly severe to comply with statutory sentencing instructions, but also that there is a heightened risk of unwarranted sentencing disparity in this arena where judges are so often compelled to sentence outside the terms of the Commission's guidance.

A Thoughtful Proposal from the American Bar Association

Though there have been many ideas for how to improve federal sentencing for fraud offenses, we see value in and support this Commission looking to work already completed a decade ago by the Task Force on the Reform of Federal Sentencing of Economic Crimes created by the Criminal Justice Section of the American Bar Association ("ABA Proposal"). That impressive Task Force, which consisted of five professors, three judges, six practitioners, two organizational representatives, and observers from the U.S. Department of Justice and the Federal Defenders, drafted a comprehensive and thoughtful proposed new federal sentencing guideline to effectuate needed reforms. The work of the Task Force, starting with the specifics of the ABA Proposal, is

available at: https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf

There are many facets of the ABA Proposal that we think merit careful study and adoption in some form, though signers of this letter might differ on any number of the detailed particulars. For this letter, we want to highlight a fundamental feature of the ABA Proposal that should be central to this Commission's work – namely, its emphasis on individual culpability. Though the ABA Proposal gives some attention to loss in the revised guideline, it centers the guideline calculation around "various culpability factors." In so doing, the ABA Proposal seeks to deemphasize a mathematical focus on loss in order to ensure judges focus mostly on determining an "appropriate culpability level" which "for any given case will depend on an array of factors." Notably, the ABA Proposal does not seek to define intricately and mechanistically all possible culpability factors, but rather soundly encourages and expects sentencing judges to carefully weigh the "almost limitless variety" of possible culpability considerations.

Conclusion

We are very encouraged by the Commission's recent efforts to modify the U.S. Sentencing Guidelines to better serve the statutory goals set forth by Congress and our nation's commitments to liberty and justice. The Guidelines' undue emphasis on loss in fraud cases has often resulted in excessively punitive sentence calculations that may bear little relation to traditional sentencing factors, thus undermining Congress's statutory sentencing instructions in 18 U.S.C. §3553(a) that judges impose sentences that are no greater than necessary to achieve the purposes of sentencing. We respectfully suggest that the Commission consider efforts, like the ABA Proposal, that seek to promote an emphasis on individual culpability to improve federal sentencing for fraud and theft offenses.

Thank you very much for your consideration of our views.

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Brett Tolman
U.S. Attorney, District of Utah (2006-2009)

Stanley A. Twardy
U.S. Attorney, District of Connecticut (1985-1991)

Ursula Ungaro
U.S. District Judge, Southern District of Florida (1992-2021)

Peter Vaira
U.S. Attorney, Eastern District of Pennsylvania (1978-1983)

Thomas I. Vanaskie
U.S. Circuit Judge, Court of Appeals for the Third Circuit (2010-2019)
U.S. District Judge, Middle District of Pennsylvania (1994-2010)

Alan Vinegrad
U.S. Attorney, Eastern District of New York (2001-2002)

Atlee W. Wampler III
U.S. Attorney, Southern District of Florida (1980-1982)

T. John Ward
U.S. District Judge, Eastern District of Texas (1999-2011)

Donald Washington
Director, U.S. Marshals Service (2019-2021)
U.S. Attorney, Western District of Louisiana (2001-2010)

Francis M. Wikstrom
U.S. Attorney, District of Utah (1981-1982)

William D. Wilmoth
U.S. Attorney, Northern District of West Virginia (1993-1999)

Edward M. Yarbrough
U.S. Attorney, Middle District of Tennessee (2007-2010)

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Submitted: July 18, 2025

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Comments on Advancing Fairness, Equity, and Public Safety in Federal Sentencing Practices

Dear Chairman Carlton Reeves and Members of the U.S. Sentencing Commission,

On behalf of Dream.Org, thank you for the opportunity to submit these comments in furtherance of the U.S. Sentencing Commission's statutory mission. We offer these recommendations to support your dual mandate: (1) to establish federal sentencing policies and practices that advance the purposes of sentencing—just punishment, deterrence, incapacitation, and rehabilitation—while considering the capacity of correctional systems; and (2) to evaluate whether sentencing and correctional practices are achieving these goals through oversight, research, and data collection.

Our comments are aligned with both aspects of the Commission's mission. They are evidence based, rooted in the lived experiences of directly impacted individuals and informed by bipartisan collaboration through Dream.Org's Federal Advisory Council. As an organization committed to ending mass incarceration and fostering opportunities for second chances, we offer the following comments to help guide the development and implementation of sentencing practices that are just, effective, and centered in human dignity.

1. Align Sentencing Guidelines with Individual Culpability and Justice

Move Beyond Weight-Based Drug Sentencing:
Drug quantity alone should not serve as the basis for federal sentencing. The Commission should adopt a more nuanced framework that accounts for a person's role, intent, and level of participation. This reform would mitigate excessive sentences for low-level participants and better reflect true culpability.

Reform Conspiracy and Mens Rea Standards:
Current conspiracy laws often impose punishment based on the conduct of others, regardless of whether a defendant was aware of the broader scope. We recommend reforms that require a showing of

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knowledge, intent, and individual conduct before enhancements or penalties are applied—consistent with the Commission's goal of fairness and proportionality in sentencing.

2. Address Substance Use with Public Health Strategies, Not Punitive Measures

Dream.Org's *Public Health is Public Safety* campaign reflects our belief that addiction should be treated through compassionate, community-based health strategies. The Commission should guide the justice system away from punitive responses and toward evidence-based approaches that:

- Expand access to treatment and diversion
- Promote harm reduction and MAT in federal custody
- Eliminate crack vs. powder cocaine disparities
- Reduce reliance on purity or weight thresholds as proxies for culpability

3. Support Full and Equitable Implementation of the First Step Act

We are deeply concerned that systemic barriers—including chronic staffing shortages at the Bureau of Prisons (BOP)—have impeded the full implementation of the First Step Act (FSA). These staffing shortfalls prevent incarcerated individuals from enrolling in or completing evidence-based programming that earns time credits toward earlier release.

As we shared in Congressional testimony, the BOP is estimated to be more than 4,000–6,000 officers short, according to both internal sources and the Office of Inspector General. While in its FY2026 budget proposal to Congress the Department of Justice proposed restoring retention bonuses, the decision to cancel retention bonuses has only worsened this crisis, contributing to increased staff attrition, mandatory overtime, and use of non-custody staff—including medical professionals—to fill security posts. The ripple effect of this staffing crisis has directly undermined the expansion of First Step Act programs, including job training, education, and reentry support.

Compounding this issue is the frequent and extended use of institutional lockdowns, often imposed not due to violence or security threats, but due to insufficient staffing. In some facilities, people have been locked down for weeks or months at a time with little or no access to FSA programs. This includes the cancellation of classes, treatment groups, and even phone and visitation access to loved ones.

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Lockdowns and staffing shortages are not just operational problems—they are human rights concerns that delay release for people who have earned it and erode the trust and hope that the First Step Act promised. These practices stand in direct opposition to the Commission's mission to ensure that correctional systems are fulfilling the purposes of sentencing—particularly rehabilitation and successful reintegration.

We urge the Commission to use its authority to:

- Gather and publish data on staffing levels, lockdown usage, and the resulting delays in earned-time credit programming
- Recommend systemic reforms that incentivize staff recruitment and retention
- Monitor whether correctional institutions are meeting their statutory obligations under the FSA

4. Reform Supervised Release to Advance Reintegration

The supervised release system should be reoriented to support reintegration, reduce recidivism, and build public safety. We recommend:

- Presumptive early termination for individuals in sustained compliance
- Tailored supervision conditions based on individualized assessments
- Elimination of barriers such as excessive fines or blanket work restrictions
- Evidence-based supervision practices, including incentivized compliance and peer support models
- Equity audits to detect and correct racial or socioeconomic disparities

5. Improve Oversight of the Bureau of Prisons

As highlighted in our testimony, the BOP's challenges extend beyond staffing and include:

- Crumbling infrastructure across its 122 institutions, with more than $3 billion in backlogged repairs

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- Delayed release due to underused halfway house beds, even when people are statutorily eligible under the First Step Act
- Persistent culture issues, as demonstrated by the closure of FCI Dublin and ongoing litigation over abuse and misconduct

The Commission must assess whether federal correctional systems are functioning in alignment with sentencing goals and recommend corrective action where they are not. We strongly urge the Commission to hold hearings, publish findings, and offer congressional recommendations to address these structural deficiencies.

6. Engage the Public and Center Directly Impacted Voices

The Commission's work must be more visible and accessible to the people it affects. We recommend:

- National town halls and listening sessions
- Direct engagement with formerly incarcerated leaders
- Public education campaigns on the role and scope of the Commission

Dream.Org stands ready to assist with these efforts and offers the expertise of our Federal Advisory Council, composed of directly impacted individuals with deep experience in both policy and lived incarceration.

Our recommendations reflect and reinforce the U.S. Sentencing Commission's mission to ensure that sentencing and correctional policies are fair, just, and effective. Staffing shortages, misaligned sentencing structures, and lack of transparency in implementation of the First Step Act undermine that mission. The Commission's leadership in addressing these systemic challenges is more critical than ever.

We appreciate the opportunity to share these comments and look forward to continued partnership in building a smaller, smarter, and more humane justice system.

With gratitude,
Kandia N. Milton
Government Affairs Director

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Equal Human Rights Org Jul. 16, 2025

Topics:

1. Sentencing Options (Chapter Five)

2. Drug Offenses (§2D1.1)

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

7. Federal Bureau of Prisons Issues

8. Legislation

Comments:

Public Comment on Federal Sentencing and Drug Policy Reform
Submitted in reference to Sections (1), (2), (4), (5), (6), and (7)
Submitted by: Equal Human Rights (Texas based)
Equal Human Rights is a federally and state-recognized nonprofit organization committed to advocating for justice, equity, and the protection of human rights for all individuals. Our mission is rooted in advancing fair treatment under the law and challenging systemic injustices that disproportionately affect vulnerable communities. Equal Human Rights has received multiple recognitions at the congressional, state, and municipal levels—including commendations from the City of Houston—for its ongoing work in promoting civil liberties and legal reform. Our board of directors is composed of highly respected professionals with extensive expertise in human rights, public policy, legal advocacy, and community engagement
Background and Context
The United States continues to grapple with the consequences of outdated and punitive drug laws. Despite evolving scientific, medical, and sociocultural understanding of substance use and its place in society, federal sentencing guidelines remain overly harsh and disproportionately impact low-income and marginalized communities.
While the public narrative around drug use often centers on harm and criminality, the reality is more complex. Many individuals use substances without causing harm to others, and in many cases, such use is tied to cultural, spiritual, or even therapeutic practices. Numerous substances—such as cannabis, psilocybin mushrooms, and MDMA—are now being reconsidered or legalized in jurisdictions across the United States and globally due to their demonstrated medical and psychological benefits.

Historically, substances now criminalized were once legal and regulated. For example, heroin was sold commercially by major retailers, and MDMA was used in therapeutic contexts before being criminalized. Today, drugs such as morphine, Adderall, and Xanax remain legal despite their high potential for misuse, raising important questions about consistency, public health, and economic incentives underlying federal drug scheduling and enforcement.

We believe it is time for a more rational and just approach to drug sentencing—one that distinguishes between actual harm and moral panic, between addiction and economic desperation, and between public health and profit motives.

Key Concerns

1. Disproportionate Sentencing and Drug Classification

o Current sentencing guidelines often do not reflect the actual harm posed by the substance. Methamphetamine, for instance, continues to be sentenced under outdated classification, despite growing arguments that it should be considered a Schedule III substance based on its pharmacological profile.

o Federal sentencing fails to distinguish between pure drug content and total weight, unfairly penalizing individuals for the weight of benign binding agents in "mixed substance" cases.

2. Economic Disparities and Sentencing Outcomes

o Individuals from impoverished backgrounds often serve disproportionately long sentences for acting as low-level couriers or minor participants in drug distribution networks.

o Wealthier defendants frequently receive more favorable outcomes through access to private counsel, treatment options, and plea bargaining leverage.

3. Comparative Justice

o It is concerning that nonviolent drug offenses often result in longer sentences than violent crimes involving weapons or physical harm.

o First-time, nonviolent drug offenders may receive up to 10 years in prison, while individuals convicted of assault or firearms charges often serve less.

4. Rehabilitation and Community Reintegration

o Incarcerated individuals who demonstrate genuine behavioral change and complete rehabilitative programs (e.g., RDAP) should receive greater sentence reductions and expanded access to home confinement.

o Monthly evaluations and a stronger emphasis on restorative justice and reentry support can significantly reduce recidivism and support stronger communities.

5. Legal Process and Oversight

o Concerns continue to emerge regarding due process violations during federal investigations and arrests, particularly during raids.

o Inconsistent adherence to constitutional protections, alleged prosecutorial overreach, and misclassification of evidence undermine public trust in the legal system.

Policy Recommendations and Requests

In the spirit of fairness, public safety, and fiscal responsibility, we respectfully recommend the following reforms:

1. Reevaluate Drug Scheduling

o Reschedule methamphetamine based on scientific evidence.

o Review and update classifications of other controlled substances to reflect current medical

research and public health data.
2. Refine Sentencing Guidelines
o Reduce sentencing levels for methamphetamine-related charges.
o Provide a minimum 4-point reduction for first-time nonviolent offenders.
o Weigh only the illegal substance in "mixed substance" cases, excluding legal binders and packaging.
3. Enhance Rehabilitation and Reentry Opportunities
o Expand access to RDAP and other educational/workforce programs.
o Offer sentence reductions and increased eligibility for home confinement based on program participation and behavioral improvement.
o Consider a "6 months on/6 months off" sentence structure for nonviolent offenders with demonstrated rehabilitation.
4. Increase Use of Bond and Probation
o Expand bond eligibility for nonviolent federal defendants.
o Allow judges more discretion to offer probation, fines, or alternative sentencing in lieu of incarceration.
5. Support Economic Reintegration
o Encourage employment during home confinement, possibly through federally supported community jobs.
o Provide incentives for participation in programs that promote public service and skill development.
6. Ensure Transparency and Due Process
o Mandate thorough, independent reviews of allegations of misconduct during arrests and raids.
o Require courts to assess the accuracy and legality of evidence collection and testimony in drug-related cases.
7. Expand First Step Act Eligibility
o Broaden eligibility criteria for relief under the First Step Act.
o Allow retroactive application of sentencing changes to those unjustly sentenced under outdated statutes.
Conclusion
We call on policymakers, the U.S. Sentencing Commission, and the Department of Justice to lead with integrity and compassion. Drug policy must be rooted in public health, evidence-based science, and restorative justice—not retribution or revenue. By revisiting the laws that govern sentencing and classification, we can build a more just, equitable, and safe society for all.
We thank you for your time and attention to these pressing matters and remain open to dialogue and collaboration for meaningful reform.
Respectfully submitted,
www.equalhumanrights.org
Connect@equalhumanrights.org

Submitted on: July 16, 2025

July 18, 2025

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 Proposed Priorities for the 2025-2026 Amendment Cycle

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates state and federal sentencing and corrections reform. FAMM has been an active advocate before the U. S. Sentencing Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines touch countless individuals and families, including many of our members – over 75,000 people nationwide. We welcome the opportunity to comment on the priorities that the Commission has proposed and have also proposed a priority of our own that we hope will be considered.

A. Proposed Priority (1): Considering alternative sentences

As an organization dedicated to uplifting the voices of individuals uniquely harmed by incarceration, as well as advocating for more humane prison conditions, FAMM applauds the commission for considering ways to facilitate alternative sentences under the Guidelines. A carceral setting is all too often the default, but it need not be that way.

It is well documented that increased incarceration does not lead to increased public safety. In fact, as one study pointed out, it can achieve the opposite result:

> The impact of incarceration on crime is limited and has been diminishing for several years. Increased incarceration has no effect on violent crime and may actually lead to higher crime rates when incarceration is concentrated in certain communities. Instead, policymakers can reduce crime without continuing to increase the social, cultural, and political costs of mass incarceration by investing in more effective and efficient crime reduction strategies that seek to engage the community, provide needed services to

> those who are criminally involved, and begin to address the underlying causes of crime.[1]

Considering ways that the Commission can expand alternatives to incarceration is consistent with the statutory framework. The Commission's aim is to construct guidelines that meet the purposes of sentencing, but that does not mean that the guidelines should default to incarceration when it is not necessary. This is particularly true for individuals whose criminal behavior is driven by substance abuse and mental health conditions who are primarily in need of treatment. To this point, the Commission "shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment."[2]

In certain cases, non-custodial sentences are consistent with public safety, consistent with the SRA, and will help alleviate the problems that BOP is currently facing. One recent example that the Commission can draw from at the federal level is CARES Act Home Confinement. During the COVID-19 pandemic, Congress authorized the BOP to transfer certain groups of people from a custodial setting to home confinement.[3] This included individuals with lengthy remaining terms. All in, BOP placed 13,204 people on home confinement.[4] As Senator Booker said, this program "effectively serve[d] as a large-scale experiment to test the feasibility of the expanded use of noncustodial sentences."[5]

The CARES Act home confinement experiment proved incredibly successful. Among the over 13,000 people transferred to home confinement only 22 people, or 0.17% were rearrested for a new offense[6] – an extraordinarily low recidivism rate. And most of those new offenses were drug-related or minor in nature.[7] Moreover, 96% of the population transferred to home confinement fully complied with the terms of their confinement.[8] Finally, home confinement

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[1] Don Stemen, *The Prison Paradox: More Incarceration Will Not Make us Safer*, Vera Institute (July 2017), https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-prison-paradox_02.pdf?dm=1568745526.
[2] 28 U.S.C. § 994(k).
[3] *See* Senator Cory A. Booker, *CARES Act Home Confinement, Three Years Later* at 4 (June 2023), https://www.booker.senate.gov/imo/media/doc/cares_act_home_confinement_policy_brief1.pdf. Eligibility criteria for CARES Act Home Confinement included people who were medically vulnerable, had a viable release plan, were in a low or minimum security facility, had no violence or disciplinary infractions within a year, and completed a substantial amount of their custodial sentence. Certain offenses were excluded. *Id.*
[4] *Id.* at 2.
[5] *Id.*
[6] *Id.* at 4.
[7] *Id.*
[8] *Id.* at 5.; *see also* Carrie Johnson, *Released During COVID, Some People are Sent Back to Prison With Little or No Warning*, NPR (Aug. 22, 2022) (demonstrating the minor violations that

saves taxpayer dollars. Federal incarceration in 2020 cost roughly $120 per day, whereas home confinement cost roughly $55 per day.[9] And of course, there is the benefit that is much harder to quantify, but equally meaningful: the reunification of family and friends, of facilitating reintegration into society, of giving hope to people who have had little reason to hope. Home confinement is a proven alternative to custodial incarceration and the Commission should consider ways to expand its use.

B. Proposed Priority (2): Examining the penalty structure for drug offenses including methamphetamine, fentanyl, and crack cocaine

For over three decades, FAMM has been steadfast in its commitment to advocating reduced drug sentences. Drug sentences are too often overly punitive and fail to meet the purposes of punishment. Our members and our own staff have experienced the devastating consequences of these steep sentences.[10] Currently, none are as harsh as the sentences imposed for methamphetamine.[11]

Methamphetamine sentences

In 2022 alone, people sentenced for methamphetamine offenses "received longer sentences than individuals sentenced for trafficking fentanyl, heroin, or cocaine."[12] People sentenced for trafficking methamphetamine received an average sentence of 91 months, or 7.5 years.

Meth sentences remain extraordinarily high even though the Commission's own research demonstrates that these sentences are based on a flawed methodology.[13] Current methamphetamine sentences are driven largely by drug purity. At one point in time, meth that was highly pure signaled a close nexus to the source of the meth.[14] As such, a defendant closer to the source likely had a greater involvement in the scheme, justifying a lengthier punishment.[15] However, meth production practices have changed over time. Now, nearly all the meth in the U.S. drug market is highly pure, and so it no longer serves as a signal of heightened culpability.[16] Judges across the country have recognized that the meth guidelines are not a reliable marker for

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would result in re-incarceration, often with little or no due process), https://www.npr.org/2022/08/22/1118132380/released-during-covid-some-people-are-sent-back-to-prison-with-little-or-no-warn.

[9] *Supra* n.4 at 6.

[10] Letter from Mary Price and Shanna Rifkin to Judge Reeves, Re: Proposed Amendments for the 2025 Amendment Cycle at 1-2, 5-6 (March 3, 2025).

[11] *See* USSC, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice* System at 2 (June 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

[12] *Id.*

[13] *See id.* at 2-3.

[14] *Id.* at 3.

[15] *Id.* at 10-12.

[16] *Id.*

determining meth sentences. In FY 2024, only 25.9% of sentences for methamphetamine were within the guideline range.[17]

In the most recent amendment cycle, the Commission proposed amendments that would ameliorate the disparity in meth sentences.[18] FAMM supported one option in the proposed amendment that would reduce the methamphetamine calculation to the levels used for a mixture of methamphetamine. This would be consistent with the Commission's research and more consistent with sentencing practices across the country. But for whatever reason, the Commission did not finalize this proposal. Instead, it added a base offense level cap for individuals who qualify for the mitigating role adjustment. Interestingly, an overwhelming number of people whose sentences would be reduced if that amendment were made retroactive are individuals who were sentenced for methamphetamine offenses.[19] This is likely because a large percentage of individuals sentenced for meth offenses are low-level participants in drug cases, warranting reductions under §2D1.1(a)(g) and §3B1.2, but whose guideline ranges were still extraordinarily high, due to the overly punitive meth guidelines. We urge the Commission to revisit possible amendments that will lower the meth guideline ranges.

Fentanyl and fentanyl analogues

In March of 2025, FAMM submitted a response to the Commission's issue for comment related to fentanyl and fentanyl analogues.[20] FAMM urged the Commission to avoid the trap of fear-based sentencing in response to drug epidemics. We cited to reports documenting the impact that overdose prevention has had on reducing overdose deaths.[21] We steadfastly believe that overdose prevention and intervention strategies are the appropriate way to address substance use disorder. Harsher sentences are not a public health tool and cannot provide the nuanced solutions that public health tools can – in fact, time spent in prison can exacerbate substance use disorder.[22]

Earlier this year, experts felt hopeful after seeing evidence of the first-ever decline in overdose deaths, based on successful public health interventions. However, there are plans to cut funding

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[17] USSC, 2024 Sourcebook of Federal Sentencing Statistics, at 97 Tbl. D-14 (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/2024_Sourcebook.pdf.
[18] Notice of Proposed 2024-2025 Amendments (Jan. 2025), https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2024-2025-amendments-published-january-2025.
[19] USSC, *Retroactivity Impact Analysis of Certain 2025 Amendments* at Tbl. 4, (May 15, 2025), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2025-amendments/2025_Amdts-Retro.pdf.
[20] Letter from Shanna Rifkin to Judge Reeves, Re: Issue for Comment on Fentanyl and Fentanyl Analogues (May 1, 2025).
[21] *Id.* at 4-5.
[22] Nora D. Volkow, *Addiction Should be Treated, not Penalized*, J. of Neuropsychopharmacology (Aug. 2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC8369862/.

to overdose prevention groups.[23] Experts fear that more people may die because of the cuts to life-saving public health tools. And we fear that if deaths begin rising again, the pressure will mount for the Commission to impose harsher opioid sentences. But if anything, the cuts to funding emphasize the importance of the Commission's proposed priority (1) – to consider alternatives to incarceration such as drug courts, so that people with substance use disorder can get the help that they need, and not be subject to unnecessary, and potentially harmful terms of imprisonment.

Crack and powder cocaine

Although not included in the proposed priorities, FAMM urges the Commission to equalize the crack cocaine and powder cocaine weights this amendment cycle. For over 30 years, FAMM has fought to eliminate the crack/powder disparity. The Commission has, "since 1995," taken the position that the crack/powder disparity "significantly undermines the congressional objectives set forth in the [SRA]."[24]

To this end, the Commission has been a driver of change over the years, elevating the harms of this unjust disparity. Last amendment cycle, the Commission requested comments about whether it should reconsider the "different treatment" between crack and powder cocaine.[25] Specifically, it asked "whether to take action in a future amendment cycle."[26] Now is the time to eradicate the crack/powder disparity and deliver on decades of consensus that this disparity is unjust.

C. Proposed Priority (4): Continued examination of the career offender guidelines

FAMM has written numerous comments and responses urging the Commission to amend the career offender guideline.[27] The problems inherent to the career offender guideline are well documented and well known – it perpetuates racially disparate sentencing, is unnecessarily

[23] Brian Mann, *Trump team withholds $140 million budgeted for fentanyl fight* (July 16, 2025), https://www.npr.org/2025/07/16/nx-s1-5468535/fentanyl-trump-addiction-funding; Radheesh Ameresekere, *Proposed Budget Cuts to Narcan Programs Dangerously Misunderstand Public Health Aims*, (July 11, 2025), https://www.healthaffairs.org/content/forefront/proposed-budget-cuts-narcan-programs-dangerously-misunderstand-public-health-aims.
[24] USSC, *Report to Congress: Fair Sentencing Act of 2010*, Executive Summary (August 2015), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf.
[25] USSC, Proposed Amendments at 166 (Jan. 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202501_fr-proposed-amdts.pdf.
[26] *Id.*
[27] *See, e.g.*, Letter from Mary Price and Shanna Rifkin to Judge Reeves at 4-5 (Oct. 17, 2022).

harsh, and often does not capture the true "career criminals."[28] This is especially true for individuals sentenced as career offenders based on drug trafficking offenses only.[29]

In 2024, we were thrilled to see the Commission propose that state controlled substance offenses would no longer count as predicate offenses under the career offender guideline.[30] Ultimately, however, the Commission chose not to advance this amendment. We were disappointed that the Commission was unable to come to a solution that would include that proposal. For the reasons discussed in our response to the proposed amendment in 2024,[31] we believe that eliminating state prior drug offenses from the career offender calculation is a smart first step to addressing the long-recognized problems with the career offender guideline.

D. Proposed Priority (7): Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing

In numerous comments this past amendment cycle, FAMM and others have written extensively about the problems plaguing BOP.[32] These problems include understaffing, overcrowding, inadequate medical care, rampant sexual abuse, and persistent lengthy lockdowns.[33] Some of these identified issues will be addressed by the Federal Prison Oversight Act. Although the Federal Prison Oversight Act was passed by Congress and signed into law, it will not be enacted until it receives appropriations, which underscores the urgent need for multi-agency collaboration and intervention.

The Commission has a uniquely important role to play in solving the problems plaguing the BOP. By statute, the Commission is directed to "take into account the nature and capacity of the penal, correction, and other facilities and services available." Moreover, [t]he sentencing guidelines . . . *shall* be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[34] In short, the Commission is obligated to

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[28] USSC, *Report to Congress: Career Offender Sentencing Enhancements*, at Fig. 9 (2016). https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.
[29] *Id.* at 27. ("The Commission concludes that drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline.").
[30] USSC, Proposed Amendments at 2-3, 4 (Dec. 19, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20241230_rf_proposed.pdf.
[31] Letter from Mary Price and Shanna Rifkin to Judge Reeves (Feb. 3, 2025); *see also* Letter from Federal Public and Community Defenders (Feb. 3, 2025).
[32] *See, e.g.*, Letter from Shanna Rifkin to Judge Reeves (May 1, 2025); Letter from Mary Price and Shanna Rifkin (July 15, 2024).
[33] *See id.*
[34] 28 U.S.C. § 994(g).

consider the capacity of BOP and reduce overcrowding.[35] We know that the federal prisons have well exceeded their capacity. And the Commission's own research has shown that many of the priorities proposed here can help honor the statutory mandate to reduce overcrowding. For example, reducing the meth disparity can lower some of the most lengthy and ubiquitous drug sentences in the federal system. Eliminating state controlled substance offenses from the career offender definition can lower sentences for a group of people the Commission has recognized are over sentenced.[36] And of course, considering whether an individual, and the community, will be better served by a term of probation or alternative to prison can help alleviate the pressure on the BOP. These are common sense policies that the Commission can and should implement.

E. FAMM urges the Commission to amend the "adjudication standard" in sexual abuse cases under USSG §1B1.13(b)(4)

In 2022, FAMM piloted a project to address sexual abuse in custody. We began working with survivors of staff sexual abuse at FCI Dublin, a women's prison in northern California that has since closed because of BOP's inability to protect the women in that facility.[37]

Our work on behalf of survivors began when there was no binding policy statement for reduction in sentence motions. During that time, judges, defense counsel, and prosecutors were able to work together to identify cases of sexual abuse and use the reduction in sentence statute to provide relief for survivors of serious abuse.[38] Together, these actors could determine which cases of abuse presented credible, substantial claims warranting sentence reductions.

We wrote to the Commission in 2022 about the abuse at FCI Dublin, urging the Commission to include sexual abuse as a ground for a reduction in sentence under the new policy statement.[39] We remain grateful that the Commission took this issue seriously and added an enumerated ground for individuals who are survivors of abuse to the reduction in sentence policy statement. Unfortunately, however, the new guideline framework of §1B1.13(b)(4) created a standard that inappropriately excludes cases of abuse that meet the spirit and purpose of provision and has frustrated the cooperative process that developed between the relevant parties. Our continued involvement in these cases has demonstrated how unique the FCI Dublin situation was and how

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[35] In the most recent hearing on retroactivity, Vice Chair Restrepo asked the witness for the federal defender whether the Commission "can or should consider" the impact that retroactivity has on the BOP and what authority the Commission has to do so. USSC Public Hearing (July 16, 2025) (39:53-40:55), https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-july-16-2025. The statute makes abundantly clear the Commission's *mandate* to consider BOP when fashioning sentences. 28 U.S.C. § 994(g).

[36] *See supra* n.29.

[37] *See Powerless in Prison*, KTVU INVESTIGATION, https://www.ktvu.com/news/powerless-in-prison-the-shutdown-of-fci-dublin; Piper French, *What's More Extraordinary and Compelling*, Bolts Magazine (June 27, 2024), https://boltsmag.org/federal-prison-sexual-abuse-survivors-pursue-compassionate-release/.

[38] *See, e.g.*, *United States v. Chavira*, No. 3:18-cr-4216-CAB, 2023 WL 3612389, at *1 (S.D. Cal. May 23, 2023).

[39] Letter from Mary Price and Shanna Rifkin to Judge Reeves (Sept. 2022).

the current standard under USSG §1B1.13(b)(4) has failed to encompass many incidents of sexual abuse in BOP. To be clear, the cases from FCI Dublin, where there was a large scale "rape club" documented nationally in the news,[40] were not unique because of the sexual abuse, but because the notoriety led to widespread advocacy, support, and documentation of the experiences of the women being abused. In northern California, the prosecutors were swift to bring perpetrators to justice, and the judges understood the evils of sexual abuse in custody. Dublin is not the only facility where sexual abuse has occurred – in fact, in women's prisons, sexual abuse is shockingly prevalent.[41] But sexual abuse is often not documented by supportive advocates, is perpetrated by guards who know how to avoid detection, involves conduct that falls short of genital penetration but is equally degrading, and is presented before judges and prosecutors who may not be as sensitive to the nuances of sexual abuse cases.[42] The victim of abuse standard should relieve survivors in these types of circumstances, but the standard often falls short.

We shared our concerns about the burden of proof in 2024[43], and we reiterate them now: "[t]he substantiation standard erroneously prioritizes government gatekeeping – by requiring convictions, or liability determinations – over the nature of the abuse or the experience of the survivors."[44] Moreover, tethering the legitimacy of someone's sexual abuse claim to government action (or inaction) undermines the First Step Act, which was designed to remove the government from the driver's seat of a RIS motion.[45] In addition, the "sexual act" requirement often excludes abusive behavior that is equally degrading, violent, and offensive to people in custody as sexual acts under 18 U.S.C. § 2246(2).

Although nearly every case we have worked on in this area is filed under seal, we can say from our experience that several cases involving survivors of abuse have been channeled through the

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[40] *Supra* n.37.

[41] *See Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Subcomm. On Investigations, Comm. On Homeland Sec. & Gov't Affs.,* 117th Cong. 26 (2022) (observing that sexual abuse has occurred in 2/3 of the facilities that house women), 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.

[42] Compare the sentencing of former Warden Ray Garcia, *United States v. Garcia*, 21-cr-00429 (ND Cal. March 22, 2023) ("I sentence hundreds of people; I expect they should be able to expect that when they go into federal custody, they wont be abused . . . you abused them. And there was no one watching you); *with* the sentencing of Lenton Jerome Hatten, *United States v. Hatten*, 4:23-cr-18 (ND Fla, Aug. 24, 2023) (The court characterized the documented abuse of a person in custody as a domestic dispute that "two lovers might have outside with no connection to any correctional system - - couples argue." The Assistant U.S. Attorney did not dispute or object to that characterization).

[43] Letter from Mary Price and Shanna Rifkin to Judge Reeves (July 15, 2024).

[44] *Id.*

[45] *United States v. Almontes*, 2020 WL 1812713, No. 3:05-cr-58. at *2 (D. Ct. April 9, 2020) (acknowledging that the government "fell short in its gatekeeper role" for reduction in sentences and that "Congress passed the FSA against that backdrop").

(b)(5) catchall, as opposed to the (b)(4) victim of abuse standard. This is in large part because of how burdensome the standard is, and how inapplicable it is to most instances of sexual violence in custody.[46]

In one case that fell short of (b)(4) conduct, the court nevertheless found that the survivor had experienced sexual abuse that was "humiliating, degrading, and brutally offensive [] on an ongoing basis by a federal correctional officer who was entrusted with her care."[47] But because the sexual act was not penetrative, the judge used the catchall in (b)(5) to justify the reduction in sentence.[48] This example raises two problems with the (b)(4) standard – first, what good is a victim of abuse provision if it does not capture cases that federal judges recognize involve sexual abuse? And second, a broader catchall with a very narrow sexual abuse standard may suffice for judges comfortable invoking (b)(5), but what about judges who require more guidance? An overly narrow (b)(4) likely creates disparate outcomes across the country. Most importantly, survivors may look at the (b)(4) standard and conclude they will never qualify, even as they continue to endure the harm inflicted upon them. This chilling effect deters survivors from seeking relief, knowing the extraordinary hurdles and risks they face in coming forward.

For these reasons, we urge the Commission to revise §1B1.13(b)(4) to (1) reduce the evidentiary burden so that credible survivor testimony, patterns of staff misconduct, and/or corroborating evidence can suffice; and (2) broaden the covered conduct beyond "sexual act."

F. Conclusion

FAMM thanks the Commission for considering our input on issues that are critical to federal sentencing.

Sincerely,



Shanna Rifkin
General Counsel

[46] Importantly, this should not signal that (b)(4) and (b)(5) are working as they should. How a case is characterized matters - both for the integrity of the guidelines and also for the vindication of the victim. The Commission should ensure that (b)(4) is workable for people in custody who are victims of abuse.
[47] *See* ECF No. 1185 Order Granting in Part Def.'s Mot. For Modification of Sentence, *United States v. Smith*, 5:10-cr-00009-VAP-12 (C.D. Cal, Feb. 12, 2024).
[48] *Id.*

Submitted via the Commission's Public Comment Submission Portal

July 18, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attn: Public Affairs-Priorities Comment

Re: United States Sentencing Commission Request for Public Comment, Proposed Priorities for Amendment Cycle (DAC2210-40)

Dear Commission:

Pursuant to the call for public comment on the United States Sentencing Commission's (USSC's) Proposed 2025-2026 Priorities, the Federal Confinement Accountability Project (FCAP), provides the following comment:

FCAP Background and Interest

FCAP is a research platform that examines incarceration by federal agencies, including the Federal Bureau of Prisons (BOP). FCAP recognizes the unique power the BOP and other federal carceral agencies have vis-à-vis their state counterparts. For instance, the BOP's jurisdiction transcends state borders,[1] and the laws regulating its authority differ from those that govern state officials' conduct.[2] Moreover, federal carceral policies and practices remain notoriously opaque,[3] even as the federal judiciary has, in the not-so-distant past, turned to federal prison

[1] Danielle C. Jefferis & Nicole B. Godfrey, Chapman v. Bureau of Prisons: *Stopping the Venue Merry-Go-Round*, 96 DENV. L. REV. F. 9, 9 (2018) (describing the BOP's "unilateral power" to transfer the people it incarcerates "to prisons across federal judicial districts").

[2] Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case For Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 974 (2017) (describing the "inconsistent remedial consequences for violations of [constitutional] rights on state actors vis-à-vis federal actors" and explaining that such inconsistency "ignores constitutional history and design meant to protect individuals from rights infringement by the *federal* government").

[3] Jon Schuppe, *Brooklyn Jail Without Heat Reflects Wider Neglect in Federal Prisons, Critics Warn*, NBC NEWS (Feb. 5, 2019, 1:36 PM), https://bit.ly/4m5JrjO (quoting David Fathi, director of the American Civil Liberties Union's National Prison Project, as saying that the BOP "operates in the shadows with very little public oversight").

officials as sources of expertise to assist in crafting policies and remedies for constitutional violations in state and local prisons.[4]

Given the BOP's history of both avoiding accountability while simultaneously holding itself out as a model of corrections for the country, FCAP aims to (1) examine the laws governing federal carceral agencies, both as written and as applied, to better understand the ways in which carceral power is exercised, regulated, and restrained at the federal level; (2) analyze the relationships among federal carceral agencies, the federal judiciary, and Congress; and (3) hold federal carceral agencies accountable for adhering to constitutional, statutory, and regulatory standards governing confinement to ensure people in the BOP's custody are safe and treated humanely.

To that end, FCAP welcomes the opportunity to comment on the USSC's Proposed 2025-26 Priorities. In particular, FCAP encourages the USSC to focus its work on Priority (7): *Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendation or amendments*.

Comment in Support of Priority (7)

FCAP supports USSC's proposed priority to focus on the BOP's operations. A close look at the operations of the BOP in recent years demonstrates an agency besieged by scandal after scandal; indeed, the BOP in recent years seems unwilling or unable to meet the basic human needs of its confined population, as described in more detail below.

This comment proceeds in three parts. First, it outlines the BOP's troubled operations and demonstrates how those operations undermine the purposes of sentencing. Second, it suggests steps the USSC might take to increase oversight and accountability of the beleaguered federal prison system. Finally, it focuses on two specific populations that FCAP submits merit attention in the guidelines governing compassionate release: people confined in the federal supermax prison known as the U.S. Penitentiary-Administrative Maximum facility (ADX) and people with intellectual disabilities.

[4] *See, e.g.*, Holt v. Sarver, 300 F. Supp. 835 (E.D. Ark. 1969); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967) (turning to the former director of the BOP as an "eminent penologist" with expertise to help remedy unconstitutional conditions in the Arkansas prison system). *See also* John W. Roberts, *The Federal Bureau of Prisons: Its Mission, Its History, and Its Partnership with Probation and Pretrial Services*, 61 FED. PROBATION 53, 54 (1997) (touting the BOP as the "national leader in the field of corrections").

1. *The BOP's Troubled Operations Undermine the Purposes of Sentencing.*

In recent years, the BOP has been plagued by scandal. In 2015, the New York Times Magazine featured an extensive exposé on the dozens of people experiencing acute psychosis, engaging in self-mutilation, and attempting suicide at the United States Penitentiary–Administrative Maximum (ADX) — the BOP's most secure, or "supermax," prison in Florence, Colorado.[5] Another report on the atrocious conditions of the Metropolitan Correctional Center in Manhattan followed in 2018, describing insect and rodent infestations and conditions of extreme isolation.[6] Investigations into conditions at the Federal Correctional Institution–Mendota, near Fresno, California, also began in 2018 with reports of a broken air conditioning system during a brutal heat wave and whistleblower complaints describing toxic mold that led to respiratory illness for people in the prison.[7] In early 2019, during the height of winter, the

[5] Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES MAGAZINE, https://bit.ly/4kRyUaT (Mar. 29, 2015) (recounting the use of "a medieval quartet of restraints, a process known as four-pointing" on people who cut themselves; the punishment of people who slashed their wrists or throats (one of whom, "after slashing his throat with a razor and being rushed to the hospital, was returned to the same cell, given a mop and bucket and ordered to clean up the blood"); the story of a man who "fashioned a tourniquet around the base of his left pinkie, hacked off the top two joints with a Bic razor blade and ate his finger with a bowl of ramen;" and the tale of a man who "cut off both earlobes, chewed off a finger, sliced through his Achilles' tendon, pushed staples into his face and forehead, swallowed a toothbrush and then tried to cut open his abdomen and retrieve it," among others).

[6] Aviva Stahl, *Prisoners Endure a Nightmare 'Gulag' in Lower Manhattan, Hidden in Plain Sight*, GOTHAMIST (June 19, 2018), https://bit.ly/3GVHkzT (recounting instances of extreme brutality, including the cover-up of the murder of a man beaten to death by guards in 2015 and quoting Jeanne Theoharis, a Distinguished Professor of Political Science at Brooklyn College, as follows:

> If I described these conditions to you — filthy, freezing, no natural light, isolation so extreme that you're punished for speaking through the walls, absurd rules like prisoners not getting to see the newspapers unless they're 30 days old, secrecy so deep that people are force-fed and lawyers can be punished for describing the conditions their clients are experiencing — you'd be forgiven for thinking that this was Iran or Russia . . . . But in fact this gulag exists right here in lower Manhattan . . .

[7] Lewis Griswold, *Prison guards say toxic mold is making them sick. Warden says all is OK*, THE FRESNO BEE, (June 6, 2018), https://bit.ly/46dykAz (describing whistleblower complaint filed by guard at FCI-Mendota "alleging toxic mold inside the prison is making some guards sick and putting the rest at risk"); Lauren Weber, *Federal Prison in California Faces Multiple Investigations Over Dangerous Conditions*, HUFFPOST (Oct. 5, 2018), https://bit.ly/4lXtU5f (explaining that air conditioning is "not a matter of comfort or luxury" but "life or death" and detailing the rise in OSHA complaints about mold in prison).

Metropolitan Detention Center (MDC) in Brooklyn experienced a power outage that left more than a thousand people stuck in freezing cells.[8]

In addition to these reports of unhealthy conditions, the BOP and its employees have been found to be both physically abusive of the people incarcerated in federal custody and indifferent to their safety and welfare. For example, the BOP and its employees have been implicated in causing or contributing to the suspicious deaths of several high profile people incarcerated in BOP facilities in recent years.[9] And in 2024, Judge Gonzalez Rogers of the United States District Court for the Northern District of California appointed a special master in *California Coalition for Women Prisoners v. BOP*, finding that the BOP had allowed a culture of sexual assault and retaliation for reporting sexual assault to fester at the Federal Correctional Institution–Dublin in Dublin, California.[10] Moreover, just last month, the Department of Justice's Office of the Inspector General (OIG) issued a Management Advisory Memorandum to the BOP expressing concern that multiple people in BOP custody had been "placed in restraints while confined to a bed or chair for extended periods" while staff had "assaulted or otherwise mistreated" them.[11]

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[8] *See*, *e.g.*, Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and 'Frantic'*, N.Y. TIMES, https://shorturl.at/Gy73d (recounting complaints of a lack of heat, hot water, hot food, and commissary) (Feb. 1, 2019); Nick Pinto, *"'Vicious' and 'Brutal'"—Life Inside a Freezing Federal Prison with No Heat*, THE INTERCEPT, https://shorturl.at/xM6TN (Feb. 2, 2019); Jon Schuppe, *Brooklyn jail without heat reflects wider neglect in federal prisons, critics warn*, NBC NEWS, https://shorturl.at/uvU4W (Feb. 5, 2019).

[9] *See, e.g.*, *Whitey Bulger "predictably" killed in prison, family says in lawsuit*, CBS NEWS, (Nov. 4, 2020) (explaining how family members of James "Whitey" Bulger, Jr. filed a lawsuit against the BOP and its employees, accusing them of failing to protect him from the deadly beating that took his life in 2018 at the United States Penitentiary—Hazelton in West Virginia) https://shorturl.at/kOQDi; Larry Neumeister, *Two BOP workers admit crimes on morning of Epstein's death*, AP (May 25, 2021), https://apnews.com/article/crime-de9a80bc6491b926babaa51b9087e3f3.

[10] *See* California Coalition for Women Prisoners v. U.S. Fed. Bureau of Prisons, Case No. 4:23-cv-04155-YGR, 1st Public Monthly Status Report for Rating Period March 31, 2025-April 30, 2025, Submitted by Wendy Still, Senior Monitor (N.D. Cal. Jun. 30, 2025).

[11] Dep't of Just., Off. of the Insp. Gen., Management Advisory Memo. 25-065, *Notification of Concerns Regarding the Federal Bureau of Prisons' Policies Pertaining to the Use of Restraints on Inmates* (June 2025).

These examples provide just a glimpse into the unsafe, unsanitary, and inhumane conditions of American federal prisons.[12] Yet the BOP operates with little to no external oversight.[13] Ostensibly, OIG exists "to promote integrity, efficiency, and accountability" within the DOJ's departments and subdivisions, including the BOP.[14] But decades upon decades of reports from the OIG about the inadequacies in the provision of medical care have led to little change or better standards of care in federal prisons.[15] So, people incarcerated in federal prisons, like their state counterparts, are often left turning to the federal courts for relief from violations of their rights while incarcerated.

But the federal courts are often incapable or unwilling to provide relief to people incarcerated in federal prisons. The retrenchment of *Bivens* claims[16] means that people in federal prison are often only left with the option of requesting injunctive relief for the violation of their rights, but various machinations of the BOP and its lawyers often leaves incarcerated people without an adjudication on the merits of their claims.[17] Thus, people incarcerated in federal prison and their lawyers are often left with only hope that bringing the conditions in federal prisons to light may lead to change.[18]

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[12] *See* Schuppe, *supra* note 3 (recounting interview with David Fathi, who warned that all of these issues "could be happening more frequently and we're just not hearing about it . . . [The issues at the MDC in Brooklyn] happened in the nation's largest urban area with lots of lawyers going in and out, and had the visibility that other[prisons] don't").

[13] *Id*.

[14] U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., *About the Office*, https://oig.justice.gov/about (last visited Jun 15, 2021).

[15] *See generally* Nicole B. Godfrey, *Decades of Indifference and Failures in Accountability in the Provision of Medical Care in Federal Prisons*, 25 NEV. L.J. 755 (2025) (describing decades of reports from the OIG and other Congressional oversight bodies that led to little changes in the BOP's chronic failures in care).

[16] Danielle C. Jefferis, *RIP Bivens*, 103 NEB. L. REV. 1, 2-3 (2024) (explaining that a "consequence of *Bivens*' demise is that more than 150,000 people who are incarcerated in the custody of the federal government are left with no remedy for many violations of their constitutionally protected rights").

[17] *See, e.g.,* Godfrey, *supra* note 2, at 39-40 (2024) (discussing various maneuvers the BOP made to avoid merits adjudication of claims involving the denial of group prayer); Jefferis & Godfrey, *supra* note 1, at 11-16 (discussing how the BOP has the power to transfer incarcerated plaintiffs from one federal judicial district to another in ways that frustrate or impede judicial review).

[18] *See* Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 460 (2018) (explaining how litigation can provide

Given the above, conditions in BOP prisons undermine the purposes of punishment. Unless the death penalty is at issue or the offense is one that does not require incarceration, people are meant to be sentenced to a term of years.[19] "That term of years is meant to be served in self-contained societies created by the [government]–i.e., prisons. While those sentences do not have to be comfortable, the conditions in which they are served cannot be inhumane nor can they fundamentally alter the punishment meted out by the state."[20] Because conditions in federal prisons are such that they often fail to meet the basic needs of those incarcerated and enhance their punishment, the USSG should rightly prioritize examining whether and how it can account for those conditions in the sentencing guidelines. FCAP offers some suggestions below.

2. *The USSC Should Use Its Powers to Increase Oversight and Accountability of the BOP.*

In recent years, the BOP's mismanagement of its prisons has caught the attention of Congress.[21] In 2022, a group of senators led by Jon Ossoff, the Democratic Senator from Georgia, and Mike Braun, the Republican Senator from Indiana, launched the bipartisan Senate Prison Policy Working Group, which is tasked with investigating conditions and promoting transparency in the BOP.[22] In 2023, the group introduced the Federal Prison Oversight Act

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"increased visibility into a prison where the conditions and their effects on its inhabitants are shrouded in secrecy").

[19] *Glossary of Federal Sentencing–Related Terms*, U.S. Sent'g Comm'n (Sept. 2021).

[20] Nicole B. Godfrey, *Creating Cautionary Tales: Institutional, Judicial, and Societal Indifference to the Lives of Incarcerated Individuals*, 74 ARK. L. REV. 365, 415-16 (2021) (citing Rhodes v. Chapman, 452 U.S. 337, 349 (1981); Farmer v. Brennan, 511 U.S. 825, 832 (1994)).

[21] *See, e.g.*, Glenn Thrush, *Prison Personnel Describe Horrific Conditions, and Cover-Up, at Atlanta Prison*, N.Y. TIMES (Jul. 26, 2022), available at https://www.nytimes.com/2022/07/26/us/politics/atlanta-federal-prisons-corruption.html (describing a Senate subcommittee hearing and investigation into horrific conditions at the federal penitentiary in Atlanta); *see also* "Federal Corrections in Focus: Oversight of the Federal Bureau of Prisons," Statement of Rep. Jeff Van Drew, House Judiciary Subcommittee on Crime and Federal Government Surveillance & the Subcommittee on Oversight, 119th Congress (May 6, 2025) ("the Bureau of Prisons is not a system in need of some minor improvements, it is in need of a true reckoning"), available at https://judiciary.house.gov/committee-activity/hearings/federal-corrections-focus-oversight-bureau-prisons-0.

[22] *Sens. Ossoff, Braun Launch Bipartisan Working Group to Examine U.S. Prison Conditions, Promote Transparency*, Press Release, JON OSSOFF, U.S. SENATOR FOR GEORGIA (Feb. 17, 2022), available at ossoff.senate.gov/press-releases/sens-ossoff-braun-launch-bipartisan-working-group-to-examine-u-s-prison-conditions-promote-transparency/.

(FPOA), meant to provide "new, independent oversight of the" BOP.[23] Given the BOP's recent history, oversight of the beleaguered agency is critical, but it is unclear whether, when, and if the necessary funding will be provided to operationalize this law.[24]

Therefore, the USSC should use its powers to (1) require the BOP to provide the USSC with periodic reports on conditions in federal prisons, including information related to deaths in prison, the provision of medical care, and uses of force, including the use of restraints; (2) provide an assessment of the effectiveness of incarceration in federal prisons for the Senate Prison Policy Working Group; (3) hold hearings on conditions in BOP facilities to assess whether conditions in certain facilities or across the BOP are such that people confined in those facilities are being punished in a manner beyond the scope contemplated by the Sentencing Guidelines, and (4) request regular inspections of federal prisons to corroborate the agency's reports and collect additional information concerning conditions of confinement.[25]

As Professor Lindsey Webb has explained:

> [D]espite our system's dependence on incarceration, the conditions of confinement imposed — which can include violence from staff and other prisoners, lack of medical and mental health care, contaminated food or water, and a host of other ills — are largely invisible. Even when judges sentence individuals to a term of incarceration, they generally do not mention the conditions the convicted person is likely to encounter in prison or jail, the role that those conditions will play in furthering the purported aims of punishment, or the racial implications of differential exposure to harsh conditions of confinement.[26]

The Sentencing Guidelines can change this conclusion by encouraging federal judges to observe, consider, and account for the conditions of confinement in BOP prisons that a person

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[23] *Sens. Ossoff, Braun, Durbin Introduce Bipartisan Legislation to Overhaul Federal Prison Oversight*, Press Release, JON OSSOFF, U.S. SENATOR FOR GEORGIA (Apr. 26, 2023), available at ossoff.senate.gov/pres-releases/sens-ossoff-braun-durbin-introduce-bipartisan-legislation-to-overhaul-federal-prison-oversight.

[24] Walter Pavlo, *Congress Set to Have New Oversight over the Federal Bureau of Prisons*, FORBES (July 11, 2024, 5:00 PM), https://www.forbes.com/sites/walterpavlo/2024/07/11/congress-set-to-have-new-oversight-over-the-federal-bureau-of-prisons.

[25] *See generally* 28 U.S.C. § 995.

[26] Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 126-27 (2018).

will face when applying the guidelines. Given the current state of federal prisons, it is important that judges think critically about the exact punishment being meted out at sentencing to ensure that the punishment is no more severe than necessary.

3. The USSC Should Amend the Sentencing Guidelines to Account for the Heightened Punishment Experienced by Two Specific Populations in BOP Custody.

FCAP applauds the USSC for its recent amendments to the Sentencing Guidelines that allow people who have been sexually abused in prison by employees of the BOP to seek early release through a motion for a sentence reduction.[27] FCAP encourages the USSC to consider amending the guidelines in a similar manner to acknowledge and account for the other ways a person's punishment may be aggravated by conditions within BOP facilities. While there are myriad populations who may be deserving of such consideration, FCAP addresses two here: those confined to ADX for significant portions of their sentence and those who have an intellectual disability and may struggle to access programming in BOP facilities.

a. Confinement at ADX Exacerbates the Punishment of People Confined in Federal Prisons.

BOP officials have proudly described the ADX, the federal supermax prison in Florence, Colorado, as "a clean version of hell."[28] Critics, including international human rights organizations, call it a "black site[] on American soil."[29] Either way, the punishment meted out to people incarcerated at ADX is largely invisible.[30] To put it more concretely:

> The men imprisoned there [in ADX] are in solitary confinement, locked in cement and steel cells behind double doors for twenty-three hours a day. Most have been there for years, some for decades. Because BOP policy prohibits visits from anyone a prisoner did not know prior to incarceration, the ADX visiting room is frequently

[27] U.S. Sent'g Guidelines Manual § 1B1.13(b)(4) (U.S. Sent'g Comm'n 2023). While FCAP applauds these amendments, it also agrees with Professor Meredith Esser that the independent adjudication requirement of this sentencing relief "raises a host of problems." *See* Meredith B. Esser, *Who Bears the Burden When Prison Guards Rape?*, 109 IOWA L. REV. 188, 190 (2024).

[28] *60 Minutes: Supermax: A Clean Version of Hell* (CBS television broadcast Oct. 14, 2007), https://www.cbsnews.com/news/supermax-a-clean-version-of-hell.

[29] *Amnesty International Challenges America's Most Restrictive Prison*, NBC News (July 6, 2014, 2:46 am), https://www.nbcnews.com/news/us-news/amnesty-international-challenges-americas-most-restrictive-prison-n156586.

[30] Rovner, *supra* note 18, at 459.

> empty; some men have not received visits for years. Even when visits do occur — or the two fifteen-minute phone calls per month — ADX prisoners are limited in what they are allowed to say about the prison and their conditions. Mail, too, is censored. And the prison routinely refuses access to reporters and human rights bodies, including the U.N. Special Rapporteur on Torture, who has made repeated requests to the U.S. government for permission to visit, all of which were denied.[31]

Survivors of ADX have described their experience there in stark terms, laying bare the anguish caused by extreme isolation.[32] One person explained:

> For 28 years, I have been entombed in concrete and steel, and I have not enjoyed anything even remotely resembling open space. I am barely even allowed outside. When outside, I am surrounded by 20' high walls that allow me to view no more than a sliver of sky and nothing of the surrounding landscape. The mental anguish of 28 years of solitary confinement is worse than any physical pain I have ever suffered or imagined.[33]

Another person who spent eight years at ADX described the withdrawal he experienced without meaningful contact with other human beings: "I became increasingly withdrawn to the point where the only people I interacted with were the television characters on 'Seinfeld.' I watched 'Seinfeld' four times a day. 'Jerry,' 'Elaine,' 'George,' and 'Kramer' became my best friends. I felt like part of their family. They were the only friends I had."[34] Even after his release, the effects of the prolonged isolation of ADX continued to impact him. Being around people was overwhelming, so much so that he couldn't function in society; he missed Jerry, Elaine, George, and Kramer.[35]

It should be no surprise that people confined to ADX experience significant harm. As early as the 1700s, experts argued that solitary confinement should only be imposed for limited duration (no longer than 20-30 days) because longer periods amounted to "more than human

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[31] *Id*.

[32] *Id*. at 468-70.

[33] Declaration of Thomas Silverstein ¶¶ 240-41, Silverstein v. Fed. Bureau of Prisons, 2011 WL4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 320.

[34] Declaration of Anthony McBayne at 2, Silverstein v. Fed. Bureau of Prisons, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (No. 07-CV-02471), ECF No. 319-65.

[35] *Id*. at 3-4.

nature could bear."[36] And "[o]ver the past fifty years, research, descriptive studies, and first-person accounts have demonstrated–almost without exception–that solitary confinement harms people."[37] As the oft-quoted Charles Dickens found, "the slow and daily tampering with the mysteries of the brain" is "immeasurably worse than any torture of the body."[38] And ADX, by design, is meant to inflict this type of harm on all confined there; it is "not designed for humanity . . .it's far much worse than death."[39]

Given this, it is clear that people confined to ADX suffer a punishment much harsher than those who spend their sentence confined in other prisons. Indeed, research on solitary confinement shows that confinement in extreme isolation like that at ADX fails to "reflect. . . advancement in the knowledge of human behavior." 28 U.S.C. § 991(b)(1)(c). Nor is it an effective correctional practice for people who are going to be reentering society, given the lasting harms that solitary confinement inflicts.[40] 28 U.S.C. § 991(b)(2). Therefore, FCAP suggests that the USSC should amend the sentencing guidelines to instruct judges to pay special attention to requests for a sentence reduction from people who have been confined at ADX, given the extraordinarily harsh nature of confinement at that prison and the additional punishment it inflicts.

b. The BOP's Lack of Programming, Accommodations, and Support for People with Intellectual Disability Undermines the Punishment.

The Supreme Court has long recognized that people with intellectual disability are among the least culpable in criminal cases.[41] "Yet, the current efforts in the United States to reform the criminal legal system and undo mass incarceration have largely ignored individuals with

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[36] *See generally* David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 557 (2019).

[37] Nicole B. Godfrey & Laura L. Rovner, *COVID-19 in American Prisons: Solitary Confinement is Not the Solution*, 2 ARIZ. ST. L.J. ONLINE 127, 131 (2020); *see also* Laura Rovner, *Solitary Confinement, Human Dignity, and the Eighth Amendment*, 111 VA. L. REV. 671, 680-87, 730-47 (2025).

[38] Charles Dickens, American Notes 44 (NY, D. Appleton & Co. 1868) (1842).

[39] Ray Sanchez & Alexandra Field, *What's Life Like in Supermax Prison?*, CNN (June 25, 2015, 8:21 PM), https://www.cnn.com/2015/06/25/us/dzhokhar-tsarnaev-supermax-prison/index.html.

[40] Rovner, *Solitary Confinement*, *supra* note 37, at 686.

[41] *See, e.g.,* Penry v. Lynaugh, 492 U.S. 302 (1989) (recognizing intellectual disability should be a mitigating factor in sentencing).

intellectual disability."[42] Indeed, despite the Supreme Court's recognition of the lesser culpability of people with intellectual disability, courts often disregard the disability as "irrelevant to the sentencing decision or an aggravating factor."[43]

People with intellectual disabilities in prison face an uphill battle when attempting to demonstrate that they have been rehabilitated.[44] In particular, Professor Katie Kronick has identified three barriers people with intellectual disability face in prison: "(1) less access to programming; (2) more disciplinary infractions; and (3) risk-assessment tools that do not account for unique characteristics of individuals with intellectual disability."[45] Indeed, the BOP has only *one* program specific for people with intellectual disability, the SKILLS program, which is only offered in one low and one medium security institution.[46] Given that the Bureau of Justice Statistics estimates that at least 550,000 people with intellectual disabilities are incarcerated,[47] this one program cannot be sufficient for the number of people in BOP custody with some form of intellectual disability. Thus, people with intellectual disability in BOP custody are stuck attempting to muddle through regular programming, often without the accommodations necessary to succeed.[48] Additionally, when they incur disciplinary infractions as a result of symptoms associated with their intellectual disability, they can be sanctioned with the loss of good conduct time, thus increasing their punishment.

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[42] Katie Kronick, *Left Behind, Again: Intellectual Disability and the Resentencing Movement*, 101 N.C. L. Rev. 959, 962 (2023).

[43] *Id*. at 965.

[44] *Id*. at 1009.

[45] *Id*.

[46] U.S. Dep't of Justice, Fed. Bureau of Prisons, Reentry Services Division, First Step Act: Approved Programs Guide, at 29 (SKILLS Program, Residential) (Oct. 2020). Because the two locations where the BOP offers the SKILLS program are low and medium security facilities, people with intellectual disability whom the BOP has housed in high security facilities have no access to this program.

[47] H. Barry Waldman, Steven P. Perlman, Rick Rader, & Allen Wong, *Incarceration of People with Disabilities–Especially Those with Intellectual Disabilities*, Helen: The Journal of Human Exceptionality (Oct. 3, 2024), available at https://helenjournal.org/top-stories/incarceration-of-people-with-disabilities-especially-those-with-intellectual-disabilities.

[48] Kronick, *supra* note 42, at 1010-12 (explaining that people with intellectual disability often don't have the level of education necessary to complete "some of the most highly valued programs to which judges often cite in finding that a person is no longer a danger" and that "prisons are not designed to be places of accommodation where individuals can thrive–they are intended to be places of order where the system running smoothly is a top priority").

Take, for example, the experience of Michael Bacote, Jr. For years, Mr. Bacote languished at ADX without access to necessary medications or the Step-Down program that would have allowed him to progress out of ADX's brutal isolation. In large part, Mr. Bacote was stuck at ADX because the BOP refused to acknowledge his intellectual disability — a disability that the government itself acknowledged in his 2006 criminal prosecution. Only after years of civil litigation — nearly a decade from the start of his first case — did Mr. Bacote secure his release from ADX, only to find himself once again languishing in the Secure Mental Health Step-Down Unit at USP-Allenwood, without access to programming because of the BOP's steadfast failure to accommodate his disability. Without accommodations and the programming that comes with them, Mr. Bacote remains classified high security and is unable to access the SKILLS program or any other program that would meet him where he is with his disability. This leave Mr. Bacote without access to the benefits of second-look laws because of the heavy emphasis put on participation in and completion of prison programming.

Therefore, FCAP suggests that the USSC consider amending the sentencing guidelines to expressly contemplate how a person's intellectual disability should be considered when evaluating a request for resentencing, particularly where the movant lacks sufficient programming through no fault of their own–i.e., where they could not access programming above their intellectual abilities and where the BOP provided no accommodations to enable them to participate in and benefit from such programming.[49]

Conclusion

FCAP welcomes the opportunity to comment on Priority (7) because the BOP lacks oversight and accountability, which impacts the way people sentenced to BOP custody experience their punishment.. We encourage the USSC to use what powers it has to help check this powerful government agency, guide the federal courts' understanding of BOP conditions, and evaluate whether and how those conditions impact the punishment being meted out by the federal courts. Because many people incarcerated in federal prison lack civil remedies for unconstitutional prison conditions, compassionate release may be the only relief available for intolerable conditions, so we applaud continued revisions to the guidelines governing motions for a sentence reduction.

Thank you for the opportunity to submit this comment. Please do not hesitate to reach out to us should you have questions or need further information.

[49] *See* 28 U.S.C. § 994(t). The USSC also may consider recommending that the BOP provide more access to programming like the SKILLS program for people of all security levels, *see* 28 U.S.C. § 994(g), or that the BOP should account for a person's intellectual disability in the classification process, *see* 28 U.S.C. § 994(q).

FEDERAL CONFINEMENT ACCOUNTABILITY PROJECT

Sincerely,

FEDERAL CONFINEMENT ACCOUNTABILITY PROJECT

s/ Nicole B. Godfrey
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Schmid Prof. of Excellence
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s/ Laura L. Rovner
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fwd.us

July 18, 2025

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 Priorities for 2025-2026 Amendment Cycle

Dear Judge Reeves:

FWD.us is a bipartisan advocacy 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 advancing safe and effective criminal justice reforms, eliminating racial disparities, and expanding opportunities for people and families impacted by the criminal justice system.

We write today in response to the call for public comments on the United States Sentencing Commission's ("Commission") proposed priorities for the 2025-2026 amendment cycle. We propose the following priorities for the Commission:

- Expand presumptive non-prison sentences to reduce recidivism and unnecessary taxpayer spending.
- Revise the penalty structure for drug trafficking offenses to better align with data and reduce lengthy sentences by 1) eliminating the methamphetamine purity distinction; 2) reducing the highest base offense level in the Drug Quantity Table to no higher than 30; and 3) delinking drug weights from sentencing.
- Revise the economic crimes guideline to better reflect culpability.
- Reject expanding Section 4B1.1 of the Guidelines and pursue evidence-based revisions by 1) rejecting changes to the categorical approach that expand application of §4B1.1; 2) excluding state-level drug convictions from §4B1.1 determinations; and 3) only considering prior convictions that resulted in prison time of at least five years.
- Revise the Acceptance of Responsibility guideline to address the trial penalty.
- Exclude youthful convictions from criminal history calculations.

We hope that these recommendations will assist the Commission in its mission to advance data-driven changes to federal sentencing and safely reduce the federal prison population.

I. Expand Presumptive Non-Prison Sentences to Reduce Recidivism and Unnecessary Taxpayer Spending

As of July 2025, there were over 155,000 people in the federal prison system[1] and while this marks a decline from the peak population in 2013,[2] America's high incarceration rate remains a crisis in the federal system. One in eight people in prison in the U.S. is in federal custody, making it the largest prison system in the country.[3] The sprawling federal prison system is a result of failed "tough on crime" policies that research has repeatedly shown to be ineffective, wasteful, and harmful to families and communities. We urge the Commission to revise the Guidelines to authorize and encourage federal courts to impose non-prison sentences more frequently, thus expanding alternatives to incarceration and reducing reliance on imprisonment.

A growing body of evidence has called into question the public safety rationale for incarceration, particularly its deterrent effects. Extensive research has shown that prison and jail sentences do not reduce the chances that someone will break the law in the future. A meta-analysis of 116 studies that compared people who were sentenced to jail or prison with people who received noncustodial sanctions like probation found that incarceration either has no impact on a person's likelihood of committing a crime in the future or increases it.[4] In other words, a prison sentence may make future crime more likely, rather than less.

Despite clear evidence of its ineffectiveness, incarceration remains the default punishment in the federal system. Ninety-one percent of people sentenced in FY24 received a prison-only or prison and alternatives sentence, compared to just 7% that received a probation-only sentence and another 1.2% that received a combination of probation and alternatives.[5] This overreliance on prison comes at an enormous cost. Taxpayers spent $8.6 billion on the federal prison system in FY24, which accounted for 23% of the entire Department of Justice spending.[6] This taxpayer spending, however, only scratches the surface. Our latest research found that incarceration costs families across the country nearly $350 billion in lost earnings for incarcerated people and their children, as well as out-of-pocket spending each year.[7] On average, people with an immediate family member in prison

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[1] Federal Bureau of Prisons, "Population Statistics," Accessed July 2025, https://www.bop.gov/about/statistics/population_statistics.jsp
[2] Federal Bureau of Prisons, "Past Inmate Population Totals," Accessed July 2025, https://www.bop.gov/about/statistics/population_statistics.jsp
[3] Bureau of Justice Statistics, "Prisons Report Series Preliminary Data Release 2023," December 2024, https://bjs.ojp.gov/preliminary-data-release-prisons-2023
[4] Damon M. Petrich, et al., "Custodial Sanctions and Reoffending: A Meta-Analytic Review," Crime and Justice, 2021, https://www.journals.uchicago.edu/doi/abs/10.1086/715100?journalCode=cj;
[5] U.S. Sentencing Commission [hereinafter "U.S.S.C."], "Interactive Data Analyzer: Sentence Type for Sentenced Individuals," https://ida.ussc.gov/analytics/saw.dll?Dashboard
[6] Congressional Research Service, " Overview of FY2025 Appropriations for Commerce, Justice, Science, and Related Agencies (CJS)," p.12, August 2024, https://www.congress.gov/crs_external_products/R/PDF/R48134/R48134.2.pdf
[7] Brian Elderbroom, Peter Mayer, and Felicity Rose, "We Can't Afford It: Mass Incarceration and the Family Tax," FWD.us, June 2025, https://www.wecantaffordit.us/

spend nearly $4,200 every year to maintain contact and cover their loved one's basic needs behind bars.[8] This scale of incarceration is unsustainable, and it's not making our communities any safer.

We urge the Commission to examine ways to change the Guidelines to authorize and encourage federal courts to impose non-prison sentences in more cases. For instance, many state sentencing systems incorporate presumptive non-incarceration sentences into their guidelines. For example, probation is the presumptive sentence in Kansas for non-drug offenses classified at severity levels six through ten and for drug offenses at severity level five, depending on the number of prior convictions.[9] Examples of non-drug offenses that would fall in these severity levels and therefore eligible for presumptive probation are aggravated assault, arson, and theft of property valued between $25,000 and $100,000.[10] Kansas judges also have discretion to impose probation in place of incarceration for people with certain prior convictions who are convicted of severity level five non-drug offenses and level four drug offenses.[11] Examples of these non-drug offenses include theft of property valued over $100,000, robbery, and criminal discharge of a firearm that results in bodily harm.[12]

In South Dakota, a judge is required to impose probation for most Class 5 and Class 6 felonies unless they make a written finding of a significant threat to public safety.[13] This policy was enacted in 2013 along with felony reclassification, and an evaluation of both found that they reduced prison admissions and averted prison population growth two years following implementation. In 2015, 69% of felony convictions in South Dakota were subject to presumptive probation.[14] Similarly, North Dakota requires presumptive probation for most Class C felony and Class A misdemeanor offenses, unless judges find certain aggravating circumstances present to justify a prison sentence.[15] Oregon is another state where probation is the default punishment for many offenses.[16]

The examples above demonstrate that states across the country have been effectively encouraging and requiring the use of non-prison sentences, and as a result, safely reducing their spending and reliance on incarceration. We urge the Commission to follow this proven path and look for ways to authorize and spur federal judges to hand down non-prison sentences in more cases, and safely reduce reliance on incarceration at the federal level.

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[8] *Id.*
[9] Kansas Sentencing Commission, "2024 Sentencing Ranges," Accessed July 7 2025, https://www.sentencing.ks.gov/home/showpublisheddocument/1046/638665684444770000
[10] Kansas Sentencing Commission, "2024 Crime Listings," Accessed July 7 2025, https://www.sentencing.ks.gov/resources/desk-reference-manuals/-folder-126#docfold_14_91_151_126
[11] Kansas Sentencing Commission, supra note 9.
[12] Kansas Sentencing Commission, supra note 10.
[13] Brian Elderbroom et al., "Assessing the Impact of South Dakota's Sentencing Reforms," Urban Inssititue, p.5-6, April 2016, https://www.urban.org/sites/default/files/publication/80106/2000762-Assessing-the-Impact-of-South-Dakota's-Sentencing-Reforms-Justice-Reinvestment-Initiative.pdf
[14] *Id.*
[15] N.D. Cent. Code, §12.1-32-07.4
[16] Or. Admin. Code §213-005-0007

II. Revise the Penalty Structure for Drug Trafficking Offenses to Better Align with Data and Reduce Lengthy Sentences that Don't Advance Public Safety

Today, 43% of people in federal prison are there primarily for a drug offense.[17] More than 26,000 people in federal custody are serving sentences of over 20 years.[18] These lengthy sentences do not effectively deter drug trafficking; instead, they lead to family separation, destabilize communities, and drain public funds. Since the federal government launched the War on Drugs over 50 years ago, attempting to curb drug use and sales through lengthy prison sentences, a growing body of research has made clear that harsh penalties don't deter drug use or trade or make our communities safer.[19] Incarceration is particularly ineffective for drug sale offenses because of the impact of the "replacement effect." When a person gets incarcerated for selling drugs, someone else will replace them to supply the same drugs to the community as long as demand remains unchanged.[20]

Based on this growing body of research, both Congress and the Commission have taken important steps in the last 15 years to reexamine federal drug sentencing. However, more changes are critically needed to continue to address the lasting and disparate harm caused by failed mass incarceration policies and align federal drug sentencing with current research and data.

We urge the Commission to safely reduce disproportionately long drug sentences and continue the work of moving the Guidelines toward a more evidence-based approach to drug sentencing. Specifically, we urge the Commission to eliminate the unnecessary methamphetamine distinction, reduce the highest base offense level in the drug quantity table, and delink drug weight from sentencing. These proposed recommendations will promote evidence-based sentencing decisions that will reduce the federal prison population without compromising public safety.

A. Eliminate the Methamphetamine Purity Distinction

Consistent with our prior comments to the Commission, we once again urge the Commission to eliminate the unnecessary purity distinction in the guidelines for methamphetamine offenses to reflect current knowledge and data.

Under current practice, the Guidelines differentiate methamphetamine offenses based on the purity of the drug, assigning higher base offense levels for pure methamphetamine ("meth actual") and meth ice (a form of methamphetamine that is at least 80% pure) than methamphetamine mixture. The weight of methamphetamine mixture that determines the base offense level under the

[17] Federal Bureau of Prisons, Population Statistics, Accessed July 2025, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp
[18] FWD.us and NAACP, "The Federal Prison Population Is at an Inflection Point" p.2, October 2024, https://www.fwd.us/wp-content/uploads/2024/09/FWD-NAACP-Federal-Prison-Fact-Sheet.pdf
[19] The Pew Charitable Trusts, "More Imprisonment Does Not Reduce State Drug Problems," March 2018, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems
[20] Mark A.R. Kleiman, "Toward (More Nearly) Optimal Sentencing for Drug Offenders," Criminology & Public Policy, March 2006, https://doi.org/10.1111/j.1745-9133.2004.tb00051.x

guidelines is ten times the quantity of meth actual or meth ice because the latter forms of the substance are considered to be more pure. When the penalty disparity for methamphetamine offenses was first established in 1988,[21] trafficking a highly pure form of the drug was presumed to be an indicator of having higher involvement in the drug distribution chain. However, in the last two decades, purity has proven to be a weak marker of culpability. From 2011 to 2019, the average purity of methamphetamine seized and tested by the Drug Enforcement Agency has consistently been over 90%.[22] The Commission's study of people sentenced for trafficking methamphetamine in FY 2022 has also found no statistically significant difference in the purity of the drug and the person's role in the offense – the purity level was similar among people who were at the top of the drug distribution chain and people who had a very limited and low-level function in the chain.[23] As the data shows, purity is no longer an indication of increased involvement or culpability and therefore should not be used to significantly increase a person's base offense level and corresponding sentence.

Assigning higher base offense levels in the Guidelines for meth actual and meth ice results in disproportionately harsh sentences that do not advance public safety. For example, people who are sentenced for trafficking meth ice receive sentences that are on average 20 months longer than people sentenced for trafficking methamphetamine mixture.[24] These lengthy sentences also stand out from the general trend in federal drug sentencing. In FY 2022, the average imposed sentence for methamphetamine offenses was 30 months longer than the average for all other drug trafficking offenses.[25] The purity distinction is likely driving the sentencing disparity between methamphetamine offenses and other drug offenses since people receive much longer sentences for trafficking meth ice than for methamphetamine mixture. Longer sentences for methamphetamine offenses do not deter drug use or sale, but instead add years to people's sentences at a significant cost to taxpayers without improving public safety. As we know, incarceration is one of the most expensive and least effective public safety strategies.

B. Reduce the Highest Base Offense Level in the Drug Quantity Table

We also urge the Commission to reduce the highest base offense level in the Drug Quantity Table to no higher than 30 (as proposed in Option 3 of Subpart 1 of Part A of the 2025 Drug Offenses Amendment), to reflect both current practice and the research on the ineffectiveness of lengthy sentences.

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[21] U.S.S.C., "Methamphetamine Final Report," p.8, November 1999, https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf
[22] U.S.S.C., "Methamphetamine Trafficking Offenses In The Federal Criminal Justice System," p. 9, June 2024, https://www.ussc.gov/research/research-reports/methamphetamine-trafficking-offenses-federal-criminal-justice-system
[23] *Id.,* p. 39
[24] *Id.,* p. 50
[25] *Id.,* p. 45

The Commission's data shows that judges are already imposing sentences below the guidelines in most drug trafficking cases, especially in the highest base offense levels.[26] For example, in FY23, only 13% of people assigned to base offense level 38, 16% at level 36, and 21% at level 34 were sentenced within the guideline range.[27] In contrast, judges consistently imposed sentences below the guideline range for more than 40% of the individuals at base offense levels 18 through 38.[28] At some base offense levels, nearly half of the individuals received sentences below the guideline range.[29] This is further evidence that all drug sentences in the guidelines are too excessive.

The current guidelines fail to produce sentences that accurately reflect a person's role, making them an ineffective tool for judges. The sentencing trends cited above suggest that the guidelines, particularly at the higher offense levels, are frequently viewed by judges as excessively harsh or otherwise inappropriate, leading to a widespread pattern of downward departures. Lowering the highest base offense level in §2D1.1 would help address this by codifying current departures to ensure consistency in application and lowering some of the longest sentences in the guidelines.

Additionally, many of the Commission's prior amendments demonstrate that base offense levels can be reduced safely. For instance, in 2014, the Commission voted unanimously to reduce the applicable sentencing guideline range for most federal drug trafficking offenses by two base levels across all drug types. The Drugs Minus Two Amendment was subsequently applied retroactively. The Commission found no statistically significant difference in the recidivism rates of people who were released an estimated average of 37 months early through the retroactive application of the Amendment (27.9%) and people who served their full sentences and were released before the amendment (30.5%).[30] Similarly, when the Commission lowered base offense levels for crack offenses prospectively and retroactively, the Commission found that the recidivism rate for people who received an average retroactive sentence reduction of approximately 20% was similar to the rate for people who had been released prior to the adoption of the Crack Minus Two Amendment.[31]

C. Delink Drug Weights from Sentencing

We urge the Commission to revise the Guidelines to delink drug weight from sentencing because drug quantity does not correlate with role or culpability. The assumption that greater drug quantity indicates greater culpability and therefore warrants harsher sentences has resulted in

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[26] U.S.S.C., "Proposed Amendments on Drug Offenses Public Data Briefing," p.6, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] U.S.S.C., "Retroactivity & Recidivism: The Drugs Minus Two Amendment," p.6, July 2020, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.
[31] U.S.S.C., "Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment," p. 3, May 2014, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf

disproportionately long sentences that do not make communities any safer. This problematic framework has faced criticism from a range of stakeholders across the ideological spectrum, including from FAMM, Due Process Institute, and Right on Crime.[32]

Congress established the framework of linking drug quantity with perceived culpability during the War on Drugs era with the Anti-Drug Abuse Act of 1986,[33] and the Commission adopted this framework by using drug weight to determine the base offense level in the Guidelines.[34] The Commission's own prior study has since shown drug quantity to be a poor indicator of culpability. In 2010, using a sample of drug cases from FY 2009, the Commission conducted a special coding analysis to assess the role performed by people convicted of drug offenses. This study determined that the weight of drugs was not closely connected to a person's role in the drug offense.[35] When the Commission analyzed the median base offense level by role for the five major drug types, it concluded that, "there was not a strong correlation between base offense level and level of the [person's] function in the offense."[36] Despite Congress's intention to identify and harshly punish people higher in the drug trafficking chain by using drug quantity to determine sentences, this approach has instead resulted in people at all levels of the drug chain facing disproportionately long sentences that are often unrelated to their role in the offense.

Furthermore, as noted in the previous section, the Commission's data shows that judges frequently deviate from the guideline recommendations in drug trafficking cases.[37] This suggests that drug quantity does not accurately reflect the true nature of a person's culpability in a drug offense and that judges find it essential to consider the individual circumstances of each case. Relying on drug quantity leads to disproportionate and inconsistent sentencing and does not prioritize public safety. The current approach also ignores the overwhelming research demonstrating that long sentences do not advance public safety or deter drug sales.

We recommend the Commission advance evidence-based drug sentencing policies that accurately assess a person's role and the harms caused, while also addressing the root causes of drug trafficking offenses. For instance, studies have highlighted that most people engaging in drug sales

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[32] U.S.S.C., "2024-2025 Amendment Cycle Public Comment on Proposed Priorities," p.341-342, 435-438 https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=339

[33] U.S.S.C., "2011 Report To The Congress: Mandatory Minimum Penalties In The Federal Criminal Justice System," Chapter Two, p. 24, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf

[34] U.S.S.C., Amendment 782, Reason for Amendment (eff. Nov. 1, 2014), https://www.ussc.gov/guidelines/amendment/782#:~:text=Reason%20for%20Amendment%3A%20This%20amendment,Quantity%20Table%20in%20%C2%A72D1.

[35] U.S.S.C., "2011 Report To The Congress: Mandatory Minimum Penalties In The Federal Criminal Justice System," Chapter Eight, p. 168, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf

[36] *Id.*

[37] U.S.S.C., *Supra* note 26

rarely make substantial earnings and estimate that 67-80% of people sell drugs to supplement their low-paying jobs, underscoring the connection between poverty, economic conditions, and the drug market.[38] In this case, expanding economic opportunities and addressing people's material needs would be far more effective at preventing people from engaging in drug sales than imprisonment.

III. Revise Economic Crimes Guideline to Better Reflect Culpability

We urge the Commission to revise the §2B1.1 guideline, moving away from reliance on intended loss to allow for a more individualized evaluation of the offense and the actual circumstances involved.

The economic crime guideline, §2B1.1, has long been criticized by stakeholders for its reliance on monetary loss as the measure of the seriousness of the offense and culpability. This flawed framework assumes that the amount involved in a fraud or theft offense reflects the harm caused and the culpability of the individual. However, this approach, similar to the drug guideline, is problematic and produces excessive sentences that aren't reflective of culpability and do not advance public safety. Among the chief problems of the §2B1.1 guideline is its use of "intended loss," that is, losses that never materialized, in its calculation of loss and thereby the recommended sentence. This not only misrepresents the nature of the offense but also significantly and unnecessarily increases the recommended guideline range.

As the Commission noted in its 2012 report, the average sentence imposed in fraud cases has steadily diverged from the average guideline minimum over the years, "demonstrat[ing] that the influence of the guidelines has declined in fraud offenses."[39] In FY24, the average guideline minimum was 31 months, while the average sentence imposed was 21 months.[40] That same year, 56% of theft, property destruction, and fraud sentences were below the guideline range.[41] This growing disconnect between what the §2B1.1 guideline recommends and what judges actually impose suggests that the guideline is not a useful tool for judges because they see it as excessive and not reflective of individual circumstances that are not reflected by solely relying on the dollar amount of the loss.

We urge the Commission to revise the §2B1.1 guideline to ensure consistent sentencing in economic crimes and lower sentencing ranges to be more in line with evidence-based practices.

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[38] The Sentencing Project, "The Economics of Drug Selling: A Review of the Research," p.3, April 2003, https://static.prisonpolicy.org/scans/sp/5049.pdf

[39] U.S.S.C., " 2012 Report to the Congress: Continuing Impact of United States v. Booker on Federal Sentencing, Part C: Analysis of Fraud Offenses," p.11, December 2012, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C10_Fraud_Offenses.pdf

[40] U.S.S.C., "QuickFacts: Theft, Property Destruction & Fraud," https://www.ussc.gov/research/quick-facts/theft-property-destruction-fraud

[41] *Id.*

IV. Reject Expanding Section 4B1.1 of the Guidelines and Pursue Evidence-based Revisions

Section 4B1.1[42] of the 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. This guideline has been a major driver of excessively long federal prison sentences and has contributed to arbitrary outcomes and stark racial disparities.

Data shows that §4B1.1 leads to disproportionately long and racially disparate federal sentences, undermining its effectiveness as a tool for judges. According to the Commission's data on FY24 cases, the average sentence for people sentenced under §4B1.1 was 154 months and 59% of people sentenced under §4B1.1 were Black.[43] In the plurality of cases (40.6%), the application of the §4B1.1 enhancement led to an increase in both the person's offense level from an average of 25 to an average of 31 and criminal history category from an average of IV to an average of VI, which increases the recommended sentencing range from 84-105 months to 188-235 months.[44] These added years that the guidelines recommend fly in the face of the growing body of research over the last 20 years that has made clear the minimal benefits of increased sentence lengths and incarceration generally are far outweighed by the harms to individuals, communities, and public safety as a whole.[45]

Judges have responded to the excessive guideline recommendations by increasingly imposing below-guideline sentences. In FY24, 81% of individuals sentenced under §4B1.1 received a sentence below the recommended guideline range.[46] Courts often impose below-guideline sentences at the request of the government,[47] further evidence that §4B1.1 is widely viewed as excessive.

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[42] Section 4B1.1 is commonly referred to as the "career offender" enhancement. Formerly incarcerated people and advocates, however, 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." *See* FWD.us, "People First: The Use and Impact of Criminal Justice Labels in Media Coverage," June 2021, https://www.fwd.us/criminal-justice/people-first/

[43] U.S.S.C., "QuickFacts: Career Offenders," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY24.pdf

[44] *Id.*; USSG Ch. 5 Pt. A https://www.ussc.gov/guidelines/2024-guidelines-manual/annotated-2024-chapter-5

[45] Laura Bennett and Felicity Rose, "Deterrence and Incapacitation: A Quick Review of the Research," Center for Just Journalism and FWD.us, https://justjournalism.org/page/deterrence-and-incapacitation-a-quick-review-of-the-research; Roger Pryzybylski, et al., "The Impact of Long Sentences on Public Safety: A Complex Relationship," November 2022, https://councilоncj.org/wp-content/uploads/2024/05/Impact-of-Long-Sentences-on-Public-Safety.pdf

[46] U.S.S.C., *Supra* note 43.

[47] U.S.S.C., "Report To The Congress: Career Offender Sentencing Enhancements," p.7, August 2016, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf

As we have highlighted, Section 4B1.1 is a source of excessive federal sentences that do not advance public safety, and we commend the Commission for its careful examination of this guideline as it evaluates possible revisions. We urge that any revisions to this guideline be data-driven and focused on safely reducing our reliance on over-incarceration. Specifically:

- We strongly oppose replacing the categorical approach with broader criteria that would expand the application of §4B1.1. Changes that expand the reach of §4B1.1 risk worsening existing injustices and sweeping more individuals into disproportionately long prison terms that do not advance public safety.
- We recommend amendments that would narrow the types of state convictions that trigger an enhancement under §4B1.1.

Overall, we urge the Commission to pursue evidence-based revisions to §4B1.1 that promote fairness, reduce racial disparities, and reflect current research demonstrating that excessively long sentences don't improve public safety.

A. Reject Changes to the Categorical Approach that Expand Application of §4B1.1

We urge the Commission to reject any revisions that would replace the current categorical approach used to determine whether a prior conviction qualifies as a controlled substance offense or crime of violence for purposes of imposing a sentence enhancement under § 4B1.1. As we've stated in prior comments, the categorical approach acts as an important limit on the reach of the already-problematic §4B1.1 enhancement by curbing the number of state convictions that may be considered under §4B1.2.

The Commission should reject any amendments that would instruct judges to look beyond the statutory elements of the state conviction and consider the facts and circumstances of the underlying conviction. Doing so would have the potential to sweep in many more state convictions as predicate offenses for the §4B1.1 enhancement. We caution against alternative approaches, such as an "actual conduct" approach that would lead to complicated and fact-intensive "mini-trials" in each §4B1.1 sentencing. This would create a significant risk of inconsistent outcomes across federal courts and likely worsen sentencing disparities. Given the already-reduced influence of the §4B1.1 enhancement among judges and prosecutors, 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.

Further, according to a 2016 report by the Commission, while people sentenced under §4B1.1 represented only 3.4% of the people sentenced in FY 2014, they represented 11.4% of the Bureau of Prisons population that year.[48] These figures show that even a relatively small increase in the number of people subject to §4B1.1 could result in hundreds of people, overwhelmingly people of

[48] *Id.,* p. 24

color and those charged with drug trafficking offenses, seeing their guidelines range more than double without any public safety benefit.

B. Exclude State-Level Drug Convictions from §4B1.1 Determinations

We urge the Commission to revisit its proposed amendment in the 2024-2025 cycle to exclude state-level drug convictions from the definition of "controlled substance offense" for purposes of imposing a §4B1.1 enhancement.

State drug convictions are a principal driver of lengthy sentences under §4B1.1. For example, the Commission's data shows that 1,354 individuals were sentenced under §4B1.1 in FY22, and the vast majority (962) had a prior state drug conviction.[49] Considering state-level drug convictions is particularly problematic because state drug law varies widely from jurisdiction to jurisdiction. Conduct that may result in a non-criminal disposition and no incarceration in one state may lead to a felony conviction and prison time in another. For instance, a charge of simple possession of a controlled substance in Oklahoma is a misdemeanor, but a felony in Alabama.[50] The inconsistency across jurisdictions makes considering state-level drug convictions unhelpful to federal courts when considering the significance of a person's prior convictions during sentencing.

Considering state drug convictions also perpetuates sentencing disparities in the federal system and reinforces the disproportionate burden America's incarceration crisis places on communities of color, and Black people in particular. Despite making up about 14% of the population, 32% of state prison populations and 27% of people in state prisons for drug offenses are Black, despite long-standing evidence that white people use drugs at the same rate as Black people.[51] By relying so heavily on state drug convictions for the purposes of §4B1.1, the Guidelines reproduce these disparities and exacerbate them. Commission data shows that Black people accounted for 59% of people who received a §4B1.1 sentence enhancement in FY24, despite making up just 25% of people sentenced that year.[52] Excluding state drug convictions from the definition of "controlled substance offense" for purposes of §4B1.1 will go a long way in mitigating the concerns about the inconsistent, arbitrary, and racially disparate way in which the enhancement has been imposed.

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[49] U.S.S.C., "Individuals Sentenced Under §4B1.1 Proposed Amendment Data Background," p.15, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Career-Offender.pdf

[50] 63 O.S. §2-402; AL Code §13A-12-212

[51] U.S. Census Bureau, "Quick Facts: United States," https://www.census.gov/quickfacts/fact/table/US/RHI225223#RHI225223; Bureau of Justice Statistics, "Prisoners in 2022," November 2023, https://bjs.ojp.gov/library/publications/prisoners-2022-statistical-tables; Substance Abuse and Mental Health Services Administration, "Highlights by Race/Ethnicity for the 2022 National Survey on Drug Use and Health," https://www.samhsa.gov/data/sites/default/files/reports/rpt42731/2022-nsduh-race-eth-highlights.pdf

[52] *Supra* note 43; U.S.S.C., "Interactive Data Analyzer: Demographics," https://ida.ussc.gov/analytics/saw.dll?Dashboard

C. Only Consider Prior Convictions that Resulted in Prison Time

We urge the Commission to limit qualifying prior convictions under §4B1.1 to those that resulted in a person serving a prison term of at least five years (that is, Option 3 of the proposed 2024-2025 Amendments to §4B1.1). This limitation is essential to rein in the current overly broad application of the §4B1.1 enhancement and ensure it's narrowly applied, to the extent it should be imposed at all.

States differ in how much a sentence can be shortened through earned time credits and other sentence reduction policies, and as a result, how much time a person actually serves for a particular imposed sentence is not consistent across state-level convictions. Therefore, relying on the sentence imposed, instead of the actual time served, to apply the §4B1.1 enhancement can produce inconsistent outcomes. Adopting minimum requirements for the amount of time served for a prior conviction to be considered under §4B1.1 will mitigate arbitrariness in the application of the enhancement and help ensure that like cases are treated consistently across the federal criminal justice system.

V. Revise the Acceptance of Responsibility Guideline to Address the Trial Penalty

We urge the Commission to amend the Acceptance of Responsibility guideline to grant judges discretion to award the reduction in cases where the defendant exercises their right to trial.

Section 3E1.1 of the Guidelines provides for a two-point reduction in the offense level for acceptance of responsibility and an additional one-point deduction if the individual notifies the government of their intention to plead guilty early enough to allow the government to avoid preparing for trial. The Application Notes further states that, "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."[53] As currently written, this guideline reinforces the trial penalty, which is the significantly longer sentence a person receives for declining a plea deal and exercising their right to a trial, by denying meaningful sentencing relief to those who decide to go to trial.

The trial tax has been widely criticized as unjust for tipping the scales of justice against defendants. A broad coalition, including practitioners, civil rights organizations, and conservative criminal justice reform organizations such as the American Conservative Union and Right on Crime,[54] have

[53] USSG §3E1.1, (Application Note 2), https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?APP_GL_ID=%C2%A73E1.1

[54] Right on Crime, "Letter of Support, Right To Trial Act," July 2024, https://rightoncrime.com/wp-content/uploads/2024/07/ROC-Letter-of-Support_Right-to-Trial-Act.pdf ("The heavy reliance on plea bargains has damaged the legitimacy of our criminal justice system and has led to overly long and disparate sentences for identical conduct, with sentences' lengths being based solely on a case resolving through a trial or plea.")

joined together to raise awareness and advocate for policy changes to eliminate the trial penalty.[55] This partnership among organizations across the political spectrum underscores the bipartisan concern over a system that punishes people who choose to exercise their constitutional right to a trial.

Trials have become a rarity in the federal justice system: 90% of people in the BOP as of March 2025 plead guilty,[56] and only 3% of all individuals sentenced in FY24 went to trial.[57] According to the National Association of Criminal Defense Lawyers' analysis of 2015 federal sentencing data, people who decline a plea and go to trial have an average sentence that is three times longer than a person who accepts a plea.[58] Section 3E1.1 is contributing to this disparity and perpetuates this trial tax by withholding the adjustment from those who exercise their right to a trial.

To address this, we urge the Commission to amend the guideline to allow judges greater discretion to award acceptance of responsibility reduction, even after a trial. This would help ensure that the right to trial is preserved by removing the consequences currently associated with exercising that fundamental right.

VI. Exclude Youthful Convictions from Criminal History Calculations

We urge the Commission to eliminate the assignment of criminal history points for all youth adjudications *and* adult convictions for offenses committed before a person turned 18. We thank the Commission for adopting a revised §5H1.1 (Age Policy Statement) during the 2023-2024 amendment cycle, which rightly addresses the relevance of age in sentencing. We urge the Commission to adopt Option 3 of Part A of the Youthful Individuals Amendment from the 2023-2024 Amendment Cycle, excluding all sentences for offenses committed before age 18 from being considered in the criminal history score calculation. This change reflects an up-to-date understanding of adolescent brain development and acknowledges the vast differences that define our country's patchwork youth justice system and can lead to inconsistent sentencing and racial disparities.

Eliminating youthful offenses from criminal history calculation will help correct decades-long deficiencies in our youth justice system, at both the federal and state level. The Guidelines' current approach to assessing criminal history points for youthful convictions is inconsistent with the science of adolescent brain development and our understanding of young people's neurobiological

[55] End the Trial Penalty, "Who We Are,"https://www.endthetrialpenalty.org/who-we-are
[56]" U.S.S.C., "QuickFacts: Individuals in the Federal Bureau of Prisons,"
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_2025.pdf
[57] U.S.S.C., "Interactive Data Analyzer: Sentencing Outcomes," https://ida.ussc.gov/analytics/saw.dll?Dashboard
[58] 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, p.20, 2018,
https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf

maturity.[59] Assessing any criminal history points for offenses committed before a person reaches neurobiological maturity is fundamentally incompatible with our understanding of young people's diminished capacity.

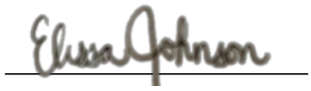
This current approach also perpetuates and exacerbates the arbitrariness and racial disparities that plague state-level youth justice systems.[60] Black youth are, on average, 4.7 times as likely as white youth to be incarcerated in juvenile detention centers across the United States.[61] The Guidelines' current approach to assessing criminal history points for youthful convictions effectively codifies existing disparities, perpetuating and exacerbating them across the federal criminal justice system.

In advancing the Youthful Individuals Amendment in the 2023-2024 amendment cycle, the Commission recognized that the Guidelines' current method of weighting youthful convictions does not further its mission of implementing data-driven sentencing policies. We urge the Commission to complete the work regarding making this critically needed amendment.

VII. Conclusion

We greatly appreciate your consideration of our recommendations regarding the Commission's proposed priorities for the next amendment cycle and stand ready to support the Commission in its efforts to advance data-driven changes to the Guidelines.

Sincerely,



Elissa Johnson
Vice President, Criminal Justice Campaigns
FWD.us

[59] National Institute of Mental Health, "The Teen Brain: 7 Things to Know," https://www.nimh.nih.gov/health/publications/the-teen-brain-7-things-to-know; Mariam Arain, et al., "Maturation of the Adolescent Brain," Neuropsychiatric Disease and Treatment, 2013, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/.
[60] Charles Puzzanchera, Sarah Hockenberry, and Melissa Sickmund,"Youth and the Juvenile Justice System: 2022 National Report," National Center for Juvenile Justice, 2022, https://www.ncjfcj.org/publications/youth-and-the-juvenile-justice-system-2022-national-report/
[61] Joshua Rovner, "Black Disparities in Youth Incarceration," December 2023, Sentencing Project, https://www.sentencingproject.org/fact-sheet/black-disparities-in-youth-incarceration/

July 18, 2025

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 2025-2026 Priorities – Support for Proposed §3E1.1(c)

Dear Judge Reeves:

On behalf of the Leadership Council for the Advancement of Pretrial Services (LCAPS), representing leadership from fifteen separate federal pretrial services districts across the country, we submit this letter in strong support of the proposed addition of subsection (c) to §3E1.1 (Acceptance of Responsibility), as suggested in the recent submission by Jefri Wood dated July 17, 2025.

Mr. Wood's recommendation to recognize a defendant's successful compliance with pretrial release conditions as a basis for an additional one-level reduction under §3E1.1 is well-founded, timely, and consistent with both the intent and structure of the federal sentencing guidelines. It would also advance the Commission's stated goal of more fully accounting for the various ways individuals may demonstrate acceptance of responsibility, while also furthering goals of fairness, transparency, and consistency in federal sentencing.

Support for a New Subsection (c) Under §3E1.1

From the perspective of pretrial services professionals who work closely with defendants during the release period, we see firsthand the significant effort and personal accountability required of individuals to remain compliant while on release. Success during this critical period often reflects a defendant's genuine commitment to rehabilitation, public safety, and respect for the judicial process.

Under the proposed §3E1.1(c), defendants would receive recognition for:

1. Avoiding new criminal conduct;
2. Appearing reliably for court and supervision obligations;
3. Refraining from technical violations that result in revocation; and
4. Going beyond release requirements by actively engaging in employment, education, treatment, or other services that support public safety and court appearance.

These four straightforward criteria represent fundamental benchmarks of responsible behavior and are already key performance indicators in pretrial services practice. Rewarding these behaviors within the Guidelines would: *Encourage sustained compliance during pretrial release; create consistent incentives for defendants across districts; assist judges and pretrial officers in promoting cooperation and accountability; acknowledge the rehabilitative potential of the pretrial phase*.

Reducing Sentencing Disparity

Currently, recognition for pretrial compliance is left largely to judicial discretion and inconsistently applied as a basis for variance. The resulting disparity undermines both the uniformity and perceived fairness of the sentencing process. By codifying pretrial compliance within §3E1.1(c), the Commission would provide clear, objective guidance that minimizes arbitrary outcomes while preserving judicial discretion for those whose conduct goes above and beyond.

Advancing Judicial Efficiency and Systemic Goals

The proposed amendment would also support broader systemic goals, including those articulated in 28 U.S.C. § 994(g), by encouraging behavior that reduces unnecessary revocations and reincarceration during the pretrial phase—contributing to more efficient use of resources and a more effective federal criminal justice system overall.

Conclusion

LCAPS commends the Commission for prioritizing the examination of behavioral incentives within the Guidelines and urges the adoption of a new subsection (c) to §3E1.1 as proposed by Mr. Wood.

Incorporating this adjustment would honor the intent of the Sentencing Reform Act, enhance fairness, reduce disparity, and further incentivize positive, lawful behavior among defendants during a critical period of judicial supervision.

We would be pleased to provide additional insight or data from our districts in support of this proposal. Thank you for your continued commitment to improving the federal sentencing framework.

Respectfully submitted,

The Member Pretrial Services Chiefs,
Leadership Council for the Advancement of Pretrial Services (LCAPS)

On behalf of:

- Chief Zena Munjid Ajou, Southern District of California
- Chief Scott Kowal, Southern District of New York
- Chief Roberto Cordeiro, Eastern District of New York
- Chief Amanda Garcia, Northern District of Illinois
- Chief Beth Wetteland, Eastern District of California
- Chief Gina Faubion, Western District of Texas
- Chief Kimberly Kaleta, Eastern District of Pennsylvania
- Chief Silvio Lugo, Northern District of California
- Chief Suzanne Arwady, Middle District of Florida
- Chief Jonathan Muller, District of New Jersey
- Chief Patricia Trevino, Eastern District of Michigan
- Chief Susan Hendrickson, Eastern District of Missouri
- Chief Denise Jansen, District of Nevada
- Chief Gervacio Lopez, Jr., District of Oregon
- Chief Melanie Furry, Southern District of Ohio

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Loved Ones Coalition

Topics:

2. Drug Offenses (§2D1.1)

Comments:

Public Comment Supporting Reform of Methamphetamine Sentencing under §2D1.1

Dear Commissioners,

I am writing to express strong support for the Commission's consideration of amendments to the Sentencing Guidelines that would eliminate the purity-based sentencing disparity for methamphetamine offenses under §2D1.1.

The current practice of differentiating between "actual" meth and meth mixture based on purity leads to unjust, excessive sentencing. It's outdated, discriminatory, and doesn't match modern realities. No other drug gets treated like this. The result? Harsh time, broken families, and another cycle of injustice.

There is no proven link between higher purity and increased violence or responsibility. These guidelines don't reflect real harm, real roles, or real lives.

It's time to shift toward individualized justice. We need to consider conduct, age, role, and impact—not chemistry lab numbers.

I urge the Commission to remove this disparity, and make any changes retroactive. It's the fair thing to do—and the right thing to do.

Submitted on: July 8, 2025

PUBLIC COMMENT — U.S. SENTENCING COMMISSION

Submitted for 2025–2026 Proposed Priorities (Docket BAC2210-40)

[redacted]

Christine Amador | Founder, Loved Ones Coalition

[redacted]

www.lovedonescoalition.org

SUBJECT: Public Comment Urging Review of § 924(c) Programming Ineligibility — Case Example: Curtis Anthony Cousins (BOP Reg. No. 19451-030)

To the United States Sentencing Commission:

My name is Christine Amador, and I'm the Founder of the Loved Ones Coalition — a national advocacy group that supports the families of federally incarcerated individuals. I'm writing today to urge the Commission to prioritize a long-overdue issue in the 2025–2026 amendment cycle:

CASE IN POINT: CURTIS ANTHONY COUSINS

- Incarcerated for meth possession and a single § 924(c) firearm charge
- No violence, no discharge, no threat, no harm
- Gun was not used in a violent act — it was simply present
- Currently housed at SPC Marion Camp, a low-security facility
- Over six years sober, with 50+ programs completed

- Certified ISSA Personal Trainer, psych unit mentor, and suicide companion
- Has confirmed reentry housing, employment, and career plans in wellness and sports medicine

And yet, Curtis is barred from earning time credits under the First Step Act and denied access to key programs — not because of his behavior, not because of risk — but simply because of a statute code.

WHY THIS MATTERS:

- Curtis is the definition of rehabilitation.
- He poses no public safety risk.
- His continued exclusion from programming undermines the very purpose of the FSA.
- Thousands of others like him — especially Black and brown men — are facing the same systemic punishment for nonviolent conduct.

The current BOP policy treats all 924(c) convictions as “violent,” regardless of actual offense conduct. That means mere firearm possession — even without use, threat, or harm — results in permanent exclusion from incentives meant to encourage rehabilitation.

REQUESTED PRIORITY:

Specifically, I urge the Commission to:

1. Formally review how § 924(c) ineligibility affects rehabilitated individuals like Curtis Cousins.

2. Recommend that BOP and DOJ reclassify possession-only 924(c) cases so they are no longer treated as inherently violent.

3. Support a case-by-case eligibility model that allows for earned time credits and program access when individuals demonstrate rehabilitation and meet public safety criteria.

4. Publish a report or data analysis on the impact of this exclusion policy, including racial disparities, recidivism, and cost to the public.

Curtis is ready to come home. He's done the work. He's changed his life. But the system refuses to even consider his progress — all because of one charge that today would not be treated the same. This is not justice. It's punishment for the sake of punishment.

You have the authority to raise this issue. We are asking you to do it — not just for Curtis, but for the thousands of men like him whose lives are hanging in the balance while the system ignores who they are today.

Respectfully submitted,

Christine Amador

Founder, Loved Ones Coalition

[redacted]

www.lovedonescoalition.org

LDF Legal Defense Fund

Advancing racial justice since 1940

July 18, 2025

Honorable Carlton W. Reeves,
Chair United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-800

Submitted Electronically

RE: Proposed 2025 – 2026 Priority Amendment for review by the U.S. Sentencing Commission: Comment on Career Offender Guideline (Priority #4)

Dear Judge Reeves:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"),[1] we submit this comment in response to Priority #4 of the United States Sentencing Commission's ("the Commission") Proposed 2025-2026 Amendment Cycle Priorities, which focuses on the continued examination of the career offender guideline. We appreciate the Commission's commitment to evaluating the impact, feasibility, and uniformity of alternative methods to the "categorical approach" and considering appropriate amendments. Courts apply a categorical approach (also considered an elemental approach) to determine if an individual's prior convictions qualify them for career offender status, focusing on the statutory elements of an offense rather than the individual's underlying conduct.[2] Unfortunately, the current *U.S. Sentencing Guidelines* ("the Guidelines") can lead to disproportionately severe punishment for Black people due to persistent anti-Black bias in the criminal legal system. It is crucial that any revisions to the Guidelines address how federal sentencing policies have long entrenched the deep-seated issues of racial disparity and contributed to mass incarceration in the U.S., especially for individuals with career offender status.

Founded in 1940 by Thurgood Marshall, LDF is the nation's first and foremost civil rights legal organization. LDF has a long history of challenging the arbitrary and pernicious influence of racial discrimination in the criminal legal system—as both counsel of record and amicus curiae—urging courts to acknowledge and combat convictions and sentences plagued by such discrimination.[3] LDF has focused on reducing the overrepresentation of Black communities

[1] LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.

[2] *See* Mathis v. United States, 579 U.S. 500, 513 (2016) (holding that the "categorical approach" requires that a sentencing court look only to the elements of the statute of conviction, and therefore that courts may not decide whether to count a conviction by determining which of multiple alternative "means of commission" a defendant used to commit an offense, even if those means are listed explicitly in the statute of conviction); *see also* Descamps v. United States, 570 U.S. 254, 263 (2013) ("[T]he categorical approach's central feature [is] a focus on the elements, rather than the facts, of a crime.").

[3] *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972); Coker v. Georgia, 433 U.S. 584 (1977); McCleskey v. Kemp, 481 U.S. 279 (1987); Banks v. Dretke, 540 U.S. 668 (2004); Buck v. Davis, 580 U.S. 100 (2017); Reed v. Goertz, 598 U.S. 230 (2023) (as amicus); United States v. Flores-González, 86 F. 4th 399 (1st Cir. 2023) (same); Commonwealth v. Dew, 492 Mass. 254 (2023) (same); Commonwealth v. Gelin, No. SJC-13433 (Mass., argued Dec. 4, 2023) (same); People v. Paredes, No. SC-166129 (Mich., filed Dec. 12, 2023) (same).

in the criminal legal system and mitigating the subsequent harm that continued contact with this system causes.[4] LDF has addressed specific concerns on the impacts of the federal criminalization of drug-related offenses[5] and focused on increasing protections for vulnerable populations in criminal proceedings and at sentencing, particularly for youth. LDF has joined as amici in many of the landmark juvenile justice cases over the last few decades, including *Roper v. Simmons*,[6] *Graham v. Florida*,[7] *Miller v. Alabama*,[8] and *Jones v. Mississippi*.[9] Additionally, LDF continues to seek parole for individuals who were previously sentenced to juvenile life without parole sentences. LDF's mission has always sought to be transformative: to achieve racial justice, equality, and an inclusive society.

We are encouraged by the Commission's continued commitment to amend its Guidelines and include policy considerations that better reflect the principles of fairness, justice, and its core mission of ensuring uniformity in sentencing. The career offender guideline carries sentencing enhancements for defendants who: (1) are facing an instant offense that involves either a controlled substance or violent felony, and (2) have at least two prior felony convictions of a crime of violence or a controlled substance offense.[10] The terms "crime of violence" and "controlled substance offense" are defined in Section 4B1.2 of the *Guidelines*.[11] Courts use a categorical approach to determine whether a prior conviction maintained a finding of guilt with respect to the required elements of the offense. Below, we address how any future or previously proposed revisions to the career offender guideline must remedy the deep-seated systemic inequalities resulting from historically racially disparate law enforcement and criminalization practices that have long plagued federal sentencing policy.

I. The Guidelines' History and Impact Disproportionately Harm Black Communities.

The Guidelines have long been steeped in a history of racism and anti-Black bias. The Commission promulgated its current Guidelines on the treatment of drug offenses in the mid-1980s in response to the "War on Drugs" initiated under President Nixon, which was designed to target Black people and the antiwar left.[12] Congress passed the Sentencing Reform Act of 1984

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[4] *Id.*

[5] *See, e.g.,* Public Comment from LDF Re: 89 FR 44597, Docket No. DEA—1362, Proposed Rule on Marijuana Rescheduling Under the Controlled Substances Act to U.S. Drug Enforcement Admin. (July 22, 2024) (on file with LDF); Nigel Roberts, *Justice Department Adjusts Longstanding Drug Policy On Crack, Powder Cocaine To End Racial Disparities*, BET NEWS (Dec. 19, 2022), https://www.bet.com/article/n77qwu/justice-department-adjusts-drug-policy-crack-powder-cocaine sentencing-disparity (quoting LDF President and Director-Counsel Janai Nelson on the harmful effects of disparate sentencing for cocaine offenses).

[6] 543 U.S. 551 (2005).

[7] 560 U.S. 48 (2010).

[8] 567 U.S. 460 (2012).

[9] 593 U.S. 98 (2021).

[10] U.S. Sent'g Guidelines Manual §4B1.1(a). U.S. Sentencing Commission data from fiscal years 2020-2024 suggest that 40 percent of career offender defendants are sentenced below the guideline range, showing a consensus among judges that the guideline is overly punitive. U.S. Sent'g Comm'n, *Quick Facts: Career Offenders* 1 (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY24.pdf [hereinafter *Quick Facts*].

[11] §4B1.2(a), (b).

[12] Dan Baum, *Legalize It All*, HARPER'S MAG. (2016), https://harpers.org/archive/2016/04/legalize-it-all/ (quoting a 1994 interview with John Ehrlichman, a top Nixon aide, who confessed that "the Nixon White House . . . had two enemies: the antiwar left and [B]lack people . . . . We knew . . . by getting the public to associate the hippies with

to avoid "unwarranted sentencing disparities" by unconstrained judicial discretion.[13] Even so, residue from Nixon's intentional targeting of Black communities persists in the disparate policing, charging, and sentencing of Black people, who remain overrepresented in the criminal legal system.[14] Black people make up 13 percent of the U.S. population, but Black adults comprise 30 percent of the people on probation or parole and 38 percent of the incarcerated population.[15] In 2020, the arrest rate for Black people was 4,223 per 100,000 people versus 2,092 for white people, totaling 1.99 million yearly arrests of Black people.[16] This overrepresentation of Black people in the criminal legal system trickles into the application of the Commission's career offender guideline, fueling immense disparities by race that do not relate to culpability nor other goals of federal sentencing.

II. Proposed Changes to the Categorical Approach Will Only Exacerbate Existing Racial Disparities.

While the categorical approach was created to institute greater consistency in judicial sentencing across the country, its methodology remains imperfect. The current career offender guideline directs courts to impose a sentence "at or near the statutory maximum" for defendants who meet specific criteria, including having at least two prior felony convictions for a "crime of violence" or a "controlled substance offense."[17] This elements-based approach was established in *Taylor v. United States*,[18] where the U.S. Supreme Court required courts to examine the statutory elements of an offense in lieu of an accused person's conduct or the facts of a specific case when determining the nature of a prior conviction for purposes of applying the career offender enhancement.[19] This approach was purposefully designed to be "under-inclusive"[20] in order to address the problems of arbitrariness and complexity in federal sentencing.[21] Black people,

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marijuana and [B]lacks 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.").

[13] 28 U.S.C. § 991(b)(1)(B) (2023); *see also* 28 U.S.C. § 994(f) (2023) ("The Commission … shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.").

[14] Univ. of Maryland College of Behavioral & Social Sciences, *Study: Nearly Half of Black Males, 40 Percent of White Males Arrested by 23* (last visited Dec. 21, 2022), Study: Nearly Half of Black Males, 40 Percent of White Males Arrested by 23 | The College of Behavioral and Social Sciences (finding that nearly half of Black men will be arrested by age 23).

[15] Prison Pol'y Initiative, *Racial and Ethnic Disparities*, https://www.prisonpolicy.org/research/race_and_ethnicity/ (last visited July 16, 2025).

[16] *Id.*

[17] 28 U.S.C § 994 (West); U.S.S.G. §4B1.1.

[18] 495 U.S. 575 (1990).

[19] *See id.* at 601 ("[T]he 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.").

[20] Borden v. United States, 593 U.S. 420, 442 (2021).

[21] FED. DEF. SENT'G GUIDELINES COMMENT, Comments on Proposals 4B & 6: Controlled-Substance and Career-Offender Offenses 68 (Mar. 2023), https://src.fd.org/sites/src/files/resources/ussc-materials/public-comment/4b-and-6-co-cso.pdf.

however, are more likely to have prior qualifying convictions partially due to the disproportionate presence of law enforcement in Black communities.[22] Based on data over a fifteen-year period, Black people make up more than half of people subject to the career offender status even though only one-fifth to one-quarter of federal defendants are Black.[23] The Commission's primary aim is to avoid unwarranted sentencing disparities among defendants with similar records and criminal conduct, and to ensure sentences are sufficient but not greater than necessary.[24] The Commission also seeks to ensure that sentences for repeat offenders are not unduly severe and proportionally account for their prior records.[25] Any proposals to modify the Commission's elements-based approach in a way that expands the reach of the application of the career offender enhancement would be an abdication of the Commission's statutory responsibilities and further produce disparate effects on Black defendants.

Expanding the reach of the categorical approach would worsen existing disparities, undermining the Commission's stated goals to reduce sentencing discrepancies, ensure proportional sentencing, and lower the cost of maintaining large prison populations.[26] In 2013, Supreme Court Justice Elena Kagan even cautioned against expanding the categorical approach in *Descamps v. United States*,[27] clarifying that the Sixth Amendment prohibits courts from increasing a criminal sentence based on facts related to a prior conviction when those facts were not necessarily established by the conviction. Thus, the Commission should maintain the elements-based categorical approach as opposed to other approaches proposed in prior amendment cycles, described below, to prevent unfair reliance on potentially biased prior conviction documents for career offender sentencing.

In prior years, the Commission has considered alternatives that would broaden the categorical approach with an accusation-based approach that allows courts to consider documents from prior cases, or a listed guidelines approach that examines underlying offense conduct.[28] The Commission's proposed amendments in 2023 to Section 4B1.2, for instance,

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[22] The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT'G PROJECT (Oct. 13, 2021), https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/ (finding that low-level drug offenses and misdemeanors stemming from overpoliced Black neighborhoods result in prior convictions that "accumulate disproportionately in communities of color.").

[23] *See* Paul J. Hofer et al., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133, U.S. Sent'g Comm'n (2004), https://www.ussc.gov/ research/research-and-publications/research-projects-and-surveys/fifteen-years-guidelines-sentencing.

[24] *See* Rita v. United States, 551 U.S. 338, 347-49 (2007) (explaining that the Commission's enabling statute tells the Commission to write guidelines that will lead to sentences that comply with § 3553(a)).

[25] *Supra* note 13.

[26] U.S. Sent'g Comm'n, *About the Commission*, U.S. SENT'G COMM'N, https://www.ussc.gov/ (last visited July 17, 2025) ("The U.S. Sentencing Commission . . . was created by Congress in 1984 to reduce sentencing disparities and promote transparency and proportionality in sentencing.").

[27] 570 U.S. 254, 270-281 (2013) (holding 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").

[28] *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180, 7209-218 (2023).

would allow courts to consider a wider array of *Shepard* documents[29] from prior cases, and analyze "any means of committing such an element" or "offense conduct cited in the count of conviction."[30] Of critical concern, charging documents typically offer one-sided narratives drawn from police reports that can drastically differ from the nuanced truth of a particular set of facts, especially concerning Black defendants.[31] Allowing courts to rely on potentially inaccurate documents from prior convictions[32] that were originally barred from consideration under the categorical approach introduces racial inequities and consequently leads to incongruent sentencing outcomes.[33] Replacing the elements-based approach with either of these approaches is problematic because it over-includes the number of defendants who are sentenced under the career offender guideline. Black people are disproportionately impacted by the career offender guideline, comprising more than half (59.1 percent in fiscal year 2024) of people subject to career offender status.[34] In fact, Black people are nearly six times more likely to be classified as people subject to career offender status than white individuals.[35] Any modifications that broaden the reach of the categorical approach would exacerbate racial disparities and should be avoided at all costs.

III. Current Federal Drug Trafficking Offenses Under the Guideline Disproportionately Harm Black Communities.

The currently federal drug trafficking offenses under the guideline create disproportionate harm on Black communities, while functioning as a racial proxy that subjects Black individuals to harsher penalties. The majority of career offender designations stem from drug trafficking

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[29] *Shepard* documents are named after the Supreme Court case *Shepard v. United States*, 544 U.S. 13 (2005). These documents 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, and any comparable judicial record within these descriptions. U.S. Sent'g Comm'n, *Public Comment on Proposed Amendments (88 Fed. Reg. 7180)* at 901 (Mar. 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=298%20target= (last visited July 16, 2025).

[30] Sentencing Guidelines for United States Courts, 88 Fed. Reg. at 7210.

[31] For example, the police report involving the murder of George Floyd varied greatly from video footage depicting his death. Axios, *How Minneapolis Police Initially Described George Floyd's Murder*, AXIOS (Apr. 21, 2021), https://www.axios.com/local/twin-cities/2021/04/21/minneapolis-police-george-floyd-press-release (explaining that the Minneapolis Police Department's press release initially claimed George Floyd "physically resisted officers" and was in "medical distress" without any reference to Officer Derek Chauvin's knee on his neck, even though video footage clearly showed it). In Memphis, police incident reports on Tyre Nichols omitted officers' kicks, batons, and pepper spray, though body-cam footage clearly showed their use. Kiara Alfonseca, *Discrepancy Between Police Accounts, Evidence in Tyre Nichols Case Revealed*, ABC NEWS (Feb. 2, 2023), https://www.abcnews.go.com/US/discrepancy-police-accounts-evidence-tyre-nichols-case-revealed/story?id=96795495.

[32] *See supra* note 27 and accompanying text.

[33] Nneka Ewulonu, *Over-Reliance on Plea Deals is Damaging the Criminal Legal System*, THE APPEAL (Dec. 14, 2022), https://theappeal.org/over-reliance-on-plea-deals-is-damaging-the-criminal-legal-system/; Catherine Concannon & Chantal Na, *Examining Racial and Ethnic Disparity in Prosecutor's Bail Requests and Downstream Decision-Making*, RACE & SOC. PROBS. 1–18 (advance online publication, 2013), https://doi.org/10.1007/s12552-022-09385-0.

[34] *Quick Facts, supra* note 10 (showing that, in fiscal year 2024, Black people constituted 59.1% of those subject to the career offender guideline as opposed to white people constituting 22.8%).

[35] This figure was derived from the U.S. Sentencing Commission, *Individual Datafiles FY 2017-2021*, which reflect that 6.9% of Black individuals sentenced under the *Guidelines* were identified as people subject to career offender status, compared to just 1.2% of non-Black individuals. *Supra* note 21, at 41, 64.

convictions, with a substantial and growing number of individuals qualifying based solely on non-violent drug trafficking offenses without any history of violent crime.[36] The non-violent nature of this distinct population should exclude them from career offender enhancements. The Commission explicitly supports this view, stating in 2016 that "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."[37] Moreover, the Commission previously 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 the directive to no longer include those who currently qualify as career offenders based solely on drug trafficking offenses."[38] According to the Commission's 2023 annual report, drug offenses accounted for 29.9 percent of the total sentencing caseload.[39] Black individuals are most often sentenced for drug trafficking offenses, accounting for 34.6 percent of the total sentencing caseload in 2023.[40] Additionally, the Commission found significant demographic disparities among sentences imposed on individuals convicted of federal drug trafficking, with Black males being 33.8 percent less likely to receive a probation-only sentence and instead be subjected to incarceration lengths that were 1.2 percent longer compared to their white male counterparts.[41]

The racial disparities in career offender status partially stem from the inclusion of state drug offenses as predicates in the career offender guideline for federal sentencing.[42] Many state-level controlled substance laws may criminalize substances more leniently than federal penalties for the same offense. For instance, many states decline to criminalize marijuana, although the

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[36] In Fiscal Year 2014, approximately 26.7% of all people subject to career offender status in a Commission study sample were classified in the "drug trafficking only" pathway. By Fiscal Year 2022, this same group comprised 52.6% of all people subject to career offender status. *See* U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* 28 (Aug. 2016), https://www.ussc.gov/sites/default/ files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf [hereinafter *2016 Report to the Congress*]. *See also Quick Facts*, *supra* note 10 (finding that of the 61,678 cases reported in 2024, 1,280 involved people subject to career offender status and the most common offense was drug trafficking, accounting for 1,048 career offender cases); U.S. Sent'g Comm'n, *Individuals Sentenced Under §4B1.1 Proposed Amendment Data Background* (2025), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Career-Offender.pdf (finding that in fiscal year 2022, a total of 1,354 individuals were sentenced under the career offender guideline. Of these, 711 individuals were identified as being in the "Drug" pathway, meaning their career offender status was based solely on drug trafficking offenses in the fiscal year 2022, a total of 1,354 individuals were sentenced under the career offender guideline. Of these, 711 individuals were identified as being in the "Drug" pathway, meaning their career offender status was based solely on drug trafficking offenses).

[37] *2016 Report to the Congress*, *supra* note 36, at 3.

[38] *Id.*

[39] U.S. Sent'g Comm'n, *2023 Annual Report* 14-15 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023-Annual-Report.pdf [hereinafter *2023 Annual Report*].

[40] *Id.* at 15.

[41] U.S. Sent'g Comm'n, *Demographic Differences in Federal Sentencing* 27-28 (Nov. 2023), https://www.ussc.gov/sites/default/ files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf/.

[42] Excluding state drug offenses, the estimated number of individuals who would be sentenced under §4B1.1 in the year 2022 drops significantly to 392, from an initial count of 1,354 individuals. U.S. Sent'g Comm'n, *Individuals Sentenced Under §4B1.1 Proposed Amendment Data Background* (2025), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Career-Offender.pdf.

substance is criminalized under federal law.[43] Even simple marijuana possession offenses, particularly prior state convictions, can result in higher federal criminal history calculations and sentencing ranges, despite marijuana's changing legal status in many states.[44] Of the 1,765 offenders whose criminal history category was negatively impacted by a prior marijuana possession sentence in 2021, Black males accounted for 41.7 percent.[45]

Racial imbalances in drug offenses are also prevalent in the crack-powder cocaine sentencing disparity. The disparate sentencing treatment of crack and powder cocaine offenses was designed to target Black people along with the disproportionate arrest rates for crack-related offenses among Black people.[46] Studies, some of which were conducted by the Commission, found that crack cocaine was never more inherently dangerous or addictive than its powder counterpart, nor did it uniquely contribute to violence in ways that justified vastly harsher penalties.[47] Reforms stemming from the Fair Sentencing Act of 2010 significantly lessened excessive sentences for Black defendants, cutting nearly 24,000 years from the total amount of time Black defendants sentenced for crack cocaine offenses would have otherwise served.[48] But even this reduced disparity remains an arbitrary and indefensible relic of a failed drug war that continues to disproportionately harm Black communities. This data and history are especially impactful on Black communities, who are disproportionately arrested and convicted for drug offenses despite similar drug usage rates across racial groups.[49] Moreover, the legacy of the

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[43] *See* Carly Knight, *High Time to Revisit Federal Drug Sentencing: The Confusing Interplay Between Controlled Substances and Career Offender Sentence Enhancements*, 39 GA. ST. UNIV. L. REV. 895 (2023).

[44] U.S. Sent'g Comm'n, *Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System* 3 (Jan. 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/ 20230509_Marijuana-Possession.pdf (finding that in the fiscal year of 2021, "[n]early all (97.0%) of the prior marijuana possession sentences were for state convictions, some of which were from states that have changed their laws to decriminalize (22.2%) or legalize (18.2%) marijuana possession, states that allow for expungement or sealing of marijuana possession records (19.7%), or some combination thereof. Prior sentences for marijuana possession from these states resulted in higher criminal history calculations under the federal sentencing guidelines for 695 offenders.").

[45] *Id.*

[46] NAACP Legal Defense & Educational Fund, *Proposed 2025 Amendments to the Federal Sentencing Guidelines and Issues for Comment on Drug Offenses*, LDF (Mar. 3, 2025), https://www.naacpldf.org/wp-content/uploads/2025.03.03-LDF-USSC-Comment-Final-signed.pdf.

[47] *See, e.g.* U.S. Sent'g Com'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 184-87 (Feb. 1995) (concluding that the violence associated with crack is primarily related to the drug trade and not to the effects of the drug itself); Knight, *supra* note 43, at 895 (finding the effects of crack and powder cocaine are nearly identical, with no significant difference in addiction potential).

[48] According to a 2011 NAACP resolution, if the Fair Sentencing Act of 2010 and its guidelines had been made retroactive, the U.S. Sentencing Commission estimated that as many as 24,000 people would be eligible for relief over a thirty-year period. Nat'l Ass'n for the Advancement of Colored People, *NAACP Supports Complete Elimination of Racial Disparities Associated with Crack Cocaine*, NAACP, https://naacp.org/resources/naacp-supports-complete-elimination-racial-disparities-associated-crack-cocaine (last visited July 14, 2025); *see generally* U.S. Sent'g Comm'n, *Report to the Congress: Impact of the Fair Sentencing Act of 2010* (Aug. 2015), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf.

[49] Diane Whitmore Schanzenbach et al., *Twelve Facts about Incarceration and Prisoner Reentry*, THE HAMILTON PROJECT 7 (Oct. 2016), https://www.hamiltonproject.org/assets/files/12_facts_about_incarceration_prisoner_reentry.pdf (last visited July 16, 2025).

unnecessary distinction between the treatment of crack and powder cocaine offenses continues to contribute to the extreme racial disparities in who qualifies for career offender status.[50]

LDF urges the Commission to implement its proposal presented to Congress in 2016 to amend the career offender guideline to focus only on offenders who have committed at least one "crime of violence" and excluding defendants who qualify for the enhancement based solely on non-violent drug trafficking offenses.[51] Additionally, we implore the Commission to exclude state drug offenses in the *Guidelines*, which it has both the power and authority to do.[52] Together, these two revisions are crucial steps towards creating racial equity in federal sentencing.

IV. Redefining "Crimes of Violence" Without Comprehensive Reform Worsens Inequity and Complexity.

Moving away from the categorical approach to the Commission's other considered approaches without enacting significant reforms would risk drastically expanding the application of the career offender guideline with particularly harmful effects on Black people in the U.S., especially in cases involving "crimes of violence."[53] As previously proposed in 2023, replacing the categorical approach with a broader focus on "any means of committing such an element" or the "offense conduct cited in the count of conviction," without substantial amendments to narrow the guideline's reach, would lead to overly broad and harmful outcomes.[54] The categorical approach serves as a critical safeguard that limits the reach of the career offender guideline by excluding many state-level violent convictions, from being automatically classified as "crimes of violence" under the federal guideline.[55] Indeed, according to the Commission's own statistical analysis, shifting from a categorical toward a conduct-based approach for defining crimes of violence could quadruple the number of individuals subject to the guideline, since state convictions that were previously excluded would now qualify based on the defendant's actual conduct.[56] Although these numbers are staggering, they are not unexpected. Given the racial disparities embedded in the history and ongoing practices of the criminal legal system, the majority of those who will be subjected to this enhancement due to the alternative approach would disproportionally be Black. Of the 61,678 cases reported to the Commission in fiscal year 2024, 1,280 involved individuals with career offender status.[57] In 93 percent of those cases, the career offender designation resulted in an increased guideline range. Of the individuals sentenced

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[50] *2023 Annual Report*, *supra* note 39, at 19-20 (finding that the predominate race of individuals sentenced for offenses involving powder cocaine was Hispanic (71.2 percent), while the predominate race of individuals sentenced for offenses involving crack cocaine was Black (79 percent)).

[51] *2016 Report to the Congress*, *supra* note 36, at 3.

[52] 28 U.S.C. § 994(a) directs the Commission to "promulgate sentencing guidelines and policy statements for Federal courts," granting it statutory authority to define how state drug offenses are treated or excluded under the Guidelines. U.S. Sent'g Comm'n, *Guidelines Manual* § 4A1.2 (2024), https://www.ussc.gov/guidelines/2024-guidelines-manual/annotated-2024-chapter-4 (last visited July 14, 2025).

[53] U.S.S.G. §4B1.1(a).

[54] U.S.S.G., 88 Fed. Reg., at 7210.

[55] *See Mathis,* 579 U.S., at 513; *Taylor,* 495 U.S. 575, at 600-601.

[56] *See* U.S. Sent'g Comm'n, *Data Briefing: Individuals Sentenced Under §4B1.2* 20-22 (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Career-Offender.pdf.

[57] *Quick Facts*, *supra* note 10.

under the career offender enhancement, 96.1 percent were men, and among them, 59.1 percent were Black compared to just 22.8 percent who were white.[58]

In January 2016, the Commission amended the definition of "crime of violence" and notably deleted the "residual clause."[59] The revised definition retained an "elements clause" (requiring the use, attempted use, or threatened use of physical force against the person or another) and an "enumerated offenses clause" listing specific offenses.[60] As part of the 2016 revisions, the Commission also narrowed the definition of "extortion" to include only offenses involving "fear or threats of physical injury" as opposed to a prior definition that included non-violent threats.[61] As a result of this narrow definition, every Court of Appeals that addressed the issue has held that the definition of "robbery" under the Hobbs Act[62] does not qualify as a "crime of violence" under §4B1.2 of the guidelines.[63] The Commission's 2023 amendments directly addressed this "unintended consequence"[64] and added a specific definition of robbery that mirrored the Hobbs Act.[65] Additionally, the amendment clarified that the phrase "actual or threatened force" within this new robbery definition refers to "force that is sufficient to overcome a victim's resistance," consistent with the Supreme Court's holding in *Stokeling v. United States*.[66] The Commission's 2023 amendments adopting the Hobbs Act definition of "robbery" directly contradicts its own statutory goal of "combat[ing] crime through an effective, fair sentencing system" and will sweep in non-violent state extortion conviction as crimes of violence.[67] Moreover, defining "actual or threatened force" as "force sufficient to overcome a victim's resistance" is improperly vague and subjective, which perpetuates confusion and unwarranted disparity.

There is no justification for expanding the already over-inclusive career offender guideline to reach offenses involving future threats against property. In its 2016 amendments, the Commission purportedly sought to narrow the definition of "extortion" in the context of what

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[58] *Id.*

[59] *2016 Report to the Congress*, *supra* note 36 at 48, 52.

[60] *Id.* at 53 ("With the deletion of the residual clause under subsection (a)(2), there are two remaining components of the 'crime of violence' definition — the 'elements clause' and the 'enumerated offense clause.' The 'elements clause' under subsection (a)(1) remains unchanged. Thus, any offense under federal or state law, punishable by imprisonment for a term exceeding one year, qualifies as a 'crime of violence' if it has as an element the use, attempted use, or threatened use of physical force against the person of another. The 'enumerated offense clause' lists specific offenses that qualify as crimes of violence. In applying this clause, courts compare the elements of the prior offense of conviction with the elements of the enumerated offense in its 'generic, contemporary definition.' While most of the offenses on the enumerated list under §4B1.2(a)(2) remain the same, the amendment did revise the list in a number of ways to focus on the most dangerous repeat offenders.").

[61] *Id.* at 55.

[62] 18 U.S.C. § 1951(b)(1).

[63] *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. O'Connor, 874 F.3d 1147 (10th Cir. 2017).

[64] U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines* 97 (Apr. 27, 2023) https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf [hereinafter *2023 Amendments*].

[65] *Id.*

[66] *Id.*

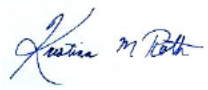
[67] U.S. Sent'g Comm'n, *Guidelines Manual §3E1.1* 2-3 (Nov. 2024), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2024/GLMFull.pdf.

constitutes a "crime of violence" to focus on "the most dangerous offenders."[68] The 2023 amendment to define "robbery" by mirroring the Hobbs Act definition, including "fear of injury, immediate or future, to his person or property,"[69] would reverse the Commission's prior resource intensive efforts to target "just punishment" and "recidivism risk."[70] Hobbs Act robbery can be committed without an immediate threat of force or a threat of force against the person.[71] This distinction is recognized in other federal laws; for instance, the "serious violent felony" definition for federal three-strikes laws and First Step Act[72] drug enhancements explicitly excludes Hobbs Act robbery.[73] Thus, if the Commission considers moving away from the categorical approach, it must also implement robust guardrails to prevent the application of the career offender guideline to "crimes of violence" that do not genuinely warrant such severe enhancements.

V. Conclusion

We applaud the Commission for proposing priorities that would promote stronger and more fair sentencing policies with respect to enhancement mechanisms that, in practice, perpetuate racial biases and uncertain outcomes. Maintaining the categorical approach to determine qualifying predicate offenses for career offender status is crucial to limit the reach of this enhancement. We urge the Commission to explicitly exclude state-level offenses in consideration of this federal sentencing enhancement, as well as solely non-violent predicates. We greatly appreciate the opportunity to offer recommendations to the Commission on its Proposed Priorities for the 2025-2026 amendment cycle. Should you have any questions, do not hesitate to contact Senior Policy Associate Kristina Roth, at [redacted] and Policy Fellow Sarah Seo, at [redacted].

Sincerely,



Kristina Roth, Senior Policy Associate
Sarah Seo, Policy Fellow
Demetria McCain, Director of Policy

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Washington, D.C. 20005

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[68] *2016 Report to the Congress*, *supra* note 36, at 54-55.
[69] *2023 Amendments*, *supra* note 64, at 97.
[70] *2016 Report to the Congress*, *supra* note 36, at 52.
[71] *See* 18 U.S.C. § 1951(b)(1).
[72] *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).
[73] *See* 18 U.S.C. § 3559(c)(2)(F)(ii) (defining "serious violent felony" as "the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense"); 21 U.S.C. § 802(59)(a) (defining "serious violent felony" as "an offense described in section 3559(c)(2) of Title 18 for which the offender served a term of imprisonment of more than 12 months").

July 16, 2025

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

Re: Comments to the US Sentencing Commission on Proposed 2025-2026 Priorities

Dear Judge Reeves:

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

NACDL, with its diverse membership of more than 10,000 spanning state, federal, and military practice, wishes to express its views on preferred Commission priorities. The Commission puts forward multiple noteworthy priorities, and NACDL responded to those it views as most pressing. We concur with other advocates and stakeholders that current sentences are excessively long, and certain sentencing factors disproportionately affect racial minorities within the criminal legal system. Whatever issues the Commission determines to prioritize, these flaws should be foremost in considering potential amendments.

Priority 2 – Drug Sentencing: Eliminating Purity Distinctions in the Methamphetamine Guidelines.

NACDL supports the Commission's proposed priority of examining the penalty structure for certain drug offenses under Guideline Section §2D1.1, particularly the purity distinction for methamphetamine offenses. NACDL supports the elimination of purity distinctions in the methamphetamine guidelines, specifically eliminating references to "Ice" (Subpart 1) and "Methamphetamine (Actual)" (Subpart 2), thus erasing the empirically unjustifiable 10:1 ratio between methamphetamine-ice/actual and methamphetamine-mixture. This is an issue the Commission has previously considered and we urge the Commission to consider it again and act to reduce this unfair and unwarranted sentencing disparity.

The Commission's inclusion of this as a proposed priority rightly reflects the growing awareness among sentencing judges across the country that the methamphetamine guidelines—like the crack guidelines to which they were linked—lack any empirical basis. The U.S. Supreme Court's statements in *United States v. Kimbrough* about the crack cocaine guidelines, namely, that the Commission abandoned its usual empirical approach based on past sentencing practices for a weight-driven approach[1], applies with equal force to the methamphetamine guidelines.[2] In fact, it applies to all drug guidelines that are based on mandatory minimums, rather than empirical data.[3] Like the former crack cocaine guidelines, the Sentencing Commission has consistently linked the meth guideline ranges to statutory penalties, even though it is not required to do so.[4] None of these sentencing increases had anything to do with an examination of sentencing practices or any of the sentencing objectives set out in 18 U.S.C. § 3553. In fact, the severe penalties for methamphetamine are not justified by any purpose of sentencing. As to the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), methamphetamine is less physically dangerous or addictive than heroin or cocaine, yet methamphetamine is now punished more severely than any other drug.

Not only do the current methamphetamine guidelines lack a legislative basis, they also lack any empirical justification. In 1989, when the 10:1 ratio was developed, untested methamphetamine mixture typically received a presumed purity of 10%.[5] Today, the Sentencing Commission has acknowledged that "methamphetamine is highly and uniformly pure."[6] Multiple analyses have shown that typical methamphetamine mixture hovers close to 95% purity.[7] Thus, sentences now receive massive arbitrary enhancement based entirely on whether the methamphetamine received laboratory testing,[8] something that is obviously beyond the control, and unrelated to the culpability, of any defendant. All else being equal, a 90% pure methamphetamine sample, untested, would lead to a Guidelines range of 51–63 months. But with testing, the same exact sample would lead to a Guidelines range of 97–121 months.[9] The chances that a sample will receive testing is subject to factors unrelated to culpability, like whether the lab had a chance to complete testing or at what procedural juncture in the case the defendant entered a guilty plea.[10]

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[1] 552 U.S. 85, 96 (2007)

[2] *See*, *e.g.*, *United States v. Valdez*, 268 Fed. App'x 293, 297 (5th Cir. 2008); *United States v. Goodman*, 556 F. Supp. 2d 1002, 1010-11, 1016 (D. Neb. 2008).

[3] *See Gall v. United States*, 552 U.S. 38, 46 n.2 (2007) (noting that the "Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses").

[4] *See, e.g.,* U.S. Sent'g Comm'n, Methamphetamine: Final Report of the Working Group 7 (1999), https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf.

[5] *United States v. Weimer*, 2024 WL 2959187, at *2 (D. Idaho June 11, 2024).

[6] U.S.S.C., Methamphetamine Trafficking Offenses in the Federal Criminal Justice System at 4 (June 2024).

[7] *See id.* (finding median methamphetamine sample purity of 98%); *see also Weimer*, 2024 WL 2959187, at *2 ("Today, methamphetamine is almost always imported from foreign drug labs and the purity levels are much higher. A recent 2015–16 survey of drug purity levels in the District of Idaho revealed an average purity level of 92.6% with a low of 88% and a high of 100%."); U.S. Dep't of Just., Drug Enf't Admin., Drug Enforcement Administration 2020 National Drug Threat Assessment 19–20 & fig. 12 (citing DEA sampling of methamphetamine seizures and finding it to average 97% purity) (Mar. 2021).

[8] *Weimer*, 2024 WL 2959187 at *3 (Simply put, the presumed purity of 10% for untested methamphetamine is no longer valid. This, in turn, has led to substantial and unwarranted disparities in sentencing based solely on whether methamphetamine is lab tested.").

[9] *Id.*

[10] *Id.* ("Today, most methamphetamine seized at all distribution levels is remarkably pure, which means that higher

The Sentencing Guidelines' initial rationale for enhancements based on purity was that "controlled substances are often diluted and combined with other substances as they pass down the chain of distribution," therefore postulating that "unusually high purity . . . is probative of the defendant's role or position in chain of distribution."[11] But this rationale is unsupported when, as explained above, nearly all methamphetamine is uniformly high in purity. Additionally, many low-level offenders do not know the quantity or quality of the product they are involved in distributing. A qualitative research study of federal prisoners charged with drug crimes shows that the organizational structure of drug trafficking includes smaller, decentralized units operating independently of one another.[12] Individuals had limited knowledge of others' roles in the enterprise and the structure of the larger operation.[13] It was common that members of the drug smuggling trade were involved in other enterprises, including legitimate means of employment, but found themselves in a tight spot that led to the drug world.[14]

Given the aforementioned disparities and resulting arbitrariness of this guideline, numerous courts have determined that the treatment of methamphetamine (actual) versus methamphetamine (mixture) produces inequitable and unusually long sentences and have elected to deviate from the guidelines.[15] Indeed, the Commission's own data reveals substantial and extensive below-guidelines sentences in methamphetamine cases.[16]

In sum, NACDL supports the Commission's proposed priority of examining drug guidelines, in particular the actual vs. mixture disparity in methamphetamine sentencing. We urge the Commission to amend Guideline §2D1.1 to remove this distinction and to sentence all methamphetamine defendants under the more lenient "mixture" amounts on the drug quantity table.[17]

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purity is not a good indicator of a defendant's place in the chain of distribution. The importance assigned to purity is even less justified for a low-level offender who has no knowledge or control of the purity level.").

[11] USSG § 2D1.1, note 27(C).

[12] Jana S. Benson & Scott H. Decker, *The Organizational Structure of International Drug Smuggling*, 38 J. Crim. Just. 130, 135 (2010).

[13] *Id.*

[14] *Id.* at 136.

[15] *See e.g. United States v. Celestin,* 2023 WL 2018004, at *3 (E.D. La. Feb. 15, 2023) (citations omitted); *United States v. Robinson,* 2022 WL 17904534, *3 (S.D. Miss. Dec. 23, 2022) (noting that in a recent case, "the United States conceded that there is no empirical basis for the Sentencing Commission's 10-to-1 weight disparity between actual methamphetamine and methamphetamine mixture," and that other district courts had concluded there was no empirical basis for the disparity); *United States v. Ferguson*, 2018 WL 3682509, at *8 (D. Minn. Aug. 2, 2018) ("[M]ethamphetamine purity is no longer a proxy for, and thus not probative of, the defendant's role or position in the chain of distribution."); *United States v. Hayes*, 948 F. Supp. 2d 1009, 1026 (N.D. Iowa 2013) ("This issue [of punishing a pure substance more than a mixed substance] is heightened when the offender was merely a courier or mule who has no knowledge of the purity of the methamphetamine he or she is transporting."); *United States v. Ortega*, No. 8:09CR400, 2010 U.S. Dist. LEXIS, at *21 (D. Neb. May 17, 2010) ("To punish [a street-level distributor] as harshly as an upper-level distributor because of a presumptive ten-to-one ratio does not reflect his position in the hierarchy nor will it promote respect for the law.").

[16] *See* U.S. Sent'g Comm'n, Methamphetamine Trafficking Offenses Quick Facts (FY 2023) (in fiscal year 2023, 41% of all individuals convicted of methamphetamine trafficking received a non-guideline sentence; out of those, 99% were downward variances averaging a 35% reduction), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Methamphetamine_FY23.pdf.

[17] The proposed priority also includes possible consideration of "miscellaneous issues pertaining to drug trafficking offenses coming to the Commission's attention, such as possible statutory changes relating to fentanyl." On this issue, NACDL refers the Commission to the May 1, 2025 letter of the Drug Policy Alliance on fentanyl NACDL co-

Priority 3 – Role of Loss, Intended Loss and Gain, and the Loss Table in Sentencing

NACDL supports the Commission's proposed priority to examine the guidelines relating to loss, intended loss and gain, and the loss table to ensure that they appropriately reflect the culpability of the individual and harm to the victim in theft, property destruction, and fraud cases. As we have previously said, NACDL supports a wholesale reevaluation of § 2B1.1 to address issues such as overlapping enhancements, the existence of a loss chart, and the problematic use of "intended loss" in lieu of "actual loss."[18] NACDL also believes a complete modification of § 2B1.1, similar to the framework proposed by the American Bar Association and submitted to the Commission in 2014, is needed.[19]

As a part of a comprehensive examination of § 2B1.1, NACDL believes the Commission should modify § 2B1.1 to reduce the extent to which offense levels are based on loss amount. Reliance on the loss table as a key driver of sentences in fraud cases has drawn widespread criticism from both bench and bar.[20] NACDL continues to believe that §2B1.1 should be reconceptualized to address these criticisms by reducing the outsized role that loss amount currently plays in sentencing determinations.

Additionally, NACDL has long advocated for the Commission to reconsider the use of "intended loss" in § 2B1.1. The current construction often produces unfair sentencing outcomes for defendants whose offenses have caused little or no losses, as those defendants often face years or decades in prison because of what they purportedly intended but failed to achieve. Along with the unjust result of a sentence so vastly disproportionate to the injury caused by the crime, this approach raises serious questions regarding a court's ability to determine what a defendant intended in the absence of actual harm. NACDL recommends that that the Commission consider decoupling "intended loss" from the loss table and instead treat any disparity between actual and intended loss as grounds for a potential sentence enhancement.

NACDL also continues to support modifications that would both (1) reduce the impact of the loss table for all defendants sentenced under § 2B1.1 who gain little or nothing from their

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signed, *available at*: https://www.nacdl.org/Document/CommentsUSSCEnhancementsFentanylOpioids-05012025.

[18] *See* NACDL, Comments on Proposed Amendments for 2015 Cycle, *available at* https://www.nacdl.org/Document/Comments-USSC-2015Amend-03182015, at 8-13 (2015).

[19] American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf. (Nov. 10, 2014).

[20] *See, e.g.*, *United States v. Gupta*, 904 F.Supp.2d 349, 350 (S.D.N.Y. 2012) (noting that "the numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice"); *United States v. Parris*, 573 F.Supp.2d 744, 751 (E.D.N.Y. 2008) ("[W]e now have an advisory guidelines regime where . . . any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment."); *see also* James E. Felman, The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes, 23 Fed. Sent. R. 138, 139 (2010) (describing the current high-loss guidelines as "overkill"); Frank O. Bowman III, Sentencing High-Loss Corporate Insider Frauds After Booker, 20 Fed. Sent. R. 167, 169 (2008) ("In sum, since *Booker*, virtually every judge faced with a top-level corporate defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high"); Samuel W. Buell, Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud, 28 Cardozo L. Rev. 1611, 1648-49 (2007) (discussing how the loss table often overstates the actual harm suffered by the victim).

conduct, and (2) better adhere to the statutory directive in 28 U.S.C. § 994(j) to ensure the Guidelines reflect the appropriateness of a non-custodial sentence for first-time, non-violent, non-serious offenders. Such a revision would promote fairness in sentencing for offenses that do not produce pecuniary harm (or that produce less harm than a defendant may arguably have intended).

Accordingly, NACDL supports the Commission's proposed priority of examining the loss guidelines in § 2B1.1 to ensure that they produce fair sentencing outcomes consistent with an individual's culpability.

Priority 4 – Career Offender

NACDL appreciates that the Commission remains focused on improving the career offender guideline.[21] As detailed below, the career offender guideline drives overincarceration and inequities in federal sentencing; it is very worthy of reform. NACDL remains fearful that moving away from the categorical and modified categorical approach for the "crime of violence" definition will increase the use of the career offender guideline.[22] While imperfect, the categorical and modified categorical approach is "under-inclusive by design," and helps prevent some of the worst excesses of the career offender guideline. *Borden v. United States*, 593 U.S. 420, 442 (2021). Approaches suggested in prior amendment cycles also create significant administrative difficulties in implementation.

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.[23] And defendants sentenced under the career offender

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[21] *See, e.g.*, U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* (Dec. 19, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202412_fr-proposed-amdts.pdf.

[22] *See* NACDL et. al., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf; NACDL et. al., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Feb. 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf.

[23] *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 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 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf [hereinafter, *Quick Facts* 2023] (showing that, in fiscal year 2023, Black people constituted 58.4% of those subject to the career offender guideline), *with* U.S. Sentencing Commission, *Interactive Data Analyzer*, https://ida.ussc.gov/analytics/saw.dll?Dashboard (showing that in fiscal year 2023, only 24.5% of federal defendants were Black).

guideline—again, the majority of whom are Black—also make up a disproportionate percentage of people incarcerated in federal prison.[24]

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. Black communities and other communities of color face systematic and ongoing discrimination at every level. For example, Black people are more likely to have 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."[25] In some jurisdictions, like Ferguson, Missouri, "these patterns hold even though police have a higher 'contraband hit rate' when searching white versus black drivers."[26] As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.[27]

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.[28] These two features of many state-court systems reinforce one another. 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 monetary bail—but 90% were unable to post it.[29] The Commission further explained: "Research consistently shows Black and Latinx

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[24] 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 guideline 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 38.9% 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 Jan. 18, 2025).

[25] *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 [hereinafter, *Black Lives Matter*]; *see also Fifteen Years*, *supra* n.23, at 134.

[26] *Black Lives Matter*, *supra* n.25, at 4.

[27] 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), https://www.americanbar.org/content/dam/aba/administrative/crsj/human-rights-magazine/have-we-overcome-obstacles-to-racial-equality.pdf. This discrepancy is particularly salient to the career offender context, as the overwhelming majority—78.2% in fiscal year 2023—of defendants receiving the guideline enhancement are being sentenced for drug trafficking offenses. U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Tbl. 26 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table26.pdf.

[28] *See, e.g.*, Radley Balko, *The states of indigent defense: part one*, THE WATCH (Oct. 30, 2023), https://radleybalko.substack.com/p/the-states-of-indigent-defense-part. Mr. Balko has released the first three parts of an intended report on the state of indigent defense in all 50 states.

[29] U.S. Commission on Civil Rights, *The Civil Rights Implications of Cash Bail* 3 (Jan. 2022),

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."[30] 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,"[31] perhaps due in part to the fact that "similar felony pretrial detainees were more likely to plead guilty by 10 percentage points."[32]

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.[33] 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 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;[34] that is still true in fiscal year 2023.[35] Moreover, "[s]ome of the most significant sentencing impacts apply to those offenders who had the least extensive criminal history scores."[36] 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.[37]

The long-standing pattern[38] 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

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https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf.

[30] *Id.* at 33-34.

[31] *Id.* at 52.

[32] *Id.* at 51.

[33] *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.29, at 53–54.

[34] *Quick Facts* 2012, *supra* n.23, at 1.

[35] *Quick Facts* 2023, *supra* n.23, at 1.

[36] *Report to the Congress*, *supra* n.24, at 21.

[37] *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 guideline 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).

[38] *See, e.g.*, Quick Facts 2012, supra n.23, at 2 (chart); Quick Facts 2023, supra n.23, at 2 (chart); *see also Report to the Congress*, supra n.24, at 23 ("[T]he anchoring effect of the guidelines for career offenders appears to be diminishing.").

and the average sentence imposed in career offender cases," which "demonstrates a continuing decline in the guideline's influence."[39] Section 4B1.1 therefore "has among the lowest within-guideline rates each year."[40]

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 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]

NACDL remains concerned that prior proposed amendments that move away from the categorical and modified categorical approach for the "crime of violence" definition will expand, rather than narrow, the scope of the career offender guideline. The racial disparities detailed above, taken together with the lack of evidence that the imposition of the career offender enhancement reduces recidivism or improves public safety, strongly caution against any action that would expand its reach. Last year, NACDL welcomed the Commission's

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[39] 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.

[40] *Id.* at 55.

[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.*

[43] *Fifteen Years*, *supra* n.23, at 134 (emphasis in original).

[44] *Report to the Congress*, *supra* n.24, at 3.

[45] *Id.* at 44.

efforts to ameliorate the effect of the drug guidelines on lower-level players through its addition of a mitigating role adjustment in the drug guideline itself. However, career offenders—who are often low-level players in the drug hierarchy—are not eligible for this adjustment, further increasing the potential disparities between sentences imposed under the drug guidelines and sentences imposed under the career offender guideline. NACDL is ready and willing to further contribute to this discussion as the Commission considers how to change the career offender guideline.

Respectfully Submitted,

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The National Council for Incarcerated and Formerly Incarcerated Women and Girls

Comment on Proposed 2025-2026 Priorities (BAC2210-40)
National Council for Incarcerated and Formerly Incarcerated Women and Girls
July 17, 2025

(1) Examination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option (e.g., imprisonment, probation, or fine), and possible consideration of amendments that might be appropriate.

I. Executive Summary

The National Council for Incarcerated and Formerly Incarcerated Women and Girls proposes that the Sentencing Commission amend the compassionate release guidelines to include hazards caused by the Federal Bureau of Prison's funding and management woes, such as environmental hazards, poor medical care, inadequate nutrition, and non-punitive lockdowns. Furthermore, these conditions, which have been documented by numerous inspector general reports, should also be taken into consideration when deciding if punishment has been sufficient under 18 USC § 3553(a). Although it may be easier to reduce a guidelines sentence under the existing procedures, thought should also be given to reducing sentences based on conditions at a defendant's designated prison.

II. BOP Crisis Conditions

The Federal Bureau of Prisons (BOP) is in crisis. Although disagreement may exist as to the causes and solutions, the BOP has been asking Congress for years to give it more funds to increase salaries, fill vacancies, fix environmental hazards, and repair crumbling infrastructure. In February 2025, a BOP official told Congress that 4,000 beds — the equivalent of two prisons — were unusable because of problems such as leaking roofs, mold, asbestos, or lead.[1] The BOP has said that it needs $3 billion to complete all of the deferred maintenance and eliminate environmental

[1] Oversight Hearing – Bureau of Prisons, Before the Subcommittee on Commerce, Justice, Science, and Related Agencies Committee on Appropriations United States House of Representatives, 119th Cong. (2025) (Statement of Kathleen Toomey Associate Deputy Director, Bureau of Prisons).

hazards.[2] Although the BOP budget has increased over time, funds for maintenance on facilities have been cut 38%, despite the $3 billion repair backlog.[3] As stated by former BOP employees in their *amicus* brief to the Supreme Court: "Deteriorating facilities complicate operations, interfere with safety and security, and harm employee morale and retention. Congressional appropriations for prison infrastructure are consistently inadequate to address the problem."[4]

Staff shortages have plagued the BOP for years, as detailed by over 100 OIG reports. In May 2025, the Associated Press, citing union officials, reported the BOP has 4,000 open positions.[5,6] The Trump Administration initially spared the BOP from job cuts, but subsequently has implemented a soft hiring freeze and eliminated incentive pay for BOP staff, showing that fixing long-term staffing is not a priority. Understaffing requires all BOP employees to work overtime hours, often in correctional officer positions they did not sign up to take on, a process known as augmentation. Staffing shortages have put incarcerated people in danger throughout the system. Morale is at an all-time low.

Instead, Congress has tripled the ICE budget, including $45 billion for new detention centers, a 62% larger budget than the entire federal prison system.[7] Congress has set this country's priorities for the foreseeable future and government agencies must react as necessary.

III. Effects of Funding Shortfalls

The Bureau of Prisons has been struggling for decades, but the last five years have been particularly catastrophic. During the COVID State of Emergency from March 31, 2020, to May

[2] Peters, Colette S., "Oral Statement of Director Colette S. Peters to the House Judiciary Committee, Subcommittee on Crime and Federal Government Surveillance." (July 23, 2024). https://www.bop.gov/news/pdfs/20240723-peters-oral-stmt-sjc-hearing.pdf

[3] Tarinelli, Ryan, "Congress cuts federal prison infrastructure funding." *Roll Call* (March 20, 2024). https://rollcall.com/2024/03/20/congress-cuts-federal-prison-infrastructure-funding/

[4] Brief of Former BOP Officials as *amicus curiae* supporting Petitioner, *Rutherford v. United States.* No. 24-820 (March 4, 2025). https://www.supremecourt.gov/DocketPDF/24/24-820/351254/20250305115710096_Amicus%20Curiae%20Brief.pdf

[5] By counting employees in non-pay status, the BOP in June 2025 reported the number of vacancies to be 2251. Federal Bureau of Prisons, "Federal Bureau of Prisons Fact Sheet." (June 9, 2025). https://www.bop.gov/about/statistics/docs/fbop_fact_sheet.pdf?v=3.1.3

[6] Sisak, Michael, "Cash-strapped Bureau of Prisons freezes some hiring to 'avoid more extreme measures,' director says." *Federal News Network* (May 9, 2025). https://federalnewsnetwork.com/hiring-retention/2025/05/cash-strapped-bureau-of-prisons-freezes-some-hiring-to-avoid-more-extreme-measures-director-says/

[7] American Immigration Council. "Senate Approves Unprecedented Spending for Mass Deportation, Ignoring What's Broken in our Immigration System." (July 1, 2025). https://www.americanimmigrationcouncil.org/press-release/congress-approves-unprecedented-funding-mass-detention-deportation-2025/

11, 2023, 317 incarcerated people died and 43,681 became sick from the virus but recovered.[8] During these three years, people were locked down for months at a time. In some cases, that meant being confined to an 8'x12' cell with 4 people. In other situations, people were locked into crowded dormitories.[9] Food was delivered in brown bags. People were let out for an hour at a time and often had to choose between showering, calling loved ones, sending email, or attending to administrative problems.

The COVID pandemic was not foreseeable, and people everywhere suffered, thus the courts generally rejected claims that incarceration during COVID warranted a sentence reduction due to being considered "hard time." *See, e.g. United States v. Veliu*, No. 17-CR-0404, 2022 WL 2484240, at *5 (E.D.N.Y. July 6, 2022). Some judges, however, did grant compassionate release in part on the grounds that they had not intended defendants to suffer being crammed into a prison facility with inadequate food and medical care: "a day spent in prison under extreme lockdown and in well-founded fear of contracting a once-in-a-century deadly virus exacts a price on a prisoner beyond that imposed by an ordinary day in prison." *United States v. Mcrae*, No. 17-CR-643 (PAE), 2021 WL 142277, at *5 (S.D.N.Y. Jan. 15, 2021). These hardships may not be "extraordinary" in that they happen all the time, but systematic failure cannot erase the hardship that incarcerated people endure. Accordingly, precedent is developing that conditions of confinement may be considered in the totality of a defendant's circumstances when considering compassionate release. *United States v. Latney*, No. 18-CR-0606 (JS), 2025 WL 1126474, at *6 (E.D.N.Y. Apr. 16, 2025).

Since the end of the pandemic, the situation in the BOP has continued to deteriorate. The BOP has used lack of staff to justify non-disciplinary lockdowns.[10] Last spring FMC Carswell announced that Fridays would be run on a holiday schedule, meaning the women would be locked down and would receive 3 bagged meals that day. On the first day of this new regime, women received meals that consisted of 4 slices of white bread, peanut butter, a slice of cheese, and fruit punch. On the same day, staff held an outdoor barbecue paid for by leftover union funds.[11] Protests by advocates

[8] Department of Justice Office of the Inspector General, "BOP At a Glance." (May 11, 2023) https://experience.arcgis.com/experience/ab22fb4c564e4f4b986e257c685190e8/page/BOP-at-a-Glance/
[9] Blakinger, Keri and Hamilton, Keegan, "'I Begged Them To Let Me Die': How Federal Prisons Became Coronavirus Death Traps." *The Marshall Project* (June 18, 2020). https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps
[10] U.S. Department of Justice Office of the Inspector General, "Top Management and Performance Challenges Facing the Department of Justic – 2024." (October 10, 2024). Pages 1-6. https://oig.justice.gov/sites/default/files/2024-11/TMPC-2024.pdf
[11] Emails available from The National Council upon request.

and intervention by the BOP Central Office led to a quick reversal of this policy, but non-disciplinary lockdowns remain a go-to tool to handle staffing issues.[12]

Conditions have gotten so bad that the BOP has been forced to close prisons. The Metropolitan Correctional Center, New York, was a "longstanding disgrace" and was eventually shut down because of the violence and corruption.[13] The BOP shut down FCI Dublin, also known as the Rape Club, in March 2024 because it could not control the widespread sexual abuse that had gone on at the prison for years. Judge Gonzalez Rogers declared the prison to be a "dysfunctional mess" and sent an open letter to her colleagues asking them to consider time served at Dublin "hard time" when considering compassionate release motions.

This is literally a question of life and death. From mid-March to the beginning of May, 2025, 11 people incarcerated in federal prisons have died. In February 2024, the Department of Justice Inspector General drew a direct connection between staffing shortages and prison deaths: "The BOP specifically identified insufficient staffing as an issue in at least 30 of the inmate deaths in our scope."[14] The same connection exists between "staffing levels for Psychology Services with an institution's ability to screen inmates for suicidality and provide preventive treatment that could reduce the instances of suicide."[15,16]

Starsha Silva was a 36-year-old mother of four with a known heart condition, incarcerated at FCI Waseca. Throughout the spring of 2023, Starsha's health deteriorated. In early May, she was finally sent out to consult with a specialist at the Mayo Clinic who determined that she needed immediate open-heart surgery. The case manager who accompanied her refused to allow the surgery because there was insufficient staff to guard Starsha during the procedure. She was returned to FCI Waseca and no arrangements were made for the surgery. Three weeks later Starsha was dead.[17] Her family has filed a lawsuit but everyone agrees that this 36-year-old mother of four might well be alive today if FCI Waseca had been fully staffed.

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[12] Talvi, Silja J.A., "Prison Lockdowns Are Becoming More Frequent and More Brutal Across the US." *truthout* (February 6, 2024). https://truthout.org/articles/prison-lockdowns-are-becoming-more-frequent-and-more-brutal-across-the-us/

[13] Weiser, Benjamin, "Justice Dept. to Close Troubled Jail Where Jeffrey Epstein Died." *The New York Times* (August 26, 2021). https://www.nytimes.com/2021/08/26/nyregion/MCC-epstein-jail-closed.html

[14] U.S. Department of Justice Office of the Inspector General, "Evaluation of Issues Surrounding Inmate Deaths in Federal Bureau of Prisons Institutions." Evaluation and Inspections Division 24-041 (February 2024). https://oig.justice.gov/sites/default/files/reports/24-041.pdf; *See also* UCLA Law Behind Bars Prison Project, https://uclaprisondata.org/

[15] *Id* at 66.

[16] Associated Press, "AP Sources: Staffing Hampered Response to Prison Suicide." *Courthouse News Service* (May 27, 2021). https://www.courthousenews.com/ap-sources-staffing-hampered-response-to-prison-suicide/

[17] Nelson, Sarah, "*Family of woman who died in Waseca prison file lawsuit*." *Star Tribune* (May 19, 2025). https://www.mankatofreepress.com/news/local_news/family-of-woman-who-died-in-waseca-prison-files-lawsuit/article_fd9a54d6-70ac-47f5-a6b8-

IV. Reductions in Sentences Are Necessary to Honor the Purposes of Sentencing Until the BOP Is Fully Functional

Congress has instructed courts to impose a sentence sufficient, *but not greater than necessary* to meet the following purposes: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; 18 USC 3553(a) (emphasis added). The current Guidelines have been designed to meet this directive, premised on the assumption that the BOP can meet its statutory obligation to ensure people are imprisoned in safe environments where their basic needs are met. 18 U.S.C. § 4042(a)(2). This assumption is no longer valid. Extensive lockdowns, nutritionally insufficient food, and poor medical care violate the agency's own policies.

During the pandemic, these hardships were commonplace, leading to the recognition that "detention during the pandemic is 'essentially the equivalent of either time and a half or two times what would ordinarily be served.'" *United States v. Elias*, 579 F. Supp. 3d 374, 378 (E.D.N.Y. 2022) (cleaned up). The BOP is unable to fix these problems, but that does not obliterate the statutory mandate to keep the punishment proportional to the crime. By integrating conditions of confinement into the sentence reduction analysis, judges could reduce sentences, not just time served.

Because incarceration in the BOP is harsher than statute allows, the Sentencing Guidelines must be adjusted to restore the mandate that sentences be no longer than necessary.

In a recent *amicus* brief to the Supreme Court, a group of former BOP executives argued that the BOP could no longer afford to keep elderly and ill people incarcerated because of the medical expenses. This brief also argued that these people did not pose a threat to society. The brief outlined stress on employees from inadequate staffing levels and low pay, describing the current situation as untenable. These senior officials concluded: "Amici therefore support empowering district courts to undertake a comprehensive, specific review of applications for compassionate release that considers all relevant circumstances."[18] The Sentencing Commission should adopt this recommendation in the Guidelines to fit the reality of incarceration in the BOP.

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e06deca36e21.html#:~:text=Starsha%20Silva%2C%20of%20Hawaii%2C%20died,the%20facility%20for%20wrongful%20death

[18] Brief of Former BOP Officials as *amicus curiae* supporting Petitioner, *Rutherford v. United States.* No. 24-820 (March 4, 2025). n.5 at 3.https://www.supremecourt.gov/DocketPDF/24/24-820/351254/20250305115710096_Amicus%20Curiae%20Brief.pdf

The Sentencing Commission must do its part to mitigate the substandard conditions of confinement by shortening sentences and encouraging compassionate release.

A. Incorporate Analysis of Conditions of Confinement into the Sentence Reduction Analysis

The Sentencing Commission should amend section 1B1.13(b)(5) to clarify that "hard time" should be taken into consideration when determining if the totality of the circumstances meets the extraordinary and compelling standard. Following existing case law and an emerging approach taken by some judges, conditions of incarceration that may not in and of themselves justify a sentence reduction should be weighed under a totality of the circumstances analysis. *Compare United States v. Gonzalez*, No. 19-CR-467, 2022 WL 16919842, at *5 (S.D.N.Y. Nov. 14, 2022) (finding that the difficult conditions of imprisonment occasioned by the COVID-19 pandemic alone are not sufficiently "extraordinary and compelling" to warrant compassionate release) *with United States v. Tavarez*, 747 F. Supp. 3d 557, 563 (E.D.N.Y. 2024) (taking conditions of confinement during COVID into account along with medical condition, family circumstances, and rehabilitation).

Amended language could read as follows:

> (5) OTHER REASONS.—The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4). *Conditions of confinement such as non-punitive lockdowns, environmental hazards, unreasonably long waits for programming or access to medical care, may be considered to determine whether the defendant's situation meets the required standard.*

In addition, the guidelines should also be amended to include a comment encouraging judges to consider the hardships that the person has endured while incarcerated. Days on non-punitive lockdown; days waiting for medical appointments; days on waiting lists for required programming; and days spent in solitary for non-disciplinary reasons. Exposure to environmental hazards, food insufficiency, sexual abuse or harassment are some of the elements that intensify punishment and thus support the view that the purposes of sentencing have been met. Similarly, these hardships also serve as a deterrent. A period of incarceration is much less daunting than a period spent in constant lockdown with limited access to the outdoors, recreation, and contact with family and friends. Judges are doing this on an *ad hoc* basis now but the logic should be standardized and applied uniformly.

B. Reduce Sentences Based on Prison of Designation

Judges cannot designate where people serve their sentences. 18 U.S.C. 3621(b). But that does not mean the BOP must have sole control. In New York, a judge believed that the defendant convicted of tax fraud should go to prison but could not countenance him being sent to MDC Brooklyn. He got around the problem by sentencing the man to 9 months in prison unless the BOP designated him to MDC Brooklyn, in which case the sentence would automatically convert to home confinement. *United States v. Colucci*, 743 F. Supp. 3d 452, 461 (E.D.N.Y. 2024).

Building on this approach, each prison could be assessed as low-hardship, medium-hardship, or highest hardship based on metrics such as staff vacancies, which necessitate more frequent lockdowns, or medical staff vacancies, which would mean longer waits for medical care. There are 122 prisons in the BOP system, the BOP is supposed to have a staffing level tool in place which should show the vacancies and needs in each prison. Other metrics could include available programming, known environmental hazards, failure to comply with the National Menu, and staff discipline rates. Based on a point system, each prison would be rated with sentences reduced by one-level for time spent in a low-hardship, two-levels in a medium-hardship and three-levels for time in a highest hardship prison.

Adding "hard time" to the criteria for compassionate release is not meant to create leverage for updated prisons with decent food, adequate medical care, and personal safety. Instead, this proposal will restore compliance with the statutory purpose of sentencing that limits incarceration to the minimum time "necessary." Creating another road to early release will prove, as the CARES Act did, that people can take accountability, rebuild their lives, and contribute to their communities outside the prison walls. The National Council remains an abolitionist organization that is focused on reimagining communities to eliminate poverty, poor public education, housing and food instability, and the illness of addiction, a.k.a. the factors that drive people to a prison bunk to begin with. This is long-term work, however. Today the Sentencing Commission asked how the guidelines can be improved to determine appropriate sentences. Our answer is to amend the guidelines to reduce sentences for those who are subject to unconscionable conditions of confinement.

(5) Examination of whether the guidelines provide appropriate adjustments for good behavior, including examination of whether §3E1.1 (Acceptance of Responsibility) and §5K1.1 (Substantial Assistance to Authorities) fully account for the variety of ways in which an individual may manifest acceptance of responsibility and provide substantial assistance, and possible consideration of amendments that might be appropriate.

Both provisions regarding acceptance of responsibility and substantial assistance suffer from the same flaw: they give the government control over whether the reductions will be sought. Under §3E1.1 (Acceptance of Responsibility) this is less of an issue because a defendant can negotiate for the reduction as part of a plea deal. But acceptance of responsibility is currently limited to statements before sentencing, preventing acknowledgement of the more meaningful actions during incarceration. The commentary should be revised to expand the interpretation of §3E1.1, Application note 1(G) (post-offense rehabilitative efforts) to include all efforts between the offense and release from incarceration.

The sincerest form of accepting responsibility is to give back. Some incarcerated people engage in truly selfless behavior: providing hospice care, supporting people who are suicidal, working as nurse assistants, preventing fights, or mentoring younger people who have a release date. Glenn Metz, now in his third decade of incarceration for running a drug ring in the last century, is a spiritual leader on the inside. While incarcerated at FCI Beaumont, he preached to generations of young men that "there is no right way to do wrong." Dozens of formerly incarcerated men have written to support Glenn's release because he saved their lives by teaching them how to thrive on the outside. A retired BOP Educational Specialist wrote:

> *I worked side by side with Mr. Metz on a daily basis. He was a vital part of the Offender Mentoring Program through the Release Preparation Program as he assisted and mentored young offenders housed at the institution in learning how to safely adjust to prison in the most positive and constructive way possible. He used his past and present experiences to impact the lives of the offenders he mentored. It is important to mention that Mr. Metz has taken full responsibility for his actions that lead to his incarceration.*[19]

No mechanism exists to give Mr. Metz credit for years of meaningful work that has repaired numerous lives, broken the cycle of poverty, and saved the taxpayers untold thousands of dollars in recidivism costs. Mr. Metz exercised his constitutional right to go to trial and thus did not receive credit for acceptance of responsibility when sentenced. Yet in the intervening decades he has done more to show acceptance of responsibility than anyone who admitted guilt pre-sentencing. The commentary to §3E1.1 should be amended to clarify that a sentencing reduction for acceptance of

[19] Full letter available upon request from The National Council.

responsibility is available throughout incarceration based on a person's actions that show acceptance of responsibility by benefiting others.

The government's role as gatekeeper is a significant problem under §5K1.1 (Substantial Assistance to Authorities) because incarcerated people have to run the risk of providing evidence, often seen as snitching, and have no recourse when the government then declines to seek the reduction in sentence. The recent situation at FCI Dublin illustrates this problem. Women suffered decades of sexual abuse and then were retaliated against when they finally complained enough to be heard. Even when these testimonies resulted in investigations, resignations, arrests, or convictions, there was no mechanism for filing Rule 35 motions on their behalf. Instead, whistle-blowers had to seek compassionate release, which has a different legal framework. For instance, a movant would have to argue that her assistance was "extraordinary and compelling" under the catch-all standard, leaving her with no recourse even if that contention is accepted if the motion is denied for other reasons.

As a result, the women who courageously came forward to expose the abuse at FCI Dublin have been left to fend for themselves in a system that is hostile to them due to their whistleblowing, all because the government controls access to sentence reductions for substantial assistance. By failing to support women from FCI Dublin who reported abuse, the government is sending the message to other potential whistleblowers that the more prudent course is to remain quiet.

If a movant for compassionate release alleges that she or he was a whistleblower, the commentary to the guidelines should require the government to provide an assessment of that assistance in its opposition under §5K1.1(a)(1) and allow the movant to respond to that assessment so that the judge can give it proper weight in the overall analysis on whether a sentence reduction is appropriate.

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To advance equality and justice for American Muslim organizations and individuals
by promoting legal compliance and protecting their rights in matters concerning national
security law.

July 15, 2025

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

Comment on U.S.S.C. Proposed Priorities and Recommendation for New Priority and Associated Research Agenda re the Terrorism Enhancement (§ 3A1.4) for Amendment Cycle Ending 2024-2025

Dear Judge Reeves,

The National Security Criminal Defense Center (NSCDC) is part of the Muslim Legal Fund of America (MLFA), a 501(c)(3) non-profit legal organization dedicated to defending civil rights and liberties in national security cases through federal litigation. The NSCDC represents clients in federal courtrooms across the country in national security cases (often material support of terrorism offenses, federal terrorism offense, obstruction of justice, false statements in a terrorism investigation, threats etc.). The NSCDC also provides expert assistance, co-counsel assistance, and consultation in national security cases nationwide. NSCDC cases are selected for the unique constitutional issues they present, including prosecutorial overreach and discriminatory application and enforcement of federal law and the Sentencing Guidelines.

MLFA welcomes the Commission's intention to focus on furthering the Commission's statutory purposes and missions as set forth in the Sentencing Reform Act, including:

- Establishing "sentencing policies and practices that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities." 28 U.S.C. § 991(b)(1)(B).
- Measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.
- Requesting such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law. 28 U.S.C. § 995(a)(8).

- Serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices. 28 U.S.C. § 995(a)(12)(A).
- Making "recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy." 28 U.S.C. § 995(a)(20).
- Holding "hearings and calling witnesses that might assist the Commission in the exercise of its powers or duties." 28 U.S.C. § 995(a)(21).

In response to the Commission's request for comment on: its proposed priorities, comment on additional priorities commenters believe the Commission should consider this amendment cycle and beyond, and for recommendations on specific avenues of research and policymaking that would serve to fulfill the above goals, the NSCDC respectfully submits:

1. Comment and proposals regarding and additional proposed priority to research and amend the Terrorism Enhancement (U.S.S.G. § 3A1.4) (Chapter 3, victim-related adjustment);

2. Comment and proposal on the research and amendment of extended supervised release terms and special conditions in non-violent, victimless, federal terrorism offenses.

SUMMARY

In the last Amendment Cycle, MLFA submitted a comment regarding the Terrorism Enhancement and now again proposes, with additions, that it be an additional priority this Amendment Cycle. Last cycle, the Commission made an amendment to Application Note 4 of the Terrorism Enhancement (§ 3A1.4), but it did not address the below issues and itself poses a concerning "solution" to the issue of discriminatory enforcement and results in additional discriminatory impact.

In the **first section** of this comment we address the impact of the Terrorism Enhancement; its intended versus actual application; lack of empirical evidentiary basis; its undermining of the purposes of sentencing and the objective factors under 18 U.S.C. § 3553(a); its discriminatory application and resulting disparate sentencing, and comment on the failings of the Application Note amendment made last cycle.

The Terrorism Enhancement (§ 3A1.4) is:

- the most severe sentencing guideline in use (second only to the genocide/crimes against humanity guideline, § 3A1.5, which is not in use);

- the Enhancement's arbitrary automatic designation as a career offender strips away any effective consideration of the 18 U.S.C. § 3553(a) factors and results in unwarranted sentence disparities for similarly situated defendants;

- it is a victim-related adjustment that is largely applied to defendants whose crimes had no victims (at its inception the Commission anticipated it would be rarely used, but it is applied in numerous cases annually, including 100% of material support cases which include attempt and conspiracy offenses conducted entirely online in sting operations with FBI agents);

- it lacks any evidentiary basis to support its draconian treatment of Muslims convicted of terrorism-related offenses— recent data suggests that defendants who receive the enhancement have one of the lowest recidivism rates, which rebuts the unsubstantiated assumption of their inability to be rehabilitated;

- of significant concern is that the Terrorism Enhancement is discriminatorily applied largely only to Muslims convicted of crimes "calculated to influence or affect the conduct of government." But the Enhancement is rarely sought for non-Muslim[1] and White individuals and was found inapplicable where it has been sought.

    - In the last Amendment Cycle, the Commission amended Application Note 4 striking the upward departure provision that would allow the enhancement to apply to offenses not listed as federal terrorism offenses, this amendment does not address the significant issues with the application of the Terrorism enhancement.

Second, we comment on the abusive and unsubstantiated terms of supervised release placed on many individuals convicted of terrorism-related offenses. The lengthy terms of supervised release, overbroad and unconstitutional Special Conditions of Release, and the lack of any evidentiary basis to support either resulting in unjust and discriminatory use of supervised release in non-violent terrorism-related cases**.**

Third, we propose an interim immediate amendment to the Terrorism Enhancement to curb its most discriminatory and harmful applications and limit the Enhancement to what was originally intended by the Commission, and recommend a research agenda for the Commission to study the Enhancement. After conducting the proposed research, the NSCDC recommends significantly reforming the Terrorism Enhancement by removing the automatic designation of Category VI criminal offender score, removing the mandatory offense level minimum of 32, and including an application note that explains the Enhancement is to be used only in cases of actual violence with victims.

Fourth, we propose amendments to the Commissions guidelines and policy statements regarding supervised release terms to account for the discriminatory and unsupported practice of issuing lengthy terms of supervised release on the basis of offense statute, and not on the numerous factors considered for all other offenders, or in line with the Commissions own policy statements. This includes a proposed recommendation to Congress to modify _____ to remove a blanket allowance for up to a lifetime of supervised release in all federal terrorism offenses. We also

[1] Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L. J. 1520, 1560 (2017), https://digitalcommons.law.yale.edu/ylj/vol126/iss5/5.

propose that special conditions of release in non-violent, first-time federal terrorism offenses be limited to evidence-based conditions and that the Commission collect data on the use of these conditions and the constitutionality of their implementation by Courts and the Office of Probation.

Specifically, MLFA proposes:

- While conducting appropriate data collection, analysis, and research on the use of the Terrorism Enhancement (§ 3A1.4), amend the use of the Terrorism Enhancement via an Application Note to limit its application to the rare case of actual violence and terrorism with identifiable victims, as originally intended. Currently § 3A1.4 is applied in almost every single material support of terrorism case, including attempts and conspiracies largely driven through FBI sting operations online with minors and young, first-time offender, non-violent adults.

- A comprehensive research agenda for the Commission to collect and analyze data that is easily identifiable and available. The goals of this agenda should be to study the use and impact of the Terrorism Enhancement as compared to its originally intended application; collect data on the recidivism rate of various terrorism-related offenders and their actual criminal history score; study the lack of evidentiary basis for the Terrorism Enhancement's arbitrary career offender designation and its hindrance in effectively meeting the purposes of sentencing under 18 U.S.C. § 3553(a); collect and analyze data on the race, religion, and ethnicity of those whom the Terrorism Enhancement is applied to, and those whose conduct would qualify for the enhancement as currently applied but have not received it, in order to assess if the enhancement is being applied discriminatorily.

- Implement the typical 5-year maximum of supervised release for terrorism offenders. Also, research the impact and efficacy of extreme supervised release terms (especially internet conditions) on terrorism offenders, gathering data on the race, religion, and offense of the convicted as well as the terms of supervised release and rate of recidivism.

- Conduct hearings and call witnesses from relevant organizations, defendants, families, community leaders, etc. to understand the disproportionate impact and negative consequences of the enhancement, as well as the supervised release terms and special conditions impact in terrorism-related cases.

These two new proposed priorities also address the Commission's following proposed priorities:

- Proposed Priority #4 and Prior Priority: Continued examination of the career offender guidelines, including… (B) possible consideration of amendments that might be appropriate.
- Proposed Priority #6: Continued **exploration of ways to simplify the *Guidelines Manual***, including…(B) examining the operation of specific provisions of Chapter Four, Part A (Criminal History);… (D) **evaluating infrequently applied specific offense**

characteristics and adjustments provisions throughout the *Guidelines Manual*; and (E) possible consideration of amendments that might be appropriate.

- Proposed Priority #7: Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.
- Proposed Priority #10: Consideration of other miscellaneous issues coming to the Commission's attention.
- Continued reform of the Guidelines' treatment of youthful offenders (Prior Priority)
- Further study and reform of the sentencing differences due to the trial penalty (Prior Priority)
- Continued study regarding recidivism (Prior Priority)

I. COMMENT REGARDING TERRORISM ENHANCEMENT

A. The impact of the Terrorism Enhancement (§ 3A1.4) – an arbitrary auto-designation as a career offender and a 12-point increase to at least level 32.

Terrorism-related offenses have been aggressively prosecuted in the United States since 9/11. The leading statute in the anti-terror push is the material support statute, 18 U.S.C. § 2339B, which punishes knowingly providing material support or resources to a designated foreign terrorist organization ("FTO") or attempting or conspiring to do so. The government frequently uses the material support statute because convictions under the law do not require that the defendant engaged in terrorism, aided or abetted terrorism, or conspired to commit terrorism. This endlessly broad statute, along with many others (false statements, and obstruction of justice)[2], has resulted in unjust convictions and unjustifiably lengthy sentences.

The statutory maximum of a § 2339B conviction is 20 years. The sentences prescribed for material support independently reflect Congress's intent to deter and punish terrorism-related crimes. If the offense results in the death of any person, the required prison sentence is any term of years or for life. The guideline for material support offenses, USSG § 2M5.3, carries a base offense level of 26. If the offense involved dangerous weapons, firearms, explosives, funds to purchase any of those items, or funds or other support believing they will be used to commit a violent act, 2 levels are added.[3] Assuming a Criminal History Category I and an offense level of 26, the advisory guideline range is 63 to 78 months; at offense level 28, the advisory guideline range is 78 to 97 months.

But these sentencing ranges are rarely ever the advisory guidelines ranges for individuals convicted under the material support statutes. The Terrorism Enhancement then, on top of the

[2] For example, 18 U.S.C. § 2339A, 18 U.S.C. § 2339C, but the Terrorism Enhancement is also applied to false statements (1001(a)), obstruction of justice, and other conduct that does not warrant the extreme treatment of the Terrorism Enhancement.

[3] § 2M5.3(b)

sentencing in § 2339B (and other statutes), increases the sentence for individuals convicted of "a federal crime of terrorism," i.e., crimes "calculated to influence or affect the conduct of government." *See* U.S.S.G § 3A1.4 (adopting the definition of "Federal Crime of Terrorism" in 18 U.S.C. § 2332b(g)(5)). This adds 12 more levels to the offense level, or increases the level to 32, whichever is higher. And regardless of the individual's actual criminal history, the enhancement assigns them to Criminal History Category VI, usually reserved for career offenders. *See United States v. Segura-Del Real*, 83 F.3d 275, 277 (9th Cir. 1996) ("Defendants are placed in category VI because they are the most intractable of all defendants."). The Terrorism Enhancement is the reason that individuals convicted of terrorism-related conduct, no matter how minor, receive abnormally long criminal sentences.

After applying the Terrorism Enhancement, the minimum possible Guidelines range for any offense is 210 to 262 months—that is, 17.5 to 21.8 years.[4] But more typically, the enhancement leads to a recommended sentence of thirty years to life or the statutory maximum, whichever is less. The result: it can put a criminal defendant away for thirty years to life for a crime that would otherwise result in a sentence of around five years.[5] In an internal analysis of each report on national defense-related federal offenders, the average increase of sentence length when applying the Terrorism Enhancement is approximately an additional 10.2 years.[6] This is regardless of any mitigating or aggravating factors, non-violence of the crime, the youth and rehabilitative capacity of the defendant, or any of the other factors or purposes of sentencing.

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[4] U.S. SENT'G GUIDELINES MANUAL § 2X1.1(b), 406-07 tbl. (U.S. SENT'G COMM'N 2023).

[5] *Id.*

[6] More research, separated by offense type, violent or non-violent, race, and religion is necessary to see the disparate impact on young, non-violent, Muslim, first-time offenders, but the available data demonstrates at least an average 10-year increase in offenses where the Terrorism Enhancement is applied.

In FY 2013 the average sentence for a national defense offender without the Terrorism Enhancement was 94 months, with it it was 208 months, with a difference of 114 months between the two averages. In FY 2017 the average sentence for a national defense offender without the Terrorism Enhancement was 66 months, with it, it was 176 months, a difference of 110 months. In FY 2018 the average sentence for a national defense offender without the Terrorism Enhancement was 60 months, whereas with the Enhancement, it was 181 months, with a difference of 121 months between the two averages. In Fiscal Year 2021 the average sentence for a national defense offender without the Terrorism Enhancement was 40 months, whereas with the Enhancement, it was 134 months, with a difference of 94 months between the two averages. In Fiscal Year 2022 the average sentence for a national defense offender without the Terrorism Enhancement was 47 months, whereas with the Enhancement, it was 188 months, with a difference of 141 months between the two averages. After averaging the differences of the averages, the ultimate average difference between a sentence with and without the Terrorism Enhancement is estimated at 122.14 months or about 10.19 years. *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2013* (July 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_National_Defense.pdf; *See United States Sentencing Commission Quick Facts on national Defense Offenders Fiscal Year 2017* (July 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY17.pdf; *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2020* (July 2021), https://www.ussc.gov/research/quick-facts/national-defense#:~:text=(July%202023)%20In%20fiscal%20year,13.2%25%20since%20fiscal%20year%202018; *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2021* (July 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY20.pdf; *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2022* (July 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY21.pdf

B. The Terrorism Enhancement does not consider, and actually undermines, the objective factors required under 18 U.S.C. § 3553(a).

Courts are required to consider seven factors in developing an appropriate sentence, including the nature of the offense and the characteristics of the defendant. § 3553(a)(1). The Terrorism Enhancement violates 28 U.S.C. § 991(b)(1)(A) and 991(b)(1)(B)—and undermines 18 U.S.C. § 3553(a)—as its express language and application suggests the Commission does not advise courts to follow the § 3553(a) factors for terrorism-related cases. In fact, none of the § 3553(a) factors are encompassed within or referenced by the enhancement at all. Instead, the Terrorism Enhancement automatically increases the level of the offense and the Criminal History Category, neither of which are based on an evaluation of the defendant's conduct or characteristics or the need for the sentence imposed. *See* 18 U.S.C. § 3553(a).

In the context of a material support offense under 18 U.S.C. § 2339A or § 2339B, the Terrorism Enhancement would not direct a court to consider objective factors, such as the amount or kind of support given, whether the support was choate or inchoate, the defendant's actual role in the terrorist activity, or the extent of harm caused by the defendant's support. Rather, the Enhancement hinges on a single question: was "the offense a felony that involved, or was intended to promote, a federal crime of terrorism," with "federal crime of terrorism" defined as an offense calculated to influence or affect the conduct of government. U.S.S.G. § 3A1.4(a); 18 U.S.C. § 2332b(g)(5). If the court finds, by a preponderance of the evidence, that the defendant attempted to provide material support to a terrorist or terrorist organization, then the Guidelines oblige the sentencing court to apply the Terrorism Enhancement with no adjustment for mitigating or aggravating conduct. *See United States v. Awan*, 607 F.3d 306, 317 (2nd Cir. 2010) (citing 18 U.S.C. § 2332(b)(g)(5)(A)).

In reality, the type of criminal conduct subject to the Enhancement varies significantly: from planning and participating in a terrorist attack that kills many people (i.e. what would likely be accompanied by life in prison to capital punishment), to making false statements to law enforcement officials (i.e. punishable by a maximum five-year prison sentence). *See e.g., United States v. Benkahla*, 530 F.3d 300, 304, 307 (4th Cir. 2008) (applying the Terrorism Enhancement, the defendant's sentence for perjury was increased from approximately three years to 10-12 years, or up to four times the normal length for perjury). This variance in conduct is not accounted for in the Terrorism Enhancement and the resulting Guidelines range is thus often inconsistent with the statutes criminalizing and punishing the conduct. *Id.*[7]

[7] A concerning trend that has emerged in national security prosecutions are cases brought after lengthy FBI sting operations conducted entirely online against minor, or young adult, Muslim teenagers— several with autism, who are then charged with attempted provision of material support based on statements they made to online covert agents agreeing to travel abroad to join a terrorist organization etc. These are speech crimes, non-violent, no victims, and instead of involving the family where there are concerns about online radicalization, FBI online agents take on the role of radicalizing these vulnerable young individuals. The Terrorism Enhancement then uniquely exposes these first-time, non-violent offenders to unwarranted lengthy sentences that lack any evidentiary basis. *See* Murtaza Hussain, *Undercover FBI Agents Helped Autistic Teen Plan Trip to Join ISIS*, THE INTERCEPT (Jan. 10, 2024, 3:37:00 PM), https://theintercept.com/2024/01/10/fbi-sting-isis-autistic-teen/; *see also* Austen Erblat, *Castle Rock teen with mental health issues arrested, accused of trying to join ISIS*, CBS News Colorado (July 19, 2023, 4:31:00 AM), https://www.cbsnews.com/colorado/news/castle-rock-teen-mental-health-issues-arrested-accused-trying-join-

Moreover, the Terrorism Enhancement directly contradicts the language of the material support statutes, which acknowledge that there are different levels of support requiring different punishments. For example, while § 2339A permits a maximum sentence of fifteen years, if death results from the support provided, the maximum sentence increases to life. Likewise, under § 2339C, if a defendant provides financial support with the intent or knowledge that the funds will be used in an act of terrorism, the maximum sentence is twenty years. But if someone only conceals, rather than provides, financial support, the maximum is just ten years. By contrast, the minimum recommended sentence under the Terrorism Enhancement is 17.5 years, *regardless of the type of material support provided*.[8] While the material support statutes' variation in sentencing shows that Congress intended for sentences to be "proportional to the culpability of the conduct, to the injury that can be directly attributed to a defendant's actions, and to the nature of the organization's actions," the Terrorism Enhancement treats an individual who provides any type of material support as harshly as the terrorist who himself commits violent acts.[9,10]

These concerns were shared with the Commission in 1997 when it sought public comment on codifying the emergency amendment that implemented § 3A1.4 to the Antiterrorism and Effective Death Penalty Act of 1996. In response, the American Bar Association Criminal Justice Section's Committee submitted a comment noting, "…we remain uncomfortable with U.S.S.G.§ 3A1.4 … because we see it as violative of the basic structure of the guidelines. We believe that the existing provisions in Chapter Two and Chapter Four, coupled with the ability to depart for relevant offense and offender characteristics, should be sufficient to address these clearly more serious crimes of terrorism. Further, in the absence of data and/or other evidence speaking to the inadequacy of the current provisions and mechanisms, we cannot support the establishment of a mandatory minimum of 210 months for all such crimes committed by all offenders (including those with no criminal history points)."[11] Those concerns have been born out in the uniquely harsh, disparate, and inequitable sentencing of these cases.

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isis/; *see also* Murtaza Hussain, *The FBI Groomed a 16 year-old with "Brain Development Issues" to Become a Terrorist*, The Intercept (June 15, 2023, 9:01:00 AM), https://theintercept.com/2023/06/15/fbi-undercover-isis-teenager-terrorist/

[8] U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2023) 406-07 tbl.

[9] James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 100, 116 (2010).

[10] Attachment 1 is a table demonstrating the wide ranging sentences for similar types of offenders subject to the Terrorism Enhancement. The result is disparate and dissimilar sentencing for similar offenses.

[11] *See* American Bar Association Criminal Justice Section's Committee on the United States Sentencing Guidelines, Public Comment on March 1997 United States Sentencing Commission Proposed Amendment 5 (March 1, 1997), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/199703/199703_PCpt7.pdf.

C. The Terrorism Enhancement Functions as a Mandatory Minimum in Terrorism-Related Cases and is Presumed Necessary and Reasonable.

Although the Guidelines were deemed advisory in *Booker*, because sentencing courts are required to consider them and must provide a sufficient justification for departing from them, they largely continue to act as mandatory.[12] *See Rita v. United States*, 551 U.S. 338, 366 (2007) (Stevens, J., concurring) ("I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in Booker."). Perhaps nowhere is this more evident than with the Terrorism Enhancement. Sentencing courts start from a place of little experience with terrorism-related cases, like the district judge noted in *United States v. Said Azzam Rahim* (N.D. Tex. 2019).[13] They rely on the Terrorism Enhancement in the Guidelines based on the assumption that the Commission, with superior knowledge and data, must have created the Terrorism Enhancement for some logical and substantiated reason. *See Gall v. United States*, 552 U.S. 38, 46 (2007) (explaining that the Guidelines are the "product of careful study based on extensive empirical evidence"). While this assumption is inaccurate,[14] terrorism defendants then receive severe punishments that, when reviewed by an appellate court, are given a "presumption of reasonableness." *See Rita*, 551 U.S. at 347.

In other words, because the sentences are within the Guidelines range, appeals courts typically defer. It seems that the only time appellate courts have stepped in is to overturn sentences as too lenient when district judges vary downward from the Guidelines range created by the Terrorism Enhancement.[15] *See United States v. Ressam,* 679 F.3d 1069 (9th Cir. 2012); *id*. at 1106 (Schroeder, J., dissenting) ("The majority's implicit assumption that terrorism is different . . . flies in the face of the Congressionally sanctioned structure of sentencing that applies to terrorism as well as all other kinds of federal criminal offenses."); *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011) (vacating sentence which varied downward from Guidelines range and remanding with instructions to increase sentence into range of 360 months to life). Thus, to call the Terrorism Enhancement "advisory" is to ignore reality—that no matter the route taken, we end up right back at applying the Terrorism Enhancement's automatic offense level and Criminal History Category increases without regard for the defendant's conduct or characteristics.

As this Commission has noted in other cases, mandatory minimums are counterproductive and inconsistent with the guideline system. The Terrorism Enhancement's mandatory minimum offense level of 32 and mandatory Criminal History Category VI violates the Commission's

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[12] *See* United States Sentencing Commission, *Federal Sentencing: The Basics*, 3 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf ("[T]he average sentence imposed for all cases has closely tracked the average guideline range—both before and after *Booker*.").

[13] *United States v. Said Azzam Rahim*, 3:17-cr-00169 (N.D. Tex. 2019), Doc. 180, Transcript of Sentencing Hearing, 69 ("Mr. Rahim, we don't see many cases like this here. We might do maybe one case a year for the various courts . . .").

[14] *See* discussion *infra* Section I. E.

[15] *See* Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 525 (2014). *See also* Said, *supra* note 8, at 525-27.

purposes and missions to: establish policies that assure meeting the purposes of sentencing, provide certainty and fairness, and avoid unwarranted sentencing disparities. 28 U.S.C. 991(b)(1)(A)-(b)(1)(C). The Guidelines are set up so that chapters two and three address the offense conduct; and Chapter Four captures the defendant's criminal history. Under the Terrorism Enhancement, every defendant has the same Criminal History Category, which renders Chapter Four meaningless and has resulted in unwarranted disparity between defendants with a serious criminal record and defendants with little to no criminal record.

D. The Sentencing Commission's Analysis and Recommended Reforms of the Career Offender Guideline Should be Applied to the Terrorism Enhancement.

Chapter Four of the Guidelines classifies defendants by Criminal History Category based on their number of past offenses because, according to the Commission, courts should impose a sentence that will "protect the public from further crimes of the defendant" (18 U.S.C. § 3553(a)), and "repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." 18 U.S.C. § 4A1.1, Introductory Comment. "Prior convictions . . . serve under the Guidelines to place the defendant in one of six 'criminal history' categories; the greater the number of prior convictions, the higher the category. . . . the Guidelines seek to punish those who exhibit a pattern of 'criminal conduct.'" *Nichols v. United States*, 511 U.S. 738, 751 (1994) (Souter, J., concurring). In other words, the Criminal History Category is intended to increase sentences for "career offenders."

The Sentencing Commission has studied the career offender guideline (§ 4B1.1) which implements a Congressional directive instructing the Commission to set the guideline range for offenders with specified instant and prior convictions at or near the statutory maximum. A defendant qualifies as a career offender if (1) the defendant was at least eighteen years old at the time he or she committed the instant offense of conviction; (2) the instant offense is a felony that is a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[16]

In its analysis, the Sentencing Commission explored concerns that the career offender guideline does not meaningfully distinguish among career offenders. That same concern applies to the Terrorism Enhancement. The career offender portion of the Terrorism Enhancement is significantly more problematic than section 4B1.1 because it is applied to first-time, non-violent offenders regularly. Section 4B1.1, at least requires a present felony, as well as two prior felonies that were either a *crime of violence* or for a controlled substance offense.

Importantly, the Commission found clear differences between offenders who had drug trafficking only offenses, violent only offenses, and mixed offenses. The Commission found that "career offenders who have committed *a violent instant offense or a violent prior offense generally have a more serious 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."[17]

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[16] United States Sentencing Commission, *Guidelines Manual,* § 4B1.1 (Nov. 2023).

[17] U.S. SENT'G COMM'N, REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 26 (2016).

Based on its findings, the Sentencing Commission concluded that the career offender directive is best focused on those offenders who have committed *at least one "crime of violence."* The Commission recommended that "Congress amend the directive to reflect this principle by no longer including those who currently qualify as career offenders based solely on drug trafficking offenses" and noted that such "reforms would help ensure that federal sentences better account for the severity of the offenders' prior records, protect the public, and avoid undue severity for certain less culpable offenders."[18]

The same findings apply to the Terrorism Enhancement, which *pretends* that first-time offenders are career offenders.[19] There is no evidentiary basis for the harsh impact of the enhancement.[20] In fact the evidence in the aftermath of these prosecutions reveals what the

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[18] *Id.* at 3.

[19] None of the other "Victim-Related Adjustments" result in an automatic Criminal History Category increase. *See* U.S.S.G §§ 3A1.1-3.

[20] Note that these defendants are also disqualified from consideration as zero-point offenders. The Commission stated that establishing § 4C1.1, Adjustment for Certain Zero-Point Offenders, "was informed by its studies of recidivism among federal offenders," among other extensive data analyses of offenders relating to their criminal histories. However, none of these studies or reports on recidivism establish an empirically proven basis for predicting that terrorism-related defendants are of higher likelihood to reoffend. In fact, the vast majority of these offenders are first-time offenders, and the vast majority of Muslim first-time offenders are non-violent—both traits the Commission have found correlate to the lowest likelihood for recidivism. *See Recidivism of Federal Offenders Released in 2010* (Released 2010, Updated Feb. 10, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220210_Recidivism-Violence.pdf; ; *See also Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf; *See also Recidivism and the "First Offender"* (May 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf; *See also A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf; *See also Recidivism Among Federal Offenders: A Comprehensive Overview* (March 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf; *See also United States Sentencing Commission Report to Congress: Career Offender Sentencing Enhancements* (August 2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf; *See also The Past Predicts the Future: Criminal History and the Recidivism of Federal Offenders* (Mar. 9, 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf; *See also Recidivism Among Federal Offends Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* (Mar. 28, 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf; *See also The Criminal History of Federal Offenders* (May 17, 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517_criminal-history.pdf; *See also Recidivism Among Federal Violent Offenders* (Jun. 21, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf; *See also Length of Incarceration and Recidivism* (April 29, 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220621_Recidivsm-SentLength.pdf; *See also An Overview of Mandatory Minimum Penalties*

Commission has already learned about "career offenders"—that past crimes of violence are better indicators of recidivism, and non-violence indicates a much lower risk of recidivism. Below, MLFA requests that the Commission recommend a similar amendment to Congress regarding the terrorism enhancement as it begins a recommended research agenda that can inform a more complete amendment and reform of § 3A1.4 in the future.

E. The Empirical Evidence Does not Support Treating and Sentencing First-Time Terrorism Offenders like Career Offenders.

According to the Commission, "the guidelines represent an approach that begins with, and builds upon, empirical data." U.S.S.G. Part A Introduction and Authority (2023) at 5.[21] Indeed, the Supreme Court has repeatedly claimed that the reason courts should and do look to the Guidelines in imposing fair sentences is because the Commission develops the Guidelines by using empirical data. *See Rita*, 551 U.S. at 349 (outlining the "empirical approach" that the Sentencing Commission used to structure the Sentencing Guidelines); *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) (The Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience. . . .'"). Despite this imperative, there was little empirical data on terrorism sentences when the Commission promulgated the Terrorism Enhancement in 1994.[22]

In nearly thirty years since the inception of the most extreme enhancement in the Guidelines, the Commission has not collected or studied the data to assess if any evidentiary basis exists to support its broad application, or whether it has resulted in unwarranted sentence disparities. Instead, the Terrorism Enhancement was created on the unsubstantiated assumption that terrorism defendants, no matter their individual situation, were so different from other defendants that an extreme increase in Criminal History Category was necessary across the board.[23] At the time, neither Congress nor the Commission could have envisioned how a group like ISIS would use the internet to ensnare individuals online into making verbal statements of

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in the Federal Criminal Justice System (July 11, 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf

[21] The United States Sentencing Commission maintains a "mission of implementing data-driven sentencing policies." *Amendment 821 to the United States Sentencing Guidelines* (Nov. 1, 2023), https://www.ussc.gov/guidelines/amendment/821

[22] *See Brown*, *supra* note 2, at 547.

[23] The belief that defendants in terrorism-related cases cannot be rehabilitated because of how serious their conduct is presumably sourced in the outrage and rhetoric that officials of the United States government have used in reference to them. When President Bush signed the infamous Patriot Act of 2001 into law, he remarked that terrorists could not "be reasoned with" because they "have no conscience." *Bush Signs Anti-Terrorism Legislation*, Wash. Post. (Oct. 25, 2001), https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_102601.html. Courts have echoed these unsubstantiated claims. *See United States v. Segura-Del Real*, 83 F.3d 275, 277 (9th Cir. 1996) ("Defendants are placed in category VI because they are the most intractable of all defendants.").
See also Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 Yale L.J. 1520, 1537 (2017); *See also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303.

support, offers of online financial support, or discussions about traveling abroad etc., thereby exposing first-time non-violent offenders to statutory maximum sentences.

Moreover, the evidence since 1994 strongly discredits the logic of the Terrorism Enhancement's blanket increase in Criminal History Category, particularly where the defendant is a first-time offender. According to the Commission, individuals with no criminal record have the lowest rate of recidivism.[24] One study cited by the Commission in 2004 determined that 93.2% of first-time offenders did not reoffend.[25] Based on this evidence, for non-terrorism defendants without a criminal history, courts regularly impose sentences below the advisory Guidelines range because they recognize that a lesser prison sentence is nonetheless a significant punishment and deterrent for someone who has never experienced prison.[26] There is *no evidence* however, that terrorism-related defendants are an exception, or reoffend at higher rates. To the contrary, the available data shows that individuals convicted of terrorism-related offenses do not reoffend at higher rates than those convicted of other crimes. Scott Shane, Beyond Guantánamo, a Web of Prisons for Terrorism Inmates, N.Y. TIMES (Dec. 10, 2011), https://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html.

Of more than 300 prisoners who had completed terrorism sentences since 2001 (up to 2011), "Justice Department officials and outside experts could identify only a handful of cases in which released inmates had been rearrested, a rate of relapse far below that for most federal inmates . . ." *Id.* Thus, "it appears extraordinarily rare for the federal prison inmates with past terrorist ties to plot violence after their release." *Id.* In fact, a recent 2021 publication reporting results from an ongoing Terrorism Recidivism Study (TRS) highlights the "surprisingly lower recidivism rates" among this population.[27] This Terrorism Study Database was established in response to the deficit of information available on the rate of recidivism for individuals who were convicted terrorism-related offenses in the United States following 9/11. In 2019, an article based on the TRS database reported a 1.6% recidivism rate among its subjects. At the time, out of the 561 offenders included in the TRS, only nine recidivated over the entire period of analysis. In other words, only 1.6% of the TRS sample recidivated between 2001 and 2018. [28]

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[24] *See* Sameer Ahmed, *Is History Repeating Itself: Sentencing Young American Muslims in the War on Terror*, 126 Yale L. J. (2017), https:// digitalcommons.law.yale.edu/ylj/vol126/iss5/5.

[25] *Recidivism and the "First Offender,"* U.S. SENT'G COMM'N 26 (May 2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/20040 5_Recidivism_First_Offender.pdf [http://perma.cc/MLD8-RQU8].

[26] *See, e.g.*, *United States v. Willis*, 479 F. Supp. 2d 927, 937 (E.D. Wis. 2007) (varying downwards because the "sentence provided a substantial punishment for someone . . . who had never before been to jail and who engaged in no violence").

[27] Omi Hodwitz, *The Terrorism Recidivism Study (TRS): An Update on Data Collection and Results*, 15 PERSPECTIVES ON TERRORISM, 27-38, 2021, https://www.jstor.org/stable/27044233

[28] The TRS is a longitudinal study that will continue to track the recidivism of individuals throughout their lives post-conviction. On the question of whether a delay characteristic could be present for terrorism-related offenders, the study has produced no such evidence.

Between 2001 and 2020 only 20, or 3.1 prevent, recidivated over the two decades of analysis. "Of the 20 that recidivated, 11 re-offended following release and the remaining nine re-offended while still incarcerated. It is interesting to note that recidivism rates do not change when assessing the full sample (629) or the sample of releases (354); 3.1 percent re-offended in both samples." TRS at 31-32.

By significant contrast, the evidence shows that not only do terrorism defendants not offend more, they re-offend ***significantly less*** than apolitical/non-terrorism defendants:

> "Recidivism data released in 2018 of the 247 offenders showed a a consistent recidivism rate of 1.6% which is 'stark when compared to a non-extremist or apolitical sample of offenders. The Deptement of Justice, for example, examined a state sample of released offenders, reporting a 44 percent re-arrest rate within the first year and a 68 perent arrest rate in the first three years." Page 31, referencing Department of Justice, "2018 update on prisoner recidivism: A 9-year follow-up period (2005–2014)."

Importantly, the Terrorism Recidivism Study also notes,

> "The type of recidivism is also important; many of the questions around terrorist recidivism are rooted in the concern that, upon release, they will re-engage in political violence. Herein lies a particularly interesting outcome. Apart from one individual, the recidivists did not return to extremist activities following release. Instead, releasees engaged in apolitical activities, including parole violations, minor theft and fraud for personal gain, drugs, and domestic violence. The one exception has a tenuous connection to political activity, at best. This offender was originally convicted of human trafficking for profit, including smuggling members of Hezbollah. He resumed his old ways upon release, reengaging with a smuggling ring. Although his involvement was driven by profit, it is possible that he continued to do business with extremist organizations although this is not documented in his second set of convictions. Thus, crediting him with continued terrorist-related activities is generous and unconfirmed. Regardless, the data provide a clear picture of apolitical recidivism. This does not exclude the possibility that future releasees will re-engage with political violence, but this expectation is not borne out in the TRS sample." TRS at 34.

Because the Terrorism Enhancement automatically increases a defendant's Criminal History Category to VI, the fact that the defendant is a first-time offender with an extremely low likelihood of recidivism is not only ignored but actually erased.

Courts scrutinizing this issue agree that the complete lack of evidence is a weak basis for the Terrorism Enhancement. Senior Judge George O'Toole, Jr., presiding over *United States v. Mehanna*, Transcript of Disposition, No. 09-10017-GAO (D. Mass. 2012), criticized the mandatory Criminal History Category VI as "too blunt an instrument to have any genuine analytical value" and "fundamentally at odds with the design of the Guidelines" because it

"imputes a fiction into the calculus." *Mehanna*, Sentencing Transcript (Doc. 480) at 8-9. Moreover, the Court in *United States v. Jumaev* refused to apply the enhancement because it "is not backed by any empirical evidence" and because "treating all 'terrorists' alike is impermissible under our sentencing paradigm." 2018 WL 3490886, *10, CR 12-0033 JLK (D. Colo. July 18, 2018). And the Judge Charles R. Breyer explained in *United States v. Alhaggagi:*

> [T]he enhancement's treatment of criminal history-automatically assigning to all terrorism defendants a criminal history category of VI is inappropriate based on the seriousness of the crime, inappropriate based on assumptions about recidivism, and inappropriate as to this Defendant, warranting a downward departure.

2019 U.S. Dist. LEXIS 37889, 2019 WL 1102991 at *16 (N.D. Cal. March 8, 2019). There, Judge Breyer noted that "criminal history category has nothing to do with how serious the crime is" and that there was no "evidence [that he was aware of] to show that the criminal history category should be increased to Level VI because of the seriousness of the crime". He concluded that §3A1.4(b) "[made] literally no sense." *United States v. Alhaggagi,* Sent. Tr. 3:17, No. 146, at 119-120; *see also United States v. Khan*, No. 4:15-cr-00263, Judgment at Doc. 126 (S. D. Tex. July 2, 2018), rev'd and remanded, 938 F. 3d 713 (5th Cir. 2019), resentenced (sentencing the defendant to 18 months because he had no criminal history and terminated his plans).[29]

Courts applying the Terrorism Enhancement, on the other hand, conspicuously fail to cite any evidence to justify imposing the Guidelines' harsh sentences in terrorism-related cases.[30] They seek to justify its steep increase by arguing, with no evidence, that "terrorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *Jayyousi*, 657 F.3d at 1117; see also *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003). This belief, "that terrorism is different, maybe even exceptional" is premised on "a type of visceral outrage at all conduct linked to terrorists that can taint the individualized and careful process that is supposed to go into a criminal sentencing" and, despite the lack of evidence, and evidence to the contrary, is used to "justif[y] a departure from the normal standards."[31] Not only is this belief unsupported, its resultant sentencing enhancement also causes harm to the Muslim American community.[32]

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[29] *United States v. Khan* (S.D. Tex. 2019) (initial Court did not apply the Terrorism Enhancement to Khan's sentence), rev'd, 5th Cir. (2021). The government appealed a second time, the Fifth Circuit reversed and remanded again, the original judge was recused, and the new sentencing judge sentenced the defendant to 12 years.

[30] McLoughlin, *supra* note 6, at 112-15.

[31] Said, *supra* note 8, at 521.

[32] Ahmed, *supra* note 15, at 1556. "These [similar] negative effects include (1) increasing discrimination by reinforcing stereotypes of African Americans and Muslims as inherently dangerous, (2) furthering distrust of law enforcement among African Americans and Muslims, . . . and (3) failing to effectively rehabilitate drug and terrorism offenders and reintegrate them into society." *Id*.

F. Discriminatory Application of the Terrorism Enhancement to Muslim Individuals and Court Refusal to Apply the Enhancement to Non-Muslim, White Offenders where Applicable.

While the Terrorism Enhancement is written for broad application, it has been largely applied only to Muslim defendants or offenses involving Muslim organizations.[33] The Terrorism Enhancement is intended to dramatically increase the punishment of offenses that were "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." This can apply to the list of enumerated statutes in § 3A1.4, but Application Note 4 to § 3A1.4 also allows for an upward departure—equivalent to what would result if the enhancement was applied—for any other offense that "was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." The upward departure can also apply to any of the enumerated statutes where the terrorist motive was to intimidate or coerce a civilian population, rather than influence the conduct of government.

Many of the January 6th convictions were based on a clear and established intent to "influence or affect the conduct of government by intimidation or coercion, or retaliation," and would thus qualify for application of the Terrorism Enhancement or the upward departure it provides for in Application Note 4.

On January 6, 2021, a mob of President Donald Trump's supporters went to the U.S. Capitol, attempting to interfere with the certification of electoral votes from the 2020 presidential election. The rioters assaulted the Capitol police force and looted and invaded the complex for several hours. They destroyed property and sent members of Congress and their staff into hiding in offices and bunkers. The riots killed five, injured nearly 150 members of law enforcement, and caused $2,881,360.20 worth of property damage.[34]

The Justice Department, however, has not charged the vast majority of the rioters with any terrorism charges: of the nearly 1,300 defendants charged, 332 received charges of corruptly obstructing, influencing, or impeding an official proceeding, or attempting to do so, 57 received charges of conspiracy to obstruct a congressional proceeding, obstruct law enforcement during a civil disorder, and/or injure an office.[35] The Justice Department however has only sought the Terrorism Enhancement in a couple of the over 900 prosecutions.[36] Currently, the 'terrorism

[33] Trevor Aaronson & Margot Williams, *Trial and Terror*, THE INTERCEPT (last updated June 14, 2023), Trial and Terror (theintercept.com). This online database spotlights 992 terrorism-related prosecutions by the Department of Justice. Of these 992, only ~95 cases are against non-Muslim offenders/non-Muslim organizations.

[34] Amanda S. Nhek, *Judicial Uncertainty and Domestic Terrorism: Reforming the Sentencing Guidelines after January 6,* 11:2 NATIONAL SECURITY LAW JOURNAL. 270 (2024).

[35] Nhek at 278.

[36] *United States v. Reffitt*, (D.D.C. 2022) Case number: 1:21-cr-00032 (tried to storm the Capitol while armed with a gun. The judge refused to apply the Terrorism Enhancement and sentenced Reffitt to just over 7 years.*); United States v. McCaughe*y, III et al (D.D.C. 2023), Case number: 1:21-cr-00040

enhancement' has only been added to sentences of three January 6 defendants: Enrique Tarrio, Joseph Biggs, and Zachary Rehl, all former leaders of the Proud Boys organization.[37] The lack of sentencing enhancements sought for January 6th domestic extremists, however, is not an isolated case but rather a continuing disparity. Judges were reluctant to impose the terrorism enhancement in the case of January 6th because they were unsure if the actions qualified as "crimes of terrorism," they did not believe it fair to single out some January 6th offenders when rest did not receive similar sentencing enhancements, and oftentimes because the prosecutors never requested the judges to seek the enhancement.[38] Judges were extremely inconsistent in their application of the terrorism enhancement as others "exhibited similar behaviors and held similar intentions, yet judges did not apply the enhancement in many of these cases."[39]

In the case of Capitol rioter Guy Reffitt, prosecutors described that "Reffitt sought not just to stop Congress, but also to physical attack, remove, and replace the legislators who were serving in Congress," a "quintessential example of an intent to both influence and retaliate against government conduct through intimidation or coercion."[40] Another Capitol rioter, Thomas Webster, tackled, choked, and assaulted an officer.[41] Lonnie Leroy Coffman drove to the Capitol with "282 Molotov cocktails, a 9mm handgun, a rifle, a shotgun, hundreds of rounds of ammunition, large-capacity ammunition feeding devices, a crossbow with bolts, machetes, camouflage smoke detectors and gas-filled Mason jars used to make napalm."[42] Reffitt's case, Webster's, Coffman's, and many others like them were strikingly similar to Tarrio, Biggs, and Rehl, the Judges refused to implement the terrorism enhancement for the vast majority of January 6 cases.[43] Yet, nonviolent offenses by Muslim, non-white defendants regularly receive the enhancement.

In September 2023, the University of Maryland's National Consortium for the Study of Terrorism and Responses to Terrorism (START) published research finding that sentencing enhancements were disproportionately applied to international terrorism cases, resulting in sentencing disparities between international and domestic terrorism defendants.[44] Despite the

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(Judd launched a lit object at a tightly packed tunnel of law enforcement and the mob in an attempt to clear a path for rioters. The judge did not apply the Terrorism Enhancement, sentenced to 32 months.).
See also Josh Gerstein, *Why DOJ is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants*, POLITICO (Jan. 4, 2022, 4:30 AM), https://www.politico.com/news/2022/01/04/doj-domestic-terrorism-sentences-jan-6-526407.

[37] Nhek at 278, 283.
[38] Nhek at 279.
[39] Nhek at 285.
[40] Nhek at 280.
[41] Nhek at 282.
[42] Nhek at 282.
[43] Nhek at 283.
[44] Michael A. Jensen et al., *Prosecuting Terror in the Homeland: An Assessment of Sentencing Disparities in United States Federal Terrorism Cases* (2023), https://www.start.umd.edu/sites/default/files/publications/local_attachments/Prosecuting%20Terror%20in%20the%20Homeland%20Research%20Brief.pdf (START's findings come from an analysis of 344 federal terrorism prosecutions—118 international terrorism cases and 226 domestic terrorism cases—between 2014 and 2019; "Cases were classified as international terrorism if the defendants had links to, or were acting in support of, terrorist groups and movements whose bases of operations and primary activities are located outside of the territorial boundaries of

Terrorism Enhancement not requiring a transnational element to the crime, researchers found that that the Terrorism Enhancement was sought in approximately 60% of international terrorism cases; similar sentencing penalties were sought only in 15.4% of domestic terrorism cases.

The discriminatory application of the Terrorism Enhancement to mostly Muslims, or offenses involving Muslim organizations, has long been established. From the available data it is also clear that Muslims are disproportionately prosecuted for attempt or conspiracy to provide material support to a foreign terrorist organization, often as the result of a sting operation; and the Terrorism Enhancement has been applied in almost 100% of material support cases.[45] Thus, in the face of the government's refusal to seek the enhancement against white, non-Muslims, and courts' refusals to apply the enhancement to white, non-Muslims whose conduct clearly warrants its application, the enhancement is now on its face discriminatory on the basis of religion.

The Sentencing Commission's tracking and reported data does not show this clear discrimination, however. The Commission only tracks race as commonly tracked in the U.S. Census. There is no category for Arab, Iranian, or Southwest Asian. More than 80% of individuals of Middle Eastern, Southwest Asian, or North African (Egypt, Morocco etc.) background, select themselves as "White."[46] Indeed, the Sentencing Commission indicates that the Terrorism Enhancement is applied to 50% "white" individuals. This is inaccurate and results in an erasure of the discriminatory impact of the Enhancement on those of Southwest Asian, Arab, and North African descent.

The Commission also does not track religion. As a result, there is currently no data from the Sentencing Commission that would alert a clearly discriminatory application of the Terrorism Enhancement to Muslim Americans or other resulting unwarranted sentencing disparities. For the reasons discussed above, religion, race/ethnicity, and violent/non-violent conduct, should be clearly tracked for this enhancement and analyzed in the context of discriminatory application.

II. COMMENT REGARDING SUPERVISED RELEASE TERMS AND SPECIAL CONDITIONS IN TERRORISM-RELATED CASES

A. Extensive Supervised Release Terms for terrorism-related offenders out of line with purposes of sentencing, Commission policy statements, and lack any evidentiary basis.

the United States…Cases were classified as domestic terrorism if the defendants had links to, or were acting on behalf of, groups or other movements that operate primarily within the territorial jurisdictions of the United States.")

[45] *United States Sentencing Commission Fiscal Year 2023 Guideline Application Frequencies Chapter 3 Adjustments* (April 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2023/Ch3_Guideline_FY23.pdf

[46] Sarah Parvini & Ellis Simani, *Are Arabs and Iranians white? Census says yes, but many disagree*, LOS ANGELES TIMES (March 28, 2019), https://www.latimes.com/projects/la-me-census-middle-east-north-africa-race/. ; *See also* Abboud, Sarah et al. "The Contested Whiteness of Arab Identity in the United States: Implications for Health Disparities Research." *American journal of public health* vol. 109,11 (2019): 1580-1583. (Discussion on how "Arab classification as White leads to their cultural invisibility and perpetuates a cycle of undocumented health disparities.")

18 U.S.C. 3583(b) mandates that Class A felonies—crimes punishable by up to life imprisonment or the death penalty—may receive up to a *maximum* term of 5 years of supervised release; if the offense involves a child victim, sex crime, and/or drug-use, the term may be longer.[47] 18 U.S.C. 3583(j) carves out an *additional* exception to the maximum term of supervised release, exempting certain terrorism offenses from the 5-year limit.[48] Even if those offenses are not punishable by up to life imprisonment or death, and/or do not involve a child victim, sex crime, or drug use (ex. Material support offenses under 18 U.S.C. 2339B, 2339A, 2339C punishable by up to 10 to 20 years).

Because of how broadly terrorism charges [e.g., 2339(a)(b)(c)] have been construed by the Courts, many of these cases are nonviolent, victimless, first-time offenses by youthful offenders.[49] Thus, Courts often impose supervised release terms disproportionate to the severity of the offense—both in duration of the term of supervised release and the special conditions attached to it. Such disproportionate terms are at odds with the letter and spirit of the Sentencing Commission's own policy statements, lack any evidentiary basis, and in fact are in contradiction to the existing evidence.

The Commission's policy statement at guideline § 5D1.2 (b) states: "Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum terms specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—(1) any offense listed in 18 U.S.C. Sec 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death, or serious bodily injury to another person. This would seem to exclude many of the cases in which courts nationwide have mandated lengthy terms of supervised release (ie. attempt or conspiracy non-violence material support offenses).

In the case of terrorism offenses, first-time offenders with non-violent, victimless crimes (often due to online speech) consistently face terms of supervised release far beyond 5-year maximum imposed on Class A Felonies where the available evidence indicates these offenders have the lowest recidivism rates.

Case Examples:

[47] See 18 U.S.C. §§ 3583(b), 3559; see also *United States. v. Hertler*, 776 F.3d 680, 682–83 (9th Cir. 2015) (discussing the maximum terms of supervised release that a court may impose).
[48] Federal terrorism offenses list.
[49] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8-40 (2010)

Zacharia Abdurahman, *USA v. Ahmed et al.* (Nov. 30, 2016, D. MN.)

Mr. Abdurahman was a teenager at the time of his offense. Appalled by the Assad regime's atrocities against his co-religionists, his desire to help suffering Syrians became perverted by ISIS propaganda. When an FBI informant offered documents to travel to Syria, he accepted and was arrested soon afterwards. While Abdurahman undoubtedly took steps in furtherance of a conspiracy to travel abroad and join ISIS, the teenaged Abdurahman never possessed a weapon, never made threats against law enforcement, did not discuss committing any acts of terrorism, and did not provide support to ISIS.[50] Abdurahman's guilty plea on one count of 18 U.S.C. § 2339B(a)(1) for his victimless, nonviolent, first-time offense was given a sentence of 10 years imprisonment followed by *20 years* of supervised release—four times the usual maximum and without any of the usual criteria that would permit exceeding the maximum (e.g., sex offense; child victim; drug use, serious injury/death, or reasonable foreseeable).[51] This included strict internet conditions and a limitation on his internet devices that have had severe limiting impacts on his day to day life. Conditions that are typically reserved for sex offenders, for which there is significant evidence to support such conditions.

Georgianna Giampietro, *United States v. Giampietro*, (July 6, 2022, M.D. TN.)

A 37-year-old mother of two, her caring, sympathetic nature led her to obtain a Master Social Worker license, support her elderly dependent mother, etc and eventually, to empathize deeply with Syrian children suffering under the Assad regime. When an undercover FBI agent befriended Giampietro and later stated her intentions to travel to Syria to join a designated terrorist group, Giampietro tried to convince her friend not to go. But the agent's insistence on travelling wore Giampietro down to the point where she offered an alternative travel contact to the agent to travel to ISIS.[52] She pled guilty to a violation of 18 U.S.C. § 2339C, receiving a sentence of 66 months followed by *15 years* of supervised release.[53]

Alaa Mohd Abusaad, *USA v. Abusaad*. (April 27, 2022, N.D. AL.)

A 26-year-old woman with an undiagnosed case of Major Depressive Disorder (MDD), grew up in the public housing projects of Tuscaloosa. Excelling in school, but isolated in her social life, she found refuge on the internet. When asked by a government informant about how to send money to a designated terrorist organization in Syria, Abusaad provided the information. She pled guilty to a violation of 18 U.S.C. 2339C(2)(a) and received a sentence of 90 months (7 ½ years) incarceration and a supervised release term of *10 years*.[54]

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[50] Sentencing Memorandum. Dkt. 706 at 1-5. Case No.:0:15-cr-00049-MJD-HB-5. *USA v. Ahmed et al.* (Nov. 3, 2016, D. MN.)
[51] Judgement. Dkt. 787 at 2-3. Case No:0:15-cr-00049-MJD-HB-5. *USA v. Ahmed et al.* (Nov. 30, 2016, D. MN.)
[52] Sentencing Memorandum. Dkt. 425 at 7-12. Case No.:2:19-cr-00013-1. *USA v. Giampietro.* (July 6, 2022, M.D. TN.)
[53] Judgement. Dkt. 438 at 3-4. Case No.:2:19-cr-00013-1. *USA v. Giampietro*. (July 20, 2022, M.D. TN.)
[54] Judgement. Dkt. 18 at 2-3. Case No.:7:19-cr-00475-LSC-GMB-1. *USA v. Abusaad*. (April 27, 2022, N.D. AL.)

The typical criteria required for imposing supervised release beyond five years (e.g., sex offense, destructive act, child victim, drug use, serious injury or death, or foreseeable risk of) are not present for these defendants. Terrorism defendants are treated as exceptionally dangerous without any empirical evidence to support such treatment.[55] The Terrorism Recidivism Study noted "[T]he evidence suggests that political offenders are very unlikely to recidivate and, therefore, strict conditions upon release are unwarranted. In addition, as mentioned previously, many incidents of recidivism were minor parole violations…". TRS at 35. See *supra* section I. E.

III. PROPOSED PRIORITIES, AMENDMENTS, AND RESEARCH AGENDA RE TERRORISM ENHANCEMENT

Based on the above, MLFA makes the following **six recommendations**:

1. Prioritize Data Collection, Research, and Amendment of Terrorism Enhancement to Bring it in Line with the Commission's Stated Missions and the Purposes of Sentencing.

Make amending, researching, studying, and reforming the Terrorism Enhancement (§ 3A1.4) a priority in light of unwarranted sentence disparities, new studies of the career offender guidelines, lack of empirical evidentiary basis for the enhancement, and the stated purposes and missions of the Commission.

2. Implement an Interim Application Note Limiting Application of the Terrorism Victim-Related Adjustment to Crimes with Identifiable Victims.

In the interim, as an injunctive measure based on the significant data presented here and the lack of any empirical evidentiary basis to support the enhancement, MLFA respectfully recommends that the Commission implement an Application Note to the § 3A1.4 (and any other amendments necessary to ensure consistency) that requires that as a victim-related adjustment the enhancement is "only applied in cases in which there are identifiable victim persons." Attempts and conspiracies, false statements, obstruction offenses, and other offenses that do not involve actual violence (and thus no identifiable person victim) should be excluded from application of the Enhancement. Such an amendment is more in line with the original intention of the Terrorism Enhancement as a "victim-related adjustment".

3. Proposed Research Agenda and Data Collection on the Terrorism Enhancement.

MLFA proposes the following research priorities to assist the Commission in fulfilling its stated purposes and missions:

A. Comprehensive Data Collection for Terrorism-Related Offenses

While there is evidence of the discriminatory application of Terrorism Enhancement and the resulting unwarranted disparities, it needs to be analyzed through empirical evidence.

[55]

Unfortunately, a comprehensive database of terrorism-related offenses and sentencing does not currently exist. The need for this data is more critical in light of the findings of the TRS study because findings across time and the two separate analyses show trends that bring into question what the guidelines understand about predicting future offending in apolitical (non-terrorism cases). With terrorism/political defendants, it appears that the low likelihood of offending remains consistent across different backgrounds, histories, and level of involvement of designated terrorist organizations. The Commission does not have any evidence to substantiate these lengthy sentences and terms of supervised release. Further, in order to substantiate this extreme enhancement and lengthy terms of supervised release would require evidence that these individuals are more likely to commit terrorist offenses and not merely engage in any type of non-terrorism offending that can include technical parole violations and nonviolent crimes. These latter, typical types of reoffending would not warrant such lengthy additions to the sentences under the enhancement since they do not pose any additional threat to society than other, apolitical, defendant would warrant. See TRS at 34.

The University of Maryland's 2023 study was the first of its kind to analyze disparities in international and domestic terrorism sentencing; however, the study does not approach whether sentencing disparities manifest along the lines of religion or race as well. Without comprehensive data and analysis, potential sentencing discrimination and disparities may stay hidden.

In addition to demographic characteristics, there is also a need for improved data collection regarding offense characteristics, such as whether a terrorism offense was a victimless crime, was violent, etc.

The Sentencing Commission is in a unique position to gather this information through obtaining the Presentence Investigation Reports (PSRs) of defendants involved in terrorism-related cases by requesting them from each United States Attorney's Office.

Accordingly, we propose that the Sentencing Commission prioritize improving data collection and transparency by tracking the following variables for all terrorism-related offenses including specifically non-violent terrorism related offenses since 1994:

- Whether an offense involved domestic or international terrorism
- Type of charge (e.g., material support of a foreign terrorism organization, obstruction of justice, false statements in a terrorism investigation, etc.)
- Sentencing enhancements sought by the government
- Sentencing enhancements received by the defendant
- Whether the offense had a victim or was a victimless crime
- Whether the offense was violent
- Whether defendant went to trial or pled guilty
- Criminal history of the defendant prior to any enhancements
- Racial identification for the defendant accounting for the fact that those of Arab, North African, and Southwest Asian descent self-select as "White" for racial identification because of a lack of other options when collecting racial data
- Religious identification of the defendant

B. Transparency and Improved Accessibility of Terrorism-Related Offense Data

The NSCDC recommends the United States Sentencing Commission's dedication to providing public access to sentencing data via helpful online tools and reports. MLFA makes the following suggestions to increase accessibility of national security sentencing data:

- The United States Sentencing Commission's interactive data analyzer provides information regarding federal sentencing, including the number of defendants sentenced over time under a particular guideline. There is no data for offenses sentenced under the Terrorism Enhancement (U.S.S.G. § 3A1.4(a)). Incorporating this information will increase public accessibility to data regarding national security offenses.

- The United States Sentencing Commission publishes annual factsheets on National Defense offenses, including descriptive statistics. Currently, these factsheets, when reporting on the race of offenders, do not account for those of Arab, North African, and Southwest Asian descent who often self-select as "white" for racial identification because of a lack of other options.

- These factsheets also do not report on religion. Updating the descriptive statistics in these factsheets to include these variables will improve public access to relevant information regarding terrorism offenses. We recommend that they also begin categorizing whether the offense was violent or non-violent (an essential factor for career offender guideline and recidivism rates).

C. Recidivism Studies for Terrorism Defendants and accurate risk assessment in light of recent studies/evidence.

As discussed above, there is no empirical evidence to support the Terrorism Enhancement and the data that exists demonstrates that contrary to the idea that terrorism-related defendants are different, and intractably incapable of rehabilitation, they have some of the lowest recidivism rates. The Commission should study the recidivism rates of those convicted of terrorism-related crimes, similar to the recidivism study for career offenders published by the Commission in 2016,[56] in order to gather empirical evidence on whether there is any evidentiary justification for the Terrorism Enhancement and to develop an accurate, evidence-based risk assessment that reflects whether these individuals are likely to engage in reoffending, and particularly in terrorism-reoffending. This information is necessary for the Commission to comply with its policy statements, and to reflect the level of deterrence that is needed and justified in these cases.

[56] U.S. SENT'G COMM'N, REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS (2016) https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

D. Examination and Comparison of Sentences Disposed of Through Trial Versus Plea where the Terrorism Enhancement was Sought

The Commission previously proposed prioritizing further examination and comparison of sentences imposed in cases disposed of through trial versus plea. The trial penalty in terrorism-related offenses is extraordinary because of the Terrorism Enhancement. The broad applicability of the Enhancement, and its severe impact, mean that defendants feel enormous pressure to plead guilty with a cap on the potential sentence, rather than facing a statutory maximum recommend sentence after trial because of the enhancement. The Enhancement is also used as a "bargaining chip to strong-arm a desired result" and "prosecutors sometimes seek the Terrorism Enhancement against a formerly cooperative defendant if they default on a cooperation agreement. Rather than determining 'who is and who is not…a terrorist, the enhancement's practical utility is often reduced to that of a tool used to punish a lack of cooperation."[57]

Given that many of these offenders are non-violent, first-time offenders, the impact of the trial penalty in these cases is particularly harmful to the defendants and their communities. The Commission should include a comparison of sentences imposed in terrorism-related cases that went to trial versus plead guilty.

4. Recommended Hearings and Witnesses to Assist the Commission re Terrorism Enhancement

The NSCDC recommends that the Commission host hearings to better understand the disproportionate impact of the Terrorism Enhancement. Invited witnesses to these hearing should include stakeholders and leaders, including, but not limited to: defendants impacted by the Terrorism Enhancement, their families, Muslim community leaders, and organizations involved in and familiar with terrorism cases like MLFA[58] (such as the Coalition for Civil Freedoms, Federal Defenders, especially those in New York, and the National Security Committee at the NACDL).

5. Revision and Amendment of the Terrorism Enhancement Based on Results of Data Collection and Research

After conducting the proposed research, MLFA recommends significantly reforming the Terrorism Enhancement pursuant to 28 U.S.C. § 994(o) and 28 U.S.C. § 994(p), by submitting the following amendments to Congress:

a. The automatic designation of Category VI criminal offender score should be removed, along with the mandatory offense level minimum of 32. The Commission should also make permanent the proposed interim Application Note that explains

[57] Madeline Johl, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 FORDHAM URB. L.J. 465 (2023).

[58] MLFA's Federal Criminal Defense Department has specialized in defending against national security prosecutions of non-violent Muslim defendants for over 20 years and has significant experience, knowledge, and insight into the use and impact of the Terrorism Enhancement.

the enhancement is to be used only in cases of actual violence with identifiable victim persons.

b. The Commission should recommend that the 12 level increase be removed as statutory elements and other enhancements already adequately account for specific types of conduct. The arbitrary 12 level increase ignores these measures, and undoes the purposes of 18 U.S.C. § 3553(a).

c. Application Note 1 to § 3A1.4, states that a "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5), which in turn defines a "federal crime of terrorism" as "an offense that (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of [the enumerated statutes]."

d. The Commission should recommend that this definition be amended to reduce the list of enumerated offenses to include only offenses which do not already incorporate provisions for aggravating conduct.

e. The Commission should also recommend that any amended Terrorism Enhancement should only apply to conduct in which there was at least one identifiable victim person,[59] and that the defendant specifically intended to himself "influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." The specific intent requirement of the Terrorism Enhancement is the source of a circuit split among various circuits.[60] Conduct in support of a foreign terrorist organization that is indirect and unconnected to any specifically known terrorist activities should not be included (i.e. an online agreement to travel to live in the territory of an FTO, or sending donations for food, clothing, other types of aid to an FTO, providing contact information for travel to the FTO, etc.).

IV. PROPOSED AMENDMENTS AND RESEARCH AGENDA REGARDING SUPERVISED RELEASE TERMS AND SPECIAL CONDITIONS IN TERRORISM-RELATED CASES

[59] Many of the attempted provision of material support convictions state there were no victims of the offense in the PSR.

[60] *See United States v. Amer Sinan Alhaggagi*, 978 F.3d 693 (9th Cir. 2020).

Given the frequent discrepancy between the nonviolent, victimless nature of the offense, the youth & strong family/community ties of the offender, the lack of criminal history, and the lack of evidentiary basis for onerous special conditions on one hand and the extreme duration, intensity, and invasiveness of the supervised release terms on the other, the NSCDC recommends that the Sentencing Commission:

1. Implement the typical 5-year maximum of supervised release for terrorism-related offenses by recommending to Congress a modification to remove the blanket maximum lifetime term for all federal terrorism offenses in 18 U.S.C. 3583(j).
2. Research the impact and efficacy of extreme supervised release terms (especially internet conditions) on terrorism offenders, gathering data on the race, religion, and offense of the convicted as well as the terms of supervised release and rate of recidivism, in light of the findings in the Terrorism Recidivism Study. *See supra* section I. E.

V. CONCLUSION

In conclusion, MLFA hopes that these issues regarding the Terrorism Enhancement and supervised release terms and special conditions in the sentencing of young, Muslim, first-time offenders are studied and reformed through amendment proposals in the coming amendment cycle. We look forward to submitting additional comments on such proposals and are available to assist the Commission as it may require.

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PRISON FELLOWSHIP

Seek justice. Love mercy. Restore hope.

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July 18, 2025

Chair Reeves and Members of the Sentencing Commission,

Thank you for the opportunity to offer recommendations on policy priorities for the coming year. We appreciate the U.S. Sentencing Commission's ongoing commitment to promoting fairness in sentencing and advancing practices that support rehabilitation.

Prison Fellowship is the nation's largest Christian nonprofit serving prisoners, former prisoners, and their families, and a leading advocate for criminal justice reform. For nearly 50 years, we have worked to bring hope and purpose to incarcerated individuals through programming that fosters personal transformation and supports successful reintegration. Our staff and volunteers enter correctional facilities nationwide to share the Gospel, nurture community, and provide evidence-based, faith-informed programming. Our goal is for incarcerated men and women to experience the life-changing love of Christ and to prepare them to be leaders in their communities, both inside and outside of prison.

Today, more than 155,000 individuals are incarcerated in federal prisons.[1] Access to effective programming during incarceration is essential to rehabilitation and reducing recidivism. Research shows that individuals who participate in educational or vocational programming while incarcerated are 43% less likely to recidivate.[2] Our most intensive in-prison program, the Prison Fellowship Academy, offers men and women a voluntary, year-long, holistic journey of transformation focused on developing values such as responsibility, integrity, and restoration. A recent study in Texas showed a 53.8% reduction in recidivism among Academy graduates compared to a similar group. The First Step Act was intended to expand access to rehabilitative programming in federal prisons, including initiatives like the Prison Fellowship Academy. We appreciate Director Marshall's leadership in moving toward full FSA implementation with the creation of the FSA Task Force. Although the Bureau's review process for external in-prison programs, which does not apply to their internal programs, aims at statutory alignment and program fidelity, it has historically operated as a barrier to scaling meaningful, evidence-based programming. The recommendations below are intended to help streamline that process without sacrificing quality.

We respectfully recommend that the Commission:

- Evaluate the Bureau of Prisons' current program offerings, including participation rates, and the expansion of programming under the First Step Act.

[1] BOP, *Statistics*, Federal Bureau of Prisons https://www.bop.gov/about/statistics/population_statistics.jsp (last visited June 2025).

[2] Lois M. Davis, H*igher Education Programs in Prison: What We Know Now and What We Should Focus on Going Forward*, RAND Corporation, (August 2019), https://www.rand.org/content/dam/rand/pubs/perspectives/PE300/PE342/RAND_PE342.pdf; Robert Bozick, et. al., *Does Providing Inmates with Education Improve Post-Release Outcomes?*, RAND Corporation (July 2018), https://www.rand.org/pubs/external_publications/EP67650.html.

- Encourage transparency and accountability to ensure programming is accessible and aligned with the goal of rehabilitation.

Efforts to increase program access must also address the ongoing staffing crisis within federal prisons. With prison staffing at its lowest point in over two decades, facilities face serious operational and safety challenges that directly impact the ability to deliver and sustain rehabilitative efforts.[3] Officers often work long hours under significant stress, contributing to burnout and health risks.[4] Improving staff recruitment, providing mental health support, and fostering strong leadership are essential to creating safer, more constructive prison environments. Prison Fellowship is positioned to support both staff and incarcerated individuals in these efforts. Through our Warden Exchange program, we equip correctional leaders with tools to cultivate restorative prison cultures. To date, the program has trained over 680 leaders across 47 states, with an additional 149 currently enrolled.

Finally, supervised release is another critical component of federal reentry. As of 2023, nearly 110,000 individuals were under federal supervised release, a population that has nearly tripled over two decades.[5] When applied appropriately, supervised release can provide the structure and accountability individuals need as they transition back into society. However, excessive or unnecessary supervision can create barriers to successful reintegration and overwhelm community corrections sources.[6] We urge the Commission to review how sentencing guidelines address supervised release terms to ensure they are applied fairly and in ways that support long-term success.

The Commission plays a vital role in shaping sentencing policies that can impact prison populations, and we applaud the steps already taken to provide certainty and fairness in sentencing. Every human being is created in God's image, with inherent dignity and value. Our justice system must reflect this belief by ensuring that all individuals are treated with respect and afforded the opportunity for rehabilitation.

Sincerely,

Cody Wilde
Senior Vice President, Correctional Programs
Prison Fellowship

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[3] Shannon Heffernan & Weihua Li, *New Data Shows How Dire the Prison Staffing Shortage Really Is*, The Marshall Project (Jan. 2024), https://www.themarshallproject.org/2024/01/10/prison-correctional-officer-shortage-overtime-data.
[4] Vera, *The Prison Experience of Corrections Staff*, Vera Institute of Justice, https://www.vera.org/reimagining-prison-web-report/examining-prisons-today/the-prison-experience-for-corrections-staff (last visited June 2025).
[5] Bureau of Justice Statistics, *Federal Justic Statistics, 2023*, U.S. Department of Justice (March 2025), https://bjs.ojp.gov/document/fjs23.pdf; Pew, *Number of Offenders on Federal Supervised Release Hits All-Time High*, The Pew Charitable Trusts (Jan. 2017), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/01/number-of-offenders-on-federal-supervised-release-hits-all-time-high.
[6] Pew, *Max Out: The Rise in Prison Inmates Released Without Supervision*, The Pew Charitable Trusts (June 2014), https://www.pewtrusts.org/en/research-and-analysis/reports/2014/06/04/max-out.(Research indicates that individuals released to community supervision have better public safety outcomes, such as lower recidivism rates, compared to those who serve their entire sentence in prison and therefore are released without supervision.)

July 18, 2025

Dear Judge Reeves and Members of the United States Sentencing Commission:

Thank you for seeking public comment on proposed and additional priorities for the U.S. Sentencing Commission's ("Commission") amendment cycle ending May 1, 2026. On behalf of Right On Crime—a national criminal justice campaign of the Texas Public Policy Foundation focused on conservative, data-driven solutions to reduce crime, restore victims, reform offenders and lower taxpayer costs— I am pleased to submit the following comments and recommendations.

In its solicitation dated June 9, 2025, the Commission invited comment on nine amendment priorities, including a catch-all whereby the Commission would also consider "other miscellaneous issues[.]"[1] Right On Crime applauds the Commission for pursuing input from the public on how to improve the federal Sentencing Guidelines (hereafter "Guidelines"). Such a transparent and communicative process is essential for good governance and building trust. As such, this amendments process will assuredly encourage a comprehensive dialogue on meaningful and data-driven improvements to the criminal justice system that the Commission can undertake, while understanding that other solutions may be better delegated to Congress.

To that end, Right On Crime respectfully submits to the Commission the below select comments and further recommendations to the Guidelines for the amendment cycle ending May 1, 2026.

(1) Drug Trafficking offenses under §2D1.1

Methamphetamine purity distinctions:

Methamphetamine is the most common drug in the federal criminal justice system.[2] But, unlike the vast majority of the illicit drugs subject to federal criminal penalties, methamphetamine offenders are subjected to different sentences based on the purity of the drug involved in the offense. The current statutory penalties effectively create a 10-to-1 ratio, where it takes ten times less pure methamphetamine to trigger the same penalty as it would for a more pure, detectable amount of methamphetamine.[3] The Guidelines similarly use drug purity as a proxy for a defendant's culpability.[4] This disparity has resulted in overly punitive and lengthy sentences for offenders culpable of the same conduct.

The impetus of the purity distinction for methamphetamine offenders was rooted in addressing the domestic production crisis earlier this century.[5] However, most methamphetamine now distributed and used in the United States originated in Mexico and is smuggled across the southwest border.[6] And more so, the purity of this Mexican-made methamphetamine rarely tests less than 90% pure.[7] So the alleged purpose behind the purity disparity is now moot.

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[1] U.S. Sentencing Comm'n, Federal Register Notice of Proposed 2025 – 2026 Priorities, available at https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2025-2026-priorities.
[2] U.S. Sentencing Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 13, 2024).
[3] *Id*.
[4] U.S.S.G. § 2D1.1 comment 27(C).
[5] *Supra* n. 2.
[6] U.S. Drug Enforcement Administration, *National Drug Threat Assessment 2025*, p. 25 (May 2025).
[7] *Supra* n. 2.

A growing number of federal courts have recognized the absurdity of this purity distinction.[8] To that end, Right On Crime urges the Commission to eliminate this arbitrary and meaningless purity distinction and instead apply the "mixture" Guidelines for all methamphetamine cases. This will result in more predictable and consistent sentencing ranges for offenders while still ensuring that culpable actors are held accountable for their illegal methamphetamine-related acts.

Possible Statutory Changes Relating to Fentanyl:

As the Commission knows, Congress recently advanced the *HALT Fentanyl Act*, which amends the *Controlled Substances Act* to permanently classify illicit fentanyl analogues – also known as fentanyl-related substances (FRS) – as Schedule I.[9] President Trump signed this bill into law on July 16, 2025. Including all FRS into Schedule I will certainly impact federal criminal sentencing and the Guidelines.

For instance, all individuals who manufacture, import, or possess with the intent to distribute FRS will face mandatory minimum sentences aligned with other Schedule I drugs. Right On Crime believes that the Commission should follow the mandate from Congress and include FRS drugs adjusted penalty ranges accordingly in the Guidelines. However, to assist in balancing an inadvertent overinclusion of criminal behavior,[10] the Commission could include commentary language allowing judges to consider the following relevant factors when deciding where in the statutory range a defendant's sentence should be: scientific developments, research, or studies that call into question or undermine the lethality of the instant FRS that could warrant the statutory mandatory minimum overly punitive; the role of the defendant in the manufacture, distribution, or importation of the FRS; and the mens rea of the defendant.[11]

Similarly, the Commission should review and study opportunities for petitions, hearings, or comparable re-sentencing options for defendants who were convicted and sentenced to a federal crime involving FRS but where the instant FRS involved was later found to be inert or not within the bounds of Schedule I.[12]

The *HALT Fentanyl Act* was passed by Congress on a bipartisan basis with the hopes of fighting against the scourge of fentanyl drugs. It is Right On Crime's hope that this law is effective in combatting drug cartels, transnational criminal organizations, and other nefarious criminal groups. Likewise, Right On Crime believes that the Commission can assist in supporting holistic sentencing options to ensure that sentences are reflective of the cumulative nature of the crime.

Measuring drug quantity:

It is no secret that production, manufacture and distribution of illicit drugs has radically changed in the last decade. What used to be a plant-based trade is now largely synthetic, with drug cartels and trafficking

[8] *See, e.g., United States v. Robinson*, No. 21-14, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022); *United States v. Moreno*, 583 F. Supp. 3d 739 (W.D. Va. 2019).
[9] S. 331, 119th Cong. Available at https://www.congress.gov/bill/119th-congress/senate-bill/331/text?s=1&r=1&q=%7B%22search%22%3A%22halt+fentanyl%22%7D.
[10] *See, e.g.*, U.S. Gov't Accountability Off., *Synthetic Opioids: Considerations for the Class-Wide Scheduling of Fentanyl-Related Substances*, Apr. 2021, p. 60 – 64.
[11] Such factors could arguably be encompassed already in 18 U.S.C. 3553(a), but its inclusion specifically in reference to FRS could be beneficial for practitioners and judges alike.
[12] The Drug Enforcement Administration defines Schedule I drugs are those that have "no currently accepted medical use and a high potential for abuse." U.S. Drug Enforcement Administration, Drug Scheduling, https://www.dea.gov/drug-information/drug-scheduling (accessed July 8, 2025).

organizations capitalizing on a high-volume and low-cost business model.[13] Americans see this most explicitly in the spread of methamphetamine and synthetic opioids, like fentanyl. Synthetic drugs like fentanyl are responsible for nearly all the fatal overdoses and poisonings in our country.[14]

Currently, the statutory penalties and accompanying Guidelines are based on the quantity of drugs. These were largely created when plant-based drugs, such as cocaine and heroin, dominated the criminal justice system. But the quantities to trigger many of these mandatory minimums and associated sentencing ranges are not entirely effective for synthetic drugs like fentanyl, FRS, and methamphetamine. It is not our recommendation for Congress to lower the quantity thresholds of these drugs for mandatory minimums to trigger, or for the Commission to consider similar quantity readjustments to make it easier for harsh sentences to be imposed. Rather, Right On Crime urges the Commission to evaluate and consider the utility, effectiveness, and dangers of the current drug quantities needed for federal sentences to be imposed with the advent and continued growth of synthetic drugs.

The imprecise and troubling nature of quantity-based sentences is particularly apparent when considering the discrepancy in available sentences between the weight of a finished drug product and the amount of precursors or drug materials found. In general, once a drug is found and its identity is determined, the next step in a prosecution is to measure the drug quantity. The quantity may be a "mixture or substance containing a detectable amount of the controlled substance."[15] Determining this quantity is, unfortunately, an imprecise science. In fact, except in cases where the government seizes and then measures all the drugs attributable to a defendant, the court must "approximate the quantity of the controlled substance."[16] This means that courts are forced to exercise significant discretion in estimating drug quantities.

This is in and of itself worrisome, illustrating the vast discrepancies that could unfurl from a discretionary determination about quantity. But two other considerations make this even worse. First, courts may rely on financial records to estimate drug quantity.[17] When cash is seized as part of a drug investigation, courts may equate it with a corresponding drug quantity. Second, courts may use the size or capability of a drug laboratory to estimate drug quantities.[18] The "theoretical mass yield" that can be calculated based on these two premises is bizarre and disconnected to actual drug quantities possessed by a defendant.

Courts have signaled hesitancies with these Guidelines provisions, urging that they must be applied "on the side of caution" when estimating drug quantities and that a court must determine the lesser punishment when possible.[19] In short, using the Guidelines to get a theoretical mass yield of a drug

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[13] *Supra* n. 6, at p. 5.
[14] According to the Centers for Disease Control and Prevention (CDC), synthetic opioids were involved in 74,225 deaths in 2022–68% of the total 111,036 deaths that year–and psychostimulants, the class of drugs that includes methamphetamine, were involved in 31% of the overall deaths. Provisional CDC data for January-June 2023 shows that nearly 38,000 people died as the result of a synthetic opioid (usually fentanyl) overdose or poisoning in the first six months of the year.
[15] U.S.S.G. § 2D1.1, Notes to Drug Quantity Table (A); *see also* comment 1.
[16] *Id*. at comment 5.
[17] U.S.S.G. § 2D1.1 comment 5 ("[T]he court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant[.]").
[18] *Id*. ("[T]e court may consider . . . the size or capability of the laboratory involved.").
[19] *United States v. Forrester*, 616 F.3d 929, 949 (9th Cir. 2010); *see also United States v. Chase*, 499 F.3d 1061, 1069 (9th Cir. 2007).

quantity for sentencing purposes has been "discouraged[,]" and deemed to be both "an inappropriate methodology to calculate drug quantity[,]" and "unreliable[.]"[20]

Right On Crime urges this Commission to remove financial records and laboratory capabilities language from the Guidelines—thus removing guess work and unreliable methodologies—so that criminal defendants are sentenced based on the quantity of drugs actually in their possession.

Role vs. quantity:

In a similar vein, Right On Crime asks the Commission to study and consider a revision of the Guidelines that focuses an individual's culpability on all the circumstances of the case as opposed to just quantity. Sentencing enhancements are already at a prosecutor's disposal for identifying leaders, organizers or managers of criminal enterprises. Therefore, if a particular defendant's case warrants it, those enhancements are applied. But as both the methamphetamine purity issue and the growing prevalence of synthetic drugs illustrate, quantity-based determinations for sentencing are no longer probative. A role-based approach is likely a better long-term solution, and the Commission is uniquely equipped and situated to evaluate this method.

(2) Examination of Theft, Property Destruction, and Fraud Under §2B1.1

Actual loss, intended loss, and gain

When an individual commits a theft, embezzles, or damages property, prosecutors are tasked with determining the amount of property lost. In general, the Guidelines currently define "loss" as the "greater of actual loss or intended loss."[21] The higher the victim's calculated loss, the higher the sentencing range can be. For a prosecutor, a key question is if the defendant should be on the hook for "intended loss," a concept that is mentioned only in the Commentary and not in the loss Guideline itself.

Intended loss can far exceed what is actually lost. This Commentary language gives prosecutors a great deal of discretion to inflate a defendant's sentencing range, which can lead to a significant and unreasonable disparity in prison sentences.

Right On Crime urges the Commission to eliminate the Commentary language allowing for considerations of intended loss, instead only allowing a sentencing range to apply to the amount of actual loss. This will result in a more consistent and fair adjudication of cases and will put the Commission in line with some federal courts that have recently rejected the "intended loss" approach.[22]

(3) Bureau of Prisons' Effectiveness in Meeting Sentencing Purposes of 18 U.S.C. 3553(a)(2) and Amendments to Help Improve Practices.

The Federal Bureau of Prisons (BOP) has been plagued with several issues, ranging from safety challenges to implementation of the *First Step Act*. The safety, security, and rehabilitation of federal inmates depend largely on a well-functioning BOP. Right On Crime is pleased that the Commission is

[20] *Id*. (citing *Chase*, 499 F.3d at 1069).
[21] U.S.S.G. § 2B1.1 comment 3(A).
[22] *See United States v. Banks*, 55 F.4th 246 (3d Cir. 2022).

reviewing policies and improvements to the Guidelines that ensure the dual goal of punishment and rehabilitation are met.

To that end, a close alignment of the BOP's role and mission and 18 U.S.C. 3553(a)(2) is warranted. 18 U.S.C. 3553(a)(2) outlines factors that a court must consider before imposing a sentence, including:

> (2) the need for the sentence imposed –
>
> > (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;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[23]

In sum, sentences must punish the offender appropriately, deter similar criminal behavior, protect public safety, yet not cut off the defendant from rehabilitation while incarcerated. The BOP has several opportunities to better align itself with these statutory factors.

Continue to implement the First Step Act

The First Step Act made several changes to how the BOP facilities rehabilitate federal prisoners, particularly with regards to earned time credits (ETCs).

The First Step Act allows mostly minimum and low security prisoners the ability to earn up to 15 days per month off their sentences (capped at 365 days) by participating in certain programs and productive activities. After that, prisoners can earn credits that will count towards a home confinement sentence. But some prisoners have received too many credits, and some none. Attributed largely to computer errors, BOP Director William Marshall has made clear that transparent calculations and communications on ETCs are a priority.[24] To assist in implementation of the First Step Act's ETC program, the Commission could consider adding language in commentary of the Guidelines to encourage consistent and transparent ETC calculations for eligible offenders as part of the sentence. This will align the BOP with the sentencing factors of 18 U.S.C. 3553(a)(2) more closely because it will encourage more consistent and effective treatment, training, and programming for the individual while in BOP custody.

Increase the use of home confinement

There are two pervasive and dangerous issues that the BOP is facing: understaffing and increased costs for house BOP inmates. In the past decade, the number of BOP staff has dropped significantly. Concurrently, the number of prisoners in BOP facilities and the cost to incarcerate them have increased. These dueling issues illustrate the need for the BOP to reduce its current costs and prioritize facility security. The best policy path for this is home confinement.

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[23] 18 U.S.C. 3553(a)(2)(A)-(D).
[24] Pavlo, Walter, *Bureau of Prisons Director William Marshall Addresses Challenges*, Forbes, June 30, 2025, available at: https://www.forbes.com/sites/walterpavlo/2025/06/30/exclusive-interview-with-bureau-of-prisons-director-william-marshall/.

Under 18 U.S.C. 3624(c)(2), the BOP may "place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or six months." Home confinement is meant primarily for "prisoners with lower risk levels."[25] This authority was expanded through Attorney General Barr during the COVID-19 pandemic as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). In 2020, federal prisoners were allowed to serve a portion of their sentence in home confinement under the following criteria: being in low or minimum security; having a clean misconduct record; no history of violence, sex, or terrorism offenses; a viable re-entry plan; a minimum or low risk score on a risk assessment tool; and serving a substantial portion of their sentence (at least 50% or 25% with 18 months or less remaining).[26]

After release from home confinement, these CARES Act-eligible individuals had a 3.6% recidivism rate over one year. To compare, those without the eligibility parameters of the CARES Act had a 13.0% recidivism rate.[27] And to distinguish the public safety outcome even further, the average recidivism rate of all offenders has hovers around 50%.[28]

Targeted use of home confinement is a public safety centered policy that also alleviates many of the pressures facing the BOP, including staffing shortages and prisoner population growth. The Commission could consider opportunities to amend the Guidelines that would encourage more deliberate and expansive home confinement opportunities, in line with CARES Act eligibility. Similarly, the Commission should consider researching those individuals who have been eligible for and successful on home confinement. Such information could help lawmakers, judges, and advocates understand the cost savings and public safety benefits to permanent home confinement eligibility expansion.

Limit use of solitary confinement and lockdowns

Special Housing Units (SHUs) are housing units in BOP facilities where inmates are securely separated from the general inmate population and may be housed either alone or with other inmates. According to the BOP, SHUs help ensure the safety, security, and orderly operation of correctional facilities, and protect the public, by providing alternative housing assignments for inmates removed from the general population.[29] However, some reports have indicated that the use of solitary confinement and other SHUs can result in an increased use of recidivism.[30]

Compounding this is the ubiquity – or even overuse – of solitary confinement and special housing. It has been reported that BOP has isolated prisoners in cells for up to 23 hours per day.[31] As of October 2023, the BOP continued to house about 8% of its population (about 12,000 individuals) in these settings.[32]

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[25] 18 U.S.C. 3624(c)(2).
[26] William Barr, *Memorandum from the Attorney General: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, April 3, 2020, found at: https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000.
[27] Jason Gwinn, PhD, *Cares Act: Analysis of Recidivism*, March 2024, U.S Department of Justice, Federal Bureau of Prisons, Information Technology & Data Division, Office of Research & Evaluation (www2.fed.bop.gov/202403-cares-act-white-paper).
[28] U.S. Sentencing Com'n, *Recidivism of Federal Offenders Released in 2010* (Sept. 30, 2021).
[29] U.S. Dep't of Justice, Federal Bureau of Prisons, Program Statement, *Special Housing Units* (Nov. 23, 2016).
[30] Andreea Matei, Urban Institute, *Solitary Confinement in US Prisons* (Aug. 2022); *see also* Ilanit Turner and Noelle Collins, Right On Crime, *A Call to Reform Federal Solitary Confinement* (Jan. 2022).
[31] U.S. Gov't Accountability Office, *Bureau of Prisons: Additional Actions Needed to Improve Restrictive Housing Practices* (Feb. 2024); *see also* U.S. Dep't of Justice, Office of the Inspector General, *Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness* (July 2017).
[32] *Id.*

Federal inmates are also placed into isolation – including SHUs and solitary confinement – if there is a facility-wide lockdown. The frequency of lockdowns can hamper inmate access to programs and activities, including those eligible for First Step Act ETCs. This in turn can also negatively impact inmate success rates upon reentry.

Therefore, the opaque and incongruent use of SHUs, solitary confinement, and isolation runs afoul of 18 U.S.C. 3553(a)(2). It undermines access to meaningful programming and public safety. The Commission should explore options at its disposal to encourage the BOP to provide access to First Step Act ETC-eligible programs while inmates are in SHUs, solitary confinement, or lockdowns. The Commission could also research and publish data on public safety impacts on solitary confinement.

Compassionate Release

Pursuant to section 18 U.S.C. 3582(c)(1)(A), courts are authorized to reduce a defendant's term of imprisonment based on "extraordinary and compelling reasons." When considering any compassionate release motions, the court must find that "extraordinary and compelling reasons" warrant such a reduction and that any reduction "is consistent with applicable policy statements issued by the Sentencing Commission."[33] Compassionate release allows inmates to qualify for early release under certain criteria, most frequently because of illness or age. This is a particularly important tool with elderly inmates who require medical care or have aged out of crime. Given the high cost of operating a federal correctional facility and increased costs for accommodating specific needs for aging inmates, additional opportunities to balance fiscal responsibility with public safety should be explored.

Before December 2018, courts were authorized to consider compassionate release motions only if they were filed by the Director of the Bureau of Prisons. In December 2018, Congress amended the law, allowing federal inmates themselves to seek early release in certain circumstances.[34] The Commission addressed compassionate release in 2023, even choosing to expand the eligibility for extraordinary and compelling reasons for a sentence reduction.[35]

Yet, despite both actions by Congress and the Commission, compassionate release motions are denied more frequently than granted.[36] In fact, in April 2024, a motion for compassionate release was almost 7.5 times more likely to be denied than granted.[37] There may be a few reasons for this disparity in motions received and motions granted. Perhaps some motions are not meritorious or fall outside the parameters of 18 U.S.C. 3564(c)(1)(A). Or perhaps the BOP could do more to support inmates – particularly those in elderly or aging populations – with their motions.

Yet, as it stands, only 4% of requests in the BOP are granted.[38] The BOP could improve this by reducing barriers. For instance, the BOP could make it easier for inmates to receive care and documentation from a physician about their ailments that may be relevant for a compassionate release motion. The BOP could

[33] 18 U.S.C. 3582(c)(1)(A).
[34] *First Step Act*, Pub. L. 115-391 (Dec. 21, 2018).
[35] USSG §1B1.13.
[36] *See, e.g.*, https://datawrapper.dwcdn.net/PHAC8/full.pdf.
[37] *Id*. Also, it is worth noting that this is well outside the timeframe of the COVID-19 pandemic.
[38] Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, FAMM (June 2018).

issue affidavits in support of an inmate's meritorious motion. And the BOP could look for individual cases where a compassionate release motion may be warranted, in addition to inmate-instigated motions.

To the extent that the Sentencing Commission can, it should consider including language in the Guidelines and conduct research on the BOP's role in facilitating increased use of effective compassionate release.

(4) Other Possible Amendments for Consideration

Relevant Conduct: Uncharged conduct

Relevant conduct is a broad term encompassing "[a] range of conduct that is relevant to determining the applicable offense level."[39] Its extensive application in sentencing makes it a "cornerstone" of the Guidelines.[40] But such ubiquity is not always good. For instance, the Guidelines permit somewhat unlimited consideration of uncharged conduct for sentencing purposes. Such consideration can invariably lead to the imposition of a more severe sentence than what is necessary or fair. As the Guidelines currently permit, relevant conduct easily encompasses too much uncharged conduct and results in defendants being sentenced for acts not covered in a count of conviction. In fact, not only can prosecutors enhance sentences without having to prove the conduct beyond a reasonable doubt, but they can also increase sentence lengths without even bringing an indictment alleging that conduct. This flies in the face of constitutional fairness and underlying due process principles. The Guidelines' wide berth acceptance of consideration of uncharged conduct unfortunately negates the need for a grand jury and findings of guilt. Simply put, "sentencing a defendant based on uncharged conduct is suspect as both a constitutional and policy matter."[41] To that end, the "Commission has the authority to address th[is] issue[], and it should."[42]

To remedy this problem, Right On Crime recommends that the Commission assesses how to narrow the scope and application of uncharged relevant conduct, similar to how it has addressed acquitted conduct sentencing to date.[43] Specifically, the Commission could narrow the scope of relevant uncharged conduct, moving closer to a charge-offense system where a defendant is sentenced only to those charges of which he or she is found guilty. Alternatively, the Commission could change the way relevant uncharged conduct is used. For instance, there could be a cap on the increases attributable to uncharged conduct or a bar on its consideration except for purposes of mitigation. A combination or individual consideration of either would greatly improve fairness, predictability, and consistency of sentencing.

Relevant Conduct: Acquitted conduct:

Last year, the Commission amended the Guidelines to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the Guidelines.[44] This unanimous vote was a long-awaited and meaningful step towards ending the unfair practice of allowing federal judges to consider acquitted conduct to enhance a criminal defendant's sentence. However, the Commission's amendment did not forbid its use wholesale; rather, the prohibition of considering

[39] U.S.S.G. § 1B1.3, comment background.
[40] U.S. Sentencing Comm'n, *Simplification Draft Paper: Relevant Conduct and Real Offense Sentencing*.
[41] *U.S. v. Brasher*, No. 23-1180 (7th Cir. June 28, 2024).
[42] *Id*.
[43] *See* more on this below; *see also supra* n. 41.
[44] Amendments to the Sentencing Guidelines, Amendment 1 (U.S. Sentencing Comm'n 2024).

acquitted conduct by a sentencing court is limited to federal acquitted conduct that does not also establish the instant offense of conviction.

This curtailed approach is much appreciated and needed. But more can be done. To that end, Right On Crime recommends that the Commission proposes an amendment that would completely prohibit the use of acquitted conduct in federal sentencing except for the purposes of sentence mitigation. Such an approach has already been considered by this Commission[45] and in bipartisan legislation.[46] The Commission can use this amendments cycle to finish this important job and ban acquitted conduct from being considered in federal sentencing.

White Collar Crimes: Sophisticated means:

For white collar crimes, the Guidelines provide a sentencing enhancement if "sophisticated means" were used. This is defined as conduct that is "especially complex or especially intricate."[47] However, the Guidelines illustrate such "complex" and "intricate" conduct as the main office for a telemarketing scheme being in one jurisdiction while the solicitation operations are in another jurisdiction.[48] Also, "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore accounts" are cited as examples of "sophisticated means."[49]

This two-level enhancement is easily overused in our modern, digital world. "Sophisticated means" is an extremely subjective standard, particularly when looking at our highly–if not entirely–digitized world and what was once "sophisticated" is now mundane. The Commission should consider how to better refine the definition of and attendant examples for "sophisticated means." The Commentary language should be updated to better reflect modern business practices and issues. This sentencing enhancement is not wholly without purpose and should therefore be maintained. However, it is being overused and has the capacity for misuse. The Commission can and should proactively work to prevent this.

White Collar Crimes: Position of trust:

The Guidelines permit a sentencing enhancement when a defendant abuses his or her position of public or private trust, which is based on the notion that people who hold a position of trust relative to a victim are viewed as more culpable.[50] Based on the application notes, it is fair to say that this enhancement should apply when there is a professional or managerial discretion afforded to the defendant's role.

Right On Crime believes this sentencing enhancement serves an important role in holding certain defendants accountable. However, this language should be clarified to rectify confusion over when the enhancement applies. For instance, the current language–directed and limited almost entirely to those in professional or managerial positions–is too broad. Based on its text, prosecutors could argue that the enhancement applies to almost anyone. The argument could easily be made that someone in the human resources department holds a position of trust, even if not in a managerial role relative to a victim. The broad language of the amendment could also be read to encompass a manager at a fast-food restaurant, a

[45] *Id.*; *see also* Proposed Amendments to the Sentencing Guidelines, Proposed Amendment 3 (U.S. Sentencing Comm'n 2023).
[46] "Prohibiting Punishment of Acquitted Conduct Act of 2023," S. 2788, 118th Cong. (2024); H.R. 5430, 118th Cong.
[47] U.S.S.G. § 2B1.1(b)(10)(C) comment 9(B); *see also* 2T1.1(b), comment 5; 2T3.1(b)(2), comment 5.
[48] *Id.*
[49] *Id.*
[50] U.S.S.G. § 3B1.3.

substitute teacher, or mid-level manager at a paper company. Surely, this enhancement loses its intent and teeth when it can be over-applied.

To that end, the Commission should limit a "position of trust" to instances where a fiduciary or quasi-fiduciary obligation exists. Several courts have already interpreted "position of trust" to mean this.[51] In refining the language to encompass fiduciary or quasi-fiduciary relationships, the universe of eligible defendants will inevitably narrow, but the intent of the enhancement will importantly be clarified. This will result in far more consistency in the handing down of criminal sentences among circuits.

Obstruction of Justice Enhancements:

If a federal criminal defendant obstructs justice, there are several avenues a prosecutor may pursue to enhance his or her sentence. Pursuant to § 2J1.2(b)(3), the sentencing range may be increased by two levels if the offense was "extensive in scope, planning, or preparation[.]" No further notes or information is provided by the Commission on what it means for an offense to be so extensive in scope or that the government had to do so much planning or preparation as to warrant the two-level enhancement. To wit, such vague language is easily weaponized and used against criminal defendants unfairly. This is particularly easy to imagine in a politically motivated or emotionally heightened prosecution.

Therefore, it is Right On Crime's recommendation that this language be entirely removed from the Guidelines. In the alternative, the Commission must clarify what "extensive in scope, planning, or preparation" means.

If a criminal defendant chooses to take the stand and testify in his or her own defense in a criminal prosecution, there is nothing in statutory law or in the Guidelines prohibiting the government from seeking an obstruction charge or obstruction enhancements for allegedly slowing down the prosecution. A defendant has the right to testify in his own defense, and similarly is afforded the constitutional privilege to not testify. Coercing his or her testimony is unlawful. To wit, any use of an obstruction charge or sentencing enhancement in the presence or absence of such testimony runs afoul of the promised constitutional protections of the Fifth Amendment. It follows that the Guidelines should do its best to ensure such protections. Therefore, Right On Crime recommends that the Guidelines explicitly prohibit the use of obstruction of justice offenses[52] or enhancements[53] when a criminal defendant testifies in his or her own defense.

Artificial Intelligence

Artificial intelligence (AI) is a force multiplier, allowing criminals to commit crimes more efficiently and with higher sophistication, while also allowing law enforcement to detect and stop criminal activity with more precision. For better or for worse, AI is here to stay. One question for the criminal justice community, and the Commission in particular, is how sentencing should or should not be impacted if the bad actor uses AI. Right On Crime believes a thoughtful and intentional approach is necessary, where the equities of punishment and rehabilitation are balanced appropriately.

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[51] *See, e.g., United States v. Huggins*, No. 15-1676 (2d Cir. Dec. 19, 2016); *see also United States v. Ntshona*, 156 F.3d 318, 320 – 21 (2d Cir. Sept. 10, 1998); *United States v. Jolly*, 102 F.3d 46, 49 (2d Cir. Dec. 5, 1996); *United States v. Brunson*, 54 F.3d 673, 677 (10th Cir. 1995).
[52] U.S.S.G. § 2J1.2.
[53] U.S.S.G. § 3C1.1.

As AI tools continue to grow more sophisticated and capable, the potential harms from this technology also increase. For example, AI allows criminals to execute more sophisticated and scalable fraud schemes. "Scams have evolved well beyond the 'Nigerian prince' emails of the 1990s, with fraudsters now able to create messages that appear to come from friends or family members in distress..."[54] And this impacts even high-ranking government officials. Earlier this month, for example, AI-savvy fraudsters mimicked Secretary of State Marco Rubio's voice and reached out to foreign ministers, a U.S. Senator, and a Governor.[55] This criminal attempt comes weeks after the FBI issued a public service announcement to warn against malicious actors impersonating senior U.S. officials.[56] These outreach efforts are intended to build rapport to gain access to personal information or perhaps even more nefarious – to undermine American interests.

Similarly, with the use of Generative AI, criminals are using the technology for "sextortion."[57] Historically, suspects will coerce the victims to send explicit pictures and then blackmail the victim. The perpetrators threaten to release the photos to friends and family if the victim does not make payment.[58] Through the use of Generative AI, deepfakes are created by the perpetrators by taking innocuous pictures of the victims and transforming them into sexualized, nude and graphic photos.

These crimes are serious, the victims real, and the consequences grave. The threat of AI will continue to grow, urging its users (such as law enforcement) to be educated; criminal justice agencies to be transparent; and policymakers to be thoughtful.

There is no question that AI can make some crimes more dangerous and may justify tougher penalties in rare cases— such as crimes committed with a firearm. But applying harsh enhancements across the board could overwhelm the justice system and lead to excessive punishment. We need to be smart: reserve longer sentences for when AI clearly increases harm, while preserving room for accountability, rehabilitation, and judicial discretion.

Our existing laws offer a firm foundation, one that may not need to be sub-categorized if AI is used. Identity theft using AI is still identity theft. Drug trafficking using AI is still drug trafficking. The means exacerbate efficiency, but the crime is often still the same. Simply put, the mere presence of AI – without an apparent and significant increase in dangerous – may not warrant sentences longer than currently authorized by Congress

Right On Crime believes that the Commission should conduct research on the sentencing outcomes in cases involving AI. It would be helpful to know the scope of federal cases involving AI and the

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[54] U.S. Dep't of Homeland Security, Public-Private Analytic Exchange Program, *Impact of Artificial Intelligence on Criminal and Illicit Activities* (2024).
[55] Samantha Jo-Roth, *Marco Rubio deepfake scam underscores the 'explosion' of AI voice impersonation*, Washington Examiner, July 11, 2025, available at: https://www.washingtonexaminer.com/news/senate/3468316/marco-rubio-deepfake-scam-explosion-ai-voice-impersonation-robocalls/.
[56] Federal Bureau of Investigations Public Service Announcement, Alert Number: I-051525-PSA, *Senior US Officials Impersonated in Malicious Messaging Campaign* (May 15, 2025).
[57] National Center on Missing and Exploited Children, *The Growing Concerns of Generative AI and Child Sexual Exploitation*, https://www.missingkids.org/blog/2024/the-growing-concerns-of-generative-ai-and-child-sexual-exploitation (accessed July 14, 2025).
[58] Reuven Aronashvili, Forbes, *The Evolution of Sextortion Attacks: How Generative AI is Taking a Front Seat*, Feb. 20, 2024, available at: https://www.forbes.com/councils/forbestechcouncil/2024/02/20/the-evolution-of-sextortion-attacks-how-generative-ai-is-taking-a-front-seat/.

sentencing ranges, including any variances, stiffer penalties, and types of crimes typically committed. Also, the Commission could provide information on feedback from practitioners, judges, and advocates on conflicts in understanding how to hand down criminal sentences where AI is involved. Lastly, the Commission could consider adding language in Chapter 3 that would make it clear that enhancements should not be applied because of the presence of AI unless an act of Congress affirmatively permits.[59]

Right On Crime greatly appreciate the Commission's thoughtful and thorough review of these recommendations and look forward to continuing to work with the Commission to improve our criminal justice system.

Sincerely,

Brett Tolman
Executive Director
Right On Crime

[59] To be sure, this can and very well should change in the future depending on the types of crimes, victims, and outcomes of crimes committed using AI. But such language could be beneficial for consistency in sentences and to provide temporary clarity to litigators and judges navigating this developing landscape.

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President and CEO
Maya Wiley

July 18, 2025

The Honorable Carlton Reeves, Chair
United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Request for Public Comment on United States Sentencing Commission Proposed 2025-2026 Policy Priorities (90 FR 24710)

Dear Judge Reeves,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States, we are pleased to submit the following comments and suggestions regarding the commission's proposed 2025-2026 priorities. We urge you to act on these priorities in a manner that reverses ineffective investments in overcriminalization, overincarceration, and excessive sentencing practices.[1]

We urge the commission to work to reduce racial disparities in sentencing. As we have shared in past comments,[2] people of color are disproportionately affected by policies in every aspect of the criminal-legal system. Black and Brown people are over-policed, and these disparities are only perpetuated by current sentencing practices.[3] The commission has shown that it is well aware of and working towards reducing and eliminating these injustices, and we implore the commission to continue this vital work.

The current guidelines for methamphetamine sentencing are outdated and lead to unfair and harsh sentences

[1] For more information on our conceptualization of a more just and fair system, *see* "Vision for Justice." *The Leadership Conference on Civil and Human Rights*. https://www.visionforjustice.org/.
[2] *See, e.g.*, "Leadership Conference Comments on the U.S. Sentencing Commission Proposed Amendments." *The Leadership Conference on Civil and Human Rights*. March 3, 2025. https://civilrights.org/resource/leadership-conference-comments-on-the-u-s-sentencing-commission-proposed-amendments/.
[3] Ghadnoosh, Nazgol, and Barry, Celeste. "One in Five: Disparities in Crime and Policing." *The Sentencing Project*. Nov. 2, 2023. https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/.

We commend the commission for continuing to examine the guidelines for drug trafficking offenses. With regard to purity distinctions for methamphetamine, we believe that current sentencing practices unjustifiably emphasize drug purity, leading to unfair sentences. Currently, penalties for trafficking methamphetamine vary depending on the purity of the substance, with lengthier sentences for purer methamphetamine. As the commission itself has explained, when Congress enacted these disparate statutory penalties in 1988, the average purity of the methamphetamine trafficked in the United States was rarely greater than 50 percent, leading to an assumption that those sentenced for trafficking highly pure methamphetamine were more culpable in the offense.[4] Today, however, most trafficked methamphetamine has a higher than 90 percent purity, meaning that this distinction is no longer a "reliable proxy for the sentenced individual's culpability."[5] This disparity echoes the unfair sentencing disparities between crack and powder cocaine: Just as there is no empirical basis for punishing trafficking of crack cocaine more harshly than powder cocaine, there is likewise no basis for punishing meth-actual and "Ice" more severely than meth-mixture.[6] This sentencing scheme has also resulted in racial disparities, as people of color make up almost 60 percent of those sentenced for meth offenses, despite using these substances at a lower rate than White people.[7] We urge the commission to revise the guidelines to remove these disparities and to reconsider linking quantity and purity to culpability with regard to all illicit substances.

The commission should build on its previous work related to alternatives to incarceration and supervision

Regarding alternatives to sentencing, we hold fast to principles that lend themselves to supporting all people instead of criminalizing and imprisoning them. The United States imprisons people at a higher rate than any other nation, in part because of its egregiously long sentences.[8] About 580 per 100,000 adults in the United States are behind bars.[9] As mentioned *supra*, the criminal-legal system is also rife with racial disparities: In state prisons, Black people are five times more likely to be incarcerated than White

[4] United States Sentencing Commission. "Methamphetamine Trafficking Offenses in the Federal Criminal Justice System." June 2024. Pg. 3. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf [hereinafter "Meth Trafficking Offenses"].
[5] Id. The commission found that couriers are twice as likely to be sentenced for pure meth than meth mixture, meaning that those less responsible for large-scale drug trafficking are subject to harsher sentences. Id. at 38.
[6] The Leadership Conference also urges the commission to eliminate the 18:1 sentencing disparity between crack and powder cocaine. *See* "Vote Yes on H.R. 1693, the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act." *The Leadership Conference on Civil and Human Rights*. Sept. 27, 2021. https://civilrights.org/resource/vote-yes-on-h-r-1693-the-eliminating-a-quantifiably-unjust-application-of-the-law-equal-act/.
[7] "Meth Trafficking Offenses," *supra* note 4, at 21. *See* "Results from the 2018 Nat'l Survey on Drug Use and Health: Detailed Tables." *Substance Abuse and Mental Health Service Administration*. 2018. Table 1.41A. https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf.
[8] "United States Profile." *Prison Policy Initiative.* March 11, 2025. https://www.prisonpolicy.org/profiles/US.html.
[9] "How many people are locked up in the United States?" *Prison Policy Initiative.* March 11, 2025. https://www.prisonpolicy.org/graphs/pie2025.html.

people,[10] and Hispanic individuals are incarcerated at a rate nearly three times higher than that of non-Hispanic White people.[11] These sentences can rip parents from their children and devastate entire communities. The time has come to dramatically rein in this system of mass supervision and free people from control of the carceral state. We appreciate the commission's past efforts to reform supervision and ask that you continue this vital work. We urge the commission to provide guidelines that expand the use of alternatives to incarceration, including deflection programs, community supervision, halfway houses in local communities, and suspended sentences, without the use of electronic monitoring and with an increase in a court's discretion to impose probation. Courts should improve community supervision by limiting the possibility of revocation and minimizing the possibility of reincarceration. The commission should seek to build on its recent amendments by setting clearer and fairer criteria for reincarceration due to a violation of probation or supervision conditions and eliminating reincarceration for technical violations of supervision conditions. Using these tools, the commission could help promote equity in supervised release and probation.

Conclusion

We applaud the commission's attention to these important issues. We look forward to continuing to work with the commission to advance justice and equality. If you have any questions, please feel free to contact Chloé White, senior policy counsel, justice, at [redacted].

Sincerely,

Jesselyn McCurdy
Executive Vice President of Government Affairs

[10] Nellis, Ashley. "The Color of Justice: Racial and Ethnic Disparity in State Prisons." *The Sentencing Project*, Oct. 13, 2021. https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.
[11] Vorpahl, Amelia. "How are Hispanic Individuals Represented in the Criminal Justice System?" *CSG Justice Center*. Oct. 12, 2021. https://csgjusticecenter.org/2021/10/12/how-are-hispanic-individuals-represented-in-the-criminal-justice-system/.

THE SENTENCING PROJECT

July 15, 2025

United States Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington, DC 200002-8002
Attention: Public Affairs—Proposed Amendments.

Re: Potential Priorities, 2025-2026 Amendment Cycle, Sentencing Guidelines for United States Courts, U.S. Sentencing Commission

Dear Chairman Reeves:

The Sentencing Project appreciates this opportunity to comment on potential priorities for the amendment cycle ending May 1, 2026. 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. We are eager to be a resource as you work to create just, equitable sentencing policies.

Significant guideline revisions are particularly urgent given the crisis unfolding within the Bureau of Prisons. Federal prisons are plagued by disrepair, abuse, and corruption.[1] In 1980, federal prisons held 25,000 people, now they hold nearly 143,000.[2] The staffing crisis has worsened due to the current hiring freeze and pay cuts.[3] The federal prison population urgently needs to be reduced. By lowering base offense levels wherever possible the Commission can preserve scarce funds for infrastructure repairs, salaries, and effective public safety interventions.

We applaud the Commission's work thus far to improve federal sentencing practices and we urge you to continue to build on that progress.

Promote community-based sentences and alternatives to incarceration

With regard to proposed priority one, "examination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option," The Sentencing Project encourages the Commission to prioritize decarceration and instruct courts to impose the least carceral sentence necessary to maintain public safety. Research shows "a very weak relationship

[1] *See* DOJ Office of the Inspector General (2024). *Inspection of the Federal Bureau of Prisons' Federal Correctional Institution Sheridan*; Levin, S. (April 15, 2024). *US federal women's prison plagued by rampant staff sexual abuse to close.* The Guardian.
[2] Bureau of Prisons (2025). *Population Statistics*.
[3] *See* Quandt, K. (2025). A surprise target of Trump's cutbacks is devastating one specific population. *Slate*; Sisak, M. (2025). Cash-strapped Bureau of Prisons freezes some hiring to 'avoid more extreme measures,' director says. *AP*.

between higher incarceration rates and lower crime rates."[4] The toll of mass incarcerations on communities, however, is clear. It tears apart families, creates lasting trauma, harms the health of individuals and communities, and deepens poverty.[5] And those harms are disproportionately borne by Black, Latino, and Native American communities.

18 U.S.C. 3553(a) instructs sentencing judges to impose sentences that are sufficient but not greater than necessary to comply with the purposes of sentencing under 18 U.S.C. 3553(a)(2). We urge the Commission to clarify this mandate and establish a rebuttable presumption that community-based sentences are appropriate where statutorily permissible. As the Vera Institute has urged,[6] a presumption that a community-based sentence is appropriate, unless proven otherwise by clear and convincing evidence, would reduce racial disparities and honor fundamental liberty interests.[7] Studies have also found that community supervision produces better public safety outcomes than shorter terms of imprisonment.[8]

Revise the drug trafficking and methamphetamine guidelines to reflect actual culpability

During the last amendment cycle, the Commission considered amendments designed to cure unwarranted methamphetamine sentencing disparities by fixing the meth-actual and "Ice" offense levels. As The Sentencing Project previously commented, we urge the Commission to not only adopt these methamphetamine amendments, but to delink the drug quantity table at §2D1.1 from statutory mandatory minimums.[9] We refer to the Commission to that letter in connection with proposed priority two for a more detailed response to last amendment cycle's proposed revisions.

Base economic crime sentences on culpability not loss

We urge the Commission to base §2B1.1, the economic crimes loss guideline, on individual culpability, rather than actual or imaginary loss. Section 2B1.1's loss table, including its instruction to use "the greater of" actual or intended loss, yields extreme sentencing ranges that bear little relation to actual harm or individual culpability. Scholars, judges, and the defense bar have long criticized the economic crimes guideline and the extraordinarily long sentences it imposes on individuals convicted of low-level involvement in economic crimes.[10] The high rate

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[4] Stemen, D. (2017). *The Prison Paradox: More Incarceration Will Not Make Us Safer*. Vera Inst. of Justice; National Research Council. (2014). The growth of incarceration in the United States: Exploring causes and consequences. The National Academies Press. https://doi. org/10.17226/18613.

[5] Travis, J., Western, B., & Redburn, S. (2014). *The growth of incarceration in the United States*. National Academy of Sciences.

[6] Nelson, M. et al (2023). *A new paradigm for sentencing in the United States*. Vera Inst. of Justice.

[7] *Id.*

[8] Petrich, D. M., Pratt, T. C., Jonson, C. L., & Cullen, F. T. (2021). Custodial sanctions and reoffending: A meta-analytic review. *Crime and Justice*, 50(1), 353–424. https://doi.org/10.1086/715100; Loeffler, C. E., & Nagin, D. S. (2022). The impact of incarceration on recidivism. *Annual Review of Criminology*, 5(1), 133–152. https://doi.org/10.1146/annurev-criminol-030920-112506.

[9] The Sentencing Project (2024). *Potential priorities, 2024-2025 amendment cycle, sentencing guidelines for United States Courts, U.S. Sentencing Commission*.

[10] *See* Dena, D. (2024). *Statement on behalf of Defenders to the USSC on 2024 economic crimes proposed amendments*; Felman, J. (2015). *Statement on behalf of the American Bar Association to USSC on proposed amendments to the Federal Sentencing Guidelines regarding economic crimes*; American Bar Association

of downward departures in cases sentenced under §2B1.1 – in FY2024, 44% after excluding cases that received substantial assistance or fast track departures – reflects the disproportionality of the guideline ranges.[11] The Commission should adopt proposed priority three and overhaul §2B1.1 to ensure that sentences reflect an individual's actual role in an offense and real world harms, rather than fictitious losses.

Overhaul the career offender guideline

As The Sentencing Project previously commented, the career offender guideline deepens racial disparities and yields unnecessarily long sentences.[12] We urge the Commission to return to this critical topic with proposed priority four. Stakeholders, including The Sentencing Project, have offered extensive feedback on potential changes to the career offender guideline over the past decade. For example, in our March 14, 2023 letter on prior proposed amendments to the career offender guideline, we expressed strong concerns regarding the potential elimination of the categorical approach to defining crimes of violence, which, without other significant changes to the career offender guideline, would have expanded the reach of the career offender guideline and likely deepened racial disparities.[13] In our February 3, 2025 comment we applauded the Commission's proposed robust revision of the career offender guideline as it again considered the elimination of the categorical approach – particularly the potential exclusion of state drug offenses.[14] We refer to the Commission to that letter for a more detailed response to last amendment cycle's proposed revisions.

Examine the 18 U.S.C. 3553(a)(2) sentencing factors

In *Booker*, the Supreme Court held that sentencing judges must consider Guidelines ranges but may also "tailor the sentence in light of other statutory concerns as well," such as the §3553(a) sentencing factors.[15] These factors include the need for the sentence imposed "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Given the deteriorating conditions within the Bureau of Prisons, added scrutiny of whether the Bureau is meeting judicial expectations of education and vocational training and medical care is merited. We urge the Commission to adopt proposed

(2014). *A report on behalf of the American Bar Association Criminal Justice Section Task Force on the reform of federal sentencing for economic crimes*; *United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (Underhill, J., concurring) (explaining that "the loss guideline is fundamentally flawed," and "those flaws are magnified where . . . the entire loss amount consists of intended loss.").

[11] *See* Federal Defenders (2025). *Annual letter to the US Sentencing Commission regarding proposed priorities for the 2025–2026 amendment cycle* (citing US Sentencing Commission, 2024 Sourcebook of Federal Sentencing Statistics, at 133 tbl. E-7.).

[12] The Sentencing Project (2025). *Comment on "Career Offender" guideline*.

[13] Comment from 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 (2023). *Proposed amendments to the career offender and criminal history guidelines*.

[14] The Sentencing Project (2025). *Comment on "Career Offender" guideline*.

[15] *United States v. Booker,* 543 U.S. 220 (2005).

priority seven. Additionally, as we commented during the 2024-2025 amendment cycle, we urge the Commission to explore the impact of each §3553(a) sentencing factor on sentences.[16]

The weight the sentencing judges accord to each factor, not simply §3553(a)(2)(D), is particularly deserving of examination given evolving evidence. For example, what weight do sentencing courts give to factor §3553(a)(2)(B), the need for the sentence to afford "adequate deterrence to criminal conduct," and is that weight consistent with existing evidence on the impact that sentence lengths have on deterrence? Or to what extent do judges consider the need to "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" under §3553(a)(2)(C) and is that consideration consistent with actually available care and programming in the Bureau of Prisons? We particularly urge the Commission to study the extent to which these factors influence the most extreme sentences of 20+ years, 40+ years, and life. A greater understanding of the effect of the §3553(a) factors on federal sentencing, established via a judicial survey or other means, will shed valuable light on opportunities for evidence-based reform.

Revisit the impact of youthful offenses on criminal history scores

We urge the Commission to return to the issue of the impact of youthful offenses on criminal history scores. The Commission should amend §4A1.2(d), which assigns criminal history points for certain offenses committed prior to age 18. In December 2023, the Commission proposed a two-part amendment related to the guidelines' treatment of youthful individuals ("2023 Youthful Individuals Amendment"). Part A, which it did not adopt, would have changed the criminal history computation rules for offenses committed prior to age 18, limiting or eliminating the impact of these youthful offenses on a person's guidelines range.

As The Sentencing Project discussed in greater detail in our March 2024 joint comment with the Juvenile Law Center, The Gault Center, the National Youth Justice Network, and Citizens for Juvenile Justice, the consideration of offenses committed under 18 years of age in criminal history scores injects substantial arbitrariness and opportunity for bias into federal sentencing, contrary to the purpose of the Guidelines.[17] We urge the Commission to exclude consideration of all offenses committed prior to age 18 from criminal history scores to advance equity and consistency in sentencing.

Reduce life sentences

Additionally, as we have recommended in prior comments, we urge the Commission to amend the guidelines with regard to Base Level 43 offenses, especially for those with little or no criminal history.[18] Under the Commission's sentencing table an individual's recommended

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[16] The Sentencing Project (2024). *Potential priorities, 2024-2025 amendment cycle, sentencing guidelines for United States Courts, U.S. Sentencing Commission*.

[17] Juvenile Law Center, et al. (2024). *Comments of Juvenile Law Center, The Sentencing Project, The Gault Center, National Youth Justice Network, & Citizens For Juvenile Justice to U.S. Sentencing Commission proposed amendment 2 regarding youthful individuals*.

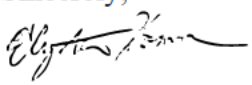
[18] The Sentencing Project (2024). *Potential priorities, 2024-2025 amendment cycle, sentencing guidelines for United States Courts, U.S. Sentencing Commission*. *See also* Hernandez, J. (2018). *Comment to the U.S. Sentencing Commission that a policy statement be implemented advising that offense level 43's recommendation of life without*

sentence is determined – in most circumstances – by calculating the offense's "base offense level" based on its severity and the individual's criminal history category. With one exception, for each base offense level the recommended sentencing range rises with an individual's criminal history category. For offenses with a base level of 43, however, a life sentence is recommended regardless of whether an individual has a criminal history. Base level 43 offenses can include a wide array of conduct. §2A1.1 (First Degree Murder), §2D1.1(a)(1) (Unlawful Manufacturing, Importing, Exporting or Trafficking), and §2M1.1(a)(1) (Treason) all specifically establish a base offense level of 43. Other offenses, including nonviolent drug offenses, may be aggravated to a base level of 43 based on an individual's perceived role in the offense and other factors.

Recommending life imprisonment for all base level 43 offenses is inconsistent with a wealth of evidence that makes clear that extreme sentences – including sentences to life and death – are not necessary to protect public safety.[19] The vast majority of individuals age out of crime.[20] Individuals with little or no criminal history are also less likely to recidivate.[21] As such, we recommend that the Commission amend the guidelines to remove the recommendation that all offenses with a base level of 43 result in life sentences and institute sentencing ranges for such offenses, especially for those with little to no criminal history.

Thank you for this opportunity to speak and we look forward to opportunities for continued feedback and collaboration. Please reach out to Liz Komar, Sentencing Reform Counsel, at [redacted] with any questions.

Sincerely,



Liz Komar
Sentencing Reform Counsel
The Sentencing Project

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parole be reduced to 360 months - life without parole for offenders with a criminal history category I and II who are convicted of a nonviolent crime.

[19] Nellis, A. & Barry, C (2025). *A matter of life: The scope and impact of life and long term imprisonment in the United States*. The Sentencing Project.

[20] Farrington, D. (1986). "Age and crime." In Michael Tonry and Norval Morris (eds.), *Crime and Justice: An Annual Review of Research*. Vol. 7. Chicago, Ill.: University of Chicago Press; Piquero, A., Jennings, W., and Barnes, J. (2012). Violence in criminal careers: A review of the literature from a developmental life course perspective. *Aggression and Violent Behavior*. Vol 17 (3): 171-179.

[21] U.S. Sentencing Commission (2016). *Recidivism among federal offenders: A comprehensive overview.*

TZEDEK
ASSOCIATION

Save A Life, Save A World

July 18, 2025

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: Tzedek Association Comments on the Commission's Proposed 2025-26 Policy Priorities

Dear Judge Reeves and Members of the Commission,

Tzedek Association is again exceedingly grateful for the annual opportunity to comment on the Commission's proposed priorities for the upcoming cycle. Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian cases around the globe. Tzedek is committed to championing the civil rights of those mistreated by the criminal justice system, empowering individuals to be productive citizens and aiding the less fortunate. Tzedek seeks a society that values compassion and fairness. To that end, Tzedek is proud of its efforts to champion the First Step Act and the home confinement provision within the CARES Act, and to provide input to the Commission via both written submissions and oral testimony.

In recent years, Tzedek has been heartened by the Commission's willingness to take steps that reflect Tzedek's view that a criminal justice system worthy of our nation must temper the need for punishment with compassion and must be informed by empirical evidence rather than reflexive and arbitrary policies and mechanisms that ignore the innate human capacity for growth and change.

More specifically, Tzedek extols the Commission for its thoughtful, principled, and impactful accomplishments over the past several years. From recent amendments addressing compassionate release and criminal history scoring, to the recent efforts to reevaluate the scope and structure of economic crime enhancements under § 2B1.1, and from the efforts to simplify the guideline calculation process to the limitations on the use of acquitted conduct, the Commission has demonstrated a deep commitment to data-driven reform and greater fairness in federal sentencing.

Tzedek is especially grateful for the Commission's willingness to engage with diverse stakeholders and to pursue policies that promote proportionality, rehabilitation, and public safety. Tzedek also extends heartfelt thanks for the opportunity for Norman Reimer to testify before the Commission earlier this year on behalf of Tzedek—an invaluable forum to share the organization's perspectives and advocate for a fairer justice system.

Introductory Comment Regarding the Current Priority Cycle

Overall, Tzedek commends the Commission for the breadth of the possible priorities for the 2025-2026 cycle. Despite meaningful progress through the Commission's adoption of recent amendments, Tzedek continues to believe there is still considerably more work to do to effectuate a much-needed paradigm shift in the application of federal criminal law to correct fundamental flaws that have plagued federal sentencing practices for decades. Tzedek's comments seek to address several potential priorities identified by the Commission and suggest additional priorities that are closely connected to those priorities.

As it has in the past, Tzedek strongly urges the Commission to act boldly to implement the kind of overarching course correction that can restore fairness and humanity, while remaining faithful to the statutory framework for sentencing.

I. The Continuing Need for *Mens Rea* Reform

Consistent with its recent submissions to the Commission, Tzedek continues to see a critical need to address the absence of adequate *mens rea* considerations in the sentencing process. *Mens rea*, or criminal intent, is the moral anchor of a criminal code and a just and effective scheme of criminal punishments. In general, the United States Sentencing Guidelines ("U.S.S.G.") as currently constructed tend to ignore and essentially eviscerate traditional notions of *mens rea* as a fundamental feature of a sound sentence system. Tzedek believes that the Guidelines should reflect the fundamental principles that punishment should be proportionate to the

offender's culpability, and *mens rea*, or criminal intent should be a key factor in determining that culpability.

Concerns about the undermining of *mens rea* principles have been expressed by astute jurists and commentators for many years. For example, the Honorable Judge Jack Weinstein & Fred Bernstein wrote[1]:

> "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 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[2]:

> "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."

Tzedek believes that the need for *mens rea* reform is long overdue, and that the issue merits sustained attention across many guidelines and in conjunction with this Commission's proposed priorities. Specifically, this issue is directly related to proposed priorities (2) and (3) focused on examining the drug and economic offense guidelines, §2D1.1 and §2B1.1; it is also related to broader priorities (1) and (6) examining how the guidelines can provide guidance to courts to select appropriate sentencing options and exploring means for continued simplification of the U.S.S.G.

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[1] Judge Jack Weinstein & Fred Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Federal Sentencing Reporter 121 (1994).

[2] Judge Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 Federal Sentencing Reporter 112 (1994).

As a general matter, Tzedek urges the Commission to review and revise all components of the U.S.S.G. to ensure they properly incorporate, and to ensure courts properly consider *mens rea*, motive, purpose, and personal culpability issues at sentencing. This review and revision of the U.S.S.G. 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 level of proof.

The government should generally be required to prove a culpable state of mind with respect to any and all key offense facts that impact guideline ranges, such as the quantity of drugs or the amount of financial loss involved in the offense, and proof of a more culpable state of mind should generally be required for greater sentencing enhancements. Review and revision of the U.S.S.G. to reflect these principles should also ensure that courts are fully and clearly instructed to consider all mitigating aspects of a defendant's *mens rea*, including motive, purpose, and personal culpability in determining the appropriate sentence.[3]

The two areas in which there is the greatest need for *mens rea* reform is with respect to §§ 2B1.1 and 2D1.1, two specific guidelines noted in the Commission's latest proposed priorities. Addressing the *mens rea* deficiencies in these sections will not only address unnecessary harshness but also help provide improved guidance to courts while simplifying the sentencing process.

A. Reformulate Base Offense Level Calculation for Economic Crimes and Drug Offenses

The single greatest driver of excessive harshness and disparity in federal sentencing derives from the dated formulaic approach to base offense level calculations that disregards *mens rea* considerations to focus on metrics that often

[3] The significant guideline simplification amendments now pending before Congress, which will remove most departure-related policy statements, creates a heightened risk that judges may not readily and regularly consider all mitigating *mens rea* matters. Though imperfect and incomplete, policy statements expressly addressing matters such as "Mental and Emotional Conditions" and "Aberrant Behavior" served to signal to the parties and to jurists that mental state issues are important matters in the sentencing process. The Commission can and should work on guideline revisions to ensure these matters and others related to culpability are never overlooked or slighted in the sentencing process.

serve as very poor proxies for actual culpability. Driven by the application of adjustments based on factors that often bear no relation to an individual's true culpability, the U.S.S.G. establishes presumptive sentences that are often disproportionately harsh and overly excessive for less serious offenders.[4] In particular, the use of the "Loss Table" for economic offenses in U.S.S.G. § 2B1.1 and the "Drug Quantity Table" under U.S.S.G. § 2D1.1 should be replaced—or at the very least modified—through reforms that tether sentence lengths to *mens rea* and other culpability criteria. Tzedek believes that the current focus on quantification serves as an unreliable and unjust proxy, and in a way contradictory to individual culpability and factors set forth in 18 U.S.C. § 3553(a). The Commission's own data shows that courts largely agree that these guidelines consistently fail to guide courts effectively. While judges sentence below the drug and fraud table guidelines in a significant majority of cases, reinforcing the idea that substantial reform is a bold but necessary step toward a more just sentencing system, judges (often those recently appointed to the bench) still lean too heavily on these drug and fraud tables.

In today's federal sentencing framework, numerical formulas tied to loss amounts and drug weights have largely supplanted the pursuit of individualized justice. The enhancement structures under §§ 2B1.1 and 2D1.1 have become increasingly disconnected from a defendant's actual culpability, relying instead on mechanical calculations and doctrinal intricacies that often fail to reflect the nuanced realities of true aggravating and mitigating factors for individual defendants. In particular, the interpretation of "loss" in § 2B1.1 has drawn criticism for reducing complex conduct into rigid mathematical estimates. As a result, defense attorneys frequently express frustration that their roles have shifted from advocates to calculators and number-crunchers, navigating a system where human storytelling and meaningful context are simply overshadowed by spreadsheets and point tables.

By now the stories of individuals whose criminality is vastly overstated through the application of these provisions are well-established and are surely well-known by the Commission. These have resulted in grossly unjust sentences. Whether it is

[4] For example, sentences that are in essence a life sentence for nonviolent offenses are unacceptable. *See United States v. Rubashkin*, where a presidential commutation was granted to a man in his fifties who was sentenced to 27 years for fraud, a sentence "which many have called excessive in light of its disparity with sentences imposed for similar crimes." https://trumpwhitehouse.archives.gov/briefings-statements/president-trump-commutes-sentence-sholom-rubashkin/

the girlfriend or a hired driver recruited to participate in a narcotics conspiracy, with absolutely no knowledge of the quantities involved, or the mid-level bookkeeper, whose false entries contribute to a fraud whose scope is beyond his or her knowledge, the draconian presumptive sentences, based on metrics that disregard *mens rea*, can be wholly excessive and disproportionate. (Notably, recent presidents from both parties have registered their judgment on these kinds of excessive sentences by commuting and/or pardoning a historic number of nonviolent drug and fraud offenders.) It is high time for the Commission to look at alternative approaches.

The optimum approach is to identify key culpability factors such as *mens rea*, motive and purpose, factors that judges already recognize are central in determining an individual's culpability but which currently do not find sound expression in the guidelines. Accordingly, Tzedek urges the Commission to formulate a completely revised culpability-focused approach to the determination of the base offense level for drug offenses and economic offenses. These comments address loss calculation in the next sub-section of this letter.

With respect to drug offenses, given the pervasive statutory mandatory minimums that apply to many drug offenses which the Commission cannot directly change, there is no sound justification for having the Drug Quantify Table drive guideline ranges, rather than a more individualized assessment of culpability. The Commission should completely end the practice of centering the base level for drug offenses through a reference to the weight of the drugs and develop a guideline that directs the court to focus on individual culpability factors, such as role, knowledge, motivation, external pressures, and other factors relevant to the circumstances pertaining in each case. While drug weight should still be a factor to consider in appropriate circumstances, especially when a defendant is knowing and purposeful about trafficking large quantities of drugs, it should no longer serve as the principal driver in the determination of the base offense level in § 2D1.1.

B. Alternative Approaches to Economic Offenses for § 2B1.1

The need for *mens rea* reform is especially acute with respect to proposed priority (3) (examination of § 2B1.1), and Tzedek supports significant and wholesale reform. The portions of the U.S.S.G. on federal fraud crimes—embezzlement, thefts, securities fraud, insider trading, and related crimes—have long been the subject of extensive and bipartisan criticisms. Due to the U.S.S.G. instructions to use the *higher* of "intended" or "actual" loss, numerous overlapping sentencing enhancements, and a tendency to treat similarly intentional conduct/results and

unintended conduct/results, there is a broad consensus that the fraud guidelines often recommend excessive punishment for many types of economic offenses. These guidelines often result in widely disparate sentences for like conduct, and federal judges regularly register their disapproval of these sentencing guidelines by varying from them in a wide range of cases.[5]

Though structured with various elements, this proposal fundamentally seeks to alleviate at least some of the excessive harshness of these fraud guidelines by focusing more closely on defendants' actual intent and directing judges to consider mitigating, as well as aggravating, factors. Reforms that better align the fraud guidelines with actual culpability and other sound sentencing factors will help reduce disparity as judges will be more likely to follow guideline recommendations.

Accordingly, Tzedek urges the Commission to fundamentally rethink and restructure the entire fraud Guideline by exploring amendments that would allow the Guideline to function without a Loss Table to focus on a defendants' *mens rea*, motive, culpability and the extent to which they deliberately inflicted economic hardship on discrete individuals. Under such an approach, there may be cases in which the intended loss is a more significant factor than the actual loss or gain; but the reverse may also be true in many cases. Thus, this new approach would jettison the notion that courts should rely upon the higher of either intended or actual loss in favor of one that focuses on the unique circumstances of the case and the true *mens rea* of the individual offender. In that context, loss amounts should be a factor—just as under the proposed revision to § 2D1.1 outlined above, drug weight should be a factor—but numerical benchmarks unconnected to real culpability would cease to be the principal driver in determining the guideline range and the severity of the recommended sentence.

If the Commission does not fundamentally rethink this Guideline as Tzedek proposes, then the Commission should at least significantly reform and simplify the Loss Table in § 2B1.1. With financial crimes now, it is the government's (sometimes fanciful) construction of loss amounts that (too greatly) drives the sentence. All too often, loss calculations are built on suppositions about intent or resulting harm and they often push a Guideline sentence to a length of time that the

[5] David DeBold & Matthew Benjamin. *"Losing Ground'—In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. Penn. L. Rev. 141 (2011).

average person would consider outrageously long and a punishment that does not sensibly meet the crime given the defendant's actual culpability.

Indeed, the current Loss Table is outdated, most certainly does not reflect inflation since its adoption, creates a false sense of precision, and is excessively complicated. A million dollars today is not what it was when the Table was created, and frauds that the government claims involve $975,000 and $1,005,000 are not meaningfully different because of the distinct "loss" amount. The Loss Table currently functions arbitrarily and results in human beings often losing their freedom for a greatly excessive amount of time. That is wrong, unjust and must be fixed. Taking away a citizen's freedom is the government's greatest power and thus must be exercised with fairness and with the utmost care. In the annexed attachment Tzedek proposes two alternatives for revision of the Loss Table but does so strongly urging the Commission to opt for the more sweeping change outlined above so that there is no need for a formal Loss Table.

II. Proposals Concerning Priority (5)

Tzedek lauds the Commission for identifying an examination of §§ 3E1.1 (Acceptance of Responsibility) and 5K1.1 (Substantial Assistance to Authorities) as potential priorities during this cycle and takes this opportunity to resubmit and augment its previous proposals in these areas.

A. Acceptance of Responsibility Reform

Not all individuals who proceed to trial do so as an act of defiance or stubborn denial. There are cases where an individual has a legitimate defense. This is especially true when the ultimate issue relates to intent. If the right to a jury trial is to have meaning, it should not be that merely because one puts the government to its constitutional duty to prove its case, they are automatically disqualified from receiving a third point for acceptance of responsibility.[6] Accordingly, Tzedek proposes that the Commission amend U.S.S.G. § 3E1.1 to provide that a court may

[6] This is even more important if one believes that trial should be the norm and the default for the Government to take away somebody's freedom. In our system, a defendant has a constitutional right to a jury trial even if they lack a good defense and even if defiant or stubborn, and a decision to exercise that right alone should not be the basis for additional criminal punishment. Nor should a defendant's decision to proceed to trial automatically support a finding that a person is without remorse or recognition of wrongdoing.

award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

Additionally, in practice, proceeding to trial is not just about the third point, it is about all three of the acceptance points. Proceeding to trial will almost always mean not getting any points off, especially since U.S.S.G. § 3E1.1 Application Note 2 provides that it will be the "rare situation []" where a person "may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial," and unequivocally states that the adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial…" Tzedek believes this approach is flawed.

First, there is nothing inherently inconsistent in maintaining that the government cannot meet its burden of proof and still sincerely expressing regret and accepting responsibility for one's conduct. Second, it is fundamentally inconsistent with the constitutional right to a trial to cast that right as merely a "burden" that the government must shoulder rather than the norm that is contemplated by the Constitution. Third, while there certainly may be circumstances where a defendant's behavior or failure to express remorse may justify denial of an acceptance adjustment, Tzedek believes that the Commission should not put its finger on the scale with an Application Note that clearly states that denial of acceptance should be the norm whenever a defendant goes to trial.

Accordingly, Tzedek proposes that the Commission strike the first sentence of Application Note 2 to U.S.S.G. § 3E1.1 and strike "[i]n rare situations" from the beginning of sentence three. Additionally, the last sentence should be amended to make clear that post-trial statements or conduct, including the completion of any treatment programs, payment of restitution or other manifestations of remorse may also be considered in determining whether to grant an acceptance reduction following a conviction at trial.

1. Contributions to the Community

Firm in the belief that no one should automatically be defined by a misdeed, particularly where it represents a single departure from an otherwise fruitful and law-abiding life, Tzedek urges the Commission to consider an additional qualifying factor under Acceptance of Responsibility. Specifically, where an individual has rendered extraordinary service to the community, such as, for example, serving as a volunteer Emergency Medical Technician, a volunteer at a homeless shelter or a soup kitchen, or any of the numerous ways that individuals provide service to the

community, either before or after the commission of an offense, the Commission should provide for an additional one-point reduction.

B. Obstruction Reform

Closely related to § 3E1.1 is § 3C1.1. Indeed, Application Note 4 to § 3E1.1 is a statement that conduct resulting in an enhancement under § 3C1.1 ordinarily indicates that a defendant has not accepted responsibility for criminal conduct. Because it is common practice to assess an obstruction enhancement when a defendant testifies at a motion hearing or at trial—and may be assessed just for filing an affidavit that contradicts a law enforcement account of a search, seizure, or alleged statement—meaningful reform of § 3E1.1 must necessarily include § 3C1.1 reform. This practice of imposing the obstruction enhancement merely for involvement in motion practice or asserting a right or defense chills fundamental constitutional rights by imposing an unwarranted tax merely for presenting a claim for consideration by the court or jury. In a sense, it uniquely places the defendant in a "double or nothing" dilemma. If the court or jury rejects their version, they not only lose the motion or the trial, but they get an additional significant penalty merely for presenting their arguments or version of events.[7]

The imposition of an obstruction enhancement solely for testifying should be contrasted with situations in which a defendant does more than provide their own account by taking independent steps that obstruct or impede justice, such as by presenting false evidence or any of the numerous others way that a defendant or a subject of an investigation may affirmatively engage in efforts to frustrate the administration of justice. In those situations, the assessment of the enhancement remains appropriate.

Accordingly, Tzedek proposes that the text of U.S.S.G. § 3E1.1 be amended to make clear that the obstruction adjustment should not be assessed solely for testifying at a hearing or trial in support of the defendant's rendition of the facts. Similarly, Application Note 2 of § 3C1.1 and Note 4 to § 3E1.1 should also be amended to reflect this principle.

C. Substantial Assistance to Authorities Reform

[7] Note that no corresponding penalty is imposed upon the government or the government's witnesses when their witnesses are not believed, or a jury renders a not guilty verdict.

There may be no greater contributor to irrational disparity in federal sentencing practice than the current statutory and U.S.S.G. framework that vests the government with the sole power to seek a downward departure for a defendant who provides substantial assistance.

At the outset, Tzedek notes that as a matter of fundamental principle, there is something profoundly disturbing about a system of justice that pervasively relies upon the testimony of cooperating witnesses to initiate, or buttress investigations and/or prosecutions of others. Further, courts, scholars and experience teach us that testimony of such witnesses is often unreliable.[8] Indeed, false testimony from cooperating witnesses is a major contributor to wrongful convictions in the very small subset of criminal cases in which DNA evidence is available to support an eventual exoneration.[9] For cases in which there is no biological evidence, which is the case in the overwhelming majority of federal prosecutions, it is virtually impossible to establish the extent to which cooperator testimony contributes to an unwarranted conviction.[10]

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[8] *See Giglio v. United States*, 405 U.S. 150 (1972); *On Lee v. United States*, 343 U.S. 747, 757 (1952); *United States v. Bernal Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 108, 108 (2006); Jeffrey S. Neuschatz, Danielle K. DeLoach, Megan A. Hillgartner, Melanie B. Fessinger, Stacy A. Wetmore, Amy B. Douglass, Brian H. Bornstein and Alexis M. Le Grand,, *The Truth About Snitches: An Archival Analysis of Informant Testimony*, 28 Psychiatry, Psychology and Law 508-530 (Nov. 10, 2020), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9090405/

[9] *See* Innocence Project, *Unregulated Jailhouse Informant Testimony Deeply Harms Our System of Justice*, https://innocenceproject.org/informing-injustice-the-disturbing-use-of-jailhouse-informants/ (last visited July 11, 2024), (False informant testimony contributed to nearly one in five of the 375 DNA-based exonerations); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 744 (2016) (The use of informant testimony is so pervasive throughout the criminal legal system, but only a fraction of wrongful convictions are challenged postconviction.)

[10] The Guidelines, government, and judges should also pay attention to how dangerous cooperation often is and to how incredibly little the Federal Bureau of Prisons (BOP) does to actually protect cooperators. The Guidelines should remind judges of the possible dangers related to cooperation and to factor that in both in whether to depart for somebody who did not cooperate and/or for someone who did.

Notwithstanding these concerns, Tzedek recognizes that the government use of and reward for cooperation is a key element of the current federal criminal justice system. According to the data from 2024, 9.9 percent of all sentences imposed involved U.S.S.G § 5K1.1 motions, with 100 percent of those sentences beneath the guideline range. The mean decrease in those cases was a sentence reduction of 56.5 percent and the median departure was 50.4 percent.[11] The current application of this incredible power to avoid both mandatory minimum sentences and guideline sentencing ranges is highly problematic. There are all too many cases in which the determining factor as to who gets this benefit turns on such arbitrary factors as 1) who gets to the government first;[12] 2) who gets an attorney that is more inclined to promote or recommend an early guilty plea and cooperation rather than an attorney who is more deliberative and committed to assessing the evidence before providing a recommendation to plead and cooperate; or 3) who has the most information to offer.

The first two of these factors are determined by arbitrary factors that have nothing to do with justice or an individual's state of mind and level of culpability. And the third factor is a manifestation of the most abusive aspect of the substantial assistance departures, namely that the most culpable defendants are often in the best position to provide truly substantial assistance and the least culpable defendants are in the worst position. The Commission is no doubt aware of the many cases in which more culpable defendants cooperate and receive far lesser sentences than other co-defendants who ranked lower in the criminal enterprise, especially when the less culpable are convicted after trial.

Additionally, there are some circumstances where an individual is willing to cooperate, but the government will not agree that the cooperation is substantial unless it includes implicating a loved one, sometimes including a parent, spouse, child, or sibling. To deny the departure when the sole reason why a cooperative

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[11] *See* U.S. Sentencing Comm'n, *2024 Annual Report and Sourcebook of Federal Sentencing Statistics*, https://www.ussc.gov/research/sourcebook-2024 U.S, Tables 29 and 37, and Figure 9, (over the ten-year period of 2015 – 2024 § 5K1.1 departures have ranged between 8.2 and 12.4 percent of sentences imposed, with 9.9 percent or 6,099 receiving this benefit in 2024).

[12] It must be noted that while it might be an indication of extreme contrition if a defendant cooperates early, it is just as likely that it may be because a defendant got counsel sooner than other co-defendants or that their attorney's workload was such that the attorney brought their client to the government before counsel could do so for co-defendants. That is hardly a legitimate basis to deprive the other defendants of access to this relief mechanism.

individual cannot provide substantial assistance is a reluctance to cooperate against a close family member undercuts values which should be extolled rather than denigrated, and are, at the very least, deeply understandable on a human level.

While it may seem like the current structure is necessary to ensure that the government secures cooperation to pursue other wrongdoers, those who practiced law before the U.S.S.G. know that this is not the case. Prior to the Sentencing Reform Act ("SRA "), there was a time when the judge's authority to reduce a sentence pursuant to F.R. Cr. P. 35 was more than adequate to ensure that cooperators were rewarded. But it also left open the possibility that even a defendant who could not provide "substantial assistance" could nevertheless secure a sentence reduction for making good faith efforts to cooperate. There was no evidence that the government was unable to secure cooperation when the authority to determine who qualified for a benefit from cooperation was shared with the court.

Accordingly, Tzedek urges the Commission to address the disparity that results from the way the U.S.S.G. § 5K1.1 operates by amending the section to include a provision that would permit the court to grant a downward departure, notwithstanding the absence of motion by the government, provided a defendant made a good faith effort to cooperate, and that although the defendant could not provide substantial assistance it was not through any fault of the defendant.[13]

Tzedek further recognizes that pursuant to 18 U.S.C. 3553(e), a sentence below a mandatory minimum requires a motion by the government attesting to the defendant's substantial assistance.[14] Hence, Tzedek urges the Commission to recommend that Congress implement a statutory revision to similarly permit the court to consider imposing a sentence below a mandatory minimum by authorizing

[13] Notably, certain people of faith hold sincere religious beliefs that prevent them from cooperating. Accordingly, courts should be advised to consider such a departure without motion of the government, when the defendant made a good faith effort in cases where the extent of their cooperation was limited by good faith religious boundaries.

[14] *S*ee *Melendez v. United States*, 518 U.S. 120 (1996) (holding that absent a motion by the government to depart from the mandatory minimum due to substantial assistance, a sentencing court lacks authority to do so).

a court to grant a departure where a defendant has made good faith efforts to provide substantial assistance.[15]

III. Suggested Additional Priorities

As has been conveyed in prior submissions, Tzedek believes that U.S. sentencing practices perpetuate the proliferation of excessively punitive sentences and systemic disparities that are manifest in various phases of the criminal justice process. To address these concerns, Tzedek urges the Commission to consider the following additional proposed priorities:

A. Establish Presumptive Maximum Sentences

18 U.S.C. § 3553(a) provides that a "court shall impose a sentence sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in the Act. Despite this statutory directive to avoid excessive sentences, the severity of federal sentences has increased dramatically since the advent of the SRA. In 1986, the year before the U.S. Sentencing Guidelines became effective, only just over half of all federal sentences included some term of imprisonment;[16] in Fiscal Year 2024, according to Commission data, 91.5 percent of all federal sentences included a prison term.[17] And the prison sentences are too long. Countless commentaries, reports and studies advancing a wide array of reform proposals support the proposition that the U.S. incarcerates too many people for too long, despite increasing evidence that overly harsh sentencing has disparate impact on some populations and no corresponding public safety benefits.[18]

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[15] As noted above, one of the more grotesques elements of cooperation is that often it requires a person to inculpate a loved one and thus choose between an extremely close relationship and longer prison terms. Accordingly, courts should be advised not to penalize a person when the inability to provide substantial assistance arises solely because it would require the inculpation of someone in such a relationship.

[16] Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, *Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90* (June 1992), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf.

[17] *See* FY 2024 Sourcebook, *supra*, note 11, Figure 6.

[18] *See*, e.g., Council on Criminal Justice Task Force, *How Long is Long Enough?*, March 2023, https://counciloncj.foleon.com/tfls/long-sentences-final-report/ (defining "long sentences" as prison sentences of 10 years or more); Vera Institute of Justice, *A New Paradigm for Sentencing in the United States*, February, 2023, https://www.vera.org/downloads/publications/Vera-

A range of factors contribute to undue sentence severity in the federal system because the U.S.S.G. are suffused with a vast array of often overlapping and severe enhancements, some of which are specifically addressed in this submission, but all of which contribute to disproportionately harsh sentences, especially for those who exercise the right to trial.

Tzedek proposes that for most criminal conduct, especially when committed by those with either no substantial or minimal history of prior criminal conduct, the Commission should promulgate presumptive maximum sentences. Judges would retain the authority to sentence above these presumptive sentencing caps provided specific reasons for doing so can be articulated based on factors that should be tied to the specific individual and the specific conduct which is the subject of the conviction.

Tzedek proposes a two-tier cap approach:

Category 1: 15-year presumptive maximum for all federal crimes other than acts of terrorism, treason, murder, rape, or any crime of violence if the defendant was previously convicted of any prior state or federal felony.

Category 2: 5-year presumptive maximum if the defendant is not convicted of a crime of violence, has no substantial criminal history, and makes efforts to ameliorate the harm caused by the criminal conduct, such as through restitution or community service, or takes other steps to reduce recidivism risk, such as successful completion of treatment, counseling and/or participation in a restorative justice program.

As necessary to effectuate these presumptive maximum categories, Tzedek urges the Commission to propose an advisory list of aggravating factors that may provide the basis for a court to be authorized to impose a sentence longer than the presumptive maximum and that the Commission recommend that Congress amend 18 U.S.C. § 3553 to provide the necessary statutory authority to implement the presumptive maximum sentence construct, notwithstanding other preexisting statutes.

Sentencing-Report-2023.pdf; *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, UMKC Law Review, Vol. 87:1, 2018, also available at The Sentencing Project, https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/.

B. Offense Level 43 Reform

Tzedek supports a specific reform to Base Offense Level calculation in the sentencing table to amend the U.S.S.G. to remove the recommendation that a base level of 43 should necessarily result in a life sentence. A defendant can get to that base level because of the severity of the conduct (e.g. First Degree Murder, Unlawful Manufacturing, Importing, Exporting or Trafficking, (if resulting in death or serious bodily injury and the defendant had prior conviction for a similar offense), and Treason (if tantamount to waging war against the United States)). But a defendant can also get to that level through aggravating factors based on such factors as drug weight, role in the offense, etc.

Tzedek joins other groups who believe that life sentences should be imposed for only the most heinous crimes, should almost never be imposed for non-violent offenses, and clearly should not be mandated for those with little or no criminal history. Accordingly, the Commission should amend the U.S.S.G. to eliminate the level 43 life recommendation and substitute a sentencing range, especially for those with a Criminal History of less than IV.

C. Criminal History Reform

Just as the mechanistic approach to loss calculation and drug quantity can distort and often exaggerate an individual's criminal responsibility, so too can the point system approach to criminal history lead to distorted outcomes. These distortions arise from multiple factors: variable sentencing practices among states, counties, and localities, which can result in arbitrarily overstated criminal history based upon local sentencing practices; over-policing of certain populations and communities, which results in higher criminal histories and therefore longer sentences for some groups; failure to adequately account for age at the time of the prior offenses, except for limited circumstances; failure to recognize that prior imprisonment itself may have contributed to subsequent criminality; and countless more intangibles such as the offender's current age, family circumstances, and employment history.

Tzedek proposes that the current point system be replaced with more adaptive categories that will provide the sentencing judge with an opportunity to make a qualitative assessment of a person's criminal history. To provide greater flexibility within a criminal history range and to underscore the importance of a court making a qualitative rather than a quantitative assessment of criminal history, Tzedek

suggests that the current model, which has six criminal history categories, be condensed into four categories: 1) no or limited criminal history; 2) low criminal history; 3) moderate criminal history; or 4) extensive criminal history. The Commission should draw on its extensive recidivism research to promulgate empirically sound criteria to aid courts in making the necessary assessment. These criteria should include an evaluation of the age at the time of the prior offenses, the nature of the offense and the extent to which the conduct evinced a motive for personal gain or reflected impulsive or reactive behavior, the extent to which the offender intentionally caused significant harm to others, whether prior sentences included treatment or any ameliorative component to address underlying pathologies, and other criteria that objectively justify enhanced punishment.

To aid in the promulgation of these criteria, Tzedek urges the Commission to undertake a multifaceted study to assess whether and to what extent criminal history scoring is assessing points for past conduct that has little or no additional risk-predictive value. Such a study should also assess whether unique personal factors, such as age, employment history, family circumstances, community support, and medical and mental health issues are more risk-predictive than a mere point-based quantification of criminal history standing alone. Tzedek especially believes that extenuating family circumstances should receive more attention than it currently does

D. Ameliorating the Trial Penalty

As reported in the 2024 Sourcebook, 97.2 percent of all cases were disposed of by a guilty plea,[19] precisely the same percentage as in the prior year and consistent with data from the past several years. It is generally now well-established that a principal reason why trials have virtually disappeared from the federal criminal justice system is a phenomenon known as the trial penalty.[20] The trial penalty has essentially so burdened the fundamental right to a trial and is so costly to the

[19] *See:* FY 2024 Sourcebook, *supra*, note 11, Table 11.

[20] American Bar Association/Criminal Justice Section, *Plea Bargaining Task Force Report*, 2023, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf; Federal Sentencing Reporter, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, Vol 31, Issue 4 -5, April/June 2019, https://online.ucpress.edu/fsr/issue/31/4-5; National Association of Criminal Defense Lawyers, *The Trial Penalty on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf

accused—in terms of the additional years of imprisonment one faces if convicted after trial—as to transform the system into a plea-bargaining assembly line. Indeed, if one were to eliminate from the data those cases that proceed to trial where the alleged crime is so heinous that the government makes no offer, the frequency of meaningful trials is even more miniscule.

It is beyond the scope of this submission to detail the many reasons why the loss of criminal trials, and the accompanying pre-trial litigation through which courts and juries can exercise a check on government excess, is detrimental to justice. Suffice it to say that this system of pleas is clearly not what was envisioned by this nation's founders and is a development that has been decried by advocacy groups across the ideological spectrum.[21]

The various studies of the trial penalty rightly note that one of, if not the main drivers of the trial penalty is the government's unilateral control over charging decisions and the impact of mandatory minimum sentences and the U.S.S.G., even since they were rendered advisory. Prosecutors alone can select the charges and have the power to determine what conduct to urge the court to consider in imposing sentence. It is established practice for prosecutors to bring superseding indictments, add new charges and threaten to withdraw prior offers for those who do not capitulate. It is also routine practice for prosecutors to extract all manner of waivers as the price of the plea, thereby preventing legitimate issues that other constitutional rights from ever being subjected to judicial review.

1. Acceptance of Responsibility, Obstruction, and Substantial Assistance Reform

While some of the contributors to the trial penalty are beyond the scope of the Commission, there are many factors that could be alleviated by the Commission. One such contributor has been the use of acquitted conduct to enhance a sentence. Tzedek lauds the Commission for partially addressing this factor in a prior amendment cycle. Other steps that can ameliorate the trial penalty include the proposals outlined above to implement reforms related to acceptance of responsibility, obstruction enhancements and substantial assistance departures.

2. Relevant Conduct Reform

[21] *Id*., especially, Federal Sentencing Reporter, *Tyranny of the Trial Penalty.*

Tzedek also urges the Commission to take an additional step to tackle a factor that overly burdens the right to trial and incentivizes even the arguably innocent defendant to "cut a deal" rather than risk the consequences of the trial to which they are theoretically entitled. Previously, when Tzedek commented on the proposed revisions to address the use of acquitted conduct, it urged the Commission "to consider in future cycles reforms that address the pernicious impact of sentencing based upon uncharged conduct."[22] Tzedek now urges the Commission to tackle the extraordinary harshness and disparity that have arisen from the use of uncharged conduct under the rubric of determining Relevant Conduct pursuant to U.S.S.G. § 1B1.3.

The context for this proposed reform is the indisputable fact that the government pervasively and routinely uses the threat that a sentence will be enhanced with uncharged conduct to coerce defendants to plead guilty. Because of the operation of the U.S.S.G., the government exploits the current process that requires a court to consider relevant conduct under U.S.S.G. § 1B1.3 and directs the court to enhance the sentence, without the evidentiary safeguards of trial, if the other conduct is established by a preponderance of the evidence pursuant to U.S.S.G. § 6A1.3. This process makes a mockery of the fundamental constitutional right to a trial by jury. That right is so essential that it is mentioned multiple times in the Constitution and the Bill of Rights (e.g. Art. III, § 1 [3]; Amendment VI; Amendment VII). Indeed, even in the context of civil matters, the Supreme Court recently struck down a statute that vested the executive branch with the power to impose a civil fine for fraud rather than afford the defendant the constitutional right to a jury trial.[23] It is hard to fathom and, in Tzedek's view, unacceptable that the federal criminal justice system has evolved to the point where one can be severely punished for conduct absent any finding or admission of guilt and upon the low preponderance of the evidence threshold.

While there are cases where the individual's responsibility for the full scope of the criminality is embraced within the count of conviction and the jury's finding of guilt beyond a reasonable doubt, in virtually all multi-defendant prosecutions, especially when (as is usually the case) there is a conspiracy charge, that is not so. The operation of § 1B1.3, which *inter alia* involves "all acts and omission reasonably foreseeable in connection with that criminal activity" (§

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[22] *See* Letter from Tzedek Association, *Re: Proposed 2023-2024 Amendments and Issues for Comment* (February 20, 2024), https://www.ussc.gov/policymaking/public-comment/public-comment-february-22-2024#pa3 531, 533-53

[23] *SEC v. Jarkesy,* No. 22-859 (S. Ct. June 27, 2024).

1B1.3(a)(1)(B), and that provision's interaction with § 6A1.3 (and the accompanying commentary), which allow a court to rely on assertions without the procedural protections of a trial on a finding of "probable accuracy," truly allow the tail to wag the dog. Further, the current approach to uncharged conduct also implicates important concerns with respect to the evisceration of *mens rea* requirements, addressed earlier in this submission.

In sum, the Commission's efforts to adopt a real offense as opposed to a charge offense sentencing model to prevent the prosecution from "influenc[ing] the sentence by increasing or decreasing the number of counts in the indictment"[24] has been frustrated by how relevant conduct leads to the same problems of undue prosecutorial control over sentencing factors. In actuality, the process is even worse in terms of promoting excessive harshness and unwarranted disparity because it permits prosecutorial arguments that lead to sentencing enhancements based on conduct that is neither charged nor proved beyond a reasonable doubt. Tzedek firmly believes that the U.S.S.G. should be restructured to minimize this bludgeon, which is routinely deployed to assert overbearing leverage to extract guilty pleas and to punish those who assert their right to a trial.

Tzedek urges the Commission to think broadly about how best to address this fundamental flaw. There are numerous possible approaches, each of which implicates other aspects of the current sentencing regime. For example, one approach might be to revise the U.S.S.G. to have far fewer offense levels, but with considerably wider ranges, essentially evolving into a system where the charged conduct is the anchor. If that were the case, then a solution that will constrain how uncharged conduct drives the sentence might be to amend § 1B1.3 to limit relevant conduct to adjustments with the guideline range. Broader ranges, of course, could run afoul of the statutory 25 percent rule (28 U.S.C. § 994(b)(2)), and therefore would likely require legislative action.

Another possibility could be to revise §1B1.3 to limit the scope of any increase to the guideline established by the application of U.S.S.G. Chapter 2 for the offense conduct charged and admitted or proved at trial.

Yet another possibility is to amend U.S.S.G. § 6A1.3 to provide that when a relevant fact in dispute relates to uncharged conduct the court may not rely upon that fact unless admitted or found beyond a reasonable doubt.

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[24] *See* U.S. Sentencing Comm'n, Real Offense v. Charge Offense, Guidelines Manual 2023, Ch. 1, Pt A(1)(4)(a).

Any of these approaches, or others, are obviously significant change—but significant change is necessary if the Commission is to curtail the pervasive trial penalty. Accordingly, Tzedek urges the Commission to prioritize a reconsideration of how uncharged and unproved conduct is taken into consideration and invite thoughtful and comprehensive proposals as part of the current amendment cycle.

E. A Proposed Role for the Commission in Assessing Presidential Clemency

The Commission last looked at presidential clemency with its September 2017 report titled *An Analysis of the Implementation of the 2014 Clemency Initiative*.[25] That report largely focused on who received sentence commutations under the Initiative, the effect of the commutations on the sentences for those offenders, and the extent to which it appears that the announced factors were followed. It also endeavored to identify offenders who may have met the stated criteria by the end of President Barack Obama's terms but did not receive clemency as of the end of his term.

Over the past three administrations, the first Trump Administration, the Biden Administration and now the current Trump Administration, many more commutations (and pardons) have been issued. Tzedek firmly supports the notion of "second chances" and believes in the robust, principled use of the clemency power by the President on the federal level and by Governors or other designated bodies on the state level. Tzedek also recognizes that clemency grants can be controversial and understands that the Commission should avoid offering judgment as to the wisdom of any specific clemency program or individual clemency grant. But particularly when it comes to commutations, Tzedek believes the Commission can play a vital role in helping to inform the use of the constitutional power of clemency by using its unique resources to provide an array of data analyzing past commutations patterns and possible future commutation grounds. For example, a profile of the cases in which commutations have been granted, in terms of the nature of the underlying crime, the prior criminal history, the sentence length, and myriad other factors can provide a treasure trove of information that can inform clemency policies and practices not only at the federal level, but also nationwide.

[25] https://www.ussc.gov/research/research-reports/analysis-implementation-2014-clemency-initiative

Additionally, a study of recidivism among commutation recipients, especially if compared to similar defendants who did not receive clemency, would be an invaluable resource for those who wield clemency power. To the extent possible, such a study should go back as far as data is readily available and certainly should reach back to include the 2014 Initiative.

Finally, the Commission may consider identifying individuals who are serving outlier and disparate sentences—i.e. sentences that seem aberrantly harsh and inconsistent with broad sentencing norms or in light of recent sentencing reforms based on the available data concerning the relevant crime and criminal history. This work could be invaluable information for the various groups that provide pro bono assistance to deserving clemency candidates and for the executive branch in the exercise of the clemency power. It also would, of course, help to advance a key purpose Congress gave to the Commission, namely helping to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B).

Because there is every reason to believe that clemency, especially commutations, is and should be an increasingly important feature of criminal justice in the United States, Tzedek believes that the Commission should consider data collection in this area as a priority for the upcoming cycle and should consider issuing and regularly updating the three reports suggested above.

F. Expansion of Alternatives to Incarceration

Tzedek vigorously urges the Commission to undertake multiple steps to encourage the robust use of diversion and restorative justice programs as alternatives to incarceration, and to adopt the necessary amendments to make non-jail sentences more broadly available.

It is well-established in states and the federal districts that have started diversion and alternative to incarceration ("ATI") programs that these initiatives promote less severe sentences and ultimately result in decreased recidivism. This should not be a surprise because criminal behavior is often the inevitable result of underlying pathologies, such as substance abuse and addiction, mental health problems, and other issues that can better be addressed through treatment, counseling, and community support rather than through imprisonment. Unfortunately, however, these alternatives are all too rare in the federal system. As reported in the 2024 Sourcebook of Federal Sentencing Statistics, only 6.9 percent of federal defendants received a sentence of probation, which stands in stark contrast to 63 percent in

1986. Indeed, even when adding sentences that involve fines and alternatives to incarceration to those receiving probationary sentences, 91.5 percent of defendants were sentenced to incarceration.[26]

Tzedek passionately encourages the Commission to take all appropriate steps to promote the expansion of ATI programs. In addition to expanding the availability of information and best practices related to ATI, the Commission should more generally promote alternatives to incarceration, including the use of home confinement, electronic monitoring, intermittent (e.g. weekend) jail sentences, and other forms of supervision. There needs to be far greater emphasis on the criminogenic consequences of jail sentences and the cascading impact of incarceration on families. Sentencing practices that facilitate rehabilitation and minimize recidivism also promote public safety and respect for the law.

Accordingly, Tzedek proposes that the Commission plan a national convening in the form of a Commission-sponsored symposium, and/or conduct a series of regional hearings to give much needed attention to alternatives to prison. Federal judges, U.S. Probation, lawmakers, prosecutors, states and localities nationwide—as well as many other stakeholders and interested parties—could and would draw considerable guidance from a Commission-sponsored event that brought together leading researchers and scholars to discuss the role of alternatives to incarceration in promoting public safety. In addition to informing this Commission's work, one (or a series of major events) on this topic would help advance collective knowledge of whether and when incarceration is needed and appropriate as a response to a range of criminal behavior.

Concomitantly, the Commission should take steps to address the fact that since the advent of the SRA, there has been a marked decrease in the imposition of non-jail sentences, such as probation—a development that there is no empirical basis to conclude promotes public safety and is plainly at odds with the intent of the SRA.

Congress, in the SRA, stated clearly that the Commission "shall 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 also provided that the U.S.S.G. should direct that imprisonment is generally appropriate

[26] *See* FY 2024 Sourcebook, *supra*, note 11, fig. 6 and Table 13; Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90 (June 1992), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf

only when persons are "convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j). Yet, the undeniable fact is that this mandate is almost entirely ignored in today's sentencing system. Indeed, the Commission's most recent data shows that in FY 2024 for the 47.1 percent of sentenced persons who had the lowest criminal history score (CHC 1),[27] the mean sentence imposed on that group, (many of whom would fit the category Congress indicated should generally receive a "sentence other than imprisonment"), was imprisonment for 46 months (nearly 4 years).[28]

Additionally, because there is empirical evidence showing that even individuals with a prior criminal history can benefit from ATI, there is no rational basis to categorically exclude such individuals from these beneficial approaches. On the contrary, ATI in many cases offers the best hope of reducing recidivism. Further, since higher criminal history scores are more common for defendants of color, which correlates to over-policing of certain communities, expanding the availability of these programs to include those with modest criminal histories will ensure that ATI does not exacerbate racial and ethnic disparity.

To ensure that the U.S.S.G. implement the statutory preference that first offenders qualify for non-jail sentences and to ensure the broadest availability of non-jail alternatives for all defendants who may benefit from ATI, Tzedek proposes the following array of reforms:

- The Commission should amend U.S.S.G. §§ 5B1.1 and 5C1.1 to make ATI sentences available for all sentences imposed pursuant to Zones A, B, and C of the Sentencing Table.

- The Commission should amend U.S.S.G. § 3E1.1 (Acceptance of Responsibility), and Part 5F (Sentencing Options), to encourage adjustments for individuals who participate in court-approved ATI programs. Courts should be given broad discretion to consider the level and extent of participation in determining the extent of the adjustment.

- The Commission should consider promulgating best practices for ATI programs to ensure fair access and to ensure that they do not replicate pre-existing racial, ethnic, and economic disparities and that

[27]See FY 2024 Sourcebook, *supra*, note 11, fig. 7.

[28] See FY 2024 Sourcebook, *supra*, note 11, Table 28.

individuals who may not benefit from participation in such a program retain eligibility for a non-jail alternative sentence. Simply because a defendant does not have a condition that warrants participation in some kind of treatment program should not lead to imprisonment where a different alternative sentence is appropriate.

- The Commission should advise Congress to amend 18 U.S.C. § 3553(b) to insert a subsection that would address alternatives to prison sentences. The new subsection should establish that, at least for defendants with no prior felony convictions for federal or state criminal offenses, and no act of violence was involved in the offense for which they were convicted, it shall be presumed, absent a specific judicial finding of aggravating circumstances, that alternatives to prison shall be sufficient to satisfy justice and the other purposes set forth under § 3553(a) of Title 18. Such legislation should make clear that this provision applies irrespective of any pre-existing statute which prescribes a mandatory sentence of imprisonment.

Examples of alternatives to prison sentences should include: Home-confinement, supervised probation, community service, intermittent confinement (being home on weekends and in prison on weekdays or vice versa), fines, restitution payments to victims, electronic monitoring, participation in rehabilitation programs, participation in faith-based programs, placement in residential confinement centers (centers based in communities for the purpose of confinement similar to Residential Reentry Centers currently contracted by the BOP), and other alternatives to prison.

G. Identify Collateral Consequences and Their Punitive Impact

It is now widely recognized that criminal convictions result in wide-ranging collateral sanctions. Often these sanctions bear no rational relationship to the nature of the crime nor are there any reasonable temporal limitations on these consequences. Collateral consequences can impact family rights, access to housing and education, immigration status, access to credit, all manner of prospective employment and countless other aspects of human endeavor. Nevertheless, when convicted of a crime these punitive consequences are a component of the punishment suffered by the defendant and, because the sentencing court invariably lacks authority to eliminate them, they should be considered as such by a sentencing court.

Accordingly, Tzedek proposes that the Commission 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 Commission should conduct research and issue a report 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 recognition of the punitive nature of collateral consequences.

H. Recommendation that Judges, DOJ Officials and Others Visit Federal Prisons

As an organization that works with prisoners, Tzedek is acutely aware of the conditions of confinement in our nation's prisons. The impetus for this proposal is simple: those involved in sentencing persons to imprisonment should be keenly aware of the conditions of those institutions and have some first-hand knowledge of what life in prison is like. The Commission conducts training sessions for judges and other court personnel throughout the year, and Commission staff speak at numerous circuit conferences and other like events. In line with such sessions Tzedek proposes that the Commission should make a concerted effort to make visits to prison an integral part of this training and other programming.

Additionally, Tzedek urges the Commission to recommend that Congress amend 28 U.S.C. § 134, mandating that within one year of their initial appointment, and every five years thereafter, all United States District Judges,[29] United States Magistrate Judges, United States Circuit Judges, United States Supreme Court Justices, all U.S. Attorneys, Assistant U.S. Attorneys, the U.S. Attorney General, the Deputy Attorney General, and all attorneys of the Criminal Division of the U.S. Justice Department, should visit at least one federal prison. The BOP should be required to help coordinate these visits and help ensure that these visitors have

[29] As a case in point, Judge Mark W. Bennett, former U.S. District Judge to the Northern District of Iowa, visited 400 inmates he had sentenced, encouraging other judges to follow suit. https://www.desmoinesregister.com/story/opinion/columnists/rekha-basu/2019/10/31/judge-pursued-justice-where-others-didnt-visiting-inmates-prison/4107681002/

access to all areas within the prison and be permitted to speak with any prison staff and prisoners.

Conclusion

Tzedek greatly appreciates the opportunity to share its perspective on the priorities for the 2025-26 cycle and looks forward to continuing to provide import and support for the Commission's important work.

Sincerely,



Rabbi Moshe Margaretten[30]
President

Attachment

Revision of Section 2B1.1 of the United States Sentencing Guidelines Regarding Fraud & Other Revisions to the Guidelines.

Note: The following proposals are offered solely as alternative considerations should the Commission not pursue the proposal outlined in the body of Tzedek's comments, which

[30] Tzedek wishes to express enormous gratitude to Norman L. Reimer and Professor Douglas A. Berman for their instrumental assistance and counsel to formulate this document.

would jettison the loss table approach in favor of one that more meaningfully on individual *mens rea* and the unique circumstances of each case.

1. The Loss Table in Section 2B1.1 is outdated, excessive and exceedingly unfair in creating a false sense of precision and in being excessively complicated. Moreover, loss is only a sound aggravating factor in a Guideline calculation if a defendant both intended ***and*** actually caused a significant loss Importantly, the current Guideline already rightly recommends a departure if and when the Guideline "substantially understates" or "substantially overstates" the seriousness of the offense, and so sentencing judges can and do have authority to look beyond the crude metric of loss. Assessment of loss should be just one component of determining a fair and effective sentence for an economic offense, and hence, we propose that the USSC revise Section 2B1.1 of the United States Sentencing Guidelines by amending and revising the Table in Section (b) to read as follows or similar:

"b) Specific Offense Characteristics

If the intended and actual loss roughly exceeded $100,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
Loss intended or actual loss is less than roughly $100,000	no loss-specific increase
Loss intended and actual loss is more than roughly $100,000 and less than roughly $1,000,000	add 3
Loss intended and actual loss is more than roughly $1,000,000 and less than roughly $50,000,000	add 6
Loss intended and actual loss is more than roughly $50,000,000 and less than roughly $250,000,000	add 9
Loss intended and actual loss is more than roughly $250,000,000 and less than roughly $1,000,000,000	add 12
Loss intended and actual loss is more than roughly $1,000,000,000	add 15.

If the Commission is disinclined to rework the structure of the Loss Table as recommended above, Tzedek recommends that the Commission revise the loss amounts in Section 2B1.1 as follow to provide greater fairness and consideration of current economic conditions and factors:

"b) Specific Offense Characteristics

If the loss exceeded $100,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
$100,000 or less	no increase
More than $100,000	add 2

More than $250,000	add 3
More than $500,000	add 4
More than $1,000,000	add 5
More than $10,000,000	add 6
More than $50,000,000	add 8
More than $100,000,000	add 10
More than $150,000,000	add 12
More than $200,000,000	add 14
More than $250,000,000	add 16
More than $375,000,000	add 18
More than $500,000,000	add 20
More than $750,000,000	add 25
More than $1,000,000,000	add 30.

The Peter L. Zimroth Center on the Administration of Criminal Law
NYU SCHOOL OF LAW

July 18, 2025

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

Re: Proposed Priorities for the 2025-26 Amendment Cycle

Dear Judge Reeves:

We previously appeared before the Commission during the 2022-2023 cycle to present our views on how the Bipartisan Safer Communities Act ("BSCA") should be interpreted.[1] During that cycle, one of the undersigned testified before the Commission regarding BSCA's legislative history in the runup to its passage and explained the significant ways in which BSCA altered the federal government's approach to preventing and responding to gun violence.

As a continuation of our recommendations to the Commission, we respectfully request that the Commission include a study of firearms offenses in its priorities for the 2025-2026 cycle. For the reasons set forth below, we believe there are important policy rationales to initiate research into how the BSCA provisions have been enforced.

The Passage of the Bipartisan Safer Communities Act Supports Studying the Enforcement of Federal Firearms Laws.

When it was passed in 2022, BSCA was the first major gun violence prevention legislation that Congress enacted in nearly 30 years. The legislation took a holistic, 360-degree approach to the problem of gun violence: it provided for large investments in community violence intervention, mental health, and state crisis intervention programs and created criminal enforcement provisions that sought to end the flow of illegal guns into communities.

As discussed below, BSCA's criminal statutes reflected Congress' intent to expand the federal government's response to gun violence. Instead of focusing

[1] *See* October 17, 2022 Peter L. Zimroth Center Letter re: United States Sentencing Commission Proposed Priorities for the 2022-2023 Amendment Cycle at 14-15, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/zimroth.pdf.

on individual end users who illegally possess firearms, Congress created new laws that directly relate to what the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") determined to be the two leading sources of illegal firearms in its gun trafficking investigations: unlicensed sellers and straw purchasers.

First, Congress included in BSCA a directive to the Commission that it should focus on ensuring the robust implementation of firearms trafficking provisions. Notably, this directive is broad: it instructs the Commission to create sufficient guidelines and policy statements related to sections 932, 933 and "*other offenses applicable to the straw purchases and trafficking of firearms.*"[2] This encompasses not just the creation of Guidelines for 932 and 933 offenses, but also the assessment of other federal offenses that are relevant to straw purchasing and firearms trafficking, which includes, among other things, the statute prohibiting the unlicensed dealing in firearms (18 U.S.C. § 922(a)(1)(A)),[3] as well as statutes that prohibit false statements made during the purchase of a firearm (18 U.S.C. §§ 922(a)(6), 924(a)(1)(A)) and the statute regulating federally licensed gun dealers' recordkeeping practices (18 U.S.C. § 922(m)).

The BSCA Directive also recognized that not all members of a gun trafficking network have the same level of culpability. For instance, Congress sought to deter straw purchasing of firearms while recognizing that straw buyers may have been under duress or coerced into participation and are neither the main beneficiaries of the criminal conduct nor the masterminds of the scheme. Accordingly, Congress directed the Commission to consider amending the Guidelines to account for straw purchasers without significant criminal histories that "reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors."[4] The Commission published Guidelines for this offense and should assess whether, and to what extent, the Guidelines are consistent with this BSCA directive.

Relatedly, the Commission should now study federal offenses brought pursuant to sections 932, 933 and 922(a)(1)(A) to understand broad offense and offender trends and characteristics. For the reasons discussed herein, the significant change to federal firearms laws, not to mention Congress's clear

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[2] "Directive to Sentencing Commission," Bipartisan Safer Communities Act at 43 (2022) ("BSCA Directive").
[3] Indeed, a study of unlicensed dealing offenses is important, because ATF's most recent study of firearms, which includes a review of five years' worth of gun trafficking investigations, found that unlicensed sellers were the leading source of illegally trafficked firearms. *See* Bureau of Alcohol, Tobacco, Firearms and Explosives, "Firearm Trafficking Investigations - Volume Three," (2024) ("ATF Report Volume III"), available at https://www.atf.gov/firearms/docs/report/nfcta-volume-iii-part-iii/download.
[4] BSCA Directive, *supra* note 2.

intent to add a new dimension to the federal effort to stop the flow of illegal guns, makes this area ripe for study by the Commission to gauge whether Congress' intent has been implemented.

Second, the United States Department of Justice's ("DOJ") enforcement of the new BSCA statutes, and more intentional focus on gun trafficking, over the past three years presents a research opportunity to examine a new enforcement paradigm for federal firearms laws.

By way of background, the prior Administration made significant policy changes to address gun trafficking that could impact the findings in the United States Sentencing Commission's 2022 report, "What Do Federal Firearms Offenses Really Look Like?" ("2022 Report").[5]

First, prior to BSCA's passage, DOJ initiated five gun trafficking strike forces in key areas across the country; used a data-driven approach to prioritize which gun dealers to inspect; instituted a new zero tolerance approach to gun dealers who willfully violated the law; and prioritized investigations of unlicensed sellers who were found to have supplied firearms that were recovered in crimes.

Second, the prior Administration worked with Congress to pass BSCA in 2022. BSCA gave federal law enforcement three new legal tools to address gun trafficking that did not previously exist: (i) by revising section 922(a)(1)(A), which criminalized unlicensed dealing of firearms, and (ii) creating sections 932 and 933, which criminalized straw purchasing and gun trafficking, respectively.[6] Post-BSCA, DOJ and ATF also published a new regulation regarding 922(a)(1)(A) conduct by clarifying when someone was "engaged in the business" of dealing firearms, so as to distinguish between a hobbyist and someone who was making monetary or other economic profits from the selling or dealing of firearms without a license. The ATF's gun dealer inspections, referenced in the earlier paragraph, also led to over 600 federally licensed firearm dealers either having their licenses revoked or voluntarily surrendering them in advance of revocation.[7]

This approach to federal regulation and prosecution of firearms offenses was deliberate. It sought to direct limited federal resources further upstream to

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[5] Matthew J. Iaconetti, et al., United States Sentencing Commission, What Do Federal Firearms Offenses Really Look Like? at 9, (July 2022), available at https://www.ussc.gov/research/research-reports/what-do-federal-firearms-offenses-reallylook

[6] We have analyzed these criminal cases and discuss them in the middle section of this comment.

[7] In addition, the Administration finalized a regulation around unfinished frames and receivers to address the proliferation of ghost guns, which the U.S. Supreme Court recently upheld. *See* Bondi v. Vanderstok, 604 U.S. ____ (2025).

focus on crucial links in the gun trafficking chain that had historically been ignored. BSCA's focus on these upstream links in the gun trafficking chain also coincided with the use of different federal investigative tools, such as using crime gun intelligence data and investigative resources to root out gun trafficking rings, illegal unlicensed dealers that supplied trafficking rings, rogue federally licensed gun dealers that were supplying firearms to straw purchasers or traffickers, and ghost gun companies that were selling thousands of easy-to-make guns to gun traffickers. This enforcement approach was based in part on ATF data and analysis about the flow of guns into the illegal market; was consistent with academic research on how to more effectively address gun violence the illegal gun trade; and complemented and expanded upon existing state and local efforts by utilizing the federal government's additional resources.

Third, while the Commission previously studied federal firearms offenses when it released the 2022 Report, we submit that the passage of BSCA, combined with the prior Administration's efforts to target gun trafficking and unlicensed dealing, represented a significant change in the federal government's approach to prosecuting federal firearms offenses, which merits further analysis to understand how, if at all, federal prosecution priorities changed to align with Congress and the Executive's intent to shift enforcement efforts further "upstream" in the gun trafficking pipeline.

The 2022 Report was a comprehensive analysis of federal firearms offenses and offender characteristics. Notably, the 2022 Report found that while firearms offenses comprised a significant bulk of the caseloads across federal districts, straw purchasing, gun trafficking, and unlicensed dealing offenses were almost never charged. Instead, the overwhelming bulk of cases charged the prohibited person offense of being a felon in possession of a firearm. Equally noteworthy was the 2022 Report's finding that, when straw purchasing, gun trafficking, and unlicensed dealing were charged, offenders received sentencings well below the Guidelines. In sum, the 2022 Report showed that federal prosecutors focused on individuals already in possession of a firearm and did not target individuals or groups who were obtaining and selling or transferring firearms.

However, the 2022 Report's analysis has likely been affected by BSCA's passage. As discussed below, our preliminary research into the cases being brought under sections 932, 933 and 922(a)(1)(A) suggest a different approach to prosecuting federal firearms offenses. Given our findings, as well as Congress' significant action on firearms (that also included the BSCA Directive), and the apparent new approach to federal law enforcement, we believe this counsels in favor of initiating a new study.

Lastly, we note that after the 2022 Report was issued, the ATF released new data that can also inform the Commission's work. The ATF's National Firearms Commerce and Trafficking Assessment[8] is a four-volume assessment with new insights on gun trafficking channels, crime gun intelligence, and the investigations conducted by ATF. Given that Congress passed BSCA to address gun trafficking, the Commission's analysis of federal firearms offenses will assist the public in determining whether DOJ has implemented BSCA in a manner that seeks to target the illegal trafficking channels that ATF identified in its report.[9]

Research Methodology: Federal Prosecutions Involving Straw Purchases, Gun Trafficking and Unlicensed Dealing

BSCA provided new tools to address gun trafficking and to understand the extent the BSCA changes had on charging firearms offenses, the Zimroth Center researched federal prosecutions that fell into the following two categories:

- All cases charging straw-purchasing (18 U.S.C. § 932) and/or gun-trafficking (18 U.S.C. § 933); and
- All unlicensed dealing prosecutions (18 U.S.C. § 922(a)(1)(A)) brought during the prior Administration.[10]

To identify these cases, we used Bloomberg Law's CourtDockets to search across all federal jurisdictions and identify cases where these charges were brought. In a minority of cases, we also used CourtListener, a free database that collects PACER docket filings for public access. While we attempted to collect the same information and documents that the Commission relies on, we were limited to publicly available data and were thus unable to access Presentence Investigation Reports and the Statement of Reasons. In some cases, we were also unable to access charging documents and plea agreements, depending on whether these filings were sealed.

Preliminary Research Findings

Before we discuss areas for further research, we will start with a description of the universe of cases we analyzed and some general trends across the cases.

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[8] *See* ATF Report Volume III, *supra* note 3.
[9] The Commission's research can also bolster academic and policy research into how the criminal legal system can best address gun trafficking.
[10] While the federal statute criminalizing unlicensed dealing predates BSCA, BSCA clarified the definition and the prior Administration sought to reinvigorate its use, based in part on ATF data showing that unlicensed dealers were the largest source of firearms subject to ATF trafficking investigation.

First, our research showed that BSCA led to a significant number of new cases and a refinement in how the charges were being used. For straw purchasing and gun trafficking offenses, we searched for cases charged from June 25, 2022 (the date BSCA was passed) to May 16, 2025 (a cut-off period to enable us to limit our research). We identified **329 cases** that charged straw purchasing (18 U.S.C. § 932) and/or gun trafficking (18 U.S.C. § 933). For unlicensed dealing cases, we searched for cases brought during the entirety of the prior Administration and found **708 cases.** Notably, unlicensed dealing cases more than doubled after the passage of BSCA. From January 20, 2021 (the start of the prior Administration) to June 24, 2022, there were 208 cases that charging unlicensed dealing. From June 25, 2022, to January 20, 2025 (the end of the prior Administration), there were 500 cases brought.

Second, in the cases we identified, federal prosecutors were not generally charging *both* gun trafficking and unlicensed dealing. Instead, they were opting for one charge or the other. Our preliminary review of the cases shows that pre-BSCA unlicensed dealing cases often had fact patterns more similar to gun trafficking (e.g., offenders acquiring guns and then illegally reselling across state/national boundaries or to individuals prohibited from possessing them) as opposed to simply selling firearms without a license (e.g., a person without a federal firearms license selling firearms to the general public without background checks). A review of the post-BSCA cases shows that each section of the code is now being used to capture the conduct intended by Congress. This "either/or" charging decision is also interesting, because it appears that in some of the cases, the facts would have supported both charges. For instance, in some cases, federal investigators tended to utilize undercover law enforcement officers and/or confidential sources who provided specific information to the target(s) of the investigation that would appear to satisfy legal elements for both unlicensed dealing and trafficking, *i.e.*, the UC and/or CI would mention they had a prior felony conviction, while other times the UC and/or CI would state their intention to transfer or sell firearms for illegal purposes, or to move the firearms to another state or country.

Third, while we saw widespread adoption of these new BSCA charges, not every federal jurisdiction charged BSCA or unlicensed dealing offenses for the period we researched:

- 25 federal districts did not charge any straw purchasing or gun trafficking offenses. Notably, neither the Eastern District of Michigan, which includes Detroit, or the Northern District of Illinois, which includes Chicago, charged either offense, despite documented issues with gun violence

- Likewise, neither the Eastern District of Missouri nor the Middle District of Alabama charged either straw purchasing or gun trafficking, even though these two districts had the highest number of § 2K2.1 cases in fiscal year 2021. This disparity suggests a sustained focus on individual offenders in possession of a single firearm, rather than a shift to upstream links in the gun trafficking chain.[11]

- During the prior Administration, 28 federal districts did not charge unlicensed dealing. Once again, neither the Eastern District of Missouri nor the Middle District of Alabama brought unlicensed dealing charges, despite both these districts having the highest number of § 2K2.1 cases in fiscal year 2021.[12]

- Finally, 14 federal districts declined to charge any of the three BSCA offenses.

Based on the 329 straw purchasing and gun trafficking cases and 708 unlicensed dealing cases we reviewed, we see the following offender and offense characteristics:

- Of the 329 straw purchasing and gun trafficking cases we reviewed, 198 were single-defendant cases,[13] while 109 were cases involving 2-4 defendants, and 22 cases involved 5 or more defendants;

- Of the 708 unlicensed dealing cases we reviewed, 513 were single-defendant cases,[14] while 170 were involving 2-4 defendants, and 23 cases involved 5 or more defendants;

- There was a wide array of firearms involved in both the BSCA and unlicensed dealing cases.

    - Of the 329 gun trafficking and straw purchasing cases, 94 (29%) involved 1-2 firearms; 81 (24%) involved 3-7 firearms; 82 (25%)

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[11] USSC 2022 Firearms Report at 11. Section 2K2.1 cases also made up the highest percentage of the Eastern District of Missouri's case load. *See id.*
[12] *See id.*
[13] We have likely overcounted the number of single-defendant cases, given that federal prosecutors sometimes proceeded separately against a defendant who was part of a conspiracy, and whose co-conspirators were charged together in a separate matter.
[14] We have likely overcounted the number of single-defendant cases, given that federal prosecutors sometimes proceeded separately against a defendant who was part of a conspiracy, and whose co-conspirators were charged together in a separate matter.

involved 8-24 firearms; 27 (8%) involved 25-99 firearms; 6 (2%) involved 100-199 firearms; and 3 (0.9%) involved 200+ firearms;[15]

- Of the 708 unlicensed dealing cases, 49 (7%) involved 1-2 firearms; 149 (21%) involved 3-7 firearms; 189 (27%) involved 8-24 firearms; 130 (18%) involved 25-99 firearms; 62 (9%) involved 100-199 firearms; and 11 (2%) involved 200+ firearms;[16]

- Most cases did not involve FFLs:
  - Only 7 of the 329 BSCA cases involved offenders who were either current/former FFL holders or FFL employees.
  - Only 10 of the 708 unlicensed dealing cases involved offenders who were either current/former FFL holders, FFL employees, or people who applied for FFLs;

- Most cases did not involve gangs. Only 11 of the 329 BSCA cases contained allegations of gun trafficking and/or straw purchasing against identified gangs.[17] Of the 708 unlicensed dealing cases, only 22 cases contained allegations against identified gangs;

- In some cases, offenders were on notice that their conduct was illegal. 6 offenders charged under BSCA received ATF warnings before being charged with gun trafficking, while 25 offenders charged with unlicensed dealing had received prior ATF warnings;

- There were several cases involving trafficking and/or transporting firearms between the United States and Mexico.[18] Of the 329 cases

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[15] The BSCA cases do not total 329 because we were not able to identify the number of firearms in every offense, usually because the plea agreement did not specify the number of firearms involved, and/or we were unable to ascertain the number of firearms from the charging documents and/or sentencing filings.
[16] The unlicensed dealing cases do not total 708 because we were not able to identify the number of firearms in every offense, usually because the plea agreement did not specify the number of firearms involved, and/or we were unable to ascertain the number of firearms from the charging documents and/or sentencing filings.
[17] We coded a case as involving a gang if the government pleadings contained allegations that a defendant was involved in or associated with a gang.
[18] These findings seem relevant considering BSCA's directive to the Commission to amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of straw purchasing or gun trafficking 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* Commission Notice of Proposed 2022-2023 Amendments, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2022-2023-amendments.

involving straw purchasing and/or gun trafficking, 58 cases dealt with firearms being trafficked into Mexico. Of the 708 unlicensed dealing cases, 56 of them involved the flow of firearms into Mexico. Some of the cases involved firearms seizures at the United States-Mexico border when offenders were attempting to enter Mexico. Most of these cases were charged in the District of Arizona, followed by the Southern and Western Districts of Texas. Notably, we found no cases in the Southern District of California.

- Of the 329 straw purchasing and gun trafficking cases, 21 involved a probationary sentence. Of the 708 unlicensed dealing cases, 105 involved a probationary sentence.

Areas for Further Research

Considering Congress' intent to change the federal approach to firearms offenses, we respectfully submit that the Commission consider studying firearms offenses during the 2025-2026 amendment cycle as follows:

First, the Commission should study federal offenses prosecuted pursuant to BSCA, *i.e.*, cases prosecuted pursuant to 932, 933, and 922(a)(1)(A). As a starting point, such a study would be consistent with helping to satisfy BSCA's broad directive to the Commission to issue guidelines and policy statements on straw purchasing, gun trafficking and "*other offenses applicable to the straw purchases and trafficking of firearms*."[19] Furthermore, this will fulfill BSCA's directive to the Commission to amend the Guidelines to create sentences for straw purchasing and gun trafficking that are greater than the ones previously in place, because this necessarily involves a comparison of pre- and post-BSCA sentences.

Indeed, our preliminary case analysis suggests several avenues of further research that may be useful to the Commission. For instance, as we observe in the earlier section, prior to BSCA's passage, federal prosecutors appeared to use 922(a)(1)(A) as a "catch-all" statute to prosecute upstream firearms trafficking misconduct, *i.e.*, they used the statute to target straw purchasing and gun trafficking, as well as unlicensed dealing.[20] Thus, one area of study could assess offense/offender characteristics in 922(a)(1)(A) cases to see how, if at all, they changed once BSCA was passed in 2022 and prosecutors could charge straw purchasing and gun trafficking as separate, stand-alone offenses.

[19] BSCA Directive, *supra* note 2.
[20] As an example, in one federal jurisdiction, prosecutors charging 922(a)(1)(A) cases prior to BSCA's passage referred to this charge as "gun trafficking" in indictments.

Relatedly, it appears that unlicensed dealing and gun trafficking were not charged together. As we described above, prosecutors appeared to choose between either gun trafficking or unlicensed dealing charges. These charging decisions raise questions about whether there are differences between offenders that might be reflected in, or be driving, charge selection. For instance, unlicensed dealing offenders sometimes looked like "legitimate" businesses, *i.e.*, in some cases, offenders were selling firearms at swap meets or gun shows or as a roadside business. This raises a question about whether such a veneer of legitimacy influenced charging and/or sentencing decisions.

Second, the Commission should study 932, 933, and 922(a)(1)(A) cases to understand how, if at all, federal firearms offenses have changed after BSCA's passage. As described in the first section, BSCA was a deliberate effort to change the federal government's response to gun violence by empowering prosecutors to move further up the trafficking chain to target offenders who were responsible for the diversion of firearms into the illegal market. Accordingly, it seems valuable to study how, if at all, federal prosecutors used these new tools, For instance, the 2022 Report showed that firearms offenses in fiscal year 2021 were predominantly comprised of felon-in-possession offenses, and that straw purchasing, gun trafficking, and unlicensed dealing were almost never charged. Pursuant to BSCA, we would expect this case mix to change—and given Congress' and the Executive's intent to shift this caseload mix, we respectfully submit this merits further study.

Separately, our preliminary analysis suggests differences between the cases in the 2022 Firearms Report and the BSCA cases that also merit further study. For instance, cases in the 2022 Report predominantly involved 1-2 firearms, whereas the BSCA cases had a wider array of firearms involved. Indeed, unlicensed dealing cases seemed to address offenders who were supplying larger amounts of firearms: only 7 percent of the cases involved 1-2 firearms—and 27 percent of the cases involved 8-24 firearms. Conversely, our data suggest that gun trafficking cases were not addressing large-scale firearms trafficking: despite the statute being meant to address the flow of firearms, 29 percent of the cases involved 1-2 firearms.

As another example, when we last appeared before the Commission, we presented research on straw purchasers. The research was limited, and it suggested that they tended to be women who might have been romantically involved with the true purchaser of the firearm, and/or who might have purchased the firearm under duress or coercion. However, in the BSCA cases we analyzed, most of the offenders who were charged with straw purchasing were men, some of whom appeared to be using their clean criminal records to earn money in exchange for straw purchasing and were straw purchasing large

amounts of firearms.[21] BSCA also obligated the Commission to ensure that straw purchases with little criminal history received a sentence that was sufficient to deter their conduct, while recognizing their relative lack of culpability. The Commission should thus study whether straw purchasers are in fact receiving lower sentences. In cases where straw purchasers were less culpable but purchased large numbers of firearms, they could also study the average number of firearms across offenders, which can in turn assist law enforcement as they review firearms purchase data to look for possible criminal activity.

We also note that while certain jurisdictions were identified in the 2022 Report as prosecuting high numbers of felon-in-possession cases, they were also failing to prosecute *any* BSCA cases. It seems valuable to understand these districts' caseloads, both because it raises questions about how well DOJ implemented prosecution priorities across jurisdictions and highlights the fact that not every jurisdiction is following data-based policies designed to address gun violence.

Lastly, there were almost no FFL offenders. This is significant, because Federal Firearms Licensees play an important role in preventing straw purchasing and gun trafficking—putting aside ghost guns, every crime gun starts out in the legal channel and is sold by an FFL, and FFLs are obligated to comply with federal law to prevent straw purchases and gun trafficking. The lack of prosecutions against FFLs is significant, and it merits further analysis.

Third, the Commission should study BSCA cases to determine whether to the Guidelines' specific offense characteristics accurately captures offense conduct. Prior to BSCA's passage, federal firearms offenses overwhelmingly focused on prohibited persons in possession of firearms—and in particular people with prior felony convictions. The enhancements applied were thus consistent with individual offenders possessing a firearm: defaced and stolen firearm enhancements were commonly applied, and enhancements for more than 2 firearms were rarely applied, because most offenses involved an individual offender. However, straw purchasing, gun trafficking, and unlicensed dealing offenses contemplate different offender behavior, namely, the purchase and transfer of larger numbers of firearms, and the violation of ATF regulations that ensure compliance with federal firearms laws. This raises the possibility that different enhancements are needed. For instance, some offenders' conduct was arguably more egregious because they had received warning from ATF that

[21] While female offenders were most often charged with straw purchasing (as opposed to trafficking or unlicensed dealing), and while some of them were under duress and/or were victims of domestic violence, they were not the majority of straw purchasing offenders.

they were acting in violation of federal law and continued to sell and transfer firearms anyway—behavior which seems more culpable yet is not captured in any specific offense characteristics.

Conclusion

We thank you for the opportunity to provide comment on the Commission's proposed priorities for the 2025-2026 amendment cycle, and we remain committed to working with you and the Commission staff on this priority. If you have any questions about these comments, please contact Courtney M. Oliva at [redacted]

Sincerely,

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July 18, 2025

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
Via Public Submission Portal

Re: Comment on 2025–2026 Proposed Priorities

Dear Judge Reeves:

We respectfully submit two comments on the Sentencing Commission's proposed priorities for the 2025–2026 amendment cycle. I am a Clinical Professor of Law in the Federal Criminal Justice Clinic at the University of Chicago Law School. My students and I submit this letter in our individual capacities.

First, we urge the Commission to prioritize amending U.S.S.G. § 1B1.10, which governs retroactive sentence reductions. Section 1B1.10 excludes comparable sentence reductions for below-guidelines sentences imposed at an individual's initial sentencing. Ending this exclusion would simplify the *Guidelines Manual* by aligning § 1B1.10 with post-*Booker* case law and practice and by eliminating at least two circuit splits. Making this change will likewise serve the statutory purposes of the Commission and federal sentencing. In short, enacting this change would well-serve the Commission's priorities for this amendment cycle.

Second, we agree that the Commission should take up simplifying § 5G1.3 as a priority this amendment cycle. We have enclosed a short supplement to and summary of our prior suggestions for revising § 5G1.3, as well as an Appendix reprinting those suggestions. Ultimately, § 5G1.3 is unnecessarily complex, and it can and should be revised.

Thank you for your attention to these important matters. Our detailed comments follow.

Sincerely,



Judith P. Miller, Clinical Professor of Law
Federal Criminal Justice Clinic
University of Chicago Law School

Written with:
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I. The Commission Should Prioritize Amending § 1B1.10 to Re-Authorize Comparable Sentence Reductions.

Now is the time to amend § 1B1.10 to re-authorize comparable sentence reductions for below-guidelines sentences imposed by an individual's sentencing judge. The current regime is inconsistent with Supreme Court case law that followed the elimination of comparable reductions, has resulted in unnecessary complexity and litigation, has left deserving people ineligible for relief, and betrays the statutory purposes of federal sentencing and the Commission. Today, there is no good reason to exclude comparable sentence reductions, and every reason to allow them. The Commission should prioritize this issue in order to simplify the *Guidelines Manual*, resolve multiple circuit splits, and fulfill its statutory charges under 18 U.S.C. § 991 and § 994.[1]

In 2006, William Henry Muldrow pleaded guilty to one count of a federal drug trafficking offense arising out of his use of fraudulent prescriptions to obtain and sell painkillers.[2] The government, the defense, and the district court all agreed that his criminal history was overrepresented, and the court departed downward by one criminal history category to impose a low-end sentence of 235 months custody.[3] Eight years later, in 2014, the Commission retroactively reduced the sentencing guidelines for individuals like Mr. Muldrow in what is now known as "drugs minus two."[4] The Commission concluded that reducing drug offense levels by two would help relieve prison overcrowding, have no effect on recidivism,

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[1] Proposed Priorities for Amendment Cycle (2025 Proposed Priorities), 90 Fed. Reg. 24710 (June 11, 2025). We submitted a comment on the 2024–2025 Simplification Amendment cycle that would have addressed some of the issues with § 1B1.10 in a different way, especially the circuit split discussed below. *See infra* at Part I.A.2; *see generally* PROF. JUDITH MILLER ET AL., Proposed 2024–2025 Amendment on Simplification in *Public Comment on Certain Proposed Amendments* (Miller Simplification Comment) 5–11 (Feb. 3, 2025), https://perma.cc/6V6U-WWZ8. We understand the Commission to instead have preserved the status quo rather than open up these § 1B1.10 problems by way of last year's enormous changes.. The instant proposal in response to the Commission's Proposed Priorities would resolve those issues in a more straightforward manner, starting from a clean slate. We nonetheless stand by our earlier proposal as well.

We also emphasize that we are not the first to urge the Commission to prioritize ending § 1B1.10's bar on comparable sentence reductions. As recently as February 2024, Stephen R. Sady, Chief Deputy Federal Public Defender for the District of Oregon, similarly argued that the § 1B1.10 exclusion should be eliminated as soon as possible. Stephen R. Sady, *Retroactive Guidelines Amendments Must Apply to Individuals Who Receive Below-Guidelines Sentences to Protect the Individualized Sentencing Required by Federal Sentencing Statutes*, 36 FED. SENT'G R. 163 (2024) [hereinafter Sady, *Retroactive Guidelines Amendments*]. This Comment owed a tremendous debt to Mr. Sady's article and agrees in large part with his analysis.

[2] *United States v. Muldrow*, 844 F.3d 434, 436 (4th Cir. 2016).

[3] *See id.*

[4] U.S.S.G. App. C, Amend. 782 (Nov. 1, 2014).

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and potentially enhance public safety by freeing up resources spent on unnecessarily incarcerating drug offenders.

By then, Mr. Muldrow was 70 years old—a non-violent man who had committed his underlying crime after becoming addicted to painkillers. He was precisely the sort of individual at whom drugs minus two was aimed. And, at the time he was convicted, he could indeed have received the full benefit of the Commission's retroactive wisdom. In 2006, § 1B1.10, which governs retroactive sentence reductions, authorized "comparable sentence reductions" for below-guidelines sentences. With that comparable sentence reduction, Mr. Muldrow's court could have reduced Mr. Muldrow sentence by two levels, resulting in 188 months imprisonment.

By 2014, however, the Commission had eliminated all comparable sentence reductions, except for departures for substantial assistance. Under the new regime, the judge could reduce Mr. Muldrow's sentence to only 210 months custody, **nearly *two more years* in prison than Mr. Muldrow could have received under the earlier system**. Instead of starting with the sentence the court actually imposed, the starting point under the new regime was Mr. Muldrow's underlying guideline range before his departure for overrepresentation of criminal history. The court could reduce only the latter range by two levels—no matter the fact that Mr. Muldrow's district judge never imposed that sentence, and no matter the fact that his district judge never thought Mr. Muldrow deserved it.

Mr. Muldrow was eventually released in 2019 and has since successfully completed his supervised release without a violation. Had the district court been able to comparably reduce his sentence to account for Mr. Muldrow's overrepresented criminal history, his earlier release would have saved the federal government thousands of dollars with no increased risk to public safety—the very reasons the Commission passed drugs minus two in the first place.

Mr. Muldrow is not alone. Individuals who receive below-guidelines sentences can be either partially or wholly excluded from relief when the Commission retroactively reduces one of the guidelines on which their sentence is based. Individuals convicted of drug crimes, in particular, are likely to be disproportionately represented among those who cannot receive the benefit of the Commission's retroactive sentence reductions. And any of the individuals who receive a four-level departure for early disposition are nearly always ineligible for relief under § 1B1.10.[5] Indeed, Assistant Federal Defenders around the country confirm that the recent Amendment 821/825 reductions excluded many otherwise eligible individuals in their districts—all because § 1B1.10 prohibited comparable sentence reductions for below-Guidelines sentences that the original sentencing judge thought necessary to fulfill the congressionally mandated purposes of federal sentencing.

[5] Of the 18,635 people sentenced under § 2D1.1 in the 2023 fiscal year, only 4,915 were sentenced within their guideline range. U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* (2023 Sourcebook) at Table 32, https://perma.cc/VYG8-E4S3.

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Section 1B1.10(b)(2)(A) is responsible for these confusing and unjust results, and the Commission should prioritize amending it. As currently written, § 1B1.10 limits retroactive sentence reductions to the low-end of an individual's original guideline range.[6] It excludes any variances and departures that a judge found necessary at the underlying sentencing, with the exception of substantial assistance.[7] As a result, people whose mitigation required sentences substantially below their guidelines range at their initial sentencing are paradoxically excluded from sentence reductions—precisely *because* their original sentencing judge determined that a below-guidelines sentence was necessary to ensure that their sentence was sufficient but not greater than necessary.

The situation was not always so. For nearly twenty years, § 1B1.10 authorized comparable sentence reductions to account for any below-guidelines sentence at the original underlying sentencing.[8] In 2008, three years after *United States v. Booker*, the Commission revised § 1B1.10 to exclude the new *variances* from comparable sentence reductions while continuing to allow reductions for *departures* imposed at the original sentencing.[9] The Commission explained only that variances resulted in "non-guideline sentence[s]," which could not be the basis for a comparable sentence reduction from the sentencing guidelines.[10] In 2011, in the interest of uniformity, the Commission also eliminated comparable sentence reductions for departures.[11]

In hindsight, the 2008 and 2011 elimination of comparable sentence reductions were premised on legal missteps that the Supreme Court has since corrected. Contrary to the 2008

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[6] *See* U.S.S.G § 1B1.10(b)(2)(A); *id.* § 1B1.10, comment. (n.1(A)).

[7] *Id.* at § 1B1.10(b)(2)(B).

[8] *See* U.S.S.G. § 1B1.10(b) (1989); *id.* §§ 1B1.10(b), § 1B1.10, comment. (n.3) (1997); *id.* § 1B1.10(b), § 1B1.10, comment. (n.3) (2007).

[9] U.S.S.G. App. C, Amend. 712 (Mar. 3, 2008); *United States v. Booker*, 543 U.S. 220 (2005).

[10] U.S.S.G. App. C, Amend. 712 (Mar. 3, 2008). The Commission's publicly stated reasons for passing this component of Amendment 712 are somewhat opaque. Nonetheless, it does not appear that anyone advocated for the position the Commission ultimately took. Instead, most of the public comments related to a different issue, namely, whether to make the recent crack cocaine amendment retroactive. *See id.* Amend. 706 (Nov. 1, 2007), *as amended by id.* Amend. 711 (Nov. 1, 2007). The public comments relevant to comparable sentence reductions focused primarily on ensuring that § 1B1.10 sentence reductions did not allow for full-fledged resentencing—e.g., one where new variances could be imposed at the sentence reduction proceeding itself. *See, e.g.*, U.S. DEP'T OF JUST., *Attention: Public Affairs-Retroactivity Public Comment.* 8–9 (Nov. 1, 2007), https://perma.cc/YT9J-4ATR; COMM. ON CRIM. L., *Re: Comments on Retroactivity of Crack Cocaine Amendments* 5 (Nov. 2, 2007), https://perma.cc/DQ63-2B6C; NAT'L ASS'N OF ASSISTANT U.S. ATT'YS, *Re: Retroactivity of Amendments 9 and 12 to Previously Sentenced Defendants* 2 (Oct. 30, 2007), https://perma.cc/MWK7-48W4. They did not address the matter at issue in this Comment. *See generally* Sady, *Retroactive Guidelines Amendments* at 154–55 (explaining Amendment 712 as a form of "hostility toward variances based on *Booker*").

[11] U.S.S.G. App. C. Amend. 759 (Nov. 1, 2011); *see also* Sady, *Retroactive Guidelines Amendments* at 154–55.

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amendment, the Supreme Court has since clarified that sentences involving variances are nearly always "based on" the Guidelines.[12] It was understandable for the 2008 Sentencing Commission to think of variances as "non-guideline" sentences, and act accordingly.[13] Nonetheless, the Supreme Court in *Hughes v. United States* explained that a sentence is "based on" the Guidelines when "a defendant's Guidelines range is both the starting point and a basis for his ultimate sentence."[14] Most sentences, *Hughes* explained, are in this way "based on" the Guidelines because most judges begin by calculating the Guidelines range, and then consider that range in their calculation.[15] Sentences that involve a downward variance from a guideline range are therefore "based on" the Guidelines; as a matter of law, they are not "non-guideline" sentences at all.[16] As for the second change, had the Commission retained comparable reductions for variances, there would have been no reason to eliminate comparable reductions for departures.[17] If anything, uniformity would have counseled in favor of retaining it the reductions.

Amending § 1B1.10 to correct its erroneous exclusion of below-guidelines sentences would further the Commission's important work of updating and simplifying the *Guidelines Manual* for a post-*Booker* world. *Hughes* had not yet been issued when the Commission eliminated comparable sentence reductions in 2008 and 2011, and the Commission did not have a quorum for most of the time following *Hughes*. Nonetheless, the § 1B1.10 exclusion was based on a fundamental premise that *Hughes* has since explicitly undermined. The 2024–2025 amendment cycle boldly eliminated departures in order to align the Guidelines with the framework and reality of post-*Booker* sentencing, and this amendment cycle continues the important work of simplifying the *Guidelines Manual*.[18] Incorporating § 1B1.10 into this amendment cycle would further that project by harmonizing § 1B1.10 with *Booker* and its progeny.

Correcting the § 1B1.10 exclusion will also eliminate at least two circuit splits that have developed in its wake, addressing another Commission priority. First, the Second and Eighth Circuits have split with the Eleventh Circuit over whether courts can include adjustments under § 5G1.3(b) in sentence reduction proceedings.[19] Second, the Seventh and Ninth Circuit have

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[12] *Hughes v. United States*, 584 U.S. 675, 686 (2018). *Hughes* and its relationship with the *Gall* line of cases is discussed in great detail in Sady, Retroactive Guidelines Amendments at 155–56.

[13] U.S.S.G. App. C. Amend. 712 (Mar. 3, 2008).

[14] *Hughes*, 584 U.S. at 685–86.

[15] *Id.*; *see* 18 U.S.C. § 3553(a)(4).

[16] *See Hughes*, 584 U.S. at 685–86; U.S.S.G. App. C., Amend. 712 (Mar. 3, 2008).

[17] *Cf.* U.S.S.G. App. C, Amend. 759 (Nov. 1, 2011).

[18] *See* U.S. SENT'G COMM'N, *Amendments to the Sentencing Guidelines* (2025 Amendments to the Sentencing Guidelines), 81–682 (Apr. 30, 2025), https://perma.cc/SF86-GZU3.

[19] *Compare United States v. Gonzalez-Murillo*, 852 F.3d 1329, 1337–39 (11th Cir. 2017), *with United States v. Zapatero*, 961 F.3d 123, 128–31 (2d Cir. 2020); *United States v. Helm*, 891 F.3d 740, 742–44

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split with the Sixth Circuit over how to account for sentencings where an individual received a departure for substantial assistance and a second departure/variance on another ground.[20] Fixing § 1B1.10 would eliminate both circuit splits.

This Part of our Comment proceeds in four parts. First, the Comment explains how re-authorizing comparable sentence reductions will simplify the *Guidelines Manual* by better aligning § 1B1.10 with post-*Booker* case law and practice and by eliminating circuit splits. Second, this Comment emphasizes the ways in which the current § 1B1.10 exclusionary regime is inconsistent with the statutory purposes of the Commission and federal sentencing. Third, the Comment lays out the Commission's authority to enact this change. Finally, this Comment demonstrates the simplicity of making this change by offering two suggestions for implementing it.

At this stage in the Amendment cycle, we recognize that the Commission is setting priorities—not making final decisions. Nonetheless, we hope that this relatively in-depth explanation, along with our suggestions for implementation, underscore the significance and simplicity of our proposal, and show how it aligns with the Commission's important priorities.

A. Re-Authorizing Comparable Sentence Reductions Will Simplify the *Guidelines Manual*.

Over the past two years, the Commission has taken a much-needed step back to examine and implement overarching changes where the *Guidelines Manual* no longer fits the post-*Booker* world of federal sentencing. Section 1B1.10's exclusion of comparable sentence reductions should be removed for the same reasons. The § 1B1.10 exclusion is premised on a post-*Booker* legal premise that the Supreme Court has since corrected. This alone is a sufficient reason to eliminate it. In addition, however, correcting § 1B1.10 will also resolve at least two circuit splits and has the potential to prevent new circuit splits. Nor will it result in an unadministrable rule. It is simply a return to the nearly two decades of standard practice that preceded its elimination.

1. Section 1B1.10 is Inconsistent with Post-*Booker* Case Law.

Following *Hughes*, there can be no question that the 2008 and 2011 reasons for excluding comparable sentence reductions are inconsistent with Supreme Court case law. Before *Booker*, the Guidelines authorized district courts to take departures into account in sentence reduction proceedings.[21] Section § 1B1.10 explained: "When the original sentence

(8th Cir. 2018). Undersigned has a pending case that rests on this circuit split.

[20] *Compare United States v. Phelps*, 823 F.3d 1084, 1087–88 (7th Cir. 2016); *United States v. D.M.*, 869 F.3d 1133, 1143–44 (9th Cir. 2017), *with United States v. Taylor*, 815 F.3d 248, 251–52 (6th Cir. 2016); *see also United States v. Anderson*, 686 F.3d 585, 588–591 (8th Cir. 2012) (assuming without deciding that § 1B1.10(b)(2)(B) prohibits a second departure in addition to a departure for substantial assistance).

[21] *See* U.S.S.G. § 1B1.10, comment. (n.3) (2004).

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represented a downward departure, a comparable reduction below the amended guideline range may be appropriate" at a sentence reduction proceeding.[22]

The Commission removed this comparable reduction language because of *Booker*. *Booker* resulted in a new type of below-Guidelines sentence which the Supreme Court in 2008 called "variances."[23] The same year, in Amendment 712, the Commission revised § 1B1.10 to characterize sentences resulting from variances as "non-guideline sentence[s]" that should on that basis be excluded from sentence reduction proceedings.[24]

Three years later, in 2011, Amendment 759 further revised § 1B1.10 to impose a blanket prohibition on all comparable reductions except where an individual received a departure for substantial assistance at the initial sentencing.[25] In justifying Amendment 759, the Commission focused primarily on the importance of uniformity.[26] Excluding both departures and variances would avoid having "one rule for downward departures . . . and another rule for variances" and eliminate any related litigation.[27]

Subsequent Supreme Court case law, however, rejects the premise on which both amendments rely; sentences involving variances are *not* "non-guideline" sentences. In 2018, the Supreme Court held in *United States v. Hughes* that nearly all sentences are "based on" the guidelines, because judges must consider the Guidelines as part of the sentencing process.[28] "The Sentencing Reform Act requires a district court to calculate and consider a defendant's Guidelines range in every case."[29] For that reason, "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the

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[22] *Id.*

[23] *See Irizarry v. United States*, 553 U.S. 708, 712–13 (2008).

[24] U.S.S.G. App. C, Amend. 712 (Mar. 3, 2008).

[25] U.S.S.G. App. C, Amend. 759 (Nov. 1, 2011). This exclusion does not extend to departures granted for substantial assistance. *See* U.S.S.G. § 1B1.10(b)(2)(B).

[26] *See id.* Judges, scholars, and the *Guidelines Manual* itself recognize the tension between uniformity and fairness in federal sentencing. *See, e.g.*, U.S.S.G. ch. 1, Pt. A(1) ("There is a tension, however, between the mandate of uniformity and the mandate of proportionality."); *Callins v. Collins*, 510 U.S. 1141, 1149 (1994) (Blackmun, J., dissenting) (observing, in death penalty context, that "[a] step toward consistency is a step away from fairness."); Lana L. Freeman, *Sentences Should Be Reasonable, Not Shocking: A De-Emphasis on Loss for Federal Securities Fraud Sentencing*, 2012 U. ILL. L. REV. 969, 997 (2012) (criticizing loss calculations as "a bright-line rule favoring uniformity . . . at the expense of fairness and proportionality"); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992).

[27] U.S.S.G. App. C, Amend. 759 (Nov. 1, 2011).

[28] *See Hughes*, 584 U.S. at 685–87.

[29] *Id.* at 686.

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sentence."[30] Variance or not, a sentence is accordingly "based on" the Guidelines when an individual's "Guidelines range was a relevant part of the framework the judge used to . . . determine the sentence."[31] As a result, "in 'the typical sentencing case,' and as 'the general rule,' the guidelines range forms the basis of a defendant's sentence for purposes of § 3582(c)(2)," even when the ultimate sentence involves a variance.[32]

Plainly, the Supreme Court's holding in *Hughes* is inconsistent with the Commission's 2008 assumption that variances result in "non-guidelines" sentences. Contrary to Amendment 712, when a judge calculates a guideline range for an individual and then uses that range as the starting point from which to vary or depart, the resulting sentence is "based on" the Guidelines; it is not a "non-guidelines sentence."[33]

Experience confirms *Hughes*' holding. Take, for example, the individuals who receive fast-track sentences for illegal reentry in the District of Arizona and the Southern District of California.[34] Their sentences were indisputably based on the Guidelines: courts began by calculating the Guidelines, subtracted up to four offense levels for early disposition, and then applied any additional departures and variances.[35] Yet despite the fact that many of these individuals received status points at their original sentencing, they could not could not receive the benefit of Amendment 821's retroactive changes to status points if they earlier received a substantial reduction under fast-track.

Amendments 712 and 759's reasoning for disabling judges from treating their own below-guidelines sentences as comparable sentence reductions no longer holds. Their fast-track sentences were wholly based on the Guidelines. And there was no reason to bar them from granting relief under Amendment 821 in order to ensure uniformity with "non-guideline" variances—not now, when we now know that sentences involving a variance are also based on the Guidelines. The same is equally true for any other departure or variance.

Simplification tries to do away with the legal contortions that resulted from the piecemeal working out of *Booker*'s consequences. The § 1B1.10 exclusion is precisely such a consequence. To simplify the Guidelines Manual, consistent with the broader Simplification project, we respectfully suggest that the Commission should amend § 1B1.10 to authorize comparable sentence reductions for below-guidelines sentences.

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[30] *Id.* (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 199 (2016)).

[31] *Id.* at 690; *see also* Sady, *Retroactive Guidelines Amendments*, at 155.

[32] *See* Sady, *Retroactive Guidelines Amendments*, at 156 (quoting *Hughes*, 584 U.S. at 686).

[33] *Hughes*, 584 U.S. at 686; U.S.S.G. App. C., Amend 712.

[34] Fast-track plea agreements bind the government to request a downward departure of up to four levels, in exchange for a guilty plea and waiving certain appeal rights. *See* Primer: Departures and Variances 13–14 (2023), https://perma.cc/3M7Q-8WFM.

[35] Commission data show that the nearly all fast-track sentences were given to people convicted of illegal reentry. *See* 2023 Sourcebook at Table 38.

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2. Re-Authorizing Comparable Sentence Reductions Will Eliminate at Least Two Circuit Splits.

Excluding comparable sentence reductions from § 1B1.10 has resulted in at least two circuit splits—both of which would be resolved by allowing comparable sentence reductions.

First, the Eleventh Circuit has split with the Second and Eighth circuits over whether the § 1B1.10 exclusion requires courts to also exclude adjustments under § 5G1.3(b). The Eleventh Circuits includes § 5G1.3(b) adjustments in the calculation; whereas the Second and Eighth Circuits exclude them.[36] Unfortunately, the 2024–2025 simplification project reiterated (and possibly exacerbated) the underlying legal question on which the split rests.[37] The underlying legal issue is highly technical but easily resolved by authorizing comparable sentence reductions. Regardless of the best way to conceptually classify the § 5G1.3(b) adjustment, a sentence reduction court will be able to take the sentencing court's reduction on that basis into account during sentence reduction proceedings.

Second, the Seventh and Ninth Circuits have split with the Sixth Circuit over sentencings involving both a departure for substantial assistance and a second departure or variance for another reason. Can the court include both the substantial assistance departure and the second departure/variance in sentence reduction proceedings, or only substantial assistance? The Seventh and Ninth Circuits would authorize a court to include the second departure/variance, whereas the Sixth Circuit would prohibit it.[38] The same question is now also pending in the Eleventh Circuit. These issues have not been settled; they continue to crop up with subsequent rounds of retroactive guideline amendments. Again, allowing comparable sentence reductions resolves the entire question without having to answer exactly how many angels can dance on the head of a pin. Courts can include the entirety of the original judge's decision by way of a comparable sentence reduction.

Finally, correcting the § 1B1.10 exclusion will also prevent future circuit splits arising out of the 2024–2025 Simplification Amendments. For example, how does Simplification affect the circuit split over incorporating § 5G1.3(b) into § 1B1.10? Likewise, can the new policy statement regarding early disposition, § 3F1.1, be considered as part of the guideline range itself (and therefore part of § 1B1.10 reductions)? Or does it remain a departure by a different name (and therefore not a part of § 1B1.10 reductions)?

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[36] *Compare Gonzalez-Murillo*, 852 F.3d at 1337–39, *with Zapatero*, 961 F.3d at 128–31; *Helm*, 891 F.3d at 742–44 ; *see generally* Miller Simplification Comment at 5–11 (discussing this circuit split and proposing alternative resolution).

[37] *Id.*

[38] *Compare Taylor*, 815 F.3d at 251–52; *with Phelps*, 823 F.3d at 1087–88; *D.M.*, 869 F.3d at 1143–44; *see also Anderson*, 686 F.3d at 588–591.

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All of these hyper-technical circuit splits are the result of Amendment 712's wrong turn. Returning to the earlier era by allowing comparable sentence reductions would do away with each of these unnecessary circuit splits, and it would do so without risking further creation of new and complex legal questions. It is a simple and straightforward change, one already born out by nearly twenty years of practice.

3. Comparable Sentence Reductions are Administrable.

Allowing courts to account for below-guidelines sentences in sentence reduction proceedings is no more than a return to the pre-2008 regime. We know that courts can easily handle this change because they *did* handle it—for nearly twenty years. They likewise have been straightforwardly handling comparable reductions for substantial assistance for the last fourteen years (since 2011). Nor would this change require complex new calculations. If anything, it will simplify the calculation process by allowing courts to reimpose precisely the same sentence they did at the original sentencing, changed only by substituting the newly amended guideline.

Re-authorizing comparable sentence reductions likewise does not present an unadministrable risk of "double-dipping." Judges proved able to handle any potential double-dipping concern in the pre-2008 regime, and there is no reason to think that contemporary judges are less capable than their predecessors. Sentence reductions are not automatic. A judge can reduce a sentence by any amount within the amended range or can leave an individual's original sentence in place.[39] Courts before and after the elimination of comparable sentence reductions have had little difficulty singling out individuals who, though eligible for a § 1B1.10 reduction, should not receive one.[40] The same will be true if the Commission returns to the original § 1B1.10 rule allowing comparable sentence reductions: if a judge concludes that any further sentence reduction would amount to double-dipping, then the judge need not reduce the sentence. Doing so appears to pose little administrative difficulty.

B. Excluding Comparable Sentence Reductions Is Inconsistent with the Statutory Framework of Federal Sentencing.

Section 1B1.10's below-Guidelines exclusion is patently unfair. The exclusion undermines the statutory role of original sentencing judges, is inconsistent with the statutory purposes of the Commission and federal sentencing, and fails to pay adequate heed to the

[39] *Dillon v. United States*, 560 U.S. 817, 826–828 (2010).

[40] *See, e.g.*, *United States v. Zayas-Ortiz*, 808 F.3d 520, 525 (1st Cir. 2015); *United States v. Figueroa*, 714 F.3d 757, 760–61 (2d Cir. 2013); *United States v. Styer*, 573 F.3d 151, 155 (3d Cir. 2009); *United States v. Legree*, 205 F.3d 724, 727–30 (4th Cir. 2000); *United States v. Smith*, 595 F.3d 1322, 1323 (5th Cir. 2010); *United States v. Watkins*, 625 F.3d 277, 280–81 (6th Cir. 2010); *United States v. Purnell*, 701 F.3d 1186, 1190–91 (7th Cir. 2012); *United States v. Jones*, 836 F.3d 896, 898–99 (8th Cir. 2016); *United States v. Dunn*, 728 F.3d 1151, 1159–60 (9th Cir. 2013); *United States v. Osborn*, 679 F.3d 1193, 1195–96 (10th Cir. 2012); *United States v. Vautier*, 144 F.3d 756, 761–62 (11th Cir. 1998); *United States v. Jones*, 846 F.3d 366, 371–73 (D.C. Cir. 2017).

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wisdom of the Commission's amendment process. The Commission should amend § 1B1.10 to fix these problems.

First, the present § 1B1.10 requires infidelity to the original sentence by forcing the sentence reduction judge to ignore the original judge's variance or departure. The Supreme Court in *United States v. Dillon* emphasized that sentence reduction proceedings are not resentencings.[41] There is only one sentencing, undertaken by the original sentencing court. Sentence reduction proceedings are "only a limited adjustment" to that "otherwise final sentence."[42]

Despite that direction from the Supreme Court, § 1B1.10 offers no deference to the original sentencing judge's determination that a below-Guidelines sentence was warranted. No matter how necessary the sentencing judge deemed a below-Guidelines sentence, § 1B1.10 does not permit a comparable sentence reduction (except for substantial assistance).

Second, for similar reasons, § 1B1.10 fails to provide judges with sufficient flexibility for individualized sentencing, contrary to the 28 U.S.C. § 991(b)(1)(B) statutory requirement that the Commission "establish sentencing policies" that "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." Both variances and departures help sentencing judges accomplish this goal by giving them the tools to tailor sentences to an individual's circumstances.[43] Excluding variances and departures from sentence reduction proceedings cannot be squared with § 991(b)(1)(B)'s individualization requirement. The exclusion prohibits judges from applying at a sentence reduction proceeding the very same departures or variances that were necessary at the underlying sentencing. Multiple circuit courts have questioned the § 1B1.10 exclusion on this very basis.[44]

Relatedly, the § 1B1.10's exclusion creates unwarranted sentencing disparities between individuals, contrary to a different § 991(b)(1)(B) statutory requirement that the Commission "establish sentencing policies . . . [that] avoid[] unwarranted sentencing disparities."[45] Most obviously, § 1B1.10's exclusion creates disparities between similarly situated individuals who can receive the benefit of a given retroactive sentence reduction, and those who cannot. Take the following example from an article by Stephen Sady:

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[41] *Dillon*, 560 U.S. at 825.

[42] *Id.*

[43] *See* Sady, *Retroactive Guidelines Amendments*, at 156–57.

[44] *See United States v. Hogan*, 722 F.3d 55, 63 (1st Cir. 2013) ("We, like the Second Circuit in *Montanez*, question as a policy matter, why courts 'should not have the discretion to give defendants the benefit of [] departures during sentencing reduction proceedings.'" (quoting *United States v. Montanez*, 717 F.3d 287, 294 (2d Cir. 2013)).

[45] 28 U.S.C. § 991(b)(1)(B); *see also* 18 U.S.C. § 3553(a)(6).

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> Both Individuals A and B are at Offense Level 36 and in Criminal History Category I, with zero criminal history points, yielding a guidelines range of 188 to 235 months. Individual A presents strong mitigation [at the original sentencing] from personal history and post-offense rehabilitation resulting in a two-level downward variance to 151 months. Individual B has no personal mitigation, has done no rehabilitation work, and receives a sentence to 188 months—the bottom of the guidelines range. Both would receive a two-level reduction under the new U.S.S.G. § 4C1.1 if sentenced today. Although the sentencing judge based both sentences on the same (now-lowered) guidelines range, under the current policy statement, Individual A is categorically disqualified from a sentence reduction, while Individual B is eligible to receive the two-level reduction to the same 151 months Individual A received.[46]

Any benefit that Individual A received for his personal history and post-offense rehabilitation is lost. Both Individuals A and B receive the same sentence, despite the fact that a court deemed Individual A far less culpable. Requiring courts to treat unlike defendants alike is a form of unwarranted sentence disparity that contradicts the Commission's statutory purposes.[47]

The § 1B1.10 exclusion likewise creates classes of unwarranted sentencing disparities. Early disposition sentences are one egregious example. So-called "fast track" sentencing awards a substantial departure for prompt guilty pleas in certain districts. For example, in the Southern District of California, where I formerly practiced, individuals pleading guilty to illegal reentry could receive a four-level departure for fast-track. Those sentences began, however, with a standard guidelines calculation, including a two-level increase for "status points" under the former § 4A1.1(e) where applicable. Amendments 821 and 825 properly did away with status points in certain cases; status points failed to predict future recidivism as accurately as originally believed.[48] And yet, *none* of the individuals sentenced under fast-track could receive the benefit of that new knowledge. These and similar unwarranted sentence disparities cannot be squared with § 991(b)(1)(B)'s requirement that the Commission avoid unwarranted sentence disparities.[49]

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[46] Sady, *Retroactive Guidelines Amendments*, at 156. Mr. Sady offers two additional, pointed examples that are also worth review. *See id.* at 156–57.

[47] Although it ultimately upheld the § 1B1.10 against legal challenge, the Ninth Circuit pointedly observed precisely this tension: "Under § 1B1.10(b)(2)(A), defendants who originally had lower sentences may be awarded the same sentences in § 3582(c)(2) proceedings as offenders who originally had higher sentences. That is, sentences that were initially tailored to avoid unwarranted disparities and to account for individualized circumstances will now converge at the low end of the amended guideline range." *United States v. Padilla-Diaz*, 862 F.3d 856, 861 (9th Cir. 2017).

[48] U.S.S.G. Supp. App. C. at 240–41, 261.

[49] *See also* Sady, *Retroactive Guidelines Amendments*, at 157 (highlighting classes of unwarranted sentencing disparities for, e.g., departures such as victim conduct, lesser harms, coercion and duress, and diminished capacity; and for plea agreements that include variances).

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Third, § 1B1.10 also obstructs efforts to comply with the statutory purposes of federal sentencing. Section 991(b)(1)(A) tasks the Commission with ensuring that "the purposes of sentencing as set forth in" § 3553(a)(2) are met. Those purposes include the seriousness of the offense, deterrence, and the need to protect the public from future crimes.[50] Again, judges use variances and departures to do that. A judge may, for example, vary or depart downward when an individual's offense is less serious than the guidelines contemplate. Prohibiting a comparable sentence reduction requires judges to reject that very § 3553(a)(2) reasoning on which the original sentence was based. It risks requiring judges to impose a sentence that does not reflect, among other things, the seriousness of the offense, deterrence, and the need to protect the public from future crimes—contrary to the Commission's charge in § 991(b)(1)(A).

Finally, § 1B1.10 disrespects the Commission's own decision-making. The Commission does not amend the Guidelines lightly, and even less lightly makes those amendments retroactive. The Commission's amendments "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[51] The Commission likewise holds a statutory duty to determine when a sentence reduction should be made retroactive.[52] Regardless of any disagreements as to outcome, the Commission plainly takes those twin duties extremely seriously. Any amendment to the *Guidelines Manual* and any determination that an amendment should be made retroactive is the result of a lengthy process, involving a great deal of time and effort by Commissioners, staff, and stakeholders. The fruits of that process—the amendments themselves—should be given full effect.

And yet, § 1B1.10 arbitrarily limits the class of individuals who can benefit from the Commission's decisions that an amendment should be made retroactive. There is no reason consistent with "advancement in knowledge of human behavior" to limit relief from retroactive amendments to people who received within-Guidelines or nearly within-Guidelines sentences.[53] The dead hand of the past Commission should not be permitted to override the mandate of the current Commission.

C. The Commission Has the Authority to Fix § 1B1.10's Exclusion Problem.

There is no question that 18 U.S.C. § 3582(c)(2) authorizes the Commission to allow sentence reductions when the initial sentence was a departure or variance from the guideline range. This authority is self-evident for departures: until 2011, the Manual expressly permitted comparable sentence reductions for all departures, and the Commission's power to do so appears to have been uncontested.[54]

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[50] 18 U.S.C. § 3553(a)(2).

[51] 28 U.S.C. § 991(b)(1)(C); *see* 28 U.S.C. § 994(o).

[52] 28 U.S.C. § 994(u).

[53] 28 U.S.C. § 991(b)(1)(C).

[54] *See* U.S.S.G. App. C, Amend. 759 (Nov. 1, 2011).

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In *Hughes*, the Supreme Court similarly confirmed the authority to include variances in sentence reduction proceedings. Under *Hughes*, sentences resulting from variances are "based on" the guideline range when the "range was a relevant part of the framework the judge used to . . . determine the sentence."[55] For that reason, nearly all sentences that involve variances satisfy the statutory requirement for a sentence reduction, namely, that an individual was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered."[56] Following *Hughes*, courts have demonstrated their ability to distinguish between the sentences that were based on such a sentencing range, and sentences that were not.[57]

The Commission accordingly has the authority to allow district courts to consider variances as comparable sentence reductions in § 1B1.10 proceedings, and such a rule would be easily administrable. Indeed, such a "change" would be no more than a return to the pre-*Booker* status quo.

D. Section 1B1.10 Can Be Easily Modified to Authorize Comparable Sentence Reductions.

The previous sections described why the Commission should amend § 1B1.10 to fix § 1B1.10's exclusion problem, and why it has the authority to do so. Fortunately, the fix is simple. This Comment offers two alternatives for implementing that change, though there are other ways to tackle the problem. Both suggestions follow the model of comparable sentence reductions currently used for substantial assistance departures and formerly used for all departures.[58] In addition to the changes in the text below, knock-on changes to the definition of "applicable guideline range" in Application Note 1(A) and to Application Note (b)(2) would also be required.

Option #1: Eliminate Current Prohibition

Our first option for fixing § 1B1.10's exclusion expands the existing authorization for a comparable sentence reduction from substantial assistance alone to any variance or departure. It otherwise leaves § 1B1.10 as-is. The advantage of this option is its simplicity and the limited

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[55] *Hughes*, 584 U.S. at 689–90.

[56] 18 U.S.C. § 3582(c)(2) (emphasis added).

[57] *Compare, e.g.*, *United States v. Smith*, 896 F.3d 466, 471–72 (D.C. Cir. 2018) (concluding that underlying sentence was based on guidelines); Order at 2–3, *United States v. Vancil*, 18-cr-40034 (C.D. Ill. May 22, 2024), Dkt. 43 (same); *United States v. Delrio*, No. 8:14-cr-00378, 2020 WL 1702353, at *2 (D. Neb. Apr. 7, 2020) (same), *with United States v. Langen*, No. 3:12-30041, 2019 WL 4237852 (C.D. Ill. Sept. 5, 2019) (denying reduction where underlying sentence was not based on guidelines).

[58] *See* U.S.S.G. § 1B1.10(b)(2)(B) ("[T]o reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range . . . may be appropriate."); U.S.S.G. § 1B1.10, comment. (n.3) (2010) ("If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range . . . may be appropriate.").

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scope of its changes. A revision of this kind will make the transition straightforward in that it accords with judges' and practitioners' current experience.

This revision is based on language in § 1B1.10(b)(2), which otherwise contains the prohibition (additions bolded, underlined, and in red; deletions in strike-through).

> (2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—
>
> (A) LIMITATION.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
>
> (B) EXCEPTION FOR **BELOW-GUIDELINES SENTENCES** ~~SUBSTANTIAL ASSISTANCE~~.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing ~~pursuant to a government motion to reflect the defendant's substantial assistance to authorities~~, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.
>
> (C) PROHIBITION.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served

Option #2: Revert to Historical Authorization for Comparable Sentence Reductions

We also offer a second option, based on the historical version of § 1B1.10. Although we prefer our first option, this option is similarly straightforward. The historical language provided: "When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate."[59] The Commission could reincorporate that language, expanded for below-guidelines sentences more generally. Given the success of the prior regime, returning to the earlier language could prove simple and straightforward. That said, with the rise of variances, the earlier use of the term "represented" is somewhat hard to understand. What is it to "represent" a below-Guidelines sentence? In our view, Option #1's language better addresses the current post-*Booker* framework. Nevertheless, both options would be easy to implement.

This revision again focuses on § 1B1.10(b)(2) (additions bolded, underlined, and in red; deletions in strike-through) and revises the historical language to make clear that the comparable sentence reduction applies to all below-guidelines sentences.

> (2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—

[59] *See* U.S.S.G. § 1B1.10, comment (n.3) (2007).

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(A) LIMITATION.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) **BELOW-GUIDELINES SENTENCES.** ~~**EXCEPTION FOR SUBSTANTIAL ASSISTANCE.**~~ **When the original sentence represented a below-guidelines sentence, a comparable reduction below the amended guideline range may be appropriate.** ~~If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.~~

(C) PROHIBITION.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served

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II. The Commission Should Prioritize Amending § 5G1.3.

The Commission's proposal to prioritize exploring ways of simplifying the *Guidelines Manual* by examining the guideline's operation is a welcome one. In response to the Commission's December 2024 Simplification proposal, my students and I previously submitted a comment asking the Commission to revise and revisit § 5G1.3.[60] More specifically, our earlier proposal asked the Commission to retain two departures and to make several clarifying changes throughout § 5G1.3. For the convenience of the Commission, I have attached a copy of our earlier proposal to this email as an Appendix.

These comments supplement, summarize, and update our earlier proposal in light of the Commission's important changes from the 2024–2025 amendment cycle. Section 5G1.3's strengths and weaknesses mirror each other. The guideline provides comprehensive guidance for structuring a federal sentence for individuals who are subject to another term of imprisonment. For that reason, its statutory underpinnings reflect not just 18 U.S.C. § 3553(a) but also §§ 3584 and 3585. It likewise responds to broad concerns about federalism, comity sentencing courts, double jeopardy, and fairness.[61] Understandably, the breadth of § 5G1.3's comprehensive guidance encompassing these somewhat unusual topics of federal sentencing is "complex and at times confusing for courts."[62]

Our earlier comment responded to this complexity in two ways. First, we asked the Commission to retain § 5G1.3's two departures in some form so as to maintain § 5G1.3's comprehensive guidance through the statutory and constitutional minefield it covers.[63] Other commenters raised similar issues.[64] Ultimately, the Commission clarified that courts could vary under § 3553(a) to reflect the issues embodied in the former departures.[65]

Second, we asked the Commission to make a series of changes to § 5G1.3 to clarify its operation. Some of our proposed changes were minute but nonetheless significant. For example, we proposed revising the § 5G1.3's title to make clear where § 5G1.3 applies.[66] Other changes

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[60] Miller Simplification Comment at 11–21, *see infra* at App'x.

[61] *See, e.g.*, *Setser v. United States*, 566 U.S. 231, 239–41 & n.4 (2012) (discussing the interplay between federal courts, state courts, and the BOP in making "concurrent-vs.-consecutive [sentencing] decisions"); *Witte v. United States*, 515 U.S. 389, 404 (1995) (noting that "the Guidelines take into account the potential unfairness" incident to multiple prosecutions).

[62] 2025 Amendments to the Sentencing Guidelines at 81.

[63] *See* Miller Simplification Comment at 16–17, 21 (proposing retaining Application Notes 4(E) and 5), *infra* at App'x 5, 9.

[64] *See* FED. PUB. & CMTY DEFS., Comment on Simplification of Three Step Process (Proposal 4) in *Public Comment on Certain Proposed Amendments* 8–9 (Feb. 3, 2025), https://perma.cc/K5ZY-EWP5 (proposing retaining Application Note 4(E)).

[65] 2025 Amendments to the Sentencing Guidelines at 474 (modifying but retaining Application Note 5).

[66] *See* Miller Simplification Comment at 13, 18, *infra* at App'x 1, 6.

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took more direct aim at ongoing areas of confusion. For example, we proposed that the Commission clarify exactly what a court must do to apply § 5G1.3(b), to explain how § 5G1.3 and federal sentencing interacts with the Bureau of Prisons' credit calculation, and to put the former departure for "discharged" terms of imprisonment on equal footing with the current adjustment for "undischarged" terms of imprisonment.[67] We understand the Commission to have deferred these sorts of proposals to the present.

We urge the Commission to see through its proposed priority of exploring ways to address § 5G1.3's unnecessary complexity and further simplify the *Guidelines Manual*.[68] Most of our recommendations are the same, and, for that reason, we simply summarize them below. Some of our recommendations, however, have changed in light of the Commission's much-needed revisions to § 5G1.3 during the 2024–2025 amendment cycle. Our suggestions reflect this framework. The recommendations proceed through § 5G1.3 in the same order as when one reads the guideline.

First, we suggest adopting a simpler, less technical, and more accurate title in order to more clearly signal when § 5G1.3 applies. Section 5G1.3's current title is wordy, relies on multiple technical terms with which practitioners may not be familiar, and does not fully capture its reach. It states, in twenty words: "Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment."[69] In fact, § 5G1.3 offers guidance for all other terms of imprisonment, including discharged terms of imprisonment. The guideline's title should accordingly make clear to courts and practitioners that they should refer to § 5G1.3 when faced with any individual subject to *any* other term of imprisonment. The 2013 Practitioners Advisory Group proposed title makes § 5G1.3's breadth more clear: "Imposition of a Sentence on a Defendant Subject to Another Term of Imprisonment."[70] We suggest the Commission adopt this title.

Second, we propose adding subtitles to each of § 5G1.3's subsections in order to clarify its structure. One unnecessarily complex aspect of § 5G1.3 is that courts and practitioners must understand the entire guideline just to figure out which subsection applies to their client. However, this apparent complexity obscures what is in fact a relatively straightforward structure. Subsection (a) provides for a sentence to run consecutive to a previous sentence. Subsection (b) provides for a sentence to run concurrent with a previous sentence. Subsection (c) provides for a sentence to run concurrent with an anticipated sentence. Finally, subsection (d) provides guidance when none of the other three subsections apply. In other complicated Guidelines provisions, subsection titles are provided to clarify the role of

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[67] *See* Miller Simplification Comment at 13–15, 18–20, *infra* at App'x 1–3, 6–8.

[68] *See* Proposed Priorities for Amendment Cycle, 90 Fed. Reg. at 24710.

[69] U.S.S.G. § 5G1.3.

[70] PRACS. ADVISORY GRP., *Response to Request for Comment on Proposed 2013 Amendments and Related Issues* at 17 (Mar. 19, 2013), https://perma.cc/RER6-HZLD. My previous comment made the same proposal. *See* Miller Simplification Comment at 13, *infra* at App'x 1.

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each individual subsection.[71] Adding subsection titles as in our February 2024 proposed revision would clarify § 5G1.3's structure.[72] Should the Commission choose to revise § 5G1.3 differently than we propose, we nonetheless urge it to add subsection titles to each subsection's specific aim.

Third, **we recommend adding language to subsection (a) clarifying that it trumps subsections (b) and (c) and deleting related language from the latter two subsections**. As currently written, subsections (b) and (c) begin with confusing language that adds an unnecessary condition precedent to already-complex subsections. They each begin: "If subsection (a) does not apply,".[73] Adding a sentence to (a) noting that it supersedes (b) and (c) will clarify that (a) is the first step in applying § 5G1.3.[74] For example, a sentence could be added to subsection (a) stating, "Subsections (b) and (c) do not apply where this subsection applies." Regardless of the exact language, the additional sentence in (a) would enable the Commission to delete the related language from (b) and (c), thereby making their language more legible. We acknowledge that there are other ways to restructure the interaction between (a), (b), and (c). However, on balance, we are concerned that greater changes to fix this problem could make § 5G1.3 more confusing in other ways. We recommend instead making the simple change we propose to subsection (a) and deleting the related language from (b) and (c).

Fourth, **we suggest restructuring subsection (b) to clarify at the beginning precisely the conditions under which it applies.** The structure of § 5G1.3(b) is confusing. At present, there are at least three conditions precedent that the court, Probation, and the parties must understand in order to properly apply 5G1.3(b): (1) subsection (a) does not apply; (2) the individual being sentenced is subject to an undischarged term of imprisonment that resulted from another offense and that is relevant conduct to the instant offense; and (3) that period of imprisonment will not be credited by the Bureau of Prisons.[75] Each condition precedent itself is complex, and other suggestions address that problem. However, the actual *structure* of § 5G1.3 is also part of the problem, and it can be relatively easily corrected. The first two of the three conditions precedent are set out at the *beginning* of § 5G1.3(b), but the third is at the *end* of § 5G1.3(b)(1).[76] Courts and practitioners less immersed in the underlying issues can easily miss the fact that there is a third condition precedent to apply. Indeed, that has been my experience when people reach out to me for assistance. The solution is simply to revise subsection (b) so that all of the conditions precedent are listed together, at the beginning of the section.

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[71] *See, e.g.*, U.S.S.G. § 1B1.10.

[72] *See* Miller Simplification Comment at 13–14, *infra* at App'x 1.

[73] U.S.S.G. § 5G1.3(b), (c).

[74] In my previous comment, I proposed the language: "Subsections (b) and (c) do not apply where this subsection applies." Miller Simplification Comment at 13, *infra* at App'x 1.

[75] *See* U.S.S.G. § 5G1.3(b).

[76] *See id.*; *id.* § 5G1.3(b)(1).

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Fifth, we implore the Commission to revise the language of § 5G1.3(b) to clearly state that parties and the court must determine whether and to what extent the Bureau of Prisons will credit an individual's time served on a related, undischarged sentence. The question of whether—or to what degree—the Bureau of Prisons will credit time served on another sentence appears to be one of the most common sources of error in applying § 5G1.3.[77] The Commission has recently amended Application Note 4(E) to provide some additional guidance on the interaction between the Bureau of Prisons and § 5G1.3(d).[78] But the text of § 5G1.3 and its accompanying guidelines still do not clearly state that the parties and court must determine whether and how much of the other sentence the Bureau of Prisons will credit, and especially not in the § 5G1.3(b) context where it is essential. We urge the Commission to amend the Guideline itself to make clear that this is a calculation that *the parties and the court* must perform, and to amend the Application Notes to include the relevant statutory framework and provide guidance on the interaction between the Bureau of Prisons and § 5G1.3(b).[79]

Sixth, we urge the Commission to revise § 5G1.3(b) to authorize adjustments for *discharged* terms of imprisonment on the same terms that § 5G1.3(b) currently authorizes adjustments for *undischarged* terms of imprisonment. At the very least, we recommend that the Commission further explore this question. At present, Section 5G1.3(b) adjusts a sentence downward to account for time served on related, undischarged terms of imprisonment that the Bureau of Prisons cannot credit.[80] The purpose of that adjustment is "to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence."[81] The downward adjustment thus ensures that the "starting point" or "benchmark" for an individual's federal sentencing reflects the time that individual already served on the related other sentence.[82]

One especially challenging component to § 5G1.3(b) is the fact that it properly accounts for the potentially arbitrary sentence increase resulting from *undischarged* sentences but does not do so for *discharged* sentences. This distinction is confusing in multiple ways. From the perspective of the parties, there is no functional difference between undischarged and discharged sentences nor are the terms commonly used aside outside of the § 5G1.3(b) context.

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[77] *See e.g.*, *United States v. Kieffer*, 596 F. App'x 653, 655–59 (10th Cir. 2014) (unpublished) (describing district court's multiple attempts to effectuate judgment vis-à-vis state sentence, in light of BOP sentence calculation); *United States v. Wilder*, 125 F. App'x 740, 742–43 (7th Cir. 2005) (unpublished) (remanding for resentencing after district court and parties miscalculated time credited for state sentence under § 5G1.3(b)).

[78] *See* 2025 Amendment (Simplification of Three-Step Process) at 474.

[79] *See* Miller Simplification Comment at 14–15, 20 (proposing and explaining amendments to Application Note 2(B) that provides this guidance), *infra* at App'x 2–3, 8–9.

[80] U.S.S.G. § 5G1.3(b)(1).

[81] *Witte*, 515 U.S. at 405; *see also United States v. Garcia-Hernandez*, 237 F.3d 105, 109 (2d Cir. 2000) (Section 5G1.3(b)'s "purpose . . . is to prevent [] double-counting").

[82] *See, e.g.*, *Peugh v. United States*, 569 U.S. 530, 536 (2013).

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The same logic resulting in an adjustment for undischarged related sentences applies with equal force to discharged sentences. As multiple federal judges have noted, the Guidelines' differential treatment of discharged and undischarged sentences appears to be wholly arbitrary.[83] In essence, the distinction is confusing conceptually, and practically difficult to apply. Against this backdrop, it is easy to misunderstand when and how § 5G1.3(b) applies, and very easy to misapply it.

The simplest solution is to incorporate related, *discharged* terms of imprisonment, on the same terms as § 5G1.3(b) currently applies to related, *undischarged* terms of imprisonment. The 2024–2025 amendment cycle revised § 5G1.3(b) to expressly clarify that related, discharged terms of imprisonment can be a basis for a variance under § 3553(a).[84] However, that change treats related, discharged terms of imprisonment as an add-on—not part of the Guidelines' "starting point" for federal sentencing.[85] That differential treatment also has no evidentiary support, contrary to the Commission's statutory purpose.[86] The simplest course is to take the successful well-established single route—the § 5G1.3(b) adjustment—and apply it equally, in both contexts.[87]

Seventh, the Commission could clarify that 5G1.3 adjustments are part of the § 1B1.10 amended guideline range calculation in order to resolve a circuit split. There is a circuit split over whether a § 5G1.3(b) adjustment is part of the guidelines analysis for sentence reduction purposes under § 1B1.10.[88] The first part of this Comment suggests resolving the circuit split by re-authorizing comparable sentence reductions for all below-guidelines sentences.[89] In our opinion, that revision to § 1B1.10 is the most straightforward way of addressing the issue, and is also necessary to correct historical missteps and simplify the

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[83] *See, e.g.*, *Gonzalez-Murillo*, 852 F.3d at 1340 (Rosenbaum, J., concurring) ("I write separately to note [] that the apparent incongruity of results between §§ 5G1.3 and 5K2.23 seems out of line with the purpose of § 5G1.3."); *United States v. Hill*, 187 F. Supp. 3d 959, 965 (N.D. Ill. 2016) ("[T]he distinction . . . between discharged and undischarged prior sentences . . . creates disparities that are wholly irrational."). These cases highlighted the disparity between the § 5G1.3(b) adjustment and the now-eliminated § 5K2.23 departure. This analysis does not change now that discharged prior sentences are a variance.

[84] 2025 Amendments to the Sentencing Guidelines at 473–74 (amended § 5G1.3 comment. (n.4(E), 5).

[85] *Peugh*, 569 U.S. at 536.

[86] 28 U.S.C. § 991(b)(1)(C).

[87] Our 2024–2025 Simplification Comment proposed language for incorporating discharged sentences into § 5G1.3(b). *See* Miller Simplification Comment at 13 (proposing splitting § 5G1.3(b) into two subsections one of which deals governs undischarged terms of imprisonment and one governs discharged terms of imprisonment); *infra* at App'x 1.

[88] *Compare United States v. Gonzalez-Murillo*, 852 F.3d 1329, 1337–39 (11th Cir. 2017) (§ 5G1.3 is part of the range), *with United States v. Zapatero*, 961 F.3d 123, 128–31 (2d Cir. 2020) (§ 5G1.3 is not part of the range), *and United States v. Helm*, 891 F.3d 740, 742–44 (8th Cir. 2018) (same).

[89] *See supra,* Part I.

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Guidelines for a post-*Booker* world.[90] Nonetheless, the Commission could take a narrower approach by amending § 5G1.3 to clarify just that *§ 5G1.3 adjustments* are part of the § 1B1.10 calculation. This change would allow the Commission to resolve the specific circuit split created by the interaction of § 1B1.10 and § 5G1.3(b) without taking on the larger questions posed by § 1B1.10 itself.

The circuits that bar § 5G1.(b) adjustments from sentence reduction proceedings demonstrate an especially egregious consequence of the § 1B1.10 exclusion. (It also appears to be a wholly unintended consequence.) Section 5G1.3(b) adjustments apply only where an individual has *actually served time in custody* on a related case, but the Bureau of Prisons cannot credit that time. The Sentencing Guidelines properly account for that time by adjusting a sentence downward under § 5G1.3(b). Excluding that adjustment from a retroactive sentence reduction under § 1B1.10 in effect requires double-sentencing in a sentence reduction proceeding while prohibiting it at the original sentencing. The result does not make sense and is grossly unjust to affected individuals.

III. Conclusion

We applaud the Commission's decision to update and simplify the *Guidelines Manual* for a post-*Booker* world. Amending § 1B1.10 to authorize comparable sentence reductions for all below-guidelines sentences is an important next step in that mission, as is simplifying § 5G1.3. The § 1B1.10 exclusion is unjustifiably out of step with Supreme Court case law and contemporary practice, the Commission's statutory purposes, and the proper role of both courts and the Commission. It likewise has resulted in at least two circuit splits. As for § 5G1.3, its complexity is a continued source of unnecessary error. Revising its terms will bring much-needed clarity to the sentencing process. We thank the Commission for its time and attention to these important issues.

[90] *See supra*, *id*.

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Appendix

We submitted the following suggested revision to § 5G1.3 on February 3, 2025, in response to the Commission's 2024–2025 Simplification Proposal. The follow reprint of our earlier suggestion includes our proposed changes to § 5G1.3 itself and our explanation of those changes.

A. Proposed Revision to § 5G1.3.

We propose revising § 5G1.3 to read as follows (revisions bold, underlined, and in red; deletions in strike through):

Imposition of a Sentence on a Defendant Subject to Another ~~an Undischarged~~ Term of Imprisonment ~~or Anticipated State Term of Imprisonment~~

(a) **CONSECUTIVE SENTENCE.—**If the instant offense was committed while the defendant was serving a term of imprisonment ~~(including work release, furlough, or escape status)~~ or after sentencing for, but before commencing service of, such term of imprisonment, **then** the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment. **For the purpose of §5G1.3, a term of imprisonment includes work release, furlough, or escape status. Subsections (b) and (c) do not apply where this subsection applies.**

(b) **CONCURRENT SENTENCE.— When a defendant has received** ~~If subsection (a) does not apply, and~~ a term of imprisonment **that** resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

(1) **UNDISCHARGED OTHER TERM OF IMPRISONMENT.—For any such term of imprisonment that is undischarged,** the court shall **impose the instant sentence to run concurrently to the remainder of that term of imprisonment and shall** adjust the **instant** sentence for any period of imprisonment already served on the undischarged term of imprisonment**.** ~~, if the court determines that~~ **Provided, this adjustment applies only when** such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons**.** ~~; and the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.~~

(2) **DISCHARGED OTHER TERM OF IMPRISONMENT.—For any such term of imprisonment that is discharged, the court may adjust the instant sentence to account for the discharged term of imprisonment.**

(c) **ANTICIPATED TERM OF IMPRISONMENT.—**If ~~subsection (a) does not apply, and~~ a state term of imprisonment is anticipated to result from another offense that is

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relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), **then** the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (POLICY STATEMENT) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense. **In an extraordinary case, it may be appropriate for the court to adjust the sentence for a period of imprisonment already served.**

Commentary

Application Notes:

~~1. **Consecutive Sentence—Subsection (a) Cases.** Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.~~

~~2~~1. Application of Subsection (b).—

(A) **In General**.—Subsection (b) applies in cases in which all of the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). Cases in which **none or** only part of the prior offense is relevant conduct to the instant offense are covered under subsection (d).

~~(B) **Inapplicability of Subsection (b).**—Subsection (b) does not apply in cases in which the prior offense was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is a prior conviction for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).~~

(B) Relevance of Bureau of Prisons.—The Bureau of Prisons alone determines when to credit a prior term of imprisonment against a federal sentence. *See United States v. Wilson*, 503 U.S. 329, 335 (1992). A statutory and regulatory framework has developed to answer the question of whether the Bureau of Prisons grant that credit. *See* 18 U.S.C. § 3585.

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Subsection (b)(1)'s adjustment applies for undischarged, related terms of imprisonment, where the Bureau of Prisons will not credit a defendant's time served on the other term of imprisonment. To determine whether Subsection (b)(1)'s adjustment applies, the court must determine whether the Bureau of Prisons will credit time served on the other term of imprisonment. The extent of the reduction is governed by Subsection (b)(1).

Subsection (b)(2) applies to discharged, related terms of imprisonment. Federal law offers no avenue for the Bureau of Prisons to credit such prior terms of imprisonment. *See generally* 18 U.S.C. §§ 3584, 3585. Accordingly, unlike in subsection (b)(1), a court may apply the Subsection (b)(2) adjustment without first determining whether the Bureau of Prisons will credit the discharged term of imprisonment.

(C) **Imposition of Adjustment ~~Sentence~~.—**If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (*e.g.*, §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) **Example.—**The following is an example in which subsection (b)**(1)** applies and an adjustment to the sentence is appropriate: The defendant is convicted of a federal offense charging the sale of 90 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 25 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12–18 months (Chapter Two offense level of level 16 for sale of 115 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

~~3~~**2**. **Application of Subsection (c).—**Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

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43. **Application of Subsection (d).—**

(A) **In General.—**Under subsection (d), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));
(ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;
(iii) the time served on the undischarged sentence and the time likely to be served before release;
(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and
(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) **Partially Concurrent Sentence.—**In some cases under subsection (d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) **Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—**Subsection (d) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) **Complex Situations.—**Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (d) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

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(E) ~~**Downward Departure**~~**Adjustment.**~~—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, i~~**I**n an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to **adjust the sentence downward.** ~~downwardly depart.~~ This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, ~~a downward departure~~ **an adjustment** may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that ~~a departure~~ **an adjustment** pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any ~~downward departure~~ **adjustment** under this application note be clearly stated on the Judgment in a Criminal Case Order as ~~a downward departure~~ **an adjustment** pursuant to §5G1.3(d), rather than as a credit for time served.

~~5. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).~~

Background: Federal courts generally "have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." *See Setser v. United States*, 566 U.S. 231, 236 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. See *Setser*, 566 U.S. at 236. Exercise of that discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.
To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure **adjustment** under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure **an adjustment** pursuant to §5G1.3(d), rather than as a credit for time served.

5. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of

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B. Explanation of Each Proposed Revision to § 5G1.3.

In response to the Commission's requests for comment, this Comment argues that the departures in Application Note 4(E) to § 5G1.3, § 5K2.23/Note 5 should be retained by incorporating them into the text of § 5G1.3, in revised form. To implement this change, this Comment simplifies those provisions and suggests conforming changes to the rest of § 5G1.3. In sum, these changes put all of the guidance on consecutive and concurrent sentences in one place while also making the provision easier to understand for courts and practitioners. This subsection explains each change in the order in which it appears in our proposed revision to § 5G1.3. However, the underlying motivation for all of the changes is to retain the substance of the two departures.

Title. Section 5G1.3's current title is twenty words long and contains multiple technical terms and sub-clauses. Its complexity creates a barrier for the less-experienced practitioner or judge to determine whether or when the section applies at all. We propose simplifying the title as proposed by the Practitioners Advisory Group over a decade ago.[1] Replacing "an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment" with "Another Term of Imprisonment" retains the same meaning while making § 5G1.3 easier to identify for courts and practitioners.

5G1.3(a). Our three changes to § 5G1.3(a) each make § 5G1.3 more digestible, which allows us to simplify § 5G1.3(b)'s complex terms. First, we add a sentence to § 5G1.3(a) explaining that, where it applies, it always trumps § 5G1.3(b) and § 5G1.3(c). Currently, that trumping mechanism is contained in the latter two subsections. ("If subsection (a) does not apply,"). Moving the trumping mechanism into § 5G1.3(a) itself and revising accordingly leaves its meaning the same. ("Subsections (b) and (c) do not apply where this subsection applies.") But consolidating all of § 5G1.3(a) in one subsection streamlines the operation of

[1] PRACS. ADVISORY GRP, *Response to Request for Comment on Proposed 2013 Amendments and Related Issues* at 17 (Mar. 19, 2013), https://perma.cc/RER6-HZLD.

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§ 5G1.3(a), (b), and (c). That streamlining facilitates the addition of the § 5K2.23/Note 5 departure into § 5G1.3(b) without adding undue complexity.

The remaining two changes are minor. We add headings throughout § 5G1.3 (here, "Consecutive Sentence") to tell the reader what the subsection is about and to highlight the internal structure of § 5G1.3. This change was especially important for § 5G1.3(b) and § 5G1.3(d) in light of their newly added sentence reductions. We then insert similar headings across the rest of § 5G1.3 for internal consistency. Finally, we move § 5G1.3(a)'s key examples of a term of imprisonment to their own sentence. Doing so improves readability by reducing the sentence length and eliminating a parenthetical.

5G1.3(b). We propose incorporating what is now § 5K2.23/Note 5 into § 5G1.3(b)(2). The provisions serve the same purpose: avoiding unfair double-counting. In many ways, § 5K2.23/Note 5 is a quasi-adjustment already—it mimics § 5G1.3(b)'s adjustment in order to avoid arbitrary disparities between individuals who fully served their related state sentence by the time of their federal sentencing (§ 5K2.23/Note 5) and individuals did not (§ 5G1.3(b)).

Placing § 5K2.23/Note 5 into § 5G1.3(b) is a natural structural fit. Section 5K2.23/Note 5's discharged sentence provision is already intricately bound up with § 5G1.3's undischarged sentence provision, § 5G1.3(b). Currently, § 5K2.23 states that a "downward departure may be appropriate" for a discharged sentence if *§ 5G1.3(b)* "would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense."[2] Note 5 authorizes the same departure, cross-referencing § 5K2.23. Section 5K2.23's historical placement as an application note to § 5G1.3 further confirms the interwovenness of the two provisions.[3]

The rest of our proposed revisions to § 5G1.3(b) streamline the provision in light of the addition of what is currently § 5K2.23/Note 5. We split § 5G1.3(b) into two parts: § 5G1.3(b)(1) for the current § 5G1.3(b) and § 5G1.3(b)(2) for the current § 5K2.23. Both provisions continue to require that the other term of imprisonment is related to the conduct underlying the instant sentencing. To streamline the application of the new § 5G1.3(b), we retained that shared requirement at the beginning of the subsection. The distinctive parts of (b)(1) and (b)(2) follow, using language that clarifies their relationship. In light of the new structure, we also simplified the conditions precedent for applying new § 5G1.3(b)(1).[4] For the

[2] U.S.S.G. § 5K2.23. The interwoven relationship between what is now the § 5K2.23/Note 5 departure and the § 5G1.3(b) adjustment appears to be long-standing and undisputed. *See, e.g.*, *United States v. Blackwell*, 49 F.3d 1232, 1241 (7th Cir. 1995) (recognizing parties, Probation, and Sentencing Commission's position that "the rationale underlying § 5G1.3—to avoid double punishment" supported departure).

[3] *See* U.S.S.G. App. C, Amend. 645 (Nov. 1, 2002); *id.* Amend. 660 (Nov. 1, 2003). Notably, the current § 5K2.23 was removed from § 5G1.3 only for the purpose of clarity. *Id.* With the elimination of departures, re-inserting into § 5G1.3 now serves the purpose of clarity.

[4] When the undersigned advises people about this guideline, they constantly confuse this issue.

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same reason, we added headings to each part of § 5G1.3(b) so that a reader skimming § 5G1.3 can quickly identify the provision for which they are looking. Finally, we eliminated the qualification that § 5G1.3(b) only applies if § 5G1.3(a) as unnecessary given our revisions to § 5G1.3(a).

5G1.3(c). We propose adding a heading for clarity and consistency, cutting the qualification about § 5G1.3(a) as unnecessary given our revisions to § 5G1.3(a), and adding "then" to draw the reader's attention to the 'if-then' structure of § 5G1.3(c).

5G1.3(d). We propose revising § 5G1.3(d) to incorporate the departure currently contained Note 4(E) as an adjustment. The Commission should make this change to ensure that § 5G1.3 continues to offer guidance in the broad range of situations courts face when sentencing an individual with another term of imprisonment. Eliminating that guidance risks further confusing an already-complex area of the Guidelines.

Section 5G1.3(d) is a catchall policy statement offering guidance about imposing concurrent, partially concurrent, or consecutive sentences in the broad range of cases that share similarities with the prior three subsections of § 5G1.3, but do not fall within their specific narrow terms. In turn, Note 4(E) in turn acknowledges the propriety of reducing a sentence for time-served in circumstances similar but not identical to the § 5G1.3(b) adjustment and the § 5K2.23/Note 5 departure. Eliminating the Note 4(E) departure from § 5G1.3's carefully structured guidance creates a confusing gap: how do the Guidelines advise a court handle such circumstances? And more fundamentally, what do courts have the power to do in such circumstances? Where it applies, the departure is central to structuring an individual's sentence vis-à-vis time served on another sentence. As the Guidelines explain, Note 4(E) "ensure[s] that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings."[5] As a practical matter, its guidance also helps delimit the scope of § 5G1.3's other provisions without adding additional complexity to their definitions. The special role Note 4(E) plays strongly supports retaining it, albeit in revised form. The revisions in the text do so.[6]

Application Note 1. We suggest deleting what is currently Note 1 to § 5G1.3 because it is unnecessary and confusing. The application of § 5G1.3(a) is fully defined in the text. Note 1's addition of "undischarged" to the terms of § 5G1.3(a) risks unnecessary confusion with § 5G1.3(b), which now turns on whether a prior sentence is "discharged" or "undischarged."

Application Note 2(B). Our proposed revision eliminates the current version of Note 2(B) and substitutes in a new Note 2(B). The new Note 2(B) clarifies one of the most confusing parts of § 5G1.3(b), namely, its reference to Bureau of Prisons (BOP) calculations, and explains

[5] U.S.S.G. § 5G1.3, comment. (n.4(E)).

[6] Our proposed revision is very similar to last year's Defenders Comment. *See* FED. PUB. & CMTY. DEFS., *supra* note **Error! Bookmark not defined.** at 43–44. We make minor changes in implementing the change but agree with their position.

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how they apply differently to subsections (b)(1) and (b)(2).[7] The current § 5G1.3(b) and accompanying application note do not explain why the BOP calculations matter nor the legal provision(s) that governs the BOP's calculations. The proposed new Note corrects those omissions in the context of the revised guideline, cites the relevant statute, and directs the reader to pertinent Supreme Court case law.[8]

At the same time, eliminating the existing Note 2(B) streamlines and clarifies the operation of § 5G1.3(b). As currently structured, Note 2(A) tells readers where § 5G1.3(b) applies. Then, the current version of Note 2(B) repeats similar information in the negative—telling readers where § 5G1.3(b) does *not* apply. The redundancy is confusing, and cutting it offers little meaningful loss of guidance.

Application Notes 2(C), 2(D). The reasons for the remaining miscellaneous changes to Note 2 are straightforward. The current version of Note 2(C) is titled "Imposition of Sentence." However, the Note implements only the adjustment component of § 5G1.3(b) rather all sentencing components. We propose narrowing Note 2(C)'s title to more accurately reflect its specific focus on implementing the adjustment. Given the expanded ambit for § 5G1.3(b) that we propose, narrowing this part of the accompanying note should clarify and streamline 5G1.3's application. In addition, our revision to the text of § 5G1.3(b) required updating Note 2(D)'s cross reference to § 5G1.3(b) and adding "none or" to current Note 2(A), for the purpose of accuracy.

Application Note 4. Our proposed revision refashions the departure in what is currently Note 4(E) to § 5G1.3 as an adjustment in the text of § 5G1.3(d). Accordingly, we deleted the first sentence of current Note 4(E), which states that it is not an adjustment. We also changed each reference to a departure to an adjustment. The reasons for these changes are set out in our notes to § 5G1.3(d).

Application Note 5. The Commission's Simplification Amendment eliminates Note 5 to § 5G1.3. We agree with this change provided that the guidance is retained, as it is in our proposed addition of § 5G1.3(b)(2).

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[7] *See e.g.*, *United States v. Kieffer*, 596 F. App'x 653, 655–59 (10th Cir. 2014) (unpublished) (describing district court's multiple attempts to effectuate judgment vis-à-vis state sentence, in light of BOP sentence calculation); *United States v. Wilder*, 125 F. App'x 740, 742–43 (7th Cir. 2005) (remanding for resentencing after district court and parties miscalculated time credited for state sentence under § 5G1.3(b)).

[8] The first paragraph of our proposed new Note 2(B) may be best described as "background information." Simplification Amendment at 63 (Issue for Comment 4). We think this background information should be added in an attempt to limit confusion about BOP credit for time served under the existing § 5G1.3(b), and even more so under our revised version of § 5G1.3(b).

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July 18, 2025

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: Comment on Proposed Priorities for the Commission – 25-26 Cycle

Dear Judge Reeves:

We are writing to renew a suggestion for research to the United States Sentencing Commission, a version of which we also submitted last year.[1]

Our suggestion relates to the Commission's purpose to "establish sentencing policies and practices for the Federal criminal justice system" that (a) assure the purposes of sentencing, as set forth in 18 U.S.C. § 3553(a)(2) and (b) "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A) & (C).

Specifically, our proposal is that the Commission study the criminal and penal systems of some foreign countries with low incarceration rates to identify strategies and practices that could be adapted to reduce incarceration and improve justice outcomes in the United States. This recommendation is especially timely in light of the severe challenges the BOP currently faces in terms of over-crowding, under-staffing and strained resources, which will only deteriorate further given the BOP's multibillion-dollar infrastructure backlog and its ongoing struggles to recruit and retain adequate corrections, healthcare, mental health, and rehabilitative staff.[2]

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[1] This letter expresses the personal views of the authors, not the official views of the University of Minnesota.

[2] *See, e.g.*, Michael R. Sisak, *Cash-Strapped Bureau of Prisons Freezes Some Hiring to 'Avoid More Extreme Measures,' Director Says*, AP NEWS (May 8, 2025); *DOJ OIG Releases 2024 Report on the Top*

Over the past three years, our clinic visited Norway, the Netherlands and the United Kingdom to study their criminal and penal justice systems. Our focus was both the mechanisms they use to keep their incarceration rates low as well as the policies and practices that keep recidivism rates low as well. While there are obvious differences between the United States and these European countries – not least, the amount of money spent on their prison systems, their robust social welfare systems, their relatively homogenous cultures, their low crime rates and low violent crime rates, and their strong gun regulations – there are nonetheless aspects of the criminal and penal systems we visited that we believe provide useful insights and guidance for the American system of criminal justice in general, and the Commission's work in particular to fulfill the goals of sentencing.

Below, we highlight six such aspects.

1. Sentence Length and Recidivism

Our clinic's work comparing sentencing length and recidivism rates between the United States federal system European carceral systems reinforces many researchers' calls for the Commission to continue scrutinizing this issue.

Norway, the Netherlands and the U.K. not only have very low incarceration rates (55,[3] 64[4] and 141[5] per 100,000, respectively, as compared to the U.S. rate of 541[6] per 100,000), the sentences they impose are considerably shorter than those imposed in the United States. The average length of a prison sentence in Norway of all crimes and sentences handed out between 2018-2020 is just *seven months*.[7] The average sentence in the Netherlands is *four months*.[8]

The short sentences in these countries correlate with significantly reduced recidivism rates. In 2020 in Norway, only 16% of offenders who had been released from prison in the past 2 years were reconvicted for a new crime.[9] By contrast, in the US, the average length of the sentence imposed on inmates who were serving time in federal prison as of March 2025 was 152 months.[10] A study conducted by the US Bureau of Justice Statistics found that 44% of inmates that were released in 2010 were rearrested within one year, and 68% were rearrested within 3 years.[11] It would be inappropriate to

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Management and Performance Challenges Facing the Department of Justice, U.S. DEP'T OF JUST OFF. OF THE INSPECTOR GEN. (Nov. 25, 2024); *Durbin Urges OPM to Approve Special Pay Rate for BOP Employees to Address Critical Staffing Shortages at BOP Facilities Nationwide*, DICK DURBIN: U.S. SENATOR FOR ILL. (Jan. 14, 2025).

[3] *Norway*, WORLD PRISON BRIEF.

[4] *The Netherlands*, WORLD PRISON BRIEF.

[5] *The U.K. (England and Wales)*, WORLD PRISON BRIEF.

[6] *United States of America*, WORLD PRISON BRIEF.

[7] *Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018-2022* ("Correctional Statistics").

[8] *Netherlands*, PRISON INSIDER (last updated 2024).

[9] *Correctional Statistics, supra* note 7.

[10] *Quickfacts - Individuals in the Federal Bureau of Prisons*, U.S. SENT'G COMM'N (Mar. 2025).

[11] Mariel Alper et al., *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*, BUREAU OF JUST. STAT. (May 2018).

assert a direct causal connection between Norway's sentencing and recidivism rates as there are many socioeconomic and cultural factors that likely also affect the recidivism rates in Norway. Nonetheless, these numbers suggest that at the very least that it is very possible to reduce recidivism rates without imposing excessively long and punitive sentences.

On the other hand, longer prison sentences exacerbate recidivism risks by increasing the pressure on rehabilitation services. Substantial growth in the average length of UK prison sentences since 1993, spurred by the introduction of new offenses and heightened penalties for existing offenses, led to a dramatic and unsustainable increase in the prison population.[12] Overcrowding strained carceral health services, living conditions, building infrastructure, hygiene, staff-prisoner relationships, work programs, education, skills training.[13] Prisons failed to provide even basic reentry services, leaving newly released prisoners without resettlement plans, secure housing, or family contacts.[14]

Approaching an overcrowding crisis in summer 2024, the UK government reduced the proportion of a sentence that must be served in prison from 50% to 40%.[15] Reducing prison time decreased the prison population with such success that the UK now plans to further lower the release point.[16] An independent sentencing review in May 2025 recommended that prisoners be released after serving a third of their sentences if they comply with institutional rules.[17] The review further urged UK lawmakers to reduce prison sentences, noting that deferred sentences and community sentences are more successful in reducing recidivism.[18]

These comparative examples indicate that the Commission's recent findings on the issue of sentence length and recidivism should be treated with skepticism, as many other researchers have suggested. The United States Sentencing Commission's 2022 report, suggesting that a prison sentence of least 60 months is correlated with lower recidivism rates,[19] has garnered criticism from other scholars for failing to control for significant variables such as rehabilitative carceral programing, treating arrests as sufficient for a reoffence, and lack of transparency.[20] Additionally, other research suggests that the drop in recidivism is not caused by the longer sentence in and of itself but is attributable to the offender's old age upon release.[21] Furthermore, the report is an

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[12] *Independent Sentencing Review 2024–25*, GOV.UK 143 (May 22, 2025).
[13] *Annual Report 2023–24*, HM CHIEF INSPECTOR OF PRISONS FOR ENG. & WALES 23–36 (Sept. 10, 2024); *see also Better Prisons: Less Crime*, HOUSE OF LORDS: JUST. & HOME AFFS. COMM. 82–84 (July 16, 2025).
[14] *Annual Report 2023–24*, *supra* note 13, at 38–40.
[15] *Lord Chancellor Sets Out Immediate Action to Defuse Ticking Prison 'Time-Bomb,'* GOV.UK (July 12, 2024) (excluding sentences for serious violent offenses of 4 or more years, sex offenses, and domestic abuse).
[16] Jennifer McKiernan & Ashitha Nagesh, *Prisoners to be Eligible for Release After Serving a Third of Sentence*, BBC (May 22, 2025).
[17] *Independent Sentencing Review 2024–25*, *supra* note 12, at 55.
[18] *Id.* at 21.
[19] *Length of Incarceration and Recidivism*, U.S SENT'G COMM'N 4 (June 21, 2022).
[20] Tina M. Woehr & Allison L. Bruning, *Limitations of the Commission's "Length of Incarceration and Recidivism" Report (2022)*, 35 FED. SENT. R. 43, 43–44 (2022).
[21] Daniel S. Nagin, Francis T. Cullen, & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME J. 115, 136–37 (2009).

outlier amongst many other studies suggesting that longer sentences, at best, have no effect on recidivism or, at worst, contribute to recidivism.[22] The Norwegian, Dutch and U.K. systems add to these many reasons to approach the Commission's recent report with circumspection and offer actual examples of shorter sentences contributing to lower recidivism rates.

2. The Normality Principle

The most salient feature of the Norwegian and Dutch prisons is "the normality principle." As the Norwegian prison service describes it:

> The punishment is the restriction of liberty; no other rights have been removed by the sentencing court. Therefore, the sentenced offender has all the same rights as all other who live in Norway. No-one shall serve their sentence under stricter circumstances than necessary for the security in the community. Therefore, offenders shall be placed in the lowest possible security regime.
>
> During the serving of a sentence, life inside will resemble life outside as much as possible.[23]

Thus, the *only* right that shall be taken away from inmates is their right to freedom of movement.[24] In practice, as we observed, this means allowing prisoners to live in safe, clean, pleasant and enriching environments. In Norway's Halden prison, for example, inmates are allowed to purchase their own fresh food from a normal-seeming grocery store within the prison. They have fridges in their cells so that they are not limited to purchasing highly processed and unhealthy food. Furthermore, there is a house located within Halden's walls where prisoners can stay overnight with their families (if they have children) so that the children are shielded from the prison environment and to maintain parent-child relationships that feel as normal as possible. Additionally, prisoners take turns making dinners for their cohort, using sharp knives, setting the table, doing dishes, etc., much like free people would ordinarily do with their family, friends, or roommates. Prisoners and correctional officers even sit down to eat their meals and socialize together each day.

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[22] Kevin L. Nunes et al., *Incarceration and Recidivism Among Sexual Offenders*, 31 LAW & HUM. BEHAVIOR 305, 314 (2007) ("Consistent with meta-analyses on both sexual . . . and general offenders . . . our results are most in line with the notion that incarceration has little, if any, impact on recidivism . . . . In contrast, there is evidence that recent treatment programs for sexual offenders are effective at reducing sexual recidivism[.]"); Rodger Przybylski et al., *The Impact of Long Sentences on Public Safety: A Complex Relationship*, 36 FED. SENT. R. 81, 81 (2023) ("[T]he weight of the evidence indicates that long sentences have either no effect on recidivism or slightly increase recidivism when compared to shorter sentences."); *see also* Michelle R. Suskauer, *A Hard Look at Our Criminal Justice System*, 93 FLA. BAR J. 4, 6 (2019) (describing the success of Florida's specialty courts and diversion programs for juvenile offenders in reducing recidivism rates).

[23] About the Norwegian Correctional Service, KRIMINALOMSORGEN [NORWEGIAN CORR. SERV.] (commas added).

[24] *Id.*

Maintaining a sense of normalcy, self-respect, dignity, and shared humanity plays a role in helping prisoners reintegrate into society successfully. The way Norwegians and the Dutch see it, these prisoners will one day be their neighbors again, and therefore it is in everyone's best interest that they are allowed to maintain normalcy as much as possible behind bars. While some of the features of these European prisons may be expensive to implement (the low staff to inmate ratio, for example), others—such as increased informal interactions between correctional officers and prisoners—could be implemented in the U.S. federal prison system at a manageable cost.[25]

3. Democratic Therapeutic Community

A therapeutic community approach to incarceration, such as the model adopted at HM Prison Grendon in Buckinghamshire, England, could alleviate the United States' persistently high recidivism rates and unsafe prison conditions – even where these problems concern violent offenders.

Grendon operates as a therapeutic community where residents are required to participate in three days of group therapy and two days of individual therapy each week.[26] Prison staff undergo additional training to participate in and help facilitate these sessions. The program is open to all offenders, regardless of the violent or sexual nature of their offense, with two years or more of their sentence remaining. In fact, a disproportionate number of residents housed at Grendon are violent offenders compared to the United Kingdom's prison population at large.[27]

This approach has a remarkable impact on participant recidivism and conditions inside Grendon itself. Residents who complete at least 18 months of programming reoffend at a ten percent lower rate compared to offenders released from typical prisons.[28] Grendon is also an exceptionally safe facility, despite its concentration of serious offenders.[29] Researchers see this as a product of the therapeutic model in its fostering of respectful, communicative, and trusting relationships between residents and staff.[30]

These accomplishments at Grendon encourage expanding the United States' existing therapeutic programs in federal prisons. The Residential Drug Abuse Program, an addiction-focused therapeutic community program operating in 53 federal prisons, sees similar success in reducing recidivism rates of participants.[31] Grendon's example ought to encourage broadening this program's scope to make participation in a therapeutic community available to offenders of all types.

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[25] *See generally* Jordan M. Hyatt et al., *We Can Actually Do This: Adapting Scandinavian Correctional Culture in Pennsylvania*, 58 AM. CRIM. L. REV. 1715 (2021).
[26] Information not otherwise cited comes from the Clemency Project Clinic's conversations with Grendon staff and residents in March of 2024.
[27] GRENDON AND THE EMERGENCE OF FORENSIC THERAPEUTIC COMMUNITIES: DEVELOPMENTS IN RESEARCH AND PRACTICE (Richard Shuker & Elizabeth Sullivan eds., 2010).
[28] Rowena Davies, *Grendon Prison: A Model for Therapeutic Care*, COMMUNITY CARE (Aug. 22, 2008).
[29] *Grendon Prison Judged 'Very Safe' by Inspectors*, BBC (Jan. 30, 2014).
[30] *See, e.g.*, GRENDON AND THE EMERGENCE OF FORENSIC THERAPEUTIC COMMUNITIES, *supra* note 27.
[31] *Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010*, U.S. SENT'G COMM'N (May 17, 2022).

4. Restorative Justice

In Norway and the Netherlands, the prison systems follow a restorative justice model, that emphasizes rehabilitation over punishment.[32] Most notably, in the Netherlands, there is a pre-adjudication restorative justice program.

During the 2010s,[33] the Netherlands introduced a pilot program that established a criminal mediation program, which is a form of presentencing victim-offender dialogue.[34] The program was implemented in full in 2018. Every Dutch court now has a mediation bureau that facilitates the process.[35] The goal of criminal mediation is to remedy the emotional and other damages that occurred as a result of the offense.[36] Cases are prescreened by mediators to determine whether criminal mediation is appropriate.

The criminal mediation takes place with two mediators in a comfortable and safe setting. The victim and offender both complete an individual intake before the mediators decide if/when it is appropriate to move forward to a joint session. The hope for the joint session is that it will end an "agreement" between the victim and offender, which may include how to avoid future interactions and what to do if the parties come across one another. For example, if the parties use the same grocery store in the same neighborhood, the offender might agree to do their shopping at a different grocery store to minimize potential future contact. Mediation does not replace prosecution of the offender. At the offender's sentencing, the judge will consider whether the offender participated in the mediation process and the outcome of the mediation, along with other sentencing factors.

In the United States, victim offender dialogue typically takes place after sentencing and potentially years after the fact. For example, in Minnesota there are extremely low numbers of restorative justice conversations or communications taking place at all.[37] Criminal mediation before sentencing allows healing to take place early for the victim. Of course, not every case is appropriate for mediation and the mediators should screen those cases out beforehand. But overall, presentencing criminal mediation can provide huge benefits for both parties.[38]

5. Female Offenders

The Commission's recent "Quick Facts" on federally-sentenced women reveals some startling statistics: women make up one eighth of the federally-sentenced population and 80% are sentenced to prison, receiving an average sentence of *33 months*, even though 69% are in Criminal History Category I (i.e. little or no prior criminal

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[32] *See What We Can Learn from Norway's Prison System: Rehabilitation & Recidivism*, FIRST STEP ALL. (Jan. 2022); *Sentencing and Prison Practices in Germany and the Netherlands*, VERA INST. OF JUST. (Oct. 2013).
[33] Information not otherwise cited comes from the Clemency Project Clinic's conversation with a Dutch criminal mediator in March of 2024.
[34] Jolien Stoffels, *Victim-Offender Mediation in the Netherlands*, TILBURG UNIV. (June 14, 2020).
[35] *Mediation Alongside Legal Proceedings*, RECHTSPRAAK.
[36] *Id.*
[37] *Performance Report 2023*, MINN. DEP'T OF CORR. 26, 29 (reporting that in 2023 only six apology letters were actually delivered to victims and one victim-offender dialogue conversation took place).
[38] *See generally* Stoffels, *supra* note 34.

history).[39] Certain European incarceration practices reduce gender disparities in both sentencing and the collateral consequences of incarceration. As the rate of female incarceration in the U.S. continues to skyrocket, including at the federal level, these already overlooked disparities will only grow more dire.

As a preliminary matter, we believe that researchers should be vigilant when considering how the Federal Sentencing Guidelines affect women and reject the oversimplified conclusion that women benefit from gender disparities in federal sentencing. It is generally true that women are prosecuted at lower rates and receive shorter federal sentences than men for the same offenses.[40] However, this does not mean that the Sentencing Guidelines betray some indelible gender bias favoring women. Rather, this is a reflection of how many gender-neutral considerations that encourage judges to issue lesser sentences are more circumstantially consistent with patterns of female criminal behavior in the United States.[41] For example, women are more likely to have lower criminal history scores, a non-principal or coerced role in the offense, or relevant familial circumstances compared to their male counterparts—all of which the Guidelines permit factoring into one's sentence.[42] Accordingly, the Commission must be wary of uncritical claims of gender bias in federal sentencing seemingly desirous of nothing more than harsher sentences for women. If anything, the Commission ought to consider how the heat-of-passion and self-defense excuses contribute to *greater* sentences for women convicted of domestic violence.[43]

Turning to our clinic's comparative legal work, we propose that the Sentencing Commission explore how alternatives to custodial sentences may mitigate the disparate collateral consequences of conviction that befall women and their families. Fifty-eight percent of women in U.S. state and federal prisons are mothers.[44] While the incarceration of either parent exposes their child to a six-times-greater chance of criminal involvement, trauma-based antisocial behavior, lower educational attainment, and economic detriment, all of these impacts are exacerbated when the parent incarcerated is the child's primary caregiver.[45] Predictably, surveys demonstrate that most incarcerated mothers were their child's primary caregiver, whereas most incarcerated fathers were not.[46] Finally, the societal stigma children face for having an incarcerated parent is exacerbated when that parent is their mother.[47] As such, the execution of custodial sentences for women results in a unique and disparate set of collateral consequences deleterious to entire families.

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[39] *Quick Facts – Federally Sentenced Women,* U.S. SENT'G COMM'N (Mar. 2025).
[40] Margareth Etienne, *Sentencing Women*, 14 J. GENDER RACE & JUST. 73, 73 (2010).
[41] *Id.* at 81–82; Nancy Gertner, *Women and Sentencing*, 57 AM. CRIM. L. REV. 1401 (2020).
[42] Gertner, *supra* note 41, at 1408–10.
[43] *See generally* Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447 (2005).
[44] Wendy Sawyer & Wanda Bertram, *Prisons and Jails Will Separate Millions of Mothers from Their Children in 2022*, PRISON POL'Y INST. (May 4, 2022).
[45] Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NATL' INST. JUST. 2-4 (May 2017).
[46] Dona Playton, *The High Cost of Incarceration*, 21 CONN. PUB. INT. L.J. 45, 56 (2021) (in a survey of state prisons, 88% of incarcerated fathers but only 37% of incarcerated mothers reported the other parent was the primary caregiver).
[47] Keva. M. Miller, *The Impact of Paternal Incarceration on Children*, 23 CHILD & ADOLESCENT SOC. WORK J. 472, 477 (2006).

Our clinic's exposure to the Dutch penal system's application of restorative justice solutions to avoid imposing such collateral consequences on mothers and their families may be informative to the Commission in considering this issue. As noted above, the Dutch maintain a robust practice of criminal mediation where offenders and affected parties can air their conflict and contract to a mutually agreed-upon punishment. As applied to mother-offenders, such agreements often function to keep them in their communities and with their children, albeit under a set of behavioral guidelines to ensure the comfort and privacy of the affected party. For example, the parties may agree that the offender must enroll their children at a different school than those of the affected party so the latter does not have to worry about running into the former on school grounds. While a pilot criminal mediation program may be outside of the Overton window, the underlying principles of finding creative solutions that keep mothers in their childrens' lives and empowering crime victims in sentencing decisions ought to guide the Commission.

The Dutch also have a unique program whereby mothers can be incarcerated with children aged up to five years old.[48] We visited one such prison (Ter Peel), where the mother-child section resembled a suburban home. Given the average sentence in the Netherlands is about three months, the children do not experience the prison environment for a long period.

Additionally, the Commission should consider how changes to drug sentencing may also reduce the collateral consequences of imprisoning mothers, again using the Netherlands as a rough guide. Recent research suggests that drug convictions disproportionately affect mothers, as they are more likely to commit drug- or property-based "crimes of survival" to support their families.[49] While the Netherlands' decriminalization of certain narcotics has meant a reduction in the mothers incarcerated for such crimes, such changes seem unlikely in the United States in the medium-term—and beyond the scope of the Commission's mission and advocacy focus, in any event. More relevant to its work may be a reconsideration of how parenthood might factor into presumptive commitments for federal drug offenders.

6. Sparing and Non-Punitive Use of Solitary Confinement

The United States is an exceptionalist in Western democracies in its use of solitary confinement.[50] The federal system utilizes this form of confinement excessively too.[51] In Norway, however, solitary confinement is used far less frequently and, critically, not as a punitive measure.[52] Norway's Execution of Sentences Act allows for the use of solitary confinement only to "a. prevent inmates from continuing to influence

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[48] Peter Tak, *Women in Prison in the Netherlands*, *in* WOMEN IN PRISON: THE BANGKOK RULES AND BEYOND (Piet Hein van Kempen & Maartje Krabbe eds., 2018).
[49] *See* Torrey McConnell, Note, *The War on Women: The Collateral Consequences of Female Incarceration*, 21 LEWIS & CLARK L. REV. 493, 496 (2017); Niki Monazzam & Kristen M. Budd, *Incarcerated Women and Girls*, SENT'G PROJ. (Apr. 3, 2023).
[50] *See* Erik Ortiz, *New Report Reveals Over 122K Are Held in Solitary Confinement in U.S. Prisons and Jails*, NBC NEWS (May 23, 2023).
[51] *See Federal Prisons Haven't Addressed Longstanding Concerns About Overuse of Solitary Confinement*, GOV'T ACCOUNTABILITY OFF. (Feb. 6, 2023).
[52] Gabriella Wannall, *Re-Evaluating Solitary Confinement*, UNIV. TEX. PERMIAN BASIN (Oct. 17, 2020).

the prison environment in a particularly negative manner, b. prevent inmates from injuring themselves or acting violently or threatening others, c. prevent considerable material damage, d. prevent criminal acts, or e. maintain peace, order and security."[53] The correctional facilities in Norway must not keep prisoners in solitary confinement longer than is necessary to de-escalate a situation or prevent harm, and they must re-evaluate regularly whether it remains necessary.[54] We were told that the average length of time a prisoner is confined in solitary detention in Norway is under a day.[55]

Norway's use of isolation is not completely free of criticism. Prisoners in many of the Norwegian prisons remain locked in their individual cells for more than 16 hours a day, primarily due to lack of adequate staffing.[56] Nonetheless, compared to the U.S., Norway's use of solitary confinement is short-lived, relatively rare and accompanied by extensive mental health intervention, and does not involve the same lengthy solitary confinement periods of months, years, or even indefinite length that are sometimes given here in the U.S.[57]

***

In sum, there is much to be learned and absorbed about the European approach to criminal and penal justice, which can inform the Commission's work and mandate to ensure criminal justice and penal policies comply with the purposes of sentencing.

Thank you again for the opportunity to submit this comment and please do not hesitate to contact the undersigned for additional information.

Respectfully submitted,



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[53] *See* *The Execution of Sentences Act*, LOVDATA (last updated July 1, 2025).
[54] *Id.*
[55] *See also* Cyrus Ahalt & Brie Williams, *Reforming Solitary-Confinement Policy—Heeding a Presidential Call to Action*, 374 NEW ENG. J. MED. 1704 (2016).
[56] *See* *Special Report on Solitary Confinement in Norwegian Prisons*, SIVILOMBUDET [PARLIAMENTARY OMBUDSMAN] (2019).
[57] *Compare* Sven-Erik Skotte & Hilgunn Olsen, *Solitary Confinement in Norway*, MAPPING SOLITARY CONFINEMENT (2022), *with* Andreea Matei, *Solitary Confinement in US Prisons*, URB. INST. (August 2022).
[58] Myah Grimm ('25), Amy Cohen ('24), Bethany Jewison ('24) and Anna Mitchell ('24) assisted in drafting a previous version of this letter.

Reconsidering Sentencing Options Through the Risk-Need-Responsivity Framework: A Commentary to the U.S. Sentencing Commission

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Michael T. Baglivio, Ph.D. – Analytic Initiatives LLC.

Introduction

The U.S. Sentencing Commission's request for comments related to alternative sentencing options, including graduated conditions and community-based alternatives, is a welcome opportunity to realign federal sentencing with contemporary evidence-based principles. This commentary recommends expanding and restructuring sentencing practices using the Risk-Need-Responsivity (RNR) framework. Grounded in empirical support, the RNR model offers an adaptable structure for tailoring sanctions and supervision strategies to individuals' assessed risk levels, criminogenic needs, and responsivity factors. Proper implementation has been shown to increase public safety, reduce recidivism, and promote rehabilitation (Andrews & Bonta, 2010; Fazel et al., 2024).

Grounding Sentencing in the Risk-Need-Responsivity Framework

The RNR model posits three guiding principles:

- *Risk*: The intensity of supervision and intervention should match the individual's risk of reoffending.
- *Need*: Interventions should target criminogenic needs such as antisocial cognition, substance abuse, and employment instability.
- *Responsivity*: Services should be tailored to the individual's cognitive, emotional, and cultural characteristics to maximize effectiveness (Bonta & Andrews, 2007; Polaschek, 2012).

Research has shown that mismatched supervision levels, particularly the over-supervision of low-risk defendants, can inadvertently increase recidivism and ultimately undermine public safety (Lowenkamp & Latessa, 2004; Viglione et al., 2025). Conversely, failure to adequately intervene with high-risk individuals can leave risks unmitigated, resulting in increased likelihood of reoffending. These insights underscore the need for federal sentencing policy to embed valid risk and need assessment and critically evaluate the utility of each mandated condition as well as tailoring requirements to reduce counterproductive effects (Taxman & Smith, 2021).

Moving Beyond Incarceration: Alternatives That Work

A broad literature base demonstrates that incarceration, especially short-term custodial sentences, is less effective at reducing reoffending compared to structured community sanctions (Villettaz et al., 2015; Petrich et al., 2021). Effective alternatives are available:

- Community-based sanctions, including suspended sentences and supervised release with treatment conditions, have been found to reduce recidivism more effectively than incarceration (Gainey, Steen, & Engen, 2005).
- Structured decision-making tools, like Florida's Disposition Matrix, match sentencing options to risk and need, resulting in reduced recidivism (Baglivio, Greenwald, & Russell, 2015; Lehmann, Meldrum, & Greenwald, 2020).
- Graduated sanctions, proportionate responses that escalate or de-escalate based on compliance, promote both accountability and rehabilitation (D'Amato et al., 2021).

- Protocols and oversight to ensure the least restrictive alternative (not previously attempted with a given defendant) is prioritized, prior to escalating sanctions based on defendant non-responsiveness/continued offending.

Addressing Heterogeneity and Promoting Equity

Federal sentencing must also account for individual differences that affect risk and responsivity:

- Emerging adults (ages 18–25) benefit more from developmentally appropriate and rehabilitative interventions due to ongoing brain development and heightened neuroplasticity (Du & Kurlychek, 2025).
- Women and racial/ethnic minorities may experience disproportionate harms from incarceration and may respond differently to interventions; thus, sex-responsive and culturally competent programming is vital (Brusman-Lovins et al., 2007; Fazel et al., 2024).
- Despite demonstrated benefits, federal ATI programs currently serve only a small fraction of eligible defendants, with participation disproportionately skewed by sex and race highlighting the need for scalable alternatives to incarceration (Wolff et al., 2024).

Recommendations

To modernize federal sentencing in line with the RNR framework, the Commission should support efforts to:

1. Institutionalize Structured Decision-Making Tools: Promote validated risk/need assessments to guide sentencing decisions and conditions of supervision (Bonta & Andrews, 2007). These tools should go beyond the PTRA and PCRA currently used to assess risk in order to identify dynamic needs and promote effective case planning and service matching.
2. Embrace Evidence-Based Alternatives to Incarceration and Problem-Solving Courts: Encourage jurisdictions to implement proven models such as drug courts, mental health courts, and other diversionary programs that reflect the principles of proportionality, rehabilitation, and targeted intervention (Wolff et al., 2024).
3. Incorporate Graduated Responses: Support models that adjust supervision and treatment in response to behavior, promoting adaptive compliance and reducing reliance on revocation (D'Amato et al., 2021).
4. Promote Equity and Responsivity: Encourage programs and policy guidance that reflect individual responsivity factors such as age, trauma exposure, and cognitive functioning (Polaschek, 2012; Mikolajewski et al., 2021).
5. Support Ongoing Evaluation: Require districts to evaluate the implementation and impact of alternative sentencing programs using transparent data collection and performance metrics (Taxman & Smith, 2021).

Conclusion

By embedding the RNR framework into federal sentencing policy, the Commission can enhance public safety, promote fairness, and reduce unnecessary and costly incarceration. A risk-informed, need-responsive, and equity-conscious approach is not only supported by empirical evidence but also aligns with broader criminal justice reform goals. The expanded use of ATI programs and increased tailoring of conditions is likely to improve client outcomes without sacrificing public safety.

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Public Comment - Proposed 2025-2026 Priorities

Submitter:

Anthony Blackman, Minister

Topics:

1. Sentencing Options (Chapter Five)

Comments:

I'm a concerned citizen and brother of an inmate in federal prison for a gun charge. Using his state priors to enhance federal sentencing is unethical and double jeopardy. Thank you

Submitted on: July 17, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

David Carver, Presbyterian Church (USA)

Topics:

1. Sentencing Options (Chapter Five)

4. Career Offender

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

6. Simplification (Grouping Rules, Criminal History, §5G1.3 & Others)

7. Federal Bureau of Prisons Issues

10. Miscellaneous

Comments:

I share these thoughts in support of the lived experience of families whose loved ones are in the Federal System.

The following reflect my thoughts concerning several of the items being addressed in the U.S. Sentencing Commission's review of BAC2210-40. I am writing from the perspective of having a loved one currently serving out his sentence in Federal Custody. I want to start by expressing my appreciation that this Sentencing Commission is taking time to evaluate the ways in which current sentencing practices address the DOJ/BOP objectives for incarceration - Public Safety/Containment, Punishment, Rehabilitation, and Deterrence.

Comments on Rehabilitation:

The objectives of Containment and Punishment seem to be profoundly over-emphasized in our current incarceration system. These two objectives are shown most clearly in the extremely long sentences given to too many federal inmates, especially in comparison to state sentences for similar offenses.

Looking past Containment and Punishment, the objective of Rehabilitation is systematically under-resourced and not a priority. The fact that most rehabilitative programs are withheld until near the end of a sentence demonstrates the low priority of rehabilitation. In addition,

psychological services offered to inmates are avoided because of fear that anything shared with institutional professionals can and will be used to the inmate's detriment. Rehabilitation programs need to be resourced and offered at the beginning of one's incarceration.

While incarnated, most inmates experience a severe lack of caring social contact with the outside world. Extremely limited phone time, infrequent in-person visits, and geographical distance from family and community create unsustainable strain on the inmate, their family and their community connections. Plenty of phone time, frequent in-person visits, and geographical closeness to family and community are essential to true rehabilitation.

Studies show that incarceration often causes severe financial hardship for families, who are frequently unable to support their loved ones while they are in prison. When institutions offer inmates only extremely low wage jobs, the basic needs of both inmates and their families remain unmet. By depriving inmates opportunities to achieve any level of economic stability during their lengthy sentences, the institution contributes to significant financial hardships and increases the inmate's and their family's vulnerability in society. Moreover, the combination of low-calorie meals and overpriced, unhealthy commissary food leaves prisoners undernourished and unhealthy when they are released.

Adult continuing education programs offered to inmates are woefully inadequate and standards of curriculum and effective classroom learning are lacking. Making the most of these classes as a focused rehabilitative effort would have significant potential to prepare inmates for reintegration in the outside world.

All of these issues I've addressed could be ameliorated by decreasing time in prison and instead, substituting longer sentences of home confinement and halfway house placements. These alternatives give more time to reconnecting inmates to productive and rehabilitative vocations, positive social networks, and family ties. There would also be greater opportunity for regulation and monitoring of rehabilitation programs to ensure that the education being offered is meeting standards that genuinely prepare the inmate for success and independence once out of custody. This also serves as a much more economical system to address the DOJ/BOP objectives.

Comments on "Career Criminal" Sentencing Enhancement:

I believe the "Career Criminal" enhancement should be limited to those who have made an actual career of their crime, lasting more than a year, and constituting a commitment to or habit of a continued enterprise of crime, as the word "career" suggests. I know of someone who had no prior convictions, engaged in criminal activity for 3 months and never again afterwards for the 8 years prior to arrest - and this "Career Criminal" enhancement was used to add an additional 6 years onto his sentence. This enhancement needs to be reviewed in full so that it is applied only when habitual criminal behavior is sustained over a long period of time and not applied in cases

where criminal behavior persisted for a few short months.

Comments on "Good Time" Considerations:

I have several insights on how best to apply to "Good Time" to promote rehabilitation for release. I believe Good Time should be doubled or otherwise dramatically increased for inmates with a perfect record while incarcerated. Not getting ANY marks for bad behavior in prison - having a stellar record - is incredibly hard to achieve, and suggests an exceptionally self-controlled inmate, one who, in my opinion, will very likely not be a public threat upon their release.

This suggested application of Good Time for a perfect prison record would be a huge incentive for quick rehabilitation for addicts, likely motivating changes much earlier into their sentence. Currently inmates don't go to drug, alcohol, or sex addiction programming until the end of their sentence, so they may sit in prison for years nursing an addiction post arrest, further entrenching themselves in the behavior that got them in prison. The possibility that a perfect record could get an inmate out sooner would motivate a lot of people to begin making personal changes and better choices immediately. It would also help identify inmates who have conducted themselves in a way that demonstrates that confinement is minimally effective for their rehabilitation.

Sentences can be "enhanced" based on predetermined indicators that add severity in one's crime. It seems reasonable, then, to also provide deductions for sentencing based upon those behaviors society wants to encourage. If somebody has, for example, a history of volunteering, financial donations, paying taxes on time, participating in community development and social service - these factors could serve as deduction indicators of pro-social behavior and being a benefit to society. I ask this commission to take into consideration a judgement of good behavior/public service prior to arrest or crime as a more complete assessment of a person's capacity to be a positive and constructive member of society. I propose that "Good Time" could have a broader application that helps meet the overarching objectives of the system - not only to punish but also to recognize and encourage rehabilitation, civic responsibility, and social reintegration.

Comments on Prior Criminal History:

Regarding how sentencing guidelines should consider prior criminal history, I want to highlight that the current model is used more truly as a "first strike - you are out" - which mutes the legitimacy that sentencing guidelines themselves serve as a deterrent. I ask this commission to consider that a broader deduction should be offered for first time offenders. First time offenders don't usually have any first-hand knowledge of the laws they are violating and punishment that would result until they are arrested, sentenced, and incarcerated.

A first offense should incur much lower sentences, while re-offense guidelines could produce much longer sentences, and a third offense could be more drastic still. This would bring some coherence to the intention of deterrence because offenders would become aware of the consequences of re-offense in the way they typically are not when it comes to a first offense. Similarly, simple parole violations currently incur very short sentences compared to the initial offense, while secondary parole offenses do indeed produce longer sentences. I think parole violations related directly to the original crime could be taken more seriously, if needed, to balance a drastic reduction of initial sentences. With this model, there is a very clear message of deterrence meant to deter career criminals.

Thank you so much for considering my comments. I ask that these suggestions be applied retroactively for those already serving out their sentences. These insights come from my lived experience with a loved one in Federal Custody.

Submitted on: July 17, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Hollisha Hale, American Intercontinental University / Criminal Justice

Topics:

3. Theft, Property Destruction, and Fraud (§2B1.1)

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

8. Legislation

Comments:

Regarding the issues with "Adjustments for good Behavior", this revision can be made by reviewing Fiduciary Cases within nonprofit organizations representing clients with state or government funding, to be able to account for the client and present them in court for a case status update every 3-5 years at least. This will ensure that the clients have not passed, been neglected, or any assets fraud underlying or suspected.

Regarding theft, intellectual property has increased with inflation as other goods. This means sentencing should be stricter or weighed equally w/ relevant implementation of AI training for officiates regarding cybersecurity.

Adopt new guidelines to promote medical records oversight through Legislation. Medical ID theft and tampering is at an all time high, due to human smuggling and deportation. DA

Submitted on: June 17, 2025

July 17, 2025

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 Priority Regarding Sentencing Options

Dear Judge Reeves, Vice Chairs, and Commissioners,

As a lawyer, social scientist, and statistician who has spent decades researching the federal sentencing system, I write to offer observations and suggestions aimed at supporting the Commission's ongoing work. My perspective is informed by experience across multiple facets of the justice system: former time serving as a police officer, corrections officer, and judicial law clerk (for Judge Sam Johnson) on the U.S. Court of Appeals for the Fifth Circuit. An American citizen educated in the United States, I am now an academic based in England, where my research focuses on comparative sentencing practices and evidence-based criminal justice policy. Having witnessed the profound human and institutional impacts of sentencing decisions from the vantage points of enforcement, adjudication, and scholarship, I am motivated to contribute ideas that may help advance consistency, proportionality, and effectiveness in federal sentencing.

I will address herein six topics that might provide insights when considering the types of sentences available in the federal system:

1) the custodial threshold,
2) short prison terms,
3) suspended sentences,
4) time-served sentences,
5) non-prison alternatives, and
6) evidence-based sentencing practices.

1. Custodial Threshold Decision

Per 18 U.S.C. §3582(a), a "court, in determining whether to impose a term of imprisonment . . . shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." Section 3553(a), in turn, begins with the admonition of parsimony: a sentence must be "sufficient, but not greater than necessary" to achieve the purposes of punishment.

Whether a sentence includes a custodial term is often in the U.S. referred to as the "in/out" decision. Other applicable terms are the "custody threshold" or "custodial threshold." Several jurisdictions worldwide require the judge to make an affirmative finding that imprisonment is necessary before imposing a prison term. This decision plays a critical role in achieving the overarching goal of reserving prison for the most serious offenses.

One example is to require the judge, before imposing a custodial sentence, to find that the crime "was so serious neither a fine alone nor a community sentence can be justified."[1] Another version requires a determination that a prison sentence is "indispensable to influence the offender or defend legal order."[2] The principle of last resort applies in various locales where a custodial sentence should not be imposed unless no other penalty is sufficient to fulfil the purposes of punishment.[3]

a. A Custodial Threshold Policy Guideline

Without a custodial threshold guideline, a system lacks a shared, principled framework to guide judges in the foundational question of whether imprisonment is necessary. Judges may thereby reach different conclusions about whether a case warrants custody, even for otherwise similarly-situated defendants. This variation undermines consistency, proportionality, and the parsimony principles of § 3553(a).

Moreover, the absence of explicit guidance may help explain a persistent reality in federal sentencing: judges appear often to default to imprisonment as the "norm," without sufficient consideration that noncustodial options can be equally legitimate sanctions in a swath of cases.[4] Indeed, experts realize that probation sentences can be perceived by many defendants as *more severe* than prison terms.[5] Overall, more clarity could be offered as to when and how noncustodial sanctions can be utilized (an issue addressed further below).

The proposal here is to reframe the issue as a custodial threshold decision and to create a guideline that operationalizes § 3553(a)'s directives. Notably, two of goals of sentencing within § 3553(a)(2) are purposely excluded from the conception of a custodial decision. First, rehabilitation is absent due to 18 U.S.C. § 3582(a) directing that prison is not a suitable option to promote rehabilitative outcomes. Second, deterrence is absent because of the lack of empirical evidence to support a connection between prison terms and deterrence (see discussion further below). Consistent with the conclusions of the Model Penal Code's new Sentencing provisions, the framework of a custodial guideline considers that prison is a suitable option only for purposes of incapacitation and/or when nonprison sanctions would not be proportional considering the severity of the offending behavior (i.e., retributive purposes).[6]

As an illustration, the Custodial Threshold Guideline could read:

> Before imposing a custodial sentence, the court shall determine and state on the record:
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> **1. Necessity of Custody:** Whether
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> a) the offender poses a specific and articulable risk to public safety that cannot reasonably be addressed through noncustodial measures; or

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[1] SENTENCING COUNCIL FOR ENGLAND AND WALES, CUSTODIAL SENTENCES (2025), https://www.sentencingcouncil.org.uk/droppable/item/custodial-sentences/.
[2] Stefan Harrendorf, *Sentencing Thresholds in Germany Criminal Law and Practice*, 28 CRIM. L. FORUM 501, 510 (2017) (offering translation of German penal code).
[3] ANABELA MIRANDA RODRIGUES ET AL., NON-CUSTODIAL SANCTIONS AND MEASURES IN THE MEMBER STATES OF THE EUROPEAN UNION: COMPARATIVE REPORT 81 (2022), available at: https://cdn.penalreform.org/wp-content/uploads/2022/12/Comparative-Study-eBook-English.pdf.
[4] Nora V. Demleitner, *Replacing Incarceration: The Need for Dramatic Change*, 22 FED. SENT'G REP. 1, 1-2 (2009).
[5] American Law Institute, Model Penal Code: Sentencing § 7.02 Commentary.
[6] Kevin R. Reitz, *The Compelling Case for Low-Violence-Risk Preclusion in American Prison Policy*, 38 BEHAVIORAL SCI. & L. 207, 209 (2020).

b) the seriousness of the offense is such that a custodial sentence is the minimum necessary to achieve proportionality in punishment.

2. Consideration of Alternatives: Whether a noncustodial sanction could adequately achieve the purposes of sentencing under 18 U.S.C. § 3553(a).

3. Collateral Consequences: In assessing proportionality and necessity, the court shall consider the punitive impact of foreseeable collateral consequences (e.g., loss of employment, housing, immigration status, voting rights, or family integrity).

4. Affirmative Finding Required: Custody may be imposed only where the court affirmatively finds, with specific factual findings on the record, that no combination of noncustodial measures would suffice to meet the statutory objectives.

This approach requires a structured inquiry. It would encourage judges to articulate their reasoning clearly and help reserve incarceration for cases where less restriction measures are demonstrably insufficient.

As mentioned, the proposal above does not incorporate the goal of deterrence, despite the presence of such terminology in § 3553(a). A concise summary of current research to the contrary is provided below for context.

b. Deterrence and the Severity of Penalties: Insights from Recent Research

When Congress enacted the Sentencing Reform Act in 1984, the law's language reflected the prevailing belief that harsher penalties deter both individuals (specific deterrence) and the broader public (general deterrence) from engaging in criminal conduct. However, research in the twenty-first century reflects a strong empirical consensus that harsh and lengthy prison sentences are not effective for purposes of either specific or general deterrence.[7]

Deterrence theory traditionally identifies three core elements: certainty, swiftness, and severity of punishment. Contemporary evidence indicates that severity is the least influential factor. Increasing the harshness of penalties, particularly in the absence of high certainty of detection and swiftness of sanction, has little impact on crime.[8] The National Institute of Justice summarizes its conclusions on the relationship between criminal punishment and deterrence:

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[7] Benjamin van Rooij, Malouke Kuiper, & Alexis Piquero, *How Punishment Affects Crime: An Integrated Understanding of the Behavioral Mechanisms of Punishment* (2024), available at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4807554_code1636539.pdf.

[8] Damon M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 CRIME & JUST. 353, 353 (2021) (meta-analysis of 116 studies, concluding "the current analysis shows that custodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions such as probation . . . regardless of variations in methodological rigor, types of sanctions examined, and sociodemographic characteristics of samples"). *See generally* Michael Tonry, *An Honest Politician's Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony, in* DETERRENCE, CHOICE, AND CRIME (Daniel S. Nagin et al. eds., 2018) (summarizing economics and social science literatures generally accepting that evidence of the deterrent effects of punishment is "no, too small, or too contingent" and instead that police deployment can more effectively reduce crime), version available here: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2981749_code702020.pdf; Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LIT. 5 (2017) (citing studies), available at: https://eml.berkeley.edu/~jmccrary/chalfin_mccrary2017.pdf.

> The certainty of being caught is a vastly more powerful deterrence than the punishment.
>
> Sending an individual convicted of a crime to prison isn't a very effective way to deter crime.
>
> Police deter crime by increasing the perception that criminals will be caught and punished.
>
> Increasing the severity of punishment does little to deter crime.[9]

This position is reinforced by the revised Model Penal Code on Sentencing, which importantly recommends that:

> sentencing judges should not be allowed to consider general deterrence as a reason to sentence someone to incarceration or to extend the length of a confinement term longer than is justified on other grounds. Instead, [it] authorizes prisons and jail sentences on only two grounds—incapacitation of dangerous offenders and seriousness of the offense.[10]

Instead, the model legislation's commentary explains that "[j]udgments about general deterrence are best made at the systemwide policymaking level, in light of empirical evidence, and are least likely to be administered effectively or uniformly by sentencing judges, one case at a time."[11]

Accordingly, while deterrence remains one of the statutory purposes of sentencing, it need not occupy a dominant position in individual sentencing decisions—particularly given the lack of evidence that harsher penalties achieve meaningful deterrent effects. At the same time, rehabilitation, also a statutory consideration within the 1976 act, has often been sidelined under the influence of the now debunked "nothing works" narrative of the late 20th century.[12]

Contemporary research supports a renewed focus on rehabilitation and individualized interventions as more effective strategies for reducing recidivism and promoting public safety (see the reflections on evidence-based practices further below). A custodial threshold policy, by requiring judges to carefully consider whether imprisonment is necessary to achieve sentencing objectives, would help recalibrate federal sentencing to reflect these empirical and statutory realities.

2. Guidance on Short Prison Sentences

Short custodial terms are generally ineffective and often counterproductive. A substantial and growing body of research underscores that short-term prison sentences—often defined as custodial terms of two years or less—fail to deliver meaningful rehabilitative outcomes and, instead, in fact can exacerbate the conditions associated with criminal behavior. Multiple empirical studies find that short periods of incarceration are associated with higher rates of recidivism compared to community-based alternatives.[13]

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[9] NATIONAL INSTITUTE OF JUSTICE, FIVE THINGS ABOUT DETERRENCE 1 (2016), available at: https://www.ojp.gov/pdffiles1/nij/247350.pdf.

[10] Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing—Workable Limits on Mass Incarceration*, 48 CRIME & JUST. 255, 281 (2019).

[11] American Law Institute, Model Penal Code: Sentencing § 6.11 Comment *e*.

[12] *See generally* Francis T. Cullen & Paul Gendreau, *From Nothing Works to What Works: Changing Professional Ideology in the 21st Century*, 81 PRISON J. 313 (2001).

[13] *See generally* Hilde T. Wermink et al., *Estimating Effects of Short-Term Imprisonment on Crime Using Random Judge Assignments*, 41 JUST. Q. 317 (2024) (using a random judge assignment

a. Evidence on the Downsides of Short Prison Stints

Several key factors explain these troubling findings:[14]

- **Higher Reoffending Rates:** Short custodial terms interfere with positive social support networks and community ties, increasing the likelihood of reengaging in criminal activity.
- **Disruption of Lives and Employment:** Even brief periods in custody can lead to substantial disruptions in employment, housing, and family relationships. This loss of stability negatively impacts reintegration efforts, resulting in long-term social and economic costs both to the individual and society.
- **Inability to Address Mental Health and Rehabilitation Needs:** Short prison sentences offer insufficient time or resources to address underlying correlates of criminal behavior, including mental health issues, substance abuse, and educational deficits. An emerging interest is the role of past trauma in criminal justice-involved individuals and how imprisonment can unfortunately exacerbate their issues.[15] The lack of rehabilitative programming during brief incarceration undermines the potential for positive change.
- **Disproportionate Impact on Women and Children:** Short custodial sentences disproportionately harm vulnerable populations, particularly women who are often primary caregivers. Research indicates that even brief imprisonment can profoundly impact children, increasing their likelihood of future involvement in criminal justice systems and perpetuating cycles of poverty and incarceration.
- **Strain on Prison Resources:** Short-term incarceration strains correctional infrastructure, diverting resources away from rehabilitative programming for those who need it most, thereby diminishing the effectiveness of the overall prison system.
- **Cost-Ineffectiveness:** Empirical evaluations consistently demonstrate that short prison terms are significantly less cost-effective compared to community-based alternatives, which offer stronger rehabilitative outcomes at lower taxpayer expense.

Recognizing these compelling findings, several jurisdictions (e.g., Germany, Scotland) have adopted presumptions against short prison sentences, requiring judges to consider options other than imprisonment.[16]

b. A Guideline Policy Addressing Short-Term Prison Sentences

In line with this evidence-based international practice, the Commission could adopt a formal policy statement explicitly indicating that when short prison sentences—perhaps

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method in the Netherlands and citing other studies), https://www.tandfonline.com/doi/epdf/10.1080/07418825.2023.2193618?needAccess=true.

[14] See generally NATASHA MUTEBI & RICHARD BROWN, UK PARLIAMENT POSTBRIEF, THE USE OF SHORT PRISON SENTENCES IN ENGLAND AND WALES (2023) (discussing reasons and citing studies), available at: https://researchbriefings.files.parliament.uk/documents/POST-PB-0052/POST-PB-0052.pdf; JAY GORMLEY, MELISSA HAMILTON, & IAN BELTON, THE EFFECTIVENESS OF SENTENCING OPTIONS ON REOFFENDING 35-36 (2022) (discussing reasons and citing studies), available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Effectiveness-of-Sentencing-Options-Review-FINAL.pdf.

[15] *See generally* KATHERINE J. MCLACHLAN, TRAUMA INFORMED CRIMINAL JUSTICE (2024).

[16] MUTEBI & BROWN, *supra* note 14.

defined as two years or less—are considered proportional and appropriate, community-based alternatives are generally preferable. Such a policy statement would:

- Explicitly recognize the established ineffectiveness and negative consequences associated with short custodial terms;
- Encourage judicial consideration of evidence-based nonprison sanctions;
- Improve consistency and transparency in sentencing decisions by providing clear guidance to judges, probation officers, and stakeholders; and
- Support broader federal policy goals of reducing recidivism, alleviating prison crowding, and promoting effective resource allocation.

By signaling the evidence-based reasons to try to avoid short-term prison stints, the Commission could align sentencing policy with contemporary empirical findings and international best practices, thus advancing public safety, rehabilitation, and fairness. Such a policy is consistent with the Model Penal Code: Sentencing's admonition that criminal justice actors "avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct."[17]

3. Suspended Sentences

The federal system continues to allow for suspended sentences, even after the Sentencing Reform Act.[18] Indeed, the publicly available USSC datasets record over 200 suspended prison sentences issued between fiscal years 1999 and 2024.[19] These 212 cases that were tagged as suspended were in conjunction with sentences that were coded in various sentence types: fine only (13.2%), probation only (43.9%), probation and alternatives (4.2%), prison and alternatives (2.4%), prison only (34.0%), and those without a sentence type specified (2.4%).[20]

The inconsistency in how these suspended sentences were recorded likely indicates considerable judicial uncertainty regarding the proper mechanism to impose a sentence that is explicitly custodial but conditionally suspended. Such ambiguity undermines sentencing uniformity and reduces the effectiveness of suspended sentences as a structured alternative to immediate custody.

a. Suspended Sentences Count as Prison Sentences

To enhance sentencing consistency and leverage the potential benefits of suspended sentences, the Commission could proactively provide clear, affirmative guidance. An international example to consider is the approach taken by the Sentencing Council for England and Wales. There, the Council explicitly recognizes two distinct custodial sentence forms:

1. **Immediate Custodial Sentences**: Individuals immediately serve their sentence in custody.

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[17] American Law Institute, Model Penal Code: Sentencing § 1.02(2)(a)(iv).

[18] Richard S. Frase, *Suspended Sentences and Free-Standing Probation Orders in U.S. Guidelines Systems: A Survey and Assessment*, 82 LAW & CONTEMP. PROBS. 51, 57 tbl. 2, 58-59 (2019), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4898&context=lcp.

[19] Using the variable TYPEOTHS = 1 for "suspended prison term."

[20] U.S. Sentencing Commission, Individual Datafiles (2025), https://www.ussc.gov/research/datafiles/commission-datafiles (drawing on the SENTIMP variable). The percentages do not total 100.0% due to rounding. All statistical analyses using these datafiles were conducted in SPSS v. 29.

2. **Suspended Custodial Sentences**: Courts impose a custodial sentence, but conditionally suspend its execution, contingent upon compliance with specified requirements.

This second type, called a "Suspended Sentence Order," is clearly defined by the Council as a *custodial* penalty because "its imposition is itself a punishment."[21] Such clarity ensures that suspended sentences are seen as meaningful punishment while preserving an incentive structure encouraging compliance and rehabilitation.

Empirical evidence supports this approach: suspended sentence orders in England and Wales have consistently demonstrated lower reoffending rates compared to immediate short-term custodial sentences (less than 12 months).[22] This finding suggests that clearly structured suspended sentences can offer superior outcomes by incentivizing individuals to engage positively with rehabilitative conditions outside prison.

b. Values of Suspended Sentences

The strategic policy benefits of expressly adopting suspended sentences as a primary sentencing option are substantial:

- **Announcing the Severity of Punishment**: Suspended sentences clearly communicate the seriousness of the offense by assigning a numerical length of imprisonment as proportionate, thereby satisfying public expectations regarding accountability and public safety.
- **Incentivizing Positive Behavior**: Offering these defendants the structured opportunity to avoid custody encourages compliance, rehabilitation, and positive behavioral changes.
- **Reducing Prison Overcrowding**: Successfully completed suspended sentences directly mitigate prison overcrowding by preventing defendants who comply from serving more time in custody, thus conserving resources for higher-risk individuals who are better candidates for prison.

c. A Suspended Sentence Guideline

The Commission could adopt the approach of England and Wales by counting suspended penalties as *prison* sentences. Further, the Commission could recommend:

- Suspended sentences be imposed only when the custodial threshold has been crossed.
- A standardized mechanism within the guidelines clearly outlining how suspended sentences are to be imposed and documented.
- Explicit criteria identifying which types of offenses and defendants are most suitable for suspended sentences, including factors to distinguish between immediate custodial and suspended prison sentences. The inclusion of evidence-based practices (described further below) would be quite suitable to this task.
- Recommending specific judicial commentary on the record justifying suspended sentences as a meaningful penalty, consistent with the statutory mandate under 18 U.S.C. § 3553(a).

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[21] SENTENCING COUNCIL FOR ENGLAND AND WALES, IMPOSITION OF COMMUNITY AND CUSTODIAL SENTENCES (2025), https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/imposition-of-community-and-custodial-sentences-overarching-guideline/#9.%20Suspended%20sentence%20orders.

[22] GORMLEY ET AL., *supra* note 14, at 35-36 (citing studies).

- Regular data collection and analysis by the Commission staff on suspended sentences' prevalence and effectiveness.

4. Time-Served Sentences

Experienced sentencing practitioners and observers are familiar with the term "time served," generally referring to a determination that the period the defendant spent in detention prior to sentencing is sufficient to meet the purposes of punishment. Upon such a finding, the defendant is meant to be free, having served the imposed sentence during their presentencing confinement. While widely understood as a pragmatic judicial practice, time-served sentences currently operate without formal recognition as a policy matter in the federal system. Time-served outcomes are not explicitly addressed in the U.S. Sentencing Commission's Guidelines Manual or clearly reported on in its publicly available publications.[23]

Yet these cases are far from rare. Analysis of the Commission's datasets shows that nearly 17% of all sentences issued between fiscal years 2020 and 2024 reflect a time-served outcome (present in more than 50,000 sentencings).[24] This significant share (i.e., one out of every six cases) underscores that federal courts are already relying on this practice as a means of delivering proportional punishment while minimizing unnecessary additional incarceration. All of these are treated by the Commission datasets as "prison only" cases.

The Commission could usefully adopt a guideline policy to explicitly support and provide guidance on the imposition of time-served sentences. Such a move would advance several important goals within the sentencing framework:

- **Reinforcing proportionality**. Time-served sentences can comply fully with the proportionality principle under 18 U.S.C. § 3553(a). Judges who determine that the period already spent in pretrial custody adequately reflects the seriousness of the offense and satisfies the statutory sentencing purposes can impose a time-served disposition with confidence that it fulfills legal requirements for just punishment. This approach also reflects a more nuanced understanding of the punitive experience of pretrial detention, which—although not part of a formal sentence—is often experienced as equally or more burdensome than post-sentencing incarceration due to uncertainty, lack of access to programs, and harsher conditions in some detention facilities.
- **A symbolic message**. By formally imposing a time-served sentence, courts communicate a clear and proportionate symbolic message: that the offense was serious enough to warrant imprisonment, but the period already spent in custody suffices to satisfy that punitive element. This preserves the expressive function of sentencing while avoiding redundant incarceration.
- **Respecting prison resources**. Recognizing and supporting time-served sentences can help alleviate strain on federal correctional facilities. As

[23] The only explicit reference I have been able to locate in publicly available documents appears in an attachment to the annual Sourcebook, which notes that this type of penalty is "recorded as 'time served'" by the sentencing judge on the Judgment and Commitment Order. U.S. SENTENCING COMMISSION, 2024 SOURCEBOOK App. A at 180 (2025).

[24] U.S. Sentencing Commission, Individual Datafiles (2025), https://www.ussc.gov/research/datafiles/commission-datafiles. Results on file with the author. For example, a time-served sentence applies to a defendant assigned a 6-month prison sentence (without alternative months) while simultaneously being credited with 6 months of presentencing detention time. In effect, this outcome means that the defendant has completed their main sentence and would thus will not face additional prison time (albeit supervised release may also be imposed).

presentencing detention credits are applied against imposed terms, the need for further custody often diminishes. Formalizing time-served dispositions would avoid the costs of reincarcerating individuals whose confinement has already satisfied the intended sanction.

- **Promoting consistency, transparency, and fairness**. Without explicit guidance, judicial practices surrounding time-served sentences may vary widely across districts. Some judges may use them readily, while others may avoid them due to uncertainty about their legitimacy or how they fit within the guidelines. A formal guideline would promote consistency and transparency, ensuring similarly-situated defendants are treated alike nationwide. It would also clarify for defendants and the public that time served is a recognized sentencing outcome—rather than an ad hoc or informal judicial workaround.[25]

5. Non-Prison Alternatives

The Commission has access to a rich body of discussions and resources on alternative sentencing options already embraced in the federal system (e.g., home detention, community confinement, and alternative confinement) and state systems, such as at the 2008 Symposium on Alternatives to Incarceration[26] and the 1990 Alternatives to Imprisonment Project.[27] A decade ago, proposals encouraging broader use of noncustodial options received the endorsement of the Practitioners Advisory Group[28] and the Probation Officers Advisory Group.[29] Nonetheless, an expert writing in 2009—though these sentiments appear valid still today—complains that the "limited use of alternatives [has a] stifling effect on sentencing practice . . . such that U.S. attorneys, defense attorneys, federal probation offices, and even federal judges have a limited and, in many instances anecdotal, knowledge of alternatives to incarceration."[30]

Rather than revisiting the existing options, it may be more productive to highlight additional varieties of sanctions that might be included within a broader menu of available sentencing types that may act as the main sentence. The term "main sentence" is meant to be a sanction that serves as the focal point of a penalty—imposed *in lieu of*, and not merely in addition to—imprisonment, probation, or fines.

Drawing from European systems, examples include:

- **Community service orders** – imposed as the main sentence in several jurisdictions, at times even when imprisonment for a number of years was otherwise a legally available option.[31] U.S. Probation & Pretrial Services in a 2005 document recommended that courts consider community service orders

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[25] For example, an expert, writing at the time he served as Deputy Staff Director of the United States Sentencing Commission, contended that it was common for some judges to use sentences of time served plus supervised release as a substitute for a probation sentence. Brent Newton, *The Story of Federal Probation*, 53 AM. CRIM. L. REV. 311, 340 (2016).

[26] Materials available at: https://www.ussc.gov/research/research-reports/proceedings-symposium-alternatives-incarceration-july-14-15-2008 and at https://www.rashkind.com/alternatives/toc.htm.

[27] Document available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/121990_Intermediate_Punishments.pdf.

[28] Letter from the Practitioners Advisory Group to the United States Sentencing Commission on Response to Request for Comment on Proposed Priorities 9-12 (July 27, 2015).

[29] Letter from the Probation Officers Advisory Group to the United States Sentencing Commission 3-5 (July 17, 2015).

[30] Herbert J. Hoelter, *Sentencing Alternatives—Back to the Future*, 22 FED. SENT'G REP. 53, 57 (2009).

[31] RODRIGUES ET AL., *supra* note 3.

as a viable alternative that is "less restrictive than prison" and serves as a "fair and cost-effective sanction."[32]

- **Restrictions on rights** – targeted prohibitions aimed at addressing the nature of the offense and reducing the type of reoffending that seems most relevant to the case. These include:
    - Professional disqualifications (e.g., barring practice in certain fields);
    - Restrictions on movement or area bans (e.g., exclusion zones, curfews);
    - Prohibitions on attending certain events (e.g., sporting or social events);
    - Weapon possession bans;
    - Forfeiture of property tied to the offense; or
    - Driving bans for traffic-related or dangerous conduct offenses.[33]

These types of options minimize the collateral consequences of imprisonment or intensive probation, while having a minimal footprint on the resources of probation personnel.

One reason not to just add any of these on top of the current probation regime is the danger of overprogramming. Assigning too many conditions or programs, particularly to defendants with little criminal history or assessed at low risk, increases their likelihood of supervision failure.[34]

A likely concern with expanding non-prison sentencing options is the perception that such alternatives are appropriate only for less serious offenses and may have limited relevance in the federal system, where cases often involve high-severity crimes. However, statistical analysis using the Commission's own datasets[35] demonstrates that a sizable number within the federal caseload presents with relatively low final offense levels—suggesting ample opportunity for these alternative options to be meaningfully applied. To ensure the analysis is not skewed by immigration defendants (which tend by their nature to be assigned few offense levels), the following figures exclude immigration cases altogether. Even so, across fiscal years 2020-2024:

Over 21,000 cases were assigned a final offense level of 10 or lower;

Over 10,000 cases were at level 6 or lower; and

Over 7,000 were at level 4 or lower.

These exemplar thresholds are offered to address differing views on which final offense level represents low-level offending. The point is that using any of them still demonstrates that a healthy cohort exists where additional main sentence options would be reasonably suitable, while also easing pressures on federal prison capacity.

In sum, the Commission could consider developing a broader menu of sentencing options—drawing on both domestic innovations and international best practices—to allow judges to craft responses tailored to the individual's circumstances and the goals of punishment.

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[32] U.S. PROBATION & PRETRIAL SERVICES, COMMUNITY SERVICE (2005), available at: https://web.archive.org/web/20050903045614/http://www.uscourts.gov/misc/revision-community.pdf. Community service would be supervised within the probation regime. *Id*.

[33] RODRIGUES ET AL., *supra* note 3 at 13-14 (e.g., France, Ireland, Czech Republic, Cyprus, Portugal).

[34] Letter from the Probation Officers Advisory Group to the United States Sentencing Commission 3-5 (July 17, 2015) (articulating reasons).

[35] U.S. Sentencing Commission, Individual Datafiles (2025), https://www.ussc.gov/research/datafiles/commission-datafiles.

6. Evidence-Based Sentencing

The proposals outlined above align closely with a broader movement toward evidence-based practices in sentencing. Evidence-based sentencing integrates scientifically validated tools and methods to assist judges in tailoring penalties that balance public safety, proportionality, and rehabilitation. Notably, this approach departs from traditional deterrence theory, which lacks sufficient empirical support and is increasingly viewed as inconsistent with evidence-based practice.

a. Dynamic Risk and Needs Assessment

At the core of evidence-based sentencing is the use of risk and needs assessment tools. The most suitable instrument for this task is to evaluate the likelihood of reoffending by analyzing both static factors—unchangeable attributes like criminal history and age—and dynamic factors, such as substance use, employment, mental health, and social ties.

Dynamic factors are especially valuable because they reflect an individual's evolving risk profile and rehabilitation potential. By focusing on these changeable characteristics, judges gain a more accurate and forward-looking perspective on an individual's capacity for desistance. Incorporating dynamic factors into sentencing promotes proportionality (by aligning the severity of punishment with actual risk), fairness (by recognizing human capacity for change), and public safety (by targeting interventions to address criminogenic needs).

Responsivity is the third foundational element in this model (in addition to assessing risk and needs), focused on tailoring programming to the individual's learning style, motivations, and abilities. Assessing responsivity is important in best practices as the fit between the rehabilitative intention and the person's receptivity to it can increase opportunities for success.[36]

Judges can serve procedural justice by articulating clear, evidence-based expectations to the defendants at their sentencing hearings—such as maintaining sobriety, securing housing, or engaging in prosocial activities. These interactions can be helpful regardless of sentencing type to promote desistence.

b. The Role of Protective Factors

While risk assessment often emphasizes factors that increase reoffending likelihood, there is growing recognition of protective factors: "personal, social, and institutional resources that foster competence and promote successful development, *decreasing* the likelihood of engagement in problematic behavior."[37] Examples of protective factors include prosocial identity, strong social networks, stable employment, and self-efficacy.

The presence of protective factors can directly promote successful reintegration. Over time, risk factors tend to decline as protective factors tend to increase.[38] Failing to account for these positive influences can mean overestimating danger, leading to unnecessary incarceration and missed opportunities for intervention.

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[36] Grant Duwe & Valerie Clark, *The Gap Between the Ideal and Reality in Risk-Needs-Responsivity Assessments*, CORRECTIONS (2025) (online first).

[37] Jean-Pierre Guay, Geneviève Parent, & Massil Benbouriche, *Disentangling Promotive and Buffering Protection: Exploring the Interface Between Risk and Protective Factors in Recidivism of Adult Convicted Males*, 47 CRIM. JUST. & BEHAVIOR 1468, 1469 (2020) (emphasis added).

[38] Simon T. Davies, Caleb D. Lloyd, & Devon L.L. Polaschek, *Does Reassessment Enhance the Prediction of Imminent Criminal Recidivism? Replicating Lloyd et al. (2020) with High-Risk Parolees*, 29 ASSESSMENT 962, 969 (2022).

c. Evidence-Based Practices and the Custodial Threshold

Dynamic risk and protective factors can play a crucial role in custodial threshold decisions. Reserving imprisonment for individuals who pose an ongoing and significant risk to the community requires tools that help assess whether such risk is present—and whether it can be potentially mitigated through community-based interventions.

Importantly, criminality is not an immutable trait. Evidence-based sentencing encourages the sentencer to be cognizant of the possibility that the defendant may in the future bear little likeness to the supposedly risky person that appears before them at the sentencing hearing. Even the salient age-crime curve suggests otherwise as people age and mature. For those assessed as high risk of serious reoffending, judges can look beyond aggregate scores to understand whether the risk stems from dynamic factors that could change with targeted interventions. In many cases, this may support a decision to impose intensive supervision or a suspended custodial sentence coupled with rehabilitative programming, rather than immediate incarceration.

Some jurisdictions already apply similar approaches. For example:

- In Germany, courts consider a "social prognosis" about the likelihood of future offending when deciding whether to suspend a prison sentence.[39]
- In New Zealand, algorithmic risk tools help assess whether defendants can be safely supervised in the community.[40]

Where reducing prison populations is a policy goal, such tools also provide judges with a principled, evidence-based rationale—and legal and political support—for using noncustodial sanctions.[41]

d. Addressing Critiques

Critics rightly caution about the fairness and accuracy of algorithmic risk tools, especially when they rely on input data from historically biased sources like arrest records.[42] To mitigate these concerns:

- Tools must be scientifically validated as posing a sufficient level of accuracy, periodically updated, and scrutinized for bias.
- Courts should use these tools to inform, not dictate, sentencing decisions, preserving individualized justice.
- Group-based risk predictions must be combined with judicial discretion and attention to the unique circumstances of each case.
- More attention should be paid not only to the proposed likelihood of reoffending but also the type and severity of the crime the tool is designed to predict. A "high risk" of a low-level offense (e.g., minor property crime or a technical violation) is not the same for sentencing purposes as a significant likelihood of committing serious offenses (e.g., violent crime or major fraud).

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[39] Stefan Harrendorf, *Sentencing Thresholds in Germany Criminal Law and Practice*, 28 CRIM. L. FORUM 501 (2017).
[40] Oliver Fredrickson, *Risk Assessment Algorithms in the New Zealand Criminal Justice System*, 341 NEW ZEALAND L. J. 328 (2020).
[41] Michael O'Hear, *Actuarial Risk Assessment at Sentencing: Potential Consequences for Mass Incarceration and Legitimacy*, 38 BEHAVIORAL SCI. & L. 193, 202 (2020).
[42] *See generally* Brandon L. Garrett, *Federal Criminal Risk Assessment*, 41 CARDOZO L. REV. 101 (2019).

When carefully implemented, dynamic assessments can outperform unguided human judgment, which is prone to bias and inconsistency.[43]

e. Developing an Evidence-Based Practices Guideline

The federal system is well-positioned to expand evidence-based sentencing. Probation officers already use risk tools like the Pretrial Risk Assessment (PTRA) and Post Conviction Risk Assessment (PCRA). The Bureau of Prisons employs the tool called PATTERN. However, these instruments could be enhanced to better account for dynamic and protective factors relevant at sentencing. For example:

- **PCRA could be modified**, or a new tool developed, to inform judges about a defendant's current risk profile, inform on the presence of protective factors, and guide on the potential for safe supervision in the community.
- **Incorporating such assessments into presentence reports** would provide judges with the information needed to impose proportionate, forward-looking sanctions.

Thoughts on the various items that an evidence-based practice guideline could include are beyond the scope of this document. Expert advice and commentary on the implementation of evidence-based practices into sentencing are available elsewhere,[44] such as in the Model Penal Code's updated Sentencing doctrine.

7. Conclusion

In closing, these observations are offered with deep respect for the difficult task facing the Commission and an appreciation of the progress already achieved in promoting fairness and consistency in federal sentencing. Drawing on my experiences as a practitioner and academic, I have sought to highlight ways in which emerging research and comparative practices can inform a sentencing framework that better aligns with statutory purposes and the realities of human behavior. The federal system stands at an important juncture, with an opportunity to integrate evidence-based practices, expand noncustodial alternatives, and reserve incarceration for cases where it is truly necessary. I hope these suggestions contribute meaningfully to that effort and support the Commission's vital role in fostering a justice system that is principled, proportionate, and effective.

Sincerely,

Melissa Hamilton

J.D., Ph.D
Professor of Law & Criminal Justice
Guildford, Surrey GU2 7XH
United Kingdom

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[43] Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CAL. L. REV. 439, 455 (2020).
[44] *See generally* ROUTLEDGE HANDBOOK OF EVIDENCE-BASED CRIMINAL JUSTICE PRACTICES (Edelyn Verona & Bryanna Fox eds., 2024); OXFORD HANDBOOK OF EVIDENCE-BASED CRIME AND JUSTICE POLICY (Brandon C. Welsh et al. eds., 2023).

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Catherine Hollinrake, Iowa, Southern

Topics:

6. Simplification (Grouping Rules, Criminal History, §5G1.3 & Others)

Comments:

As a U.S. Probation Officer involved in presentence investigations for 13 years, I respectfully submit this comment regarding the simplification of grouping rules, specifically Chapter Three, Part D (Multiple Counts). I would like to suggest the Commission explore re-ordering the grouping provisions provided in USSG §3D1.2 to reflect the way these provisions are often analyzed and applied.

When grouping counts under USSG §3D1.2, practitioners of the Guidelines often default to first determining whether the guidelines for the counts of conviction are listed under USSG §3D1.2 (d) before completing any additional analysis under USSG §3D1.2(a)-(c). This application aligns with the Commission's own methodology as provided in the decision tree, after determining the counts use the same guideline. Based on this, it appears the application of this guideline may be simplified by re-ordering the provisions found in USSG §3D1.2, to provide that if the count of conviction's guideline is found in the list provided, no additional analysis needs to occur. Essentially, placing USSG §3D1.2(d) as the initial consideration, reflecting its use as the most common grouping provision.

Additionally, as a longtime trainer on guidelines in my district, I would also request that in the event the guideline is revised, the Commission should consider explaining more explicitly that grouping under the USSG §3D1.2(d) list requires that each count has the same guideline. This is made plain in the Commission's training materials but could be more prominently included in the text of Guideline itself. The language in the application notes that expand on the "same general type" of offenses groupable under (d) do not appear to reflect the current reality of how the grouping rules are applied, based on the Commission's training materials, and create confusion for practitioners.

Submitted on: June 17, 2025

Comment to United States Sentencing Commission

Concerning Imposition of Supervised Release

Section 5D1.1(c)

Submitted by Elaine Mittleman

July 18, 2025

I am submitting this comment on possible policy priorities for the amendment cycle ending May 1, 2026. I am an attorney and have been a member of the District of Columbia Bar since 1980. I have handled numerous criminal appeals pursuant to the Criminal Justice Act.

This comment about Section 5D1.1(c), which concerns a situation when the defendant is a deportable alien. The last sentence of Application Note 5 provides that "[t]he court should, however, consider imposing a term of supervised release on such a defendant if the court determines that it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case."

The Defender Comment on Supervised Release, March 3, 2025, p. 8, explained that, out of the noncitizens sentenced in fiscal year 2023 who received a term of imprisonment, 72% received terms of supervised release to follow.

I believe that there should be stronger measures to monitor deported defendants who have a sentence of supervised release. It appears that probation officers do not monitor defendants who have been deported and who have a sentence of supervised release. Instead, the cases are treated as "inactive" until a defendant has been arrested for a new offense after illegally reentering the United States. The probation officer likely gets involved only after there is another arrest following illegal reentry.

The purposes of supervised release, including deterrence and protecting public safety, could be furthered if probation officers actively monitor defendants who have been deported and who have sentences of supervised release. It apparently has just been assumed that probation officers cease monitoring defendants who have been deported. However, the sentence of supervised release does not provide that there can be no monitoring or supervision after a defendant has been deported until after a subsequent rearrest. It appears that there has just been a practice or policy to cease monitoring those defendants and treat the cases as "inactive."

It can be questioned what a sentence of supervised release means if the cases are treated as inactive. The purposes of supervised release should apply to all defendants with those sentences, whether they are in the United States or have been deported.

With the strong concern now for border security, there should be an emphasis on deterrence against repeated illegal reentries by defendants. The probation officers could serve an important role in that deterrence. By contrast, the probation officers now apparently are not significantly involved in that deterrence against illegal reentry. Their active monitoring role resumes after a defendant has once again illegally reentered and is located by authorities, perhaps following a new offense.

Location monitoring or other measures could be used by probation officers to keep track of defendants who have been deported. The resources used for this monitoring would be well-spent if the monitoring serves as a deterrent to deported individuals illegally reentering the United States and committing new offenses. If defendants do not continue to illegally reenter the United States, there should be a substantial reduction in new offenses, including illegal reentry charges.

Judges have expressed frustration when they tell defendants that they are not allowed to reenter the United States and, yet, it is possible that many defendants ignore that order from the judge. There should be stronger measures used in supervised release so that the warnings from judges not to reenter illegally are respected and obeyed by defendants who are deported.

In *United States v. Azcona-Polanco,* 865 F.3d 148, 154-55 (3d Cir. 2017), the Third Circuit affirmed the term of supervised release. The court relied upon the facts cited by the district court: the defendant's serious criminal history; his previous defiance of an order of removal; his having been order removed a second time; his illegal reentry into the United States after having been deported; his purchase of false identification and assuming an alias to remain in the United State illegally.

In a recent nonprecedential Seventh Circuit order, the court affirmed the imposition of supervised release. It noted that the district judge's sentencing remarks show that he considered deterrence when imposing supervised release. *United States v. Acuna-Diaz,* No. 24- 2070 (7th Cir. March 3, 2025). In mid-2022, federal prosecutors charged Acuna-Diaz with one count of illegal reentry in violation of 8 U.S.C. section 1326(a). He pleaded guilty and admitted to having entered the United States illegally three times.

The district judge deemed supervised release to be appropriate. A further reentry would violate Acuna-Diaz's conditions of release and permit a prompt sentence for that violation without an indictment.

The district judge addressed deterrence and stated that "specific deterrence really matters in this case because you've never been able to follow the law up to now." The judge also addressed general deterrence:

> General deterrence, laws relating to immigration seem to have very little deterrent effect, but maybe it will become known to even a few people that if you sneak into the United States and commit crimes, it's just not going to be a quick deportation so you can reenter and commit the same crimes over and over again.

There should be much stronger emphasis on supervised release for defendants who are deportable. If judges order supervised release, the probation officers should carry out their duties to monitor defendants with those sentences. The deterrent effect of supervised release is important.

Thank you for your consideration of this comment. Please let me know if I can provide additional information.

Elaine Mittleman
[redacted]



July 16, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Request for Comment on Changes to §3E1.1

To the Members of the United States Sentencing Commission:

I am pleased that the Commission is considering changes to §3E1.1 in the current amendment cycle. In the spirit of some of the important Guidelines amendments adopted by the Commission in the previous cycle, I suggest here a conceptual *simplification* of §3E1.1, rendering it a more transparent and reliable discount for guilty pleas.

From the start, §3E1.1 has been plagued by a fundamental ambiguity about the practical meaning of "acceptance of responsibility." In earlier writing, I have described two competing paradigms that are both embodied to some extent in §3E1.1 and its application notes.[1] In the "remorse paradigm," defendants earn their discount by acting and speaking in ways that reflect genuine internal feelings of contrition about their criminal conduct. In the "cooperation paradigm," defendants earn their discount by behaving in ways that facilitate the efficient processing of their cases and are otherwise consistent with what we would generally desire of people in the wake of having committed a crime (e.g., voluntarily seeking counseling to address a criminogenic risk factor or making voluntary restitution to a victim).

[1] Michael O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507 (1997) ["O'Hear, *Remorse*"]. A substantially shorter version of this article was published as *Rethinking Acceptance of Responsibility*, 9 FED. SENT. REP. 101 (1996).

I have argued previously, and continue to believe, that the remorse paradigm has no proper place in the Guidelines.[2] It is not clear why precisely remorse should matter at sentencing. Today's feelings of regret, no matter how genuine, do not change the seriousness of yesterday's offense or provide much of a guarantee against a relapse into bad behavior tomorrow.[3] Nor is it clear that judges can reliably serve as "remorse-detectors."[4] Indeed, whether and how a defendant expresses remorse, and whether expressions of remorse are credited as sincere by a judge, may be influenced by such dubious factors as the defendant's mental illness, race, cultural background, educational attainment, or coaching by defense counsel.[5] Remorse, in other words, may be a backdoor for precisely the sorts of unwarranted disparities that the Guidelines were intended to ameliorate.

Post-*Booker*, there is now even less need for the Guidelines to account for remorse. Even assuming that there are some truly compelling displays of remorse—or the flipside, truly disturbing displays of defiance—that ought to affect a person's sentence, the district judge now has discretion to take such matters into account in deciding whether to impose a sentence outside the recommended Guidelines range. Remorse need not be a factor that is used to determine the Guidelines range itself.

In my earlier writing, in lieu of the mixed remorse-cooperation orientation of the existing Guideline, I recommended that §3E1.1 be restructured entirely along the lines of the cooperation paradigm.[6] While I continue to believe that such a change would be an improvement on the status quo, I am no longer convinced that this is the very best path forward. "Cooperation" itself suffers from some indeterminacy that may invite unfairness and disparity. Much would doubtlessly depend on mode of conviction. It is not clear, though, what type of *uncooperative* behavior would be sufficient to deny the discount to a defendant who pleads guilty, or what type of *cooperative* behavior would be sufficient to grant the discount to a defendant who goes to trial. There is no

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[2] O'Hear, *Remorse*, *supra* note 1, at 1554-56.

[3] *See* Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2144 (2010) ("Despite the conventional wisdom that present feelings of remorse predict future desistance from crime, very little research has been done to substantiate the remorse-recidivism connection.").

[4] *See id.* at 2143-47; M. Eve Hanan, *Bias and the Remorse Discount*, 43 CHAMPION 16 (2019).

[5] O'Hear, *supra* note 3, at 2147. *See also* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 306 (2018) ("Because the decision whether to believe a defendant's expression of remorse is profoundly subjective, it is a fertile area in which implicit bias can flourish and lead to sentencing disparity.").

[6] For the specific language of my proposal, see O'Hear, *Remorse*, *supra* note 1, at 1560.

readily apparent metric for toting up all of a person's cooperation merits and demerits. There are other tools, moreover, by which some of the behaviors of interest can be incentivized or disincentivized (e.g., through the system of conditions for pretrial release or through the adjustments in Part 3C of the Guidelines). And, of course, post-*Booker* there is more freedom for district judges to take into account important sentencing considerations that are not incorporated into the fabric of the Guidelines themselves.

I would suggest, therefore, that consideration be given to making §3E1.1 more of a straightforward plea discount. This seems to be how the provision *generally* functions in practice already. More clearly codifying this general tendency would serve the interests of transparency, simplicity, and uniformity. The defendant who pleads guilty or no contest at any time prior to the start of trial should reliably receive the two-point discount in §3E1.1(a), without concern that a judge will deny the discount on the basis of some idiosyncratic weighing of factors under such amorphous headings as "acceptance of responsibility," "remorse," or "cooperation."

The flipside proposition, however, should not be adopted. Going to trial should not categorically disqualify a defendant from the discount. Making §3E1.1 wholly dependent on mode of conviction would reinforce the unfortunate tendency of some in the court system to view trials solely as a matter of social *cost*. Trials also deliver social *benefits*, and sometimes they are well worth having. Trials can protect defendants from wrongful convictions and other miscarriages of justice; provide valuable feedback about community values to prosecutors, judges, and defense lawyers; reassure defendants that the law's promises of due process and a fair opportunity to be heard in court are more than empty rhetoric; and provide ordinary citizens with unique opportunities to learn about and participate meaningfully in their government.

This is not to say that *all* trials are worthwhile, or that *every* conceivable legal and factual dispute should be litigated to the hilt in all cases. Indeed, the latter would be a self-defeating proposition. The time and resources spent on unnecessary litigation of clear-cut issues and clear-cut cases would cause endless delays in the litigation of more reasonably contested matters. Thus, even if it is not structured as an automatic plea discount, §3E1.1 might appropriately be designed to encourage litigation efficiency.

More specifically, existing Application Note 1(A) provides a helpful distinction that may be utilized more broadly. The Note asserts,

> A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a

> manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous . . . .

The same disqualifying principle (false denial or frivolous contestation) could be adapted and extended from relevant conduct to charged conduct. Thus, a defendant who goes to trial might be denied the discount if the defendant wastes government and court time by presenting frivolous defenses or false testimony. On the other hand, if there is a reasonable basis for the positions taken by the defendant at trial, then the trial should not necessarily be regarded as an inefficient use of government and court resources.

Reenvisioned along these lines, §3E1.1 might look something like this:

> **§3E1.1. <u>Permitting the Government and the Court to Allocate Their Resources Efficiently</u>**[7]
>
> (a) If the defendant's conduct in relation to the case is consistent with the efficient allocation of the government's and court's resources, decrease the offense level by **2** levels. Absent extraordinary circumstances, the defendant's entry of a guilty or nolo contendere plea prior to the start of trial shall be regarded as sufficient for the 2-level reduction.[8] If the defendant chooses to take the case to trial, the defendant may still receive the two-level reduction so long as there is a reasonable basis in fact for the positions taken by the defendant with respect to the elements of the charged offense(s) and any affirmative defenses presented by the defendant.
>
> (b) [Retain in current form.]

Anticipated objections might come from two different directions. First, it might be asserted that the revised subsection (a), by making the plea discount more overt and closer to automatic, unconstitutionally burdens the defendant's right to a trial. The law in this area is unclear in some respects, for instance, as to whether there is constitutional significance to framing §3E1.1 as a plea

[7] This phrase is borrowed from existing §3E1.1(b).

[8] "Start of trial" should be a defined term. One possibility would be to define the start of a jury trial as the commencement of *voir dire*, and the start of a bench trial as the swearing of the government's first witness.

discount rather than a trial penalty.[9] Nonetheless, it appears that constitutional concerns played a role in the original Commission's decision to reject an automatic plea discount in favor of a more discretionary "acceptance of responsibility" discount.[10] However, unlike the original Commission, the current Commission is operating in the post-*Booker* world, in which the Guidelines are themselves, in a sense, discretionary. Moreover, even in relation to the calculation of the Guidelines range, it is possible to make the plea discount more transparent and reliable than it is now without making it wholly automatic. Thus, my proposal aims to preserve some ability "in extraordinary circumstances" to deny the discount in plea cases, and even more flexibility to grant the discount in trial cases ("may still receive"). Some discretion is retained here, albeit linked to a more focused objective (litigation efficiency) than the current Guideline (acceptance of responsibility)

Second, moving from a constitutional to a pragmatic objection, it might be asserted that the court's ability to award the discount even to defendants who go to trial would result in a large, possibly system-crushing increase in trials. This seems doubtful, however, in light of the many other sources of prosecutorial leverage available to induce guilty pleas, e.g., the third-point discount under §3E1.1(b), which I do not propose to change at present; the adjustment for early-disposition programs under (newly relocated) §3F1.1; the substantial assistance benefit under §5K1.1; bargaining over charges, including mandatory minimums; bargaining over recommendations under Fed. R. Crim. P. 11(c)(1)(B); and bargaining over specific sentences or sentencing ranges under Fed. R. Crim. P. 11(c)(1)(C). Moreover, it should be appreciated that the proposed reworking of §3E1.1(a) continues to treat guilty-plea cases differently from trial cases; the former result in a nearly automatic discount, while the latter only result in a discount at the court's discretion and if the reasonable-basis test is satisfied. Even just with an eye to §3E1.1(a), risk-averse defendants might still see a plea as more attractive than a trial. If the proposed new language did lead to an increase in the number of trials, such an outcome would not necessarily be either unmanageably large in magnitude nor socially undesirable at the margins.

I hope the Commission finds some of these comments to be helpful in the important deliberations to come. I wish to note that my institutional affiliation is provided herein only for identification purposes. These comments do not represent the views of Marquette University, Marquette Law School, or any persons or departments affiliated with those institutions save for me in my personal capacity.

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[9] O'Hear, *Remorse*, *supra* note 1, at 1557.
[10] *Id.* at 1513 n.22.

Sincerely,



Michael O'Hear
Professor of Law

M E M O R A N D U M

To:	The Honourable Carlton W. Reeves, Chair, United States Sentencing Commission
From:	Professor JC Oleson, University of Auckland
RE:	USSC Priorities and 28 U.S.C. 994(g)
Date:	7 July 2025

My name is James C. Oleson and I am a Professor of Criminology at the University of Auckland in New Zealand. Prior to this role, however, I served as a 2004-05 US Supreme Court Fellow and as Chief Counsel to the Criminal Law Committee of the Judicial Conference of the United States (2005-2010). I remain keenly interested in the US federal criminal justice system. I am therefore very pleased to contribute to the Commission's request for comment on "examination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option (*e.g.*, imprisonment, probation, or fine), and possible consideration of amendments that might be appropriate."

It is said that imposing a criminal sentence is the most difficult thing a judge ever has to do.[1] It is difficult both because the ceremony of imposing sentence is an act of moral judgment,[2] and because it requires the federal judge to evaluate all of the competing elements of 18 U.S.C. §3553(a). Some sentencing considerations (e.g., retribution) are retrospective in nature, while others (e.g., deterrence, rehabilitation, and incapacitation) are prospective in nature.[3] And, in many cases, the logic of retribution undercuts the logic of prevention.[4] As the playwright George Bernard Shaw wryly notes, "Now, if you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him. And men are not improved by injuries".[5] So guidance in sentencing is a valuable (and many-splintered) thing.

In-out decisions, deciding between custodial sentences (e.g., prison terms) and non-custodial punishments (e.g., fines, probation) are some of the most difficult decisions judges will face.

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[1] Daniel E. Walthen, *When the Court Speaks: Effective Communication as a Part of Judging,* 57 ME. L. REV. 449, 452 (2005) ("Sentencing decisions are often described as among the most difficult that a judge faces.").

[2] H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 613 (1958) ("To a judge striking a balance among these claims, with all the discretion and perplexities involved, his task seems as plain an exam-ple of the exercise of moral judgment as could be; and it seems to be the polar opposite of some mechanical application of a tariff of penalties fixing a sentence careless of the moral claims which in our system have to be weighed").

[3] J.C. Oleson, Risk in Sentencing: Constitutionally-Suspect Variables and Evidence-Based Sentencing, 64 *SMU L.* REV. 1329, 1330-33 (2011).

[4] Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice,* 114 HARV. L. REV. 1429, 1438, 1441 (2001) ("Dangerousness and desert are distinct criteria that commonly diverge **....** [T]hey inevitably distribute liability and punishment differently. To advance one, the system must sacrifice the other.").

[5] GEORGE BERNARD SHAW, 22 *THE COLLECTED WORKS OF BERNARD SHAW* 173, 184 (1932).

Some jurisdictions (e.g., Oregon's SB 395 laws) have attempted to make custodial and non-custodial sentences more fungible, experimenting with punishment units. But there are fundamental differences between probation and prison.

It is widely acknowledged, especially outside the US, that the US is over-reliant on its use of prisons:

> Outside of the academic literature, there is little understanding of just how very out of step the United States is with the rest of the world in its reliance on incarceration. Many criminal justice practitioners do not understand that, compared to the rest of the world, the United States is an outlier in terms of imprisonment rates. "A far higher proportion of adults is imprisoned in the United States than in any other country in the entire world. Our incarceration rate, which is nearly 750 individuals per 100,000 in the population, is now roughly five to ten times the rate of most other Western industrialized nations". Jails and prisons in the United States house a collective 2.3 million inmates, representing an astonishing imprisonment rate of 743 per 100,000 Americans. Worldwide, Rwanda has the second-highest incarceration rate (595 per 100,000) and Russia has the third-highest rate (568 per 100,000), yet it is reported that the U.S. rate exceeds the rate of the top 35 European countries *combined*. Also disturbing is the pronounced racial imbalance in American prisons. For white men between the ages of 18 and 64, 1 in 87 is incarcerated; for Hispanics, the rate is 1 in 16; yet for black men, the rate is 1 in 12. It is an unflattering and worrying portrait of American penal exceptionalism.[6]

This reliance on prisons is particularly concerning given mounting evidence that prisons are criminogenic, breeding—not reducing—crime.[7] This may help explain high rates of recidivism and re-incarceration.[8] Petrich and his colleagues now identify this finding as a "criminological fact."

> [C]ustodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions such as probation. This finding is robust regardless of variations in methodological rigor, types of sanctions examined, and sociodemographic characteristics of samples. All sophisticated assessments of the research have independently reached the same conclusion. The null effect of custodial compared with noncustodial sanctions is considered a "criminological fact."[9]

Accordingly, it is my view that custodial penalties should be reserved for cases in which risk assessment instruments suggest that the sentenced offender represents a risk of violence or a threat to public safety.[10] In all other cases, prison sentences are contraindicated, and combinations of community-based punishment are preferrable. In particular, the European

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[6] J.C. Oleson, A Decoupled System: Federal Criminal Justice and the Structural Limits of Transformation, 35 JUST. SYS. J. 383, 384-85 (2014).
[7] Petrich, Damon M., Travis C. Pratt, Cheryl Lero Jonson, & Francis T. Cullen. Custodial sanctions and reoffending: A meta-analytic review, 50 CRIME & JUSTICE 353 (2021).
[8] Matthew R. Durose & Leonardo Antenangeli. Recidivism of prisoners released in 34 states in 2012: A 5-year follow-up period (2021).
[9] *Supra* note 7, at 353.
[10] J.C. Oleson, 'Evidence-Based Sentencing', *Oxford Bibliographies in Criminology*, https://www.oxfordbibliographies.com/view/document/obo-9780195396607.

experience with income-adjusted day fines is worthy of the Commission's study. Germany has had stunning results, even in cases of serious crime.[11]

Indeed, the shift away from prisons as the modal form of punishment has enormous potential. I recently advised the New Zealand Minister of Justice on the experience of the Netherlands:

> Just a decade ago, the Netherlands had one of the highest rates of incarceration in Europe. In 2006, they imprisoned 125 people per 100,000. Today, the rate is 59 per 100,000: less than half of what it was. And despite closing more than 25 of its prisons in the last decade, the country has resorted to accepting prisoners from Belgium and Norway. The policy changes that led to this halving of the prison population? They were not particularly dramatic or controversial. They involved shifting police resources away from drug offences to human trafficking and terrorism offences, as well as allowing judges to do more with community service orders, fines, and electronic monitoring. Now, I am well aware that the Netherlands is not New Zealand. Importing policies from abroad can be problematic (q.v., New Zealand's variation on California infamous three strikes laws) and adapting the successes of a social democracy to the inequalities of a neoliberal state would be an enormous challenge. But these relatively unobtrusive steps halved the Dutch prison population in less than a decade. If we could do that here, it would change the lives of 5000 people currently behind bars; it would free up ~$500 million annually that could be redirected into education, health care, housing, and infrastructure (ironically thereby making us look a little more like those social democracies of Scandinavia and Western Europe).

I do not have the time to develop these themes (I am travelling), but if it should be helpful, I would be happy to provide further information to you and your fellow commissioners. I can be reached at [redacted]

[11] Thomas Weigend, Sentencing and Punishment in Germany, SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry & Richard Frase, Eds.) (2001).

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July 8, 2025

VIA Public Comment Submission Portal
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002

RE: Public Comment: Amending §5K1.1 as a Policy Priority

Dear Commissioners:

This letter strongly urges the United States Sentencing Commission to make amending §5K1.1 (Substantial Assistance to Authorities) a policy priority for the Commission's amendment cycle ending May 1, 2026. Section 5K1.1 needs amending to allow defendants to receive guidelines reductions and relief when prosecutors withhold substantial assistance motions in bad faith.

The federal prosecutor has the unilateral power under §5K1.1 to unlock a sentencing court's authority to depart from the sentencing guidelines. *See* U.S. Sentencing Guidelines Manual, §5K1.1 (requiring government motion). While the federal prosecutor has "the power, [but] not a duty" to file a substantial assistance motion, as per the Supreme Court in *Wade v. United States*, this power is not unlimited. 504 U.S. 181, 185-186 (1992) A sentencing judge can review a prosecutor's refusal to file a substantial assistance motion and grant a remedy when the refusal was based on an unconstitutional motive (i.e. race, religion) or not rationally related to any legitimate government end. *See id.*

Wade, however, did not settle whether a federal judge can impose guidelines relief pursuant to §5K1.1 when the court finds that a substantial assistance motion was withheld on bad faith. Bad faith is present when a prosecutor withholds a substantial assistance motion for a reason unrelated to the faithfulness of a defendant's cooperation and even if a defendant fully and faithfully cooperated and complied with the defendant's cooperation agreement. A substantial assistance motion withheld on bad faith denies a cooperating defendant from receiving the value of his bargained-for cooperation for reasons unrelated to the value and faithfulness of the defendant's cooperation. The current §5K1.1 offers a defendant no recourse if a prosecutor withholds a substantial assistance motion for bad faith reasons, such as the prosecutor simply not liking a defendant, or a prosecutor's anger for losing a case/trial despite a defendant's full and faithful cooperation.

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The Commission should amend §5K1.1 so that bad faith review and relief are consistently and universally available. Alternatively, the Commission should amend §5K1.1 to allow a sentencing court to provide guidelines departures/reductions in the absence a substantial assistance motion when a defendant can show: (a) she fully complied with her cooperation agreement; (b) she complied with all of the government's reasonable cooperation requests; and (c) she provided truthful information to the government/law enforcement and/or provided truthful testimony to a grand jury or petit jury.

Why should this issue be a priority of the Commission for the amendment cycle ending May 1, 2026? Three reasons stand out. First, §5K1.1 needs amending to maintain the trust of defendants whose cooperation is critical to law enforcement and public safety. Cooperation's role in federal prosecutions cannot be overstated or over-exaggerated. It is not hyperbole that collectively the leads, information, identifications, testimony, surveillance, and evidence obtained through cooperation is the "life blood" of today's federal investigations and prosecutions. *See* Mary P. Brown and Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia,* 43 Am. Crim. L. Rev. 1063, 1073 (2006). This "life blood" will go dry when defendants lose trust because they lack the means to obtain the sentencing credit they deserve when prosecutors withhold substantial assistance motions in bad faith.

Second, this cooperation issue is a matter of due process. Due process includes a defendant's rights to be: (1) heard at meaningful time and in a meaningful manner; and (2) sentenced based on accurate information. *See Matthews v. Eldridge,* 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) (meaningful time and manner); *Government of Virgin Islands v. Yarwood,* No. CR. 70/2001, 2002 WL 31422984, at *5 (Terr. Ct. V.I. October 2, 2002) (accurate information). The amendments proposed here will infuse much needed due process into sentencing when prosecutors withhold substantial assistance motions in bad faith.

Third, defendants put themselves (and their loved ones and family) at great risk of harm and death when they agree to cooperate. That risk is not eliminated or minimized when the government withholds a substantial assistance motion. To put a cooperating defendant at risk and not reward her with guidelines relief despite her good faith cooperation is grossly unjust and an indictment of the criminal legal system.

For additional information and support for the need to incorporate bad faith review and relief into §5K1.1, please s*ee* Lucius Outlaw, *A Net for A Cooperator's Leap of Faith: The Due Process Need for Universal Acceptance of Bad Faith Review of Prosecutors' Substantial Assistance Determinations in Federal Sentencing,* 104 Marq. L. Rev. 661 (2021).

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Sincerely,



Lucius T. Outlaw III
Associate Professor &
Supervising Attorney

Criminal Justice Clinic
Howard University School of Law

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Dave Sanders, Pastor/Friend

Topics:

1. Sentencing Options (Chapter Five)

4. Career Offender

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

6. Simplification (Grouping Rules, Criminal History, §5G1.3 & Others)

7. Federal Bureau of Prisons Issues

10. Miscellaneous

Comments:

To the United States Sentencing Commission:

I respectfully submit the following recommendations for your review of the sentencing guidelines under BAC2210-40. My comments are informed by the lived experiences of families whose loved ones are currently serving time in the Federal system. As the family member of someone in federal custody, I am deeply invested in reforms that bring sentencing policy into alignment with the core objectives of the Department of Justice and Bureau of Prisons: Public Safety, Punishment, Rehabilitation, and Deterrence.

1. On Rehabilitation: A Critically Underutilized Objective

The current federal sentencing structure heavily prioritizes containment and punishment, often at the cost of rehabilitation. This imbalance is reflected in excessively long sentences that far exceed those given in state systems for comparable offenses.

Rehabilitation is routinely delayed until the final phase of incarceration, signaling its diminished importance. Meaningful programming—mental health services, addiction treatment, education, and vocational training—should be front-loaded early in a sentence, when it is most likely to foster transformation. Inmates often avoid psychological services due to valid fears that disclosures will be used against them, undermining trust and access to care.

Moreover, maintaining familial and community ties is essential for rehabilitation. Yet limited phone access, infrequent in-person visits, and transfers to distant facilities impose unsustainable burdens on inmates and families alike. True rehabilitation must include generous visitation policies, abundant phone time, and geographic placement that allows for regular contact with loved ones.

Economic hardship is another barrier to successful rehabilitation. Inmates are assigned extremely low-wage jobs, leaving them unable to support themselves or their families. When combined with poor nutrition from low-calorie meals and overpriced commissary items, the system deprives inmates of basic dignity and health.

Educational programs are also inadequate, with substandard curricula and minimal oversight. Robust, standards-based education—beginning early in the sentence—can dramatically improve reintegration outcomes.

To support genuine rehabilitation, I urge the Commission to consider expanding alternatives to incarceration. Greater use of home confinement and halfway houses would promote community reentry, increase access to family and work, reduce institutional costs, and better serve DOJ/BOP goals.

2. On the "Career Criminal" Sentencing Enhancement

The application of the "Career Criminal" enhancement should be limited to individuals with a demonstrable, sustained pattern of criminal activity. A person who commits a single offense over a short period and lives crime-free for years afterward does not reflect the definition of a career criminal.

Enhancements must be based on clear evidence of habitual, long-term criminal enterprise. Overbroad application of this provision leads to unjust sentence inflation and undermines the integrity of the justice system.

3. On Good Time Credit: Incentivizing Rehabilitation and Responsibility

Good Time credit should be substantially increased for inmates who maintain perfect disciplinary records. Sustaining a flawless conduct record in prison is extremely difficult and indicates exceptional self-discipline and a low likelihood of recidivism.

Currently, inmates often wait years before accessing addiction programming. Early, sustained engagement in rehabilitative efforts should be incentivized through expanded Good Time opportunities. Accelerating program access and linking it directly to sentence reductions would promote faster personal transformation.

Furthermore, society should reward positive contributions. If sentence enhancements are based

on aggravating factors, then sentence reductions should similarly consider pre-incarceration prosocial behavior—such as volunteering, community service, and paying taxes—as indicators of civic engagement and rehabilitation potential.

Good Time should be reframed as a multifaceted tool that encourages personal growth, promotes public safety, and recognizes both past and current behavior as relevant to sentencing outcomes.

4. On Prior Criminal History and First-Time Offenders

Current sentencing practices often treat a first offense as though it were the culmination of a criminal career. This contradicts the intended deterrent function of sentencing guidelines.

First-time offenders often lack awareness of the legal consequences of their actions. Sentences should reflect this by offering more leniency on a first offense while escalating significantly for repeat violations. This model would preserve deterrence through a clear, progressive penalty structure.

Additionally, parole violations tied directly to an original offense could justifiably carry greater weight in a system where first-time offenses are sentenced more leniently. This would maintain public safety while giving initial offenders a fair opportunity for reform.

Conclusion

The current federal sentencing structure often sacrifices fairness and rehabilitation for an overreliance on extended confinement. A modern, balanced system should focus not only on punishment but also on human potential, family stability, and pathways to reintegration.

I deeply appreciate the Commission's willingness to reassess the sentencing framework and encourage reforms that reflect evidence-based practices, proportional justice, and our shared commitment to a more restorative criminal justice system.

Respectfully,

Dr. David O. Sanders
Pamplin, VA
Pastor/Retreat Center Director

Submitted on: July 18, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Sheila Sullivan, Empowering Your Life Ministries Jul. 10, 2025

Topics:

2. Drug Offenses (§2D1.1)

Comments:

Dear Judge Reeves,

I am writing to comment on the Commission's proposed priorities for the 2025-2026 amendment cycle.

Methamphetamine sentences are extraordinarily high, in part because of outdated purity distinctions. In light of the Commission's own research, I urge the Commission to reimagine meth sentences. The current meth guideline sentences do not accurately reflect the present-day reality of meth trafficking offenses. As a result, too many people are sentenced to unnecessarily long terms of imprisonment for these offenses.

For the past few years, the Commission has considered amendments to the Career Offender guideline. And for good reason. This guideline imposes harsh enhancements on many individuals whose crimes simply do not fit the punishment. The "career offender" designation was meant to target serial recidivists, but for too long, it has swept in people who are simply not "career criminals."

Finally, I am deeply concerned about the state of the BOP. From overcrowding, to crumbling infrastructure, to persistent lockdowns, BOP cannot handle the population it currently has. The Commission should consider whether the guidelines can help to ensure that people do not serve more time than necessary in BOP.

I hope that any proposals the Commission considers will reduce the number of people serving lengthy terms of imprisonment that do not fit the purposes of punishment.

Submitted on: July 10, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Sheila Sullivan, Empowering Your Life Ministries Inc

Topics:

7. Federal Bureau of Prisons Issues

Comments:

The conflict between the court's sentencing intent and the FBOP's aggregation policy has resulted in a complex situation where the petitioner's sentence is being treated as a single, ineligible offense, despite the court's clear intention to impose consecutive sentences. The court's order specifies that Count 2 (924c) is consecutive to Count 1 (841), with Count 1 being 100 months and Count 2 being 60 months, totaling 160 months.

The FBOP's aggregation policy, intended for administrative purposes, should not override the court's sentencing intent or negate the benefits of the First Step Act (FSA) for eligible offenses. By aggregating the sentences, the FBOP is effectively treating the petitioner as if they were serving a single sentence, rather than two consecutive sentences. This approach is inconsistent with the court's intent and the plain language of the FSA.

As supported by *United States v. Wilson*, 390 F.3d 1003 (7th Cir. 2004), and *United States v. Doe*, 351 F.3d 929 (9th Cir. 2003), the court's sentencing intent should be given significant weight in determining the petitioner's eligibility for FSA benefits.

Given that the petitioner has served 51 months, which is 85% of the 60-month sentence for the 924c offense (Count 2), it can be argued that the requirements of the law for that specific offense have been fulfilled. The remaining portion of the sentence related to Count 1 (841) should be eligible for FSA benefits, as it is a separate and distinct sentence.

The FSA provides benefits like earned time credits for eligible inmates, and certain offenses, including those under 18 U.S.C. § 924(c), are ineligible for these benefits. However, the question arises whether the aggregation of sentences for administrative purposes should impact the eligibility for FSA benefits for the portion of the sentence related to the eligible offense (Count 1, 841).

In *Wade v. United States*, 504 U.S. 181 (1992), the Supreme Court emphasized the importance

of judicial review of administrative decisions, highlighting that courts have the authority to review and interpret statutes and administrative actions. This principle supports the argument that the court should review the FBOP's aggregation policy and its application to the petitioner's sentence.

The recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo* (2024) emphasizes the importance of statutory interpretation and limits agency discretion in interpreting statutes. This could influence how the FBOP's aggregation policy is applied in the context of FSA eligibility. Given the *Loper Bright* decision, the FBOP's aggregation policy and its application to deny FSA benefits may be considered an overreach of administrative authority.

In light of these facts and the *Loper Bright* decision, it is reasonable to request that the FBOP reconsider its application of the aggregation policy and allow the petitioner to earn FSA credits on the eligible portion of their sentence, specifically the 100-month sentence for the 841 offense.

The petitioner requests that the court consider the plain meaning of the FSA and the sentencing court's intent, rather than the FBOP's interpretation, in determining eligibility for FSA benefits. Given the consecutive nature of the sentences and the petitioner's significant portion of time served, a reevaluation of FSA eligibility is warranted based on the specific terms of the court's order and the statutory language of the FSA.

Submitted on: July 10, 2025

July 16, 2025

By Email

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Ms. Jennifer Dukes
Public Affairs – Priorities Comment

Dear Ms. Dukes:

This letter and its three attachments respond to the U.S. Sentencing Commission's notice and request for public comment on Proposed Priorities for Amendment Cycle. I address reasons why the Commission should include in its priorities for the upcoming amendment cycle possible consideration of amending U.S.S.G. § 5K1.1.

Background: Why substantial reform for substantial assistance motions is still needed. In 2002, I authored a law review article (Attachment A) that responded to an earlier article in which the author proposed certain changes to the law and process governing substantial assistance motions. At the time, I was an assistant federal public defender in the Northern District of Ohio. Since that time, I've served as the chief federal public defender for that office and as the acting chief federal public defender in the Southern District of Ohio, earned two master's degrees in business administration and finance at Case Western Reserve University's Weatherhead School of Management, and represented many individuals through appointments by both United State District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit as a member of both courts' Criminal Justice Act panels. Today, I work as a sole practitioner representing only defendants in federal criminal cases, appeals, or post-conviction matters exclusively by appointment or plaintiffs in federal civil cases through the District Court's civil pro bono program again exclusively by appointment.

In these varying capacities, I have represented a sizeable number of individuals who chose to cooperate with the government in resolving their criminal cases. The trends that prompted me to write my article in 2002 continue today. I'm hopefully wiser for my work with the two plus decades of additional courtroom experience (thanks to my work in the FPD offices and as a CJA lawyer), and hopefully more analytically astute for my additional classroom studies (thanks to my graduate degrees and the statistical and quantitative focus they provided). That wisdom alerts me to key ongoing problems with substantial assistance. Thus these comments, which represent solely my own views on this issue.

Dennis G. Terez, Esq. ■ P.O. Box 22128, Beachwood, Ohio 44122 ■ 216-256-4059

Substantial assistance motions are still plagued with the same puzzling problems I saw in 2002. Federal judges for the most part seem to view the government's proposed ceiling on the sentence reduction offered for a defendant's substantial assistance as an unbreakable barrier; defense lawyers oftentimes seem all too hesitant to seek a greater reduction for a defendant's substantial assistance (often are even prohibited from doing so by plea terms); and the hearing on any so-called motion for substantial assistance is usually perfunctory at best. These concerns are in addition to those I raised in my 2002 article.

The problem lies in part, of course, with the statute itself that authorizes motions for a sentence reduction in light of a defendant's substantial assistance. That statute, 18 U.S.C. § 3553(e), tilts the table in the government's favor by authorizing only the government to file such a motion. My comments here assume that Congress will not amend that statutory provision in its foreseeable sessions. My 2002 article recommended an amendment that would authorize the defense to file a motion for a substantial assistance reduction to level the playing field. Although I still believe that is a good solution to the current problem, the political landscape does not provide fertile ground for that kind of amendment.

Nevertheless, even given the tilted playing field, there is room to reduce the tilt and make the process more equitable. Attachment B is U.S.S.G. § 5K1.1 after the currently proposed amendment goes into effect on November 1, 2025. Attachment C is my proposed set of amendments to U.S.S.G. § 5K1.1.

Reasons behind the proposed amendments. The reasons behind the proposed amendments to U.S.S.G. § 5K1.1 are simple. As already noted above, the problems I saw in 2002 have not abated over the decades, and have grown even larger to some degree in scope and consequence.

Federal criminal drug trafficking cases, for example, now often encompass sprawling drugs conspiracies involving large drug amounts and quasi-arsenals of semi-automatic and automatic weapons. The motivation to cooperate has, therefore, become concomitantly greater to avoid sentences that are best counted in decades of time rather than in months or years.

At the same time, though, the pressure in jails, in prisons, and on social media not to cooperate seems to have grown. Gang activity in jails and prisons is commonplace, probably most likely due to staffing shortages and less oversight of inmates. The loyalty oath not to cooperate, therefore, finds added strength behind bars. Those who are released on bond in a typical drug conspiracy are quickly identified as cooperators. And those who remain behind bars but receive lower-than-anticipated sentences are also quickly so identified even if they didn't cooperate.

The demand by defendants for a copy of their sentencing transcripts to take with them to their designated BOP facility has noticeably increased. A long-time court reporter recently noted that for the first time in his career, family members are paying out of their own pockets the expense of transcribing the sentencing hearing just so their incarcerated family member can prove to other inmates that he or she isn't a cooperator. The demand is easy to explain. Other inmates now typically ask for a sentencing transcript or other proof of no cooperation as soon as the defendant arrives at the designated BOP facility, or sometimes even in transit. In a recent case, a client who was sentenced for a violation of his supervised release asked for proof that he had never cooperated, even though his term of incarceration will be only slightly more than a half a year. The risk of being harassed as a cooperator is very real, he explained, despite the short time he'll serve.

Moreover, the risk of being identified, sometimes even wrongly, as a cooperator has increased. With the widespread use of social media, rumors about a defendant as a possible cooperator, whether true or false, quickly spread. Both the defendants who cooperate and their family and friends are then at risk of bodily injury or worse. Threats of retribution have always been a problem. The familiar saying "snitches get stiches" embodies that long-standing concern. But in jails and prisons, the risks are more varied and greater than ever before. When in doubt about a new inmate's status, other inmates who have been incarcerated at the facility for a while have the ability to enforce their own rules of conduct even when the new prisoner is unable at the time to prove he or she didn't cooperate, such as barring that inmate from commissary, watching television, using the telephones, etc.

The federal sentencing regime we currently have is intended to encourage and reward cooperation. Some prosecutors have acknowledged that they'd face a severe impediment if cooperation wasn't an option in some cases. Consequently, if a defendant chooses to cooperate, it seems incumbent on all who are part of the criminal justice system to make sure we do everything reasonably within in our power 1) to make sure the process of getting a sentence reduction for the person's cooperation is as fair as reasonably possible (*i.e.*, make the cooperation process worth it); and 2) to make sure as many safeguards as practically possible are in place to reduce the risks inherent in the process to the defendant and the defendant's family and friends (*i.e.*, make it as safe as possible for defendants to cooperate if they choose to do so). My proposed changes go more to the first concern but would likely improve upon the second concern as well.

The proposed changes to U.S.S.G. § 5K1.1. My proposed changes to U.S.S.G. § 5K1.1 are modest in scope. No set of guideline amendments can alone fix all problems in our current criminal justice system. The amendment I propose, however, would work towards alleviating the key problems noted above.

The first proposed change is to make explicit in the text of the guideline itself the fact that the District Court can sentence an individual below a mandatory minimum sentence as well as a specific guideline range in light of cooperation. There seems to be no reason for leaving this point in the Application Notes where it currently is. U.S.S.G. § 5K1.1, App. Note 1. Having this language in the guideline itself may also draw attention to the fact that the District Court needs to keep an eye on the danger of the government providing, say, three offense levels for a defendant's cooperation, but then adding back some or all of that reduction through the imposition of a notice under 21 U.S.C. § 851. As I mentioned in my 2002 article, what the one hand giveth in terms of a substantial assistance benefit, the other hand can often taketh away through a § 851 enhancement. That outcome seems inherently unfair for someone who risks his or her safety and security to provide assistance to the government in prosecuting other individuals involved in criminal conduct.

The second proposed change is to make explicit that the motion the government makes for the substantial assistance sentence reduction needs to be decided after a hearing before the District Court. At first blush, this addition might seem to be surplusage. A hearing would seem to be implicitly required for any motion. In reality, though, the hearing for substantial assistance motions is typically perfunctory at best. It has become a brief moment in the sentencing hearing at which the prosecutor quickly summarizes the defendant's cooperation and how many offense level points that cooperation is worth to the government. The defense counsel rarely says anything other than voicing agreement with the reduction (of course), and the District Court then granting the motion. In many cases, the process has evolved into not much of a hearing at all, because plea terms often prohibit the defense from asking for a greater reduction than that proposed by the government. In some cases, defense counsel are reluctant to speak up for fear of losing what the prosecutor has already put on the table for a sentence reduction.

Having language about a hearing explicitly in the guideline should mean what it says. A hearing will take place on the government's motion, and both sides will be able to present their side of things. That's how fair hearings work. If the government believes a one-offense level reduction is appropriate in light of the defendant's cooperation, the prosecution can present that position at the hearing. If defense counsel explains in response that the cooperation the defendant provided spanned, for example, three sit-down meetings and involved a half dozen law enforcement agents who asked questions about numerous other individuals, then the District Court will be able to be in a better position to assess whether that one-offense level reduction is indeed appropriate or perhaps inappropriately too low. These scenarios are discussed further below.

The third proposed change acknowledges that not all risks or injuries have already occurred at the time of sentencing. In fact, most of the dangers associated with cooperating are yet to come after the defendant stands to be sentenced. Some of those typical future risks are

described above. Bear in mind, too, that a co-defendant's ire against another co-defendant (defendant A) for having cooperated in the case often arises only after the co-defendant is sentenced and receives more time than defendant A. Just having the additional proposed language in the guideline itself would remind the District Court and the lawyers that understanding the risks and dangers of substantial assistance requires thinking into the future. And it is possible that only in the future will those serious risks and dangers arise.

Two examples illustrate why it is so important to the fairness of the process to take into consideration future risks and dangers. In our first example, let's assume defendant A has provided information to the government on two individuals not yet apprehended but who are suppliers to drug trafficking organizations in the Greater Cleveland area. Certainly there are risks and danger to defendant A regardless of the situation; however, those risks and danger dissipate if the two individuals are arrested, indicted, and sentenced to, say, 20 years in prison. Risks and dangers associated with cooperation naturally dissipate over time. In this instance, probably more quickly once the two suppliers are apprehended.

Our second example paints a different picture. Let's assume defendant A has provided information about the operations of a nationwide network of drug suppliers. Moreover, the cooperation is ongoing and may even warrant a further sentence reduction under Fed. R. Crim. P. 35 later on. In this instance, the risks and dangers to the cooperating defendant continue well into the future regardless of who is arrested and incarcerated from the network of suppliers. The nationwide scope of the cooperation, moreover, will likely increase the likelihood that somewhere on the internet defendant A will be identified as a cooperator. All of this information should be presented at the hearing on the government's substantial assistance motion. Otherwise, the District Court may inaccurately assess the risks and dangers defendant A exposed himself and his family to by cooperating.

At this point, one might ask: well, isn't it true that defendant A should have to face those risks and dangers because he's the one who agreed to cooperate? True enough, and he will face those risks and dangers as will his family. The other side of the coin, though, is that the government presumably benefited greatly from the information defendant A provided. There's a cost for that information, and, in the admittedly peculiar world of substantial assistance (but remember, that's the system our lawmakers have chosen to build), the cost is paid to the defendant in the form of a sentence reduction. To place an accurate value on that cooperation, the District Court needs to hear from both sides where neither side should feel constrained to present its position on the motion.

The fourth proposed change runs counter to current practice in many districts. It is designed to address the inequities in the substantial assistance process to lessen the tilt in the playing field mentioned above. Just as the law gives authority only to the prosecution to file substantial assistance motions, we must keep in mind that that same law places the authority to

decide that motion with the District Court, not with the prosecution. That should mean, therefore, that the District Court can go both lower and higher in terms of the substantial assistance sentence reduction it grants. All too often, though, we see both the parties and the courts viewing the reduction in offense levels proposed in the government's motion as the reduction limit. Nothing in the law suggests that should be the case.

Making explicit that the District Court is not bound by the offense level reduction proposed in the government's substantial assistance motion may also work against the trend so often seen where the prosecution forces the defendant to agree to the reduction proposed by the government in advance and further agree not to request a greater reduction in court. In other words, the sentence reduction as proposed by the government is a take-it-or-leave-it proposition.

Nothing, presumably, can prevent an overbearing prosecutor from forcing the defendant to accept that type of offer, especially when the defendant doesn't want to take on the risk that the District Court will possibly reduce the size of the proposed reduction. It seems, though, that if we are working to make the substantial assistance process more equitable and to respect the law which intended the District Court to decide the sentence reduction and not the government, the guideline language should push us in the direction I propose rather than stay silent on the issue. Making it clear, too, that the District Court is not bound by the offense level reduction proposed by the government moves us somewhat closer to trying to level the playing field—which nevertheless will remain tilted to some degree regardless of guideline amendments because of the statutory language authorizing only the government to file substantial assistance motions.

Substantial assistance and how a defendant is compensated for providing it to the government continue to play an oversized role in our federal criminal justice system. I urge the Commission to add this issue to its proposed priorities for future amendment cycles. Whether it is through the modest amendments I propose or otherwise, the process can be improved by making it more equitable and more transparent.

Thank you for this opportunity to provide comments on possible policy priorities for the amendment cycle ending May 1, 2026. Please don't hesitate to reach out to me if you wish to discuss the contents of this letter or it attachments.

Sincerely,

/s/ Dennis G. Terez

w/Attachments A-C

ATTACHMENT A

ATTACHMENT A

COMMENT

SUBSTANTIAL REFORM FOR SUBSTANTIAL ASSISTANCE MOTIONS

*Dennis G. Terez**

I. INTRODUCTION

Tackling the issue of how substantial assistance or a criminal defendant's cooperation with the government is to be handled is a daunting task. Cooperation by the accused has always been a critical element in law enforcement strategies. In the federal system, following the passage of the Sentencing Reform Act of 1984[1] and the subsequent birth of the sentencing guidelines shortly thereafter, the cooperating defendant has become even more important to law enforcement.

In responding to the reform proposal recently set forth in the *Journal of Legislation*,[2] four questions warrant further examination: (1) Who is to judge the value of a defendant's cooperation? (2) How is that cooperation to be rated or evaluated? (3) How much discretion are we going to give the person or institution ultimately deciding on the value of the cooperation? (4) When should this process occur? Let us begin exploration through three scenarios.[3] By way of these three scenarios, it is my purpose to show some of the difficulties embodied in the issues surrounding substantial assistance, and hopefully to begin answering the four questions posed.

A. Scenario 1

A young man by the name of José Martin is arrested with a friend while sitting in a car parked outside of a drug store. Mr. Martin is a passenger in the car and his friend is seated in the driver's compartment at the time of the arrest. Unbeknownst to Mr. Martin, his involvement with a drug

1. Sentencing Reform Act of 1984, P.L. No. 98-473, §§ 211–12, 98 Stat. 1987-2017 (1984) (codified as amended in scattered sections of 18 U.S.C.).

2. Maria Limbert, *Problems Associated with Prosecutorial Control over Filing Substantial Assistance Motions and a Proposal for a Substantial Assistance Pre-sentence Hearing*, 27 J. LEGIS. 251 (2001).

3. All of the scenarios presented in this article are based on actual factual scenarios or portions of scenarios that the author has encountered in some fashion, but have been modified where needed to protect attorney-client privilege and client identity. All defendant names are fictitious, and any similarities with the names of actual individuals are purely coincidental.

transaction that just took place was videotaped and audio taped. The person to whom the crack cocaine was sold was an undercover police officer. As he is being taken down to the station, Mr. Martin opens up his mouth and starts arguing with the arresting officer that he sold no dope. The officer continues the conversation by saying that he knows all about Martin and has been watching him for some time. Mr. Martin then responds with the obligatory incriminating language as is so often the plight of defendants winding up in federal court: "Alright. I might have been involved with the sale, but it wasn't my dope."

At his arraignment, Mr. Martin explains the entire situation to his lawyer. One of the case agents approaches the lawyer, and informs her that law enforcement would be interested in having Mr. Martin proffer (cooperate) with law enforcement.[4] The agent promises the lawyer that cooperation points would be in order if Mr. Martin agreed to such a proffer. No specific number of points is discussed.

Mr. Martin ultimately proffers, and provides law enforcement with very valuable information. In fact, the information is so valuable that it allows law enforcement to arrest and indict another drug supplier on the streets. The information also allows law enforcement to confirm many of their hunches regarding drug dealers in Mr. Martin's neighborhood. The lawyer is not present for the proffer.

Mr. Martin decides to change his plea in the case, and the lawyers for both parties then engage in plea negotiations. Unfortunately for Mr. Martin, he has his sentence enhanced to a mandatory minimum period of imprisonment because of prior convictions for drug trafficking.[5] The government tells the defense lawyer not to worry though, because the enhancement will be essentially nullified by a motion the government is prepared to file on Mr. Martin's behalf. In its motion, the government will suggest to the court that a downward departure of two offense level points is appropriate. Despite their best efforts, Mr. Martin and his defense lawyer are unable to persuade the government that the enhancement is out of line, and that the two-point reduction for substantial assistance is insufficient.

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4. Although beyond the scope of this particular article, the entire notion of what exactly a "proffer" is needs to be brought into the discussion of substantial assistance. At its most fundamental point, a proffer means to divulge information to law enforcement officials, typically in a room with at least a case agent involved. But proffers can develop into many different shapes and sizes. Proffers can lead to further discussions with law enforcement personnel out of the area or from another agency; review of video tapes, mug shots, or line-ups previously made by law enforcement; identification of voices on an audio tape; conducting monitored telephone conversations; leading law enforcement through high crime areas to identify various landmarks or structures relevant to ongoing criminal investigations; and controlled drug transactions.

5. *See* 21 U.S.C. §§ 841(b), 851 (2000).

B. Scenario 2

As soon as Thomas Smith stepped off the train, he was arrested for trafficking in heroin. He had been through this before. After all, he had served as a mule for a drug lord in New York City for a considerable period of time, and had already served a five-year sentence awhile back. He was well familiar with the system, and was well familiar with the street life that he was living over the past ten years. So when it came to meeting his lawyer, his request to participate in a proffer with the government was an easy decision for him to make.

The prosecutor willingly took the proffer of Mr. Smith. This time the defense lawyer was present, as well as the prosecutor and three law enforcement agents. All the individuals on the side of the government were interested in hearing what Mr. Smith had to say, particularly as it related to the drug lord in New York City. Mr. Smith had a lot to say, and what he had to say he expressed in an intelligent and articulate way.

Being wise to the ways of the streets, Mr. Smith was able to give the agents, who were attentively listening, more than they had bargained for. He told them not only about the drug lord in New York City, but also discussed with law enforcement at the multiple proffer sessions numerous details regarding supply networks that extended beyond U.S. borders. After one of the proffers, the anxious prosecutor asked the defense lawyer if one more proffer session would be possible. This time, the prosecutor wanted to bring in an agent from another neighboring district, so that law enforcement could extend its sweep based on the information that Mr. Smith had given them.

At that subsequent proffer session, the newly added agent, for one reason or another, chose not to believe Mr. Smith's statements. In fact, he claims he is certain that Mr. Smith is lying. Unsure as to whether to believe the agent or Mr. Smith, the prosecutor nevertheless offers Mr. Smith a two-level departure for his substantial assistance (or for his troubles, depending on one's perspective).

The defense lawyer later confirms after Mr. Smith is sentenced that the new agent who had been brought in to the last session just did not like Mr. Smith, and that all the other agents were able to confirm the veracity of the salient points of Mr. Smith's statement. No law enforcement action is ever taken against the New York drug lord. For all intents and purposes the information obtained in the proffer sessions is not used. The two-level downward departure that the government recommends to the court, and which the court grants, turns out to be far less than the actual value of Mr. Smith's extensive information.

C. Scenario 3

Monique Johnson always wanted to be a millionaire. When she was arrested for engaging in securities fraud, wire fraud, and mail fraud, she felt grave remorse. She felt remorse for herself because her business plan had failed miserably, but also remorse for the customers she let down. She told her lawyer that under no circumstances did she want to go to trial, and that she wanted to cooperate in every way possible with the government.

Her lawyer quickly discovered that one of the reasons Ms. Johnson's business efforts failed was because of her lack of organization. When he made a simple request of her to outline in detail the companies she had formed, she responded with a 40-page letter, complete with diagrams and narrative. The prosecutor agreed to the proffer session but with great hesitation. When the session began, Ms. Johnson could not stop talking. She rambled on for almost an hour in a fashion that even her lawyer had to admit was nonsensical. She tried in vain to explain her 40-page chart, but it only made the prosecutor more impatient.

That is not to say, however, that the prosecutor was entirely tuned out. When Ms. Johnson successfully identified three individuals of a conspiracy that the government had been investigating for the past several years, and added a couple of new names to that group, the prosecutor took interest in what she had to say. He agreed to a subsequent proffer.

The lawyers on the case eventually negotiate a plea agreement that leaves room for a motion by the government for cooperation. It also leaves room for possible sentencing departure under Federal Rule of Criminal Procedure 35(b). Unfortunately for Ms. Johnson, she was never able to get her act together, or her facts concisely presented to the prosecutor. Despite her best efforts, the government was never sufficiently impressed with Ms. Johnson's presentation to believe that substantial assistance was warranted, and thus, never filed its motion for substantial assistance. As a consequence, Ms. Johnson never received a sentence reduction despite the fact that she had valuable information among her clutter.

II. WHO IS TO JUDGE?

In all three scenarios, the prosecution is effectively the decision-maker as to how many points the cooperation is to receive. In all three scenarios, almost complete discretion rests with the prosecution. It appears that, while people may agree on little in the area of substantial assistance, one exception is concern over large and growing prosecutorial discretion. "Post-SRA prosecutorial discretion is perhaps the single most-cited topic mentioned with respect to the substantial assistance policy statement. In context,

however, this concern is only one part of a much larger general concern of increased prosecutorial discretion under the guidelines."[6] A survey by the Federal Judicial Center reported that eighty-six percent of survey respondents, which included individuals working in the federal criminal justice system, believed that "sentencing guidelines give too much discretion to prosecutors."[7] Perhaps more interesting is that 74.9 percent of federal judges and 58.6 percent of chief probation officers agreed that prosecutors had "the greatest influence on the final guideline sentence."[8]

Leaving the decision-making with the prosecution creates inherent discrepancies as to who receives what and how much. There are no rules that would dictate how much certain cooperation is worth. This lack of uniformity is a significant force running contrary to the goals of the Sentencing Guidelines. The Guidelines, after all, are to bring some sense of uniformity to the sentencing process in the federal system. That is entirely undercut, if the prosecutor gives, for example, a two-point offense level reduction to one defendant for bringing a new criminal case to their attention, but four points to another defendant who might be able to bring only valuable information to an already ongoing law enforcement effort. And, as the above scenarios illustrate, personalities and experience in the field could come into play in the prosecutor's decision.

The problem is plainly aggravated when the decision to file a sentencing enhancement under 21 U.S.C. § 851 rests with the prosecution as well. As the first scenario illustrates, what one hand giveth, the other hand can quickly taketh away. That scenario not only runs contrary to the uniformity objective in the Guidelines, but would also seem to run contrary to one of the ultimate goals of the Sentencing Guidelines themselves, which is to encourage cooperation among defendants. What defendant in his or her right mind would cooperate only to know that the government is still going to file a sentencing enhancement under 21 U.S.C. § 851?

Therefore, there can be no real quibble as to the need to place the decision of doling out offense level reductions for substantial assistance in the hands of a neutral party, as Limbert proposes.[9] But one may legitimately

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6. LINDA D. MAXFIELD & JOHN H. KRAMER, U.S. SENTENCING COMMISSION, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 14 (Jan. 1998), *available at* http://www.ussc.gov/research.htm. The authors of this study were at the time Acting Director and Staff Director, respectively, of the Office of Policy Analysis of the U.S. Sentencing Commission. The paper presented an analysis of data gathered by the Commission's Substantial Assistance Staff Working Group.

7. Molly Treadway Johnson & Scott A. Gilbert, *The United States Sentencing Guidelines: Results of the Federal Judicial Center's Survey,* contained in REPORT TO THE COMMITTEE ON CRIMINAL LAW OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Dec. 5, 1996).

8. *Id.*

9. *Id.* at 7.

ask: isn't this already done? After all, U.S.S.G. § 5K1.1, which is the main sentencing guideline governing substantial assistance motions, states that "[u]pon motion of the government . . . *the court* may depart from the guidelines." (emphasis added.) Similar language is found at 18 U.S.C. § 3553(e), which provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Nothing in this language requires the court to grant the government's motion.

The Congress authorized the United States Sentencing Commission to:

> assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.[10]

It did just that by placing the responsibility for filing the motion with the government, and the authority to decide the motion with the court.

The proposal espoused by Limbert would shift the responsibility for decision-making to a federal magistrate judge. This may not have that significant of an impact, however, if the goal is to try to reduce the discretion the prosecution has over substantial assistance credits. If the prosecution, for one reason or another, believes that substantial assistance should not be granted or, at most, for only one level even when the defendant pleads for more because he or she truly has provided substantial assistance, nothing will change in the prosecution's discretionary power by shifting the decision-making to a federal magistrate judge.

But the question is nevertheless a nagging one. If the power of who makes the motion rests solely with the prosecution, then the ultimate decision-making authority often rests with it as well. If, as the Sentencing Commission has decided, it takes a motion by the government before the court can grant any substantial assistance benefit at all, the government deprives the court of the power of that decision by simply not filing the motion.

As the scenarios point out, the power tug-of-war is considerably more complicated than it might first appear. In all three scenarios, the gov-

10. 28 U.S.C. § 994(n) (2000).

ernment listens to the defendant during proffer sessions. In all three, the information's value does not translate into a benefit for the defendant equivalent to its true worth.

In scenario 3, the confusing and disorganized manner in which the defendant presented the information hindered the government's evaluation of the information, and, for the less patient prosecutor, also gave the government an excuse for not filing a substantial assistance motion. One can imagine the following exchange between the prosecutor and Ms. Johnson's lawyer following the proffer session. "We know your client tried her best, but frankly, we simply couldn't make heads or tails out of what she was trying to tell us."

In scenario 2, personalities—and egos—come into play.[11] Some law enforcement have their way of dealing with the world in which they work, and so do defendants. When a defendant comes along who, because of his "inside track" and his own touch of arrogance, can inadvertently rub a case agent the wrong way by pointing out errors in the agent's view of the world of crime (or at least one of the neighborhoods), the backlash can have serious repercussions for the defendant. What would have happened if Mr. Smith in scenario 2 had unbeknownst to him fallen upon false information, but the bulk of what he had to say at the proffer was valuable and correct? Should he in effect be punished (either by the government's refusal to file a substantial assistance motion or one for only a point or two) because one agent happens to discount all of what Mr. Smith says merely because he was honestly incorrect on one portion of the information he proffered? What goes on in the proffer room, even when things like egos and personalities are at play there, ends up having an enormous impact on the court's sentencing power. What if the agent in scenario 2 who, for one reason or another, did not believe any of Mr. Smith's information (even though it was correct) was supervising agent and had veto power over all substantial assistance motions in the case? In that instance, despite Mr. Smith's having given the government substantial assistance, the court never has a chance to take that information into consideration at sentencing, because the supervising agent refused to permit a substantial assistance motion to be filed.

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11. It is, of course, impossible to avoid entirely these elements in the evaluation of a defendant's substantial assistance. The goal is to limit their impact, since they undercut uniformity and equity in the evaluation of and reward for substantial assistance. And for any prosecutor or defense lawyer who has participated in numerous proffer sessions, the impact of these elements is undeniably strong. Examples include the overbearing agent, the taciturn defendant who fails to speak up even though it is in his or her interest to do so, the skeptical prosecutor who simply refuses to believe what the defendant is telling him or her, and the supervisor who simply wishes to send a message to all defendants in a particular conspiracy that the government is going to play "hard ball" and give no one more than a two-point reduction. The talk around the proffer table often becomes that of the "generous" prosecutor or the "stingy" one.

Scenario 1 is perhaps the most troubling because it appears to reflect an unresolved conflict between the governing statute and the Guidelines. Section 3553(e) of Title 28 draws the line between responsibilities: the government files the substantial assistance motion, and the court is thereby authorized to depart, even if to do so means to sentence the defendant below a mandatory minimum sentence.

In drug trafficking cases where mandatory minimum sentences come into play,[12] the government may seek to increase mandatory minimum sentences. In one instance, a mandatory minimum sentence can be increased from ten years to twenty years, and once again from twenty years to life.[13] In another instance, a mandatory minimum sentence can be increased from five years to ten years.[14] The enhancement automatically takes place with a mere one-page filing by the government setting forth the defendant's prior drug offense.

The sentencing power placed in the prosecution's hands is enormous. Let us assume, for example, that Mr. Martin in scenario 1 has one prior felony conviction for drug trafficking (scored at three criminal history points, placing Mr. Martin in criminal history category II).[15] Assume further that the amount of crack cocaine he sells to the undercover officer is six grams. This quantity of crack cocaine results in a mandatory minimum five-year sentence.[16] The Sentencing Guidelines place Mr. Martin at offense level 26 for a sentencing range of seventy to eighty-seven months.[17] Let us further assume that Mr. Martin's cooperation is valued by the prosecutor as a two-level benefit. By filing a motion for substantial assistance, the government would authorize the district court to sentence Mr. Martin below the statutory minimum of five years.[18] Under a strict guideline calculation, Mr. Martin's offense level could then potentially drop from 26 levels to 21 levels. This calculation results from a two-level reduction for Mr. Martin's substantial assistance (assuming the court's grants the government's motion) and an additional three-level reduction in the event Mr. Martin pleads guilty (again assuming the court grants Mr. Martin acceptance of responsibility points).[19] At that offense level, Mr. Martin's sentencing range drops to forty-one to

12. *See, e.g.*, 21 U.S.C. § 841(b).
13. 21 U.S.C. § 841(b)(1)(A).
14. 21 U.S.C. § 841(b)(1)(B).
15. United States Sentencing Guidelines Manual Ch. 5, Pt. A (2001) [hereinafter U.S.S.G.] sets forth the sentencing chart in its entirety.
16. 21 U.S.C. § 841(b)(1)(B)(iii).
17. U.S.S.G. § 2D1.1(c)(7).
18. 18 U.S.C. § 3553(e) (2000).
19. U.S.S.G. § 3E1.1.

fifty-one months, which, even at the high end, is substantially below the five-year mandatory minimum sentence.

Mr. Martin's prior conviction could come back to haunt him, however, to erase any benefit of his cooperation—and in the process dramatically change the district court's sentencing power. The federal drug trafficking laws give the prosecution unbridled discretion to file an enhancement whereby Mr. Martin's mandatory minimum sentence is not five years but ten years.[20] The statute governing such enhancements does not require the United States attorney to provide any reason whatsoever for filing the enhancement. It also sets no standards or requirements for the filing of the sentencing enhancement.[21]

Therefore, if the government believes that enhancement is appropriate, a notification to the court of Mr. Martin's prior drug offense increases his mandatory minimum sentence to ten years. In this event, Mr. Martin's starting offense level is 29, which results in a sentencing range of 97 to 121 months. This is the first sentencing range in the appropriate criminal history category (II) where we can find the mandatory ten-year sentence.

The same five-level reduction (two levels for substantial assistance and three levels for acceptance of responsibility) now brings Mr. Martin down to offense level 24, resulting in a sentencing range of fifty-seven to seventy-one months. Thus, by sentencing Mr. Martin even at the low end of that guideline range (fifty-seven months), the district court is back to sentencing Mr. Martin roughly where he would have originally fallen without any cooperation and without any offense level reduction for foregoing trial in the case, namely, five years. The entire benefit to Mr. Martin's cooperation is nullified not by the court but by the prosecutor.

Limbert's proposal of placing on the defendant the burden of filing a substantial assistance motion dramatically levels the playing field. One might argue, though, that both parties should be able to file such motions. After all, there is no reason to deprive the government of its leverage in proffer discussions of filing such a motion, and, as Limbert correctly observes, the neutral decision-maker will likely rely heavily on the prosecutor's opinion.[22] In other words, a prosecutor's motion is likely to be looked upon more favorable in most situations than a defendant's motion.[23]

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20. 21 U.S.C. § 841(b)(1)(B)(iii).

21. *See*, 21 U.S.C. § 851.

22. *See, supra* note 2, at 264.

23. The courts of appeals have not been receptive to arguments in support of allowing the defendant to file substantial assistance motions. *See, e.g.*, *In re* Sealed Case, 181 F.3d 128, 142 (D.C. Cir. 1999) (en banc), *cert. denied sub nom.* Sealed Petitioner v. United States, 528 U.S. 989 (1999) ("in the absence of a government motion, a district court lacks authority under the Guidelines to depart from the applicable sentencing range on the basis of a defendant's substantial assistance."); *In re* Sealed Case, 292 F.3d 913, 917 (D.C. Cir. 2002). The

Moreover, although Limbert's proposal acknowledges that the defendant-informant has first-hand knowledge of the amount and extent of his or her cooperation that does not necessarily mean that the defendant's view of the worth of such assistance will be valued. Practically every defendant in every conspiracy thinks he or she has the inside information that is most beneficial to the government.

Furthermore, there may well be instances where the government does not wish to go through the full-blown hearing that Limbert's proposal calls for. In a sensitive investigation where the defendant has given valuable information, yet because of the ongoing nature of the investigation the government does not wish to bring forward the value of the defendant's information through a court hearing, the government should be able to file in its own right an unopposed motion for substantial assistance. Because of the unopposed nature of the motion, no court hearing would be needed to ensure that the defendant receives full value for the substantial assistance, and the secrecy of the ongoing investigation would be preserved.[24]

III. HOW IS SUBSTANTIAL ASSISTANCE TO BE EVALUATED?

The handling by the courts and the government of substantial assistance motions under the Sentencing Guidelines suggests two points: no two districts appear to evaluate substantial assistance the same, and federal judges have no difficulty determining reasons for granting substantial assistance departures.

Districts have authority to establish their own policies for reviewing substantial assistance motions. The United States Attorneys' Manual ("USAM") requires prior internal approval before such a motion can be filed. The USAM provides as follows:

Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart

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courts have recognized, however, some limited relief from this prohibition. District courts have the authority to grant relief "if they find that the refusal [by the government to file a substantial assistance motion] was based on an unconstitutional motive," or "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." Wade v. United States, 504 U.S. 181, 185-86 (1992). Relief may also be forthcoming if the defendant provided cooperation pursuant to a plea agreement, and can demonstrate that the government's refusal to file the substantial assistance motion is attributable to bad faith or breach of the plea agreement. *See* Santobello v. New York, 404 U.S. 257, 268 (1971); United States v. Jones, 58 F.3d 688, 692 (D.C. Cir. 1995); United States v. Lukse, 286 F.3d 906, 912-13 (6th Cir. 2002).

24. Concerns over protecting the integrity of an ongoing investigation and the confidential nature of information often arise in the context of substantial assistance being offered by someone. When those concerns arise in the context of a hearing on a substantial assistance motion, the court can easily address those concerns by placing the hearing under seal. This is not a new problem. It arises from time to time at sentencing where a defendant's cooperation may be discussed in detail by the court. Again, the easy solution is placing the hearing under seal, which is typically in both parties' interests at that point.

below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. Similarly, for Department of Justice attorneys, approval authority should be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals.

Every United States Attorney or Department of Justice Section Chief or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading. The repository or repositories of this documentation need not be the case file itself. Freedom of Information Act considerations may suggest that a separate form showing the final decision be maintained.

The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading.[25]

Most districts have a written policy on the topic, and virtually all districts have some type of approval procedure in place.[26] Typically, the approval process involves supervisory personnel and/or a committee.[27] But even with procedures in place, policies are not internally or consistently followed. Internal procedures and policies are consistently followed in about half to two-thirds of the districts.[28] In other words, even with a policy in place, nothing prevents a district from acting inconsistently. Indeed, upon closer analysis, there would seem to be no particular incentive to any district to act consistently according to its internal policies on substantial assistance. Acting inconsistently with a particular written policy translates into increased flexibility in dealing with informant-defendants.

The USAM also instructs United States attorneys to consider the defendant's cooperation in deciding whether to enter into a plea agreement:

> Defendant's Cooperation. The defendant's willingness to provide timely and useful cooperation as part of his/her plea agreement should be given serious consideration. The weight it deserves will vary, of course, depending on the nature and value of the cooperation offered and whether the same benefit can be obtained without

25. United States Attorneys' Manual ("USAM"), § 9-27.400 (B) (Plea Agreements Generally).
26. MAXFIELD & KRAMER, *supra* note 6, at 7.
27. *Id.*
28. *Id.*

> having to make the charge or sentence concession that would be involved in a plea agreement. In many situations, for example, all necessary cooperation in the form of testimony can be obtained through a compulsion order under 18 U.S.C. §§ 6001-6003. In such cases, that approach should be attempted unless, under the circumstances, it would seriously interfere with securing the person's conviction. If the defendant's cooperation is sufficiently substantial to justify the filing of a 5K1.1 Motion for a downward departure, the procedures set out in USAM 9-27.400 (B) shall be followed.[29]

The policy does not define how the "nature and value of the cooperation offered" is to be determined.

The USAM provides slightly more guidance when deciding not to prosecute a person in exchange for his or her cooperation. In this instance, considerations of the public interest are primarily weighed.[30]

> (A) In determining whether a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including:
>
> (1) The importance of the investigation or prosecution to an effective program of law enforcement;
>
> (2) The value of the person's cooperation to the investigation or prosecution; and
>
> (3) The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.
>
> (B) Comment. This paragraph is intended to assist Federal prosecutors, and those whose approval they must secure, in deciding whether a person's cooperation appears to be necessary to the public interest. *The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case.* Rather they are meant to focus the decision-maker's attention on factors that probably will be controlling in the majority of cases.[31] (emphasis added).

Further guidance is given in a following section of the USAM. While this guidance is directed at a decision whether to prosecute in return

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29. USAM, § 9-27.420(B)(1) (Plea Agreements—Considerations to be Weighed).

30. USAM, § 9-27.600(B)(3) (Entering into Non-prosecution Agreements in Return for Cooperation—Generally).

31. USAM, § 9-27.620 (Entering into Non-prosecution Agreements in Return for Cooperation—Considerations to be Weighed).

for a person's cooperation, the same factors make similar sense when considering substantial assistance motions.

In order to be in a position to adequately assess the potential value of a person's cooperation, the prosecutor should insist on an "offer of proof" or its equivalent from the person or his/her attorney. The prosecutor can then weigh the offer in terms of the investigation or prosecution in connection with which cooperation is sought. In doing so, he/she should consider such questions as whether the cooperation will in fact be forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his/her case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.[32]

What seems to be sought for evaluating substantial assistance—whether examining these factors or the list of objective and subjective factors proposed by Limbert—is a "totality of the circumstances" standard. In other words, the more factors the court considers, the more likely the evaluation is to be fair.[33]

While this method may not foster predictability, it does carry benefits for both the government and the defendant. On the one hand, the government's flexibility is increased by allowing it to consider a wide range of factors when determining the value of a defendant's assistance. This appears to match current practice. For the defendant, a "totality of the circumstances" standard would allow more grounds to argue that the assistance provided was in fact valuable to the government.

At the end of the day, we can turn to the list of factors contained in the Sentencing Guidelines for considerable guidance in this area. The list, while not exhaustive, is an acceptable starting point.

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32. USAM, § 9-27.620(B)(2) (Entering into Non-prosecution Agreements in Return for Cooperation—Considerations to be Weighed).

33. Although Limbert in her proposal also calls for a "totality of the circumstances" standard, this author does not believe it is practicable to divide sharply between objective and subjective factors. While the decision-maker—whether a federal district judge or a federal magistrate judge—will always try to focus on objective factors, subjective considerations inevitably come into play, and should. For example, what may be a risk taken for one defendant is a normal state of affairs for another. Substantial assistance is, after all, a rather subjective issue. A "totality of the circumstances" standard ensures that both objective and subjective factors are considered.

> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) The court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) The truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) The nature and extent of the defendant's assistance;
>
> (4) Any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) The timeliness of the defendant's assistance.[34]

Two steps would eliminate significantly the unnecessary hodgepodge of considerations that now seems to be in effect. First, the Sentencing Commission and the United States Department of Justice should consider joining forces to adopt a single set of factors for evaluating substantial assistance.[35] Having a single set of factors would benefit all parties concerned. It would provide an inclusive roadmap for the courts; it would provide clearer and more unified guidance for all United States Attorney Offices across the country; and it would allow defense lawyers to more effectively counsel their clients who may desire to cooperate with the government.

Second, a single policy on substantial assistance motions governing all United States Attorney Offices should be adopted. If the nation's federal criminal justice system can operate on a single set of Sentencing Guidelines, there is no reason why the executive branch cannot operate on a single policy for substantial assistance motions. The fact that there are multiple policies throughout the country (which apparently are often ignored) only undermines the uniformity sought in the Sentencing Guidelines. Moreover, the fact that there are multiple policies produces the unseemly result of cooperation being valued more (or less) depending on the jurisdiction in which the defendant happens to be arrested. Evaluating substantial assistance will

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34. U.S.S.G. § 5K1.1.

35. It is assumed that defense interests would be represented through the Sentencing Commission's various committee structures. To the extent the outcome is a "totality of the circumstances" standard, the defense will benefit, as noted in the text. It is important, however, that the list of factors reflect defense input, since defense lawyers will likely be the first ones to explain to defendants what they can expect through cooperation. In other words, defense lawyers may often be the first ones to evaluate possible assistance so as to be able to advise their clients of the chances of a substantial assistance motion.

always be a rather subjective exercise. That does not mean, however, that we should abandon all efforts to make the exercise a more objective one.

IV. HOW MUCH DISCRETION TO THE DECISION-MAKER?

Having a "totality of the circumstances" test for evaluating substantial assistance may rightly lead one to conclude that we now need to limit the court's discretion in deciding such motions. If such limitations are not imposed, it is argued that sentencing disparities may creep back into the system. This rationale underlies Limbert's proposal to limit downward departure motions for substantial assistance to two to five levels.[36]

The short answer to this argument lies in the Sentencing Guidelines themselves. In Section 5K2.0, the Sentencing Commission makes clear in one of its many policy statements[37] that "[t]he decision as to whether *and to what extent departure is warranted* rests with the sentencing court on a case-specific basis."[38] (emphasis added). This policy statement mirrors the statutory instruction to federal courts regarding sentencing.

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [referring to sentencing guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.[39]

Nowhere does either the statute or the Sentencing Guidelines limit the extent of an otherwise authorized departure—regardless of whether the departure is upwards or downwards.

In *Koon v. United States*,[40] the Supreme Court made clear that sentencing is the traditional exercise of discretion by the court. And, in the Supreme Court's view in this post-guidelines era, sentencing necessarily en-

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36. Limbert, *supra* note 3, at 263.

37. Policy statements of the Sentencing Commission, which are clearly identified as such in the Sentencing Guidelines, are distinct from guidelines which the Sentencing Commission also promulgates. According to the statute governing the Sentencing Commission's functions, policy statements regard "application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code." 28 U.S.C. § 994(a)(2). The initial guidelines needed to be submitted to Congress by a set deadline, but policy statements did not. Federal judges must only "consider" when determining a particular sentence "any pertinent policy statement issued by the Sentencing Commission . . . that is in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(5). They are, however, required to sentence within the Guidelines unless a departure ground exists. 18 U.S.C. § 3553(b). In other words, policy statements do not set forth requirements for federal judges to follow as do the guidelines.

38. U.S.S.G. § 5K2.0.

39. 18 U.S.C. § 3553(b).

40. 518 U.S. 81 (1996).

compasses departures from the Sentencing Guidelines as well.[41] For this reason, the Supreme Court in *Koon* instructed appellate courts to analyze a district court's departure under an abuse of discretion standard.[42] Since *Koon*, the lower courts have interpreted departure jurisprudence essentially to allow specific departures so long as the Sentencing Guidelines do not prohibit them.[43] In short, departures are as much a fabric of the sentencing scheme presently in effect as are the guideline sentences that fall well within the "heartland" cases mapped out by the Sentencing Commission.

The absence in either the Sentencing Guidelines or the applicable statutes of any limitation on a court's departure discretion rests on sound policy for both law enforcement and the defense. Limbert's proposal of limiting from two to five offense levels any departures for substantial assistance is made for the salutary purpose of avoiding widespread sentencing disparity.[44] But the evidence suggests that federal courts across the nation generally sentence within the guideline range otherwise suggested by the "heartland" cases described by the Sentencing Commission in the Sentencing Guidelines.

For fiscal year 2000, for example, the Sentencing Commission reports that 64.5 percent of cases are sentenced within the guideline range. Substantial assistance departures occurred in 17.9 percent of cases, and downward departures for other reasons occurred in 17 percent of cases. For the same period of time, upward departures occurred in only 0.7 percent of cases.[45] Not surprising, the highest percentage of substantial assistance departures occurred in the area of drug trafficking (27.8 percent).[46] These data are similar to data for fiscal year 1995. At that time, 71 percent of cases were sentenced within the guideline range; 19.7 percent received downward departures for substantial assistance; 8.4 percent received departures for other reasons; and 0.9 percent of the cases received an upward departure.[47] Again, the area of highest substantial assistance departures was drug trafficking (33.6 percent).[48] This evidence comes from the period when no

41. *Id.* at 98.

42. *Id.*

43. *Koon* established a four-part analytical framework to guide appellate review of departure determinations, classifying departure factors as: "(1) forbidden, (2) encouraged, (3) discouraged, or (4) unmentioned." *Id.* at 95-96.

44. Limbert, *supra* note 3, at 263.

45. Sourcebook of Federal Sentencing Statistics, tbl. 5.32 (2000). This entire compilation of data is located through the United States Sentencing Commission's web site, *available at* (http://www.ussc.gov). The data are limited to six fiscal years beginning in 1995. The fiscal year used here is from October 1 to September 30.

46. United States Sentencing Commission, Office of Policy Analysis, 2000 Datafile, tbl. 9 at www.ussc.gov/JUDPACK/2000/1c00.pdf (9/19/02).

47. United States Sentencing Commission, Office of Policy Analysis, 1995 Datafile, tbl. 8 at www.ussc.gov/JUDPACK/1995/1c00.pdf (9/19/02).

ficking (33.6 percent).[48] This evidence comes from the period when no departure limitations were in place other than the Sentencing Guidelines themselves.

If sentencing disparity is the concern, then the proposed limitation would have to be made across the board in both an upward and downward fashion. A sentence that is increased, for instance, seven levels beyond the guideline range mandated by the Sentencing Guidelines is as much a problem when it comes to disparate sentencing as a sentence that is seven levels below. The problem is the same whether we are talking about departures based on substantial assistance or any of the many other (and essentially limitless) bases on which a departure can be constructed. In sum, the problem of disparity does not go away if we limit a court's departure discretion solely to substantial assistance motions.[49]

As noted above, the proposed limitation has problems for both the prosecution and the defense. Returning to scenario 2 with our street-wise drug trafficker, Thomas Smith, we can imagine a set of facts where the agents and the defendant are truly of one mind, where the agents use Mr. Smith's testimony to nab a drug kingpin in New York, and want to use Mr. Smith as a testifying witness at the kingpin's trial. In this instance, the substantial assistance departure is probably a small price to pay for the considerable law enforcement assistance which Mr. Smith lends. Law enforcement may need to offer Mr. Smith more than five levels to make it worthwhile for him to put himself and his family at risk forever.

V. WHEN SHOULD THE PROCESS OF DETERMINING SUBSTANTIAL ASSISTANCE MOTIONS OCCUR?

Under Limbert's proposal, the decision as to how many levels a substantial assistance departure is worth, if any at all, would be made immediately prior to sentencing.[50] While she is correct that under current practice the government usually files its substantial assistance motion right before or

48. *Id.* at tbl. 9.

49. There seems to be no reason that justifies imposing a limit on a defense motion for a downward departure based on substantial assistance but not on a defense motion for a downward departure based on, for instance, the defendant's diminished capacity. *See, e.g.*, U.S.S.G. § 5K2.13. Similarly, there seems to be no reason for limiting the benefit a defendant could receive for his or her substantial assistance, but not limit how much the court might upward depart based on, for example, the defendant's extreme conduct. *See, e.g.*, U.S.S.G. § 5K2.8. Limbert's proposal, as stated, might run into equal protection challenges as well. But if the challenge were answered by imposing the limit also on how far a court might upward depart—in other words, imposing the limit on both defense and prosecution motions—the government would then lose an important sentencing tool that currently allows it to seek an upward-sentencing departure reflecting a particular defendant's heinous or brutal conduct that undisputably falls way beyond the "heartland" boundaries.

50. Limbert, *supra* note 3, at 264.

during the sentencing hearing, the decision to file such a motion is often made before the defendant pleads guilty or is convicted.

Reality dictates that a proffer session usually occurs when the prosecution wants it to occur. In scenarios 1 and 2, law enforcement may believe both Messrs. Martin and Smith can assist immediately with ongoing investigations. For that reason, the proffer session might occur shortly after the arrest. In scenario 3, the urgency of the proffer and assistance from the defendant may not be present, therefore, the proffer session may not take place until shortly before the change of plea conference or even afterwards. Indeed, because of Federal Rule of Criminal Procedure 35(b), the proffer session could even take place after sentencing.

In analyzing when a determination on substantial assistance is made, three events need to be separated out: when the proffer session occurs; when the motion for a substantial assistance departure is made; and when the court (whether magistrate or district judge) decides the motion. As noted above, when the proffer occurs will typically be dictated by events out of defendant's control—and more likely in the prosecution's control. When the proffer occurs will in turn control when the remaining two events occur. In our three scenarios, the prosecution discloses its decision regarding a substantial assistance motion prior to sentencing and possibly prior to plea negotiations, if any cooperation points are to be forthcoming at all.

Notwithstanding the necessary flexibility in timing, which is inherent in gathering substantial assistance from a defendant, the goal should be to have this process unfold to conclusion prior to the change of plea conference and ideally prior to the final negotiations of the plea agreement. In this way, both parties enter into the plea agreement with as clear an understanding of the final offense level as possible. For both parties, achievement of this goal would minimize (though obviously not eliminate) any undue surprises at sentencing.

After all, written plea agreements usually include the parties' recommendation to the court of a total adjusted offense level to be used at sentencing.[51] It is difficult to recommend a particular sentence or sentencing range, as the federal rules contemplated,[52] if the parties have not come to an agreement on the anticipated total adjusted offense level. Other offense level adjustments are usually set forth in the plea agreement. There is no reason why the offense level adjustment a defendant may receive for substantial assistance should be treated any differently (except when the proffer

51. FED. R. CRIM. P. 11(e)(1)(B) governs plea agreements containing sentencing recommendations that are not binding on the court.

52. *Id.*

session is delayed). Substantial assistance issues *must* be resolved prior to the change of the plea conference when the written plea agreement sets forth a specific sentence or sentencing range that is binding on the court once the agreement is accepted.[53]

The precautions embodied in Federal Rule of Criminal Procedure 11 regarding the taking of pleas also justify adjudicating substantial assistance motions prior to the change of the plea conference as often as possible. The aim of the precautions and the plea colloquy between the judge and the defendant at the change of plea conference is to ensure that the defendant is entering into the plea knowingly and voluntarily.[54] That goal cannot be entirely achieved if the defendant admits his or her guilt before the court without knowing how much the proffered assistance is worth or what the adjusted total offense level will be. It is also difficult to accept that a defendant's plea is truly voluntary and knowing when the key factor that prompted the defendant to resolve his or her case through a plea agreement—the sentencing benefit to be received in exchange for cooperation—is still undetermined at the time the defendant pleads guilty.

VI. CONCLUSION

No one disputes that sentencing lies at the heart of judicial authority. By allowing only the government to file substantial assistance motions, judicial authority has been eroded. Reform is sorely needed in this area. Regardless of the specific approach we may choose, the aim should be to preserve judicial sentencing authority. By allowing defendants *and* the government to file substantial assistance motions, we move in that direction. And by so moving, we enhance fairness in sentencing by returning to judges sentencing discretion that is now unjustifiably in the hands of the prosecution. If this proposal is adopted, more equitable sentences and fewer sentencing disparities will result, and progress will be made in achieving desirable goals of the Sentencing Guidelines.

53. *See* FED. R. CRIM. P. 11(e)(1)(C).

54. "In federal courts . . . Rule 11 prescribes a procedure 'designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary . . . [and] to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination.' " United States v. Dewalt, 92 F.3d 1209, 1211-12 (D.C. Cir. 1996) (quoting McCarthy v. United States, 394 U.S. 459, 465 (1969)).

ATTACHMENT B

ATTACHMENT B

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, a sentence that is below the otherwise applicable guideline range may be appropriate.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defend- ant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

ATTACHMENT C

ATTACHMENT C

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, a sentence that is below the otherwise applicable guideline range or lower than that established by statute as a minimum sentence may be appropriate.

(a) The appropriate reduction shall be determined upon hearing by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered by, or any present or future danger or risk of injury to, the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

(b) The court shall not be bound by any offense level reduction specified in the government's motion.

To: United States Sentencing Commission

From: Jefri Wood

Date: July 17, 2025

I am submitting the following comment based on no. 5 of the Sentencing Commission's "Proposed 2025–2026 Priorities," and specifically the highlighted language:

> (5) Examination of whether the guidelines provide appropriate adjustments for good behavior, including examination of whether §3E1.1 (Acceptance of Responsibility) and §5K1.1 (Substantial Assistance to Authorities) fully account for the variety of ways in which an individual may manifest acceptance of responsibility and provide substantial assistance, and possible consideration of amendments that might be appropriate.

I respectfully suggest that the Commission consider a new subsection (c) to §3E1.1 along the lines of this example. The reasons for and explanation of this suggestion follow.

§3E1.1. Acceptance of Responsibility

. . .

(c) If the defendant qualifies for a decrease under subsection (a), and has been on pretrial release under 18 U.S.C. § 3142 or on release pending sentence under 18 U.S.C. § 3143, decrease the offense level by 1 additional level if while on release the defendant:

(1) has not committed another federal or state felony or misdemeanor offense;

(2) has appeared as required in court or as otherwise required by the terms of release;

(3) has not had release revoked for any other reason; and

(4) has engaged in conduct beyond the minimum requirements of the terms of release in areas such as employment, education, drug treatment, and counseling, or has otherwise demonstrated a commitment to participating in programs or other services that are "reasonably deemed necessary to protect the public and ensure that such persons appear in court as required." 18 U.S.C. § 3154(4).

If the defendant was charged with an offense but the charge was dropped or the defendant was acquitted, that does not count as an offense under subsection (1). If the defendant failed to appear but a court found that the defendant had a valid excuse for missing the appearance, that does not count as a failure to appear under subsection (2). The items listed in subsection (4) are not exclusive and the defendant may satisfy this condition through other conduct.

The court retains the discretion under 18 U.S.C. § 3553(a) to consider a variance for conduct that exceeds the requirements for the offense level adjustment or is otherwise not adequately considered under this provision. *See also* Form AO 245B: Judgment in a Criminal Case, Statement of Reasons attachment at "VI. Court Determination for a Variance, C. 18 U.S.C. § 3553(a) and other reason(s) for a variance" (listing "Pre-sentence Rehabilitation" and "Conduct Pre-trial/On Bond" as grounds for a variance). The court also has the discretion to consider conduct that satisfies subsections (1) – (3), but not (4), when

> determining a sentence under section 3553(a) that is "sufficient, but not greater than necessary, to comply with the purposes set forth in" section 3553(a)(2).
>
> Because the determination of whether a defendant qualifies for a reduction under this subsection—or a variance—may depend upon the specific facts of the defendant's time on release, the presentence report should include a sufficiently detailed description of the defendant's behavior during release to enable the court to conduct an individualized assessment of the defendant.

• Explanation for this recommendation:

This suggestion is the result of my work at the Federal Judicial Center over the course of many years on the Sentencing Guidelines, the *Benchbook for U.S. District Court Judges*, and pretrial release and detention. I started working as a research attorney/writer at the FJC in Feb. 1987, and participated in some of the original orientations by the Sentencing Commission for the then upcoming Sentencing Guidelines. After the Guidelines took effect and cases started coming down in early 1988, I wrote over 150 issues of *Guideline Sentencing Update*, summarizing case law, until 2002. I also wrote several editions of *Guideline Sentencing: An Outline of Appellate Case Law*, concluding with the 500-page 2002 edition that included citations to over 3,000 individual appellate cases. These publications are available at https://www.fjc.gov/content/guideline-sentencing-update-volumes-1-through-6-0 and https://www.fjc.gov/content/guideline-sentencing-outline-appellate-case-law-selected-issues-8.

During that time, I also assisted with the *Benchbook for U.S. District Court Judges*, and for over 20 years now have been the sole staff person working with the *Benchbook* Committee. The Guidelines, of course, have from their start played a central role in the *Benchbook*'s sections on sentencing, so I have kept up with the changes over the years, including the 2025 amendments.

Before working on the upcoming Seventh Edition of the *Benchbook*, I revised the Center's *Bail Reform Act of 1984, Fourth Edition* (2022) (https://www.fjc.gov/content/373297/bail-reform-act-1984-fourth-edition). My research led me to believe that the section in the *Benchbook* on pretrial release and detention needed to be completely rewritten. We have done that, with the help of several pretrial services officers and others with substantial knowledge and experience in this area. Included in this rewrite is a recommendation that magistrate judges consider informing defendants who are being released of the advantages of complying with their conditions of release and cooperating with pretrial services. That recommendation will follow the warning to defendants, required by 18 U.S.C. § 3142(h)(2), of the penalties for and consequences of violating their conditions. The intention of the new recommendation is that discussing the possible *benefits* of a successful period of pretrial release—which could include a lower sentence—will encourage defendants to abide by their conditions and to take advantage of the various forms of assistance that pretrial services provides. *See* 18 U.S.C. § 3154(4) & (7). The newly revised portion of section 1.03 that includes this recommendation, II.E.3 in the current final draft, is provided at the end of this submission. [Note: The *Benchbook* draft is still being copy edited and this section may see minor changes, but the substance will not change.]

We believe this advice could benefit defendants by giving them additional incentive to avoid having their release revoked. It could also assist pretrial services and defense attorneys by persuading defendants to be more willing to cooperate with pretrial services and take full advantage of the programs and services that are available during release. The release of a defendant until trial or sentencing is only the first step. The second step is *keeping* them on

release. Offering the opportunity to earn some reward for commendable conduct over what could be a lengthy period of time would help. In addition, success on pretrial release may lessen the risk of recidivism beyond the period of pretrial services supervision. A study of over 79,000 defendants released on pretrial supervision between October 1, 2000 and September 30, 2007 evidenced that "even among the highest-risk offenders, those who successfully completed pretrial release were nearly twice as likely to avoid a new arrest while on post-conviction supervision. The study clearly shows that success on pretrial release leads to greater levels of success on post-conviction supervision." Department of Justice, Office of Justice Programs, NCJRS Virtual Library (summarizing Timothy P. Cadigan & Christopher T. Lowenkamp, *Preentry: The Key to Long-Term Criminal Justice Success?,* 75 Federal Probation Journal 74–77 (September 2011), *available at* www.ojp.gov/ncjrs/virtual-library/abstracts/preentry-key-long-term-criminal-justice-success

However, the *Benchbook* can only *recommend* that judges advise defendants of the benefits of cooperating with pretrial services and that sentencing judges consider a defendant's conduct while on release (which we also do with new language in the upcoming edition at section 4.01: Sentencing Procedure). Giving this advice would still be, as it is now, at the discretion of the individual magistrate judge. And whether there would actually be any benefit at sentencing for a successful period of release—or it is even considered—will still be at the discretion of each sentencing judge. This inevitably results in some defendants receiving a downward variance for "pre-sentence rehabilitation" or "conduct pretrial/on bond" (see Form AO 245B) while other, similarly situated defendants do not. A new U.S.S.G. §3E1.1(c) would reduce this unwarranted sentence disparity in accordance with 18 U.S.C. § 3553(a)(6).

Sentencing judges *must* consider the Sentencing Guidelines. If conduct during release is part of §3E1.1, it would require all sentencing judges to consider behavior on release and result in more consistent treatment of defendants. Magistrate judges, defense attorneys, and pretrial services could assure defendants who are released before trial or sentencing that their conduct, their cooperation, their attempts at rehabilitation, will in fact be considered at sentencing. A §3E1.1(c) that offers an offense level reduction for a successful period of release, while still providing judges the flexibility to grant a variance for defendants who go beyond the section's requirements, would lessen disparity while offering further incentive for defendants to adhere to the terms and conditions of their release and to engage in additional ways of demonstrating acceptance of responsibility and a desire for rehabilitation. Together, §3E1.1(c) and the court's discretion to grant a variance would, in your own words, "provide appropriate adjustments for good behavior" and more "fully account for the variety of ways in which an individual may manifest acceptance of responsibility." Additionally, the potential for a decrease in sentences because of this new reduction would be consistent with the Sentencing Commission's stated intention "to consider the issue of reducing costs and overcapacity of prisons" pursuant to 28 U.S.C. § 994(g), as noted in your priorities for this amendment cycle.

Please note: This suggestion is submitted by me as an individual, not as an employee of or in conjunction with the Federal Judicial Center. I officially retired in January, although I am still working with the *Benchbook* Committee and the FJC on the *Benchbook*'s new Seventh Edition until it is ready for publication (which we hope will be September at the latest). I did not, however, work with or consult with anyone at the FJC on this project.

Thank you for considering this submission.

Jefri Wood
Senior Attorney/Researcher/Writer (Retired)

Excerpt from the *Benchbook* Seventh Edition draft, section 1.03, at II.E.3:

II. Release: Procedure and Requirements

E. Contents of Release Order, 18 U.S.C. § 3142(h)

. . .

3. Although not required, after giving the above warnings about the possible penalties for violating any conditions of release, consider informing the defendant of the advantages of complying with court ordered pretrial release conditions. Pretrial release serves as an opportunity for defendants to provide evidence of their ability to follow the law, cooperate with pretrial services, and demonstrate stability in the community.[36] At sentencing, a defendant's pretrial conduct is included in the presentence investigation report and success on pretrial release could lead to a sentence at the low end of the guideline range or a downward departure or variance based on such post-offense rehabilitative efforts.[37] In fact, Form AO 245B: Judgment in a Criminal Case, specifically lists "Pre-sentence Rehabilitation" and "Conduct Pre-trial/On Bond" as reasons for a variance,[38] and a 2010 survey found that "the defendant's post-offense rehabilitative effort was one of the factors about which federal judges reported caring the most in sentencing."[39] At the very least, a successful period of pretrial

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[36] *See* James G. Carr, *Why Pretrial Release Really Matters*, 29 Federal Sentencing Reporter 217, 218 (April 2017) ("defendants, if not detained, have the opportunity to stand on the best, most upright footing of all when before the judge for sentencing. . . . [A]ny defendant, regardless of charged crime, criminal history, or guideline range, who can show a court, often for the first time in his or her life, that he or she can be law-abiding offers the court the best of all possible records and reasons to consider leniency."). *See also* Christine S. Scott-Hayward and Connie Ireland, *Reducing the Federal Prison Population: The Role of Pretrial Community Supervision*, 34 Federal Sentencing Reporter 327, 331 (June 2022) (based on a survey of 241 federal cases in 2020, finding that "pretrial performance is an essential mitigation—arguably as important as, if not more important than, other mitigating factors considered by the court. In particular, judges seemed to respond positively to evidence that defendants have demonstrated rehabilitation while on pretrial supervision.").

[37] *See, e.g.,* United States v. Sayad, 589 F.3d 1110, 1119 (10th Cir. 2009) (affirming downward variance to probation in part because the defendant had "been fully compliant while on [pretrial] release" and "rehabilitated himself after his release from custody"); United States v. Munoz-Nava, 524 F.3d 1137, 1149 (10th Cir. 2008) (affirming significant downward variance based in part on defendant's "exemplary" conduct during year-and-a-half pretrial release); *Bail Reform Act, 4th ed.* at 15–17 & nn.71–76 (citing articles comparing the effects of release or detention). *See also* Statement of U.S. District Judge Esther Salas, Program Session: *Judicial Practice Perspectives*, National Sentencing Policy Institute (Oct. 18, 2022) ("When I see a defendant that's been on pretrial release, I'm going to . . . look at that presentence report" to see how the defendant did on release, whether they showed "that they are receptive to rehabilitation."), *available at* Judicial Practice Perspectives panel.

[38] Form AO 245B: Judgment in a Criminal Case, Statement of Reasons attachment at "VI. Court Determination for a Variance, C. 18 U.S.C. § 3553(a) and other reason(s) for a variance."

[39] Stephanie Holmes Didwania, *The Immediate Consequences of Pretrial Detention: Evidence from Federal Criminal Cases*, 22 Am. L. & Econ. Rev. 24, 26 (Spring 2020) (citing 2010 survey conducted by the United States Sentencing Commission). *See also* Statement of Judge Salas, *supra* n.37 (when taking a plea for defendants who are on pretrial release, telling them:

release would help to avoid a higher sentence that might result from violating conditions of release or having release revoked. It may also influence the number and type of conditions imposed on probation or supervised release. See also section 2.01: Taking Pleas of Guilty or Nolo Contendere, *infra,* at V.3, offering similar advice to defendants who will be on release after pleading guilty.

Cooperation with pretrial services is critical during the period of pretrial release. The statutory mandate of pretrial services is not simply to monitor defendants for compliance with the conditions of release and report violations.[40] "The purpose of pretrial services supervision is to assure compliance with conditions of release *and to provide the defendant with services as needed*."[41] Officers are "expected to clarify all court orders, develop and thoroughly explain reporting expectations based on the orders of the court,"[42] and to help defendants comply with their conditions of release while assisting them "in securing any necessary employment, medical, legal, or social services."[43] Pretrial services can provide many benefits to their supervisees if given the opportunity.[44]

"You have the ability to make or break your sentence, your future," with how you perform on release. "The good stuff's going to help you. And the bad stuff is not.").

[40] 18 U.S.C. § 3154(3) & (12)(B) (duties of pretrial services include: "Supervise persons released into its custody under this chapter. . . . Any violations of the conditions of release shall immediately be reported to the court and the Attorney General.").

[41] *Guide to Judiciary Policy,* Vol. 8, Pt. B at § 320.20 (emphasis added).

[42] *Id.* at § 320.40.

[43] 18 U.S.C. § 3154(7). *See also id.* at (4) ("Pretrial services functions shall include the following: . . . monitor and provide treatment as well as nontreatment services to any such persons released in the community, including equipment and emergency housing, corrective and preventative guidance and training, and other services reasonably deemed necessary to protect the public and ensure that such persons appear in court as required.").

[44] *See, e.g.,* Probation and Pretrial Services Office, Administrative Office of the U.S. Courts, *News and Views*, "Understanding Risk, Need, and Responsivity" (February 27, 2023) (In one case, a person under supervision was failing to attend ordered treatment. The pretrial services officer "learned that these failures to appear were not caused by willful noncompliance. Rather, the person was experiencing sudden housing instability and could not afford basic necessities like food and hygiene products. The root cause of these problems was a temporary interruption to his disability benefits. When faced with those immediate barriers, getting himself to treatment was beyond his wherewithal in the moment. The officer helped him secure food from a local food bank and basic necessities from another community partner. The officer was also able to tap into funds through the Second Chance Act to temporarily assist the person with rent until disability benefits resumed. With the barriers to his basic needs addressed, the person was able to better engage with treatment.").

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Rondell Allman

Topics:

1. Sentencing Options (Chapter Five)

Comments:

It is time for the government to look at the 100 to 1 ratio of meth to cocaine. It is absolutely ridiculous to charge one drug higher then another. In fact fentanyl doesn't carry the amount of time that meth does. All drugs are evil...all drugs like these come from Mexico which means the U.S. government is nearly complicent in the movement and distribution of these drugs. It's like to treat all the se drugs fairly and the same. Take a moment and compare some meth cases to others and tell me that these are fair sentences these judges are handing out. Especially if you consider these so called dealers are truly users with a large social circle and pays for their use with sells. It's time to change the fact you deport the cartel members within 3 years of conviction while the Americans get a 10 yr minimum...come on now it's time to use the balance of justice with giving the help to these same people being taken away from families and given extreme sentences

Submitted on: July 14, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Jazzmin Bratcher

Topics:

4. Career Offender

Comments:

The gov needs to stop using state charges that a defendant has already served time for or been on probation for to enhance them to more federal time. It's double jeopardy as the crime has already been served once and the defendant is being punished for it again, leading to a substantial large gain in the time required to serve in Federal custody".... and proposed priority #2 Fentanyl 841 (b)(1)(B): the 40 gram quant, shouldn't disqualify a person from receiving FSA, as a quant doesn't disqualify a heroin or methamphetamine charge from receiving FSA.

Submitted on: July 14, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Rayanna Breedlove

Topics:

2. Drug Offenses (§2D1.1)

Comments:

Re: Public Comment Supporting Reform of Methamphetamine Sentencing under §2D1.1

Dear Commissioners,

I am writing to express strong support for the Commission's consideration of amendments to the Sentencing Guidelines that would eliminate the purity-based sentencing disparity for methamphetamine offenses under §2D1.1.

The current practice of differentiating between "actual" meth and meth mixture based on purity leads to unjust, excessive sentencing. It's outdated, discriminatory, and doesn't match modern realities. No other drug gets treated like this. The result? Harsh time, broken families, and another cycle of injustice.

There is no proven link between higher purity and increased violence or responsibility. These guidelines don't reflect real harm, real roles, or real lives.

It's time to shift toward individualized justice. We need to consider conduct, age, role, and impact—not chemistry lab numbers.

I urge the Commission to remove this disparity, and make any changes retroactive. It's the fair thing to do—and the right thing to do.

Respectfully submitted,
Rayanna Breedlove

June Breen
[redacted]

July 7, 2025

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

Subject: **Urgent Request for Sentencing and Registry Reform for Non-Violent, No-Contact Offenses**

Dear Honorable Members of the United States Sentencing Commission,

I am writing to respectfully urge the Commission to take meaningful steps toward reforming the sentencing guidelines/policies and collateral consequences for individuals convicted of non-violent, no-contact sex offenses particularly those involving possession or access with intent to view unlawful materials. It is vital that sentencing reform focuses on fair access to rehabilitation, and a more evidence-based, individualized approach moving forward into the future.

While the protection of children and public safety must always be paramount, I believe our current system does not sufficiently differentiate between individuals who pose an ongoing risk to the community and those who do not. Many individuals charged with offenses such as possession or access with intent to view illegal materials have never had physical contact with a minor, have no history of violence, and are often first-time offenders. Nevertheless, these individuals are often sentenced under harsh guidelines that equate them with violent or predatory offenders, leading to excessively long prison terms, lifetime supervision, and severe civil disabilities that hinder rehabilitation and reintegration into society including registration as a sex offender even when they present a low risk of recidivism and have shown genuine efforts toward rehabilitation. Countless families are impacted by these overly broad sentencing frameworks. Our system should allow room for reform, compassion, and second chances particularly for those who demonstrate true remorse, growth, and a desire to change.

This is not a request to excuse illegal behavior, but rather to advocate for fair, proportionate, and evidence-based policies that uphold public safety while recognizing the human capacity for change. I thank you for your continued work on behalf of justice and fairness in federal sentencing and continued efforts to improve the federal sentencing policies. I hope you will consider giving greater attention to these issues in your upcoming policy priorities and amendment cycles to promote justice and fairness.

My son is currently serving a sentence for a non-violent, non-contact offense. He has taken full responsibility for his actions, completed educational and rehabilitative programs, and continues to grow and change. However, because of the label imposed on him, he is ineligible for programs under the First Step Act and is facing a lengthy registration status despite posing no threat to public safety. He is not the person the stigma of his charge has imposed upon him. He is a son, a brother, a veteran, and a human being who deserves the opportunity to rebuild. I hope the Commission will consider that not all individuals convicted under these statutes are the same and that some are truly capable of reintegration and redemption.

I ask the Commission to consider the following reforms:

1. **Proportionality in Sentencing:** Federal guidelines should differentiate between non-contact and contact offenses, focusing on actual harm caused and risk posed. Current guidelines can impose disproportionately severe sentences on non-violent offenders based solely on digital factors (such as image count or use of encryption), without context. Many individuals are sentenced more harshly than

individuals convicted of contact offenses due to factors like image count or technology use, not intent or harm caused.

2. **First Step Act and Program Access:** Many non-contact persons with a sex offense conviction are automatically excluded from earned time credits, housing programs, and rehabilitation opportunities under the First Step Act and Bureau of Prisons policies. These blanket exclusions undermine public safety goals by discouraging positive change. Please consider expanding the FSA to include these convictions.
3. **Support for Second Chances:** Justice should allow space for growth, healing, and redemption. Individuals who have taken accountability and completed their sentences should not be permanently defined by a non-violent mistake.
4. **Registry Reform:** Mandatory placement on sex offender registries imposes devastating, lifelong consequences. These include housing and employment discrimination, social isolation, and barriers to reintegration—often without regard to whether the person poses a real public safety threat. The registry should be used with greater discretion, especially in non-violent, non-contact cases reflecting actual risk level, not simply offense type. Individuals who do not pose an ongoing public safety threat should have access to relief from registration.
5. **Individualized Risk Assessment:** Registration and post-release restrictions should be based on empirically validated risk assessment tools, not offense type alone. Individuals who demonstrate rehabilitation, low risk, and stable community support should have pathways to petition for registry removal and relief from lifetime restrictions.
6. **Support data-driven sentencing reform** that is proportional, fair, and aligned with modern understanding of rehabilitation and public safety. Offering a pathway to redemption granting second chances to those who have shown accountability, undergone treatment, and proven they pose little to no risk should not be punished indefinitely through registry status and civil restrictions.

Justice must be rooted in **proportionality, public safety, and the possibility of redemption**. The current structure of automatic enhancements, rigid registration rules, and blanket exclusions is outdated, ineffective, and harmful to families and communities across the country. Please consider the overwhelming evidence and growing expert consensus calling for **comprehensive reform** to this system. It is time to stop equating all sex offenses and to start differentiating based on behavior, intent, and risk.

Thank you for your time, public service, and commitment to improving federal justice policy.

Sincerely,
June Breen

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Daishianna Brown

Topics:

1. Sentencing Options (Chapter Five)
2. Drug Offenses (§2D1.1)

Comments:

Dear Commissioners,

I am writing as a concerned family member of Michael Maes ([redacted] who is currently serving a life sentence in federal prison due to methamphetamine-related charges. I urge the Commission to prioritize the reevaluation and revision of methamphetamine sentencing guidelines, particularly with regard to outdated purity distinctions and disproportionate penalties that fail to account for a person's actual role or conduct within a conspiracy.

Michael's sentence reflects the harshest possible outcome, despite there being no physical recovery of drugs attributed to him in multiple alleged transactions, no leadership enhancement being proven at trial, and the government's reliance on cooperating co-defendants seeking reduced sentences through testimony. The application of guideline levels tied to drug purity and quantity exaggerated his sentencing exposure, producing a result that is inconsistent with justice, rehabilitation, and proportionality.

The current guidelines do not differentiate sufficiently between low-level participants and those with limited means, often punishing people more severely than major drug manufacturers or traffickers. Furthermore, the outdated focus on methamphetamine purity distorts sentencing outcomes and perpetuates the mass incarceration of individuals who do not fit the intended profile of "career criminals" or violent offenders.

Michael has been incarcerated for years, separated from his children and community. He is a human being capable of growth and redemption. His life sentence for a non-violent drug offense is emblematic of a system in dire need of reform.

I respectfully urge the Commission to adopt reforms that reflect the modern realities of drug sentencing and allow for second chances. Revisions that cap offense levels for mitigating-role

participants, eliminate excessive purity enhancements, and reevaluate "career offender" designations are long overdue and would help restore fairness and hope.

Thank you for considering this plea, not just for Michael, but for thousands of families like ours impacted by overly harsh sentencing policies that fail to meet the true purposes of justice.

Submitted on: July 8, 2025

I write to request that the Sentencing Commission include, in its list of priorities for the upcoming year, clarification on the base offense level for certain conspiracy offenses, for which there are multiple base offense levels in the guideline section for the substantive offense. For the purposes of this letter, I will address the issue by example of a conviction for conspiracy to sex traffic by force, fraud or coercion.

A conviction for conspiracy to sex traffic by force, fraud or coercion is a violation of conspiracy statute 18 U.S.C. § 1594(c). The substantive offense of sex trafficking by force, fraud or coercion is a violation of § 1591(b)(1).

According to Section 1B1.2 of the Sentencing Guidelines, the first step in calculating an offense level is to "determine the offense guideline section…applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant is convicted)." U.S.S.G. § 1B1.2(a). And "[i]f the offense involved a conspiracy…refer to § 2X1.1…, as well as the guideline referenced in the Statutory Index for the substantive offense." *Id*. Taking our example, because conspiracy to sex traffic does not have its own guideline section, following the instructions for this first step would lead us to the guideline *section* (emphasis added), not necessarily the base offense level, for the substantive crime of sex trafficking by force, fraud or coercion, Section § 2G1.1.

According to step two as outlined in Section 1B1.2, "After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct." U.S.S.G. § 1B1.2(b). Application Note 2 of the same section tells us, "Where there is more than one base offense level within a particular guideline, the determination of the applicable base offense level is treated in the same manner as a determination of a specific offense characteristic. Accordingly, the 'relevant conduct' criteria of § 1B1.3 are to be used, unless conviction under a specific statute is expressly required." *Id*. at n.2. After it is established that a conspiracy to sex traffic by force, fraud or coercion requires use of the substantive guideline section § 2G1.1, the next step, according to Sections 1B1.2(b) and 1B1.2 Application Note 2 is to determine the base offense level using the criteria under Section 1B1.3, "unless conviction under a specific statute is expressly required."

Section 1B1.3 Application Note 7 states, "A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute." It further states, "Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy…in respect to that particular statute." U.S.S.G. § 1B1.3 n.7.

Section 2G1.1 has two base offense levels, 34, "if the offense of conviction is 18 U.S.C. § 1591(b)(1)" and 14, "otherwise." U.S.S.G. § 2G1.1(a)(1-2). Although the language seems quite clear, this letter requests that the Sentencing Commission clarify that Application Note 2 of § 1B1.2 and Application Note 7 of § 1B1.3 require that, in our example, a base offense level of 14 would apply if the defendant were only convicted of *conspiracy* to violate § 1591(b)(1).

Language that directs us to apply a particular base offense level "if the offense of conviction is" suggests that although a conspiracy conviction requires the application of the guideline section for the substantive offense, if there is more than one base offense level, and one *requires* the "offense of conviction" to be a conviction for the substantive offense, that base offense level cannot apply. The base offense level that does not require conviction under a particular statute must apply. In our example, that base offense level would be 14.

Further clarification is also required with regard to what the Sentencing Commission intends to reference when it uses the language "offense of conviction" as it does in § 1B1.2(a) and § 1G1.1(a) versus "convicted under" as used in § 2G1.3(a), and if these have the same meaning. It seems as if they all intend to make direct reference to a particular statute under which a defendant is convicted, rather than intending to reference the charged and uncharged conduct for which the defendant would be responsible at sentencing.

This request arises out of a current circuit split on the appropriate base offense level to apply when a defendant is convicted of conspiracy to commit sex trafficking by force, fraud or coercion. The Ninth Circuit in *United States v. Wei Lin*, 841 F.3d 823 (2016), found the base offense level to be 14, while the Third, Eighth, and Eleventh Circuits have rejected the Ninth Circuits interpretation of the Guidelines, finding simply and incorrectly, that the base offense level for a sex trafficking conspiracy is the same as that for the substantive offense under Section 2X1.1. The Third, Eighth, and Eleventh Circuits ignore the instructions in Sections 1B1.2 and 1B1.3 that certain base offense level applications require a defendant to have been convicted of a particular statute—that certain language expressly directs us to apply factors only if defendants were actually convicted of a particular statute—such as the requirement under Section 2G1.1(a)(1).

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Trystan Clark

Topics:

1. Sentencing Options (Chapter Five)

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

7. Federal Bureau of Prisons Issues

10. Miscellaneous

Comments:

Dear Members of the U.S. Sentencing Commission,

Thank you for the opportunity to provide public comment. I write today as a concerned citizen and as a close friend of someone currently incarcerated for a sexual offense.

I fully acknowledge the profound harm caused by sexual offenses and the necessity of accountability. However, I also believe that effective public safety policy should be rooted in evidence-based practices and allow for individualized assessments of risk and rehabilitation.

Multiple large-scale studies demonstrate that individuals convicted of sexual offenses actually have some of the lowest rates of recidivism among all criminal categories. According to a Bureau of Justice Statistics (BJS) study tracking 67,000 released sex offenders, only 5.3% were rearrested for a new sex crime within nine years — much lower than the general re-arrest rate of over 68% for all offenses.

Further, meta-analyses such as Hanson & Morton-Bourgon (2005) show that appropriate treatment programs can reduce sexual recidivism rates by 26–40%. These programs focus on cognitive behavioral therapy, relapse prevention, and social reintegration skills, all of which are critical to reducing risk and promoting lasting change.

Despite this, current federal guidelines and registry requirements often rely on broad, categorical approaches instead of individual risk assessments. Studies (e.g., Levenson & D'Amora, 2007) have found that public safety is not significantly improved by universal restrictions such as residency bans or blanket supervision periods. In fact, these policies can increase housing

instability and unemployment, both of which are associated with higher general recidivism risks.

My friend has actively participated in every rehabilitative opportunity available to him, including cognitive behavioral therapy, restorative justice programs, and vocational training. He has consistently demonstrated accountability and sincere remorse, as well as a genuine commitment to positive change. Yet, under current policies, he faces barriers to meaningful reintegration and potentially excessive supervision or registry requirements that may not reflect his individual risk level.

I respectfully urge the Commission to consider future amendments that address the following:

Allow greater judicial discretion in tailoring sentences and supervision conditions based on validated risk assessments rather than rigid offense categories.

Expand and incentivize rehabilitative programming, including community-based treatment alternatives and earned reduction in supervision time for demonstrated progress.

Re-examine lifetime or excessively long registry and supervision mandates, especially for individuals assessed as low risk after treatment and time served.

By aligning policies with empirical evidence, we can better allocate resources, reduce recidivism, and improve public safety outcomes while also fostering opportunities for successful reintegration.

Thank you for your attention to this important issue and for considering perspectives grounded in both personal experience and empirical research.

Sincerely,
Trystan Clark

Submitted on: July 14, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

M C

Topics:

2. Drug Offenses (§2D1.1)

Comments:

Re: Public Comment Supporting Reform of Methamphetamine Sentencing under §2D1.1
Dear Commissioners,
I am writing to express strong support for the Commission's consideration of amendments to the Sentencing Guidelines that would eliminate the purity-based sentencing disparity for methamphetamine offenses under §2D1.1.
The current practice of differentiating between "actual" meth and meth mixture based on purity leads to unjust, excessive sentencing. It's outdated, discriminatory, and doesn't match modern realities. No other drug gets treated like this. The result? Harsh time, broken families, and another cycle of injustice.
There is no proven link between higher purity and increased violence or responsibility. These guidelines don't reflect real harm, real roles, or real lives.
It's time to shift toward individualized justice. We need to consider conduct, age, role, and impact—not chemistry lab numbers.
I urge the Commission to remove this disparity, and make any changes retroactive. It's the fair thing to do—and the right thing to do.
Respectfully submitted,
Marguerite Cottone

Submitted on: July 11, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

David Doty

Topics:

1. Sentencing Options (Chapter Five)

Comments:

Dear USSC,

As a family member of an incarcerated individual, I am writing to urge the Commission to prioritize reforms that promote fairness, rehabilitation and compassion in the federal sentencing guidelines. Harsh mandatory minimums and inflexible guidelines have caused unnecessary suffering for families like mine and have not always served the interests of justice or public safety.

I support efforts to reduce the costs of incarceration and address prison overcapacity. I encourage the Commission to consider alternatives to incarceration, such as probation and community-based programs, especially for nonviolent offenses. These options can help keep families together and support successful reentry.

Thank you for considering the perspectives of families affected by federal sentencing policies.

Sincerely,
David Doty
Evansville, IN

Submitted on: July 14, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Teresa Evans

Topics:

10. Miscellaneous

Comments:

There is one topic that I'd like to discuss, one that comes with a stigma and no one wants to be associated with. Exploitation of children. The sentencing guidelines are so very strict, that there is no room for atypical cases. Cases that don't fit the profile of a pedophile predator, cases that sentencing disparities are unjust and not fair.
There is no distinction between a child rapist and a picture of a toddler snapped during a diaper change. The sentencing guidelines double the points for a victim under 12 and a victim under 3. If my math is right, 3 should be included in "under 12".
There is no doubt that anyone who harms a child should be punished and held accountable. But there are inmates who are serving 20 plus years, working at rehabilitation, taking as many programs as they are offered, working on themselves and yet despite doing all the things that are requested of them, they are not eligible for the First Step Act. Studies show that with rehabilitation most of these offenders are low risk for recidivism. Why should these inmates feel compelled to better themselves, when there are no benefit to doing so? And then when they are released, they face further punishment with life long registry and supervised release?
Basically, there's two issues here: The sentencing guidelines are too narrow. They need to differentiate between contact and no contact crimes, as well as consider atypical crimes. The second issue is, if the offenders are working programs and working towards rehabilitation, they should be offered FSA reductions. Child exploitation is a serious crime that deserves serious punishment, but the punishment should be fair and there should be less disparities in sentencing.

Thank you for taking the time to read and consider this matter.
Sincerely,
Teresa Evans

Submitted on: July 17, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Jocelyn Faddis

Topics:

1. Sentencing Options (Chapter Five)
2. Drug Offenses (§2D1.1)
5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)
6. Simplification (Grouping Rules, Criminal History, §5G1.3 & Others)
7. Federal Bureau of Prisons Issues

Comments:

Dear U.S. Sentencing Commission,

Thank you for the opportunity to submit comments on the proposed amendments and priorities for the U.S. Sentencing Guidelines. I respectfully urge the Commission to adopt reforms that promote fairness, reduce unnecessary incarceration, and recognize genuine rehabilitation. My comments address the following topics:

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1. Sentencing Options (Chapter Five):
The Commission should expand non-custodial sentencing options, especially for low-level and nonviolent offenses. Community-based alternatives such as probation, home confinement, and treatment programs have been shown to reduce recidivism and promote rehabilitation more effectively than incarceration in many cases. Expanding downward departure opportunities would also allow judges to consider the unique circumstances of each case and impose more individualized, just sentences.

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2. Drug Offenses (§2D1.1):
The Guidelines continue to impose disproportionately severe penalties for drug offenses, particularly for those involving lower-level, nonviolent offenders. I urge the Commission to revisit drug quantity tables and reduce reliance on drug weight as the primary driver of

sentencing severity. Greater consideration should be given to an individual's role in the offense and personal history. More distinctions should also be made between individuals who exploit addiction for profit and those who are themselves victims of substance use disorder.

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5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others):
Incentivizing and rewarding genuine rehabilitation is vital. The current mechanisms for granting sentence reductions for acceptance of responsibility or substantial assistance are too narrow and inconsistently applied. I recommend expanding these provisions to include participation in rehabilitative programs, education, vocational training, and other evidence of positive institutional conduct. These changes would better align sentencing policy with the goal of encouraging transformation and reintegration.

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6. Simplification (Grouping Rules, Criminal History, §5G1.3 & Others):
The Guidelines remain overly complex, particularly in how they address grouping and criminal history. These complications often lead to inconsistent outcomes and confusion. I support the Commission's efforts to streamline the grouping rules and refine the criminal history categories. Special attention should be paid to reducing the weight given to minor or outdated convictions that disproportionately impact marginalized populations. Simplifying these sections will enhance transparency and reduce disparity.

Overall, I urge the Commission to continue its commitment to evidence-based reform and the pursuit of a more humane and rational sentencing system. These improvements would not only reduce unnecessary incarceration but also restore hope and dignity to individuals working to rebuild their lives.

Thank you for your consideration.

Submitted on: July 8, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Adriana Funk

Topics:

1. Sentencing Options (Chapter Five)

2. Drug Offenses (§2D1.1)

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

6. Simplification (Grouping Rules, Criminal History, §5G1.3 & Others)

Comments:

Public Comment Submission to the U.S. Sentencing Commission
Submitter Location: medford, Oregon

Dear Members of the U.S. Sentencing Commission,

Thank you for the opportunity to submit this comment regarding the federal sentencing guidelines. I write not just as a concerned citizen, but as the wife of a man who is currently facing sentencing in a historical drug conspiracy case. The charges stem from conduct that allegedly occurred over five years ago. In that time, he has completely turned his life around—he has had zero legal trouble, has remained sober for over three years, and is a dedicated father to our three children. These efforts came long before any indictment came to light. He is the primary caregiver for our special needs child and works swing shift with overtime weekly to care for our household. He is involved in Bible studies, counseling, youth mentoring and more. We got married last year and continue to provide a stable loving home for our three children and do all we can to prevent generational trauma or harm. A lengthy prison sentence of their father will undoubtedly cause harm and trauma to their childhood.

My comment addresses the following key areas:

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1. Sentencing Options (Chapter Five):
I strongly urge the Commission to continue expanding alternatives to incarceration. In cases like

my husband's—where the offense is nonviolent, years removed, and the individual has clearly demonstrated rehabilitation on his own—long prison terms are counterproductive. A sentence that separates a father from his children after he has worked so hard to become a positive, stable presence in their lives only causes further harm to our family and community. Judges should have more flexibility to impose non-custodial sentences, especially when the person has already demonstrated meaningful change.

2. Drug Offenses (§2D1.1):
The current drug guidelines often fail to distinguish between low-level participants and major traffickers. In my husband's case, the conspiracy charge does not reflect his actual role or behavior. The heavy reliance on drug quantity to determine punishment overlooks the context of the offense and the person behind it. We need reforms that give more weight to individual circumstances, personal history, and the genuine potential for continued rehabilitation.

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others):
Rehabilitation should matter. Sobriety, responsible parenting, community involvement—these should all count. My husband has done the work to become a better man, partner, and father. He has proven that he is not the same person he was years ago. The guidelines should encourage courts to recognize and reward this kind of transformation, not punish people as if no time or growth has occurred.

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6. Simplification (Grouping Rules, Criminal History, §5G1.3 & Others):
Simplifying the guidelines, especially in how criminal history is scored, is essential. Older or minor offenses can unfairly inflate someone's criminal history category and lead to harsher sentences than are warranted. A fairer, more focused approach would ensure that individuals aren't punished over and over again for their past mistakes, especially when they have demonstrated meaningful change.

Conclusion:
My husband is not just a "defendant"—he is a father, a husband, and a man who is already doing

the hard work of living right. A lengthy prison sentence now would only tear apart our family and undo years of progress. I ask the Commission to take into account real-life stories like his and continue pushing for guidelines that recognize redemption and support second chances.

Thank you for your time and commitment to justice.

Sincerely,
Adriana Funk

Submitted on: July 8, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Cheryl Fyten

Topics:

1. Sentencing Options (Chapter Five)

10. Miscellaneous

Comments:

Dear Judge Reeves,
I am writing to comment on the Commission's proposed priorities for the 2025-2026 amendment cycle.

I am deeply concerned about the state of the BOP. From overcrowding, to crumbling infrastructure, to persistent lockdowns, BOP cannot handle the population it currently has. The Commission should consider whether the guidelines can help to ensure that people do not serve more time than necessary in BOP.

There also needs to be rehabilitative programs, specific to the behavior(s) that led to incarceration. Other countries, such as Norway & The Netherlands have significantly lower recidivism rates & much shorter sentences. They provide treatment with the day one goal being reintegration into society as a contributing-to-society, whole person.

I hope that any proposals the Commission considers will reduce the number of people serving lengthy terms of imprisonment that do not fit the purposes of punishment.

Sincerely,

Cheryl Fyten
Concerned citizen

Submitted on: July 8, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

William Gallion

Topics:

10. Miscellaneous

Comments:

Dear Judge Reeves,
I am a former inmate in the federal prison system. I received a long sentence but was released under the Covid plan and subsequently received clemency from President Biden. I am writing to comment on the role of the BOP in rehab rehabilitation and especially education of inmates.
My crime was white-collar, no drugs or violence. Consequently, there were no real educational opportunities for me, although I participated in numerous of the BOP educational programs. Probably 100. However, during my 12+ years of incarceration I observed, and became fairly familiar with all of the programming available to inmates. What I took away from it was that many of my fellow inmates or intelligent enough and interested in receiving a real education while incarcerated. As you know, there is virtually no higher education available to inmates. The educational opportunities, and I am speaking of college education, are only available to inmate to have the resources and the know how to participate. The BOP is not very helpful in that regard. I served as a mentor and a tutor for several really smart young men who were high school graduates, but went the wrong way afterward. I encouraged them to investigate educational opportunities and several of them did that. As Il I am sure you are also aware, only a few colleges offer courses, but they are extremely expensive and the time it takes to complete even one course is prohibitive. I am suggesting that the BOP focus some of its efforts on identifying inmates who have the potential to receive college degrees and offer real opportunities for them.
And totally, while I am now 74 years old, when I was in college, I worked for several years as a tutor at the BOP Ashland. I was impressed at the time that there were several students who were very interested in receiving a college education And under a program known as the project new Gate they were able to receive an associate degree from the University of Kentucky, Ashland community college. I followed several of these men and they received college and some received medical and dental degrees. All due to the availability of college classes while incarcerated.
May I suggest that the sentencing commission encourage the VOP to put some effort into identifying those individuals who have the potential to accomplish something other than the Sentence.
Thank you for your consideration on this matter.

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Steven Garcia, Revise this

Topics:

4. Career Offender

Comments:

This needs to be revised and fixed. These enhanced penalties do not accurately reflect the the instant offense. The disparity between circuits proves the inefficiency of this enhancement. It is unfair and injust. The fact the one individual in one circuit can receive this enhancement and another in a different circuit can receive a completely different sentence, that have exact same past and instant offense, is unfair and unjust. Individuals that can receive of to 3 times the amount of time for past crimes that are not even illegal in other states is ridiculous. Thank you

Submitted on: July 9, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Gabriela Gomez

Topics:

1. Sentencing Options (Chapter Five)

2. Drug Offenses (§2D1.1)

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

7. Federal Bureau of Prisons Issues

Comments:

The overcrowding of prisons reflects the need for a reform in many areas, sentencing being one of the many. Additional guidance and consideration to amendments allows for a fair sentencing in some cases. The penalty structure for some drugs has been modified but others have not, a restructure would better the intent of the First Step Back act. Lack of personnel, overcrowded prisons, abuse, and inhumane conditions, increases the level and severity of violence within prison walls. An appropriate adjustment to good behavior would remediate the current issues. The Bureau of Prisons has no accountability for their actions. They are allowed to mistreat inmates and families that visit in whatever manner they choose. This can be rooted from political views, racism, anger issues, and lack of training and accountability.
I ask that you please consider the proposed changes to the current proposal that would treat inmates with dignity and respect and allow them a real chance for change. Thank you.

Submitted on: July 17, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Viren Gowda

Topics:

7. Federal Bureau of Prisons Issues

8. Legislation

Comments:

Topic: Felony Disenfranchisement

Dear U.S. Sentencing Commission,

Felony disenfranchisement remains the most alarming of the various injustices embedded within the American criminal justice system, as it denies nearly 4 million Americans, encompassing over 13% of Black men nationwide, the democratic right to vote because of a prior felony conviction. This policy, rooted in a history of racial control, disproportionately not only targets, Black and minority-majority communities, but also systematically undermines American democratic values by implementing a permanent group of second-class citizens. For example, in states such as Tennessee, one in four Black adults is barred from voting, while in Florida, over 961,000 people remain disenfranchised, many solely because they cannot afford court fees due to the economic victimization of low-income communities. There is no evidence that denying millions their voting rights enhances public safety or reduces crime; in fact, research indicates that restoring such abilities supports successful reintegration and lowers recidivism. Addressing and reforming felony disenfranchisement is not only an issue of policy, but it is also a moral obligation to uphold justice, equity, and true democratic participation.

End the Use of Criminal Justice Debt to Prevent Voting
Advocate for federal guidelines that prohibit past felons to pay heavy fines, fees, or restitution to restore their rights. Specifically, monetary sanctions disproportionately target and impact low-income and minority communities and effectively generate a modern-day poll tax.

Create Mandate Notice and Education
Implement a requirement that all individuals impacted by the criminal justice system receive clear, written notice of their voting rights status and the processes to restore them upon release. This is because many newly released felons are unaware, they can vote or they can work to vote

again, leading to, in reality, disenfranchisement.

Collect and Publish Data
Start pushing for more comprehensive, publicly available data collection and professional work on felony disenfranchisement by race, ethnicity, and gender on the basis of correctional status. Transparent data is fundamental to identifying and properly addressing racial disparities and tracking progress or issues within our criminal justice system.

Support Federal Legislation to End Felony Disenfranchisement
Begin to encourage the Commission to publicly support and provide research for federal legislation that could eliminate felony disenfranchisement for federal elections, setting a national standard for inclusion.

Sincerely,
Viren Gowda

Submitted on: July 10, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Gloria Grundman

Topics:

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

Comments:

There should be an incentive to encourage good behavior in prison. It offers hope for the inmates who may have made a major mistake in life and want to serve their time, keep out of trouble, and move forward in life leading a better life. The longer people serve the harder it is to keep out of what goes on within the prison walls and encourages continued criminal behavior. Basically our prisons are breeding grounds for continued criminal behavior. Inmates should be offered incentives to serve their time productively, taking classes and making better choices for which they will be rewarded. Especially those serving their first time in prison. Otherwise can just turn into the wild wild west making it difficult to manage by COs and Warden, which can impact staffing issues. Many inmates just want the opportunity for a 2nd chance.

Submitted on: June 29, 2025

Dear U.S. Sentencing Commission:

There is an urgent need to reform and reduce the use of life sentences, particularly sentences of life without parole, in the United States' federal criminal justice system. The U.S. has many more prisoners serving life sentences than any other country, holding 40% of the global total of life-sentenced prisoners and an astounding 83% of those serving life without parole worldwide. This is a crucial factor in the phenomenon of mass incarceration, which has resulted in the United States' prison population exploding over the past several decades even as crime rates have fallen to historic lows. Mass incarceration has led to many issues for the criminal justice system, as housing the United States' vast number of prisoners is immensely expensive and results in overcrowded prisons where violence and disease are more common. Limiting the usage of life sentences in order to reduce the prison population thus has clear practical benefits and should be a goal for the Commission.

There is ample evidence that the United States' current practices regarding life sentences are unfair, excessive, and do little to provide justice and safety to the public. The idea that harsher sentences work to deter people from committing crime has been disproven by multiple studies, as people committing crimes do not consider potential consequences rationally. Many scholars agree that a retributive "tough on crime" ideology results in an inefficient system designed to hand out disproportionate punishments, rather than one that works well to provide justice. I urge the Commission to take steps to reform the parole system and strengthen parole boards, to move away from "truth-in-sentencing" policies that keep people in prison, and to recommend opportunities for resentencing. Moving toward flexible sentencing that allows judges and juries to take in account specific circumstances and away from mandatory sentencing is the first step towards a criminal justice system focused on rehabilitation.

Placing restrictions on the implementation of life sentences, such as making it impossible to sentence people convicted of non-violent crimes to life in prison, abolishing or severely limiting the use of life without parole, and applying juvenile sentencing restrictions to people up to the age of 25 will also go a long way to reducing the pervasive racial bias in the criminal justice system. There are notable racial disparities among life-sentenced prisoners, as 67% percent of this population is made up of people of color, especially Black Americans, who comprise more than half of people sentenced to life without parole. Working to create a fairer criminal justice system for people of all races should be an important objective for the Commission and is an area which requires a great deal of further study and investment from the federal government.

Thank you for this opportunity to share my thoughts on priorities for the Commission.

Sincerely,
Margaret Hunter

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Ganesha Jefferson

Topics:

1. Sentencing Options (Chapter Five)

7. Federal Bureau of Prisons Issues

Comments:

Dear Commissioners:

I write to express my strong support for the Commission's proposal to review and consider policies addressing the Federal Bureau of Prisons' (BOP) role in fulfilling the purposes of punishment as articulated in 18 U.S.C. § 3553(a).

Federal sentencing is premised on achieving multiple objectives: just punishment, deterrence, incapacitation, and rehabilitation. However, longstanding challenges within BOP facilities including chronic overcrowding, insufficient access to meaningful educational and treatment programs, and disparities in conditions of confinement undermine these goals.

Overcrowding and Conditions of Confinement:
Numerous reports, including those by the Department of Justice Inspector General, have documented that overcrowded facilities strain security, reduce programming availability, and compromise safety and humane treatment. Courts have limited ability to consider these realities at sentencing, which can result in unintended punitive severity beyond what the Guidelines or statutory minimums contemplate.

Access to Rehabilitation and Programming:
Many incarcerated individuals do not have equitable or timely access to substance use treatment, mental health services, or vocational and educational programs, even when judges recommend them. This lack of meaningful rehabilitative opportunity is in direct tension with the goals of reducing recidivism and promoting reintegration.

Potential Policy Considerations:
I urge the Commission to consider policies that would:

- Allow courts to meaningfully account for BOP overcrowding and program availability when

weighing the nature and circumstances of the offense and the characteristics of the defendant under § 3553(a).

• Encourage or clarify judges' authority to recommend placement in facilities offering specific treatment or educational opportunities.

• Provide guidance on downward departures or variances where conditions of confinement are likely to be harsher or more restrictive than contemplated by the sentencing range.

• Collect and publish data on disparities in BOP facility conditions and program access to inform future policy.

Conclusion:
The Commission has an important opportunity to align sentencing practices with the real-world consequences of incarceration in the federal system. Clear, evidence-based guidance recognizing the impact of BOP conditions on the purposes of punishment will improve fairness, promote rehabilitation, and enhance public confidence in the integrity of federal sentencing.

Thank you for your consideration of these comments.

Nesha Jefferson

Submitted on: July 8, 2025

July 14 2025

Dear Judge Reeves and Honorable Members of the United States Sentencing Commission,

I am writing to comment on the Commission's proposed priorities for the 2025-2026 amendment cycle.

Our communities are working on Substance Use Disorder treatment. We invest funding and more dedicated professional and peer support staff are working in this field every day. I hope the Commission could review methamphetamine sentences with this in mind. The cost of imprisonment where people do not get the recovery and rehabilitative support that they need is much greater than using community diversion and support programs. Too many people are sentenced to unnecessarily long terms of imprisonment for these offenses when they could be recovering and contributing in our communities.

I support positive amendments to the "Career Offender guideline". We have vast data that shows brain development of emerging adults continues into a person's late 20's. Considering adverse childhood experiences and trauma, we are understanding that younger people may make more poor decisions. However there is also vast data that people 'age out' of potentially committing crimes for many reasons including maturing and community support programs. Labeling a person as a 'career offender' goes against all the data we have, and is detrimental to individuals, families and communities.

I am deeply most concerned about the state of the BOP. I wrote to my Senators in Maine regarding FCI Dublin and the horrific treatment of women there in particular. Women there endured sexual abuse then were shuttled around the country in the middle of the night without medication, property, family contact or any understanding of where they were going. How was the BOP allowed to treat people in this criminal and inhumane manner? BOP prisons are overcrowded and understaffed. This causes lockdowns which have a detrimental effect on everyone's health, and ends programming which stops the rehabilitative process. I hope the Commission is seriously reviewing guidelines to ensure that people do not serve more time than necessary in BOP. This is a human rights issue that affects the incarcerated population as well as staff, families and is a large cost to communities.

I hope that any proposals the Commission considers will reduce the number of people serving lengthy terms of imprisonment that do not fit the purposes of punishment.

Thank you for your time and consideration.

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Ari Lee

Topics:

1. Sentencing Options (Chapter Five)
2. Drug Offenses (§2D1.1)
3. Theft, Property Destruction, and Fraud (§2B1.1)
4. Career Offender
5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)
6. Simplification (Grouping Rules, Criminal History, §5G1.3 & Others)
7. Federal Bureau of Prisons Issues
8. Legislation
9. Circuit Conflicts
10. Miscellaneous

Comments:

Dear Judge Reeves,

Here are my comments on the Commission's proposed priorities for the 2025-2026 amendment cycle.

First, a word from Scripture: Continue to remember those in prison as if you were together with them and those who are mistreated as if you yourselves were suffering. (Hebrews 13:3)

In light of the Commission's own research, I urge the Commission to reimagine meth sentences. The current meth guideline sentences do not accurately reflect the present-day reality of meth trafficking offenses. As a result, too many people are sentenced to UNNECESSARILY LONG TERMS of imprisonment for these offenses.

The Career Offender guideline imposes OVERLY HARSH enhancements on many individuals who still have so much to contribute to society if only given the help to change and become more educated.

I am deeply concerned about the state of the BOP. From overcrowding, to crumbling infrastructure, to persistent lockdowns, BOP cannot handle the population it currently has.

The Commission should consider whether the guidelines can help to ensure that people DO NOT spend more time than absolutely necessary in BOP!

I hope that any proposals the Commission considers will reduce the number of people serving LENGTHY terms of imprisonment that do NOTHING to help them become contributing, peaceful members of society. PLEASE CHOOSE MERCY when making your decisions. We will all need grace and forgiveness in our lives.

Please pray and find it in your heart to forgive and give people a chance to experience God's gift of life again, no matter what they may have done. These are the men and women you we will see again someday in heaven.

Psalm 69:33 states: For the Lord hears the needy and doss not despise his own people who are prisoners.

I pray for you to make the right, merciful, and forgiving decision and wish you all the best.

Sincerely,
Ari L

Submitted on: July 10, 2025

Public Comment Submission

Glenn E. Martin

United States Sentencing Commission

Proposed Priorities for Amendment Cycle Ending May 1, 2026

Dear Chair Reeves and Members of the Commission,

Thank you for the opportunity to submit comments on the Commission's proposed priorities for the upcoming amendment cycle. I write as a formerly incarcerated advocate, a very successful entrepreneur, and someone who has worked for over 25 years with individuals navigating the federal system, including efforts to obtain pardons, commutations, resentencing, and successful reentry.

The Commission is tasked with two missions. The first is to create "sentencing policies and practices for the federal criminal justice system" that "assure the meeting of the purposes of sentencing." To fulfill that mission, Congress gave the Commission the power to issue sentencing guidelines—guidelines that must "take into account the nature and capacity of the penal, correction, and other facilities and services available." Congress also required the Bureau of Prisons to make decisions about where to incarcerate defendants and how to grant furloughs in light of "any pertinent policy statement issued by the Sentencing Commission." Beyond guidelines and policy statements, the Commission can help create sentencing practices by conducting training programs and making recommendations to Congress.

The Commission is also tasked with the mission of "measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." To fulfill this second mission, the Commission is empowered to: (1) obtain "information, data, and reports from any Federal agency"; (2) collect and disseminate "information regarding the effectiveness of sentences imposed"; (3) produce and fund research; and (4) hold "hearings and call witnesses."

In addition to my direct advocacy and professional work in New York State, I have visited and studied prisons in Norway, Germany (Berlin and Hamburg), Brazil, the Caribbean, Copenhagen, and across the United States. These experiences have provided me with a global understanding of how sentencing policies and prison environments shape rehabilitation, public safety, and human dignity.

I commend the Commission for prioritizing the reduction of prison overcapacity and for acknowledging the need to modernize sentencing structures. However, more must be done to ensure federal sentencing policy reflects what research, data, and international models clearly show: reducing excessive incarceration, incentivizing rehabilitation, and creating fairer, more

individualized sentencing reduces recidivism and enhances public safety. In short, we need to do more of what works and less of what does not.

1. Maximize Sentencing Incentives That Reduce Prison Overcapacity and Promote Rehabilitation

The Commission plays a critical role in ensuring that federal sentencing guidelines support pathways to rehabilitation and reduce unnecessary incarceration, consistent with its statutory directive under 28 U.S.C. 994(g) to consider costs of incarceration and prison overcapacity. One of the most immediate tools at the Commission's disposal is expanding good behavior adjustments under §3E1.1 and §5K1.1 to:

- Reward participation in evidence-based rehabilitative programs, including education, cognitive-behavioral interventions, mentorship, entrepreneurship and workforce development;

- Acknowledge a broader spectrum of conduct that reflects accountability and personal growth beyond limited traditional criteria;

- Encourage sentencing practices that reduce time served for individuals demonstrating sustained rehabilitative engagement.

As the Commission considers its statutory obligation under 28 U.S.C. 994(g) 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," I urge the Commission to ensure that all proposed amendments explicitly prioritize reductions in overcapacity, fiscal efficiency, and humane alternatives to incarceration.

The data is clear: jurisdictions that provide meaningful incentives for rehabilitation—including sentence reductions—experience lower recidivism, improved institutional safety, and reduced prison populations (The Pew Charitable Trusts, More Imprisonment Does Not Reduce Recidivism, 2018; The Sentencing Project, Decarceration Strategies, 2018). Additionally, I urge the Commission to explicitly support sentencing alternatives, including probation, home confinement, and community supervision, for appropriate cases, aligned with research demonstrating their effectiveness in reducing recidivism at a fraction of the cost of incarceration (National Institute of Justice, Five Things About Deterrence and Incarceration, 2016).

2. Ensure Sentencing Guidelines Complement the Goals of the First Step Act

While the Commission does not control the Bureau of Prisons, sentencing guidelines and statutory reforms are inextricably linked. The First Step Act (FSA), a bill I helped advocate for, was designed to incentivize rehabilitation, yet implementation gaps, particularly around earned time credits, continue to undermine its impact (DOJ OIG Report 23-085, 2023; GAO-23-106041, 2023). The Commission can strengthen FSA outcomes by:

- Structuring guidelines to increase participation in programs that qualify for earned time credits, thus reducing time served and prison populations;

- Avoiding guideline enhancements that negate earned time benefits or create disparities inconsistent with FSA objectives;

- Encouraging sentencing practices that reflect an individual's rehabilitative efforts and potential for successful reentry.

By aligning guidelines with FSA goals, the Commission can amplify existing statutory tools to safely lower incarceration rates.

3. Revise Drug Sentencing to Reduce Excessive Incarceration and Improve Proportionality

The Commission's review of §2D1.1 provides a critical opportunity to address outdated drug sentencing structures that have contributed to excessive incarceration without improving public safety. Specifically, I urge the Commission to:

- Reevaluate the role of drug purity distinctions, which often produce disproportionate sentences disconnected from individual culpability;

- Promote judicial discretion in trafficking and possession cases, allowing for community-based alternatives to incarceration when appropriate;

- Ensure penalties align with the best available public health research, particularly regarding substances like fentanyl, where treatment and harm reduction often prove more effective than incarceration alone (Brennan Center for Justice, Federal Drug Sentencing Reform, 2022; National Academies of Sciences, Evidence-Based Strategies for Addressing the Opioid Crisis, 2020).

Given the opioid crisis and the failures of purely punitive drug sentencing, I urge the Commission to structure §2D1.1 reforms through a public health lens, ensuring that sentencing promotes treatment, harm reduction, and community safety over incarceration.

These reforms align with the Commission's mandate to reduce prison overcapacity while maintaining proportionality and public safety.

4. Encourage Sentencing Practices That Professionalize Corrections and Promote Dignity

Although the Commission does not oversee prison operations, sentencing policy directly shapes the prison population and environment. Through my international and domestic prison visits, it is clear that excessive incarceration, long sentences disconnected from rehabilitation, and lack of incentives foster stagnant, unsafe environments that harm both incarcerated individuals and correctional staff.

Systems that emphasize dignity, dynamic security, and normalized conditions improve safety, promote rehabilitation, and enhance staff professionalism (Coyle et al., Imprisonment Worldwide, 2016; Pratt & Eriksson, Contrasts in Punishment, 2014; Prison Policy Initiative, 2019). The Commission can:

- Promote sentencing reductions for individuals engaged in rehabilitative efforts, thus relieving prison overcrowding and improving institutional dynamics;

- Encourage sentencing structures that reduce the overall prison population, supporting environments where officers can take pride in their work and individuals have meaningful opportunities for growth;

- Recognize that sentencing policy must support environments aligned with human dignity, consistent with international standards like the United Nations Mandela Rules (2015).

Simplifying the Guidelines Manual is essential not only for consistency but also for fairness and accessibility. Overly complex sentencing structures create disparities, undermine transparency, and leave many justice-impacted individuals navigating opaque systems with inadequate resources. Reforms that prioritize simplicity, proportionality, and dignity can reduce both errors and unnecessary incarceration.

5. Reexamine the Federal Restitution and Forfeiture Regime to Avoid Perpetual Economic Disenfranchisement

The current structure of federal restitution, fines, and forfeiture imposes lifelong financial burdens on many justice-impacted individuals, undermining reentry success, economic stability, and public safety. While accountability for harm is essential, the reality is that the federal system often relies on inflated, speculative, or mathematically flawed assessments of loss, particularly in white collar, fraud, and drug-related cases—producing restitution orders that individuals have no realistic ability to satisfy.

The U.S. Supreme Court has recognized concerns about excessive and disproportionate economic sanctions, notably in Timbs v. Indiana, 586 U.S. ___ (2019), where the Court applied Eighth Amendment protections against excessive fines to the states. Yet at the federal level, restitution and forfeiture often remain disconnected from both defendants' actual culpability and their post-incarceration ability to pay.

The Commission should:

- Reexamine how sentencing guidelines interact with restitution and forfeiture, ensuring proportionality and feasibility are considered at sentencing;

- Explore whether loss tables, particularly under §2B1.1, need reform to prevent speculative, inflated, or uncollectible restitution amounts that serve no legitimate penal purpose;

- Support judicial discretion to reduce or adjust economic sanctions based on demonstrated efforts toward rehabilitation and financial responsibility, rather than locking individuals into permanent poverty cycles;

- Recognize that excessive, unpayable economic sanctions discourage entrepreneurship and workforce participation, incentivize underground economies, and ultimately harm both victims and communities (The Sentencing Project, How Fines and Fees Criminalize Poverty, 2022).

Economic sanctions should serve justice, not entrench poverty. Revisiting these regimes is essential to ensuring sentencing policies foster rehabilitation, economic stability, and reentry success.

6. Do More of What Works, Less of What Does Not

Research, international comparisons, and decades of data have made clear:

- Rehabilitation reduces recidivism;

- Excessive incarceration strains resources without improving public safety;

- Incentivizing growth, education, and pro-social behavior inside prison benefits individuals, staff, and communities;

- Fairer, individualized sentencing builds legitimacy and promotes successful reintegration;

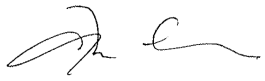
- Reassess the federal restitution and forfeiture framework to prevent excessively punitive, often speculative financial obligations that trap individuals in cycles of poverty post-release, undermining successful reentry and long-term public safety.

The Commission must accelerate reforms that reflect these lessons. Doing more of what works and less of what does not is not only cost-effective but essential to building a justice system grounded in dignity, proportionality, and public safety.

Finally, as the Commission resolves circuit conflicts, clarifies guidelines, and considers research agendas, I urge a consistent focus on expanding judicial discretion, promoting individualized sentencing, and incorporating evidence from international models that prioritize rehabilitation, human dignity, and successful reentry.

Thank you for your leadership and commitment to building a fairer, more effective justice system.

Sincerely,



Glenn E. Martin

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Dom O'Bannon

Topics:

1. Sentencing Options (Chapter Five)

Comments:

I write today out of deep concern regarding the persistent reality of unjust sentencing outcomes within the federal criminal justice system — and more importantly, the failure to provide meaningful relief to those who remain incarcerated despite recognition that their sentences were excessive, outdated, or the result of disproportional sentencing policies.

The Commission has taken commendable steps in the past through retroactive guideline amendments and adjustments for specific offenses. However, even with such reforms in place, thousands of individuals remain behind bars serving sentences that would not be imposed under today's standards. The moral contradiction here is stark: if we recognize that a sentence is unjust by current legal and ethical standards, what justification remains for continuing to enforce it?

There are three urgent concerns:
1. Unjust Sentences Persist: Numerous individuals are still incarcerated under sentencing schemes that have been modified or rescinded. Examples include outdated mandatory minimums, overly harsh drug-related sentences, and disproportionate enhancements. In some cases, courts have acknowledged the injustice but lacked the tools to correct them due to technical or procedural limitations.
2. Lack of Retroactive Relief: When sentencing reforms are made, they are too often not applied retroactively. This leaves behind a population of individuals who were sentenced under outdated laws and never benefit from the very reforms meant to address injustice.
3. The Human and Social Cost: Each day someone remains incarcerated under an unjust sentence is a failure of justice and a blow to public trust. Beyond the individual harm, families, communities, and public resources continue to bear unnecessary burdens.

Recommendations:
- Expand Retroactivity: The Commission should advocate for and implement broader retroactive application of sentencing reforms and guideline reductions.
- Support Second-Look Mechanisms: Endorse policies allowing courts to revisit sentences after

a significant passage of time or upon legislative change, especially where incarceration no longer serves a rehabilitative or societal purpose.

• Prioritize Clemency and Compassionate Release: Provide clear guidance and support for early release opportunities for those who have served lengthy terms under unjust frameworks.

We must treat sentencing not as a fixed punishment but as a moral commitment to proportionality, fairness, and rehabilitation. If the law evolves to recognize a punishment as excessive, our response should be swift and meaningful — not bureaucratic and indifferent.

Justice delayed is justice denied. The United States Sentencing Commission has the power to help correct these past harms. I urge you to take bold and restorative action now.

Submitted on: July 17, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Romeo Savoy, Friend

Topics:

1. Sentencing Options (Chapter Five)

6. Simplification (Grouping Rules, Criminal History, §5G1.3 & Others)

9. Circuit Conflicts

Comments:

The Kidnapping Guidelines have "ransom demanding" baked into the elements. Then the guidelines apply a 6 Level increase for demanding a ransom. The special adjustment states " 6 points if a Ransom demand or demand upon government official". So if a person demands a ransom from a regular person or a government official the punishment is the same? There shouldn't be a Ransom demand enhancement for the kidnapping guidelines because ransoming is baked into the conviction instead an enhancement should apply if the person demanding a ransom from a government official. The ransom enhancement is what makes the guidelines so high for the 1201 offense. Please change this

Submitted on: July 17, 2025

Dear Judge Reeves,
I am writing to comment on the Commission's proposed priorities for the 2025-2026 amendment cycle.

In our country today, we are faced with a myriad of challenges which have contributed to decades of devastating socioeconomic decline in our communities throughout the United States. We have had decades of mass incarceration in this country. The U.S. has the 5th highest incarcerated population in the world.
For the past few years, the Commission has considered amendments to the Career Offender guideline. And for good reason. This guideline imposes harsh enhancements on many individuals whose crimes simply do not fit the punishment. Surveillance, stigma, poverty, family separation, and civic exclusion all ensure that those released remain vulnerable to re-incarceration. The "career offender" designation was meant to target serial recidivists, but for too long, it has swept in people who are simply not "career criminals."

We must continue to go further and create better environments and opportunities for returning ex-offenders. To correct maladaptive behaviors

brain scans upon incarceration should be strongly considered. The goal of imposing “corrective” measures needs to be one that heals broken lives. We must aim to instill and restore human dignity to our population.

Our Justice system must correspond directly to the current socioeconomic impacts on our society. Yet what message are we sending when allowances are given exclusively to those of extreme wealth?

In contrast, our way of addressing violations by those living in poverty detains people without and until the chance of a fair trial. This fractures families and unfairly punishes innocent citizens, causes loss of necessary income, threatens mental and emotional health, contributes to declined health and disproportionately affects women due to the huge disparity of American men incarcerated

according to the Prison Policy Initiative 2025 report. Additionally, removing (oftentimes, parents) leaves torn families with traumatized children causing devastating hardships. Another factor unfairly disproportionately impacting the expanding prison population is that methamphetamine sentences are extraordinarily high, in part because of outdated purity distinctions. In light of the Commission's own research, I urge the Commission to reimagine meth sentences. The current meth guideline sentences do not accurately reflect the present-day reality of meth trafficking offenses. As a result, too many people are sentenced to unnecessarily long terms of imprisonment for these offenses.

These are just a few factors that will make a huge impact yet we are barely scratching the surface of the harm mass incarceration has caused to the communities in this country. A nation is only as strong as it's people. We must take actions to strengthen and rebuild our country, to strengthen our communities by encouraging family integrity and individual empowerment.

I am deeply concerned about the state of the BOP. From overcrowding, to crumbling infrastructure, to persistent lockdowns, BOP cannot handle the population it currently has. The Commission should consider amending the vagueness and the unjust requirement of 21 U.S. Code § 846 - Attempt and conspiracy guideline to strike “shall be subject to the same penalties as those” and instead make those “same penalties as those” as the maximum guideline. This would better reflect the fairness of the U.S. Justice system in cohesion with the purpose of the Controlled Substance Act under Pub. L. 91-513. Act to Amend the Public Health Service Act.
Doing this would help clarify whether the guidelines can help to ensure that people do not serve more time than necessary in BOP.
I am hoping that by bringing these facts to the surface that you will see that these changes are necessary for the future betterment and growth of our beloved nation.

Thank you for the hard work and dedication you have given to serve and make a difference!

For further interest:
-Incarceration rate statistics reference:
Published by Statista Research Department, Feb 20, 2025
Cuba, Rwanda, Turkmenistan, and the United States, rounded out the top five countries with the highest rate of incarceration.

-Prison Policy Initiative website:
www.prisonpolicy.org/reports/pie2025

Effective

Oct. 27, 1970

Pub. L. 91-513. An Act to amend the Public Health Service Act and other laws to provide increased research, into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse.

SEC. 6470. CONTROLLED SUBSTANCES AND RELATED AMENDMENTS.

(a) ATTEMPT AND CONSPIRACY AMENDMENTS.—Section 406 of the Controlled Substance Act (21 U.S.C. 846) and section 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 963) are amended by striking "is punishable" and all that follows through "punishment" and inserting "shall be subject to the same penalties as those".

(b) CLARIFYING AMENDMENTS RELATING TO FORFEITURE OF PROCEEDS OF A FOREIGN DRUG OFFENSE.—Subparagraph (B) of section 981(a)(1) of title 18, United States Code, is amended by—

(1) inserting ", real or personal," after "property";

(2) striking "which represents the proceeds of" and inserting "constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from";

(3) striking "or activity" the first place it appears;

(4) inserting "under the laws of the United States" after "punishable" the second place it appears; and

(5) inserting "constituting the offense against the foreign nation" after "such act or activity".

subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91–513, title II, § 406, Oct. 27, 1970, 84 Stat. 1265; Pub. L. 100–690, title VI, § 6470(a), Nov. 18, 1988, 102 Stat. 4377.)

Public Comment - Proposed 2025-2026 Priorities

Submitter:

Guy Smiley

Topics:

10. Miscellaneous

Comments:

To the Esteemed Members of the U.S. Sentencing Commission,

I am writing to express profound concern regarding the enduringly harsh and often counterproductive laws and policies applied to individuals convicted of sex offenses in the United States. While acknowledging the gravity of such crimes and the imperative to protect society, the current framework often inflicts disproportionate and lifelong punishments that extend far beyond the original sentence, fostering a system that prioritizes retribution over rehabilitation and public safety.

The impact of these "draconian laws" on individuals is devastating. Beyond the initial period of incarceration, many are subjected to lifelong registration requirements that impose significant burdens and restrictions. These include public notification, often via readily accessible online registries, which strips individuals of any modicum of privacy and marks them with a permanent scarlet letter. This public shaming extends to their families, who often suffer social ostracization by association.

The social stigma attached to a sex offense conviction is immense, effectively rendering individuals "persona non grata" in many communities. They frequently face insurmountable barriers to securing stable housing, employment, and educational opportunities, even years or decades after completing their sentences. This perpetual marginalization significantly hinders their ability to reintegrate into society and become productive citizens. Instead, it often creates a cycle of despair and recidivism, as individuals are denied the basic necessities for a stable life.

Furthermore, the loss of privacy is not merely an inconvenience; it is a fundamental erosion of dignity. Every aspect of their lives can be scrutinized, leading to constant fear and anxiety. This pervasive surveillance and lack of personal space contribute to a sense of being perpetually punished, even after their debt to society, as defined by the courts, has been paid.
It is imperative that the U.S. Sentencing Commission critically re-evaluate these laws. A more

nuanced approach is desperately needed, one that distinguishes between different types and severities of offenses, and considers individual circumstances, risk assessments, and the potential for rehabilitation. Focusing on evidence-based practices that promote successful reintegration, rather than perpetual punishment, would ultimately lead to better outcomes for both individuals and communities.

I urge you to consider the human cost of these policies and advocate for reforms that reduce the severity of these laws, restore a measure of privacy and dignity to those who have served their time, and enable genuine rehabilitation.

Sincerely,
G. Smiley

Submitted on: July 14, 2025

Public Comment - Proposed 2025-2026 Priorities

Submitter:

O Uwadiae

Topics:

1. Sentencing Options (Chapter Five)

5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others)

7. Federal Bureau of Prisons Issues

10. Miscellaneous

Comments:

Dear USSC,

Thank you for the opportunity to provide comments and for your willingness to improve the federal sentencing guidelines. We hope these changes lead to greater fairness and prevent unjust and prolonged punishments in the future.

We write as the parents of Omoruyi Uwadiae to share context about his case, which informs our recommendations for guideline reform. In December 2019, the FBI conducted a search and seizure. The Department of Justice did not indict our son until April 2024—nearly five years later—and he was sentenced in December 2024.

Contrary to the prosecutors' inflammatory and misleading claims, this was not a "criminal scheme," nor did he "target young men." If they truly believed he was a danger, why did they wait five years to indict him—just before the statute of limitations expired? Their press release in May 2024 deliberately omitted the timeframe of the allegations, misleading the public into thinking these were recent events.

Following the FBI visit, our son immediately began mental health treatment. While his actions were inappropriate, they stemmed from immaturity, loneliness, and poor judgment—not criminal intent. Therapy helped him understand and address these underlying issues. In the summer of 2020 he got promoted at his job with Proctor & Gamble and began his MBA part-time at the Northwestern University Kellogg School of Management, completing the program in December 2021, faster than the 2.5 year average. Afterwards, he began a high paying job with McKinsey & Company in July 2022. Through the years, he's also mentored countless people seeing similar

education and career goals, including helping some land jobs with his employers after coaching them on the rigorous job interview process.

In June 2024, he lost his job due to the prosecutors' press release—an unusual step for a years-old case already known to authorities. Meanwhile, a licensed forensic psychologist who evaluated him in 2023 and 2024 found no criminal intent and advised against incarceration, his findings are provided in the sentence memorandum. He also completed a three-month partial hospitalization program from June to August 2024, continued therapy, and secured a high-paying contract role in November, which he worked until self-reporting to prison on January 31, 2025.

Despite being a first-time, nonviolent offender with no restitution and no mandatory minimums, he was sentenced to 51 months in prison—five years after the alleged conduct and despite clear signs of rehabilitation. He paid his $9,500 fine in full by December 24, 2024.

A significant reason that our son is in prison is because of his attorney's failure to effectively argue against the Vulnerable Victim Enhancement pursued by the prosecutors. Sixth Circuit precedent, from just the previous year, established that the government's arguments for the enhancement did not have legal standing. Because of this enhancement, our son was unable to get the §4C1.1 Zero-Point Offender 2-point reduction and §5C1.1(10)(B) Safety Valve, which would apply because his allegations were not crimes of violence or "serious offenses". Had his attorney simply done his job to research case law and then cite this precedent, among other ways in which he gave ineffective assistance, our son likely would not have gotten a prison sentence.

We say likely because of judicial bias. His judge, J. Watson, made comments and displayed behavior that indicated some prejudice. He said that our son is privileged - this is a false accusation especially given that we are a working class family and our son has diligently worked hard all his life for his accomplishments. Our son has earned triple majors individually in his undergraduate and graduate degrees, and he's both worked and been in school simultaneously for 8 of the 12 years since he got a part-time job in high school. Judge Watson claims to have considered the 3553(A) factors in the Statement of Reasons but didn't mention this at sentencing. There are cases, including some published online (two links provided below), in which Judge Watson gave non-custodial sentences defendants for reasons such as, in his own words, stable employment, showing remorse, and suffering economic and reputational loss. All of these reasons also applied to our son yet he didn't give a non-custodial sentence let alone a downward departure from the guidelines.

It's ironic that the amount our son paid annually in federal income taxes is what tax payers are now paying to find his unjust imprisonment. He could be out in society working, even under home confinement or probation, paying taxes, continuing his mental health counseling, and contributing to economic growth through his work with the top global companies in the world.

Based on the unjust experience that our son has faced in the federal legal system, we have the following recommendations to result in fairer, just, and economically sound outcomes in

sentencing.

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1. Sentencing Options (Chapter Five):

Enhancements should not automatically disqualify first-time, nonviolent offenders from §4C1.1 Zero-Point Offender reduction or §5C1.1(10)(B) Safety Valve.

Enhancements significantly affecting sentencing (e.g., altering the zone or disqualifying reductions) should require an evidentiary hearing, a jury or panel of judges judgement, and clear legal justification, with the opportunity to present or challenge relevant precedent.

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5. Adjustments for Good Behavior (§3E1.1, §5K1.1 & Others):

Community confinement should be prioritized for first-time, nonviolent, non-"serious" offenses, especially when significant time (2+ years) has passed between investigation and indictment, with no additional offenses in that period.

In our son's case, the government allowed five years to pass—indicating they did not perceive him as a threat—yet insisted on over four years of imprisonment after he had demonstrably changed his life.

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7. Federal Bureau of Prisons (BOP) Issues:

The BOP needs to adhere to the court's judgement and not make false assumptions. They've put a Public Safety Factor (PSF) - Sex Offender on our son's classification Even though he did not commit not was charged with Sex Offenses. This is defamatory. This has barred him from minimum-security designation, prison camp, and even denied him access to email.

Sentencing courts should consider the Pattern Risk Assessment before incarceration. Our son, with no programming needs, has waited over six months for trauma programming while being told by staff not to expect support unless he is suicidal. So after 5 years of regular mental health counseling, Judge Watson thought it would be justified to sentence our son to prison where there is no regular, safe and confidential mental health counseling. It is damaging to mental health to sentence someone to prison after years of active treatment—only to deny them further care inside, and this was a concern explicitly stated by one of his mental health counselors in his sentence memorandum.

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10. Miscellaneous:

Investigate sentencing discrepancies for bias and inequality. The sentencing guidelines are advisory but they don't protect defendants from bias of individual judges. Our hypothesis is that you will find disproportionate treatment in sentencing by race and by type of crimes charged.

Our son's case is a clear example of how the current system can fail—through prosecutorial overreach, ineffective counsel, judicial bias, and flawed application of sentencing enhancements. He is a young, brilliant, and deeply reformed man whose rehabilitation was evident and well-documented before sentencing. Instead of recognizing this, the system imprisoned him—wasting taxpayer dollars and undermining public trust in the goals of justice and rehabilitation.

Sentencing should serve justice, not politics. It should respond to a person's full story, not just the government's narrative. We urge the Commission to adopt reforms that protect first-time, nonviolent defendants from disproportional punishment and that ensure courts cannot ignore strong evidence of rehabilitation.

Thank you for your time and consideration.

Submitted on: July 15, 2025

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