UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
327 SOUTH CHURCH STREET
ROCKFORD, ILLINOIS 61101

CHAMBERS OF
IAIN D. JOHNSTON
UNITED STATES JUDGE

[redacted]

January 21, 2026

Judge Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle NE
Washington, D.C. 20002

Re: Proposed Amendment Section 3E1.2 (Post-Offense Rehabilitation)

Dear Judge Reeves,

Initially, as always, thank you and the Commission for providing the opportunity for all stakeholders to be heard on proposed changes to the Guidelines Manual. Not only do I appreciate the opportunity to respond, but also the ability to hear from other stakeholders that might have a different perspective than mine. The exchange of ideas is an excellent learning opportunity for everybody.

I'm writing to comment and express my opinion in opposition to the proposed amendment to Section 3E.1 (Post-Offense Rehabilitation). Before explaining my opposition, I'd hope we could all agree that post-offense rehabilitation is an important consideration for sentencing judges to use in reaching a sentence sufficient but not greater than necessary to fulfill the sentencing goals. In a post-*Booker* world, sentencing judges should consider post-offense rehabilitation. *United States v. Zimmerman*, 2012 U.S. Dist. LEXIS 85046, *17 (E.D.N.Y. June 19, 2012) ("Now that the Guidelines are advisory, there can be no doubt that a defendant's post-arrest rehabilitation is a factor on which a sentencing court may properly rely."). I certainly do. And every defense attorney and likely every defendant appearing before me knows I give serious consideration to post-offense rehabilitation. This doesn't mean that when weighing the Section 3553(a) factors that I always vary downward from the advisory guidelines calculations. But I always consider post-offense rehabilitation as a factor. Sometimes, this rehabilitation results in significant downward variances in the sentence that I impose. Post-offense rehabilitation should always be considered, but a provision in the Guidelines Manual—particularly either option as drafted—isn't the appropriate way to consider this factor.

I have two fundamental concerns as to the proposed amendment. But, as an aside, post-offense rehabilitation is an imperfect fit as an offense consideration. Post-offense rehabilitation doesn't have much, if anything, to do with "the offense." Instead, this factor fits neatly within "the history and characteristics of the defendant," which—as we all know—is a Section 3553(a) factor. (That's called foreshadowing.)

These are my two main concerns. First, the proposed amendment is a one-way street. The proposed amendment only provides for a decrease in the offense level for rehabilitation but doesn't adjust the offense level for post-offense negative behavior. Second, the proposed amendment removes discretion from the sentencing judge and forces this consideration into a mechanical calculation fraught with many problems.

The proposed amendment is a one-way street

The proposed amendment only provides for an offense reduction for post-offense rehabilitation. If the Commission were to decide to include an offense reduction, then it must include a proposed amendment for post-offense declension or negative post-offense conduct. As any sentencing judge knows, we are often confronted with defendants whose behavior changes dramatically for the better between conviction and sentencing. But almost as often, we are confronted with defendants whose behavior remains similar or worsens. The Commission must address that phenomenon, too. There must be a counterpart. No doubt, defendants who have appeared before me have engaged in activities that show true rehabilitation. All too often the system is quick to condemn but slow to commend. So, when a defendant has truly shown rehabilitation during that time, a sentencing judge should consider that behavior, and, if appropriate, vary downward from the advisory guideline range.

But I have also had defendants—whether held in custody or not—whose behavior is just as bad or worse than when they appeared before me at the change of plea or conviction. While in custody, I've had defendants attack other inmates and correctional staff, sexually harass staff, and convince their girlfriends to engage in sexual activity with correctional staff so the defendant could be treated better while incarcerated. While out of custody, some defendants have been terminated from employment for misconduct, engaged in other criminal activity, and violated conditions of release. So, on the flip side, a sentencing judge should consider those actions and behaviors in determining whether to vary upward. I'd hope that we'd all agree with this proposition. The Commission's proposed amendment doesn't address this phenomenon. And the Commission must, if it were to decide to adopt either of the options for the proposed amendment. The objectivity of the Commission would be jeopardized if it didn't.

The proposed amendment improperly removes the sentencing judge's discretion and would be extremely difficult to apply

Even if the Commission were to have a proposed amendment to allow for an increase in the offense level for post-offense declension, I would still be opposed to both proposals.

Initially, I freely admit that I've likely lost this battle and I fully understand the rationale behind the Guidelines Manual. But sentencing—not only the application of law to fact but the use of judgment and discretion—is more art than science. Sometimes, when I'm working my way through the presentence investigation report and the government's and the defendant's objections to the proposed guideline calculation, I think of the scene in *Dead Poets Society*. You know the one. John Keating (played by Robin Williams) asks one of his students to read a passage from the textbook's introduction that explains how to determine the greatness of a poem. He then tells his students to rip that page out of the book. https://www.youtube.com/watch?v=8x0COtH4Vrw. Just as the greatness of a poem can't be quantified using mathematics, careful and thoughtful consideration of a defendant's post-offense behavior can't be quantified using an unworkable, artificial calculation. Now, of course, I certainly wouldn't use the same word Keating used to describe the proposed amendment or the Guidelines Manual. But this proposal is an example of trying to force a mechanical, mathematical calculation onto a factor that is best left within the sentencing judge's discretion. Indeed, the questions posed by the Commission prove this point. The Commission's own questions raise a host of additional, thorny questions. Here are just a few.

- Should a sentencing judge care if the defendant's actions were voluntary or motivated by good intentions? Should defendants get the benefit of engaging in post-offense good behavior simply because they know they'll serve a shorter sentence? Should an incentive exist regardless of the motive?
- What resources allowing for post-offense rehabilitation are available?
- To what extent does a sentencing judge weigh different types of positive behavior? Is completing a four-hour virtual anger management course equivalent to a thirty-day inpatient drug treatment program? (Here's a hypothetical to consider: Should completing a court ordered one-morning drug treatment program be valued the same as saving a family from a burning car on an interstate? The proposals seem to say, "Yes." I disagree.)
- One of the proposed questions is this: "Should Option 2 then provide for an additional reduction based on post-offense behavior or rehabilitative efforts undertaken by the defendant that go beyond the *typical actions* undertaken by defendants prior to sentencing?" (Emphasis added.) My question to that question is this: What are *typical actions* undertaken by defendants before sentencing? Do we somehow create a "reasonable criminal defendant"

standard against which to make that determination like some kind of reasonable person standard used in negligence law?

- Finally, what does "successfully participat[ed]" mean and how is that determined? What if a drug counselor believes that any defendant who puts in the most minimal level of effort "successfully participat[ed]" in a rehabilitation program and the defendant only "participated" to get out of his cell for an hour a day? Is the sentencing judge bound by this "finding," and if not, does the sentencing judge hold an evidentiary hearing to make an independent factual finding on what the judge believes is "success"? To make matters worse, defense counsel tell me at least once a week, "Relapse is part of recovery." So, if a defendant completes a drug rehabilitation program and then relapses, uses drugs, and engages in other negative behavior, is that still considered "successfully participat[ed]," entitling a defendant to an offense-level reduction?
- Similarly, does a defendant on pretrial release who complies with all conditions of supervised release and engages in further positive post-offense behavior, but tests positive for marijuana just once not receive a reduction?

Consistent application of the proposed amendments is highly unlikely, not just between districts but even by the same sentencing judge.

Practical administrative problems exist, too. Some of the local jails where defendants are housed during pretrial detention offer many courses and have substantial resources. But other local jails don't have those courses and resources. So, by sheer luck, one defendant will receive an offense-level reduction, but another defendant won't. And even at the local jails that have programs and resources, those programs and resources are not constant. Sometimes, because of funding and staffing, those opportunities don't exist at certain times.

Relatedly, for those defendants who are released on bond, their abilities to engage in post-offense rehabilitation depend on both financial resources and community resources. For example, a white-collar defendant might be able to go into an in-patient thirty-day treatment program, but a low-level drug distributor might not have a similar opportunity because of the lack of personal resources or community resources.

Post-offense rehabilitation and positive post-offense behavior should be considered by sentencing judges. But the place to do that is under Section 3553(a)'s history and characteristics factor. The statute already provides a time and place for this relevant consideration. Trying to artificially shoehorn this consideration into an offense reduction isn't the correct way to consider this phenomenon.

As always, thank you for your consideration.

Sincerely,

Iain D. Johnston

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

District Judge Jed S Rakoff, New York, Southern

Topics:

3. Economic Crimes

Comments:

Quite aside from the fact that it is unclear how or why the Commission arrived at the various levels reflected in 2B1.1 (revised or unrevised), a fundamental problem with section 2B1.1 is that, by increasing offense levels by very large numbers in many cases, it greatly overstates the importance of loss as compared to other relevant factors (such as vulnerability of victims, sophistication, venality, etc. etc.). For example, a securities fraudster who defrauds the 1 million shareholders of a large public company of an average of $6 each (thus resulting in an offense level increase of 18 points) is, because of the loss table, treated much more severely than a fraudster who steals an elderly widow's entire life savings of $60,000 (which only increases the offense level by 4). Yes, because the victim is vulnerable, there may also be in the latter case a further 2-level increase under section 341.1, but the total for the moral monster who defrauded the widow will still be very much less than the total for the securities fraudster whose undoubted greed only caused very modest financial harm to each of his victims. So, I don't think the tinkering reflected in the revised version of section 2B1.1 comes to terms with its fundamental problems.

Submitted on: January 26, 2026

§2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property

* * *

(b) Specific Offense Characteristics

(1) If the value of the illegal transactions exceeded $6,500$15,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2E5.1. Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations

(b) Specific Offense Characteristics

* * *

* * *

(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded $2,500 but did §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

not exceed $6,500$15,000, increase by 1 level; or (B) exceeded $6,500$15,000, increase by the number of levels from the tab

§2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property

* * *

(b) Specific Offense Characteristics

(1) If the value of the illegal transactions exceeded $6,500$15,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2E5.1. Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations

(b) Specific Offense Characteristics

* * *

* * *

(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded $2,500 but did §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
not exceed $6,500$15,000, increase by 1 level; or (B) exceeded $6,500$15,000, increase by the number of levels from the tab

* * *

* * *

In a season where fund raising fraud, and stolen election evidence is at an all time high, I find it suspicious that the commission is attempting to increase the amount of fraud before it is considered a punishable offense. The $6500. For illegal transactions should be LOWERED to $2K in order to reduce the illegal activity! Act blue is a primary example of why this amount should be reduced, not increased. Please consider yourself responsible for election honesty and integrity fund raising efforts.

American Patriot Relief Organization

Speak up for those who cannot speak for themselves, for the rights of all who are destitute.~Proverbs 31:8
For many are called but few are chosen ~Mathew 22:14

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Beat the Streetz

Topics:

1. Drug Offenses
2. Inflationary Adjustments
4. Post-Offense Rehabilitation Adjustment
5. Multiple Counts

Comments:

I appreciate the opportunity to submit a public comment regarding proposed changes to the federal sentencing guidelines. Sentencing guidelines play a critical role in shaping outcomes that affect not only individuals, but also families and entire communities.

From my experience working directly with youth and families, I have seen how overly punitive sentencing practices can contribute to cycles of instability rather than rehabilitation. Guideline changes that promote proportionality, consistency, and individualized consideration are essential to reducing disparities and improving long term public safety outcomes.

I encourage the Commission to continue prioritizing evidence based approaches within the guidelines that emphasize accountability while also supporting prevention, rehabilitation, and successful reentry. Sentencing policies that recognize the root causes of criminal behavior and provide opportunities for growth are more effective in reducing recidivism and strengthening community stability.

Thank you for your consideration of public input and for your ongoing work to ensure the federal sentencing guidelines are fair, balanced, and responsive to the needs of the communities they impact. In particular, I encourage the Commission to closely examine guideline provisions that result in disproportionately lengthy sentences for nonviolent offenders. Excessive prison terms in these cases often do little to enhance public safety and instead increase barriers to rehabilitation, family stability, and successful reentry. Thoughtful guideline changes can help ensure that sentences are proportional, effective, and aligned with long term community well being.

Submitted on: January 1, 2026

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Confronting Injustice Incorporated

Topics:

1. Drug Offenses

Comments:

To Whom It May Concern,
I strongly and unequivocally support the proposed reduction to the Methamphetamine Guideline. There is no credible data demonstrating that an individual found in possession of methamphetamine at 79% purity is more culpable—or poses greater harm—than someone found with methamphetamine at 95% purity. Treating purity as a proxy for culpability is unsupported by evidence and results in unjust sentencing disparities.
Moreover, the current framework enables Assistant U.S. Attorneys to leverage purity-based charges as a coercive tool—pressuring defendants to cooperate under the threat of dramatically increased sentences. This practice inflates the number of indictments and convictions, often serving institutional metrics and career advancement rather than the interests of justice or public safety.
Our justice system should never be structured to reward individuals based on how many years of another human being's life they can help place behind prison walls. Yet that is precisely the effect of the existing purity distinction. Eliminating this distinction between two versions of the same substance would remove one of the most harmful and inequitable mechanisms embedded in current sentencing practices.
I also strongly support the retroactive application of Option 1 of the Methamphetamine Amendment. Justice should not depend on timing, and individuals already sentenced under an unfair and unproven standard deserve the same consideration as those sentenced moving forward.
Thank you for your time, your careful consideration, and the important work you do on behalf of the Sentencing Commission and the broader pursuit of a more fair and equitable justice system.

Submitted on: December 23, 2025

FORMAL COMMENT TO THE UNITED STATES SENTENCING COMMISSION

Proposed Amendment to §2D1.1(b)(15) - Dark Web Enhancement
Information-Theoretic Framework for Sentencing Drug Trafficking Offenses

Submitted by: January, CEO | Infoton

Comment Period: December 2025 – February 10, 2026

I. EXECUTIVE SUMMARY

The Commission's proposed enhancement for dark web use in §2D1.1(b)(15) is a critical first step, but it lacks scientific foundation for calibrating offense levels. We propose an information-theoretic framework that:

1) Quantifies dark web obfuscation using computational signatures
2) Enables law enforcement to trace trafficking origins with precision
3) Provides objective metrics for sentencing enhancement magnitude
4) Reduces unwarranted disparities in dark web drug offense sentencing

II. THE INFORMATION-OBFUSCATION FRAMEWORK

A. The Core Problem with Current Dark Web Enhancement

The proposed §2D1.1(b)(15) enhancement treats dark web use as a binary categorical variable (yes/no, [2][4] levels). This approach:

1) Ignores degree of obfuscation sophistication
2) Treats all dark web trafficking equally (Silk Road vs. casual marketplace seller)
3) Fails to account for traceable vs. undetectable operations
4) Creates sentencing disparities based on detection luck rather than culpability

B. Information-Theoretic Alternative

We propose sentencing enhancements should scale based on measurable information-obfuscation intensity, quantified through:

$$Obfuscation\ Index = \Sigma_i\ log(\lambda_i/\varrho_0) + a\tau c$$

Where:

λ_i = encrypted communication channel characteristics (packet signatures, routing obfuscation, mixing protocol sophistication)

ϱ_0 = baseline legitimate dark web traffic (privacy advocates, journalists, dissidents)

$\alpha\tau c$ = operational persistence (how long the trafficking infrastructure sustained coherent operations)

Translation for sentencing context:

- Higher λ_i/ϱ_0 ratio = more sophisticated obfuscation = higher culpability = higher enhancement
- Longer τc (coherence time) = sustained operation = greater harm = higher enhancement

III. COMPUTATIONAL TRACEABILITY: WHERE INFOTON'S WORK APPLIES

A. Current Problem: Dark Web as "Black Box"

The prosecution struggles to:

- Prove defendant intentionally used dark web (not accidentally; not for privacy)
- Quantify sophistication level (why is this [2] vs [4] levels?)
- Connect dark web operations to supply chains (where did the drugs originate?)

B. Infoton's Advanced Computation Framework

Using information-theoretic analysis of network data, we can now identify:

1) Trafficking origination points – By analyzing information signatures across encrypted channels, computational methods can locate where obfuscation begins (source jurisdiction/organization)

2) Operational sophistication – Measure coherence time, redundancy, and information-theoretic complexity of trafficking infrastructure
3) Intentionality vs. incidental use – Distinguish between defendants using dark web for trafficking vs. legitimate privacy users
4) Supply chain mapping – Track information flow backward through trafficking networks to identify manufacturers/importers

IV. RECOMMENDATIONS FOR SENTENCING COMMISSION

A. Revise §2D1.1(b)(15) Enhancement to Include Computational Metrics

Current Proposed Language:

1) "If [the defendant used][the offense involved the use of] the dark web or darknets... to facilitate the commission or concealment of an offense involving fentanyl... increase by [2][4] levels."

Proposed Revision:

- "If the offense involved use of the dark web or darknets, increase by:

  [2] levels if the defendant's information-obfuscation practices were routine (standard Tor routing, basic encryption);

  [3] levels if obfuscation involved intermediate sophistication (mixing protocols, multi-hop routing verified computationally);

  [4] levels if obfuscation involved advanced sophistication (custom protocols, sustained operational security verified through information-theoretic analysis) or if law enforcement traced the trafficking origin using advanced computational methods.

  For purposes of this provision, 'obfuscation sophistication' shall be determined based on information-theoretic analysis of encrypted communication patterns and operational persistence metrics."

B. Add Application Note Incorporating Computational Evidence

- "Application Note X: Computational Traceability and Information-Theoretic Analysis

  In determining whether §2D1.1(b)(15) enhancement applies and at what level, courts may consider expert testimony regarding:

  1. Information-theoretic analysis demonstrating the defendant's communication patterns deviated significantly from legitimate dark web users (measured by divergence of λ_i/ϱ_0 ratio);

  2. Sustained operational coherence metrics (τc) indicating intentional trafficking infrastructure (not incidental use);

  3. Computational evidence of trafficking origination point, indicating the defendant's role in the supply chain.

  Such evidence may support application of the enhancement and inform the magnitude of the increase."

V. WHY THIS APPROACH SERVES COMMISSION GOALS

A. Reduces Unwarranted Disparities

Current approach: Two defendants with identical quantities receive [2] vs [4] enhancement based on vague determinations.

Proposed approach: Objective computational metrics replace prosecutorial discretion.

B. Reflects Actual Culpability

A defendant who accidentally accessed dark web ≠ defendant who engineered sophisticated trafficking infrastructure.

C. Incentivizes Cooperation and Legitimate Privacy Use

1) Defendants with low obfuscation indices have lower sentencing exposure → incentivizes cooperation
2) Legitimate privacy advocates protected from overreaching enhancement
3) Reduces chilling effect on legitimate dark web use

D. Aligns with Congressional Intent
The FEND Off Fentanyl Act and HALT Fentanyl Act require sentencing to account for trafficking sophistication. Information-theoretic metrics provide the scientific basis.

VI. IMPLEMENTATION: INFOTON'S AVAILABILITY

Infoton is prepared to:

1) Provide expert testimony on information-theoretic obfuscation analysis in federal prosecutions
2) Develop standardized computational metrics for dark web obfuscation sophistication
3) Train DOJ and DEA personnel on interpreting information-theoretic evidence
4) Consult with Sentencing Commission on drafting technical application notes

VII. CONCLUSION

The Commission has an opportunity to move beyond categorical enhancements to objective, science-based metrics that:

1) Better identify trafficking origins
2) Distinguish culpable actors from legitimate privacy users
3) Reduce sentencing disparities
4) Provide law enforcement with computational tools to trace supply chains

We respectfully urge the Commission to incorporate this information-theoretic framework into §2D1.1(b)(15) enhancement language and supporting application notes.

Respectfully submitted,

January Walker
Chief Executive Officer, Infoton
Salt Lake City, Utah
[redacted]

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Legacy Resources

Topics:

1. Drug Offenses
3. Economic Crimes
5. Multiple Counts
7. Sophisticated Means
8. Miscellaneous

Comments:

Federal sentencing policy too often proceeds from an implicit assumption that rehabilitation has failed, when the record demonstrates that meaningful rehabilitative opportunities were frequently absent prior to sentencing.

A substantial portion of individuals entering the federal system lacked access to evidence-based substance-use treatment, mental-health care, trauma-informed services, or structured interventions before indictment. Nonetheless, they are sentenced under guideline frameworks that impose lengthy terms of imprisonment and later penalize them for failing to demonstrate rehabilitation within custodial environments that are not designed to foster it.

Sentencing should reflect actual conduct and demonstrable harm. Guideline outcomes driven by conspiracy stacking, overlapping counts, and technical charging structures risk overstating culpability and producing sentences greater than necessary to comply with 18 U.S.C. § 3553(a). Empirical evidence does not support the conclusion that such excess materially advances deterrence or public safety, while the collateral consequences to families and communities are substantial.

Public safety is best served through proportional punishment, timely access to treatment, and recognition of an individual's capacity for change. I respectfully urge the Commission to reject guideline amendments that increase sentencing exposure through stacking mechanisms rather than individualized assessment.

If the Commission adopts reforms that reduce sentencing ranges or correct guideline inequities,

those reforms should be made fully retroactive. Equity and consistency in sentencing require that relief not be limited by the date of sentencing alone.

Submitted on: January 2, 2026

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Loved Ones Coalition

Topics:

1. Drug Offenses

Comments:

The Loved Ones Coalition submits this comment in response to the Commission's proposed amendments to the drug trafficking guideline, §2D1.1, including proposed adjustments related to fentanyl, methamphetamine, and other controlled substances.

Based on extensive engagement with families and individuals impacted by federal drug sentences nationwide, LOC urges the Commission to ensure that any revisions to §2D1.1 more accurately distinguish role, culpability, and actual conduct, rather than relying predominantly on drug type or quantity as a proxy for offense seriousness.

Current guideline structures often result in disproportionately severe sentencing ranges for individuals who played low-level or peripheral roles, including couriers, addicts with substance use disorders, and individuals with limited decision-making authority. Enhancements tied to drug type or purity—particularly in fentanyl and methamphetamine cases—risk compounding these disparities when they are applied without sufficient consideration of individual responsibility or intent.

LOC encourages the Commission to adopt amendments that:

- Reduce over-reliance on quantity-driven enhancements;
- Better differentiate between leadership-level trafficking and lower-level participation;
- Avoid guideline inflation that increases sentence lengths without corresponding public-safety benefit; and
- Promote proportionality and consistency across districts.

Families directly experience the downstream effects of excessive drug sentencing, including prolonged separation, economic instability, and diminished prospects for rehabilitation and reintegration. Sentencing policy that better reflects actual culpability supports not only fairness, but long-term community safety.

The Loved Ones Coalition strongly urges the Commission to apply any guideline reductions or clarifications adopted under §2D1.1 retroactively pursuant to §1B1.10. Individuals currently serving sentences under drug guideline frameworks the Commission has determined warrant revision should have a meaningful opportunity to seek relief consistent with updated policy judgments. Retroactive application would advance equity, reduce unnecessary incarceration, and restore confidence in the fairness of the federal sentencing system.

Submitted on: December 20, 2025

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Loved One's Coalition

Topics:

1. Drug Offenses

Comments:

Anonymous member
To the U.S. Sentencing Commission,

I am writing to express my strong support for the proposed 2026 amendment addressing the methamphetamine purity disparity in §2D1.1 and to urge the Commission to make this amendment retroactive.

The current distinction between methamphetamine mixture and methamphetamine (actual) no longer reflects real-world drug markets, where most methamphetamine is already high purity. As a result, this guideline creates unwarranted sentencing disparities and disproportionately harsh sentences that are not tied to actual culpability or public safety.

Eliminating or reducing the purity-based distinction would better align the Guidelines with fairness, proportionality, and the Commission's mandate to reduce unwarranted disparities. Because many individuals are currently serving excessive sentences based solely on this outdated framework, I respectfully urge the Commission to designate any adopted amendment as retroactive under USSG §1B1.10 and 18 U.S.C. §3582(c)(2).

Thank you for considering this important reform and for your continued work to promote fairness in federal sentencing.

Submitted on: January 17, 2026

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Rescue Angel®

Topics:

1. Drug Offenses

Comments:

As a mother of a Fentanyl Poisoning Victim street level dealers should be charged with murder and sentenced to life without the possibility of parole.

Submitted on: December 12, 2025

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Rescue Angel® Dec. 12, 2025

Topics:

4. Post-Offense Rehabilitation Adjustment

8. Miscellaneous

Comments:

As the mother of a homicide victim defendants captured on video participating in the murder should all be charged, indicted and bought to trial for the offense of gang assault and murder. Let a jury decide innocence or guilt. Judges and District Attorneys should not decide which defendants they can prove intent and which ones they cannot when all are on clear video participating in the brutal murder. Jurors should decide innocence or guilt on all murder cases. Sgt. Hasons Law

Submitted on: December 12, 2025

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Restore Recovery

Topics:

1. Drug Offenses

Comments:

Please adopt the changes proposed in Part A, Option 1, subsection (1). And remove references to "Ice" altogether.

I write the sentencing commission in support of the commissions proposal to amend the drug quantity table to address the purity distinction for methamphetamine provided in the drug guideline table. Specifically I support the commissions proposal to set the same quantity thresholds for all methamphetamine offenses at the quantity thresholds for methamphetamine mixture.
Purity is no longer an accurate measure of offense culpability because the methamphetamine today is highly and uniformly pure and "Ice" cases do not involve a higher level of purity then other forms of methamphetamine. In addition, disparities in testing practices and policy disagreements among judges with existing distinctions between actual, mixture and ICE meth have yielded disparate sentences for meth offenses.
Finally, methamphetamine sentencing reforms have lagged behind crack cocaine sentencing reform. Although the sentencing guidelines have changed for crack cocaine offenses, the statuary penalties for methamphetamine have remained in place, and the guidelines are linked to those penalties. The current quantity thresholds for methamphetamine mixture are appropriate thresholds because all methamphetamine are uniformly pure. Culpability is best addressed via the advisory framework of enhancements (e.g. aggravating role) and the judge's discretion to vary upwards in appropriate cases.

Submitted on: January 16, 2026

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Leslie Benjamin, ECUSA

Topics:

4. Post-Offense Rehabilitation Adjustment

Comments:

I hereby submit a motion that rehabilitation policies include changes to the way non-violent sex offenders are excluded from the advantages given to others who are near to release.

Neither should any group (other than LWOPs) be singled out and excluded from any of the First Step Act advantages.

I am not, nor do I legally represent any of the above groups. I am an individual who ministers to some in those groups, and have seen great reform of character. I am also aware that recidivism among non violent sex offenders is MUCH lower than almost any other group.
Thank you

Submitted on: January 24, 2026

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Mike Gonzales, Attorney at low

Topics:

1. Drug Offenses
2. Inflationary Adjustments
3. Economic Crimes
4. Post-Offense Rehabilitation Adjustment
5. Multiple Counts
6. Simplification
7. Sophisticated Means
8. Miscellaneous

Comments:

Im commenting for all of those is correct ots good for all people

Submitted on: January 15, 2026

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Charles Howard, Nd, Mmm, Physician, Correctional Medicine (Ret Clinical Director)

Topics:

1. Drug Offenses

6. Simplification

Comments:

Keep it simple:
1. Methamphetamine, any form, or derivarive that metabolizes to Methamphetamine, or mixed or ICE all treated the same.
2. Fentanyl, any form or derivative that metabolizes to fentanyl in ANY Form all treated the same.
Donot differentiate forms in either product.
Retroactive issue: yes up to at least 10 years, and/or now over 65yo.
Thank you for the opportunity to comment. I would love to participate in sentencing Guidelines changes.

Submitted on: January 8, 2026

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Jayne Law Group

Topics:

1. Drug Offenses

3. Economic Crimes

4. Post-Offense Rehabilitation Adjustment

5. Multiple Counts

Comments:

Agree that these should be implemented.

Submitted on: January 7, 2026

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Elaine Kauschinger, University of Miami

Topics:

3. Economic Crimes

Comments:

The sentencing table correction is past due economic offenses, and has to be adjusted to the current market economic situation. The new loss amount table should be approved and made it retroactive (at least from year 2015).

Submitted on: January 13, 2026

Riana Pfefferkorn
Stanford Institute for Human-Centered Artificial Intelligence
[redacted]
Affiliation provided for identification purposes only

January 28, 2026

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002
Online via https://comment.ussc.gov

RE: Proposal 8-A of the December 12, 2025 Proposed Guideline Amendments

To the United States Sentencing Commission ("USSC" or "Commission"):

I write in my individual capacity to submit a comment on the December 12, 2025 Proposed Guideline Amendments, Proposal 8, Part A, concerning the Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks Act ("TAKE IT DOWN Act"), Pub. L. 119–12 (2025), codified at 47 U.S.C. § 223(h). I am not commenting on any of the other proposals.

The TAKE IT DOWN Act ("Act") establishes multiple new offenses: (1) knowing publication or (2) intentional threats to publish either (3) authentic "intimate visual depictions" (as defined at 15 U.S.C. § 6851(a)(5)) or (4) "digital forgeries" (as defined by the Act) of either (5) identifiable adults or (6) identifiable minors. 47 U.S.C. § 223(h)(2), (3), (6). By combining these elements, the Act delineates a total of seven offenses, with variable requirements for intent and harm.

These seven new options potentially cover a very wide variety of conduct, committed for a variety of purposes, that targets a variety of depicted individuals, with a variety of resulting harms. I urge the Commission to defer the issuance of sentencing guidelines until the courts have handled enough TAKE IT DOWN Act

prosecutions to provide useful insights about the conduct, motivations, victims, harms, and defenses these cases may involve. Collecting sufficient information about real-world prosecutions will let the Commission create sounder, wiser policy by taking a data-driven empirical approach instead of writing on a blank slate.

One consideration especially favoring a wait-and-see approach is the likelihood of constitutional disputes over the Act. Multiple state-level laws proscribing similar conduct have drawn (unsuccessful) First Amendment challenges. *E.g.*, *State v. Zitterkopf*, 9 N.W. 2d 896, 908–13 (Neb. 2024) (upholding Nebraska statute and discussing its Indiana, Minnesota, and Vermont analogues). While the Act only covers images depicting adults if, *inter alia*, "what is depicted is not a matter of public concern," criminal defendants may challenge that language as insufficient to exempt protected speech from prosecution.

Take imagery depicting politicians, for example. Female politicians are often targeted with sexually-explicit digital forgeries.[1] These are better understood as misogynistic efforts to harass women out of positions of authority than as critiques of their policy stances. Still, haranguing women online can be protected speech even if it causes harm. *See Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 2112 (2023) (vacating conviction of defendant whose "hundreds of Facebook messages" to his victim "put [her] in fear and upended her daily existence"). And "political speech" in particular is "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003). Yet the TAKE IT DOWN Act has "no express carveouts for lawful speech such as commentary, satire or parody,"

[1] *E.g.*, Coralie Kraft, "Trolls Used Her Face to Make Fake Porn. There Was Nothing She Could Do.," N.Y. TIMES (July 31, 2024), https://www.nytimes.com/2024/07/31/magazine/sabrina-javellana-florida-politics-ai-porn.html (describing experiences of multiple female politicians in Florida who were victimized by deepfake nudes); Alice Cunningham, "MP Felt Violated after AI Image of Her in Bikini," BBC (Jan. 12, 2026), https://www.bbc.com/news/articles/c0ke3pjkxvpo (female member of British Parliament "said she had been left violated after an image of her was manipulated using AI technology so that she appeared in a bikini"); Maria Curi, "Paris Hilton Joins AOC in Fight Against AI Porn," AXIOS (Jan. 22, 2026) (describing Rep. Alexandria Ocasio-Cortez as having been the target of nonconsensual digital forgeries).

meaning even an animated cartoon might violate the Act by making fun of a politician depicted in "a deepfaked, fully nude" caricature.[2]

It will be up to the courts to determine whether the TAKE IT DOWN Act charges before them cross a constitutional line, whether on a facial or as-applied basis. Different courts may come down different ways on different facts. The Commission should wait to act until the judiciary has had at least some opportunity to define what limits the First Amendment places on prosecutions under the Act. Otherwise, hastily-issued amendments to the Guidelines risk recommending sentencing enhancements for conduct that is later deemed protected speech.

The Act is on firmer constitutional ground when it comes to imagery of children. The Supreme Court ruled four decades ago that sexually-explicit imagery produced using real children falls outside the First Amendment. *New York v. Ferber*, 458 U.S. 747 (1982). While the Court has not addressed whether the First Amendment protects "morphing" an innocuous image of a real, identifiable child into a sexually-explicit image, multiple federal appellate courts have held that it does not.[3] The Act's provisions concerning imagery of minors, whether real or deepfake, are thus less susceptible to invalidation on First Amendment grounds than the provisions regarding adults.[4]

Even in the minor context, however, there may be a range of offender conduct and motivations that will warrant different treatment under the Guidelines. My research into K-12-level students who create and share nonconsensual "deepfake nudes" of other students found a variety of motivations for such behavior. True, some children may have malicious intent, but others may view their conduct as a

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[2] Jess Miers, "Oh My God, TAKE IT DOWN Kills Parody," TECHDIRT (July 28, 2025), https://www.techdirt.com/2025/07/28/oh-my-god-take-it-down-kills-parody/.

[3] *See generally* Riana Pfefferkorn, *Addressing Computer-Generated Child Sex Abuse Imagery: Legal Framework and Policy Implications*, Lawfare (February 2024), https://s3.documentcloud.org/documents/24403088/adressing-cg-csam-pfefferkorn-1.pdf.

[4] For that reason, the Department of Justice might be inclined to avoid the risk of losing a constitutional challenge by pursuing prosecutions involving minor victims rather than adult victims and/or prosecuting only the most egregious offenses against adult victims. Either path would affect the development of case law on the Act, something the Commission should take into consideration in deciding whether and when to issue guidelines.

funny prank or intend it as bullying; what's more, they may not yet have the cognitive development level required to comprehend how harmful their conduct is to the victim.[5] That is, they may lack the Act's requisite intent to "abuse, humiliate, harass, or degrade the minor" or "arouse or gratify the sexual desire of any person" by knowingly publishing the minor's (authentic or forged) intimate visual depiction. 47 U.S.C. § 223(h)(2)(B), (3)(B). While the government generally does not prosecute minors,[6] the same intent questions may arise in prosecutions of adults.

Similarly, it remains to be seen what conduct, with what resulting degree of harm, the government will choose to prosecute in cases involving imagery of children. Some may be essentially cyberbullying cases; some may involve adults exchanging imagery for sexual gratification without the depicted minor's knowledge. Other cases may involve much more severe harms. The government has repeatedly prosecuted individuals for using (authentic or forged) intimate images of minors to extort money from them or otherwise coerce them into harmful acts.[7] Dozens of teen suicides have been linked to so-called "sextortion."[8]

In cases involving extreme conduct and severe harm, the government may start bringing charges under the Act's threats provisions (which carry distinct

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[5] Shelby Grossman, Riana Pfefferkorn, & Sunny Liu, *AI-Generated Child Sexual Abuse Material: Insights from Educators, Platforms, Law Enforcement, Legislators, and Victims* 21, 31, Stanford Cyber Policy Center (May 29, 2025), https://purl.stanford.edu/mn692xc5736.

[6] Charles Doyle, *Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters in Short*, Cong. Rsch. Serv., abridged version of RL30822 (May 9, 2023), https://www.congress.gov/crs-product/R47548.

[7] *E.g.*, Seamus Hughes, "The Rabbit Hole: 'Metastasizing Evil,'" COURT WATCH (Jan. 18, 2026), https://www.courtwatch.news/p/the-rabbit-hole-metastasizing-evil (analyzing almost two dozen federal prosecutions of members of nihilistic violent extremist group "764"); "Albuquerque Man Sentenced for Online Sextortion and Sexual Exploitation of Two Minors," U.S. Dep't of Just. (Jan. 23, 2026), https://www.justice.gov/usao-nm/pr/albuquerque-man-sentenced-online-sextortion-and-sexual-exploitation-two-minors (defendant "pled guilty to two counts of coercion and enticement of a minor"); "Illinois Man Sentenced to 75 Years for Sextortion of Minors after HSI Chicago Investigation," U.S. Immigr. & Customs Enf't (Apr. 24, 2023), https://www.ice.gov/news/releases/illinois-man-sentenced-75-years-sextortion-minors-after-hsi-chicago-investigation (defendant convicted of "25 felony counts of extortion, cyberstalking, and production, distribution and possession of child pornography").

[8] Rachel Hale, "These Teenage Boys Were Blackmailed Online – and Then It Cost Them Their Lives," USA Today (Apr. 22, 2025), https://www.usatoday.com/story/life/health-wellness/2025/02/25/teenage-boys-mental-health-suicide-sextortion-scams/78258882007/.

statutory maximums, 47 U.S.C. § 223(h)(6)) alongside other charges seen in past "sextortion" cases, such as extortion, coercion of a minor, and child pornography offenses. But it is equally possible that the government will charge the Act, with its low statutory maximums, only in cases with less egregious facts. Only time will tell.

Given the potential range of motivations and conduct involved, it might be appropriate to reference some TAKE IT DOWN Act offenses to §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens) and others to §2B3.3 (Blackmail and Similar Forms of Extortion). The Commission would do well to wait to select a Guideline reference(s) until it has adequate data on real-world TAKE IT DOWN Act prosecutions.

In conclusion, the TAKE IT DOWN Act covers a vast range of conduct: from political speech using deepfake nude caricatures, to the fatal "sextortion" of a child for money. The fact patterns that could potentially be prosecuted are so heterogeneous as to be unpredictable at this early juncture. The Commission should wait to amend the Guidelines and/or select a Guideline reference(s) for the Act until it has the benefit of a developed record of prosecutions under the new law.

Sincerely,

Riana Pfefferkorn

Riana Pfefferkorn
[redacted]

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Stephen Porterfield, United Methodist Church

Topics:

1. Drug Offenses

4. Post-Offense Rehabilitation Adjustment

Comments:

It is my opinion that The Bureau of Prisons is a corrupt institution that is allowed to operate unchecked and unregulated, and that the abuses of power within the system, most specifically the inmate housing facilities are unacceptable and inhumane.
I do not believe that inmates are given a fraction of the credit that they deserve for efforts to rehabilitate themselves. More importantly, I do not believe that the vast majority of Federal Correction Institutions follow even their own published laws and guidelines. Specifically, more than 60% of inmates nationwide are house in violation of OPI: CPD/CPB, NUMBER: 5100.08, CN-1 mandating that inmates be housed within 500 miles of their homes so that family members and clergy can visit. Many inmates are denied programming, even efforts to independently educate themselves for self improvement and betterment in preparation for re-entry into society. FCI Florence for example, banned all forms of books and magazines in 2024 making it impossible for inmates to invest any efforts into programming and education.
Perhaps the worst human rights violation of all is that drug offenders are treated with a one size fits all type of sentencing guidelines, placing even the most low-key and non-violent offenders amongst murderers, rapists and others serving life sentences with nothing to lose for killing and violence within the prison walls. The indignities and inhumanities that these non-violent drug offenders face is unacceptable and inexcusable and their efforts to maintain good, non-violent behavior, educated and rehabilitate themselves within the prison walls goes completely unrewarded. Too many lives are being waisted, rotting away inside these prisons when they could be solid citizens and contributing members of society, helping other at risk youth and young adults avoid making the same mistakes that put the inmates in prison.
It is my opinion that this proposed amendment does not go far enough, and needs to expand the early release opportunities for non-violent drug offenders who have made efforts to improve their education and moral character. I would like to propose that non-violent offenders should be rewarded with the final 20 to 25% of their sentence served in home release programs whether through ankle bracelet or other home monitoring devices under the guidance and mentoring of their families, where they can complete degree programs, develop job skills and become valuable

contributors to their communities, congregations and society at large. Additionally, those who successfully maintain a stable and positive growth pattern during the first 50% of this home incarceration period should then be considered "graduated" from said program and their time considered to be "served in full"
I thank thank the panel in advance for their consideration of these thoughts and comments.

Submitted on: January 17, 2026

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Paul Skarupa, Ohio, Northern

Topics:

1. Drug Offenses

Comments:

Hello. Is it possible for the proposed fentanyl amendment to address fentanyl precursors? I do not know if this is a regional/national issue or not; however, the precursor 4ANPP being identified as a fentanyl analogue by the presentence officer is a regular objection in fentanyl cases in the ND/OH. To the extent that it may be helpful, I have attached our objection response. Of course, probation officers are not chemists, so our objection response is more one of logical reasoning than scientific interpretation. Above all, we just want to make sure we're getting it right; therefore, if a flaw is noted in our approach, please let me know as we embrace critical feedback. Thank you!

Submitted on: December 18, 2025

ADDENDUM TO THE PRESENTENCE REPORT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
UNITED STATES V. XXXX, DKT. XXXX-XXX

OBJECTIONS

By the Government

[Insert 4ANPP objection if applicable]

By the Defendant

[Insert 4ANPP objection if applicable]

Response by U.S. Probation Officer

The following response is based on the probation office's review of a United States Sentencing Commission's ("the Commission") report on fentanyl and fentanyl analogues dated January 2021, and the Commission's primer report on drug offenses dated September 2022; the probation office's interpretation of the Guidelines Manual and statute; and the probation office's consultation with the Commission's helpline. This response is organized as follows: summarization of relevant information from reputable sources, interpretation of the Guidelines, and interpretation of statute.

Fentanyl, 4ANPP, and other known fentanyl ananlogues are classified as schedule II controlled substances. According to www.dea.gov, "Schedule II drugs, substances, or chemicals are defined as drugs with a high potential for abuse, with use potentially leading to severe psychological or physical dependence. These drugs are also considered dangerous." Additionally, according to a 2018 press release from the United States Attorney's Office for the Southern District of California (https://www.justice.gov/usao-sdca/pr/former-border-patrol-agent-pleads-guilty-conspiracy-distribute-4anpp-used-manufacturing), 1 kilogram of of 4ANPP is enough to manufacture approximately 25 kilograms of fentanyl.

In January 2021, the Commission published a 54-page report titled, "Fentantyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns." In that report, the Commission explained their reasoning for amending a few areas of the §2D1.1 guideline, including clarifying meanings of the terms fentanyl and fentanyl analogue.

Specifically, purusant to page 13 of that report, "the Commission amended the Drug Quantity Table to clarify that §2D1.1 uses the term 'fentanyl' to refer to the International Union of Pure and Applied Chemistry chemical name. This, in combination with the clarification of the definition of 'fentanyl analogue' and the addition of fentanyl analogues to the Drug Equivalency Tables is intended to limit the use of the listing for 'fentanyl' only to cases involving the specific substance named in the statute, as opposed to the situation where 'fentanyl' may be considered the most closely related controlled substance to fentanyl analogues that are already scheduled as controlled substances."

To that end, "fentanyl analogue" is now defined in §2D1.1 as "any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)." Based on the probation officer's lay review of chemical structure, it appears that fentanyl, 4ANPP, and other fentanyl anaolgues (i.e. carfentanil and/or acetylfentanyl) all have "similar" chemicial structures: Fentanyl = C22H28N20, 4ANPP = C19H24N2, Carfentanil = C24H30N203, and Acetylfentanyl = C21H26N20.

In September 2022, the Commission published a primer report titled, "Drug Offenses" to provide an overview of sentencing guidelines, statutes, and case law applicable to federal drug offenses. Page 10 of that report discusses analogues. Specifically, that section states the following, "Federal law also controls analogues and other substances beyond the more common controlled substances identified on the Drug Quantity Table. Except where otherwise provided, any reference to a controlled substance in §2D1.1 includes all analogues, salts, isomers, and salts of isomers. Fentanyl serves as one important exception where this rule does not apply because the guideline provides for the separate treatment of "any substance . . . , whether a controlled substance or not, that has a chemical structure that is similar to fentanyl." Further, the general rule for analogues [to wit: determining if a substance is an analogue by referring to 21 U.S.C. § 802(32)] does not apply to an analogue that is subsequently listed as a controlled substance."

Based on the aforementioned information from the Commission and definitions provided in §2D1.1, the probation officer maintains that 4ANPP should be classified as a fentanyl analogue, and an analysis of statute (21 U.S.C. § 802(32)) is not required since fentanyl analogues are excluded from that rule because the Guidelines provide a definition for fentanyl analogue. The probation officer is not opining that 4ANPP has the same or similar effects on the central nervous system as fentanyl or other fentanyl analogues; however, the Guidelines' definition for fentanyl analogue does not require such a determination.

While the probation officer believes no further ananylsis is required, in an effort to be extremely thorough the probation officer also explored Application Note 6 (Analogues and Controlled Substances Not Referenced in this Guideline) of §2D1.1, which states in part, "Unless otherwise specified, 'analogue,' for the purpose of this guideline, has the meaning given the term 'controlled substance analogue' in 21 U.S.C. § 802(32)." However, the criteria for a fentanyl analogue is "otherwise specified" under (J) of Notes to Drug Quantity Table in §2D1.1 of the Guidelines; therefore, the probation officer does not believe further analysis is required in order to determine if a substance is a fentanyl analogue. As such, the probation officer does not believe this note applies because (1) criteria for fentanyl analogues are referenced in §2D1.1 and, (2) as noted above, general rules for determining if a substance is an analogue do not apply to fentanyl, including the determination that it meets the "controlled substance analogue" definition under 21 U.S.C. § 802(32).

Application Note 6 also discusses using the "most closely related" controlled substance when substances are not specifically identified in the Guidelines; however, as noted in the Commission's January 2021 report, the Commission specifically added a definition of fentanyl analogue to the Guidelines to minimize this approach relative to fentanyl analogues. Moreover, if any part of the unresolved objection suggests that 4ANPP does not have an effect on the central nervous system and, therefore, classification of 4ANPP should be based on the "most closely related substance"

[to wit: fentanyl], rather than the Guidelines' definition for fentanyl analogue, the probation officer would question how a controlled substance (4ANPP) with reportedly no independent impact on the central nervous system used to illegally manufacture fentanyl and fentanyl analogues would be "most closely related" to fentanyl. If 4ANPP does not have an independent impact on the nervous system, it does not appear "closely related" to either fentanyl or fentanyl analogues in relation to it's effect on the body; rather, it would appear "most closely related" to whatever substance in the Guidelines impacts the body least or not at all. Conversely, if the thought is that 4ANPP just has a chemical structure "most closely related" to fentanyl, then the probation officer submits that the similar chemical structures of 4ANPP and fentanyl satisfies the criteria in the Guidelines' definition for fentanyl analogue under §2D1.1, Note (J).

In consultation with the Commission, the probation office does not believe that determining fentanyl analogues requires analyzing 21 U.S.C. 802(32) for the reasons noted above; however, in the event that the Court believes that 21 U.S.C. § 802(32) may apply in determining fentanyl analogues, the probation officer offers the following: 21 U.S.C. § 802(32) reads as follows:

(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance—

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

The probation officer's plain meaning interpretation of statute is that only one of (i), (ii), or (iii) must exist for a controlled substance to be considered an analogue. In this case, based on a lay comparison of their chemical structures, the probation officer believes that 4ANPP has a chemical structure that is "substantially similar" to fentanyl and other fentanyl analogues as required in (i). Further, the probation officer believes that if Congress intended for (i) and either of (ii) or (iii) to apply in order for a controlled substance to be considered an analogue, Congress would have incorporated the word "and" after the semicolon at the end of (i); however, as it reads, the probation officer's plain meaning interpretation of statute is that it resembles the Guidelines' definition for fentantyl analogue and the common definition of analogue in that there is not a requirement that the substance must impact the central nervous system as long as the chemical structures are similar and/or substantially similar. To further support this position, the probation officer notes that Merriam-Webster's Dictionary defines analogue as, "a chemical compound that is structurally similar to another but differs slightly in composition," and www.dea.gov states, "A controlled substance analogue is a substance which is intended for human consumption and is structurally **or**

pharmacologically substantially similar to or is represented as being similar to a Schedule I or Schedule II substance and is not an approved medication in the United States." (Emphasis added).

To the extent that 4ANPP may not impact the central nervous system in the same ways as other known fentanyl analogues, the probation officer offers that Application Note 6 of §2D1.1 recommends that the Court consider that factor when fashioning an appropriate guideline range or variance sentence. Specifically, Application Note 6 states in part, "In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue." Regardless of 4ANPP's impact on the nervous system, based on information cited above, it appears that there is a significant need to deter the trafficking of this controlled substance because even a small quantity of 4ANPP can assist in the illegal manufacturing of a large quantity of fentanyl.

In conclusion, absent case law to the contrary and/or scientific evidence that 4ANPP does not have a chemicial structure similar to fentanyl, the probation officer maintains that 4ANPP is a fentanyl analogue by the preponderance of evidence for the purposes of sentencing. Lastly, the probation officer is not aware of any lawful medical use of 4ANPP; therefore, it appears that 4ANPP is a precursor used exclusively in the illegal manufacture of fentanyl and other fentanyl analogues, and the control of it is necessary to prevent or limit the continued illegal manufacturing of fentanyl.

Respectfully submitted,

Robin K. Grimes
Chief U.S. Pretrial Services & Probation Officer

By: /s/ XXXX
XXXX
U.S. Probation Officer

Approved:

/s/ XXXX
XXXX
Supervisory U.S. Probation Officer

Dear Members of the U.S. Sentencing Commission,

I am writing to bring to your attention academic research directly relevant to the Commission's current 2025-2026 Amendment Cycle work on fentanyl distribution and sentencing guidelines.

As an Emeritus Professor of Finance at the University of Missouri, I changed my research focus from financial products to criminal justice reform. The past seven years have been spent examining the intersection of addiction, federal prosecution, and mandatory sentencing guidelines, with particular focus on Drug-Induced Homicide (DIH) statutes.

RELEVANCE TO CURRENT COMMISSION WORK:
The Commission is currently receiving public comment on proposed amendments related to fentanyl offenses (deadline February 10, 2026). My research directly addresses a critical gap in current sentencing frameworks: the failure to distinguish between individuals suffering from substance use disorders and those engaged in commercial drug trafficking.

My recent book, *The Criminalization of Addiction: The Case of US vs Gary Scott Hancock*, along with my peer-reviewed article "For a Motive of Kindness…20 years in federal prison" (*Novel Research in Sciences*, 2023), presents empirical evidence and case analysis that challenge current federal approaches to drug-related prosecutions, particularly in DIH cases.

KEY RESEARCH FINDINGS RELEVANT TO COMMISSION AMENDMENT WORK:

1. The Prescription-to-Prison Pipeline
Federal data demonstrates that fentanyl addiction frequently originates with legally prescribed opioids. Current sentencing frameworks fail to distinguish between individuals suffering from substance use disorders and those engaged in commercial drug trafficking—a critical oversight with profound implications for policy, families, and the efficacy of sentencing guidelines.

2. The Addict-as-Dealer Paradox
Individuals suffering from severe opioid addiction lack the capacity to function as drug dealers in any meaningful commercial sense. Federal sentencing guidelines that apply identical penalties to addicts and traffickers ignore this clinical and operational reality, resulting in disproportionate punishment for those least capable of criminal intent.

3. Mandatory Minimum Sentencing Failures in DIH Cases
While mandatory minimums were designed to ensure consistency, federal application has produced severe inequities. The law makes no distinction between substance users and commercial traffickers, resulting in decades-long sentences for individuals with no profit motive. Twenty-year federal sentences for accidental overdoses—particularly when prosecuted as homicide—vastly exceed any rational standard of proportional justice.

4. The Elimination of Motive in DIH Cases
Federal prosecutors in DIH cases systematically exclude evidence of motive, even when defendants can demonstrate they acted out of compassion rather than malice. This prosecutorial approach contradicts foundational principles of criminal law and warrants Commission attention in guideline development.

A CASE IN POINT:
The book examines the case of Gary Scott Hancock, a Missouri man sentenced to 20 years in federal prison for Drug-Induced Homicide. At the time of his arrest, Gary Scott was experiencing severe opioid withdrawal, including hallucinations so profound that he could not distinguish reality from delusion. He gave five pills to an acquaintance—not for profit, but to spare that person the withdrawal agony he himself was enduring. The recipient died of an overdose involving multiple substances and decisions beyond Gary Scott's control or knowledge.
Gary Scott's testimony reveals the cognitive incapacity that characterizes severe withdrawal: "I believed we were watching a movie about a space academy… I thought my mom had ordered Domino's pizza delivered to the jail… I had a shoot-out with the guard, using my hands as a gun."
This is not the mental state of someone capable of forming criminal intent or functioning as a drug trafficker. Yet under current federal guidelines, Gary Scott received the same sentence as a deliberate commercial distributor.

REQUEST FOR COMMISSION CONSIDERATION:
I respectfully request that the Commission consider this research as part of its public comment review process for the 2025-2026 Amendment Cycle, particularly as it relates to fentanyl sentencing guidelines and the distinction between addiction-driven behavior and commercial trafficking.
I have attached an Executive Summary of the research for your review. The complete book is available at:

Barnes & Noble: https://www.barnesandnoble.com/w/the-criminalization-of-addiction-g-danne-hancock-weise/1147093863

Amazon: https://www.amazon.com/Criminalization-Addiction-Gary-Scott-Hancock/dp/B0FNLX2T2K

I would welcome the opportunity to provide additional information or discuss how this research might inform the Commission's ongoing guideline development work.

Thank you for your consideration of this critical issue.

Respectfully,

G. D'Anne Hancock Weise, Ph.D.
Emeritus Professor of Finance
The Anheuser-Busch College of Business
The University of Missouri

THE CRIMINALIZATION OF ADDICTION:
The case of U.S. vs Gary Scott Hancock

Rethinking Drug-Induced Homicide Laws and Federal Sentencing Policy

Executive Summary & Policy Brief

Author: G. D'Anne Hancock Weise, Ph.D.
Emeritus Professor of Finance
The Anheuser-Busch College of Business, University of Missouri

Published Research: Hancock, G.D. (2023). "For a Motive of Kindness…20 years in federal prison." *Novel Research in Sciences*, 13:3, NRS 000815.

EXECUTIVE SUMMARY

Federal *Drug Induced Homicide* (DIH) prosecutions and mandatory minimum sentencing laws have created a system that criminalizes addiction rather than treating it as a public health crisis. This research examines the intersection of substance use disorder, federal prosecution, and sentencing policy—revealing fundamental flaws in how the justice system addresses drug-related fatalities.

Current federal sentencing frameworks fail to distinguish between commercial drug traffickers and individuals who have a severe addiction. The result: decades-long prison sentences for people whose only "crime" was being sick—and in many cases, trying to help others avoid the agony of withdrawal.

This policy brief presents seven evidence-based findings that challenge the current federal approach to drug overdose deaths and offers a pathway toward more effective, humane, and constitutionally sound sentencing reform. More information can be found on each factor in the chapter indicated in parentheses beside each of the seven findings.

KEY FINDINGS

1. THE PRESCRIPTION-TO-PRISON PIPELINE (Chapter 2)

Finding: Fentanyl addiction frequently originates with legally prescribed opioids. Federal sentencing guidelines make no distinction between individuals suffering from iatrogenic (medically induced) addiction and those engaged in commercial drug trafficking.

Implication: Individuals whose addiction began in a doctor's office are labelled criminals rather than victims of the opioid epidemic.

Policy Needs: First, the DOJ needs to *define* a dealer and consider how to address the different actors in a drug transaction. Federal sentencing guidelines must distinguish between addicts, dealers, and drug traffickers. Currently, the federal government offers zero financial support for rehabilitation centers. Similarly, there is no federal funding for those needing extended support to overcome drug dependence.

2. PUNISHMENT DOES NOT CURE ADDICTION (Chapter 3)

Finding: Decades of federal data demonstrate that incarceration is ineffective in treating or deterring addictive behavior. If punishment could cure addiction, addiction would not persist at epidemic levels, and recidivism would be almost non-existent.

Implication: The U.S. legal system relies on retribution and punishment despite overwhelming evidence that these approaches fail to address the neurological and behavioral dimensions of substance use disorder.

Policy Need: Shift from purely punitive models toward restorative judicial approaches that integrate clinical intervention, rehabilitation, and evidence-based treatment. The U.S. has the highest recidivism rate in the world; clearly, we are doing *something* wrong.

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3. ADDICTS CANNOT BE DEALERS (Chapter 4)

Finding: It is well known that severe opioid addiction damages the grey matter of the brain. Medical researchers have recently discovered that it also deteriorates the *white matter* in the brain. White matter comprises about *half* the brain and supports learning and normal functioning by providing the connective tissue throughout the brain. It then coordinates communication between different regions of the brain. When white matter deteriorates, as it does with opioid addicts, the result is a short-circuiting of their problem-solving competence, learning capacity, and their ability to remember.

Neuroscientists have only recently begun to understand the importance of white brain matter in thinking, learning, talking, and even walking. When this connectivity is disrupted by disease or damage, the result is often an extraordinary disturbance of normal cognitive functioning. The scope and variety of syndromes resulting from white matter destruction suggest that white matter is pivotal to all realms of human behavior, a contribution that scientists are only beginning to grasp.

Implication: Federal sentencing guidelines that apply identical penalties to drug addicts and drug traffickers ignore clinical realities and operational distinctions, resulting in disproportionate punishment for those least capable of criminal enterprise or intent. Those suffering from severe opioid addiction are not physically or mentally able to perform the duties of a dealer.

Policy Needs: The *Department of Justice* needs to rewrite the *Anti-Drug Abuse Act of 1986* to clarify that it does not apply to users, addicts, or local dealers. It is intended for international drug traffickers.

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4. CULPABILITY IN OVERDOSE DEATHS IS IGNORED (Chapter 5)

Finding: Drug-induced fatalities typically involve multiple autonomous decisions by the deceased—including the decision on substance quantity (e.g., 1, 2, or more pills?), method of administration (e.g., smoking, injecting, snorting?), and concurrent polysubstance use. Each variable alters the risk of overdose death independent of the source of the drugs.

Implication: Current DIH prosecution frameworks assign 100% criminal responsibility to individuals who may have had minimal causal influence on fatal outcomes. Shared responsibility is ignored in favor of simple attribution.

Policy Need: Federal sentencing must account for the decisions made by the deceased in overdose deaths, particularly when multiple factors contribute to fatal outcomes. Federal prosecutors too often concur with the family of the deceased by casting the departed addict as an innocent victim and the surviving addict as a murderous dealer. Nothing could be farther from the truth—on both counts. The deceased was not an innocent bystander who was physically forced to seek out and consume drugs, and the surviving addict was not a murderer.

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5. MANDATORY MINIMUM SENTENCING FAILURES (Chapter 6)

Finding: While mandatory minimums were designed to ensure consistency, federal application has produced severe inequities. The law makes no distinction between substance users, dealers, and commercial traffickers, resulting in decades-long sentences for individuals with no profit motive. To understand the absurdity of characterizing an addict as a dealer, one must understand the impact of advanced opioid addiction on the brain. Here is Scott's explanation for why he failed when he tried to be a dealer:

Scott: This addict cannot be a dealer because…

Several years ago, I spent about 3 months trying to sell opioids so I wouldn't have to work. Ha! Ha! Ha! Little did I know that running a business is difficult… especially an illegal one. My main problem when I attempted to sell drugs was not being able to move my product fast enough. It needed to be lightning fast because otherwise, I would be sitting there with a bunch of the drugs I'm addicted to. While sitting there, I would start getting dope sick, so what do you do? You fold and do the drugs to mitigate the sickness. Then I had a new problem because I had fewer drugs to sell, and I started feeling like maybe I should not sell all the drugs because I would need them when I got dope sick again.

Inevitably, I didn't have the money to pay the dealer when promised. You can't NOT pay your drug dealer; that's not an option unless you want to get robbed or shot or both. It does not take long for your 'career' as a dealer to end if you have no money to pay for the product. People who were okay with fronting you the product won't do that anymore because getting payment from you was such a big hassle. This put me right back where I started, searching for drugs to keep from getting sick. The way the drug market works, it removes addicts quickly.

If you have an addiction, don't bother with trying to deal with the drug you are addicted to; it won't work. Save yourself the time, money, and danger of trying.

Example: A twenty-year mandatory minimum federal sentence for an accidental overdose vastly exceeds any rational standard of proportional justice.

Implication: Mandatory minimums have ushered in a world of illogical punitive justice where more time is added to sentences well beyond what can be considered rational, productive, or proportional. Prosecutors appear to disregard the cost to taxpayers or the impact on society.

Policy Need: Eliminate mandatory minimum sentencing and replace it with judicial discretion and proportionality.

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6. THE ELIMINATION OF MOTIVE (Chapter 6)

Finding: Federal prosecutors in DIH cases systematically and legally exclude evidence of motive, even when defendants can demonstrate they acted out of compassion rather than malice or profit.

Case Study (U.S. vs Gary Scott Hancock): Scott, a Missouri man, was sentenced to 20 years in federal prison for giving five pills to an acquaintance—not for money, but to spare that person the withdrawal agony he himself had endured many times. At the time of his arrest, Scott was experiencing withdrawal-induced hallucinations so severe that he could not distinguish reality from delusion.

Scott's testimony: *"I believed we were watching a movie about a space academy...I thought my mom had ordered Domino's pizza delivered to the jail...I had a shoot-out with the guard, using my hands as a gun. The daily physical gut-wrenching pain was masked by total lunacy; the world was blurred, and there was no clear line between truth and fantasy. I begged for relief. How could trying to help someone avoid this hell be so wrong? I believed it* [giving TG 5 pills] *was an act of kindness."*

Implication: The crucial distinctions made between first and second-degree murder and voluntary versus involuntary manslaughter are based on the defendant's *mens rea*. Motive is the most important factor considered in murder-related trials. Hessick (2006) puts it this way, "Motive plays an important role in criminal law. It is necessary to prove liability, a key component of several defenses. It has been a traditional consideration at sentencing. Motive's role in criminal punishment has grown through the adoption of hate crime sentencing enhancements and the rise of substantive sentencing law. Motive plays an important role in punishment theory, reinforcing the centrality of shared moral judgments, which are indispensable to any criminal law system. Yet despite motives' increasing importance in criminal law, their treatment is inconsistent and incomplete."

DIH prosecutions are *strict liability* crimes. Strict liability exists when a defendant is liable for an act, regardless of their intent or mental state at the time of the act. Strict liability means that motive, an essential part of *Due Process*, does not matter.

Policy Need: There is no legal theory or explanation sufficient for removing the Constitutional right to *Due Process*. In DIH prosecutions, the defendant's motive and intent should be restored as essential legal considerations. How does DOJ have the right to remove a constitutionally *guaranteed* right?

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7. UNCHECKED PROSECUTORIAL DISCRETION (Chapter 7)

Finding: As Justice Robert H. Jackson observed in 1940: *"The prosecutor has more control over life, liberty, and reputation than any other person in America...While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."* In DIH cases, this prosecutorial discretion operates with minimal oversight, often resulting in aggressive charges that bear little relationship to the defendant's actual culpability.

Implication: Prosecutorial misconduct and overreach in DIH cases warrant serious federal review. The weaponization of DIH statutes against vulnerable populations—particularly those with severe addiction—represents an abuse of prosecutorial power.

Policy Need: Congress needs to pass another law to clarify for prosecutors that the *Anti-Drug Abuse Act* (ADAA) *of 1986* only applies to drug traffickers. This may resolve some of the problems with DIH cases, but the issue of prosecutorial overreach needs to be addressed separately by Congress.

POLICY RECOMMENDATIONS

IMMEDIATE ACTIONS:

Establish Legal Distinction: Federal law should differentiate between commercial drug trafficking and substance sharing among individuals with addiction. The DOJ needs to define the various actors, such as addicts, dealers, or drug traffickers.

Restore Judicial Discretion: Eliminate mandatory minimum sentences across all cases to allow judges to consider individual circumstances, including the severity of addiction, motive, and the culpability of the deceased. When an addict overdoses, they are reclassified as a blameless victim, while the surviving addict is portrayed as a murderous dealer. Both are incorrect in the extreme.

Require Motive Consideration: Federal DIH prosecutions must permit evidence of motive and intent—especially when defendants can demonstrate a lack of malicious purpose.

Implement Prosecutorial Oversight: Create review mechanisms to prevent the abuse and misuse of DIH statutes against individuals whose primary characteristic is addiction rather than criminal intent.

LONG-TERM REFORMS:

Shift to a Restorative Justice-Based Approach: Recognize substance use disorder as a medical condition needing clinical intervention rather than decades of incarceration. The data clearly show that the drug problem in the US has worsened over the past 50 years despite spending trillions of taxpayer dollars. Newer, more dangerous drugs have infiltrated the black-market supply, consumption has increased, more people are becoming addicted, and mortality rates have risen. The current situation involves untold suffering and despair for all involved.

Address Root Causes: Federal policy must acknowledge and target the prescription opioid origins of the fentanyl crisis, holding pharmaceutical companies and prescribing systems accountable. Society has spent enormous sums incarcerating and punishing drug addicts, yet the US has the highest recidivism rate globally. While the DOJ has implemented harsh punishments, they have mostly backfired, leaving society with little to show for the costs incurred.

Expand Access to Treatment: Invest in evidence-based addiction treatments, harm reduction strategies, and re-entry programs that lower recidivism and facilitate community reintegration. Every dollar spent on arresting, prosecuting, and imprisoning individuals with addiction is a dollar diverted from proven interventions that save lives. Harm reduction programs and medications for opioid use disorder have demonstrated life-saving benefits. Ending this overdose crisis hinges on adopting harm reduction and effective treatment options.

CONCLUSION

The current federal stance on drug-induced homicide prosecutions is falling far short of justice and public health goals. Scott's case—a man sentenced to 20 years for an act he believed was kindness, committed while severely cognitively impaired—highlights the human toll of these policies.

With bipartisan momentum for criminal justice reform, this research offers data-driven pathways for more effective and humane federal sentencing policies. The question isn't whether reform is necessary but whether we possess the political will to enact it.

Federal lawmakers, the U.S. Sentencing Commission, the Bureau of Prisons, and prosecutors have the authority to overhaul this system. The evidence is undeniable. The way forward exists. All that remains is to act.

For More Information:

Book: *The Criminalization of Addiction: The Case of U.S. vs Gary Scott Hancock.*
Other Relevant Research: Hancock, G.D. (2023). "For a Motive of Kindness…20 years in federal prison." *Novel Research in Sciences*, 13:3, NRS 000815.

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A Better Economic Crimes Guideline

The U.S. Sentencing Commission's proposal to add more culpability factors continues down the rabbit hole of complexity that is incompatible with an effective post-Booker sentencing system

JONATHAN J. WROBLEWSKI
JAN 26, 2026

Last August, the U.S. Sentencing Commission announced that one of its priorities for the 2025-26 guideline amendment year was to examine §2B1.1 of the Guidelines Manual, the guideline for fraud and theft crimes. Its goal, it said, was "to ensure the guidelines appropriately reflect the culpability of the individual and the harm to the victim," and that it would do so by "reassessing the role of actual loss, intended loss, and gain [and] considering whether the loss table in §2B1.1 should be revised to simplify application or to adjust for inflation." In December, in furtherance of that goal, the Commission published for public comment proposed amendments to §2B1.1. The proposed amendments would, (1) adjust the loss table for inflation, (2) reduce the number of categories of loss from 16 to 8, and (3) add three new culpability factors to the 20 specific offense characteristics and four cross-references to other guidelines already in §2B1.1. The first two proposals seem technical and sensible. The third proposal, adding new culpability factors, is ill-advised.

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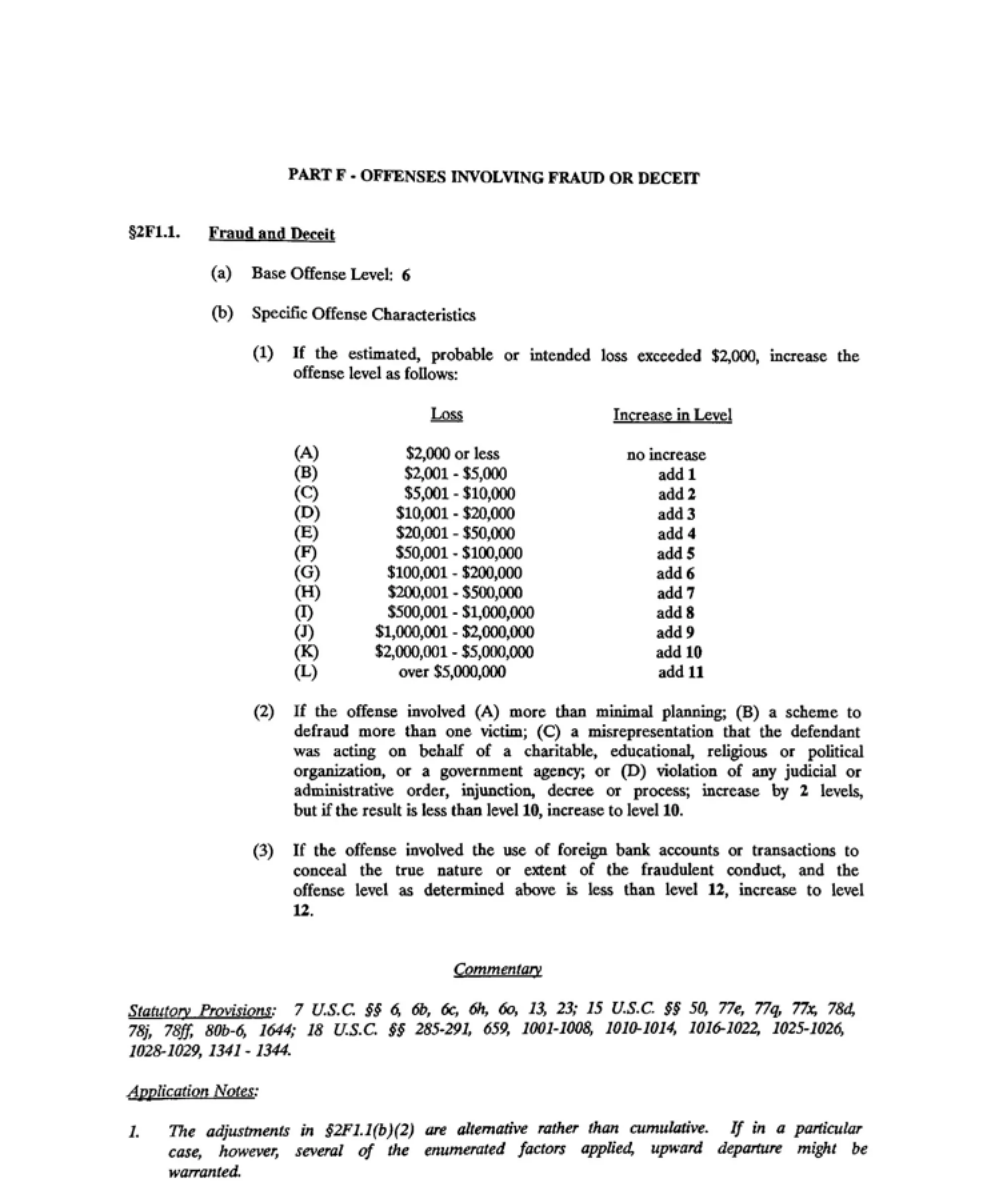
In 2017, in response to changes made by the Bipartisan Budget Act of 2015, the Commission proposed adding one new culpability factor as a specific offense characteristic to §2B1.1. The Federal Defender Sentencing Guidelines Committee opposed the proposal, calling §2B1.1, as it then existed already, "unwieldy."

> The proposed amendment would add the 20th specific offense characteristic to §2B1.1. It would add unnecessary complexity to a guideline that already covers more than 5 pages, with more than a dozen pages of commentary full of complicated rules for calculating loss and applying the current 19 specific offense characteristics, many with several subparts. Applying this guideline is already difficult and time-consuming and can require lengthy sentencing hearings. The proposed amendment is a paradigm example of "factor creep," and is not necessary given the range of sentences already provided for in §2B1.1 combined with the adjustments in Chapter Three.

The Defenders were right. Here is the fraud guideline from the original 1987 Guidelines Manual. It fits on one page. It has three specific offense characteristics and no cross-references. A defendant who received every enhancement listed in the guideline would have an offense level of 19. If that defendant had no criminal history and no other applicable aggravating or mitigating guideline factors, the recommended sentence would be between 30 and 37 months in prison.



PART F - OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1. Fraud and Deceit

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the estimated, probable or intended loss exceeded $2,000, increase the offense level as follows:

	Loss	Increase in Level
(A)	$2,000 or less	no increase
(B)	$2,001 - $5,000	add 1
(C)	$5,001 - $10,000	add 2
(D)	$10,001 - $20,000	add 3
(E)	$20,001 - $50,000	add 4
(F)	$50,001 - $100,000	add 5
(G)	$100,001 - $200,000	add 6
(H)	$200,001 - $500,000	add 7
(I)	$500,001 - $1,000,000	add 8
(J)	$1,000,001 - $2,000,000	add 9
(K)	$2,000,001 - $5,000,000	add 10
(L)	over $5,000,000	add 11

(2) If the offense involved (A) more than minimal planning; (B) a scheme to defraud more than one victim; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (D) violation of any judicial or administrative order, injunction, decree or process; increase by 2 levels, but if the result is less than level 10, increase to level 10.

(3) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78d, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 285-291, 659, 1001-1008, 1010-1014, 1016-1022, 1025-1026, 1028-1029, 1341 - 1344.

Application Notes:

1. The adjustments in §2F1.1(b)(2) are alternative rather than cumulative. If in a particular case, however, several of the enumerated factors applied, upward departure might be warranted.

2.67 October, 1987

It's astonishing to compare that guideline to what §2B1.1 is today. The current fraud/theft guideline is set out over six pages. It has 20 specific offense characteristics and four cross-references to other guidelines. A defendant who received every enhancement would have an offense level literally off the charts — Sam Bankman Fried's offense level was 60 (on a 43-level scale) — and for such a defendant with no criminal history and no other aggravating or mitigating factors, the guideline would recommend a sentence of life in prison without parole. When a guideline produces an offense level off the chart by more than a third, the Commission has lost control of its own algorithm.

Explaining in detail how this evolution occurred would take its own essay, maybe a book. But the short explanation is that current fraud guideline is indeed, as the Federal Defenders indicated in 2017, the manifestation of "factor creep." It's a phenomenon the Commission itself discussed in its comprehensive report, *Fifteen Years of Guidelines Sentencing*, issued in November 2004.

"Detailed rules implementing explicit policies make tinkering with the policies and adding to the rules very easy," the Commission said. And everyone from members of Congress, the Executive Branch, advocacy organizations, and the Commission itself are drawn to the tinkering. It gives our jobs purpose. I participated many times in advocating on behalf of the Justice Department for a new enhancement here or a new enhancement there. Each of the proposals had a logic to it, and it was difficult to argue that any of the proposed considerations were irrelevant. But as the Commission itself recognized, "as more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness." Bankman-Fried's offense level of 60 is proof positive that the Commission itself could not fully understand and control the offense seriousness algorithm of §2B1.1. From the Commission's 15-year report —

> Complex rules with many adjustments may foster a perception of a precise moral calculus, but on closer inspection this precision proves false (Breyer, 1999). Adjustments that appear necessary to achieve proportionate punishment may in actuality result in arbitrary distinctions among offenders. The original Commission recognized that "the number of possible relevant distinctions is endless. One can always find an additional characteristic X such that if the bank robber does X, he is deserving of more punishment" (Breyer, 1988, pp. 13, 14). The Commission's initial draft proposal attempted to identify a comprehensive list of distinctions among offenses and offenders, but it was judged unworkable by many reviewers. To limit such debilitating complexity, the Commission adopted drafting principles that began with offense distinctions that were sufficiently frequent and substantial to be evident in the Commission's statistical analysis of data on past sentencing practices. Additional distinctions were then added only in limited circumstances when a specific policy need could be articulated and was accepted by a majority of the Commission (Nagel, 1990).

The hope was to limit the creep of factors into the Guidelines Manual and Step One of the sentencing process. It didn't happen that way. Which then begs the question of how to amend a guideline that is already unnecessarily complex and that embodies so many factors that the interactions among them, and their cumulative effect, are incomprehensible and often nonsensical.

After the Commission's decision to remove all departure guidance from the Guidelines Manual, there is now a temptation — which has already manifested itself in this and other guideline amendment proposals published for comment — to embody more and more sentencing considerations in the Guidelines' algorithms, Step One of the sentencing process. The Commission should not go down that road.

The Supreme Court's post-*Booker* decisions make clear that although a sentencing court must "give respectful consideration to the Guidelines," sentencing courts are required to tailor the ultimate sentence imposed in consideration of all the statutory factors spelled out in 18 U.S.C. § 3553(a). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). The Guidelines are the starting point and the initial benchmark, for sure. But they are just that. There is a Step Two for sentencing courts to undertake, and which requires a balancing of a variety of factors, some in the Guidelines, many not. Step Two is meant to be a robust exercise. That's what judges believe and want. It's what defenders believe and want. It is what the Supreme Court's *Booker* decision requires. If it is to be robust and if the guideline recommendation is to be a serious part of the overall consideration, the sentencing court must understand not just the sentencing range recommended by the Guidelines, it must understand the factors the range embodies, how they interact and make sense as a whole, and the policy underlying the applicable guideline. That may have been possible with the fraud guideline in 1987. For many cases, it's not so in 2025.

The 1987 and 2025 fraud guideline share a fundamental goal, the same goal the Commission articulated in its priorities for this amendment year: to ensure the Guidelines appropriately reflect the culpability of the individual and the harm to the victim. The difference between the two guidelines is the extent to which they disaggregate — or decompose — what is "culpability" and what is "harm." The 1987 guideline has a loss table to embody harm and lists five culpability factors in two specific offense characteristics. Together with Chapter Three adjustments for role in the offense and other culpability factors listed there, such as targeting vulnerable victims, culpability was disaggregated, but to a limited and fairly understandable extent.

The 2025 fraud guideline, by contrast, slices and dices both harm and culpability so many ways that it is impossible to understand and make sense of the interactions among the factors as well as their cumulative effect. When sentencing courts get to Step Two of the sentencing process and are considering not just the Guidelines but all the other considerations embodied in § 3553(a), the incomprehensibility of the §2B1.1 makes it of little value in many cases.

The experience of the last 35 years also shows that culpability and harm are not so easily quantified. Despite the importance of quantifiable loss in the consideration of harm, the Commission has long recognized that loss is not the equivalent of harm. It also recognized that other, non-delineated culpability factors are not easily quantified or even fully identified. The commentary to §2B1.1 that the Commission just eliminated from the Guideline Manual last amendment year recognized as much. It pointed out that sometimes, an objective of a fraud offense is "an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm." It also recognized that sometimes, fraud offenses cause "substantial non-monetary harm. For example, the offense [may cause] physical harm, psychological harm, or severe emotional trauma, or [result] in a substantial invasion of a privacy interest." The 1987 fraud guideline recognized that "[d]ollar loss often does not capture the harmfulness and seriousness of the conduct. In such instances, an upward departure may be warranted." Eliminating this commentary was a mistake, notwithstanding that judges may have rarely labeled their outside-the-Guidelines sentences as departures.

Now that the departure guidance that recognized that harm and culpability factors are not easily quantified has been eliminated, the Commission is proposing to add the guidance right back into the Manual, but this time into the complex algorithm of §2B1.1. Don't do it. Step One of the sentencing process should direct judges, the parties, and the public to the sentencing considerations the Commission deems important. It should then guide everyone to the rough sentencing range appropriate for different categories of offenses and offenders. It should not try to define the precise sentence to be imposed, for there is a Step Two that is intended to take other matters into consideration, to refine the rough sentencing range into a final, singular sentence.

If Step Two of the sentencing process is to be a vital and robust balancing of all the statutory sentencing factors, the role of the Guidelines cannot be ever more precise delineation of the appropriate sentence for a given category of crime and category of offender. There are infinite variations on the way crimes can be committed, and the way offenders go about their lives. Rather, it should be to guide judges, in a comprehensible and articulable way, on how to approach harm and blameworthiness so that they can then carry this understanding over to the fuller consideration of sentencing considerations in Step Two.

Simplification is a worthy goal. But simplification should be more than eliminating unused guideline provisions, which is what the Commission is doing this amendment year. In the 1990s, Justice Breyer urged the Commission to simplify the Guidelines in a more meaningful way and recognized why it's a tough task for us lawyers. He said –

> **The greatest obstacle to doing so is, I believe, the legal mind itself.** We judges and lawyers love to make distinctions. For sentencing purposes, distinctions about how a crime was carried out are important in order to assure sentencing proportionality — a principle of fairness that insists upon treating different offenders differently. And the Guidelines should contain at least a few such distinctions — in the form of offense characteristics that can enhance, or diminish, the base offense level. **But it is important to know when to stop.** (Emphasis added.)
>
> . . .
>
> **Punishment is a blunderbuss.** We do not know its precise effects, nor can the criminal justice system tell us much (beyond fairly obvious differences) about the true comparative just deserts of any two offenders — even in respect to the crimes they have committed. There is little, if anything, to be gained in terms of punishment's classical objectives by trying to use highly detailed offense characteristics to distinguish finely among similar offenders. And there is much to be lost, both in terms of Guideline workability and even in terms of fairness (recall the Guidelines' logarithmic numerical scales). **Ranking offenders through the use of fine distinctions is like ranking colleges or the liveableness of cities with numerical scores that reach ten places past a decimal point. The precision is false.**

Emphasis added.

Simplification should be more ambitious than what the Commission is proposing this amendment yet. It should be driven by the goal of better achieving the purposes of the Sentencing Reform Act. It should be guided by aggregating culpability and harm factors in various guidelines rather than adding more factors that disaggregate and decompose them.

In 2014, the American Bar Association (ABA) Criminal Justice Section's Task Force on the Reform of Federal Sentencing for Economic Crimes issued a report and suggested a better economic crime guideline. It is worthy of reconsideration. The approach I prefer would be slightly different. It would be to list all of the factors that we can think of that go into the culpability and harm determinations, including those that are now specific offense characteristics. But the purpose of the list is not to find the perfect, precise sentence. It is to help judges do the work of aggregating the applicable case-specific culpability factors to determine whether they add up to high culpability, medium culpability, or lesser culpability (culpability on a human scale) and whether the case-specific harms — tangible, quantifiable, or not — add up to one of five categories of harm (again, a scale understandable to everyday humans). It not only simplifies the sentencing process; but like the ABA proposal, it does so to further the goals of sentencing reform and not just for simplicity's sake. It better balances quantifiable and nonquantifiable culpability and harm considerations. This is the direction the Commission should go; not further down the rabbit hole of complexity.

Here is what a better economic crime sentencing guideline might look like –

2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses 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

(a) Base Offense Level:

> (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
>
> (2) 6, otherwise.

(b) Specific Offense Characteristics

> (1) Culpability/Harm Table, increase by the applicable number of levels –

	High Culpability	Significant Culpability	Lesser Culpability
Category 1 Harm	34	28	22
Category 2 Harm	30	24	18
Category 3 Harm	26	20	14
Category 4 Harm	22	16	10
Category 5 Harm	18	12	6

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The court should determine the offender's culpability and harm with reference to the instructions and factors listed below. Courts should consult the Commission's website for examples of offender functions and roles associated with different culpability classifications and examples of victim impact associated with different harm categories.

Culpability

In assessing culpability, the court should examine all factors related to the defendant's intent, function, and role in the offense. Where there are characteristics present which fall under different culpability categories, or where the level of the defendant's function is affected by the scale of the criminal enterprise, the court should balance these characteristics to reach a fair assessment of the offender's overall culpability.

Being an organizer, leader, manager, or supervisor of criminal activity that involved three or more participants demonstrates at least significant culpability. Being a minimal participant demonstrates lesser culpability. Do not apply any adjustment under Chapter Three, Part B.

Culpability demonstrated by the defendant's function in the offense

One or more of these characteristics may demonstrate the defendant's intent, function, and role and thus, the appropriate culpability. These lists are not exhaustive.

High Culpability:

- A leading role where offending is part of a large group activity
- Involvement of others through pressure, influence
- Abuse of position of power or trust or responsibility
- Sophisticated nature of the offense/significant planning
- Fraudulent activity conducted over sustained period of time
- The defendant deliberately targeted victim(s) on the basis of vulnerability or a large number of victims
- The offense involved, (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education
- The offense involved misappropriation of a trade secret and the defendant knew or intended that the trade secret would be transported or transmitted out of the United States, or that the offense would benefit a foreign government, foreign instrumentality, or foreign agent
- 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
- The defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or the offense involved the unauthorized public dissemination of personal information
- The defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; a substantial part of a fraudulent scheme was committed from outside the United States; or the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means
- The offense involved, (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification

Significant culpability:

- A significant role where offending is part of a group activity
- Other cases that fall between high and lesser culpability categories because:
    - Factors are present that balance each other out and/or
    - The offender's culpability falls between the factors as described in the two categories
- The offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment
- The defendant was convicted of an offense under 18 U.S.C. § 1037; and the offense involved obtaining electronic mail addresses through improper means
- The defendant was convicted of a federal health care offense involving a government health care program
- The offense involved a violation of securities law and, at the time of the offense, the defendant was, (A) an officer or a director of a publicly traded company; (B) a registered broker or dealer, or a person associated with a broker or dealer; or (C) an investment adviser, or a person associated with an investment adviser
- The offense involved a violation of commodities law and, at the time of the offense, the defendant was, (A) an officer or a director of a futures commission merchant or an introducing broker; (B) a commodities trading advisor; or (C) a commodity pool operator

Lesser culpability:

- The defendant was involved through coercion, intimidation or exploitation
- The defendant was not motivated by personal gain
- That defendant played a peripheral role in organized fraud
- The offense was an opportunistic "one-off" offense, with very little or no planning
- The defendant had limited awareness or understanding of the extent of fraudulent activity
- The defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit the offense
- The defendant received no monetary compensation from the illegal acts
- The offense was an isolated incident
- The offense was committed due to an unusual circumstance that is unlikely to happen again
- The defendant has taken steps to address addiction or other offense-related behavior
- The defendant's age and/or lack of maturity, if it contributed to the commission of the offense
- The defendant's mental disorder or learning disability, if it contributed to the commission of the offense
- The defendant's vulnerability was exploited
- The defendant exhibited prospects for work, training, or education while the offense was taking place

Harm

Harm is assessed by the actual, intended or risked financial loss and the impact on the victim.

The values in the table below are to be used for actual or intended financial loss only. Intended loss relates to offenses where circumstances prevent the actual loss that is intended to be caused by the fraudulent activity.

Risk of loss (for instance in mortgage frauds) involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of loss is less serious than actual or intended loss. Where the offense has caused risk of loss but no (or much less) actual loss, the normal approach is to move down to the next category. This may not be appropriate if either the likelihood or extent of risked loss is particularly high.

After determining the quantifiable loss involved, the court should then take into account the total level of harm caused to the victim(s) or others to determine whether it warrants the sentence being moved up to the next category or to the top of the range of the initial category.

Victim impact:

If the offense had a high victim impact — move up a category; if in category 1 consider a sentence at the upper end of the range. High victim impact is evidenced by —

- Serious detrimental effect on the victim whether financial or otherwise (including emotional and psychological harm)
- 10 or more victims; or where the offense was committed through mass-marketing
- The victim was particularly vulnerable due to factors including but not limited to their age, financial circumstances, mental capacity
- The defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security
- The defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, or the offense, (A) substantially jeopardized the safety and soundness of a financial institution; or (B) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (i) was a publicly traded company; or (ii) had 1,000 or more employees

Other victim impact considerations:

- The offense involved a theft from the person of another
- The offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial

If the loss caused or intended is of no or minimal financial value but high impact – circumstances may make it appropriate to move up more than one category

Harm categories:

Category 1 More than $250,000,000
Category 2 More than $10,000,000
Category 3 More than $250,000
Category 4 More than $15,000
Category 5 $15,000 or less