United States Sentencing Commission

2026-2027 Amendment Cycle

Public Comment on Proposed Priorities

91 FR 35802

UNITED STATES SENTENCING COMMISSION

2026-2027 PUBLIC COMMENT ON PROPOSED PRIORITIES 91 FR 35802

UNITED STATES SENTENCING COMMISSION

Proposed Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice; Request for public comment.

SUMMARY: As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, and in accordance with its Rules of Practice and Procedure, the United States Sentencing Commission is seeking comment on possible policy priorities for the amendment cycle ending May 1, 2027.

DATES: Public comment should be received by the Commission on or before **July 27, 2026**. Any public comment received after the close of the comment period may not be considered.

ADDRESSES: There are two methods for submitting public comment.

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

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

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

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

The Commission provides this notice to identify possible policy priorities for the amendment cycle ending May 1, 2027. Other factors, such as legislation requiring Commission action or possible loss of a voting quorum, may affect the Commission's ability to complete work on any or all identified priorities by May 1, 2027. Accordingly,

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

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

The Commission invites comment on the following proposed priorities for the amendment cycle ending May 1, 2027 (including comment on any additional priorities commenters believe the Commission should consider in the upcoming amendment cycle and beyond, and comment proposing specific amendment text or research agendas that would address a given priority):

(1) In anticipation of the 40th anniversary of the *Guidelines Manual* and two decades of experience with advisory guidelines, the Commission intends to undertake an evaluation of the guidelines and federal sentencing practices in light of the Commission's mission set forth in the Sentencing Reform Act, the statutory purposes of sentencing in 18 U.S.C. 3553(a)(2), and relevant legal developments that have occurred in the past four decades. As part of this priority, the Commission may use regional public hearings, symposiums, roundtable discussions, conferences, and other tools to solicit input on the Commission's work from various stakeholders, including judges, Congress, the Executive Branch, Federal Public Defenders, victims, sentenced individuals, and others.

(2) In anticipation of the 30th anniversary of the Commission's Rules of Practice and Procedure, the Commission expects to undertake a comprehensive review of the Rules and consider whether any amendments to such Rules may be appropriate to further the agency's statutory purposes and enhance public engagement with and understanding of the Commission's work. As part of the priority, the Commission expects to review current practices and consider possible changes regarding: (a) what Commission work is conducted in public; (b) what Commission policymaking materials should be made public; (c) how stakeholder and public involvement is structured, including through rules about *ex parte* communications; and (d) what analyses supporting agency policymaking are conducted and released publicly.

(3) Consideration of any amendments that may be warranted in response to any legislation or case law developments.

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

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

Beyond the consideration of possible policy priorities this year, the Commission has chosen to not solicit public comment or hold a hearing on retroactivity. When the

Commission submits amendments to Congress, it may decide to publish an issue for comment and hold a hearing on whether to make some or all of those amendments retroactive. *See* USSC Rules of Practice and Procedure 4.1. The Commission is not taking these steps for any of the amendments submitted to Congress on April 30, 2026. While three Commissioners may have voted in favor of making retroactive Amendment 2 (relating to inflationary adjustments) of the amendments submitted by the Commission to Congress on April 30, 2026, those votes alone would not have met the Sentencing Reform Act's four-vote threshold for retroactivity. *See* 28 U.S.C. 994(a)(2).

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

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

Carlton W. Reeves,

Chair.

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street, Room 2346
Chicago, IL 60604

Honorable Roy K. Altman
Honorable Kenneth D. Bell
Honorable Mark Jeremy Bennett
Honorable Nathanael Cousins
Honorable Katherine Polk Failla
Honorable Charles B. Goodwin
Honorable David J. Hale
Honorable Beryl Howell
Honorable Joseph Laplante
Honorable Karen Spencer Marston
Honorable Diana Saldaña
Honorable Charles J. Williams

Honorable Edmond E. Chang, Chair

TELEPHONE
(312) 435-5795

July 23, 2026

Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chair Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, thank you for the opportunity to comment on the proposed priorities for the 2026-2027 amendment cycle. We appreciate that the Sentencing Commission is considering stakeholder input as it undertakes a comprehensive review of the guidelines, sentencing practices, and its internal rules, practices, and procedures. In this comment letter, the Committee provides recommendations that address the specific priorities identified in the Commission's Proposed Priorities and Request for Comment published in June. In addition, the Committee hopes it can provide input and participate in any Commission hearings, symposiums, roundtables, or other discussions.

Context and Summary

Within the Judicial Conference, the Committee on Criminal Law is responsible for both overseeing the federal probation and pretrial services system and for issues relating to the administration of criminal law. Specifically, the Committee monitors the workload and operations of probation and pretrial services offices and, when the budget is being formulated,

proposes adequate funding and resources to support these operations, taking into account the overall fiscal situation of the Judiciary. The Committee also reviews and recommends revisions to the staffing formula for the probation and pretrial services offices. Based on these responsibilities, the Committee provides the Sentencing Commission with public comment and feedback to support effective probation and pretrial services operations as well as the fair, efficient administration of criminal law.[1]

The Committee makes two recommendations regarding the Commission's Rules of Practice and Procedure. First, the Committee recommends that the Commission preserve in its Rules of Practice and Procedure the presumption that guideline amendments should generally "be given prospective application only." (Rule 4.1). Second, the Committee recommends that the Commission formally include in its rules or process consideration of the impact on judicial resources (including probation and pretrial services offices) when making amendment and retroactivity decisions.

The Committee also proposes that the Commission investigate potential ways to pilot or simulate amendments in near-real-world scenarios prior to adoption. We would be glad to help in this effort.

Discussion

The Committee's recommendations respond to a few aspects of the Commission's request for comment. In Priority 2, the Commission asks whether any amendments to the Commission's Rules of Practice and Procedure "may be appropriate to further the agency's statutory purposes and enhance public engagement" regarding the Commission's work. As part of that priority, the Commission states that it "expects to review current practices and consider possible changes" including, among other things, "what analyses supporting agency policymaking are conducted." In addition, the Commission invites comment on "any additional priorities commenters believe the Commission should consider in the upcoming amendment cycle and beyond."

In response to the Commission's request for comment, the Committee offers the following three proposals for consideration.

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[1] The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the Guidelines." JCUS-SEP 1990, p. 69. The Conference has resolved that "the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible." JCUS-MAR 2005, p. 15.

1. **Maintain the rule stating that amendments generally should be given only prospective application**

The Committee strongly supports maintaining Rule 4.1 of the Commission's Rules of Practice and Procedure, which has been in effect since the Commission first issued its rules in 1997. It states: "Generally, promulgated amendments will be given prospective application only."

Indeed, as the Committee stated in its April 2025 comment letter on the retroactivity criteria (Retroactivity Factors Letter), we recommend that the Commission formally incorporate that principle of prospective application into the policy statement at §1B1.10. The Guidelines Manual is constantly changing, and many amendments reflect fine-tuning of the Guidelines based on evolving research, case law, or legislative changes. Amendments addressing issues of fundamental fairness, which may warrant retroactive application, are relatively rare. When amendments have been based on fundamental fairness issues, such as the crack amendments and the "drugs minus two" amendment, the Committee has supported retroactivity even where it would place significant burdens on the Judiciary.

In the Committee's view, the Commission's general rule against retroactive application appropriately reflects the goals of the Sentencing Reform Act of 1984 (Act). Among other things, the Act abolished parole and created the Sentencing Commission to create a more predictable system of determinate sentencing. Finality of sentences promotes the general-deterrence goal of sentencing. As we have also noted in other comments, when amendments not addressing a fundamental unfairness or inequity are routinely deemed retroactive, "over time the perception may arise that the Guidelines themselves are fundamentally unfair, thereby undermining public confidence in the system of certain and determinate sentencing established by the Sentencing Reform Act of 1984." Retroactivity Factors Letter, at 4 (quoting an earlier comment letter from the Committee).

Reasonable certainty of release dates also ensures that individuals receive the advantages of release preparation and reentry services. Appropriate release planning—which requires time, resources, and coordination, from both the BOP and our probation offices—is critical to an individual's success upon release. Release preparation and planning are especially critical for those who have served long sentences, those who lack family or other community support, and those with higher risks and needs.

2. **Formalize consideration of the impact on judicial resources**

Along with the general presumption of prospective application, the Committee also recommends that the Commission explicitly state in its internal rules that the Commission should consider the impact of its amendment-related actions on judicial resources. This would largely be based on information that the Commission already gathers, such as the numbers of cases in which a new or amended guideline provision would apply and anticipated impacts on sentence length.

In providing comment and testimony to the Commission, the Committee strives to provide general information on the practical impacts that a proposed amendment (or retroactive application of an amendment) could have on judicial and probation office resources, including the probation system's workload, budget, and staffing needs, and on the interplay of those impacts with the Judiciary's mission and community safety. Adopting a formal role for consideration of workload impact would appropriately recognize the importance of the overall efficient administration of federal criminal law.

3. **Develop means of testing proposed amendments and retroactive application in real-life scenarios**

On occasion, proposed amendments give rise to challenges in crafting precise text or in clearly defining terms to guide litigants, lawyers, probation officers, and judges. To help discover substantive or administrability issues, we recommend that the Commission consider simulating the application of proposed amendments and the consequences of retroactivity in real-life scenarios. For example, the Committee could assemble a rotating set of volunteer judges and probation officers (perhaps from the Commission's Probation Officers Advisory Group or the AO's working groups) who would take facts from (anonymized) real or simulated cases and apply them to a proposed amendment or retroactive application of an amendment. The Commission could examine the results, and the volunteers also could provide the Commission with feedback on any refinements needed. To be sure, this simulation process would not be appropriate for many proposed amendments, but it could be useful for some proposed amendments with widespread impact (e.g., career offender and low-level trafficking function).

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on this set of proposed priorities for the 2026–2027 amendment cycle. The Committee members look forward to working with the Commission to improve the overall effectiveness of the sentencing guidelines and the fair administration of justice. We remain available to assist in any way we can.

Respectfully submitted,

Edmond E. Chang
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Circuit Judge Edith Jones, 5th Circuit

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

Dear USSC, the fed courts are plenty busy sentencing newly convicted criminals without toying around with pre-existing convicts' sentences. And the constant amendments are unhelpful to obtaining stability, predictability, and comprehensability of the Guidelines.
Therefore, Please (a) stop making amendments retroactive; (b) consider eliminating annual review for amendments, for at least one year. Yours, Edith Jones

Submitted on: June 11, 2026

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
200 E. Wall Street, Suite 301
Midland, Texas 79701

[redacted]

July 27, 2026

U.S. Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington D.C. 20002-8002
Attention: Public Affairs – Priorities Comment

Dear Members,

I appreciate the Commission's continued work to calibrate the advisory Sentencing Guidelines so they most accurately reflect culpability, recidivism risk, deterrence, and the need to protect the public. In that vein, I respectfully wish to provide comment on the zero-point offender reduction provision found in § 4C1.1. While the provision serves an important function in many cases, experience on the bench, and on the Southwest Border in particular, suggests that its current boundaries are too broad in at least two material respects.

First, defendants convicted of human smuggling under 8 U.S.C. § 1324 should be made categorically ineligible for the zero-point reduction. The Commission's own data show that alien smuggling is neither a minor nor purely technical offense category. In FY 2025, 53% of individuals sentenced for alien smuggling received the § 4C1.1 adjustment; yet the same Commission publication reports that 14% of alien smuggling offenses involved an unaccompanied minor, 37% involved a risk of injury, and a death occurred in 1% of cases. These figures clearly show that human smuggling regularly places vulnerable people, including children, in dangerous and sometimes lethal conditions.

The Commission's criminal-history snapshot for alien smuggling offenders also warrants caution in how these cases are characterized. The Commission reports that 71% of those sentenced for alien smuggling in FY 2025 were in Criminal History Category I, while 11% were in Category II, 9% in Category III, 4% in Category IV, 3% in Category V, and 2% in Category VI. But those category assignments do not necessarily capture a defendant's full criminal history. They reflect only criminal history events that count under the Guidelines' scoring rules, and thus, can obscure prior convictions that are too old to score even though they remain probative of recidivism risk, deterrence needs, and a defendant's actual familiarity with the criminal justice system. For that reason, the fact that a § 1324 defendant appears in a low criminal history category should not be treated as equivalent to a finding that the defendant has no meaningful prior record; some such defendants may have multiple prior criminal history events that simply do not receive points under Chapter Four.

The Commission's guideline treatment of alien smuggling also reflects the seriousness and recurring aggravation associated with these offenses. The immigration guideline for smuggling, transporting, or harboring unlawful aliens includes enhancements for the number of persons smuggled, for prior felony immigration convictions, for smuggling unaccompanied minors, for coercive detention or extortionate conduct, and for conduct creating a substantial risk of death or serious bodily injury. Those

offense characteristics are not unusual cases found only on the periphery; they are central features of the offense category as the Commission has described it. In addition, the Commission's FY 2025 quick facts report shows that 90% of individuals sentenced for alien smuggling received prison sentences and that the average sentence imposed was 15 months, which further confirms that federal courts are not dealing with harmless conduct.

The Commission reports that immigration cases were the single most common offense type among zero-point individuals who received the § 4C1.1 adjustment, accounting for 36.4% of those cases in FY 2024. In alien smuggling cases specifically, more than half of defendants received the reduction in FY 2025. Where a guideline benefit is being applied so frequently in an offense category that often involves transportation in dangerous conditions, exposure to injury, exploitation of minors, and occasional death, a categorical exclusion is warranted to preserve proportionality and deterrence.

Second, the Commission should amend § 4C1.1 so that the reduction is unavailable to defendants who have prior convictions that are too old to score under Chapter Four, Part A, or those who have been formally removed from the United States regardless of whether they have prior convictions for illegally entering the United States. A defendant may formally receive zero criminal history points and yet still have a meaningful criminal record. A defendant with prior convictions that no longer count because of age has already had prior contact with the criminal justice system and does not present the same profile as a genuinely conviction-free offender.

This distinction is especially important because the reduction is substantial. The Commission reports that, among zero-point individuals receiving the adjustment, the average sentence was 19 months, compared with 89 months for zero-point individuals who did not receive it, and that 81.7% of those receiving the adjustment were sentenced to prison. The same publication shows that 72.6% of zero-point individuals in FY 2024 received the adjustment. Given the significance and prevalence of the reduction, the Commission should reserve it for defendants who are truly first offenders, not defendants whose prior convictions happen to fall outside the scoring window.

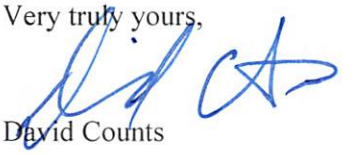
The same principle should apply to defendants who have been formally removed from the United States. Although a civil immigration removal is not always a criminal conviction, it is still a serious formal encounter with federal authorities that provides unmistakable notice of the law and of the consequences of reentry-related misconduct. The Commission's immigration guidelines already recognize the relevance of prior immigration-related misconduct by increasing offense levels for defendants who commit immigration offenses after sustaining one or more prior felony immigration and naturalization convictions. That logic should extend to § 4C1.1 eligibility: a defendant who has previously been apprehended and formally removed is not similarly situated to a defendant with no prior legal intervention.

In practical terms, these restrictions would better align § 4C1.1 with the rationale that appears to underlie it. The adjustment should reward truly exceptional criminal-history circumstances, not merely the absence of countable points on the sentencing table. Excluding § 1324 defendants, defendants with stale prior convictions, and defendants with prior formal removals would narrow the adjustment to offenders most consistent with the concept of a genuine low risk offender while preserving judicial discretion under 18 U.S.C. § 3553(a) in individual cases.

For these reasons, I respectfully urge the Commission to amend § 4C1.1 to provide that: (1) defendants convicted pursuant to 8 U.S.C. § 1324 are ineligible for the adjustment; and (2) defendants are ineligible if they have prior convictions not counted solely because those convictions are too old to receive criminal history points, or if they have prior immigration apprehensions followed by formal removal from the United States. Such amendments would better reflect offense seriousness, protect the public, and preserve the credibility of the zero-point adjustment.

Again, I thank you for your time and consideration. Your work is appreciated.

Very truly yours,



David Counts

U.S. Department of Justice

Criminal Division

Appellate Section *Washington, DC 20530*

July 24, 2026

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

The Criminal Division of the U.S. Department of Justice is pleased to submit its annual report to the Sentencing Commission pursuant to 28 U.S.C. § 994(o). Please also consider this report to be the Department's response to the Federal Register notice requesting public comment on the Commission's proposed priorities for 2026–27.[1]

Part I of our letter addresses the Commission's proposed priorities for the amendment cycle ending May 1, 2027. The Department appreciates the Commission's interest in marking the 40th anniversary of the Guidelines and the 30th anniversary of the Commission's Rules of Practice and Procedure by undertaking broad evaluations of both the Guidelines Manual and the Commission's internal rules. As the Commission moves forward with those evaluations, the Department welcomes the opportunity to provide input alongside other stakeholders.

Given the Commission's transitional moment and its focus on foundational evaluations, we offer a smaller slate of pressing priorities and calibrated amendments that would complement the Commission's broader aims this cycle. Part II highlights several issues raised in recent amendment cycles that remain unresolved, warrant the Commission's continued attention, and whose resolution would resolve significant structural issues in the Guidelines. Part III discusses potential amendments to guideline provisions, focusing on areas—such as dangerous drugs and sexual exploitation—that are vital to public safety and achievable even in a condensed cycle.

We look forward to working with you, the other Commissioners, and Commission staff on these matters during the amendment year.

I. The Commission's Proposed Priorities

Although the Department appreciates the Commission's desire to mark milestone anniversaries by reflecting more broadly on the Guidelines' framework, we believe that the

[1] *Notice of Request for Public Comment*, 91 Fed. Reg. 35802 (June 12, 2026), https://www.govinfo.gov/content/pkg/FR-2026-06-12/pdf/2026-11906.pdf; U.S. Sent'g Comm'n, *Proposed Priorities for 2026–2027 Amendment Cycle* (June 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202606_fr_proposed-priorities.pdf ("*Proposed Priorities 2026*").

Commission would be best served by focusing on the type of "good government" measures reflected in its most recent set of amendments.[2] Those measures include clarifying the role and status of guideline commentary in conjunction with the Supreme Court's forthcoming decision in *Beaird v. United States*.[3] Additionally, major amendments to the Rules of Practice and Procedure are not needed because the existing version already reflects an appropriate balance between encouraging transparency and stakeholder engagement (on the one hand) and providing the Commission the breathing space needed to deliberate and reach sound decisions (on the other).

A. Clarifying the Role and Legal Status of Commentary and Application Notes

Anticipating the 40th anniversary of the Guidelines Manual, and drawing on two decades of experience with advisory guidelines, the Commission has expressed its intent "to undertake an evaluation of the guidelines and federal sentencing practices in light of the Commission's mission set forth in the Sentencing Reform Act, the statutory purposes of sentencing in 18 U.S.C. § 3553(a)(2), and relevant legal developments" in the intervening years.[4] The Department appreciates that, in light of that milestone anniversary, the Commission wishes to undertake a broad examination of the current advisory guidelines system. And the Department stands ready to provide input, alongside other stakeholders, at any hearings, symposiums, roundtables, or conferences that the Commission decides to hold.

The Commission should, however, keep in mind that its recent, intense activity has already produced substantial changes to the guidelines—including the creation of §4C1.1's zero-point-offender reduction,[5] limitations on the use of acquitted conduct in calculating the guideline range,[6] significant changes to Chapter 5's supervised-release provisions,[7] and wholesale reworking of the multiple-counts rules,[8] to name just a few. Courts, litigants, and probation officers are still adjusting to those changes, and it is too soon to evaluate how such changes are playing out.

Against that backdrop, the Commission should maintain its focus on "good government" measures that reflect the need for stability and predictability in guidelines that continue to serve as "the starting point and initial benchmark" for judges' sentencing decisions.[9] One of the biggest sources of instability in the advisory guidelines framework is the status of Guidelines Manual commentary, including application notes that are central to the operation of some frequently applied provisions. As the Department has described in previous letters,[10] since 2019, appellate

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[2] Press Release, U.S. Sent. Comm'n, *U.S. Sentencing Commission Adopts Package of Good Government Guideline Amendments to Simplify, Streamline Federal Sentencing* (Apr. 16, 2026), https://www.ussc.gov/about/news/press-releases/april-16-2026.

[3] No. 25-5343, 2026 WL 1052007 (U.S. Apr. 20, 2026).

[4] Proposed Priorities 2026 at 3.

[5] U.S.S.G. App. C, amend. 821 (effective Nov. 1, 2023).

[6] U.S.S.G. App. C, amend. 826 (effective Nov. 1, 2024).

[7] U.S.S.G. App. C. amend. 835 (effective Nov. 1, 2025).

[8] *Notice of Submission to Congress of Amendments to the Sentencing Guidelines effective November 1, 2026*, 91 Fed. Reg. 24088 (May 4, 2026), https://www.govinfo.gov/content/pkg/FR-2026-05-04/pdf/2026-08647.pdf.

[9] *Gall v. United States*, 552 U.S. 38, 49 (2007).

[10] *See, e.g.*, Letter from Jonathan J. Wroblewski, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 3 (July 31, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-

courts have divided over the authoritativeness of the Commission's commentary. The Commission has taken only incremental steps in response: it has abrogated particular appellate decisions by moving parts of the commentary into the guidelines text,[11] and it has taken care to include substantive directions in the guideline text rather than the commentary when promulgating new or substantially revised guidelines.[12]

The Supreme Court's recent grant of certiorari in *Beaird* to clarify when and how courts should defer to the commentary heightens the need for forward-looking Commission action. Instead of waiting for the Court's decision and responding to circuit disagreements that might arise over individual application notes,[13] the Commission should lay the groundwork for action now. It should systematically review the Guidelines Manual to determine which provisions in the commentary should be moved into the guidelines text, which (if any) should be removed from the Manual, and whether other changes to guideline text are warranted. At the same time, the Commission may wish to decide whether, as discussed in previous amendment cycles, it should seek or support legislation to protect and preserve the validity of the commentary wholesale.[14] Any such changes should be paired with amendments to the Rules of Practice and Procedure that memorialize the Commission's general practice of publishing commentary and policy statement revisions for notice and comment, and eventually submitting them for congressional review, alongside Guidelines amendments. The Commission should, in short, position itself through internal deliberations and stakeholder input to promptly implement any change that might be warranted in response to, or independent of, *Beaird*.

B. Review of the Commission's Rules of Practice and Procedure

To mark the 30th anniversary of the Commission's Rules of Practice and Procedure, the Commission has announced that it "expects to undertake a comprehensive review of the Rules and consider whether any amendments to such Rules may be appropriate to further the agency's statutory purposes and enhance public engagement with and understanding of the Commission's work."[15] The Commission plans to focus on possible changes designed to promote transparency and public engagement. Those objectives are laudable, and we are open to reconsidering aspects of current Commission practice to the extent appropriate.

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comment/202308/88FR39907_public-comment_R.pdf#page=40 ("July 2023 DOJ Letter"); Letter from Jonathan J. Wroblewski, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 15–19 (Feb. 22, 2024),https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=60 ("February 2024 DOJ Letter").

[11] *See, e.g.*, U.S.S.G. App. C, amend. 822 (effective Nov. 1, 2023) (addressing inchoate offenses as career offender predicates); amend. 827 (effective Nov. 1, 2024) (abrogating Third Circuit decision regarding treatment of intended loss in the fraud guideline).

[12] *See, e.g.*, U.S.S.G. App. C, amend. 814 (Nov. 1, 2023) (significantly revising the compassionate release guideline); amend. 820 (Nov. 1, 2023) (amendment to the acceptance-of-responsibility provision).

[13] We note in this regard that not every commentary-related dispute raising deference questions will generate a circuit conflict—and that such conflicts can take a long time to materialize.

[14] *See, e.g.*, February 2024 DOJ Letter at 16; July 2023 DOJ Letter at 3.

[15] Proposed Priorities 2026 at 4.

At the same time, the Department urges the Commission to proceed cautiously. Although transparency and public input are critical to the Commission's work, they must be balanced against the Commission's need for candid internal deliberation, staff input, and careful refinement of policy options. These internal processes are essential, not only for developing rational, workable sentencing policies that function as expected, but also for ensuring that public comment is focused on the most relevant and useful policy questions. Broad or hasty changes to the Rules could unintentionally chill essential discussions, dilute the Commission's focus, and increase the burden on stakeholders without any corresponding benefits to the Commission's work. The Department would therefore encourage the Commission to consider only targeted revisions to the Rules and to identify specific ways to leverage existing advisory groups and stakeholders to more productively inform the Commission's work.

One way for the Commission to enhance transparency would be to solicit stakeholder feedback on how to optimize the comment and hearing process and then consider responsive changes to its Rules or practices. Because stakeholders expend considerable resources when providing input, the Commission has an obligation to ensure that the input it requests will be directed toward areas that will be most helpful to the Commissioners. To that end, the Commission could consider publishing proposed amendments earlier in the cycle to allow for a longer comment period and then issuing an updated version closer to the hearing that reflects any developments in the Commission's thinking. Rather than expanding the volume of publicly released materials, adjusting the public comment process in this way would promote transparency by directing stakeholder input toward amendments with a realistic prospect of adoption and minimizing the need for multiple open-ended issues for comment.

Overall, however, we do not see a pressing need for significant changes to the Rules. In their current form, the Rules provide for the Commission to conduct certain important business at its public meetings and to share with the public documents pertinent to the meeting's subject (Rule 3.2). The Rules elsewhere authorize the Commission to receive input from key stakeholders at nonpublic meetings and to conduct symposia or roundtables to receive information from a range of experts or interested parties (Rule 3.3). The Commission has put those authorities to good use in recent years, regularly meeting with its advisory groups and other stakeholders (such as the Federal Public Defenders), convening multiple roundtables, and publishing data to inform public comment on proposed amendments. The existing Rules authorized these considerable efforts to enhance openness, expand public input, and make Commission processes better informed and more accessible. That suggests to us that, if any transparency-oriented changes to the Rules are warranted, they should be modest ones enacted with full consideration of unintended consequences.

II. Continuing Workstreams

Over the last few amendment cycles, the Commission has not acted on several significant guidelines issues that were the subject of detailed Commission inquiry and extensive public comment. We highlight below several issues that still warrant the Commission's prompt attention, as well as the need to continue the Commission's important ongoing simplification efforts and its ongoing work resolving circuit conflicts.

A. Categorical Approach

The Commission has made significant efforts in recent cycles to address the pernicious effects of the categorical approach in federal sentencing, particularly regarding what constitutes a "crime of violence" for enhancements aimed at protecting the public from violent recidivists. The limitations of the categorical approach are well documented in judicial opinions and previous Department submissions: it assesses an offender's culpability based not on what he or she did, but on whether some other hypothetical person could commit the same offense with less violence; it requires an often arduous examination of case law in search of nonviolent examples; and it relies on judicial records that frequently lack sufficient detail to accurately identify the defendant's offense of conviction.[16] The result is grossly different treatment of identical offenders, too often based on discrepancies in states' drafting of offenses and maintenance of records, and the failure to properly sentence many defendants who unquestionably committed violent crimes—including murder, carjacking, and rape.[17] These disparate results for similarly situated offenders defeat Congress's express intent that those who repeatedly commit violent and other aggravated offenses should be sentenced "at or near the maximum term authorized," and that the guidelines should "provid[e] certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities."[18]

In light of those consequences, and because the constitutional concern that has animated the Supreme Court's decisions on the categorical approach is not present when applying advisory guidelines, the Department has repeatedly supported amendments that would, when warranted, permit the consideration of an offender's actual conduct to ensure consistent and appropriate punishment. Toward that end, we have engaged in extensive conversations with the Commission, its staff, the Federal and Community Defenders, and others to seek consensus on the issue. We welcome the opportunity to continue those conversations and to bring this long-simmering issue to a resolution. Equal treatment of offenders and the safety of our communities require it.

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

Last summer, the Supreme Court denied a petition for a writ of certiorari "over the proper definition of a 'controlled substance offense' under §4B1.2(b)" and again encouraged the Commission to resolve the issue.[19] In response, the Commission proposed resolving two circuit

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[16] *See* Letter from Scott Meisler, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 4 (July 18, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=87 ("July 2025 DOJ Letter"); Letter from Scott Meisler, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves 14 (July 15, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=142 ("July 2024 DOJ Letter"); July 2023 DOJ Letter at 2; Letter from Kenneth A. Polite, Jr., Assistant Att'y Gen., Crim. Div., & Jonathan J. Wroblewski, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 12 (Sep. 12, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj.pdf#page=12 ("September 2022 DOJ Letter").

[17] *See, e.g.*, *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (Washington second-degree murder); *United States v. Baldon*, 956 F.3d 1115 (9th Cir. 2020) (California carjacking); *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape).

[18] 28 U.S.C. §§ 994(f), (h).

[19] *Wiggins v. United States*, 145 S. Ct. 2621, 2621 (2025) (Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari) (explaining that the Commission has "acknowledged the split" but "has not resolved it," and calling the issue "an important one").

conflicts concerning the definition of "controlled substance offense" in §4B1.2(b) last cycle,[20] but ultimately declined to act.[21] The Department continues to request that the Commission resolve the two circuit conflicts and to do so in a manner that reflects the need—consistent with Congress's direction—for enhanced punishment for repeat state and federal drug trafficking offenders.[22]

The first circuit conflict concerns whether the term "controlled substance offense" is limited to drugs regulated by the federal Controlled Substances Act or instead may also be defined by state law. The second involves which temporal version of the applicable drug schedule should be used to decide if a prior offense qualifies as a controlled substance offense: the schedule in effect at the time the defendant committed the predicate offense, the schedule in effect at the time of the instant offense, or the schedule in effect at the time of the sentencing for that offense.[23] The Department continues to support amendments that would make clear that (1) the definition of "controlled substance" in §4B1.2(b) rests on either federal or state law, as the plain language of the provision has long provided; and (2) the term refers to any substance that was controlled under applicable law at the time the defendant committed the predicate offense.[24]

C. Fraud

Fraud comes in many forms and has far-reaching negative consequences across society. Exploitation of government programs intended to benefit hardworking Americans, for example, pilfers taxpayer money. Complex frauds often target the most vulnerable among us, with devastating consequences for victims and their families. These and other fraudulent activities undermine financial markets, harm innovation, curtail economic development, and fuel transnational criminal activity. In recognition of this landscape, the Department has adapted and refocused its enforcement efforts, including by creating the National Fraud Enforcement Division,[25] which is part of a broader interagency task force designed to disrupt and dismantle fraud networks and facilitators.[26] The efficacy of those efforts, however, depends in part on guidelines that yield, on a consistent basis, advisory ranges that adequately reflect the statutory

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[20] *Notice of Request for Public Comment and Hearing*, 91 Fed. Reg. 5556 (Feb 6, 2026), https://www.govinfo.gov/content/pkg/FR-2026-02-06/pdf/2026-02441.pdf; U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* (January 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf ("*January 2026 Proposed Amendments*").

[21] *Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2026*, 91 Fed. Reg. 24088 (May 4, 2026), https://www.govinfo.gov/content/pkg/FR-2026-05-04/pdf/2026-08647.pdf.

[22] Letter from Scott Meisler, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 25–27 (Mar. 18, 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202603/91FR5556_public-comment_R.pdf#page=149 ("March 2026 DOJ Letter"); July 2025 DOJ Letter at 5–6.

[23] See January 2026 Proposed Amendments at 43.

[24] *See* March 2026 DOJ Letter at 25.

[25] Memorandum from Todd Blanche, Acting Att'y Gen., U.S. Dep't of Just., *Creation of the National Fraud Enforcement Division* (Apr. 7, 2026), https://www.justice.gov/ag/media/1435311/dl?inline; Memorandum from Matthew R. Galeotti, Crim. Div., U.S. Dep't of Just., *Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime* (May 12, 2025), https://www.justice.gov/criminal/media/1400046/dl?inline.

[26] *See Establishing the Task Force to Eliminate Fraud*, Exec. Order No. 14395, 91 Fed. Reg. 13485 (Mar. 16, 2026), https://www.govinfo.gov/content/pkg/FR-2026-03-19/pdf/2026-05497.pdf.

sentencing factors across the wide spectrum of cases involving fraud. And the primary economic crimes guideline (§2B1.1) has been subject to persistent criticism for failing to do so.

Reacting in part to that criticism, the Commission published for comment several proposed amendments to §2B1.1 last cycle.[27] The Department supported some of those proposals but was concerned that the overall package would have significantly reduced sentences for fraudsters and other white-collar offenders.[28] These proposals were the wrong message at the wrong time. Crimes of fraud, waste, and abuse continue to devastate individual victims and the public fisc alike. Should the Commission remain interested in adjusting §2B1.1 and related provisions, any amendments should accurately reflect how crimes are now being committed and point judges toward appropriate sentences. To that end, the Department urges updating the victim enhancements in §2B1.1 to ensure that they adequately account for the scope of the offense harm and updating other specific offense characteristics to ensure that they effectively measure the seriousness of the harm of economic crimes without suppressing innovation and bogging down courts in excessively complex calculations.

D. Alien Smuggling

As discussed last cycle, alien smuggling is nefarious on multiple fronts—undermining border security, often linked to transnational criminal organizations, and inherently exploitative of those who are vulnerable. For these reasons, the primary statute prohibiting alien smuggling, 8 U.S.C. § 1324 provides punishment "for each alien" smuggled and imposes increased statutory maximums when "any person" suffers serious bodily injury, is killed, or is put at risk of death "during" or "resulting" from a smuggling offense.[29] The Department continues to urge the Commission to ensure that the guidelines reflect aggravating aspects of these offenses—the number of aliens smuggled, the risks of injuries and resulting actual injuries to those aliens, and any sexual assault against them.[30]

Specifically, the Department urges the Commission to (1) provide more gradations in the §2L1.1(b)(2) ranges for the number of aliens smuggled; (2) provide offense-level increases under §2L1.1(b)(7) for each alien who suffers bodily injury, serious bodily injury, permanent or life-threatening injury, or death as a result of the offense, subject to an appropriate offense-level cap; (3) make explicit that sexual abuse qualifies as a bodily injury; and (4) add a cross-reference to the sexual assault guidelines for smuggling offenses that involve sexual assault.[31] These changes are

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[27] U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* 43–82 (Dec. 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202512_rf-proposed.pdf#page=59 ("*December 2025 Proposed Amendments*").

[28] Letter from Scott Meisler, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 29–38 (Feb. 10, 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202602/90FR59660_public-comment_R.pdf#page=277 ("February 2026 DOJ Letter").

[29] 8 U.S.C. §§ 1324(a)(1)(B)(i)-(iv).

[30] *See* March 2026 DOJ Letter at 28–38; July 2025 DOJ Letter at 14–15; July 2024 DOJ Letter at 8–12; September 2022 DOJ Letter at 24–25.

[31] March 2026 DOJ Letter at 28–38.

in line with relevant data,[32] as well as congressional intent to increase sentences based on the number of persons smuggled and/or injured.[33]

We especially urge the Commission to add the cross reference for sexual assault. As we explained last cycle, sexual assault has become endemic in smuggling operations and often cannot be prosecuted by state and local authorities; the guidelines should consistently treat sexual assault as sexual assault.[34] Much like the existing homicide cross reference, adding the sexual assault cross reference will account for this often overlooked and dangerous conduct and more effectively punish such egregious conduct more seriously. As the Department's public comments and hearing testimony from last cycle showed, these amendments would ensure parity for substantially similar offenses, provide additional accountability for the defendants who commit this kind of egregious and exploitative conduct, and help courts distinguish between offenders and offenses.[35]

E. Simplification

The Department urges the Commission to continue exploring "ways to simplify the Guidelines Manual," as it has in past cycles.[36] As the Department has explained in previous years, we view the goal of simplification not as shortening the Guidelines Manual, but as making the application of the Guidelines less complex, and more consistent, transparent, and predictable for courts, litigants, and the public.[37] The complexity of the current guidelines system—with its numerous aggravating and mitigating factors requiring multifaceted legal and factual determinations—reflects a pre-*Booker* framework that now leads to inefficiencies and disparities.

With that view in mind, we generally supported the Commission's culling of infrequently used specific offense characteristics last cycle.[38] Moving forward, we encourage the Commission to continue its simplification work, including by considering whether cross-cutting enhancements

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[32] In Fiscal Year 2024, convictions for smuggling incidents involving 6–24 aliens showed a nearly 64% increase from 2013, and approximately 33% of §2L1.1 cases fell within that range. *Compare* U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2024* 137, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2024/Ch2_Guideline_FY24.pdf#page=137 (showing almost 1,400 §2L1.1 cases (approximately 33%) fell within the 6–24 range in 2024), *with* U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2013* 51, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2013/Use_of_Guidelines_and_Specific_Offense_Characteristics_Guideline_Calculation_Based_Revised.pdf#page=51 (showing 855 §2L1.1 cases fell within the 6–24 range in 2013).

[33] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009–566 (18 U.S.C. app. § 543).

[34] March 2026 DOJ Letter at 28–38.

[35] *Id.*; Proposed Amendment on Human Smuggling: Hearing Before the U.S. Sent'g Comm'n (Mar. 9, 2026) (transcript), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20260309/transcript.pdf#page=236.

[36] *Notice of Request for Public Comment*, 90 Fed. Reg. 24710 (June 11, 2025), https://www.govinfo.gov/content/pkg/FR-2025-06-11/pdf/2025-10556.pdf; U.S. Sent'g Comm'n, *Proposed Priorities for 2025–2026 Amendment Cycle* 5 (June 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20250609_fr_proposed-priorities.pdf#page=5.

[37] *See, e.g.*, July 2025 DOJ Letter at 9; February 2026 DOJ Letter at 52.

[38] February 2026 DOJ Letter at 52.

in Chapter Three—such as the sophisticated means proposal from last cycle and the more recent proposal addressing unmanned aircraft—are a viable alternative to provision-by-provision adjustments.[39]

III. Critical Public Safety Issues

As part of its duty to "suggest[] changes in the guidelines that appear to be warranted,"[40] the Department identifies several changes to the Guidelines Manual that are appropriate in light of new legislation, pressing public-safety problems, and the need for suitable punishment in cases relating to terrorism.

A. Fentanyl

1. FEND Off Fentanyl Act

Last cycle, the Commission proposed to incorporate the Fentanyl Eradication and Narcotics Deterrence of Fentanyl Act ("FEND Off Fentanyl Act")[41] into the guidelines but failed to act on that proposal. The Department urges the Commission to do so this cycle.

The FEND Off Fentanyl Act created two new offenses at 21 U.S.C. §§ 2313a and 2354 to apply economic and other financial sanctions to the knowing international trafficking of fentanyl, its precursors, and other related synthetic opioids, including through transnational criminal organizations. As stated in our February 2026 letter, the Department supports the Commission's proposal last cycle that a violation of 21 U.S.C § 2313a be indexed to §2S1.3 because the violation involves financial institutions as a "primary money laundering concern."[42] For a violation of 21 U.S.C. § 2354, we renew our suggestion that its guideline provision be structured similarly to the money laundering guideline at §2S1.1, which applies either the base offense level of the offense underlying the money laundering, or a set range if the underlying offense's base offense level cannot be calculated. Similarly, we recommend that the Commission provide for a determination of the base offense level according to the quantity of drugs, as provided in §2D1.1, if that quantity can be calculated. Because calculating the quantity will be difficult in some international trafficking cases, we recommend setting the same minimum base offense level as §2M5.3 (26) in cases where the quantity cannot reasonably be calculated. We also renew our recommendation that the Commission add a note to ensure that the offense level is not less than 26, so it will be either the greater of the §2D1.1 levels or level 26.

2. §2D1.11

We renew our request from last cycle to add a mechanism to §2D1.11 to address situations in which a precursor substance is scheduled under the Controlled Substances Act but not yet listed in the Chemical Quantity Table at §2D1.11.[43] Last cycle, the Commission included this issue

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[39] *See December 2025 Proposed Amendments* at 215–36; U.S. Sent'g Comm'n, *Proposed Amendment to the Sentencing Guidelines* 6–14 (Apr. 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202604_fr_proposed-amdts.pdf#page=6.

[40] 28 U.S.C. § 994(o).

[41] Pub. L. 118–50, 138 Stat. 934 (2024).

[42] February 2026 DOJ Letter at 64; *December 2025 Proposed Amendments* at 242; 21 U.S.C. § 2313a.

[43] July 2025 DOJ Letter at 8.

among its policy priorities,[44] but ultimately did not publish any amendment on the issue for public comment. The Commission should publish an amendment for comment this cycle to provide clear guidance for litigants and courts on the appropriate calculation under the guidelines for prosecutions involving these substances.

In its current form, §2D1.11 fails to reflect the shift in modern drug trafficking toward fentanyl and other synthetic opioids manufactured in labs using precursor chemicals.[45] Enforcement efforts have resulted in temporary and permanent scheduling of substances at a rate that often outpaces guideline amendments, particularly with respect to synthetic drugs and their precursors. Currently, the guidelines have limited mechanisms to account for sentencing of offenses involving chemicals not listed in the guidelines and used to synthesize dangerous and potent synthetic drugs—with the same potential harm. The table in §2D1.11 has not been amended in almost ten years and should be now to respond to this evolving area of concern.[46] Adopting a mechanism that could be used for any substance, such as a theoretical yield calculator, would reduce the litigation burden on parties and courts when these cases arise. We continue to favor the more predictable approach of a theoretical yield calculator, which would allow litigants and courts to determine the quantity of a controlled substance that could reasonably be produced from a given amount of a precursor, instead of importing the resource-intensive comparison process laid out in application note 6 to §2D1.1. In addition, or as an alternative, adding currently scheduled precursor chemicals to §2D1.11(e) would provide immediate clarity and reduce speculative plea negotiations. We think these changes would facilitate more predictable and consistent assessments of sentencing exposure and reduce the litigation burden on courts and parties by obviating the need for a costly battle of experts to find the most analogous substance under an application note 6 analysis, while also measuring the potential potency and harm of synthetic substances.

B. Sexual Exploitation

1. CSAM Guidelines Changes

While the Commission has dedicated extensive attention over the years to offenses involving child sexual abuse material (CSAM) (referred to in federal law as "child pornography"),[47] such crimes unfortunately remain prevalent and continue to rise. In the last few years, the Department has seen an alarming increase in cases involving financially motivated sextortion, in which offenders threaten to distribute child sexual abuse material unless the victim

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[44] U.S. Sent'g Comm'n, *Final Priorities for the 2025–2026 Amendment Cycle* 3 (Aug. 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20250806_fr_final-priorities.pdf#page=3.

[45] *See* U.S. Comm'n on Combating Synthetic Opioid Trafficking, *Final Report,* 19–20 (Feb. 2022), https://www.rand.org/content/dam/rand/pubs/external_publications/EP60000/EP68838/RAND_EP68838.pdf#page=39; U.S. Drug Enf't Admin., *Drug Fact Sheet: Synthetic Opioids* (Apr. 2020), https://www.dea.gov/sites/default/files/2020-06/Synthetic%20Opioids-2020.pdf.

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

[47] U.S. Dep't of Just., *Child Sexual Abuse Material* (June 2023), https://www.justice.gov/d9/2023-06/child_sexual_abuse_material_2.pdf.

pays a ransom,[48] and sadistic online exploitation, which involves global networks of offenders who target vulnerable children and viciously manipulate and coerce them into recording or livestreaming themselves engaging in and committing injurious, degrading, or sexually violent acts against themselves, other children, and pets.[49] In response to these emerging and alarming threats, we urge the Commission to enact enhancements and cross references in §§2G2.1 and 2G2.2 to reflect the aggravated conduct associated with these newer types of devastating harms.[50]

a. Offenses Leading to Suicide of Child Victims

The Department urges the Commission to expand the existing murder cross reference in §2G2.1, to add an attempted murder cross reference, and to add similar cross references in §2G2.2 to account for situations in which a victim dies by suicide as a direct and proximate result of the offense, in which the defendant encourages or instructs a victim to kill herself or himself, or in which the defendant recklessly disregards a risk that the victim will kill or attempt to kill herself or himself. According to data from the National Center for Missing and Exploited Children, more than three dozen teenage boys in the United States have died by suicide as a direct result of having been victimized by financially motivated sextortion (FMS); some of those children died by suicide within an hour of initial contact with the offender.[51] Sadistic online exploitation defendants have also attempted to cause children to kill themselves.[52] Such suicides occur in cases currently covered by §2G2.1 (*e.g.*, production under 18 U.S.C. § 2251(a)) and by §2G2.2 (*e.g.*, distribution under 18 U.S.C. § 2252A or production under 18 U.S.C. § 1466A). Currently, §2G2.1 accounts only for offenses involving the murder of victims, which is too narrow to capture all of these tragic and terrifying cases. In the Department's view, encouraging a child to die by suicide in the circumstances of the federal child exploitation statutes covered by §§2G2.1 and 2G2.2 is tantamount to soliciting murder and should be treated like murder.

b. Sextortion Via Threats to Distribute CSAM

We also recommend adding a specific offense characteristic for sextortion and other threats to distribute CSAM. Currently, §§2G2.1 and 2G2.2 fail to account for threats to distribute CSAM, which can have devastating—even deadly—consequences. In cases involving financially

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

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

[50] July 2025 DOJ Letter at 10–13.

[51] National Center for Missing & Exploited Children, *2025 Cyber Tipline Report*, https://ncmec.org/gethelpnow/cybertipline/cybertiplinedata; Julie Jargon, *'Sextortion' Scams Involving Apple Messages Ended in Tragedy for These Boys*, Wall St. J. (June 7, 2025 at 09:00 ET), https://www.wsj.com/tech/personal-tech/sextortion-scam-teens-apple-imessage-app-159e82a8?reflink=desktopwebshare_permalink.

[52] Shawn Boburg, Pranshu Verma & Chris Dehghanpoor, *On Popular Platforms, Predatory Groups Coerce Children into Self-harm*, Wash. Post (Mar. 13, 2024), https://www.washingtonpost.com/investigations/interactive/2024/764-predator-discord-telegram/; Shawn Boburg & Chris Dehghanpoor, *On Social Media, a Bullied Teen Found Fame Among Child Predators Worldwide*, Wash. Post (Sep. 9, 2024), https://www.washingtonpost.com/investigations/2024/09/09/social-media-bullied-teen-found-fame-among-child-predators-worldwide/.

motivated sextortion and sadistic online exploitation in particular, the threat to distribute CSAM is often the leverage that the offenders use to coerce victims to provide more sexually explicit images, send money, or engage in harmful conduct.[53] The Department cannot overstate the fear and panic that victims feel when threatened in this way—as illustrated in part by the more-than-three-dozen FMS-related suicides referenced above—and we urge the Commission to adequately account for the substantial harm caused by such threats by adding this enhancement.

2. Sex Trafficking Conspiracy

The Department requests that the Commission clarify which base offense level applies to defendants who engage in sex trafficking conspiracies under 18 U.S.C. § 1594(c). For substantive sex-trafficking convictions under 18 U.S.C. § 1591, §§2G1.1 and 2G1.3 apply, yielding a base offense level of 34 for § 1591(b)(1) convictions and 30 for § 1591(b)(2) convictions. Because § 1594 is not listed in the guidelines, §2X1.1 applies. Under §2X1.1(a), the base offense level is determined by the offense level for the substantive offense. A circuit split has developed regarding which base offense level applies to sex trafficking conspiracy convictions under § 1594(c). The Third, Eighth, and Eleventh Circuits have held that the same base offense levels that apply to the substantive offense of § 1591(b)(1) or (b)(2) *i.e.*, 30 or 34,[54] also apply to conspiracy.[55] The Ninth Circuit, by contrast, has held that the lower base offense level of 14 under §2G1.1(a)(2) applies to sex trafficking conspiracy offenses because the fifteen-year mandatory minimum imposed for substantive § 1591(b)(1) convictions is not applied to conspiracy offenses under § 1594(c).[56]

The Ninth Circuit's outlier approach is inconsistent with other statutes. For example, a defendant who conspires to commit labor trafficking under §§ 1589 or 1580—offenses with far lower statutory penalties—faces a higher base offense level of 22.[57] Additionally, the lower base offense level resulting from the Ninth Circuit's decision does not account for the fact that § 1594(c) carries a maximum sentence of life imprisonment,[58] the horrific toll sex trafficking inflicts on

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[53] *See., e.g.*, U.S. Dep't of Just., *Sextortion, Crowdsourcing, Enticement, and Coercion* (2023), https://www.justice.gov/d9/2023-06/sextortion_crowdsourcing_enticement_and_coercion_2.pdf.

[54] *See* U.S.S.G. §§2G1.1(a) and 2G1.3(a).

[55] *See United States v. Valdez*, No. 19-12522, 2021 WL 3478402, at *6 (11th Cir. Aug. 9, 2021); *United States v. Carter*, 960 F.3d 1007, 1014 (8th Cir. May 29, 2020); *United States v. Sims*, 957 F.3d 362, 363-65 (3d Cir. 2020).

[56] *United States v. Wei Lin*, 841 F.3d 823, 827 (9th Cir. 2016) (finding that "[the [Sentencing] Commission likely intended §2G1.1(a)(1) to apply only when the defendant received a fifteen-year mandatory minimum sentence, because the higher base offense level in §2G1.1(a)(1) was created in direct response to Congress's creation of the fifteen-year mandatory minimum," and thus the lower base offense level applies to conspiracy because only substantive offenses are subject to that minimum). Additionally, in *United States v. Pennington*, 78 F.4th 955, 965–69 (6th Cir. 2023), the Sixth Circuit found that the district court should have applied a base offense level of 14 and not 34 under U.S.S.G. §2G1.1(a) to a defendant who had been convicted of witness tampering under 18 U.S.C. § 1512(b)(1) for conduct committed while charged with sex trafficking conspiracy under 18 U.S.C. § 1594(c) because the defendant was not convicted of 18 U.S.C. § 1594(c).

[57] *Sims*, 957 F.3d at 364 (finding, among other "absurd" results, that "a defendant convicted of a sex trafficking conspiracy in the Ninth Circuit will receive a base offense level of just 14 while a defendant convicted of a labor trafficking conspiracy will still receive a base offense level of 22").

[58] 18 U.S.C. § 1594(c)

victims,[59] or the overall need for to deter these serious offenses. The Department urges the Commission to resolve the circuit split in accordance with the majority approach by adding § 1594(c) to the higher base offense levels in §§2G1.1(a)(1) and 2G1.3(a)(1).

3. TAKE IT DOWN Act Incorporation

The Department recommends incorporating the Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks Act ("TAKE IT DOWN Act") into the Guidelines.[60] The TAKE IT DOWN Act created new offenses relating to actual or threatened publication of nonconsensual, intimate visual depictions and digital forgeries involving both adults and minors. We recommend creating a new guideline to address these offenses because, as observed last cycle,[61] TAKE IT DOWN Act offenses do not fit neatly into any existing guideline.

As the Commission noted last cycle, Appendix A references other offenses under 47 U.S.C. § 223 to §2A6.1.[62] Although we initially suggested referencing TAKE IT DOWN's new publication offenses to §2G3.1 last cycle, we now believe those provisions are a poor fit. For starters, TAKE IT DOWN Act convictions might not involve material that is legally obscene under *Miller v. California*,[63] and the Act does not apply to material that constitutes "child pornography" as defined in 18 U.S.C. § 2256(8), or to obscene visual depictions of children engaged in sexually explicit conduct as set forth in 18 U.S.C. § 1466A.[64] The guidelines applicable to these offenses (*e.g.*, §§2G2.1, 2G2.2) therefore cover material that will not likely be at issue in a TAKE IT DOWN Act prosecution; inserting TAKE IT DOWN Act offenses into those guidelines risks inviting confusion and dilution of the provisions there. Additionally, the new offenses created under the TAKE IT DOWN Act raise policy questions that require careful study, such as distinctions between offenses involving adults and those involving children, offenses involving authentic imagery and those involving forged imagery, and offenses involving completed publication and those involving threatened publication, as well as degrees of harm caused depending on the types of depictions and the number or identity of recipients.

With these nuances in mind, we now think that a new guideline would best capture the nature of the harms at issue in TAKE IT DOWN Act offenses and set appropriate base offense levels commensurate with the statutory penalty ranges. We appreciate the Commission's continued

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[59] *See* Wendy Macias-Konstantopoulos, *Human Trafficking: The Role of Medicine in Interrupting the Cycle of Abuse and Violence*, 165 Annals of Internal Med. 582, 583 (2016); E.K. Hopper & L.D. Gonzelez, *A Comparison of Psychological Symptoms in Survivors of Sex and Labor Trafficking*, 44 Behavioral Med. 177–88 (2018); Elizabeth K. Hopper et al., *STARS Experiential Group Intervention: A Complex Trauma Treatment Approach for Survivors of Human Trafficking*, 15 J. of Evidence-Informed Social Work 215, 222 (2018).

[60] Pub. L. 119–12, 139 Stat. 55 (2025).

[61] February 2026 DOJ Letter at 64.

[62] December 2025 Proposed Amendments at 264.

[63] 413 U.S. 15, 24 (1973) ("The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest … (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

[64] *See* 47 U.S.C. §§ 223(h)(2)(C)(v), (h)(3)(C)(v).

engagement in this area and would welcome the opportunity to work with the Commission and to lay the groundwork for addressing related legislation currently under consideration by Congress.[65]

C. Incorporate New Offense of Animal Crushing Created by Preventing Animal Cruelty and Torture (PACT) Act of 2019

In our September 2022 and July 2024 annual letters,[66] the Department recommended creating a new guideline for animal crushing offenses prosecuted under the 2019 Preventing Animal Cruelty and Torture (PACT) Act,[67] which created a new offense under 18 U.S.C. § 48(a)(1) for animal crushing. Before the PACT Act, 18 U.S.C. § 48 criminalized the creation and distribution of animal crushing videos but did not separately criminalize animal crushing. We renew our requests to add (1) a new higher base offense level under §2G3.1 for offenses involving animal crushing as defined under 18 U.S.C. § 48(a)(1), and (2) a specific offense characteristic for when the defendant is convicted of a 18 U.S.C. § 48 violation and the offense involved conduct that, if committed against a person, would violate 18 U.S.C. §§ 2241 or 2242.

Although § 48 is already referenced to §2G1.3 under the Statutory Index (Appendix A), §2G1.3 is intended to address the *creation and distribution* of obscene material,[68] not the illegal act of crushing animals. Animal crushing convictions since 2019 demonstrate that the underlying offense conduct has become ever more heinous, sadistic, and cruel. For example, an increasing number of animal crushing cases in recent years have involved sophisticated conspiracies to pay minors in foreign countries to capture and torture monkeys for bespoke videos.[69] Recognizing this trend, legislation has been introduced to increase the maximum penalty for first time animal crushing offenses to 120 months' imprisonment and 180 months' imprisonment for subsequent offenses.[70]

In the meantime, courts have regularly imposed sentences at or above the high end of the

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[65] *See* James T. Wood Act, H.R. 6719, 119th Cong. (2026).

[66] September 2022 DOJ Letter at 8; July 2024 DOJ Letter 21–22.

[67] Pub. L. 116-72, 133 Stat. 1151 (2019).

[68] U.S.S.G. §2G3.1, comment. (backg'd.) ("Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain.").

[69] *See, e.g.*, *United States v. Dryden*, No. 1:24-CR-66, 2026 WL 395213, at *7 (observing that the defendant specifically asked the minor hired to produce the animal crushing content to inflict severe psychological and physical torment on a juvenile monkey, including cutting off a leg and burning and salting the wound, and requested that the videos be long and include older monkeys); Gov't Sentencing Mem., *United States v. Berndt*, No. 2:25-CR-52 (S.D. Ohio Dec. 8, 2025), at 4 (citing messages sent by the defendant that expressed appreciation for the "awesome," drawn-out burning inflicted on a juvenile monkey, explained his and others' desire to see the tortured monkeys "hobbled… miserable… suffering… over a period of time …. maimed and miserable," and communicated dissatisfaction with content in which the minor "put an end to it" by killing the monkeys too soon when the defendant wanted them to "suffer longer"); Gov't Sentencing Mem., *United States v. Morelli*, No. 1:24-CR-066 (S.D. Ohio Sep. 2, 2025), at 9 (quoting messages in which the defendant asked the coordinator to request infliction of "more psychological damage before [the juvenile monkey] is limp," which prompted multiple requests of torture by first being kind to the monkeys in question before initiating violence, including bottle-feeding the juvenile before "whip[ping] it for no reason").

[70] Protect Our Pets Act, H.R. 8480, 119th Cong. (2026) (amending 18 U.S.C. § 48 to increase penalties for violations of the section to a maximum of ten years for first offenses and fifteen years for subsequent offenses).

guideline range in this class of cases.[71] In so doing, courts have described the guidelines as "woefully insufficient"[72] and noted that the current guidelines fail to produce "the type of sanction that adequately deters this level of extreme conduct."[73] Because §2G3.1 has not been amended in almost ten years, we recommend revisions to better align the guideline with the seven year statutory maximum and the acts of torture involved.

D. Terrorism

1. Money Laundering to Facilitate Terrorism

The Department renews our recommendation that the Commission amend §2S1.1(b)(1) and §2S1.3(b) to provide for enhanced penalties for money laundering and violations of 18 U.S.C. § 1960 (unlicensed money transmitting business) done to facilitate terrorism offenses.[74] Prosecution and financial disruption of transnational criminal organizations (TCOs), foreign terrorist organizations (FTOs), and specially designated global terrorists (SDGTs) are Department priorities.[75] These organizations fund their activities through money laundering and unlicensed money transmitting businesses, among other means. While § 1960 criminalizes operating a money-transmitting business that is unlicensed or used to transmit funds derived from or intended to be used for unlawful activity, the guidelines for money laundering and § 1960 violations lack specific offense characteristics for situations in which the laundering activity or unlicensed money transmitting business is used to facilitate terrorism offenses. Adding the offense of a federal crime

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[71] *See* Sent. Tr. at 25, 56, *United States v. Devilbiss*, No. 3:23-CR-153 (M.D. Fla. Jun. 18, 2024) (sentencing the defendant to the top end of the 41–51-month range applicable); Sent. Tr. at 35, *United States v. Vanwoert*, No. 3:22-CR-618 (May 30, 2024) (sentencing the defendant to the top end of the stipulated range for the grouped animal crushing and child pornography offenses and expressing the court's desire to give the defendant "all I could hit [him] with with the animal crush"); Sent. Tr. at 34, 36–37, *United States v. Noble*, No. 6:23-CR-00181-MC (D. Or. Apr. 24, 2024) (upward variance from the calculated Guidelines range based on the extreme nature of the offensive conduct); Sent. Tr. at 45, 50, *United States v. Bedra*, No. 2:24-CR-48 (S.D. Ohio Oct. 10, 2024) (upward variance from the calculated Guidelines range based on aggravating factors unaccounted for by the Guidelines, including level of organization and duration of the offensive conduct). *Compare also* Defendant's Sentencing Memorandum at 4, *United States v. Morelli*, No. 1:24-CR-66 (S.D. Ohio Sep. 2, 2025) (noting the presentencing report calculated a range of 27-33 months), *with* Judgment, *United States v. Morelli*, No. 1:24-CR-66 (S.D. Ohio Sep. 30, 2025) (sentencing the defendant to 48 months, which is an upward variance).

[72] *See, e.g.*, Sent. Tr. at 33, *United States v. Vanwoert*, No. 3:22-CR-618 (N.D. Ohio May 30, 2024) ("I would make the right record and explain why the guidelines are woefully insufficient for these crush videos and contemplating what you did here because I don't think the guidelines … adequately address this.").

[73] Sent. Tr. at 35–36, *United States v. Noble*, No. 6:23-CR-00181 (D. Or. Apr. 24, 2024) (imposing 48 months' imprisonment in a monkey torture case with a guideline range of 21-27 months because "'[t]he guideline range here simply does not produce the type of sanction that adequately deters this level of extreme conduct. And I don't think this level of conduct was contemplated by the Sentencing Guideline Commission when they formed the advisory guideline range for this particular offense").

[74] July 2025 DOJ Letter at 15–16.

[75] *See, e.g.,* Memorandum from the Attorney General, *Total Elimination of Cartels and Transnational Criminal Organizations* (Feb. 5, 2025), https://www.justice.gov/ag/media/1388546/dl (directing the prioritization of "investigations, prosecutions, and asset forfeiture actions that target activities of Cartels and TCOs"); National Security Presidential Memorandum on Imposing Maximum Pressure on the Government of the Islamic Republic of Iran, Denying Iran All Paths to a Nuclear Weapon, and Countering Iran's Malign Influence (Feb. 4, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/national-security-presidential-memorandum-nspm-2/ (ordering sanctions and financial countermeasures to prevent access to revenue for Iran, the Islamic Revolutionary Guard Corps (a designated FTO), and all proxies).

of terrorism as defined in 18 U.S.C. § 2332b(g)(5) to the §2S1.1(b)(1) enumerated list of offenses receiving a six-level enhancement for violations of 18 U.S.C. §§ 1956, 1957, or 1960(b)(1)(C), and adding a two-level enhancement to §2S1.3(b) when transmitted funds were related to an offense involving a federal crime of terrorism for violations of 18 U.S.C. § 1960(b)(1)(A) or (B), would increase the effectiveness of these sections and improve deterrence of money transmitting business misuse. Together, these enhancements would strengthen the ability to use §§ 1956, 1957, and 1960 as tools to prosecute money laundering and unlicensed money transmitting businesses connected to terrorism offenses, and they would allow § 1960 to create a further deterrent effect on the misuse of money transmitting businesses.

2. Attacks on Critical Infrastructure

Sophisticated military and intelligence services, state sponsors of terrorism and their proxies, as well as other malign foreign actors hostile to the United States, present a threat to United States critical infrastructure, national security, and public health and safety. State-sponsored actors often target critical infrastructure from perceived safe harbors abroad, through the Internet or other means,[76] making these cases especially hard to detect, deter, and prosecute. The intent of these actors is to exploit vulnerabilities in critical infrastructure—such as public water supplies, power grids, and emergency response systems—and cause significant harm immediately or hold the infrastructure at risk until a time of conflict.[77] Indeed, cyber criminals and state-sponsored hackers increasingly see U.S. water systems as a target for their malicious cyber activities, as recently highlighted in a December 2025 Joint Cybersecurity Advisory.[78]

The gravity of these crimes warrants guideline ranges that provide adequate deterrence and punishment. The Department therefore recommends that the Commission add a provision to §3A1.4 extending the enhancement to include defendants working on behalf of a foreign state, instrumentality, terrorist organization, or agent who were convicted under 18 U.S.C. §§ 1028, 1029, or 1030, and whose offense included unauthorized access or damage to computer systems used to maintain or operate critical infrastructure (as defined at 42 U.S.C. § 5195c(e)). The existing enhancements do not apply to certain offenses regularly charged under these statutes against actors

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[76] Press Release, U.S. Dep't of Just., *U.S. Government Disrupts Botnet People's Republic of China Used to Conceal Hacking of Critical Infrastructure* (Jan. 31, 2024), https://www.justice.gov/archives/opa/pr/us-government-disrupts-botnet-peoples-republic-china-used-conceal-hacking-critical (hackers sponsored by the People's Republic of China (PRC) infected privately owned small office/home office routers with malware to conceal the PRC origins of subsequent attacks on U.S. critical infrastructure).

[77] Advisory, Cybersecurity & Infrastructure Security Agency, *PRC State-Sponsored Actors Compromise and Maintain Persistent Access to U.S. Critical Infrastructure* (Feb. 7, 2024), https://www.cisa.gov/news-events/cybersecurity-advisories/aa24-038a (detailing the PRC-sponsored attacks on IT networks connected to critical infrastructure and the ongoing security threats posed by such actors) ("February 2024 CISA Advisory"); Press Release, U.S. Dep't of Just., *Court-Authorized Operation Disrupts Worldwide Botnet Used by People's Republic of China State-Sponsored Hackers* (Sep. 18, 2024), https://www.justice.gov/archives/opa/pr/court-authorized-operation-disrupts-worldwide-botnet-used-peoples-republic-china-state (hackers sponsored by the PRC infected over 200,000 consumer devices in the U.S. and around the world with botnet malware, using the botnet to disguise attacks on infrastructure as routine internet traffic).

[78] Advisory, Cybersecurity & Infrastructure Security Agency, *Pro-Russia Hacktivists Conduct Opportunistic Attacks Against US and Global Critical Infrastructure* (Dec. 9, 2025), https://www.cisa.gov/sites/default/files/2025-12/aa25-343a-pro-russia-hacktivists-conduct-attacks.pdf; *see also* February 2024 CISA Advisory.

threatening national security (*e.g.*, state-sponsored hackers) or exploiting vulnerabilities in critical infrastructure by accessing it and putting it at risk. Accordingly, the existing national security-related guidelines found in Chapter Two, Part M of the Guidelines Manual simply do not address the full ambit of threats to national security, economic security, and public health and safety. Furthermore, many current guidelines calculations for offenses that fall within this gap are substantially driven by the loss table in §2B1.1(b)(1) or §2B1.1(b)(19), which fails to consider significant and difficult-to-measure non-pecuniary harms to national security posed by offenses conducted on behalf of nation states or directed against U.S. critical infrastructure. This change would appropriately deter and account for the aggravating circumstances connected to these offenses, including the risk of death or severe injuries, substantial disruption to the public and governmental functions, and ongoing poisoning of the public water system.

3. Attempts and Conspiracies to Commit Material Support for Terrorism

We also renew the suggestion previously raised in our July 2017 letter to amend §2X1.1(d) to include 18 U.S.C. § 2339B as one of the terrorism-related offenses for which the three-level reduction at §2X1.1(b) for attempts and conspiracies is inappropriate.[79] Conspiracy and attempt to commit material support under § 2339A are largely exempt from this reduction, and, for purposes of the statutory maximum sentences available under both §§ 2339A and 2339B, Congress treated conspiracy and attempt to commit material support the same as the respective substantive offenses. The Department has no reason to believe the Commission intended to authorize lesser punishments for conspiracies and attempts under § 2339B than under § 2339A or other terrorism-related statutes. This clarifying amendment should be adopted to eliminate any argument that § 2339B conspiracy and attempt convictions should be subject to a three-level reduction under §2Xl.1. The potential for widespread harm as a result of terrorist attacks warrants treating conspiracy and attempted material support convictions as seriously as convictions for completed material support offenses, whether under §§ 2339A or 2339B.

E. Adjustments to the §4C1.1 Exclusions

Although the Department appreciates the Commission's work on zero-point offender reductions in recent years, we continue to have concerns about the breadth of §4C1.1. We therefore renew our recommendation that the Commission revisit the exceptions to ensure that the reduction is carefully calibrated to benefit only those offenders to whom the underlying rationale for adopting the guideline applies.[80] When appropriate specific offense characteristics or Chapter Three adjustments are later negated by the zero-point offender reduction, the results highlight the need for greater transparency and accuracy in the ranges dictated by the Guidelines. We therefore ask the Commission to add exclusions for offenders who received adjustments under §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill) or §3C1.1 (Obstructing or Impeding the Administration of Justice), and offenders who have significant ties to cartels, transnational criminal organizations, or human smuggling organizations. We also request revision of the existing

[79] Letter from Kenneth Blanco, Acting Asst. Att'y Gen., Crim. Div., and Zachary Bolitho, Counsel to Deputy Att'y Gen., U.S. Dep't of Just., to Hon. William H. Pryor Jr., Acting Chair, U.S. Sent'g Comm'n 11–12 (July 31, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/DOJ.pdf#page=11.

[80] July 2025 DOJ Letter at 18–19.

exclusion in §4C1.1(a)(2) for offenders who received the terrorism adjustment under §3A1.4 to include defendants whose instant offenses of conviction are covered by Chapter 2, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).

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

Sincerely,

Scott Meisler

Scott Meisler, Deputy Chief, Appellate Section,
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U.S. Department of Justice
Ex Officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
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FEDERAL DEFENDER
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July 27, 2026

Honorable Carlton W. Reeves
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Re: Proposed Priorities for the 2026-2027 Amendment Cycle

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide comments on the Commission's 2026-27 proposed priorities.[1] In light of the 40th anniversary of the *Guidelines Manual* and the 30th anniversary of the Commission's Rules of Practice and Procedure, the Commission aims to reexamine the guidelines and federal sentencing practices and to review its internal operating procedures with an eye toward greater public transparency and public involvement.[2] We welcome these laudatory goals.

Because the Commission has set its proposed priorities largely around process (as opposed to specific guideline changes), this letter, too, focuses primarily on public engagement, transparency, and other process concerns. Should the Commission ultimately decide to take up substantive guidelines issues this amendment cycle, Defenders encourage the Commission to revisit the suggested guideline reforms in our May 2026 Annual Letter.[3]

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[1] Proposed Priorities for 2026-2027 Amendment Cycle (June 10, 2026).

[2] *See id.* at Proposed Priorities 1 & 2.

[3] *See* Defenders' Annual Letter to the USSC at 1-15 (May 21, 2026).

I. The Commission should correct a longstanding imbalance of viewpoints by adding a defender representative during this amendment cycle.

The Commission's membership structure has long been criticized for including a DOJ *ex officio* member without a comparable role for Federal Defenders.[4] For many years, Defenders have urged the Commission to support legislation to formally end this imbalance by adding a Defender *ex officio*. For nearly as long, we have encouraged the Commission to use its existing authority to at least reduce the imbalance by inviting a defender representative to participate in the Commission's work. Indeed, adding a defender representative would bring the Commission in line with the Judicial Conference's practices: Defenders are represented on each of the Conference's three criminal rules-related committees,[5] and the Conference's Committee on Criminal Law includes a non-voting Defender liaison.

In this regard, Defenders are heartened to see themes of public engagement, transparency, and the structure of stakeholder involvement in the Commission's first two proposed priorities. With this pair of proposed priorities, the Commission can vocally support pending legislation to add a Defender *ex officio*,[6] and can add a defender representative in the interim (or at least seek public input about whether to do so).

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[4] *See, e.g.,* Rachel E. Barkow, *The Evolving Role of the United States Sentencing Commission*, 33 Fed. Sent. Rep. 3, 4, 9 (2020); Mark Osler & Hon. Mark. W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion,* 7 DePaul J. for Soc. Just. 117, 165-66 (2014); Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol'y Rev. 93, 109 (1999); *see also* Hon. William K. Sessions III, *At the Crossroads of the Three Branches: the U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J. L. & Pol. 305, 322 (2011); Hon. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Plea Sentence Bargains*, 36 Hofstra L. Rev. 639, 646 (2008).

[5] Judicial Conference of the United States, List of Committee Members PDF, June 1, 2026 – Sept. 30, 2026 at 5, 10, 12 (listing Federal Public and Community Defenders as voting members of advisory committees on the rules of appellate procedure, criminal procedure, and evidence).

[6] Sentencing Commission Improvements Act, S. 4136, 119th Cong. (2026) (adding a Federal Public or Community Defender as an *ex officio* nonvoting member

Defenders have spoken and written at length about how the Commission can, and why it should, add a defender representative, and we urge you to revisit those letters.[7] Importantly, nothing in the SRA restricts Commission members from granting defenders access to non-public meetings and materials. Quite the opposite, the SRA expressly empowers the Commission to create its own rules of practice and procedure.[8] The Commission has rightly understood that power as allowing it to shape who it meets with,[9] what materials it considers,[10] and which internal materials become available to others.[11] Adding a defender representative simply

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of the U.S. Sentencing Commission). Of note, this legislation would align the Commission with essentially every state sentencing commission. Among the 23 states with active sentencing commissions, 14 specifically mandate a public defender representative, including Connecticut, Delaware, D.C., Illinois, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, Ohio, and Virginia. Another 8 states—Alabama, Arkansas, New York, North Carolina, Oregon, Pennsylvania, Utah, and Washington—mandate a criminal defense attorney representative, whether from the public or private defense bars. The only active sentencing commission without a mandatory defense presence is West Virginia. However, West Virginia's Sentencing Commission is a subcommittee of the broader Governor's Committee on Crime, Delinquency, and Correction (*see* W.Va. Code § 15-9-1, 15-9-4), which is required to include a public defender. *Id.* § 15-9-1(b)(11).

[7] In addition to letters to the Commission outside of the public comment process dated August 29, 2024, August 11, 2023, and as long ago as April 13, 2007, Defenders have regularly encouraged the Commission to create a Defender representative and support a statutory *ex officio* in numerous amendment cycle comments. *See, e.g.,* Defenders' 2025 Annual Letter to the USSC at 12-14 (May 16, 2025); Defenders' 2022 Annual Letter to the USSC at 27-28 (Sep. 14, 2022); Defenders' Comment on the USSC's 2012-2013 Proposed Priorities at 36-38 (July 23, 2012).

[8] *See* 28 U.S.C. § 995(a)(1) (empowering the Commission to "establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out" its duties). *Accord generally* USSC, *Rules of Practice & Procedure* (Aug. 18, 2016) (relying upon 28 U.S.C. § 995(a)(1) as authority for same).

[9] *See, e.g.,* Commission Rule 3.3(3) (authorizing nonpublic commission meetings); *cf.* Rule 4.3 (establishing the Commission's own limitation on *ex parte* communications).

[10] *See, e.g.,* Commission Rule 5.3 (directing Staff Director to prepare "relevant data, reports, and other information for consideration by the Commission").

[11] *See id.* (authorizing Staff Director to make Rule 5.3 materials publicly available); *see also* Commission Rule 6.2 (identifying a discrete set of materials

involves bringing the Defender program more formally within the reach of these rules.

And doing so makes sense: a defender representative would assist the Commission in preparing amendments and other publications by providing a "distinct and essential perspective,"[12] which is sometimes missing at crucial stages in your process. Sentencings are adversarial proceedings, often involving significant debate over how to interpret guideline provisions and whether to abide by their recommendations. Without Defender feedback, Commissioners risk overlooking key details of these debates, which could impact implementation.

II. As the Commission considers the state of the Federal Guidelines system at this pivotal 40-year mark, it should engage with a broad and diverse array of stakeholders.

The Commission proposes to evaluate the federal guidelines system considering the statutory purposes of sentencing, relevant legal developments, and its mission as set forth in the SRA. It identifies a variety of means to do so, including "regional public hearings, symposiums, roundtable discussions, conferences, and other tools . . . ."[13] Defenders encourage this work and offer additional ideas to ensure its success.

Defenders commend the Commission for engaging meaningfully with impacted people over the last several amendment cycles, through its impacted witness panels and the creation of its Sentence Impact Advisory Group. But, for a more complete and current picture of how its sentencing policies impact people, the Commission should hear from *currently* incarcerated people of varying custody levels and in diverse geographic regions. Thus, in addition to holding regional hearings, roundtables,

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always available for public review); USSC, *Public Access to Sentencing Commission Documents & Data* (Aug. 2018).

[12] Press Release, Sen. Cory Booker, Booker and Durbin Introduce Legislation Aimed at Increasing Membership within the U.S. Sentencing Commission (Nov. 30, 2021).

[13] 2026-2027 Proposed Priorities at Priority 1.

conferences and the like, we urge the Commission to visit BOP facilities and halfway houses.

During these visits, the Commission should tour BOP facilities (with eyes wide open and a healthy amount of skepticism). Defenders have written extensively about the Commission's statutory obligation to factor prison capacity into its policy decisions.[14] While the public record speaks for itself—depicting a federal prison system that is overcrowded, understaffed, inhumane, and dangerous[15]—it is imperative that Commissioners explore facilities for themselves, while doing their best to avoid an overly curated experience. For instance, Commissioners could ask to see spaces beyond itineraries, to taste the food, to sit in a cell, and to have the door slam closed. It would be useful for Commissioners to experience a sliver of what incarcerated people experience all day, every day, while bearing in mind the comfort that comes from knowing the visits are limited in duration.

Beyond prison visits, the Commission should explore sentencing practices in districts of varying sizes across the country. With 94 judicial districts and hundreds of sentencing judges, "standard" practices are anything but standard. Commissioners should investigate variation in Guideline adherence and other sentencing practices by meeting with attorneys and judges around the country and observing sentencings in geographically and culturally diverse districts (*i.e.*, in large urban areas like New York City, high-volume border districts, and rural small-caseload courtrooms in middle America). At each venue, the Commission should invite certain stakeholders to attend or, at a minimum, publicly memorialize its conversations and observations.

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[14] *See, e.g.*, Defenders' Comment on the USSC's 2025 Proposed Drug Offense Amendments at 8-13 (Mar. 3, 2025) (describing crises within the Bureau of Prisons and the Commission's statutory obligations to avoid overcrowding).

[15] *See, e.g.*, DOJ Office of the Inspector General, Top Management and Performance Challenges Facing the DOJ at 1-6 (2024) (describing widespread staffing shortages, crumbling infrastructure, and contraband as among the many challenges facing the Bureau of Prisons); BOP Press Release, Federal Bureau of Prisons Announces Facility Closures and Operational Changes (July 1, 2026) (discussing closures of 6 lower security facilities "to address decades of deferred maintenance and extreme staffing challenges," meaning fewer facilities will be available for the same or increasing numbers of incarcerated individuals).

Following these road trips, the Commission might augment its research agenda and reports with its newfound insights and consider what, if any, policy changes these insights compel.[16] Defenders would, of course, welcome the opportunity to be involved in this process.

III. The Commission should provide more information to the public.

As its second proposed priority, the Commission may examine its own Rules of Practice and Procedure to determine how it can enhance transparency and public engagement. Defenders encourage the Commission to adopt this priority and amend its rules to create a default policy of widely sharing all materials the Commission considers in preparing its research reports, special coding projects, impact analyses, proposed and final amendments, and other tools and publications.[17] As Defenders have long asked, this includes providing greater transparency in the Commission's data collection and publication processes by releasing the "dynamic" dataset underlying the JSIN tool, refining certain variables in its Individual Datafiles to avoid user confusion, and routinely collecting and publishing data on probation and supervised release revocation proceedings.[18]

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[16] As we advocated in our Annual Letter, the Commission should also update its data and research publications on supervised release and alternatives to incarceration—two topics Commissioners might pay particular attention to as it tours courtrooms. Defenders' 2026 Annual Letter to the USSC at 14-15.

[17] While not the focus of this letter, Defenders have previously urged two other rule changes to improve the guideline amendment process, and we continue to do so. *First*, the Commission should remove language from Rule 4.1A that some advocates and Commissioners have treated as establishing a substantive presumption against making retroactive ameliorative guideline amendments. *See* Defenders' Comment on the USSC's Criteria for Selecting Guideline Amendments Covered by §1B1.10 at 14-18 (Apr. 18, 2025) (listing reasons why there should not be a presumption against retroactivity). *Second*, the Commission should codify a routine practice of revising its loss tables to account for inflation. *See* Defenders' Comment on the USSC's 2026 Proposed Amendment on Inflationary Adjustments at 6 (Feb. 10, 2026).

[18] *See, e.g.*, Defenders' Comment on the USSC's 2025-2026 Proposed Priorities at 28-30 (July 18, 2025); Letter of Heather Williams & Tina Woehr to Sean Marlaire Re: Revised Statement of Reasons Form (July 17, 2025) (urging PPSO Criminal Law Policy Division to work with the Sentencing Commission to ensure Statement of Reasons form captures more information regarding judicial decisions on sentences). To the extent that further public access requires revisiting the Commission's

Compared with most other agencies, the Commission has an unusual amount of discretion over what it shares with the public. While the Commission must adhere to the Administrative Procedure Act's notice and comment rulemaking requirements,[19] it is not subject to the APA's lawsuit provisions or the Freedom of Information Act.[20]

But the Commission should not allow what it *must* share to limit what it *does* share. As an example, compared to most government agencies, the Commission creates a paltry public record of its decisions. Significantly, and unlike other agencies, the Commission's record provides little if any insight into the Commission's intentions and resolutions of disputed issues. It explains its proposed amendments but often does so by referring to others' contentions instead of the Commission's own interests.[21] The Commission releases some data presentations, but not for every amendment and with much of its underlying data unavailable for exploration.

The Commission holds hearings on many, but not all, amendments. And the hearings on each topic are relatively abbreviated, typically consisting of brief panels that include a standard set of participants. Likewise, those panels are not optimal for a fruitful back-and-forth discussion among Commissioners and participants. Rather, Commissioners question panelists, who must think on their feet, and panelists do not always have the opportunity to respond to one another (much less collaborate with one another). The Commission votes in public, but typically only on amendments it adopts. It only rarely explains its decisions, which sometimes include major changes from the originally proposed amendments. And while the

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Memorandum of Understanding with the Administrative Office of the U.S. Courts, *see* USSC, *Public Access to Sentencing Commission Documents & Data* at 6-7 (2018), Defenders encourage it to do so. *See, e.g.*, Defenders' Comment on the USSC's 2024-2025 Proposed Priorities at 16-17 & n. 42 (May 15, 2024) (asking Commission to revisit its 1988 data-sharing agreement with the AO).

[19] 28 U.S.C. § 994(x).

[20] *See generally* § 991 *et seq.*

[21] *See, e.g.*, 2026 Proposed Guidelines Amendment, Career Offender at Synopsis (Jan. 30, 2026) (detailing comments and criticism regarding Career Offender received over the years without expressing Commission's opinion about the same).

Commission produces reasons for the amendments, those explanations often pale in comparison to other agencies' rulemaking justifications.[22]

This record falls far short of what other rulemaking agencies regularly produce. In contrast to the Commission, an ordinary agency's administrative record consists of "all materials that might have influenced the agency's decision."[23] This means an administrative record will usually "include all documents and materials that the agency directly or indirectly considered . . . ."[24] Though subject to limitations like the deliberative process and attorney-client privileges, this requirement is expansive. Administrative agencies regularly disclose materials far beyond the Commission's ordinary record, including internal memoranda and documents considered and relied upon by agency subordinates who provided recommendations on decision-making.[25]

This lack of access to, and transparency in, the Commission's process really matters. The Commission's policies directly shape the lives and liberty of tens of thousands of individuals sentenced for federal crimes every year and impact those individuals' families and broader communities. Public confidence in our criminal legal system is crucial to its efficacy, and the Commission can increase public confidence in our federal sentencing system by ensuring the public fully understands its decisions. Thus, the Commission should share with the public as much information as possible, while

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[22] For example, APA-bound agencies often produce hundreds of pages explaining their rulemaking and include direct responses to comments lodged during the notice and comment period. *See, e.g.*, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (providing 217-page explanation and justification for eventually enjoined and rescinded immigration rule).

[23] *See, e.g.*, *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989); *Forest County Potawatomi Community v. United States*, 270 F. Supp. 3d 174, 178 (D.D.C. 2017).

[24] *Forest Cty Potawatomi Community*, 270 F. Supp. 3d at 178.

[25] *See Regents of the Univ. of Cal. v. DHS*, No. C 17-05211, 2017 WL 4642324, at *2 (N.D. Cal. Oct. 17, 2017) (noting an administrative record includes "not only documents that literally passed before the eyes of the final agency decision maker but also documents that were considered and relied upon by subordinates who provided recommendations to the decision-maker" (cleaned up)).

simultaneously aiming to level the playing field between the DOJ (with its much broader access to internal materials) and the rest of the public.[26]

IV. There should be no rush to amend §1B1.13(b)(6).

The Commission proposes as a third priority, "Consideration of any amendments that may be warranted in response to any . . . case law developments." Defenders presume the Commission may be considering amending its reduction-in-sentence policy statement at §1B1.13(b)(6) following the Supreme Court's decision in *Rutherford v. United States*.[27] However, no immediate action is needed. *Rutherford* did not invalidate §1B1.13(b)(6); it simply held that "Congress's nonretroactive change to § 924(c)—considered by itself or in combination with other factors—cannot make a [person] eligible for compassionate release" under 18 U.S.C. § 3582(c)(1)(a) and §1B1.13(b)(6).[28] Lower courts are currently considering whether and how *Rutherford* impacts other types of claims that might be raised under §1B1.13(b)(6). The Commission should let this litigation play out and decide, at a later time, whether and how to respond.[29]

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[26] This is not to say the Commission should prepare a litigation-ready administrative record at every instance, but it should take steps to narrow the wide gulf between the public's access to the Commission's work and that of other administrative bodies. If the Commission is hesitant to expand public disclosures, it should, as a lesser measure, provide more of this information to Defenders and its advisory groups, who are obligated by statute and the Commission's rules to provide input on the Commission's proposed policies. To most thoroughly and effectively do so, these groups must be fully informed.

[27] 146 S. Ct. 1320 (2026).

[28] *Id.* at 1335.

[29] If the Commission chooses to amend this policy statement now, at most it should add language to §1B1.13(b)(6) clarifying that non-retroactive changes in sentencing law cannot render a person eligible for a sentence reduction under § 3582(c)(1)(A) (although they can be considered as part of the discretionary § 3553(a) analysis, where other "extraordinary and compelling reasons" exist). *Rutherford v. United States*, 146 S. Ct. 1320, 1333 (2026); *see also* Br. of the United States, *Rutherford v. United States*, 2025 WL 2808970, at *37 (Sept. 25, 2025) (explaining why it is acceptable for courts to consider non-retroactive legal changes at the second, discretionary phase of the analysis, although according to the government it was not acceptable to consider such changes at the first, eligibility phase).

We appreciate the Commission's consideration of our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

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

Sentencing Resource Counsel
Federal Public and Community Defenders

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
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July 27, 2026

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RE: Practitioners Advisory Group Comment on Proposed Priorities for Amendment Cycle Ending May 1, 2027

Dear Judge Reeves,

The Practitioners Advisory Group ("PAG") submits these comments in response to the United States Sentencing Commission's proposed priorities for the amendment cycle ending May 1, 2027. These comments primarily address the Commission's first two proposed priorities and one additional proposed priority.

I. Proposed Priority 1: Seeking Input on the Commission's Work

The first proposed priority explains that, "[i]n anticipation of the 40th anniversary of the *Guidelines Manual* and two decades of experience with advisory guidelines, the Commission intends to undertake an evaluation of the guidelines and federal sentencing practices in light of the Commission's mission set forth in the Sentencing Reform Act, the statutory purposes of sentencing in 18 U.S.C. 3553(a)(2), and relevant legal developments that have occurred in the past four decades." As part of this priority, the Commission intends to "use regional public hearings, symposiums, roundtable discussions, conferences, and other tools to solicit input on the Commission's work from various stakeholders, including judges, Congress, the Executive Branch, Federal Public Defenders, victims, sentenced individuals, and others."

The PAG commends and supports the Commission's goal of soliciting input from a broad range of stakeholders. The PAG recommends that the Commission expand this proposal to include meetings with incarcerated individuals housed at Bureau of Prisons facilities at different security levels from minimum to high, as well as administrative facilities. These meetings would provide the Commission insight into whether sentences are "sufficient, but not greater than necessary" to satisfy the purposes of sentencing, including just punishment, deterrence, and providing needed educational or vocational training and medical care in accordance with § 3553(a)(2)'s mandate. Additionally, because one's custody level affects their access to programming, contact with loved ones, freedom of movement within the facility, medical

care, and preparation for reentry, these meetings would provide important perspective on how individuals throughout the Bureau of Prisons experience their incarceration and whether sentences are appropriately tailored to meet § 3553(a)(2)'s goals.

II. Proposed Priority 2: Increased Transparency in Policymaking

The Commission's second proposed priority is to "undertake a comprehensive review of the Rules and consider whether any amendments to such Rules may be appropriate to further the agency's statutory purposes and enhance public engagement with and understanding of the Commission's work," including by considering changes to "what Commission work is conducted in public," "what Commission policymaking materials should be made public," and "what analyses supporting agency policymaking are conducted and released publicly."

The PAG recommends that the Commission begin collecting, analyzing, and disseminating data on prison conditions, the availability and utilization of programming, and First Step Act ("FSA") implementation. As with the prison visits proposed above, collecting, analyzing, and publishing data on prison conditions, programming, and FSA implementation would further the Commission's goals of ensuring that sentences are "sufficient, but not greater than necessary" to serve § 3553(a)(2)'s purposes and assist the Commission in carrying out its statutory duties under 28 U.S.C. § 994(g), which requires the Commission to consider "the nature and capacity of the penal, correctional, and other facilities and services available," to "make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines" it promulgates, and to formulate guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."

The PAG therefore requests that the Commission adopt new rules requiring regular public reporting of sentencing-relevant data, including facility-specific and security-level-specific information about: prison conditions; program availability, capacity, participation rates, completion rates, waitlists, and disruptions due to lockdowns, modified operations, staffing constraints, or resource constraints; medical and mental health care availability, including staffing or resource constraints affecting availability; FSA eligibility and earned-time-credit application; and prerelease transfers. Regular collection, analysis, and dissemination of this information would allow the Commission, its advisory groups, stakeholders, and the general public to evaluate the efficacy of the Guidelines in operation.

Additionally, the PAG respectfully submits that the Commission's Rules should distinguish between public disclosure to the public at large and structured, confidential access for standing advisory groups whose function is to assist the Commission's policymaking work. The Commission's existing Rules already authorize the Commission to participate in discussions with members of advisory groups in nonpublic meetings and to receive "formal and informal input" from advisory groups.[1] As a standing advisory group created by statute, *see* 28 U.S.C. § 995, and Commission Rule 5.4, the PAG's role is to assist the Commission in carrying out its statutory duties and to "provide . . . its views on the

[1] Rules of Practice and Procedure, Rules 3.3(3) & 5.4, U.S. Sent'g Comm'n (Aug. 2016), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf.

Commission's activities and work, including proposed priorities and amendments."[2] Consistent with the PAG's and other advisory groups' institutional roles, the Rules should permit the Commission, with appropriate confidentiality measures in place, to provide the PAG and other advisory groups with draft analyses, data briefings, impact assessments, staff memoranda, and insight into the Commission's decision-making processes so that advisory groups can help improve proposed priorities, amendments, and research agendas before they are finalized for public release and can better tailor their comments to the Commission's needs.

This recommendation does not require the Commission to provide comparable access to the general public. The Commission's Rules already recognize that some information may be shared or received in nonpublic meetings, and the Commission is not subject to FOIA requests, even though it remains committed to involving the public in its work as much as possible.[3] Any concern about selective disclosure or unfairness may be addressed by requiring confidentiality for predecisional materials, adopting neutral Rules defining the categories of nonpublic materials subject to advisory group review, and making comparable access available to each standing advisory group. This would preserve limitations on public dissemination of the Commission's sensitive decision-making processes and internal debates, while allowing the Commission to obtain more useful, informed advice from the advisory bodies tasked with assisting the Commission in carrying out its statutory mission.

III. Proposed Priorities 3, 4, and 5

The PAG supports the Commission's third, fourth, and fifth proposed priorities without revisions. Those priorities are to consider "any amendments that may be warranted in response to any legislation or case law developments," to resolve "circuit conflicts as warranted," and to consider "other miscellaneous issues coming to the Commission's attention," respectively.

IV. Additional Proposed Priority

In addition to the Commission's five proposed priorities, the Commission invited "comment on any additional priorities commenters believe the Commission should consider in the upcoming amendment cycle and beyond." To that end, the PAG urges the Commission to revisit and clarify its acquitted conduct amendment, promulgated in November 2024. That amendment added a new section to the relevant conduct guideline, U.S.S.G. § 1B1.3, as follows:

> (c) ACQUITTED CONDUCT.—Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.

This new relevant conduct provision established the default rule that acquitted conduct should not be considered in determining the applicable guideline range. It did, however, carve out an exception for

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[2] Practitioners Advisory Group Charter at § 1(b)(1)-(2), available at https://www.ussc.gov/sites/default/files/pdf/advisory-groups/practitioners-advisory-group/2025_PAG_Charter.pdf.

[3] Rules of Practice and Procedure, Rule 1.1, U.S. Sent'g Comm'n (Aug. 2016), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf.

acquitted conduct that "establishes, in whole or in part" the offense of conviction. The language—"*establishes*, in whole or in part"—was selected by the Commission over the objection of the Department of Justice which had proposed alternative language, "relates, in whole or in part."[4]

In the year and a half since the amendment took effect, however, courts have interpreted the language "establishes, in whole or in part" as a relevancy or relatedness test. In essence, some courts have held that acquitted conduct is relevant conduct when it relates in any way to the offense of conviction. Treating acquitted conduct as relevant conduct merely because it is related to the offense of conviction completely eviscerates the amendment.

For example, in *United States v. Sean Combs*, No. 24-cr-542 (S.D.N.Y.), the defendant was acquitted of sex trafficking and a RICO conspiracy, but was convicted of two Mann Act counts for transporting individuals for the purpose of prostitution. In sentencing the defendant, the district court held that it could consider acquitted conduct in determining the sentencing guideline range if that conduct was relevant to the offense of conviction. Regarding the language of the amendment, the court stated:

> As to what establishes in whole or in part means, it's best understood as a relevancy test. Evidence is not relevant if it does not tend to prove or disprove an element of the offense. Nothing in the guidelines suggests that the commission intended for courts to ignore conduct relevant to establishing the offense in question, so a more restrictive reading of this language is untenable.[5]

In another case, *United States v. Richard Hall*, No. 18-cr-623 (N.D. Tex.), the defendant was charged with conspiracy to pay and receive healthcare kickbacks, four individual substantive kickback counts, and conspiracy to launder monetary instruments under 18 U.S.C. § 1956(h). The defendant was acquitted of the healthcare kickbacks conspiracy but convicted of the four substantive kickback counts and the money laundering conspiracy count.

At sentencing, the defendant objected to the inclusion in the Guidelines calculation losses from the healthcare kickback scheme as acquitted conduct within the meaning of U.S.S.G. § 1B1.3(c). The court denied the objection, holding instead that the entirety of losses from the acquitted kickback scheme was relevant conduct both for the substantive kickback counts and the money laundering conspiracy count. In so holding, the court interpreted the language of the acquitted conduct guideline as a relatedness test, asking, "But it does say in whole or in part, so that can imply related to, right?"[6]

The PAG urges the Commission to clarify that "establishes, in whole or in part" is not a relatedness or relevancy test. Rather, the phrase "establishes, in whole or in part" means that to be considered in

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[4] Letter from Dep't of Just. to U.S.S.C. at 7 (Feb. 22, 2024), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf.

[5] Sent'g Tr. at 11, *United States v. Sean Combs*, No. 24-cr-542 (S.D.N.Y. Oct. 3, 2025).

[6] Sent'g Tr. at 11, *United States v. Richard Hall*, No. 18-cr-623 (N.D. Tex. May 21, 2024). This defendant's sentencing hearing began on April 5, 2024, but was continued to May 21, 2024, in anticipation of the Commission's vote on the acquitted conduct amendment.

determining the guideline range, acquitted conduct must also prove one or more elements of the offense of conviction. It is not enough that the conduct *tends* to prove an element of the offense of conviction; the conduct must *actually* prove one or more elements.

This interpretation of the word "establish" comports with its plain meaning. "Establish" means to prove or demonstrate. *See, e.g.*, *Establish*, *Black's Law Dictionary* (12th ed. 2024) ("To prove; to convince someone of." E.g., "the House managers tried to establish the president's guilt."). By contrast, Federal Rule of Evidence 401 provides that to be "relevant," evidence need only have any tendency to make a fact of consequence to the action more or less probable.

Following passage of the acquitted conduct amendment, Judge Reeves said: "Not guilty means not guilty. . . . By enshrining this basic fact within the federal sentencing guidelines, the Commission is taking an important step to protect the credibility of our courts and criminal justice system."[7] Consistent with Judge Reeves's statement, the PAG understood the acquitted conduct amendment to prevent defendants acquitted of some or most charges from having their Guidelines ranges calculated as if those acquittals had never occurred. Unfortunately, the practice continues. We urge the Commission to clarify the amendment to ensure its application as the Commission intended.

[7] *Commission Votes Unanimously to Pass Package of Reforms Including Limit on Use of Acquitted Conduct in Sentencing Guidelines*, U.S. Sent'g Comm'n (Apr. 17, 2024), available at https://www.ussc.gov/about/news/press-releases/april-17-2024.

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July 27, 2026

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Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following written recommendations to the United States Sentencing Commission (the Commission) regarding the proposed priorities for the 2027 amendment cycle.

Information Gathering

POAG supports the Commission's effort to gather information through regional public hearings, symposiums, roundtable discussions, conferences, and other tools to solicit input on the Commission's work from various stakeholders, including judges, Congress, the Executive Branch, Federal Public Defenders, victims, sentenced individuals, and others.

POAG also supports the Commission undertaking a comprehensive review of the Rules and consideration as to whether any amendments to such Rules may be appropriate to further the agency's statutory purposes.

Amendments in Response to Legislation

POAG supports the Commission's effort to appropriately integrate changes in legislation into the guidelines. We understand that these changes are frequently critical to ensure the guidelines and statutes are in alignment.

Circuit Splits

POAG supports the Commission's effort to resolve circuit splits and welcomes amendments to the guidelines that will provide clarity and consistency across the nation.

Miscellaneous Issues

Revisiting Previous Amendment Efforts

POAG observes that the Commission has engaged in extensive efforts over the past few years to resolve some ongoing application issues. POAG suggests that the Commission continue to work towards appropriate amendments in these areas.

POAG appreciates the Commission's attempts to simplify the Career Offender guideline and encourages the Commission to continue exploring a feasible solution for the Career Offender application so it may be applied more uniformly.

POAG recognizes the Commission's attention to the various types of methamphetamine designations listed in the manual and encourages the Commission to reconcile the disparities between ice, methamphetamine actual, and methamphetamine mixtures. Similarly, POAG would encourage the commission to review the disparity between cocaine and crack cocaine.

Commentary Movement for Clarity

POAG encourages the Commission to continue its efforts to move commentary into the guidelines to avoid application disparity and resolve circuit splits. For example, USSG §2G2.2(b)(7) only references images and provides an incremental increase to the base offense level depending on the number of images involved. Conversely, videos-clips, movies, and similar visual depictions are only addressed in the commentary in Application Note 6(B)(ii) of USSG §2G2.2, that equates each video, video-clip, movie or similar visual depiction to 75 images despite the number of seconds involving child pornography in the depiction. Circuits have ruled in generally three ways that include (1) the term "image" is genuinely ambiguous and, therefore, the commentary can be relied upon for guidance and interpretation, resulting in the 1 video to 75 images conversion rate recommended by the Commission; (2) the term "image" is not ambiguous and, therefore, the commentary regarding the video to image conversion rate cannot be relied upon, resulting in a conversion rate based on the number of frames per second with analysis regarding what is being depicted per second of video; or (3) the commentary cannot be relied upon, resulting in a conversion rate is one video equals one image.

Another example of moving the Commentary into the guideline to provide clarity, uniformity in application, and reduce sentence litigation is in Application Note 2 of USSG §2K2.1. This note

houses the definition of a "Semiautomatic Firearm that is Capable of Accepting a Large Capacity Magazine" and creates difficulties in application.

Additionally, POAG highlights an opportunity for the Commission to clarify "means of identification" as noted in USSG §2B1.1(b)(11). Although Application Note 10(B) provides some examples of the types of documents to be considered, it specifically references offenses under 18 U.S.C. § 1028, which causes confusion about whether the enhancement applies to offenses other than the statute cited. The commentary could further benefit from a clearer definition of "means of identification" for application purposes. Further clarity and relocation to the guideline itself would help to avoid misapplication.

Lastly, POAG recommends the Commission consider moving the list of factors in Application Note 1(A)-(H) into the guideline under Acceptance of Responsibility at USSG §3E1.1 for greater consideration when applying the reduction. This relocation would emphasize the types of conduct that comport with acceptance of responsibility, including truthful contrition, voluntary termination or withdrawal, payment of restitution prior to adjudication of guilt, voluntary surrender to authorities, voluntary assistance to authorities, voluntary resignation from positions held during the commission of the offense, post-offense rehabilitation efforts, and the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

Revising Sex Offender Guidelines

With regard to priorities for the upcoming amendments cycle, POAG would like to request the Commission take up various issues with sex offense guidelines. POAG observed that morphed and AI altered images are becoming more prevalent, and additional guidance regarding such images would be appreciated. The ranges for number of images possessed may also be antiquated in this day of massive digital storage availability.

Additionally, POAG observed that the special instructions requiring pseudo count(s) remain a complicated issue and can result in potential double counting, particularly in cases involving multiple victims or enhancements for Pattern of Activity or Repeat and Dangerous Sex Offender Against Minors. Additional guidance on the proper application of pseudo counts (especially when not agreed to by the parties in the plea agreement), including how the pseudo counts should interact with other victim-related enhancements, would promote greater consistency.

Also, as previously submitted by POAG, there is an identified disparity issue at USSG §4B1.5. that can result in defendants with prior covered sex offense convictions receiving a lower offense level, as calculated pursuant to USSG §4B1.5(a), than a similarly charged defendant with no prior conviction, as calculated pursuant to USSG §4B1.5(b) with the applied 5-level enhancement for pattern of activity. A clarification or revision of the application of USSG §4B1.5 with regard to the determination of the greater offense level would be helpful to ensure it is consistently applied with the intended purpose.

POAG also urges the Commission to review and simplify the congressionally mandated Specific Offense Characteristics in Chapter 2, Part G, so they more accurately reflect the offense severity and avoid cumulative enhancement that apply in the majority of cases.

Lastly, POAG would also request that the Commission consider adding Child Abuse/Child Neglect offenses to Appendix A. Amongst POAG members, it was noted that some districts utilize USSG §2X5.1, while others utilize USSG §2A2.2 Aggravated Assault, as it appears to be the most analogous guideline. Currently, there is no specific guideline to address these offenses; therefore, some districts have been utilizing USSG §2X5.1, which directs the use of the most analogous guideline. In the absence of an analogous guideline, the provisions of 18 U.S.C. § 3553 shall control. When the statute controls, the sentencing range is zero months to life imprisonment, resulting in an overly broad range of possible sentencing outcomes prone to sentencing disparity. To ensure consistent application, POAG would request that the Commission make an appendix reference to USSG §2A2.2 Aggravated Assault when the offense of conviction is Child Abuse/Child Neglect.

Revisiting Zero Point Offender

POAG observes that the Zero-Point Offender guideline has now been implemented long enough to get a sense of how the list at USSG §4C1.1(a)(1)-(11) could be expanded to capture aggravating circumstances that seem inconsistent with the reduction. We believe the Abuse of Trust enhancement at USSG §3B1.3, the Obstruction of Justice enhancement at USSG §3C1.1, and the non-application of Acceptance of Responsibility at USSG §3E1.1 are a few such areas of aggravating conduct that should be considered for possibly removing a defendant from consideration of a reduction as a zero-point offender.

POAG has observed that frequently when a defendant has abused a position of public or private trust, that conduct can be as egregious as if they were in an aggravating role. Individuals who have abused a position of trust often have a higher degree of professional or personal responsibility that they are using in the commission of the offense. That higher threshold of consideration, and active, illicit decision-making to breach trust in the commission of the offense may warrant removal for consideration of a Zero-Point Offender reduction. Similarly, if a defendant receives an enhancement for Obstruction of Justice, which results in no reduction for Acceptance of Responsibility, the reduction may not comport with the intent of the Zero-Point Offender reduction.

POAG acknowledges the sentencing gap of those individuals who receive a Zero-Point reduction, in comparison to those eligible but not receiving the reduction, and with that in mind would like to ensure that the appropriate individuals are identified for any potential reduction in sentence. POAG also observes that there may be other areas of the guidelines or other aspects of conduct that would warrant preclusion from Zero-Point Offender consideration, and we request the

Commission look for areas where aggravating factors may further disqualify a defendant with zero criminal history points from receiving this reduction.

USSG §3C1.3 - Commission of Offense While on Release

POAG suggests the Commission address the circuit split regarding whether the increase at USSG §3C1.3, Commission of Offense While on Release, can be imposed on a defendant who was not notified of the enhancement at the time of his release, and perhaps clarify what kind of notice is appropriate. The Fourth, Fifth, and Seventh Circuits have required defendants to be notified at the time of their release, about the conditions of their release, including the potential enhancement for committing an offense while on release. See, *United States v. Cooper*, 827 F.2d 991, 994-995 (4th Cir. 1987); *United States v. Dadi*, 235 F.3d 945 (5th Cir. 2000); *United States v. DiCaro*, 852 F.2d 259, 264-265 (7th Cir. 1988). The Second, Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have held that no notice is required at the time of release and that it is sufficient if the defendant is notified of the enhancement before sentencing. See, *United States v. Vazquez*, 113 F.3d 383, 388-389 (2nd Cir. 1997); *United States v. Hecht*, 212 F.3d 847 (3rd Cir. 2000); *United States v. Lewis*, 991 F.3d 322, 324 (6th Cir. 1993); *United States v. Feldhacker*, 849 F.2d 293, 298-299 (8th Cir. 1988); *United States v. Rosas*, 615 F.3d 1058 (9th Cir. 2010); *United States v. Browning*, 61 F.3d 752, 756-757 (10th Cir. 1995); and *United States v. Tyndale*, 209 F.3d 1292 (11th Cir. 2000).

Additionally, POAG suggests the Commission consider clarifying the technical application of the guideline, as there is often confusion regarding its application, in terms of which offense the enhancement is applied to. Specifically, USSG §3C1.3 does not articulate whether the enhancement is applied to the offense for which the defendant was on release when he committed a new offense, or the offense the defendant committed when he was on release, or both.

Furthermore, while USSG §3E1.1, Application Note 1 lists, as a consideration for whether Acceptance of Responsibility is appropriate, voluntary termination or withdrawal from criminal conduct, it would be helpful if either USSG §3C1.3 or USSG §3E1.1 provided guidance regarding whether Acceptance of Responsibility might still be appropriate as applied to the offense committed while the defendant was on release (the second offense), if the defendant accepts responsibility as to that offense.

Other Adjustments to USSG §2D1.1

POAG requests the Commission consider amending the Drug Offense guidelines at USSG §2D1.1 in two areas. With the advent of fentanyl being distributed in pill format, we thought it may be appropriate to have a second mechanism for capturing fentanyl-laden pills when lab reports related to pill content are unavailable. We envisioned that this adjustment would have a way to count those types of pills as a unit (similar to certain other substances). This would facilitate counting drugs

when the lab does not provide the amount of a substance available or cases in which the drugs are not recovered.

POAG is also interested in an amendment to the Drug Offense commentary to include an application note on how to capture smokeable synthetic cannabinoids in a manner similar to the way LSD is captured in USSG §2D1.1, comment. (n.10).

Clarity for Fines for Individual Defendants

POAG recommends the Commission consider amending, or providing additional guidance regarding, USSG §5E1.2(c)(4), which indicates that subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing a maximum fine greater than $500,000, or (B) a fine for each day of a violation. It then states that in such cases, the court may impose a fine up to the maximum authorized by statute.

POAG believes this provision can be, and has been, interpreted by districts in two distinct ways when there are multiple counts of conviction, only one or some of which has or have a maximum fine greater than $500,000 (or a fine for each day of violation). One interpretation is that this provision instructs the user in this scenario to add the maximum fine of both/all counts, including counts with maximum fines that do not exceed $500,000, to achieve the total maximum guideline fine.

For example, in a scenario involving a drug offense under 21 U.S.C. § 841(b)(1)(C) and a conviction under 18 U.S.C. § 922(g), one interpretation of this provision is that it instructs the user that the maximum guideline fine is essentially rendered moot, such that the maximum guideline fine is the statutory maximum of all fines (here, $1,250,000). Another interpretation is that it instructs the user that the maximum guideline fine is no longer capped at the amount set forth in (c)(2) and may be imposed up to the statutory maximum of the statute for which the maximum fine is over $500,000 (here, $1,000,000). In another example, in a scenario involving two convictions for drug offenses under 21 U.S.C. § 841(b)(1)(C) and a conviction under 18 U.S.C. § 922(g), an individual taking the first approach would consider the maximum guideline fine to be $2,250,000, while an individual taking the second approach would consider the maximum fine to be $2,000,000.

POAG recommends the Commission amend this guideline so that it clarifies which approach should be taken.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to submit recommendations on the proposed priorities.

Respectfully,

Probation Officers Advisory Group
July 2026

SENTENCE IMPACT ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

Dr. Carl Reddix, Chair

JC Jones Anderson
Adam Bentley Clausen
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July 20, 2026

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
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Washington, D.C. 20002-8002

Re: Proposed Priorities for the 2027 Amendment Cycle

Dear Chairman Reeves and Members of the Commission:

The Sentence Impact Advisory Group ("SIAG") respectfully submits the following commentary regarding the Commission's proposed priorities for the upcoming 2027 amendment cycle.

I. The Proposed Priorities

As the Commission undertakes a comprehensive review of more than forty years of experience administering the Guidelines Manual, more than two decades operating under an advisory sentencing framework, and approximately thirty years of its Rules of Practice and Procedure, SIAG welcomes this opportunity to contribute to an important examination of the federal sentencing system.

Collectively, the Sentencing Guidelines, policy statements, and procedural rules establish the framework that shapes federal sentencing decisions and significantly influence why, how, and for how long individuals are sentenced to imprisonment. These policies are intended to advance

the traditional purposes of sentencing established by Congress: retribution, deterrence, incapacitation, and rehabilitation. The Commission's continuing responsibility is to ensure that these objectives are balanced with the equally important principles of fairness, proportionality, consistency, transparency, and justice. Effective sentencing policy should ensure public safety while promoting confidence that similarly situated individuals are treated equitably and that punishment is no greater than necessary to achieve its intended purposes. This is the Commission's directive from Congress.

SIAG commends the Commission for recognizing that reducing unnecessary incarceration, addressing prison overcrowding, and responsibly managing correctional resources remain important considerations where relevant to its identified priorities. This historic review presents a significant opportunity to evaluate whether existing Guidelines continue to reflect empirical evidence, promote public safety, reduce unwarranted sentencing disparities, and support successful rehabilitation and community reintegration. SIAG respectfully offers the following recommendations in support of these objectives.

II. SIAG'S APPROACH TO SENTENCING

In evaluating the Commission's proposed priorities, SIAG applies its established principles of proportionality, predictability, fairness, transparency, and public safety. These principles inform each of the recommendations that follow: sentencing policy should be grounded in empirical evidence, punishment should be proportionate to its intended purposes, and the process by which sentencing policy is made should be transparent and accessible to those it most directly affects.

III. SUMMARY OF SIAG'S POSITION

The table below summarizes SIAG's position on each of the Commission's proposed priorities in light of the principles described above. The following section addresses each priority and explains SIAG's position in greater detail.

Proposed Priority	**SIAG's**	**Key Rationale**

	Position	
Priority One — Public Engagement and Forty-Year Review of the Sentencing Guidelines	Support	Conduct listening sessions that include incarcerated and formerly incarcerated individuals, victims, families, and reentry and behavioral health providers; undertake a comprehensive, evidence-based evaluation of the Guidelines; conduct a focused review of the Career Offender Guideline (USSG §4B1.1).
Priority Two — Review of the Rules of Practice and Procedure	Support	Make the comment process accessible to individuals in federal custody; provide timely notice and sufficient comment periods; publish plain-language summaries; explain how public comment influences final policy decisions; establish a formal stakeholder engagement framework.
Priority Three — Legislative and Case Law Developments	Support with Recommended Guardrails	Implement statutory changes with limiting principles; avoid automatic increases in punishment lacking corresponding empirical support; use favorable decisions to clarify, simplify, or reduce Guideline provisions.
Priority Four — Resolution of Circuit Conflicts	Support with Recommended Guardrails	Apply a presumption favoring the less punitive interpretations; resolve ambiguities by clarifying or narrowing commentary rather than expanding provisions; ensure uniformity does not increase punishment or diminish procedural protections.
Priority Five — Miscellaneous Issues	Support	Expand alternatives to incarceration where consistent with public safety; adopt a presumption of retroactivity for amendments correcting excessive or unsupported sentencing practices wherever possible; broaden the evaluation of sentencing outcomes beyond recidivism to encompass

		proportionality, consistency, and impact on families and dependents.

IV. COMMENTARY ON PROPOSED PRIORITIES

A. Priority One — Public Engagement and Forty-Year Review of the Sentencing Guidelines: Support

SIAG strongly supports the Commission's proposal to conduct regional hearings, symposiums, roundtables, and other public engagement initiatives as part of its comprehensive forty-year review of the Federal Sentencing Guidelines. SIAG commends the Commission for recognizing that meaningful reform requires input from those who have experienced the federal criminal justice system firsthand.

Equally important, we abhor the idea that just because we have always approached a problem set a specific way limits how we address matters in the future. A more regular and holistic review of the Guidelines would ensure that they reflect the most up-to-date data and reflect the public's views on how justice is meted out. Doing so more than once every four decades would enhance the public's confidence in our judicial system.

With these core tenets in mind, we want to ensure that this review reflects the broad range of stakeholders affected by federal sentencing policy. To that end, SIAG recommends that the Commission conduct listening sessions specifically with:

- Individuals currently incarcerated in Bureau of Prisons (BOP) facilities;
- Individuals serving terms of supervised release;
- Formerly incarcerated individuals and their families;
- Crime victims and victim advocacy organizations;
- Community-based reentry, rehabilitation, and behavioral health providers; and
- Participants in at least one SIAG-sponsored public roundtable devoted exclusively to sentence-impacted perspectives.

These stakeholder groups possess unique knowledge regarding the practical operation of the Sentencing Guidelines and the long-term effects of sentencing decisions. Their experiences can provide valuable insight into how federal sentencing policies influence rehabilitation, institutional behavior, family stability, victim recovery, community reintegration, and public confidence in the justice system.

Comprehensive Forty-Year Review of the Guidelines

As part of its forty-year review, SIAG recommends that the Commission undertake a comprehensive, evidence-based evaluation of whether the existing Sentencing Guidelines continue to advance the statutory purposes of sentencing set forth in 18 U.S.C. § 3553(a) in a balanced way, while promoting fairness, reducing unnecessary incarceration, minimizing unwarranted sentencing disparities, and protecting public safety.

Specifically, the Commission should evaluate:

- Whether each Guideline meaningfully advances public safety and the sentencing purposes established in 18 U.S.C. § 3553(a);
- Whether particular Guidelines increase sentence length without producing measurable improvements in public safety, deterrence, or recidivism outcomes;[1]
- Whether specific Guidelines or sentencing enhancements contribute to racial, ethnic, geographic, or socioeconomic disparities;
- Whether existing enhancements remain supported by current empirical research, sentencing data, and criminological evidence;
- Whether the cumulative application of multiple enhancements and stacked sentences result in outcomes that are disproportionate to the offense conduct;
- Whether retroactive Guideline amendments have successfully reduced unnecessary incarceration while maintaining community safety and promoting successful reentry;

[1] See U.S. Sent'g Comm'n, Recidivism Among Federal Offenders: A Comprehensive Overview (Mar. 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf (documenting that recidivism outcomes are more strongly correlated with criminal history and age than with incremental increases in sentence length).

- Whether the Guidelines provide sufficient recognition for demonstrated rehabilitation, educational achievement, institutional adjustment, and other meaningful post-sentencing accomplishments; and
- Whether the federal sentencing system continues to maintain public confidence through fairness, transparency, consistency, and legitimacy.

Career Offender Guideline (USSG §4B1.1)

SIAG respectfully recommends that the Commission undertake a focused review of the Career Offender Guideline (USSG §4B1.1), which remains one of the most consequential sentence enhancements within the federal sentencing framework.

The current Career Offender Guideline can substantially increase advisory sentencing ranges, often doubling or tripling the recommended term of imprisonment for defendants with qualifying prior convictions. While originally intended to target repeat violent offenders and major drug traffickers, the enhancement frequently applies to individuals whose qualifying convictions consist solely of nonviolent drug offenses.

As part of its review, the Commission should evaluate:

- Whether the current definition of "career offender" appropriately distinguishes between violent offenders and individuals whose prior convictions involve only nonviolent drug offenses;
- Whether lengthy sentence enhancements imposed under §4B1.1 produce measurable reductions in recidivism or improvements in public safety;
- The extent to which federal judges vary below the Career Offender Guideline and the reasons those variances are imposed;
- Whether current empirical research supports retaining the existing enhancement structure; and
- Whether further revisions are warranted to ensure that the enhancement is narrowly tailored to offenders who present the greatest risk to public safety.

A careful reassessment of the Career Offender Guideline would help ensure that it remains consistent with evidence-based sentencing practices, promotes proportional punishment, and preserves judicial discretion while protecting communities.

A comprehensive review of these issues will help ensure that the Federal Sentencing Guidelines remain fair, evidence-based, proportionate, and consistent with the Commission's statutory mission of promoting certainty, reducing unwarranted sentencing disparities, respecting the rule of law, and protecting public safety. Meaningful public engagement, coupled with rigorous empirical evaluation, will strengthen the legitimacy of the federal sentencing system and better position the Commission to address the evolving needs of the criminal justice system into the future.

B. Priority Two — Review of the Rules of Practice and Procedure: Support

SIAG strongly supports the Commission's proposal to conduct a comprehensive review of its Rules of Practice and Procedure. Enhancing transparency, expanding meaningful public participation, and improving the accessibility of the Commission's rulemaking process are essential to ensuring that federal sentencing policy reflects diverse perspectives, empirical evidence, and public confidence in the justice system.

Meaningful public participation requires more than simply providing opportunities for comment. It requires ensuring that those most directly affected by federal sentencing policies—including incarcerated individuals, people on supervised release, crime victims, families, practitioners, and community organizations—are aware of those opportunities and are able to participate in a meaningful and informed manner without fear of retribution.

To further strengthen the Commission's rulemaking process, SIAG respectfully recommends that the Commission:

- Establish meaningful opportunities for incarcerated individuals to participate in the public comment process through accessible procedures within Bureau of Prisons (BOP) facilities;

- Ensure that individuals on supervised release, formerly incarcerated persons, crime victims, families, practitioners, and community-based organizations receive timely notice of opportunities to submit public comments;
- Coordinate with the Bureau of Prisons, Probation and Pretrial Services, and community supervision agencies to distribute notices of proposed amendments, public hearings, and comment opportunities whenever practicable;
- Publish plain-language summaries of proposed amendments, policy priorities, research reports, and Commission publications that are understandable to individuals without legal training;
- Expand the use of virtual hearings, livestreamed proceedings, and electronic comment portals to encourage nationwide participation regardless of geographic location;
- Provide sufficient public comment periods to allow meaningful review of proposed amendments and supporting research;
- Publish summaries identifying recurring themes, significant recommendations, and areas of consensus reflected in public comments;
- Explain how public comments influenced final policy decisions and amendments; and
- When recommendations are not adopted, provide a concise explanation of the Commission's reasoning, particularly in response to formal recommendations submitted by SIAG and other stakeholder organizations.

SIAG also encourages the Commission to consider establishing a formal stakeholder engagement framework that includes periodic listening sessions, advisory panels, and opportunities for ongoing dialogue between amendment cycles. Continuous engagement would provide valuable insight into how sentencing policies operate in practice and allow the Commission to identify emerging issues before they require significant reform.

Transparency is strengthened not only by inviting public participation but also by demonstrating how stakeholder input informs policymaking. Providing clear explanations for adopted amendments, as well as the reasons certain recommendations were not accepted, promotes accountability, increases public understanding of the Commission's deliberative process, and reinforces confidence in the integrity of federal sentencing policy.

The same is true as to how the Commission selects its priorities for each amendment cycle. The Commission and its staff have assembled wealth of empirical evidence and data about how our justice system operates, succeeds and fails. We strongly urge the Commission to utilize this data to identify where modifications to the Guidelines would have the greatest impact on safety, proportionality, and effectiveness.

By making its rulemaking process more accessible, transparent, and inclusive, the Commission can ensure that future sentencing policy benefits from a broader range of experiences and expertise while strengthening the legitimacy, credibility, and public trust that are essential to the effective administration of justice.

C. Priority Three — Legislative and Case Law Developments: Support with Recommended Guardrails

As the Commission considers amendments in response to statutory changes and judicial decisions, SIAG encourages a measured, evidence-based approach that preserves proportionality, promotes fairness, and avoids unnecessarily increasing punishment. While legislative enactments and judicial decisions often require corresponding Guideline amendments, the Commission should continue to exercise its independent judgment to ensure that any changes remain consistent with the purposes of sentencing set forth in 18 U.S.C. § 3553(a) and the Commission's statutory mission.

Accordingly, SIAG recommends that the Commission:

- Incorporate limiting principles whenever implementing new statutory sentencing enhancements to avoid disproportionate increases in punishment;
- Expand the availability of non-custodial sentencing alternatives (e.g., diversion programs) where appropriate and supported by evidence;
- To the extent possible, ensure that increases in punishment resulting from from legislative changes are implemented in a manner that avoids duplicative punishment or

excessive punishment that lacks empirical support demonstrating improved public safety outcomes;[2]

- Use favorable judicial decisions as opportunities to clarify, simplify, or reduce Guideline provisions where appropriate;
- Identify pending legislative developments that present opportunities to reduce sentencing severity, eliminate unnecessary incarceration, or prevent the creation of new sentencing disparities;
- Review whether existing Guideline provisions remain necessary in light of evolving case law and current sentencing practices;
- Consider the cumulative impact of multiple statutory and Guideline enhancements to ensure that punishment remains proportionate to the offense and the individual offender; and
- Evaluate proposed amendments through empirical research, sentencing data, and recidivism outcomes before adopting changes that would increase punishment.

Federal sentencing policy should remain responsive not only to statutory and judicial developments but also to evolving research regarding effective public safety strategies, rehabilitation, and successful community reintegration. The Commission's unique role is not merely to incorporate legal developments into the Guidelines, but to ensure that federal sentencing policy continues to reflect empirical evidence, proportionality, fairness, and the long-term interests of justice.

By carefully implementing legislative directives using evidence-based policymaking, the Commission can maintain a sentencing framework that enhances public safety while avoiding unnecessary incarceration and reducing unwarranted sentencing disparities.

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[2] See U.S. Sent'g Comm'n, Length of Incarceration and Recidivism (June 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220621_Recidivsm-SentLength.pdf (finding no evidence that incarceration for sentences of five years or less produces a measurable deterrent or preventive effect).

D. Priority Four — Resolution of Circuit Conflicts: Support with Recommended Guardrails

When resolving conflicting interpretations among the federal Courts of Appeals, SIAG encourages the Commission to adopt principles that promote national consistency while advancing proportionality and fairness. Although resolving circuit conflicts is an important component of the Commission's work, efforts to achieve uniformity need not take a lowest common denominator approach that results in disproportionate sentence.

Accordingly, SIAG recommends that the Commission:

- Apply a presumption favoring the less punitive interpretation when multiple reasonable interpretations of a Guideline exist, consistent with principles of fairness and proportionality;
- Resolve ambiguity by clarifying, narrowing, or eliminating commentary where appropriate, rather than expanding Guideline provisions beyond their original text or purpose;
- Ensure that amendments resolving circuit conflicts reduce—rather than increase—unwarranted sentencing disparities among the federal circuits;
- Consider whether conflicting interpretations reveal that a Guideline or commentary is overly complex or insufficiently clear, and revise the underlying Guideline where necessary;
- Evaluate the practical impact of competing interpretations using empirical sentencing data before adopting amendments intended to resolve circuit conflicts; and
- Avoid amendments that effectively expand criminal liability or increase punishment absent clear statutory authority or compelling empirical justification.

In resolving circuit conflicts, the Commission should seek not only greater uniformity but also greater fairness and transparency. Amendments should simplify the Guidelines, provide clear direction to sentencing courts, and promote consistent application nationwide while safeguarding the procedural rights of defendants.

By adopting these principles, the Commission can reduce uncertainty among the federal courts, enhance public confidence in the sentencing process, and ensure that efforts to achieve consistency do not inadvertently result in broader punishment or diminished procedural protections.

E. Priority Five — Miscellaneous Issues: Support

SIAG encourages the Commission to continue prioritizing evidence-based reforms that reduce unnecessary incarceration while preserving public safety. As the Commission undertakes its forty-year review of the Federal Sentencing Guidelines, it has a unique opportunity to determine whether existing policies continue to fulfill the statutory purposes of sentencing set forth in 18 U.S.C. § 3553(a) and reflect current empirical research regarding deterrence, rehabilitation, proportionality, and successful community reintegration.

Accordingly, SIAG respectfully recommends that the Commission:

- Expand the use of alternatives to incarceration, including diversionary and problem-solving court programs, whenever consistent with public safety and the purposes of sentencing;
- Discourage charge-driven sentence inflation resulting from cumulative or overlapping Guideline enhancements that produce disproportionately severe advisory sentencing ranges;
- Re-evaluate enhancements based primarily upon speculative, intangible, or non-economic harm to ensure they remain proportionate, transparent, and supported by empirical evidence;
- Conduct comprehensive evaluations of the effectiveness of retroactive Guideline amendments in reducing unnecessary incarceration while maintaining public safety;
- Analyze the impacts of incarceration on families to account for the true costs (e.g., economic, criminogenic, public benefits, etc.) imposed on dependents, communities, and taxpayers;

- Publish comprehensive data regarding sentence length, recidivism, racial and geographic disparities, prison misconduct, correctional costs, and other measurable outcomes associated with Guideline amendments;
- Continue evaluating whether existing Guidelines remain consistent with current research, evolving sentencing practices, and the statutory purposes of sentencing;
- Assess the effectiveness of the Federal Bureau of Prisons rehabilitation and re-entry missions to determine whether alternative sentences (e.g., home confinement, work release, etc.) offer a more impactful approach, and thus, strengthens public safety; and
- Identify Guideline provisions that no longer demonstrate measurable public safety benefits or that contribute to unnecessary incarceration or unwarranted sentencing disparities.

Strengthening the Commission's Retroactivity Policy

SIAG believes that retroactivity should play a greater role in promoting fairness and consistency within the federal sentencing system. When the Commission determines that a Guideline should be amended because the previous rule produced excessive punishment, failed to achieve its intended purpose, or is no longer supported by empirical evidence, retroactive application should be the presumptive approach unless specific public safety concerns warrant a different result.

Accordingly, SIAG recommends that the Commission:

- Establish a presumption that amendments reducing excessive or unsupported sentencing practices will apply retroactively unless a demonstrated public safety risk justifies limiting relief;
- Prioritize retroactive consideration for amendments involving Guidelines that have historically produced significant disparities or disproportionately lengthy sentences, including Career Offender provisions, Criminal History scoring, drug quantity Guidelines, crack cocaine sentencing provisions, outdated technology-related enhancements, and Guidelines affecting low-level or zero-criminal-history offenders;
- Continue individualized judicial review under 18 U.S.C. § 3553(a), allowing courts to consider institutional conduct, demonstrated rehabilitation, disciplinary history, age,

health, victim concerns, release planning, and community safety before granting sentence reductions;

- Improve access to retroactive relief by encouraging automatic identification of potentially eligible individuals, providing timely notice of eligibility, expanding access to appointed counsel where appropriate, and simplifying procedural requirements for sentence reduction motions; and
- Collect and publish data evaluating the implementation of retroactive amendments, including sentence reductions, demographic trends, geographic variation, post-release outcomes, and long-term recidivism to ensure that retroactive relief is administered fairly and consistently nationwide.

SIAG further recommends that the Commission continue examining how retroactivity may complement compassionate release and other second-look sentencing mechanisms for elderly individuals, persons experiencing serious medical conditions, and individuals who have demonstrated sustained rehabilitation after serving lengthy terms of imprisonment. These complementary forms of relief recognize that continued incarceration should remain tied to legitimate public safety objectives rather than the mere passage of time.

SIAG notes that The Sentencing Project has long recommended the elimination of mandatory minimum sentencing laws and life sentences, including "three strikes," "habitual offender," and "career criminal" laws, and—based on its research regarding criminal history and sentence length—has recommended that, for sentences of ten years or longer, criminal records should account for no more than ten percent of sentence length.[3] The Commission may find this research instructive as it evaluates the appropriate weight of criminal history in the Guidelines and the retroactivity questions described above.

Expanding Performance Measures Beyond Recidivism

SIAG also encourages the Commission to broaden its evaluation of sentencing outcomes beyond recidivism alone. A more comprehensive performance framework should include measures of:

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[3] See Nazgol Ghandnoosh, Bobby Boxerman & Celeste Barry, The Sentencing Project, *Re-Punished for the Past: How Criminal Records Increase Prison Terms and Racial Injustice* (Feb. 2026), https://www.sentencingproject.org/reports/re-punished-for-the-past-how-criminal-records-increase-prison-terms-and-racial-injustice/ (recommending that, for sentences of ten years or longer, criminal records account for no more than ten percent of sentence length).

- Sentence proportionality and average sentence length;
- Racial, ethnic, geographic, gender, and socioeconomic disparities;
- Age-related sentencing outcomes;
- Institutional conduct and disciplinary history during incarceration;
- Educational attainment, vocational training, and other rehabilitative programming completed while incarcerated;
- Employment and workforce participation following release;
- Housing stability and long-term residential security;
- Family reunification and maintenance of positive family relationships;
- Compliance with supervised release conditions and community engagement;
- Physical and behavioral health outcomes following release; and
- Short-, medium-, and long-term recidivism measured at multiple intervals after release.

Evaluating these broader indicators will provide the Commission with a more complete understanding of whether federal sentencing policies accomplish their intended objectives. Successful rehabilitation is reflected not only in reduced rates of reoffending, but also in an individual's ability to obtain stable employment, maintain safe housing, strengthen family relationships, comply with supervision, contribute positively to the community, and lead a productive, law-abiding life.

By incorporating these performance measures into its ongoing review of the Federal Sentencing Guidelines, the Commission will be better positioned to develop sentencing policies that are evidence-based, proportionate, transparent, and effective. A broader evaluation framework will improve policymaking, strengthen public confidence in the federal sentencing system, and help ensure that future Guideline amendments advance justice while reducing unnecessary incarceration, supporting successful reintegration, and protecting public safety.

V. CONCLUSION

SIAG appreciates the Commission's commitment to engaging the public throughout this comprehensive review of the federal sentencing system. More than forty years of experience

administering the Sentencing Guidelines present a rare opportunity to evaluate what has been effective, identify areas where reform is warranted, and ensure that federal sentencing policy continues to reflect the statutory purposes of sentencing while promoting fairness, consistency, and justice.

The individuals most directly affected by federal sentencing—including incarcerated persons, individuals on supervised release, crime victims, families, practitioners, researchers, and community stakeholders—offer valuable perspectives that should help inform future policy. Their lived experiences, professional expertise, and firsthand observations provide critical insight into the practical operation of the Guidelines and the long-term impact of sentencing decisions on individuals, families, and communities.

SIAG respectfully urges the Commission to place fairness, proportionality, transparency, empirical evidence, and meaningful public engagement at the center of its work. The Commission should continue to evaluate not only whether sentencing policies deter criminal conduct and protect public safety, but also whether they encourage rehabilitation, reduce unwarranted disparities, and promote successful reintegration into society. Measuring outcomes such as sentence proportionality, educational attainment, employment, housing stability, family reunification, institutional conduct, compliance with supervised release, and long-term recidivism will provide a more complete and accurate assessment of the effectiveness of federal sentencing policy.

As the Commission begins the next chapter in the evolution of the federal sentencing system, SIAG encourages it to continue fostering an open, transparent, and evidence-based policymaking process that values the voices of all stakeholders, particularly those directly impacted by federal sentencing. By embracing meaningful public engagement, rigorous empirical analysis, and thoughtful reform, the Commission can strengthen public confidence in the federal sentencing system while advancing justice, reducing unnecessary incarceration, promoting successful rehabilitation, and enhancing public safety for communities across the nation.

In closing, SIAG remains committed to continued engagement with the Commission and looks forward to supporting thoughtful, data-driven refinement of the Guidelines.

Respectfully submitted,

SENTENCE IMPACT ADVISORY GROUP (SIAG)

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SENTENCE IMPACT ADVISORY GROUP

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July 27, 2026

Hon. Carlton W. Reeves
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Re: Response to the Supreme Court's Decision in Rutherford v. United States and the Future of USSG §1B1.13(b)(6); 2026–2027 Amendment Cycle

Dear Chairman Reeves and Members of the Commission:

The Sentence Impact Advisory Group ("SIAG") respectfully submits the following views in response to the Commission's invitation regarding whether and how it should respond to *Rutherford v. United States*, 608 U.S. ___ (2026). The Commission identified three courses at the broadest level: (1) take no action; (2) strike the provisions called into question; or (3) rewrite the affected provisions based on the guidance in the opinion. In *Rutherford*, the Supreme Court held that a sentencing disparity produced by a non-retroactive change in law, "considered by itself or in combination with other factors," cannot constitute an extraordinary and compelling reason under 18 U.S.C. §3582(c)(1)(A)(i), and that §1B1.13(b)(6) is invalid to the extent it permits relief on that basis.

SIAG members expressed differing views regarding the appropriate response. Five members support prompt Commission action in the current amendment cycle: striking subsection (b)(6), codifying the Court's holding in the text of the policy statement, and concurrently promulgating a replacement provision consistent with the opinion. Three members would defer amendment pending further judicial interpretation of *Rutherford*, allowing the lower courts to determine whether, and to what extent, any applications of §1B1.13(b)(6) remain permissible. One member

did not participate in the deliberations on this issue and therefore did not cast a vote. The sections that follow reflect these views.

I. Members Supporting Commission Action in the Current Amendment Cycle

The five members supporting action begin with the text of the decision. The Court did not merely narrow one application of subsection (b)(6); it held that a change in law cannot contribute to eligibility "by itself or in combination with other factors." Because a change in law producing a gross disparity is the operative predicate of the provision, *Rutherford* forecloses the provision's mechanism. The categories the Court expressly reserved were never within (b)(6)'s terms. These members have asked, and respectfully put the same question to the Commission: what motion could a district court still grant under subsection (b)(6)? Absent an answer, deferring to judicial development means awaiting a body of denials, not a body of guidance. Courts do not develop law around a provision they may no longer apply.

These members also speak from a vantage point unavailable to most who will advise the Commission on this question. As sentenced individuals, the SIAG has lived the approach the deferral position recommends. Between 2019 and 2023, while the Commission lacked a quorum, the question whether non-retroactive changes in law could support compassionate release was left to the courts of appeals to work out. The result was not a carefully crafted national consensus. Rather, it was a circuit-by-circuit closing of doors: *Thacker* in the Seventh Circuit, *Jarvis* and then *McCall* in the Sixth, *Crandall* in the Eighth, and others, each one extinguishing relief for every similarly situated person in that circuit, permanently, regardless of individual merit. Whether a person came home or died in prison turned not on culpability or rehabilitation but on the circuit in which the sentencing court sat and the date on which the motion was filed.

One member of this Advisory Group is a direct product of that era. Following a jury trial, that member was sentenced to approximately 213 years' imprisonment, a de facto life sentence driven by nine stacked counts under 18 U.S.C. §924(c) and a structure Congress prospectively eliminated in the First Step Act. After he had served more than twenty years, the district court found extraordinary and compelling reasons in the combination of his "remarkable record of rehabilitation" and his "off the charts" sentence. With the Government's agreement that a sentence of time served was appropriate, the SIAG member saw his sentence reduced to time

served followed by three years of supervised release. *United States v. Clausen*, No. 00-cr-291-2 (E.D. Pa. Aug. 10, 2020). Under *Rutherford*, an identical motion could not be granted today: the sentence-length disparity that anchored the district court's finding may no longer be considered, alone or in combination with rehabilitation. And little more than a year after that release, the Third Circuit foreclosed the same relief for every similarly situated person in the circuit. *United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021). *Rutherford* has now made that rule national.

That member's release is final and undisturbed. His service on this Advisory Group, alongside years of work in reentry, corrections reform, and federal sentencing policy, is evidence of what this form of relief made possible; the sentencing court described his record as "virtually unprecedented and unmatched." But the men and women who stood beside him in prison, convicted under the same statute, serving the same stacked sentences, and rehabilitated to comparable degrees, remain incarcerated today for one reason: the courthouse in which their cases arose, or the timing of their motions, placed them on the wrong side of precedents set before the Commission could act. Many will die in prison unless a new path is opened. Lived experience teaches these SIAG members that "letting the courts work it out" is not a neutral interim posture. It is the policy under which their peers were left behind once, and it will produce the same result again.

The window for action is also asymmetric. Two Commission seats are vacant, two additional terms expire at the close of 2026, and confirmation of the pending nominees before the end of the legislative calendar is uncertain. If the Commission acts by May 1, 2027 and later refinement proves necessary, a seated Commission may go beyond mere repeal of §1B1.13(b)(6) and develop workable replacement language. If, however, the Commission chooses not to act and loses its quorum, text the Supreme Court invalidated in *Rutherford* would remain in the Guidelines Manual. It would be a vestigial provision – in place but of no use. There would be no way for the Commission to adopt an amendment that is responsive to *Rutherford,* but which preserves some mechanism for meaningful sentence relief. Given that the last time the Commission lost its quorum was for five years, this is problematic for the men and women left behind. A second concern is that choosing not to respond to the Supreme Court may be perceived by Congress as resisting the holding in *Rutherford*. For those of us who believe the Commission should act, we are concerned this course of action would invite a legislative

directive that would completely foreclose the Commission's discretion in this area for the foreseeable future.

The action these members recommend is compliance-first, and not confrontational. Our view is that an amendment should:

> (1) strike subsection (b)(6) and its cross-reference in subsection (c);
>
> (2) codify the Court's holding in the text of §1B1.13(c), providing that a non-retroactive change in law shall not be considered, alone or in combination with other factors, in determining whether extraordinary and compelling reasons exist;
>
> (3) adopt a "totality of the circumstances" approach rooted in the "heartland" the majority in *Rutherford* itself described, under which demonstrated and sustained rehabilitation, considered together with age, medical condition, family circumstances, or comparable personal factors, may in combination warrant relief for defendants who have served a substantial defined portion of the term imposed, consistent with 28 U.S.C. §994(t); and
>
> (4) transmit a report to Congress documenting the population still serving sentences under statutory structures Congress has since amended prospectively, including those sentenced under the former §924(c) stacking regime, because retroactivity is, and after *Rutherford* remains, Congress's prerogative alone.

So framed, such an amendment would implement the Court's decision on its face. It is difficult to characterize as defiance an amendment where the first operative provision writes the Court's holding into the Guidelines Manual.

II. Members Preferring Deferral Pending Judicial Development

Three SIAG members recommend that the Commission take no immediate action with respect to §1B1.13(b)(6). While *Rutherford* resolved an important question regarding the use of non-retroactive changes in law as an extraordinary and compelling reason for compassionate release, these members do not read the decision as requiring the Commission to conclude that §1B1.13(b)(6) is entirely or facially invalid. Rather, the Court held that the guideline is invalid to

the extent it permits compassionate release based on Congress's decision not to make certain statutory changes retroactive.

In these members' view, the Commission should allow the federal courts to determine the practical boundaries of *Rutherford* before revising §1B1.13(b)(6). The Supreme Court answered the question squarely before it, but it did not address every issue regarding the continued application of the Guideline. As district courts and courts of appeals begin applying *Rutherford* in future compassionate release cases, they will define the scope of the Court's holding and determine whether any applications of §1B1.13(b)(6) remain permissible. Allowing this body of case law to develop organically reflects respect for both the Supreme Court's decision and the judiciary's role in interpreting and applying that decision. A deliberate decision not to amend §1B1.13(b)(6) immediately should not be viewed as ignoring the Court's ruling in *Rutherford*, but rather as recognition that the law is still developing and that judicial interpretation will better inform any future Commission action. A decision not to amend §1B1.13(b)(6) immediately is itself a considered response to *Rutherford*, reflecting the Commission's judgement that further judicial interpretation will better inform any future amendment.

Accordingly, these members would refrain from revising §1B1.13(b)(6) at this time and instead allow the courts to continue developing the law before determining whether further amendments are warranted. Acting now risks reading *Rutherford* more broadly than the Supreme Court itself did. Should the Commission nevertheless determine that action is necessary at this time, these members submit that any amendment should be limited to the minimum necessary to conform §1B1.13(b)(6) to *Rutherford*. At most, the Commission should clarify in §1B1.13(b)(6) that non-retroactive changes in sentencing law, standing alone or in combination with other factors, do not constitute an extraordinary and compelling reason for a sentence reduction, while otherwise leaving the guideline intact to allow the courts to determine whether any remaining applications of §1B1.13(b)(6) survive *Rutherford*.

III. Conclusion

Every member of the SIAG believes legislation intended to modernize our sentencing regime and provide relief to those serving unnecessarily harsh sentences (and their families) is a positive step. That said, prospective-only changes create inequities that cry out to be addressed. We all

believe in a compassionate release framework that is both lawful and capable of reaching those who genuinely merit relief. We merely differ on the timing and mechanism by which the Commission should respond to *Rutherford*. Both views are presented for the Commission's consideration. The Advisory Group stands ready to assist with drafting, data, and public-comment analysis on the Commission's schedule.

Respectfully submitted,

SENTENCE IMPACT ADVISORY GROUP (SIAG)

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Ronald Evans
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United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

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Honorable Gregory Smith
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July 27, 2026

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Priorities for the 2026-27 Amendment Cycle announced by the U.S. Sentencing Commission. The Commission identified the following five proposed priorities for this amendment cycle:

1. Evaluation of the guidelines and federal sentencing practices;
2. A review of the Commission's *Rules of Practice and Procedure*;
3. Legislation and case law;
4. Circuit conflicts;
5. Miscellaneous issues.

TIAG agrees that each of the identified priorities proves worthy of consideration. TIAG will provide high-level comments on its priorities that fit within these categories and reiterate for the Commission its global concerns.

TIAG remains concerned about the lack of high-quality data regarding Indian defendants in Indian Country. TIAG, since its earliest iteration, has advocated for the collection and publication of better data on Indian Country offenders and offenses so that disparate impact can be better identified and

analyzed. TIAG previously has observed that the Commission's Sourcebook and reports largely fail to distinguish Native American persons in their own category for analysis in published materials. Native Americans are often lumped into the "other" category. TIAG must guess or assume that Native Americanss make up the largest component of the "other" category.

As a result, TIAG typically must speculate about sentencing outcomes for Native American offenders and about potential sentencing disparities as a result. Given that Indians in Indian Country remain subject to federal jurisdiction for essentially all serious crimes and that a majority of the prosecutions for many of the most serious federal crimes, including assaults and homicides, involve Indian Country defendants, it proves important to have high-quality data regarding both Native American defendants as a whole and more specifically Indian defendants in Indian Country.

TIAG has expressed these concerns for many years. Commissioner Elsie Meeks of the U.S. Commission on Civil Rights observed in 2001 that problems arise with Native Americans falling into the Commission's "other" category. A 2016 TIAG report concluded that Native American offenders may serve longer sentences compared to people from other races but noted that missing data complicated the sentencing disparity analysis.

The Commission began publishing "quick facts" specific to Native American sentenced persons. The lack of inclusion of this data in the Commission's other publications, however, means that comparative analysis generally proves impossible for stakeholders. TIAG believes that the Commission should include specific data about Native Americans in every instance the Commission publishes any data about race.

TIAG supports revising the appropriate documents that are used to collect sentencing information to specifically identify a category of "Native American" and to specifically collect information regarding which crimes involve Indian defendants who have committed crimes in Indian Country. This data further needs to address relative sentences in comparable offense level cases and analyze whether offense levels prove appropriate in those cases. TIAG specifically seeks data concerning why the guideline range for assault in

Indian Country cases call for prison time and a similarly sentenced defendant in state court likely will avoid prison. TIAG also would ask the Commission to request that the DOJ collect this information.

TIAG also observes that great disparity exists throughout Indian Country in the nature of the relationships that exist between the federal courts, federal and state law enforcement authorities, and the tribes. The Commission should encourage cooperation to more fully integrate the needs and desires of the tribal communities they serve. The federal courts that operate in Indian Country often function in the same role in the tribal communities as state and county courts do in the state systems. Because of the inherent isolation of these federal systems from the tribal government, care must be taken by the federal courts, supervising probation officers, and federal law enforcement authorities, to communicate and cooperate with tribal governments. The Commission ought to consider that the ramifications of poor communication with outside agencies are of greater concern when dealing with tribal communities lack the same access to state agencies and facilities that other communities might have.

TIAG believes the federal courts have a role to play in education, consultation, and convening other players in Indian Country to increase the level of cooperation with state, federal, and tribal authorities. TIAG believes that increased cooperation would prove particularly valuable for improved supervision schemes and in addressing the disproportionately high rates of violence against Native women and children, among other outcomes. TIAG strongly encourages increased cooperation, support, and consultation with Indian Nations. TIAG further notes that the onus remains on the Federal Government to fund adequately such efforts in recognition of the trust relationship that exists between the United States and the Tribes.

* * *

Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's sentencing priorities may impact defendants who are tribal members. As always, we look forward to working with you during the remainder of this amendment cycle and to continuing our collaboration in the future.

Sincerely,

Brian Morris
Chair

VICTIMS' RIGHTS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

Christopher Quasebarth, Chair
Colleen Clase
Shawn M. Cox
Rachael Denhollander
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Colleen Phelan
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July 22, 2026

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RE: Request for Comment on 2025-2026 Priorities

Dear Chair Reeves, Vice-Chairs, Members of the Commission:

The Victims' Rights Advisory Group ("VRAG") appreciates this opportunity to provide public comment to the Sentencing Commission ("Commission") on its Proposed Priorities for the 2026-2027 Sentencing Guideline Amendment Cycle. Our advisory group responsibility is to assist you in fulfilling your statutory responsibilities under 28 U.S.C. § 994(o) and to provide our views on how your proposed amendments may and will affect federal crime victims.

VRAG's focus for the Commission is always that crime victims are major stakeholders in the federal criminal court system and its sentencing procedures. VRAG members work directly with victims of crime. We see victim pain, victim trauma, as well as victim confusion and frustration with the criminal court process. We have noted previously for the Commission Justice Cardozo's apt statement: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." [1]

[1] *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

From these important foundations, we provide the following comments which we hope you will find useful and practical as you consider the Commission's stated priorities for its review of the current Sentencing Guidelines.

The Commission's Prefatory Comment

As a preface to the identified priorities, the Commission states its intent "to consider the issue of reducing costs of incarceration and overcapacity of prisons," pursuant to 28 U.S.C. 994(g), as may be relevant to those priorities. The public cost of maintaining a federal prison population and the capacity of federal prisons is within the Commission's statutory authority. That statutory authority includes that the Commission "shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines." 28 U.S.C. 994(g).

In this regard, VRAG asks the Commission to consider:

* Removal from the community through incarceration is oftentimes the only way to protect the safety of crime victims and the public from convicted criminal offenders, including: crimes of violence and threatened violence (murder, personal injury, sex offenses); drug traffickers causing death and personal injury; firearms offenders; and many financial criminals;

*How may the Commission better recommend changes and expansions of prison services and post-release services to better ensure that prisoners, once released, do not commit additional offenses?;

*If early release and sentence reductions are the Commission's proposed Guidelines amendments, is the Commission properly directing the courts to honor crime victim rights under the Crime Victims' Rights Act, 18 U.S.C. 3771 (CVRA), including the right to be reasonably protected, the right to reasonable and timely notice, and the right to be heard? Will the Commission's research

consider the broad societal concerns on the finality, justice and public confidence in the criminal justice system that early release or sentence reductions may impact?

The Commission's Identified 2026-2027 Priorities

1. *In anticipation of the 40th anniversary of the Guidelines Manual and two decades of experience with advisory guidelines, the Commission intends to undertake an evaluation of the guidelines and federal sentencing practices in light of the Commission's mission set forth in the Sentencing Reform Act, the statutory purposes of sentencing in 18 U.S.C. 3553(a)(2), and relevant legal developments that have occurred in the past four decades. As part of this priority, the Commission may use regional public hearings, symposiums, roundtable discussions, conferences, and other tools to solicit input on the Commission's work from various stakeholders, including judges, Congress, the Executive Branch, Federal Public Defenders, victims, sentenced individuals, and others.*

VRAG thanks the Commission for considering public comments on the Commission's priorities and other vital work. VRAG also encourages the Commission, if it uses these additional identified means of soliciting public comment, to provide reasonable notice to national and state-based victim rights and advocacy groups so that their valuable input on these topics may be received.

VRAG further thanks the Commission for its recent victim-based research, publishing in 2025 ten Crime Victim Fact Sheets focusing on federal sentencing for crimes involving victims. The Commission's important research brings attention to victims as significant stakeholders in the federal criminal court process and underscores the humanity of federal crime victims and the substantial harms victims suffer from the offenders.

VRAG recommends to the Commission that it continues to consider means by which Guidelines amendments will further respect victim rights. VRAG also recommends to the Commission that it pursue additional research as to the crime victim experience with the federal criminal justice process.

In anticipation of the 40th anniversary of the Guidelines, the Commission's first numbered priority is to undertake an evaluation of the guidelines and federal sentencing

practices in light of the purposes set forth in 18 U.S.C. 3553(a)(2). That statutory subsection requires the sentencing court to consider:

> the need for the sentence imposed—
>
> **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> **(B)** to afford adequate deterrence to criminal conduct;
>
> **(C)** to protect the public from further crimes of the defendant; and
>
> **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. 3553(a)(2).

These purposes continue to serve as the lodestar for sentencing. However, much has changed regarding *the role of the victim in criminal cases* in the intervening decades since the enactment of these purposes. By 1984, the President's Task Force on Victims of Crime had issued its report (1982), which would go on serve as the foundation for the victim's rights movement. At that time, neither the federal government, nor the states, had enacted comprehensive victim's right laws. In ten short years all that changed. Every state had enacted rights for crime victims and 30 or so had enacted state constitutional amendments. See www.nvcap.org for a comprehensive list.

In 2004, the Congress enacted the Crime Victims' Rights Act, 18 U.S.C. 3771 (CVRA). The rights established by the CVRA are both substantive and procedural:

> **(a)Rights of Crime Victims.—**A crime victim has the following rights:
>
> **(1)** The right to be reasonably protected from the accused.
>
> **(2)** The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> **(3)** The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing

> evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> **(4)** The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> **(5)** The reasonable right to confer with the attorney for the Government in the case.
>
> **(6)** The right to full and timely restitution as provided in law.
>
> **(7)** The right to proceedings free from unreasonable delay.
>
> **(8)** The right to be treated with fairness and with respect for the victim's dignity and privacy.
>
> **(9)** The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
>
> **(10)** The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

18 U.S.C. 3771(a).

This rights revolution has implications for the work of the Commission and how it applies the purposes to the task of structuring the guidelines. The purposes of sentencing include reflecting the "seriousness of the offense," "just punishment," "adequate deterrence," and "to protect the public." Each of these is directly related not only to the interests of the victim, but also to the victim's voice; the right to be informed, present, and heard.

The right to be "reasonably protected" directly addresses sentencing, including whether to use prison or probation, and any conditions of either. Sentencing must consider the views of the victim. Part of understanding the "seriousness of the offense" now must include hearing from the victim about the impact of the crime. "Just punishment" cannot adequately be understood apart from the promise made by the law to crime victims about the consequences of the crime and what is "due." *See* https://arizonastatelawjournal.org/2026/01/07/the-crime-

victims-right-to-justice/ "Deterrence" and "protection" both are purposes that should be informed by insights offered by the victim.

The right to "full and timely restitution" must be a factor in imposing "just punishment."

The CVRA protects the victim's rights to be heard at proceedings "involving release, plea, sentencing, or any parole proceeding" for a reason. These allocutions, to be meaningful, must be considered by those to whom they are directed. As the 9th Circuit holds in *Kenna v. District Court*, 435 F. 3d 1011 (9th Cir, 2006):

> Victims now have an indefeasible right to speak, similar to that of the defendant, and for good reason: The effects of a crime aren't fixed forever once the crime is committed—physical injuries sometimes worsen; victims' feelings change; secondary and tertiary effects such as broken families and lost jobs may not manifest themselves until much time has passed. The district court *must consider* the effects of the crime on the victims at the time it makes its decision with respect to punishment, not as they were at some point in the past.

Id., 435 F. 3d 1011, 1016-1017 (emphasis added).

In light of these considerations, the VRAG respectfully urges the Commission, if it were to consider additional Guidelines amendments in light of the purposes set forth in 18 U.S.C. 3553(a)(2), that such proposals formally reflect the role of the victim at sentencing. What the victim has to say, pursuant to CVRA rights, is a significant aspect of the "nature and circumstances of the offense," pursuant to 18 U.S.C. 3553(a)(1). Sentencing judges constantly must be aware that a victim statement is an integral 18 U.S.C. 3553(a)(1) factor in imposing a range of sentence. The right for a victim to give a statement to the court is to influence sentencing; it is not an act of grace by the court simply to let a suffering person be heard.

As it relates to the Commissions' request for other issues that may be relevant for consideration, VRAG recognizes and appreciates the important work of the United States Sentencing Commission's Tribal Issues Advisory Group (TIAG). TIAG possesses the expertise necessary to advise the Commission on the unique issues affecting Indian Country, tribal governments, and federal sentencing.

VRAG does not seek to duplicate TIAG's important role. VRAG is charged with advising the Commission on issues affecting crime victims. We respectfully encourage the Commission to continue prioritizing the impact of federal sentencing policies on *victims* in Indian Country who are members of federally recognized tribes. Crimes prosecuted in federal court arising in Indian Country often present unique challenges for victims who are members of tribes. Often, these victims are geographically isolated and may be without reliable transportation. Such barriers may prevent a victim from being able to access much needed services and from exercising rights under the CVRA, such as the right to participate in federal proceedings. For example, a victim who wants to make a victim impact statement, but lacks reliable transportation, reliable cell service and/or reliable internet service may not be able to appear in person or virtually to exercise their rights. These issues warrant examination of the perspective of crime victims in Indian Country that the Commission is in a good position to research.

VRAG also encourages the Commission to prioritize research examining the impact of crime on victims and the extent to which federal sentencing policies address those harms experienced by crime victims. The Commission has historically collected extensive data regarding defendants and sentencing outcomes. The Commission's recent research on crime victims, which is useful and warranted, does not focus on victims' experiences within the federal criminal justice system. Research on the initial traumatic impact of violent crime, victim participation during the process, perceptions of procedural fairness, safety concerns, and the long-term financial, emotional, and physical effects of crime would provide valuable information to assist the Commission in evaluating whether the federal sentencing guidelines comport with the rights of victims under the CVRA, 18 U.S.C. § 3771, and continue to fulfill the purposes of sentencing under 18 U.S.C. § 3553(a). Such research would also help ensure that future guideline amendments are informed by the experiences of victims, who are the people most directly affected by federal criminal offenders.

2. *In anticipation of the 30th anniversary of the Commission's Rules of Practice and Procedure, the Commission expects to undertake a comprehensive review of the Rules and consider whether any amendments to such Rules may be appropriate to further the agency's statutory purposes and enhance public engagement with and understanding of the Commission's work. As part of the priority, the Commission expects to review current practices and consider possible changes regarding: (a) what Commission work is conducted in public; (b) what Commission policymaking materials should be made public; (c) how stakeholder and public involvement is structured, including through rules about ex parte communications; and (d) what analyses supporting agency policymaking are conducted and released publicly.*

VRAG encourages the Commission, in any proposed amendments to its Rules of Practice and Procedure, to be driven by expansion to make its work open and public. Open and public work will better serve the Commission's governmental purpose to the country, and better engage the public and the stakeholders, including victims, with and in understanding of the Commission's work.

3. *Consideration of any amendments that may be warranted in response to any legislation or case law developments.*

The Commission does not identify any legislation or case law developments warranting Commission action. VRAG currently cannot offer any comment on this priority.

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

The Commission does not identify any current circuit court conflicts warranting Commission action. VRAG currently cannot offer any comment on this priority.

5. *Consideration of other miscellaneous issues coming to the Commission's attention.*

VRAG asks the Commission to consider the following proposed Guidelines amendment:

Clarifying the Application of §3B1.3 (Abuse of Position of Trust) to Clergy

VRAG recommends that the Commission amend U.S.S.G. §3B1.3, Commentary, App. n. 1, to explicitly identify "clergy" as persons who may occupy a "position of trust" for purposes of the enhancement, in the same manner the Commentary already identifies examples such as attorney, bank executive or physician. This clarification would not create a new offense category or mandatory enhancement; it would simply enhance consistency in how courts apply §3B1.3 to clergy defendants.

§3B1.3 permits a two-level enhancement when a defendant "abused a position of public or private trust... in a manner that significantly facilitated the commission or concealment of the offense." The Commentary lists illustrative examples (e.g., an attorney who embezzles client funds, a bank executive who fraudulently obtains a loan) but does not address clergy, despite a substantial body of federal prosecutions in which clergy status was central to the offense conduct itself. Circuits treat the status of clergy differently, requiring different showings to establish "position of trust." A Commentary amendment would clarify the deep trust and authority many clergy hold in society and allow enhancement of sentences where a clergy person exploits that trust and authority.

By way of example, please find a list of federal cases addressing this issue.

Child sex trafficking, forced labor, and coercion (18 U.S.C. §§ 1589, 1591, 2422, 2423).

Clergy have used their pastoral authority to groom victims, secure family or congregational complicity, and suppress disclosure.

Examples:

United States v. Taylor, No. 2:25-CR-20560, 2026 WL 413311, at *1 (E.D. Mich. Feb. 13, 2026)

United States v. Albino-Galindo, No. CR 24-00147, 2025 WL 583042, at *3 (D.P.R. Feb. 24, 2025)

United States v. Haynes, No. 3:17-CR-00158, 2021 WL 288562, at *2 (N.D. Ohio Jan. 28, 2021)

United States v. Santiago-Colon, 918 F.3d 223, 224 (1st Cir. 2019)

United States v. Dickey, No. 16 CR 475, 2019 WL 423376, at *1 (N.D. Ill. Feb. 4, 2019)

United States v. Bollinger, 798 F.3d 201, 203 (4th Cir. 2015)

United States v. Berrios, No. CRIM. 14-334 JAG, 2014 WL 3513233, at *1 (D.P.R. June 13, 2014)

Wire/mail fraud, money laundering, embezzlement (18 U.S.C. §§ 1341, 1343, 1956, 1957).

Clergy have exploited donor trust and lax institutional financial oversight to misappropriate church funds or operate fraudulent ministries.

Examples:

United States v. Holley, No. 18-20224, 2025 WL 3090761, at *5 (E.D. Mich. Nov. 5, 2025)

Terrell v. United States, No. CR411-002, 2013 WL 4482450, at *1 (S.D. Ga. Aug. 20, 2013)

United States v. Ellis, 440 F.3d 434, 437 (7th Cir. 2006)

United States v. Deutsch, 403 F.3d 915, 916 (7th Cir. 2005)

VRAG recommends that the Commission propose an amendment to §3B1.3, Commentary, App. n. 1, to add "clergy" to the existing illustrative example list of positions of trust, with accompanying commentary noting that "the relevant inquiry remains whether the defendant's position — whatever its source — afforded the kind of authority, access, or deference that significantly facilitated the offense or its concealment." This proposed language will preserve the existing case-by-case factual inquiry the guideline requires while removing the present ambiguity over whether clergy are even eligible for consideration under the provision.

Commission's Post-Priorities Statement on Retroactivity

Consistent with our prior public comments, VRAG supports the Commission's general presumption against the retroactive application of Guideline amendments.[2] VRAG is thankful

[2] "Generally, promulgated amendments will be given prospective application only." *U.S.S.C. Rules of Practice and Procedure*, 4.1A.

that the Commission lacked the necessary minimum four votes to make any of the approved 2026 Guidelines amendments retroactive. Retroactivity of adopted Guidelines amendments, which lower sentences already imposed, detrimentally affects federal crime victims, and undermines the predictability, certainty and finality for all actors in the criminal justice system.

VRAG will continue to advise the Commission against retroactive application of adopted Guidelines amendments. VRAG will advise the Commission against any changes to the Commission's Rules of Practice and Procedure that would make retroactivity easier to impose.

Thank you for this opportunity to address proposed priorities for the 2026-2027 cycle.

Respectfully yours,

Christopher Quasebarth

The Victim's Rights Advisory Group
Christopher Quasebarth, Chair

cc: Victims Advisory Group Members

Humane World for Animals
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Formerly called the Humane Society of the
United States and Humane Society Legislative Fund

July 24, 2026

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Dear Members of the United States Sentencing Commission:

On behalf of Humane World for Animals and Humane World Action Fund, we appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

We work to end wildlife trafficking through policy reform, enforcement support, public education, and strategic partnerships. We advocate for strong laws and enforcement efforts to combat wildlife crime.

We respectfully urge the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as ecosystems, through the introduction of invasive species and wildlife diseases.[1,2] Wildlife crimes and wildlife trafficking are widely recognized as one of the most profitable forms of organized crime, and can intersect with other illicit activities.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild or killed for their parts or products, is a direct and serious harm of wildlife trafficking. We urge the Commission to examine whether current wildlife trafficking penalties adequately account for the severe animal suffering occurring in this illegal trade.

Under the current U.S. Sentencing Guidelines, wildlife trafficking offenses generally begin with a lower base offense level than other federal offenses commonly associated with transnational organized crime, including drug trafficking and money laundering. As a result, wildlife trafficking could appear to operate as

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[1] U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs. (2025, March 20). *2024 End Wildlife Trafficking Strategic Review.* https://www.state.gov/2024-end-wildlife-trafficking-strategic-review
[2] Gippet, J. M., et al. (2026). Wildlife trade drives animal-to-human pathogen transmission over 40 years. *Science*, *392*(6794), 178-182. https://doi.org/10.1126/science.adw5518

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United States and Humane Society Legislative Fund

a high-reward, low-risk crime. This imbalance could undermine deterrence and could weaken enforcement outcomes.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats.

Sincerely,

Gabe Wigtil
Program Director, Wildlife Trafficking
Humane World for Animals

Drew Robertson
Program Manager, Regulatory
Humane World Action Fund

July 14, 2026

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Re: Proposed Priorities for Amendment Cycle

I am writing to you on behalf of Point Defiance Zoo & Aquarium (PDZA) and Northwest Trek Wildlife Park (NWT). As related organizations that work daily toward the care and protection of nature, we care deeply about the substantial harms that international wildlife trafficking operations inflict on wildlife and the ecosystem. We respectfully submit the following comments regarding proposed priorities for the U.S. Sentencing Commission's amendment cycle. We commend the Commission for its work and appreciate the opportunity to comment. We ask the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Operating as related facilities under the governance of Parks Tacoma, PDZA and NWT are important cultural attractions and environmental stewards in the Pacific Northwest. With a combined annual visitation near one million guests and several million more reached through our external storytelling outlets, we hold a deep responsibility to advocate for wildlife and wild places as our shared global heritage in need of protection. PDZA and NWT are accredited members of the Association of Zoos and Aquariums (AZA), a 501(c)3 non-profit organization setting the global gold standard for zoos and aquariums in animal care and welfare, conservation, education, science, and guest experience.

PDZA and NWT are Gold Partner members of AZA's Wildlife Trafficking Alliance (WTA). WTA brings together the collective expertise and influence of zoos and aquariums, corporations, nonprofit organizations, and government agencies to reduce consumer demand for illegally traded wildlife and wildlife products, advance laws, regulations, and policies that combat wildlife trafficking, and coordinate responses to ensure the care and welfare of wildlife confiscated from the illegal trade.

Wildlife crime is estimated to be one of the most profitable global crimes, estimated by Interpol to be worth up to $20 billion a year. As such, it has become a major area of activity for organized crime groups and intersects with other serious criminal activities. Wildlife trafficking fuels criminal networks, government instability and corruption, and threatens human and animal health through increased disease transmission. Yet current U.S. penalties of wildlife trafficking are much weaker than those imposed for other organized crimes like drug trafficking and money laundering.

The criminals who organize wildlife trafficking networks devastate our world by completely disregarding biodiversity and the rule of law. They run complex criminal networks that profit from poaching endangered species and selling their parts and products. Traffickers transport live animals

in inhumane conditions for the exotic pet trade, causing many deaths during transit. This highly profitable type of crime funds networks involved in many other criminal activities, often violent ones that threaten our national security.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, Point Defiance Zoo & Aquarium and Northwest Trek Wildlife Park would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Marc Heinzman
Conservation Manager
Point Defiance Zoo & Aquarium and Northwest Trek Wildlife Park

July 20 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of APOPO, I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

APOPO respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to

sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

APOPO has spent the last 30 years training animals in scent detection for the purpose of addressing humanitarian and planet crises. Our work began with the cleanup of unexploded remnants of war and has since grown to include the detection of disease and trafficked wildlife products. In our time addressing humanitarian needs, we have repeatedly seen that the difficulty in addressing one issue – IE landmine clearance – becomes compounded from the impact of other unaddressed systemic problems.

International wildlife trafficking is the penultimate example of this. The problem of wildlife trafficking is not just a conservation one. As the fourth largest criminal economy in the world, it is almost always executed alongside other crimes. Weapons smuggling, narcotics, and forced labor is conducted through the same shipments smuggling illegal wildlife products. The illegal collection and smuggling of elephant ivory and rhino horn has funded the rise and fall of civil wars and political hierarchies. International wildlife trafficking is not an isolated, niche issue. In addressing IWT, you are directly impacting international narcotics, weapons, and human trafficking networks.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine

that this issue warrants further consideration, APOPO would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Erin Sackett
US Partnerships and Exhibits Officer
APOPO, US

ASSOCIATION OF ZOOS & AQUARIUMS

8403 Colesville Road, Suite 710
Silver Spring, MD 20910-3314
301-562-0777 tel 301-562-0888 fax
www.aza.org

July 8th, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Priorities for Amendment Cycle

The Association of Zoos and Aquariums (AZA) respectfully submit the following comments regarding proposed priorities for the U.S. Sentencing Commission's amendment cycle. We commend the Commission for its work and appreciate the opportunity to comment. We ask the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Founded in 1924, AZA is a 501(c)3 non-profit organization setting the global gold standard for zoos and aquariums in animal care and welfare, conservation, education, science, and guest experience. AZA's 254 accredited aquariums, nature centers, science centers, and zoos lead in animal wellbeing, husbandry, conservation, and research. AZA members annually host more than 209 million visitors, collectively generate more than $35 billion in annual economic activity, and support more than 254,000 jobs. AZA members have a deep commitment and impact on domestic and international conservation through research, education, and animal care.

AZA's Wildlife Trafficking Alliance (WTA) is a coalition of more than 300 partners, including all AZA-accredited institutions, working together to combat wildlife trafficking worldwide. WTA brings together the collective expertise and influence of zoos and aquariums, corporations, nonprofit organizations, and government agencies to reduce consumer demand for illegally traded wildlife and wildlife products, advance laws, regulations, and policies that combat wildlife trafficking, and coordinate responses to ensure the care and welfare of wildlife confiscated from the illegal trade.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. These impacts can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with

the scope, sophistication, or harm associated with these activities – particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, AZA would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Dan Ashe
President and CEO

BIG CAT SANCTUARY ALLIANCE

Board of Directors

Kathryn Bertok, President
Carolina Tiger Rescue

Catherine Doyle, M.S., Vice President
Performing Animal Welfare Society

Carson Barylak, Secretary/Treasurer
International Fund for Animal Welfare

Bobbi Brink
Lions, Tigers and Bears

Christi Gilbreth
Cleveland Amory Black Beauty Ranch

Kristin Leppert
Global Federation of Animal Sanctuaries

Emily McCormack
Turpentine Creek Wildlife Refuge

Tammy Thies
The Wildcat Sanctuary

Meredith Whitney
Tread-Well Consulting

July 21, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of the Big Cat Sanctuary Alliance (BCSA), please accept the following comments regarding the Sentencing Commission's proposed policy priorities for the amendment cycle ending on May 1, 2027, as published in the Federal Register on June 12, 2026 (91 Fed. Reg. 35802).

The BCSA is a coalition of animal sanctuaries dedicated to the ethical, permanent care of wild felines, along with partner organizations that support this mission. Our sanctuary members are located across the United States and, collectively, provide lifelong care for hundreds of rescued felids representing more than a dozen species, including lions, tigers, leopards, and other big cats, as well as other species affected by wildlife trafficking.

BCSA also serves as the primary big cat placement resource for the U.S. Fish and Wildlife Service-led Wildlife Confiscations Network, demonstrating our recognized expertise and trusted role in federal enforcement efforts. BCSA member sanctuaries have seen firsthand the harm caused by illicit wildlife trade and violations of federal wildlife protection laws, and we believe that the seriousness of these crimes should be reflected in sentencing guidance and policy. Accordingly, BCSA respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a pervasive threat to biodiversity, international security, public health, and efforts to address organized crime around the world. In addition to these serious consequences of wildlife crime, the resulting animal cruelty and suffering cannot be overstated. Animals who survive the brutality of trafficking arrive at our sanctuaries in need of highly specialized, costly rehabilitation and long-term care. Even when provided such expert care by dedicated veterinary professionals, these animals often experience lifelong medical complications and pain.

Advancing animal welfare has been named as a priority across federal agencies, including the departments of Justice, Health and Human Services, and Agriculture, and, consistent with that approach, we urge the Commission to show leadership in addressing unsustainable and inhumane illegal trade in wild species.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the cruelty experienced by trafficked animals;
- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for considering this request. If the Commission determines that this issue warrants further consideration, BCSA would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Kathryn Bertok
President, Board of Directors
Big Cat Sanctuary Alliance

July 10,2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of Biologists without Borders, I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

We respectfully urge the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health.

Biologists without Borders has been working tirelessly since 2018 to raise public awareness and assist wildlife agencies in their efforts to combat wildlife crime. We applaud the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines are truly adequate. A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, Biologists without Borders would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Sue Orloff

Executive Director

Biologists Without Borders

8737 Colesville Road, Suite 305
Silver Spring, MD 20910
[redacted]

July 22, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

I am pleased to contact you on behalf of Born Free USA and Born Free Foundation to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

Our organization has directly supported the United States Government's efforts to combat wildlife crime in West Africa for more than a decade through programs funded by INL and USAID. During this time, we have witnessed firsthand the devastating and often irreversible impacts of wildlife crime on political stability, biodiversity, and local communities. We would therefore like to respectfully urge the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

In West Africa, globally important ecosystems, such as the Upper Guinean Forest and the Niger and Senegal Delta inland wetlands, provide habitats for a vast array of plant and animal species. However, wildlife crime, and in particular illegal trade in wildlife, is a leading cause of biodiversity loss, resulting in catastrophic and irreversible damage to ecosystems and the critical services they supply to communities across the region. Wildlife crime is perpetrated by organized criminal groups that jeopardize the security and livelihoods of communities, undermine good governance and the rule of law, and contribute significantly to instability. These criminal networks are often linked to other serious crimes, including firearms trafficking, corruption, money laundering, and transnational organized crime. The United States government has long prioritized the provision of targeted wildlife law enforcement support building strong partnerships with the 15 West African countries members of the Economic Community of West African States (ECOWAS) on wildlife law enforcement.

In 2023, West African countries adopted the West Africa Strategy on Combating Wildlife Crime (WASCWC) which recognizes illegal exploitation of wild fauna and flora as a serious crime[1]. This regional strategy, developed with the support of the US government, encouraged West African States to strengthen their national legislation by increasing penalties for wildlife crime, and ensure that wildlife crime is classified as a **serious crime**, in line with the United Nations Convention against Transnational Organized Crime.

[1]Article 2 (b) of the United Nations Convention against Transnational Organized Crime, 15 November 2000, United Nations, Treaty Series , vol. 2225, p. 209 : "'Serious crime' shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."

The WASCWC also called on West African States to develop National Wildlife Crime Strategies (NWCS) and to establish Wildlife Law Enforcement Task Forces (WLETF). Born Free USA has been funded by INL and USAID to support WASCWC implementation in 13 West African countries. Through this support, Benin, Côte d'Ivoire, The Gambia, Nigeria, Ghana, Togo and Niger have developed NWCS and established WLETFs. Born Free USA also provided training and mentoring to equip these WLETFs with the law enforcement intelligence and investigation skills they need to dismantle criminal networks trafficking in wild animals and plants. From 2022 – 2024, we organized 20 trainings, with 456 participants from 11 countries. These trainings had a significant impact across the subregion with multiple countries strengthening their legal framework while significantly increasing their enforcement success rates and collaboration to dismantle trafficking networks.

The latest issue of the World Wildlife Crime report (2024) confirms that multifaceted interventions are required at both demand and supply stages to reduce wildlife trafficking. Preventing illegal trafficking in global resources is a critical part of the United States' government mission. Elephants still account for 15% of the species most affected by wildlife crime after rhinoceroses (29%) and pangolins (28%). African forest elephants (*Loxodonta cyclotis*) remain heavily poached for ivory trade in West Africa and are now Critically Endangered. Urgent action is therefore paramount to stop elephant ivory trafficking and preserve this iconic species.

Ensuring that wildlife trafficking is consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime is paramount to curtail this threat. It will also significantly contribute to the efforts led by the United States to strengthen wildlife law enforcement across the globe by providing sufficient deterrence to discourage wildlife criminals.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of wildlife crime offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request and please know that we remain available to provide any additional information necessary.

Sincerely,

Angela Grimes
Chief Executive Officer
Born Free USA

BROOKFIELD ZOO CHICAGO

CONNECT
CARE
CONSERVE

July 27, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of Brookfield Zoo Chicago, I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

Brookfield Zoo Chicago respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

BROOKFIELD ZOO CHICAGO

CONNECT
CARE
CONSERVE

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

Brookfield Zoo Chicago's mission is to inspire conservation leadership by connecting people to wildlife and nature. This mission is advanced through world-class animal care, conservation science, education, and partnerships that protect wildlife both in human care and in the wild. As an accredited member of the Association of Zoos and Aquariums (AZA), Brookfield Zoo Chicago has extensive experience caring for animals that have been rescued, confiscated, or otherwise removed from illegal trade situations.

Just last year, the zoo became home to five young endangered spider monkeys confiscated in 2023 after being smuggled into the United States. Once trafficked, animals like these spider monkeys require specialized lifelong care, usually around 50-years, at facilities like Brookfield Zoo Chicago. Caring for rescued animals comes with many unique challenges, including extensive veterinary treatment to address illnesses or injuries they may have acquired during transport.

The Zoo works closely with federal, state and local agencies, as well as accredited zoological institutions, to provide expert veterinary care, quarantine, behavioral management, and, when appropriate, long-term placement for wildlife involved in trafficking and law enforcement confiscations. Through this work, the Zoo not only helps ensure the welfare of individual animals, but also contributes to broader efforts to combat the illegal wildlife trade by educating millions of guests each year about the threats wildlife trafficking poses to species survival.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, Brookfield Zoo Chicago would welcome the opportunity to provide any additional information or expertise that may be helpful.

3300 Golf Road
Brookfield, IL 60513

708.688.8000
info@brookfieldzoo.org

Brookfield Zoo Chicago is a private nonprofit organization operated by the Chicago Zoological Society on land owned by the Forest Preserves of Cook County.

BROOKFIELD ZOO CHICAGO

CONNECT
CARE
CONSERVE

Sincerely,

Dr. Michael Adkesson
President & CEO

3300 Golf Road
Brookfield, IL 60513

708.688.8000
info@brookfieldzoo.org

Brookfield Zoo Chicago is a private nonprofit organization operated by the Chicago Zoological Society on land owned by the Forest Preserves of Cook County.

July 22, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of the Center for Biological Diversity, we appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

The Center respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However,

the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, the Center would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Tanya Sanerib

International Legal Director

Center for Biological Diversity

CREW

CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

July 27, 2026

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Priorities Comment
(submitted via portal on Commission website)

Re: Comment on Proposed 2026-2027 Priorities

Citizens for Responsibility and Ethics in Washington (CREW) is a non-partisan non-profit organization dedicated to protecting our democratic institutions; promoting ethics, transparency, and accountability in government; and upholding the rule of law. We write to support the United States Sentencing Commission's proposal to review its Rules of Practice and Procedure with the goal of ensuring that the agency's work best serves its statutory mission, including by ensuring that the public can fully and appropriately engage with it.

CREW's interest in the Commission's Proposed Priorities

CREW has deep and longstanding expertise in government transparency and accountability. We have years of expertise in open records laws, as a frequent FOIA requester and litigator. CREW uses the Freedom of Information Act to request and receive government records that can shed light on how federal agencies and government individuals made key decisions and approached issues relevant to government accountability. By investigating and releasing these records publicly, CREW is able to foster better transparency and receive answers to pressing questions. In cases where the government fails to respond or provide documents in response to FOIA requests, CREW files lawsuits to obtain the records.

Prior to working at CREW, I previously served in the Office of General Counsel at the United States Sentencing Commission ("Commission"). I submit this comment on behalf of CREW in response to the Commission's proposed priority number 2 in its Proposed 2026-2027 Priorities.

The role of public engagement in the work of the Commission

Engaging with the public is crucial to the Commission's work. As the Commission notes in its guide for commenters: "Public comment submissions are vital to the amendment process. The Commission reads all submissions from the public to gauge interest in particular topics and uses that information to select which policy areas are prioritized and shape how the federal sentencing guidelines are amended."

This input is important to the work of the Commission because the Commission's organic statute, 28 U.S.C. 991, provides that "the purposes of the United States Sentencing Commission are to (1) establish sentencing policies and practices for the Federal criminal justice system that- (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code."

The purposes of sentencing that this statute requires the Commission to address include factors that inevitably require consideration of the public, and thus its input. In particular, 18 U.S.C. 3553(a)(2) requires federal sentences:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Promoting respect for the law, ascertaining what is just punishment, protecting the public, deterring criminal conduct, and providing effective programming all require consideration of the effect of the sentence on the public. While these effects may not always be easy to discern, no good faith effort to do so can proceed without public input.

Further, Congress clearly recognized the importance of public engagement to the Commission's work. In the agency's organic statute, Congress provided that the public notice and comment provisions of the Administrative Procedure Act - the primary way that executive branch agencies incorporate public input into their rulemaking processes - apply to the Commission's guideline promulgation, notwithstanding the agency's location outside the executive branch.

The Commission's history of public engagement

The Commission has a long history of taking serious steps to engage with the public, both as part of its policymaking process and otherwise. In addition to the statutorily-required notice and comment periods, the Commission holds open meetings and symposia, publishes on its website detailed and substantial data and research on federal sentences nationwide, and creates public-facing educational information that helps the public understand both the Commission's work and the broader federal sentencing system. Indeed, the Commission has actively worked to improve its public engagement over time, adding products like the Interactive Data Analyzer and virtual trainings to its work. As this history demonstrates, the

Commission has long understood that the process of providing transparency and opportunities for public engagement requires ongoing adaptation and improvement - as the public changes, so must the Commission's work to engage it.

Modernizing affirmative transparency and public engagement, particularly around rulemaking

CREW urges the Commission to continue its forward momentum on transparency and engagement in the current amendment cycle. While the Commission has made great strides in recent years in educating the public on its data and research and expanding access to its training materials, transparency around its rulemaking process has remained largely unchanged. The Commission should remedy this.

That transparency around the Commission's rulemaking process has fallen behind is, in some ways, understandable; unlike executive branch agencies, which Congress has subjected to various transparency provisions like the Freedom of Information Act, the Commission's location in the Judicial Branch exempts it from these laws and their associated procedures. However, this is all the more reason for the Commission to give due consideration to affirmative disclosure of relevant material beyond what currently exists in the Statement of Reasons and other associated publications. In addition to public comment, for example, the Commission receives expert research and legal analysis from its staff and informal input from its *ex officio* Commissioners; in some cases, this information is crucial to the Commission's decision-making. The public deserves to know.

Conclusion

CREW urges the Commission to take the opportunity to continue to improve its transparency and public engagement. Particularly in a post-*Booker* world, the Commission should make it as easy as possible for the public - not to mention the judges who must consider the Commission's guideline recommendations - to understand why it is making the decisions it is making.

Sincerely,

/s/ Jennifer Ahearn
Senior Advisor

Earth League International
PO Box 661623
Los Angeles, CA 90066

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle NE, Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Comments for the US Sentencing Commission

Esteemed Members of the United States Sentencing Commission:

Earth League International (ELI) thanks the Commission for the opportunity to provide public comments and recommendations on the Federal Sentencing Guidelines §2Q2.1 - Offenses Involving Fish, Wildlife, and Plants. As the only NGO that focuses on environmental crime convergence, we have unique perspective and deep expertise on how embedded–and how lucrative–wildlife crime is in modern transnational organized crime (TOC) networks. There is no doubt that wildlife trafficking and other forms of environmental crime covered by the statute, such as timber trafficking, are rapidly enriching and empowering some of the biggest global threats to security and governance as well as to the planet.

ELI investigates TOC networks around the world that commit wildlife trafficking and other environmental crimes via field investigations that provide first- and secondhand access to criminals in some of the USG's highest priority TOC networks, including the Fujianese mafia, Mexican cartels, Venezuela's Tren de Aragua, and Brazil's PCC and CV. Information obtained by our field teams is validated and augmented by OSINT research. Our focus on crime convergence means that while our priority is protecting wildlife, we holistically chart and assess *all* of the crimes and associated illicit revenue streams of the transnational criminal organizations (TCOs) that we investigate as we map out their networks. This empowers our USG and other action partners to build the most holistic and impactful cases possible. It also gives ELI deep insights into the prominent role of wildlife crime in organized crime.

We would like to make two main points in the below comments:

1. Given that wildlife trafficking and other environmental crimes are substantial and highly lucrative components of the range of criminal activities of most major TCOs, and are financially and logistically enmeshed with other serious crimes, there is no way to effectively combat TOC without effectively deterring and penalizing wildlife crime.

2. Current sentencing guidelines fall so far short of the proceeds being made by wildlife trafficking that they in no way constitute a deterrent.

Why Fighting Wildlife Crime Effectively is Central to Combatting TCOs

ELI's work has provided unique insights into where wildlife trafficking fits into TCOs' criminal portfolios, and in every country where we have worked, we have seen that wildlife crime is intertwined with other serious crimes, committed by some of the world's biggest criminal threats. In particular, financial flows and transport logistics for different illicit commodities sold by the same TCOs frequently overlap.

In practice, this means that proceeds from activities such as timber trafficking, shark fin smuggling, or IUU fishing can be and are used to finance other types of crime, including expansion into new illicit revenue streams.

This is yet another reason that the penalties for these crimes must be strengthened, to provide adequate penalties to impede the operations, expansion, and enrichment of major threats to national and global security and governance. Many of these groups and/or their leaders have already been designated by the U.S. government as terrorist organizations, sanctioned by OFAC, etc., making clear that disrupting their activities, preventing their growth, and ultimately seeking their dismantlement is a top USG priority.

- In Mexico, ELI was able to detail how Chinese TCOs collaborate with Mexican cartels in both wildlife trafficking and drug trafficking. Drugs provided by Mexican cartels were distributed in the U.S. in part by the Chinese TCOs' associates here.
- Also in Mexico, two of the same Chinese networks involved in wildlife trafficking were also heavily involved in smuggling Chinese nationals over the U.S. border. Some of these smuggled individuals were then sent to work on illegal marijuana grows in the U.S.
- In Cambodia, ELI identified a person of interest who was simultaneously smuggling illegal wildlife products into mainland China and fentanyl precursors into the Western Hemisphere.
- In Colombia, illegal deforestation and timber trafficking in protected areas by non-demobilized FARC units is closely enmeshed with illegal mining, drug trafficking, and money laundering. Significant quantities of the cocaine produced by FARC dissidents flow north into U.S. markets.
- A FWS seizure of 930 live endangered turtles at LAX airport in December 2025 enabled by ELI's information underscores how often U.S. infrastructure and financial institutions are used to enable wildlife crime, even in instances where the wildlife is sourced elsewhere. There is a clear U.S. nexus in most of ELI's wildlife trafficking investigations, regardless of the country of origin of both criminal networks and the wildlife products.

Illegal Wildlife as Currency

In part because illegal wildlife products are difficult to detect and are generally attached to low penalties, but still carry high retail value, they are used in certain circumstances as currency, particularly where criminals wish to avoid leaving financial trails. First, as Vanda Felbab-Brown from Brookings and others have documented, illegal wildlife is sometimes used to directly trade

for other illegal commodities, including drugs and drug precursor chemicals.[1] [2] Second, wildlife and wildlife products are used to bribe officials who are hesitant to accept cash or luxury items that may be easily detected and questioned. This in effect makes wildlife a type of currency that feeds corruption and undermines good governance.

ELI's field work has shown repeatedly that criminal networks are opportunists, constantly seeking to maximize profits while minimizing risk. While detestable, most criminals–particularly those in major transnational enterprises–are inherently rational actors and capable businesspeople. They manage complex global supply networks and billion-dollar industries just as their counterparts in the legitimate economy do. In multiple instances, ELI's sources have described either entering or exiting a particular type of crime based on changes in risk-benefit calculations. ELI has therefore consistently seen criminal networks across multiple countries, including in the U.S., seek to increase their wildlife trafficking activities because the penalties remain so low measured against profitability. ELI has also collected multiple examples of criminal actors moving out of specific types of wildlife crime when the level of risk–scrutiny, legal penalties, targeted law enforcement operations, etc.--is increased. For example, some of ELI's persons of interest moved away from totoaba trafficking when the issue became higher profile and a higher priority for law enforcement, raising the risk of detection and punishment.

Proceeds of Wildlife Trafficking and Deterrent Effects

There is no way to effectively combat crime without penalties that are sufficiently strong to induce deterrent effects. This is especially true of financial penalties, which are almost always far short of the proceeds of the crime(s). Criminals are not deterred by penalties that amount to a tax on a budget line, or in the worst-case scenarios, a fraction of a percent of the proceeds. Similarly, short prison sentences are a price that many traffickers are willing to pay given that their illegal profits will in most cases be waiting for them upon release. Even after long prison sentences, this ready money can and often is used to restart the same activities that sent the person to jail in the first place. We must partly deter this recidivism by creating financial barriers to re-entry into criminal economies.

For example, in ELI's investigations into the trafficking of maritime wildlife from Mexico into California for both local sale and onward shipment to China, proceeds from totoaba alone were between approximately $1 million and $2 million in just 2 years. This is without factoring in the trafficking by the same persons of interest of shark fins, sea cucumbers, sea horses, and endangered turtles. One Chinese wildlife trafficker whose 2023 arrest was enabled by ELI's work had $2 million of totoaba in stock in California at the time of arrest. Another ELI person of interest had five warehouses in Southern California to hold his wildlife products.

Current sentencing guidelines are simply insufficient to deter activity at such volume and profitability, leaving the vast majority of rewards still in criminal hands. In fact, showing wildlife

[1] https://www.brookings.edu/articles/something-fishy-wildlife-trafficking-from-mexico-to-china/
[2] https://www.sciencedirect.com/science/article/pii/S2949791425000727

traffickers that even if they get caught, arrested, and convicted, they will still come out well ahead financially could be considered an incentive to get involved in the illegal wildlife trade.

ELI therefore proposes the following to the Commission:

1. Financial penalties must be at a minimum equal to the demonstrated or reasonably estimated proceeds of wildlife trafficking acts committed by the perpetrator(s).
2. Financial penalties should be applied *even when* there are jail sentences applied, so that this money is not waiting for the criminals to be released and claim it. Ensuring that illegal profits do not remain available to poachers, smugglers, and traffickers also creates a barrier to “getting back in the game” and picking up exactly where they left off regarding their criminal enterprises.
3. Penalties for wildlife crime should be further increased if they are demonstrated to be connected to other crimes, financially, logistically, or otherwise, even if not part of a RICO case.

Earth League International thanks the Commission once again for taking the time to review these recommendations and is happy to accept additional RFIs to support the above information upon request.

United States Sentencing Commission
Attention: Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

July 24, 2026

Re: Comment for U.S. Sentencing Commission – Wildlife Trafficking Offenses

Dear Members of the United States Sentencing Commission:

On behalf of the Environmental Investigation Agency (EIA), based in Washington, DC, I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

EIA respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle. The U.S. Sentencing Commission must strengthen penalties for those convicted of orchestrating international wildlife trafficking operations, and should review and amend Section 2Q2.1 of the U.S. Sentencing Guidelines - Offenses Involving Fish, Wildlife, and Plants.

EIA's mission is to protect the environment by exposing environmental crimes and campaigning for the protection of the natural world via progressive policy-making, improved law enforcement, and behavior change. During its 35+ year tenure, EIA's intelligence, procured through the use of investigative techniques, has exposed environmental criminals, and provided actionable evidence to law enforcement to prosecute criminals. EIA understands the power of effective enforcement and deterrents.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, and fuels corruption and instability worldwide. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation. Wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

ENVIRONMENTAL INVESTIGATION AGENCY
P.O. BOX 53343 Washington DC, 20009
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We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife and timber trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime. The United States should impose sentences that reflect the gravity of wildlife trafficking crimes, particularly for the high-level traffickers at the top of criminal networks who facilitate the smuggling of wildlife across transnational supply chains.

Thank you for your consideration. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats.

Sincerely,

Amy Zets Croke
Deputy Director, Wildlife and Ocean Campaigns
Environmental Investigation Agency

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Joseph N. DiVincenzo, Jr.
County Executive

ESSEX COUNTY TURTLE BACK ZOO

Daniel K. Salvante
Director

July 8, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Priorities for Amendment Cycle

Essex County Turtle Back Zoo respectfully submits the following comments regarding proposed priorities for the U.S. Sentencing Commission's amendment cycle. We commend the Commission for its work and appreciate the opportunity to comment. We ask the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Since opening in 1963, Essex County Turtle Back Zoo has been committed to educating and inspiring our community to conserve and protect wildlife and wild places locally and globally. With almost one million visitors annually, we provide our guests with meaningful and engaging opportunities to learn and the actions and tools to participate in better stewardship of our planet. Essex County Turtle Back Zoo is an accredited member of the Association of Zoos and Aquariums (AZA), a 501(c)3 non-profit organization setting the global gold standard for zoos and aquariums in animal care and welfare, conservation, education, science, and guest experience.

Essex County Turtle Back Zoo is a Gold Partner of AZA's Wildlife Trafficking Alliance (WTA). WTA brings together the collective expertise and influence of zoos and aquariums, corporations, nonprofit organizations, and government agencies to reduce consumer demand for illegally traded wildlife and wildlife products, advance laws, regulations, and policies that combat wildlife trafficking, and coordinate responses to ensure the care and welfare of wildlife confiscated from the illegal trade. In 2024, we joined forces with other local AZA institutions, USFWS and Newark Airport to create a Wildlife Trafficking installation in the international terminal at the Newark Airport (EWR). This display educates millions of visitors a year on the dangers of purchasing animal products and encouraging exotic animal use for profit.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. These impacts can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

Joseph N. DiVincenzo, Jr.
County Executive

ESSEX COUNTY TURTLE BACK ZOO

Daniel K. Salvante
Director

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities – particularly for the high-level actors who orchestrate complex, transnational supply chains. Zoos often partner with government organizations to take responsibility for these animals once confiscated and we see first hand the severe effects of these acts. Most of the animals we receive are sick and diseased and often don't survive after countless resources are expended and those that do survive most likely can not be returned to the wild.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, Essex County Turtle Back Zoo would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Jilian Fazio, Ph.D.

Director | Essex County Turtle Back Zoo

Joseph N. DiVincenzo, Jr.
County Executive

ESSEX COUNTY
TURTLE BACK
ZOO

Daniel K. Salvante
Director

West Orange, NJ 07052

July 27, 2026

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002

Re: Comment on 2026-2027 Proposed Priorities

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. Nearly 35 years later, we mobilize communities of incarcerated persons and their families affected by unjust sentences to illuminate the human face of sentencing. For most of our history, FAMM has been an active advocate before the U.S. Sentencing Commission, participating in hearings, public comments, and meetings with staff and commissioners.

The Sentencing Guidelines are a critical piece of the work that FAMM does and are of the utmost importance to the people FAMM represents – the Sentencing Guidelines help determine how long loved ones will be away from home. With our members in mind, over 75,000 people nationwide, we welcome the opportunity to comment on the proposed priorities for the 2026-2027 amendment cycle.

A. *The Commission has a Statutory Obligation to Consider the Impact of the Guidelines on the BOP.*

As the Commission considers its role in federal sentencing as part of this amendment cycle,[1] we urge the Commission to consider the impact of their action (or inaction) on the Bureau of Prisons (BOP). Congress expressly directed the Commission to consider this issue,[2] and FAMM has now raised it in comments submitted during numerous amendment cycles.[3]

The BOP remains an agency in crisis.[4] While new leadership has promised change, many of the BOP's most pressing problems cannot be solved through leadership changes alone. These issues

[1] *See* US Sent'g Comm'n, *Proposed Priorities*, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2026-2027-priorities.
[2] 28 U.S.C. § 994(g).
[3] *See, e.g.*, FAMM Letter to the Commission at 1-2 (February 10, 2026); FAMM Comment to the Commission re: Proposed Amendments at 4-5 (Mar. 3, 2025).
[4] *See* Office of the Inspector General, *Ongoing Challenges Facing the Federal Bureau of Prisons*, (Jan. 26, 2026), https://oig.justice.gov/reports/top-management-and-performance-challenges-facing-department-justice-2025.

include: understaffing, low morale, staff misconduct, crumbling infrastructure, overdoses within facilities, sexual and physical abuse by corrections officers, lack of appropriate healthcare, broken grievance processes,[5] and insufficient programming.

Congress took an important step toward reforming BOP by enacting the Federal Prison Oversight Act (FPOA). FPOA was passed and signed into law in 2024. FPOA intends to address many of the longstanding issues with BOP. However, as of this date, Congress has not appropriated funding to implement the FPOA. As a result, many of these systemic deficiencies remain and are likely to persist for the foreseeable future.

The Commission, however, has a unique role to play in bettering the BOP. The Commission must account for the impact that any guideline or rule has on the BOP population when promulgating sentencing policy.[6] It can also urge BOP to make specific reforms to help address the issues with over-incarceration. In a 2022 article, Stephen Sady identified six recommendations that fall squarely within the Commission's statutory obligation to consider the effect of its policies on the BOP.[7] Those six recommendations are to: (1) increase the availability of community corrections; (2) expand eligibility and availability of sentence reductions under RDAP; (3) eliminate sentence computation rules that create longer sentences; (4) urge BOP itself to file more compassionate release motions; (5) revive the boot camp program for nonviolent defendants; and (6) fully implement the earned time credit program.

FAMM agrees with each of these recommendations and thinks they merit serious consideration during this amendment cycle. Doing so would not only fulfill the Commission's statutory mandate but also promote more humane treatment of people in federal custody, as well as improve safety for corrections staff.

B. *Amendments to USSG §1B1.13(b)(6) are Not Needed at This Time.*

On May 28, 2026, the United States Supreme Court issued its decision in *Rutherford v. United States*.[8] This case decided the fate of whether "extraordinary and compelling reasons," as defined under the Commission's policy statement, could include changes from the First Step Act that were not made retroactive by Congress. The Court held that Congress's decision not to make the

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[5] Christie Thompson, et al., Rejected: How Federal Prisons Stonewall Grievances and Deny Care for Years, The Marshall Project (June 17, 2026), https://www.themarshallproject.org/2026/06/17/health-federal-alabama-prison-complaint?utm_campaign=opening-statement&utm_medium=email&utm_source=newsletter&utm_term=4519-a-grievance-process-designed-to-fail&utm_source=TMP-Newsletter&utm_campaign=b3d5e934fb-EMAIL_CAMPAIGN_2026_06_17_10_43&utm_medium=email&utm_term=0_5e02cdad9d-b3d5e934fb-174891279.

[6] 28 U.S.C. § 994(g).

[7] Stephen R. Sady, Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time, 35 Fed. Sent'g Rep. 12 (2022).

[8] *Rutherford v. United States*, 146 S. Ct. 1320 (2026).

amendments to 18 U.S.C. §§ 924(c) and 851 retroactive cannot, standing alone or in combination with other factors, constitute an extraordinary and compelling reason for compassionate release. Equally important, however, is what the Court did *not* hold – the Court did not conclude that §1B1.13(b)(6) is facially invalid. Instead, the Court carefully limited its holding, explaining:

> "[w]e need not nail down the precise boundaries of the phrase 'extraordinary and compelling' to conclude that 'with regard to the particular dispute in [this] case,' the statute's language 'has a plain and unambiguous meaning.' The statutory text and structure make clear that Congress's nonretroactive change to § 924(c)—considered by itself or in combination with other factors—cannot make a prisoner eligible for compassionate release."[9]

This decision came out a mere few months ago. Since then, district court across the country have endeavored to develop the contours of what claims, if any, remain viable under §1B1.13(b)(6). FAMM urges the Commission to allow the courts to continue that process before considering any amendments to the policy statement. Premature action could create unnecessary confusion, disrupt development of the law, and jeopardize relief for individuals whose claims may remain viable.[10] At this stage, restraint – rather than revision – is the more prudent course.

C. *Conclusion*

FAMM appreciates the Commission's willingness to seek public input and to engage with the people most affected by federal sentencing policy. The decisions made during this amendment cycle will have profound consequences for thousands of individuals and families across the country. We urge the Commission to continue advancing policies that promote fairness, proportionality, and public safety, and we look forward to continuing our longstanding partnership with the Commission in that effort.

Sincerely,

Shanna Rifkin

Shanna Rifkin
General Counsel

[9] *Id.* at 1335.

[10] That said, if the Commission feels it must revise USSG § 1B1.13(b)(6) immediately, it should simply make clear that non-retroactive sentencing law changes to 18 U.S.C. §§ 924(c) and 851 cannot be considered an extraordinary and compelling reason alone, or in combination with other factors. *See id.*

Comment to the U.S. Sentencing Commission on Policy Priorities
Gabe Roth
July 23, 2026

Thank you for the opportunity to provide comment on whether any amendments to the U.S. Sentencing Commission's Rules of Practice and Procedure may be appropriate to enhance public engagement.

My name is Gabe Roth, and I am the executive director of Fix the Court, a nonpartisan organization that advocates for greater openness and accountability in the federal judiciary. At the outset, I want to commend the Commission for establishing rules decades ago putting public access at the forefront of its work.

That the Commission's public meetings and public hearings are livestreamed — and have been for years — under Rule 3.5 is a rare feat within the judiciary. Elsewhere in the branch, it wasn't until 2020 that all courts of appeals livestreamed their oral arguments. The Judicial Conference of the U.S. refuses to livestream its semiannual meetings, and though various Rules Committee proceedings are livestreamed, none of the periodic meetings conducted by its two dozen non-Rules Committees — which are responsible for overseeing branchwide policy on topics like the budget, codes of conduct and financial disclosures — is livestreamed.

Similarly, the Commission has branch-leading statistical datasets in terms of presentation and readability.[1] Datasets on the Administrative Office of the U.S. Courts website are often clunky and not interactive.[2]

Earlier this summer, members of Congress introduced legislation that would close some of these transparency gaps. In June and with Fix the Court's support, Rep. Hank Johnson and Sen. Mazie Hirono introduced the Open Meetings Act,[3] which would require Conference committees to livestream their meetings, finally catching them up with the standard the Commission set years ago.

Going one step further on the transparency front, in July Sen. Adam Schiff introduced the Judicial FOIA Expansion Act,[4] which would subject certain parts of the judiciary to the Freedom of Information Act. The bill, or at least my optimistic reading of it, is constructed in a way that would make the agendas and minutes of Judicial Conference Committee meetings public but not, say, judges' emails discussing cases.

Though my organization supports these bills, we have a slightly different approach to public access that I believe is worth mentioning here and could be informative as the Commission continues its work.

The goal of a transparency organization like ours is to make more public (i.e., governmental) information public. FOIA may be a successful way to do that, though to get useful data from the various agencies we seek information from, Fix the Court often has to file a lawsuit, which is not a great way to do business.

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[1] *See* the U.S. Sentencing Commission Interactive Data Analyzer, https://ida.ussc.gov/analytics/saw.dll?Dashboard.

[2] *See* documents on the Administrative Office of the U.S. Courts' "Statistical Reports" site, https://www.uscourts.gov/statistical-reports, though to be fair, the AO by statute must release far more data than the USSC.

[3] H.R. 9408 and S. 4857 in the 119th Congress.

[4] S. 5033 in the 119th Congress.

Instead of subjecting the third branch to FOIA, what may be a more fruitful approach to increasing transparency is identifying discrete categories of records or types of events for which there is no public access and figuring out ways to increase access to those records over time.[5]

For the third branch (though not for the Commission), one example would be the Guide to Judiciary Policy, a reference manual that sits on every judge's desk and covers issues from how to run your chambers to what your recusal and financial disclosure obligations are. It is very odd to me that this Guide is not public in full, especially with judges periodically citing the text in their opinions, but I believe that over time, the judiciary should figure out a way to release the complete volume so the public can gain a better understanding of the branch's expectations of its judges.

Similarly, since the judiciary has had significant challenges over the years, and especially over the last decade, ensuring that its employees are working in environments free from harassment, discrimination and retaliation, releasing statistics on the number and type of complaints filed under the Employment Dispute Resolution process might highlight problem areas, both functionally and geographically, so more resources could be routed in that direction.

Regarding the work of the Commission, certain data and data trends are becoming easier to scope out given recent advances in technology. I'd imagine that individuals or organizations are using scraping and AI tools to determine which judges or courts are more likely to regularly sentence defendants toward the higher or lower ends of guidelines. This information can be useful in many ways, and I hope that the Commission itself will employ some of these tools and release its own data, since it'd likely be more reliable and useful coming from a disinterested party (the Commission) over an interest group.

Further, the trove of data released by the Commission on a regular basis lends itself to a higher level of analysis that might be beneficial from a transparency and public education perspective. To offer one example, in FY2025, white defendants in the D.C. Circuit were three times more likely to have their cases go to trial than black defendants.[6] Why was that? If there were an opportunity for the public to ask these types of questions, or if Commission staff proactively offered a "behind the data" analysis for these types of statistical curiosities, it'd help explain the work of the Commission — and of the judiciary as a whole — to the public.

Nowadays, the public expects more transparency from government agencies no matter which branch they're in. Although the Commission in many respects already leads the judicial branch in this area, its work in this regard is not done, and you can always seek new ways to engage with members of the public.

I look forward to hearing more about your work as you continue this review and wish you success.

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[5] *See* "A Judicial Open Records Act," Fix the Court, available at https://fixthecourt.com/wp-content/uploads/2026/03/Judicial-Open-Records-Act-2.24.26.pdf.

[6] Data collected by me from the statistics described in note 1.

July 23, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

I am writing on behalf of my non-profit parrot rescue organization, Foster Parrots, Ltd. to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026. It is our sincere hope that the commission will recognize the gravity of illegal international wildlife trafficking and move to designate federal sentencing for crimes against wildlife as a priority issue for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar, global crisis, and as the Executive Director of one of the longest standing parrot rescue and sanctuary organizations in the country, I am acutely focused on the plight of avian victims of illegal poaching and trafficking activity. Birds are the most abundantly trafficked of all wildlife on the planet, and psittacine species (parrots) are the most abundantly trafficked of all birds. The impact of the illegal trade on parrots has been catastrophic. More than one third of all parrot species on earth are listed as threatened, endangered or critically endangered on the IUCN Red List. Over half of all parrot species in the wild are in decline. While habitat loss can also threaten wild populations, illegal trafficking that is a primary factor driving avian species toward extinction.

Although the extreme suffering of individual animals victimized by wildlife trafficking should be concerning enough, wildlife trafficking has much broader repercussions. Notoriously linked to other networks of organized crime including drug and weapons trafficking, human trafficking and violence against the indigenous communities caught in the crossfire, it extracts an enormous human rights toll. It also has a devastating environmental impact, resulting in habitat destruction and the extraction of key animal species that are essential participants in their natural ecosystems. Most tragic of all, studies demonstrate that up to 90% of trafficked animals die during transport or within the first year of captivity, representing a massive loss of life of billions of animals annually. A wildlife trafficker's path is littered with the bodies of people and animals alike, and yet, there are rarely any meaningful repercussions for these violent crimes. Light jail sentences and nominal fines are a laughable consequence compared to the profits that can be made through the suffering of wild animals.

P.O. Box 34 Hope Valley, RI 02832
(401) 343-0280
[redacted]

It is time that we begin to connect the dots and acknowledge the correlation between violence against animals and violence against humans, and move to impose a legal sentencing structure that reflects the enormity of the crimes being committed.

I respectfully urge the members of the United Sates Sentencing Commission to recognize the severity of wildlife crime. Please move to designate meaningful federal sentencing for wildlife trafficking offenses that include live animals, animal parts, and as is now a growing trend, bird eggs, stolen from nests by the hundreds of thousands each year, threatening the survival of bird and parrot species around the world.

Sincerely,

Karen Windsor
Executive Director
Foster Parrots, Ltd.
[redacted]
www.fosterparrots.com

Global Federation of Animal Sanctuaries

Helping Sanctuaries Help Animals

July 23, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of the Global Federation of Animal Sanctuaries (GFAS), I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

GFAS is a 501(c)(3) nonprofit with over 200 accredited sanctuaries, rescues, and rehabilitation centers in 18 countries. GFAS was founded to fulfill the need to differentiate and support sanctuaries that provide the highest quality of care for animals and also exhibit operational excellence in safety, financial and governance practices.

Opportunities to combat wildlife trafficking are always welcome as our sanctuaries are on the front lines of this crisis, and their teams work tirelessly to rehabilitate, and care for many of these stolen and abused animals for their entire lives. As such, GFAS enthusiastically urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across

Global Federation of Animal Sanctuaries

agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, GFAS would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Valerie Taylor
Executive Director
Global Federation of Animal Sanctuaries

END
WILDLIFE
CRIME

14 July 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of the Global Initiative to End Wildlife Crime, we express our appreciation for the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

The Global Initiative to End Wildlife Crime respectfully encourages the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational, organised criminal enterprise that threatens nature, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as to entire ecosystems through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself repugnant. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture.

Despite its scale, nature and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework nor in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international

trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

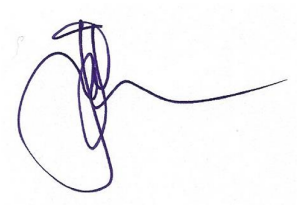
Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to nature, agriculture, animal, plant, and public health, ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, the Global Initiative to End Wildlife Crime would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,



John E. Scanlon AO

Chair

Global Initiative to End Wildlife Crime

Heal the Bay
1444 9th Street
Santa Monica, CA 90401
T: 310.451.1500
Healthebay.org

7/27/2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of Heal the Bay, I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

Heal the Bay, an environmental non-profit in Los Angeles for over 40 years, who has seen firsthand the unacceptable impacts of wildlife trafficking, respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

Heal the Bay
1444 9th Street
Santa Monica, CA 90401
T: 310.451.1500
Healthebay.org

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Heal the Bay has witnessed the impacts of wildlife trafficking firsthand. Due to the Heal the Bay Aquarium's proximity to Los Angeles International Airport (LAX) and the U.S. Fish and Wildlife Service's Torrance office, our staff has been called upon to assist with the care of wildlife confiscated through federal enforcement actions. These experiences have made clear the significant and ongoing volume of wildlife seizures occurring on a regular basis, placing considerable demands on the limited network of accredited aquariums, zoos, rehabilitation facilities, and wildlife professionals responsible for stabilizing and caring for these animals. While additional support for these critical response efforts is needed, enforcement alone cannot solve the problem. Throughout Heal the Bay's decades of environmental work, we have learned that responding to the consequences of environmental crime is not enough. Lasting progress requires addressing the underlying drivers of these offenses through effective policy, meaningful accountability, and enforcement measures that serve as a genuine deterrent. Strengthening federal sentencing for serious wildlife trafficking offenses is an important component of that broader strategy.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Heal the Bay
1444 9th Street
Santa Monica, CA 90401
T: 310.451.1500
Healthebay.org

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, Heal the Bay would welcome the opportunity to provide any additional information or expertise.

Sincerely,

Laura Rink
Associate Aquarium Director
Heal the Bay

UNITED STATES HEADQUARTERS
1400 16th St. NW Suite 300
Washington, DC 20036
USA

Australia
Belgium
Canada
China
France
Germany
Kenya
Malawi
Netherlands
South Africa
United Arab Emirates
United Kingdom
United States
Zambia
Zimbabwe

July 24, 2026

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment.

Re: Priorities for the upcoming Amendment Cycle

Dear Members of the United States Sentencing Commission:

On behalf of the International Fund for Animal Welfare (IFAW), and in the interest of combatting nature crimes that fuel transnational organized criminal activity, I urge the Commission to prioritize wildlife crime and work to ensure that sentencing guidelines meaningfully deter wildlife trafficking for the benefit of animals and people alike.

Wildlife crime, the fourth largest transnational criminal activity—which, according to the U.S. Department of Homeland Security (DHS), generates as much as $23 billion annually[1] and imposes far greater costs on communities and ecosystems—jeopardizes the survival of thousands of species globally and accelerates the collapse of biodiversity. The illegal trade in wildlife also causes tremendous suffering; countless animals die while being captured and are often restrained and drugged for transport. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

For decades, IFAW has worked to combat wildlife crime around the world, including by: building law enforcement capacity; strengthening state, national and international policies; engaging social media and e-commerce companies to disrupt online wildlife trafficking; and leading education and behavior change campaigns to address consumer demand for wildlife parts and products.

Last year alone, IFAW worked to strengthen wildlife law enforcement capacity by training or mentoring 474 law enforcement officials across four continents. In Zimbabwe, IFAW supported ZimParks intelligence gathering—efforts that led to 152 convictions, including eight individuals receiving 9-year sentences. We also work around the globe to support international and national

[1] *See, e.g.*, Homeland Security Investigations, Wildlife Trafficking, Wildlife Trafficking | Homeland Security (dhs.gov).

policy frameworks to ensure that legal tools that deter and prevent wildlife crime are available to enforcement and prosecutors.

Acknowledging the ever-expanding conservation impacts of digital media, IFAW has also worked to build and expand the work of the Coalition to End Wildlife Trafficking Online—which, since its launch in 2018, has blocked more than 63.3 million prohibited wildlife listings and suspected illicit sellers.

Supporting and witnessing these critical advances in efforts to address wildlife crime globally, IFAW and anti-trafficking partners have noted that sentencing guidelines for certain conservation crimes[2]—which, for purposes of U.S. sentencing guidance, include wildlife trafficking and other violations of federal wildlife protections—seem misaligned with the seriousness of wildlife crime and the critical importance of effective deterrence.

IFAW does not propose specific revisions to the text of federal sentencing guidance here but rather makes a broader request—that wildlife crime be treated with the same seriousness as parallel (and sometimes interconnected) offenses addressed in the Commission's guidelines. Nor do we put forward a blanket call for *harsher* sentences;[3] instead, we call for conservation and wildlife crime penalties to be guided by data-supported deterrence strategies.

To that end, we urge the Commission to account for the following while considering guidance revisions in the context of wildlife crime:

- The severe—often irreversible—harms to species and ecosystems that are associated with wildlife trafficking and related criminal activity;
- The perception and status of wildlife trafficking as a relatively low-risk (penalties), high-reward (profit) criminal activity;
- The convergence between wildlife trafficking and other serious criminal activities and enterprises[4];
- The role of illicit wildlife trade in creating and proliferating substantial threats to human health and safety, including through the spread of zoonotic disease[5];

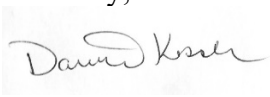
[2] *See generally* Sentencing Commission, 2023 Guidelines Manual Annotated §2Q2.1 (addressing offenses "involving fish, wildlife, and plants"), https://www.ussc.gov/guidelines/2023-guidelines-manual-annotated.
[3] The United Nations Office on Drugs and Crime (UNODC) acknowledges that harsher penalties—particularly in the context of custodial sentences—may have unintended consequences. *See* UNODC, World Wildlife Crime Report 2024, Wildlife2024_Final.pdf (unodc.org) (see discussion at p. 150); *see also* Conservation, wildlife crime, and tough-on-crime policies: Lessons from the criminological literature - ScienceDirect. The Office's policy recommendations, which extend to development of financial penalties and carceral terms, account for this principle and should be considered as USSC reviews federal guidelines. *See* UNODC, Guide on Drafting Legislation to Combat Wildlife Crime, Wildlife_Crime_ebook.pdf (unodc.org).
[4] *See, e.g.*, *See* UNODC, World Wildlife Crime Report 2024; Wildlife Justice Commission, Convergence of wildlife crime with other forms of organised crime: A 2023 review, Crime-Convergence-Report-2023-spreads-V07.pdf (wildlifejustice.org).
[5] *See* UNODC, World Wildlife Crime Report 2024, Wildlife2024_Final.pdf (unodc.org) (see discussion at page 96).

- The substantial animal cruelty often associated wildlife trafficking and related activities[6]; and
- The imbalance in penalties and sentences associated with trafficking in wildlife and trafficking in other categories of contraband of equal monetary value.[7]

We also ask that the Commission consider consulting wildlife crime experts in the course of the 2025-2026 revision process. The Commission's rules direct that it "shall conduct a public hearing on the proposed amendments, unless [it] determines that time does not permit a hearing or [] a hearing will not substantially assist the amendment process."[8] While we certainly understand the demanding nature of the Commission's work, as well as the relevant time constraints, we believe the present review process represents an important opportunity to engage specialists to determine the best sentencing options for the emergent and ever-expanding challenge of deterring and preventing wildlife trafficking and related crimes.[9]

Thank you for considering this request.

Sincerely,



Danielle Kessler, US Director
International Fund for Animal Welfare (IFAW)

[6] Recent updates direct that "extraordinary cruelty" be taken into consideration in animal fighting cases. *See* U.S. Sentencing Commission, Proposed Amendments to the Sentencing Guidelines: December 26, 2023, "Reader-Friendly" Version of Proposed Amendments to the Federal Sentencing Guidelines (ussc.gov).
[7] See, e.g., L.S. Stegman, Fighting Tooth and Nail: Deterring Wildlife Trafficking in the Era of Mass Extinction, 57 Am. Crim. L. Rev. 45, 50.
[8] U.S. Sentencing Commission Rules of Practice and Procedure, U.S. Sentencing Commission Rules of Practice and Procedure (ussc.gov).
[9] Consulting such authorities would be consistent with the Commission's past practice (albeit sporadic) of engaging experts and advocacy groups relevant to the issue. *See, e.g.*, Public Hearing Transcript, July 19, 2023, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230719/Transcript.pdf; Public Hearing Transcript, April 18, 2017, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/transcript.pdf.

The attached comments are submitted on behalf of 188 supporters of the International Fund for Animal Welfare (IFAW) across the U.S. Thank you for your consideration.

July 27, 2026

Submitted electronically via the US Sentencing Commission's Public Comment Submission Portal at https://comment.ussc.gov

United States Sentencing Commission
Attn: Public Affairs – Priorities Comment
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Priorities for Amendment Cycle

Dear U.S Sentencing Commission,

I am writing to express my concern about the global impacts of wildlife trafficking, and to urge the Commission to take them into account when considering future revisions to federal sentencing guidelines.

Wildlife crime is often treated as less serious than other categories of crime despite harming communities and ecosystems around the world. Trafficking imperiled species and protected natural resources threatens biodiversity, animal welfare, public health and global security.

From poaching to the trade of live animals, the illegal exploitation of wildlife species causes tremendous suffering. Countless wild animals die during transport for illicit trade, and each year endangered species like elephants and rhinos are poached for their tusks and horns. The proliferation of online markets and social media has made it easier than ever for traffickers to connect with buyers. A new study conducted by the International Fund for Animal Welfare (IFAW) found over 1,600 primates alone put up for sale during a six-week period in 2025.

Wildlife crime is not only dangerous to animals – it poses serious health and security threats. The global illicit wildlife trade, a "low-risk, high-reward" criminal enterprise, consistently ranks among the top five black markets alongside drugs, firearms, and human trafficking. Trafficked animals pose threats to local ecosystems and to humans through the spread of zoonotic disease.

To meet these challenges, I urge the Commission to prioritize wildlife crime and work to ensure that sentencing guidelines meaningfully deter wildlife trafficking—for the benefit of animals and people alike.

Sincerely,

Lauren A.

Deia	Almares
Laurie	Alstrom
Gary Wolf	Ardito
Jill	Armitage
David	Ashton
Debra	Ashton
Denise	Austin
Emily	Austin
Pamela	Bacon
Darlene	Baker
Marina	Barry
Donna	Bauer
Christiane	Benedix
Benjamin	Billhardt
Kaarisa	Blackwell
Susan	Bouchard
Deborah	Boychuk
David	Boyer
Andrea	Branco
Michael	Brandes
Jared	Brenner
Kim	Brower
Penny	Bryan
Tiffany	Buell
April	Burchardt
Carrie	Burri
Geary	Buydos
J.	C.
Analia	Caiazza
Stacey	Cannon
Renee	Cariglia
Victoria	Carter
Jean	Chagnon
Stacy	Chase
AJ	Cho
Cathy	Cilcius
Emily	Clark
Emily	Clark
Molly	Clark
Allison	Cohen
Harriet	Cohen
M. Cecilia	Correia
Jennifer	Corrigan

Kathy	Cott
Sean	Craig
Christina	D.
Anand	Dharawat
Linda	DiDomenico
John	Doucette
Amy	Douglass
Rosamund	Downing
Judith	Embry
Mary	Emerich
Dianne	Ensign
Heather	Florian
Laura	Fung
James	Gifford
Stephen	Gliva
Mark	Goodman
Jaimie	Gowatsky
Phyllis	Grande
Melissa	Grant
Michael	Guckian
peter	Gunning
Grace	Gutierrez
Linda	Habuda
Heidi	Handsaker
Erin	Hansen
Gail	Harmon
Sammy	Hartery
Margierite	Haupt
Lisa Leah	Haut
Susan	Heath
Joanne	Heiling
Peg	Henderson Mills
Katherine	Hickey
Pamela	Hill Yenei
Barbara	Hoch
Heather	Huegi
Bonnie	Hume
Bethany	Jaenicke
Lisa	Jefko
Jen	Jones
De	Kalahan
Lance	Kammerud
Marca	Kassera

Diane	Kastel
Bryan	Kirshon
Priscilla	Klemic
Mark	Klugiewicz
Haven	Knight
Niki	Kolaitis
Gerald	Kretmar
Michelle	Krueger
Lois	Lamonica
Dennis	Landi
Lea	LaSalle
Kate	Lenthall
Helen	Leuthner
Diana	Lewis
Linda	lewison
Lisa	Lisa
Anne	Lusby-Denham
Sheila	Magesky
Peter	Mark
Amy	Masching
Anne	Mazzone
Shaeril	McBrown
Martin & Sharon	McGladdery
Nellie	Medlin
Michelle	Meighan
Patti	Mickelsen
Anne	Milano-Cole
Phillip	Mixon
Kathleen	Mohning
Cindy	Morrison
James	Mulcare
Tammy	Nelson
Martha	Oddie
Megan	Odle
Eleanor	Ohnemus
Lea	Park
Evelyn	Parker
Diane-Michele	Petrillo
Terri	Pigford
Joslyn	Pine
Tina	Pirazzi
Jamie	Polczynski
Susan	Pritt

Patrick	Ramsey
Claudia	Reed
Sophia	Rezk
Erin	Richardson
Beatrice	Rigaud
Eric	Robinson
Julie	Roedel
Kat	Rollins
Vanessa	Rosas
Haley	Rowan
Brigitte	Rudosky
Michael	Rynes
Diana	S.
Amanda	Salvner
Cynthia	Sampson
Alyssa	Schmidt
Angela	Seda
Wayne	Shaw
Lauren	Sheytanian
Joan	Silaco
Jenne	Sindoni
Kim	Smith
Stacey	Solum
Kendall	Sosa
Nancy	Sowersby
Deborah	Spencer
Natalia	Spornik
Alex	Stavis
Lisa	Steele
Samantha	Steigerwaldt
Robert	Strelke
Heather	Strope
Sarah	Sudheer
Bianca	Tenneriello
Helen	Test
John	Thompson
Lisa	Tichenor
Margaret Guilfoy	Tyler
Stephanie	Umphlettee
Andrew	Umphries
Lesley	Vainder
Doris	Verkamp

Patricia	Vineski
Mary	Viveros
Linda	Vopicka
Melissa	Warfield
Suzanne	Weaver
Diane	Weiss Bradley
Susan	Welsford
Vicki	Wheeler
Fanny	Whitman
Terrie	Williams
Torah	Wolf
Peggy	York
Aerie	Youn
Katie	Yu
Tina	Zenko

PROMOTING THE CONSERVATION AND PROTECTION OF ALL PRIMATES SINCE 1973

IPPL
International
Primate
Protection
League

July 27, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of the International Primate Protection League (IPPL), I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

IPPL respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human trafficking and exploitation.

At the macro level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the crime's immediate conservation consequences. At the micro level, the suffering experienced by individual animals that are taken from the wild or killed in an attempt to take their offspring is in and of itself an atrocity. Often the infants who have been torn from their mothers and their family groups to be sold into the pet trade do not survive. They experience terror while they are restrained and drugged for transport and regularly end up in the custody of cruel people who barely do enough to keep them alive while attempting to make money by exploiting them in various ways.

Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated

with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and positions the United States as an attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

The impetus for the formation of the International Primate Protection League was the observed cruelty of the trafficking in wildlife, specifically primates, in 1973. Our organization has worked tirelessly since that time to end the global trafficking of nonhuman primates and to promote their well-being in captivity. Our mission is to promote the conservation and protection of all nonhuman primates around the world; as such, we strongly endorse harsher sentencing for persons convicted of wildlife trafficking.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, IPPL would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Jennifer Buchanan

Sanctuary Director

International Primate Protection League

International Wildlife Trust

July 20, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of the International Wildlife Trust, I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

The International Wildlife Trust respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

The International Wildlife Trust is composed of former U.S. federal prosecutors and agents with many years of experience in investigating and prosecuting transnational drug and organized crime cases. Our goal is to assist countries prosecute impactful cases against higher-level members of transnational wildlife trafficking organizations. We are acutely aware of the differences between the sentencing guidelines for wildlife cases compared to other areas of organized criminal activity and the impact that these differences have on the activities of wildlife trafficking organizations. We are eager to share our experiences with the Commission.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, the International Wildlife Trust would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Bruce Ohr
Executive Director
The International Wildlife Trust

July 14, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Priorities for Amendment Cycle

Lehigh Valley Zoo respectfully submits the following comments regarding proposed priorities for the U.S. Sentencing Commission's amendment cycle. We commend the Commission for its work and appreciate the opportunity to comment. We ask the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Lehigh Valley Zoo is a non-profit organization, located in the heart of the Trexler Nature Preserve and is home to more than 325 animal ambassadors representing over 125 species. Lehigh Valley Zoo is an accredited member of the Association of Zoos and Aquariums (AZA), a 501(c)3 non-profit organization setting the global gold standard for zoos and aquariums in animal care and welfare, conservation, education, science, and guest experience.

Lehigh Valley Zoo is a participating partner member of AZA's Wildlife Trafficking Alliance (WTA). WTA brings together the collective expertise and influence of zoos and aquariums, corporations, nonprofit organizations, and government agencies to reduce consumer demand for illegally traded wildlife and wildlife products, advance laws, regulations, and policies that combat wildlife trafficking, and coordinate responses to ensure the care and welfare of wildlife confiscated from the illegal trade.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. These impacts can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties

Lehigh Valley Zoological Society is a nonprofit 501(C)(3) organization as provided by IRS regulations. A copy of the official registration and financial information may be obtained by calling toll-free, within Pennsylvania (800) 732-0999. Registration does not imply endorsement.

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for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities – particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, Lehigh Valley Zoo would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Cher Vatalaro

Director of Conservation Education

● 5150 GAME PRESERVE ROAD ● P.O. BOX 519 ● SCHNECKSVILLE, PA 18078● www.lvzoo.org

Lehigh Valley Zoological Society is a nonprofit 501(C)(3) organization as provided by IRS regulations. A copy of the official registration and financial information may be obtained by calling toll-free, within Pennsylvania (800) 732-0999. Registration does not imply endorsement.

ACCREDITED BY THE ASSOCIATION OF ZOOS & AQUARIUMS

LINCOLN PARK ZOO.
FOR WILDLIFE. FOR ALL.

July 27, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Priorities for Amendment Cycle – Wildlife Trafficking

Dear Members of the United States Sentencing Commission,

Lincoln Park Zoo respectfully submits the following comments regarding proposed priorities for the U.S. Sentencing Commission's amendment cycle. We ask the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle, due to the serious nature of wildlife trafficking, currently misaligned penalties, and urgency of attacking the issue due to the destabilization of endangered populations. We commend the Commission for its work and appreciate the opportunity to comment.

We at Lincoln Park Zoo are deeply committed to ending the illegal trafficking of wildlife. We work closely with the local field office of the U.S. Fish and Wildlife Service and O'Hare International Airport as a member of the Wildlife Confiscation Network to find appropriate housing for trafficked animals and help train wildlife detector dogs. With these close relationships, we see the impact of this illegal activity every day, and we know it has the potential to not just injure humans, but also to spread disease at scale—not to mention decimate species in the wild and threaten the welfare of the animals themselves Through our work and work with collaborators, we have seen the devastating effects of trafficking on biodiversity, ecosystems, and local communities. Lincoln Park Zoo is an accredited member of the Association of Zoos and Aquariums (AZA), a 501(c)3 non-profit organization setting the global gold standard for zoos and aquariums in animal care and welfare, conservation, education, science, and guest experience, and a member of AZA's Wildlife Trafficking Alliance.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. These impacts can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities – particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, Lincoln Park Zoo would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

S. Sunny Nelson
Vice President of Conservation and Science

July 22, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

Lions Tigers & Bears respectfully submits the following comments regarding the United States Sentencing Commission's proposed policy priorities for the amendment cycle ending May 1, 2027, as published in the *Federal Register* on June 12, 2026 (91 Fed. Reg. 35802).

As a nonprofit sanctuary dedicated to the rescue and lifetime care of abused, abandoned, neglected, and confiscated exotic animals, Lions Tigers & Bears has witnessed firsthand the devastating and enduring consequences of wildlife trafficking. Based on more than two decades of experience caring for animals rescued through law enforcement actions and other unlawful circumstances, we respectfully urge the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Since 2002, Lions Tigers & Bears has provided permanent refuge for rescued lions, tigers, bears, and other exotic animals confiscated from wildlife traffickers, illegal private ownership, roadside zoos, and other exploitative situations. Many arrive suffering from severe physical injuries, chronic medical conditions, malnutrition, and psychological trauma. Their recovery requires specialized veterinary care, species-appropriate habitats, enrichment, and a lifelong financial commitment. These realities demonstrate that the impact of wildlife crime extends far beyond the initial seizure and often becomes the long-term responsibility of accredited sanctuaries.

Wildlife trafficking is a pervasive threat to biodiversity, international security, public health, agriculture, native ecosystems, and efforts to combat organized crime. It also inflicts profound suffering on individual animals, many of whom endure neglect, abuse, and inhumane conditions before rescue. Although federal investigators and prosecutors have successfully dismantled significant trafficking operations, the sentences imposed do not always reflect the scope, sophistication, financial gain, or lasting harm associated with these crimes.

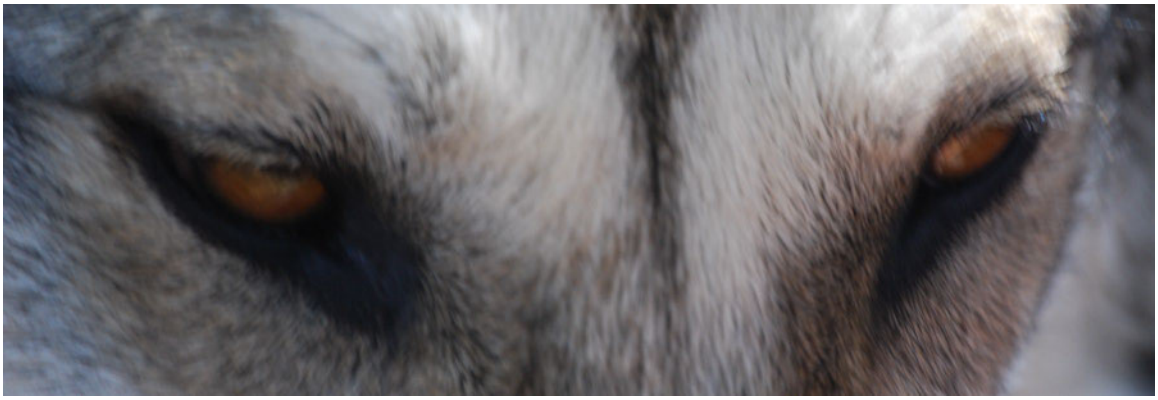
We encourage the Commission to evaluate whether existing sentencing guidelines adequately account for the cruelty experienced by trafficked animals; the organized and increasingly transnational nature of modern wildlife trafficking networks; the substantial financial incentives driving these criminal enterprises; the broader harms to biodiversity, agriculture, animal and plant health, public health, native ecosystems, and the economy; and the need for meaningful deterrence, particularly for those who organize and profit from these offenses.

Every animal that arrives at Lions Tigers & Bears represents the lasting consequences of wildlife crime. Rescuing trafficked wildlife is only the beginning of a much longer journey. Accredited sanctuaries provide the specialized care, resources, and permanent refuge necessary to address the enduring physical and psychological impacts of these crimes. A comprehensive review of federal wildlife trafficking sentencing would help ensure that penalties more accurately reflect the seriousness of these offenses while strengthening efforts to combat transnational wildlife crime and protect both wildlife and the organizations entrusted with their long-term care.

Thank you for your consideration. Should the Commission seek additional information regarding the long-term impacts of wildlife trafficking on rescued wildlife, or the role accredited sanctuaries play in supporting enforcement efforts, Lions Tigers & Bears would welcome the opportunity to assist.

Sincerely,

Bobbi Brink
Founder / Director
Lions Tigers & Bears
[redacted]



Lockwood Animal Rescue Center

A Nonprofit Charity

P. O. Box 1510
Frazier Park, CA 93225-1510
[redacted]
www.lockwoodarc.org
[redacted]

July 15, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of the Lockwood Animal Rescue Center**,** I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

The Lockwood Animal Rescue Center respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, the Lockwood Animal Rescue Center would welcome the opportunity to provide any additional information or expertise that may be helpful.

Most sincerely,

Lorin Lindner, PhD. MPH / President and Founder

Midwest Avian Adoption & Rescue Services, Inc.

July 21, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of Midwest Avian Adoption & Rescue Services (MAARS), I respectfully urge the United States Sentencing Commission to include serious wildlife trafficking offenses among its priorities for the upcoming amendment cycle.

MAARS is a GFAS-accredited parrot sanctuary in Minnesota that provides lifelong care for captive parrots with significant medical, behavioral, and psychological needs. While our work focuses on parrots already living in captivity, we see firsthand the lasting consequences of treating wildlife as commodities rather than living beings.

Wildlife trafficking is one of the most significant threats facing many wildlife species around the world. For numerous parrots and other wildlife, illegal capture and trade have contributed to population declines, the destabilization of already vulnerable species, and, in some regions, brought species closer to extinction. Every animal removed from its native ecosystem represents more than the loss of an individual. Every animal carries a unique genetic legacy that exists nowhere else. When that animal is removed from the wild, its opportunity to contribute those genetics to future generations is lost forever. For species whose populations have already been diminished by habitat loss, climate change, or decades of exploitation, each removal further reduces the genetic diversity upon which healthy, resilient populations depend. Recovery is measured not only by the number of animals that remain, but by the genetic diversity they retain.

Yet the consequences of wildlife trafficking extend well beyond conservation. Each trafficked animal is also an individual sentient being. Animals captured for the illegal wildlife trade often endure extreme stress, injury, dehydration, disease, overcrowding, and high mortality during capture and transport. Those who survive frequently carry lifelong physical and psychological trauma that cannot simply be undone once the trafficking has ended.

MAARS
1360 University Ave. W. #347
St. Paul, MN 55104
Phone: (651) 275-0568
E-mail: birds@maars.org
Web Site: www.maars.org

Midwest Avian Adoption & Rescue Services, Inc.

Wildlife trafficking is not simply an environmental crime. It is simultaneously a conservation crime, an animal welfare crime, a public health concern, and, increasingly, an organized criminal enterprise. The scope of harm extends far beyond the initial act of trafficking, with consequences that ripple across ecosystems, communities, and generations.

At MAARS, we care for parrots whose lives have been permanently shaped by captivity. While the circumstances that bring birds to our sanctuary vary, our work exists because society has long viewed wildlife as commodities to be bought, sold, and possessed. Wildlife trafficking represents one of the most extreme manifestations of that mindset. When wildlife is reduced to a commodity, individual animals become interchangeable in commerce—even though no two are truly interchangeable. Every animal is an irreplaceable individual with intrinsic value, a unique genetic legacy, and an ecological role within its wild population.

Whether a parrot entered captivity through illegal trafficking, commercial breeding, or subsequent rehoming, the result is often the same: decades of specialized care provided by rescues and sanctuaries after others have profited and moved on.

The impact does not end when trafficking stops. It continues for decades through the rescues, sanctuaries, veterinarians, and nonprofit organizations that become responsible for caring for surviving animals. Many parrot species live 30 to 80 years or more, meaning a single trafficking offense can create decades of welfare consequences and decades of financial responsibility for the organizations ultimately tasked with their care. While a criminal sentence may be measured in months or years, the consequences for the surviving animals—and for the organizations responsible for their lifelong care—are often measured in decades. These organizations absorb substantial financial costs while providing specialized housing, veterinary treatment, behavioral rehabilitation, and lifelong care, often without any corresponding support from those responsible for the harm.

Wildlife trafficking also presents significant public concerns. The movement of wild animals across borders increases the risk of introducing infectious diseases that threaten wildlife populations, agriculture, domestic animals, and human health. For avian species in particular, diseases such as Highly Pathogenic Avian Influenza, Newcastle disease, and psittacosis underscore the importance of strong deterrence and enforcement.

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Midwest Avian Adoption & Rescue Services, Inc.

Strong federal sentencing should reflect the full scope of harm caused by serious wildlife trafficking offenses. These crimes threaten biodiversity, accelerate the decline of vulnerable species, undermine international conservation efforts, create significant biosecurity risks, inflict profound suffering on individual animals, and leave nonprofit rescues and sanctuaries to bear the lifelong costs of caring for surviving victims. Recognizing wildlife trafficking as a priority within the federal sentencing guidelines would better reflect the seriousness of these offenses, strengthen deterrence, and acknowledge the far-reaching consequences that extend well beyond the initial act of trafficking.

At MAARS, we believe that when captivity fails, the responsibility does not disappear—it simply changes hands. Stronger accountability for wildlife trafficking helps reduce the number of animals entering that cycle of lifelong displacement and suffering while protecting the future of the wild populations from which they were taken.

Thank you for your consideration and for the opportunity to provide comment.

Sincerely,

Galiena Cimperman
Executive Director
MAARS

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July 23, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Priorities for Amendment Cycle

Milwaukee County Zoo respectfully submits the following comments regarding proposed priorities for the U.S. Sentencing Commission's amendment cycle. We commend the Commission for its work and appreciate the opportunity to comment. We ask the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Milwaukee County Zoo is an accredited member of the Association of Zoos and Aquariums (AZA), a 501(c)3 non-profit organization setting the global gold standard for zoos and aquariums in animal care and welfare, conservation, education, science, and guest experience. We welcome 1.2 million guests annually in service to our mission: *To inspire people to conserve wildlife and wild places*.

In alignment with our mission, Milwaukee County Zoo is a member of AZA's Wildlife Trafficking Alliance (WTA). WTA brings together the collective expertise and influence of zoos and aquariums, corporations, nonprofit organizations, and government agencies to reduce consumer demand for illegally traded wildlife and wildlife products, advance laws, regulations, and policies that combat wildlife trafficking, and coordinate responses to ensure the care and welfare of wildlife confiscated from the illegal trade. Like other AZA-accredited zoos and aquariums, Milwaukee County Zoo has committed to care for some animals deemed unable to be released after being seized from traffickers.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. These impacts can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm

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associated with these activities – particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, Milwaukee County Zoo welcomes the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Amos D Morris, Jr.

Amos D. Morris, Jr.
Milwaukee County Zoo Executive Director

Thank you for the opportunity to comment. We are Mind on Trial, a youth nonprofit publication at the intersection of neuroscience and law. Founded in 2026, we are student-led and based in California with members across the nation. Mind on Trial publishes neurolaw case analyses, provides accessible scientific explanations, and advocates for evidence-based policy reform in alignment with the Commission's mission. We do this through an original, analytical framework, examining every case through three interconnected lenses: forensic evidence, cognitive neuroscience, and legal interpretation. Find our ongoing work and progress at mindontrial.org. We submit this comment to urge the Commission to formally recognize that neuroscience, particularly research on brain development and algorithmic bias in sentencing, must be a named priority in the 2027 amendment cycle.

The Commission's own mission references "increased knowledge of human behavior" as a basis for sentencing reform, a standard that the current guidelines do not fully meet.
The *United States Sentencing Commission Guidelines Manual* was written 40 years ago, and neuroscience has advanced profoundly since then. The Supreme Court has already accepted these changes in *Roper v. Simmons* (2005), *Graham v. Florida* (2010), and *Miller v. Alabama* (2012), cases in which the Court held that the distinctive attributes of youth, including immature brain development, must be considered in the most serious sentencing decisions. We believe that the guidelines have not fully incorporated developments in neuroscience, and that the Commission's Priority 1 broad evaluation is the right vehicle to address this gap.

We suggest that the Commission examine whether sentencing guidelines for defendants under 26 should formally account for documented research on prefrontal cortex maturation and its effects on impulse control, decision-making, and culpability. The prefrontal cortex, the area of the brain that manages decision-making, cognitive skills, and social behavior, does not completely mature until one's mid-twenties (Cleveland Clinic, 2025). Thus, the 18-year-old cutoff acts only as a legal boundary that is not rooted in neurological fact. Many studies on adolescent brain development published by the National Institutes of Health (NIH) show that "the prefrontal cortex", which subserves higher cognitive functions such as behavioral control, planning, and assessing the risk of decisions, matures later than the cortical areas associated with sensory and motor tasks" (Konrad et al., 2013). Additionally, the Supreme Court acknowledged the neuroscience of adolescent brain development in *Roper v. Simmons* (2005), *Graham v. Florida* (2010), and *Miller v. Alabama* (2012), each time concluding that diminished neurological maturity reduces culpability and must be reflected in sentencing. In the former case, the court ruled that it is unconstitutional to execute individuals for crimes committed under the age of 18 (American Psychological Association [APA], n.d.), and in *Graham v. Florida* (2010), it ruled that those under 18 cannot be punished with life in prison without parole unless the crime was homicide. Their ruling was based on the fact that "juveniles are less culpable than adults because of their immaturity, vulnerability to external influences and unformed characters" (APA, n.d.), among other factors. In 2012, the Supreme Court ruled in *Miller v. Alabama* that juveniles cannot be sentenced to life in prison without parole in homicide cases (APA, n.d.). Taken together, this body of evidence makes clear that the legal boundary of 18 is a legislative convenience, not a neurological threshold, and that sentencing guidelines must be updated to reflect what the science has established about brain development through the mid-twenties.

We suggest that the Commission make transparency, bias auditing, and disclosure standards for algorithmic sentencing tools an explicit priority in the 2027 guidelines. Tools like COMPAS (Correctional

Offender Management Profiling for Alternative Sanctions) and LSI-R (Level of Service Inventory-Revised) are used in federal sentencing to predict the likelihood that a defendant will reoffend, but their current usage produces bias in legal proceedings. Such tools are presented as objective and scientific, but are proprietary, unaudited, and produce racially disparate outcomes. A 2016 investigation by ProPublica found that COMPAS flagged Black defendants as future criminals at nearly twice the rate of white defendants with comparable criminal histories (Angwin et al., 2016). These findings have been replicated in peer-reviewed research: a 2018 study published in *Science Advances* found that COMPAS performed no better than predictions made by people with no criminal justice expertise, while still producing racially skewed results (Dressel & Farid, 2018). Unlike published scientific studies, these algorithms are proprietary, which obstructs defendants' abilities to analyze and challenge them. Defendants cannot examine the inputs, attorneys cannot challenge the methodology, and the underlying science cannot be cross-examined in court. From our research, no federal oversight framework currently exists for these tools. The absence of such a framework means that racially disparate, unverifiable tools continue to influence federal sentences without accountability, a situation the Commission has both the authority and the responsibility to address.

We request that the Commission's 40th-anniversary evaluation formally include neuroscientists, forensic psychiatrists, and behavioral researchers, not only legal practitioners. Behavioral science bears directly on the statutory purposes of sentencing under 18 U.S.C. 3553(a)(2). We also suggest that regional hearings and symposiums should include voices from the scientific community as a named requirement, and not as an afterthought.

Mind on Trial exists because students are already asking questions about how neuroscience should shape legal accountability, and we believe the law should be too. The next generation of legal and scientific thinkers is watching whether this Commission treats neuroscience as a priority or a footnote. We urge the Commission to name brain development science and algorithmic accountability as explicit priorities for the 2027 amendment cycle.

Thank you for considering our comment. We welcome any follow-up questions and are happy to provide additional information upon request.

Respectfully submitted,
Mind on Trial
mindontrial.org
Maya Dave, Founder and Editor-in-Chief
California

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ANDREW S. BIRRELL
President

July 27, 2026

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Comments to the U.S. Sentencing Commission on Proposed 2026-2027 Priorities

Dear Judge Reeves:

The National Association of Criminal Defense Lawyers (NACDL) appreciates this opportunity to express its views on policy priorities for the amendment cycle ending May 1, 2027.[1] We concur with other advocates and stakeholders that current sentences are excessively long, and certain sentencing factors disproportionately affect racial minorities within the criminal legal system. Whatever issues the Commission determines to prioritize, these flaws should be foremost in considering potential amendments.

Priority 1

NACDL is generally supportive of the Commission's proposal to evaluate the Sentencing Guidelines and federal sentencing practices in light of its mission, the statutory purposes of sentencing in 18 U.S.C. § 3553(a)(2), and relevant legal developments that have occurred in the four decades since the Commission's inception. We are also supportive of its plan to consider regional public hearings, symposiums, roundtable discussions, conferences, and other tools as methods of gleaning feedback and information from a variety of stakeholders in the federal criminal legal system.

We of course ask that the voices of Federal Public Defenders, the private criminal defense bar, and Criminal Justice Act counsel are heard and considered as part of this effort. We also urge the Commission to seek input from individuals who have been sentenced under the Guidelines to gather their unique perspective.

[1] NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

Priority 2

NACDL urges the Commission to treat data transparency as a central component of its review under Priority 2. The Commission's proposed review of its Rules of Practice and Procedure specifically contemplates what analyses supporting agency policymaking are conducted and released publicly. NACDL respectfully submits that this review should extend beyond the Commission's internal deliberative materials to the underlying sentencing data itself, including data linked to individual district courts and, where appropriate, to individual judges.

The Commission's current data-release practices leave a significant gap that has long frustrated practitioners, courts, and researchers alike. The Commission collects, but does not publicly release, sentencing data linked to the sentencing judge, and district-linked data is similarly limited. This gap is not merely academic. Defense counsel routinely invoke 18 U.S.C. § 3553(a)(6) to argue against unwarranted sentencing disparities, yet counsel and courts are frequently forced to make those arguments without access to the very data that would substantiate them. The consequence is that the Commission, which Congress created in part to reduce unwarranted disparity, is also the sole custodian of the data that would allow disparity to be rigorously measured and addressed, and it has generally declined to share that data in a form that permits such analysis.

NACDL commends the Commission's recent establishment of the Ad Hoc Advisory Group on Research and Data Practices (RDPAG), as well as Chair Reeves's stated commitment to ensuring that the Commission's research operation remains "world-class and cutting-edge" and consistent with best practices employed by other government agencies and non-governmental organizations. Notably, the RDPAG's charter already directs the group to study practices for "maintaining data . . . for both internal use and making such data publicly available for external analysis and research," and for "disseminating data to outside researchers and other members of the public for purposes of testing and replicating the findings of data analyses." RDPAG Charter §§ 6(b)(4), (10). The Commission has therefore already recognized, in its own governing document, that public dissemination of research-ready data is squarely within scope. NACDL urges the Commission to ensure that RDPAG's work under these provisions produces concrete recommendations, not a general survey, on:

1. Whether and how the Commission can release judge-linked or district-linked sentencing data, consistent with the confidentiality protections that apply to individual defendants;

2. Development of a controlled-access research protocol, comparable to those used by other federal statistical agencies, that would allow qualified researchers to work with more granular data under appropriate safeguards.

The Commission's own charter for RDPAG already models the kind of controlled-access framework NACDL has in mind: RDPAG members will receive non-public Commission data under signed confidentiality agreements in order to perform their work. RDPAG Charter § 7. That the Commission has built this infrastructure for a 15-member advisory group is proof that a similar model, scaled appropriately, could extend to qualified outside researchers more broadly.

Finally, NACDL notes that RDPAG's charter requires only a status update at nine months and a final report at eighteen months, with no built-in mechanism for practitioner or public comment before the final report is presented to the Commission. RDPAG Charter § 6(c)–(d). Given that NACDL's membership is directly affected by the disparities that judge- and district-linked data would help illuminate, NACDL respectfully requests that the Commission build in an opportunity for public and practitioner comment on RDPAG's draft recommendations before they are finalized. NACDL further suggests that the Commission ensure RDPAG's at-large membership, selected under § 3(a)(3) of its charter, includes at least one individual with direct experience navigating the Commission's existing data-access limitations from the requester's perspective — for example, a researcher who has worked on judge-linked sentencing datasets — and not solely individuals whose expertise runs to agency-side data practices generally.

On a separate matter that is also part of Priority 2: NACDL is generally supportive of the Commission's current position with respect to *ex parte* communications and believes no change is needed. However, when interested groups, advocates, or agencies share data with the Commission that affects Commission decisionmaking, NACDL believes that that data should be made public.

Priority 3

NACDL wishes to bring to the Commission's attention a recent federal court decision on the constitutionality of the acceptance-of-responsibility Guideline, § 3E1.1(b). As the Commission knows, this provision provides a one-level reduction only to defendants who accept responsibility early enough to permit "the government to avoid preparing for trial." A recent District Court decision ruled that this provision unconstitutionally infringes on the Sixth Amendment right to trial.[2]

As the Commission is aware, NACDL and other advocacy organizations generally refer to the often-massive differential between post-trial and post-plea sentences as the "trial penalty," an additional number of years in prison that defendants face, if convicted, for exercising their constitutional right to go to trial. NACDL published a research report in 2018 that showed, using Sentencing Commission data, that for most primary offense categories, the average trial sentence in the federal system is three times higher than a plea sentence for the same crime.[3] For some crimes, the prison sentence for a person convicted at trial is as much as eight times greater than for those convicted after a plea.

This significant sentencing differential has major impacts on the criminal legal system. To begin, the trial penalty has virtually eliminated trials from the federal system. In 2025, over 97% of convictions in the federal system were the result of pleas with less than 3% occurring after trials.[4] These figures have been remarkably consistent over the past several years.

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[2] *United States v. Tavberidze*, 769 F.Supp.3d 264 (S.D.N.Y. 2026) (appeal pending).
[3] NACDL, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.
[4] U.S. Sentencing Comm'n, 2025 Annual Report and Sourcebook of Federal Sentencing Statistics, at 56 table 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-

The trial penalty also has a major coercive effect, with defendants understandably influenced to accept pleas because of the real threat of a significantly higher sentence if convicted at trial, even if a defendant has a strong defense. The trial penalty also allows for other coercive tactics including piling on charges, charge bargaining, threats of superseding indictments and sentencing enhancements, and threats to withdraw plea offers if the defendant seeks to assert other constitutional rights under the Fourth or Fifth Amendments.[5] Perhaps most concerningly, the trial penalty in our system is often so severe that it coerces even innocent people into pleading guilty.[6]

NACDL has long believed that §3E1.1(b) unfairly burdens the constitutional right to trial and agrees with the recent decision that it is an unconstitutional trial penalty.[7] We encourage the Commission to consider amending this guideline, in any legally permissible way, so that it does not both discourage defendants from exercising their constitutional rights and impose a penalty on those who do.

Priorities 4 & 5

NACDL has no comment on these issues.

Respectfully Submitted,

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Chair, NACDL Sentencing Committee

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sourcebooks/2025/2025-Annual-Report-and-Sourcebook.pdf (showing that 97.7% of federal criminal convictions in fiscal year 2025 were the result of guilty pleas).

[5] Even Department of Justice official policy frowns on the use of these tactics which are largely made possible by the trial penalty. See DOJ, Justice Manual, 9-27.260, https://www.justice.gov/jm/justice-manual ("Charges or statutory sentencing enhancements may not be filed, nor the option of filing charges or enhancements raised, simply to exert leverage to induce a plea or because the defendant elected to exercise the right to trial.").

[6] Data from the National Registry of Exonerations shows that roughly 18% of exonerees—people who have been found innocent and completely cleared of the crime they were once convicted of—pleaded guilty. See The National Registry of Exonerations, Browse Cases, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P. For individual stories of innocent defendants who were coerced to plead guilty, see https://guiltypleaproblem.org.

[7] *See Tavberidze*, 769 F.Supp.3d 264.

July 27, 2026

Honorable Judge Carlton W. Reeves
Chair
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Washington, D.C. 20002-8002

MLFA's Nat'l Security Criminal Defense Center's
Comment on U.S.S.C. Proposed Priorities for Amendment Cycle Ending 2027

Dear Honorable Judge Reeves,

The National Security Criminal Defense Center (NSCDC) is part of the Muslim Legal Fund of America (MLFA), a 501(c)(3) non-profit legal organization dedicated to defending civil rights and liberties in national security cases through federal litigation. The NSCDC represents clients in federal courtrooms across the country in national security cases (often material support of terrorism and other federal terrorism offenses). The NSCDC also provides expert assistance, co-counsel assistance, and consultation in national security cases nationwide. NSCDC cases are selected for the unique constitutional issues they present, including prosecutorial overreach and discriminatory application and enforcement of federal law and the Sentencing Guidelines.

MLFA has commented on U.S.S.G § 3A1.4 (the terrorism enhancement) in prior cycles on the basis of two decades defending Muslim clients in national security prosecutions. We return to it this cycle because the Enhancement's defect has now demonstrated itself on a population with no connection to our clients, and that is the clearest proof available that the defect is structural. Section 3A1.4 is the only adjustment in the Guidelines Manual that assigns a criminal history category without reference to criminal history, and it does so on the basis of a finding about the defendant's motive toward government rather than about their conduct, record, or the harm they caused. Because motive is the trigger, the Enhancement has tracked whichever identity or belief the government of the day treats as threatening, Muslim defendants for two decades, and now, under written Executive Branch directive, defendants identified by political viewpoint. The Commission has reformed the career offender guideline, the crack cocaine guidelines (Fair Sentencing Act 2010, Amendment 706, Amendment 750, and Amendment 782) and criminal history scoring on precisely the empirical and disparity grounds that § 3A1.4 presents in their most acute form. It has exempted § 3A1.4 from every one of those reforms.

The terrorism enhancement has been thrown in the spotlight since the current administration's stated desire to seek its application in a broader range of cases on the basis of political beliefs.[1] In

[1] Jamie Stengle, *8 Convicted in Texas Immigration Center Shooting and Protest Are Sentenced to Decades in Prison*, Wash. Post. (June 23, 2026), https://www.washingtonpost.com/nation/2026/06/23/alleged-antifa-members-texas-get-maximum-sentences-ice-protest/; Molly Hennessy-Fiske, *Alleged Antifa Members Get Decades in Prison Over*

September of 2025, President Donald Trump distributed the National Security Presidential Memorandum (NSPM-7) to the Secretary of State, the Treasury, and Homeland Security, as well as the Attorney General.[2] NSPM-7 leaves the statutory definition of domestic terrorism at 18 U.S.C. § 2331(5) untouched. What it changes is who gets investigated and charged under that definition: it directs the Joint Terrorism Task Forces and federal prosecutors to treat a specified set of political viewpoints, "anti-Americanism, anti-capitalism, and anti-Christianity; support for the overthrow of the United States Government; extremism on migration, race, and gender; and hostility towards those who hold traditional American views on family, religion, and morality", as the "common threads" and "indicia" identifying domestic terrorism. In December of 2025, then-U.S. Attorney General Pam Bondi instructed the Department of Justice (DOJ), describing the "common characteristics of domestic terrorists" as having an "anti-fascist platform," including adherence to "anti-Americanism, anti-capitalism, or anti-Christianity," echoing the descriptors used in President Trump's NSPM-7.[3] Prosecutors were told to be "particularly mindful" of charges such as destruction of government property (which reaches vandalism, and is a felony where the damage exceeds $1,000) or publicly disclosing the personal information of a federal agent. A. G. Bondi further instructed federal prosecutors in these cases that they should "seek all applicable [sentencing] enhancements… including the terrorism enhancement under U.S.S.G. 3A1.4."

In March of 2026, nine political protesters, known as the "Prairieland Nine," were convicted in what the Department of Justice has described as the first federal terrorism prosecution of an "antifa" cell.[4][5] All but one of these defendants engaged in non-violent, political activity. *United States v. Arnold*, No. 4:25-cr-00259 (N.D. Tex.). One defendant discharged a firearm and struck a responding officer, who was treated and made a full recovery. Each of the nine received the statutory maximum on each count of conviction, run consecutively, eight were sentenced on June 23, 2026 and the ninth on July 1, 2026, producing sentences from 30 to 100 years. Other defendants involved in the same political activity, who

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Violent ICE Protest, Wash. Post. (June 23, 2026), https://www.washingtonpost.com/national/2026/06/23/prairieland-detention-center-shooting-sentencing/4793b4ce-6f1c-11f1-8730-e7fd0e2a6404_story.html; Darryll K. Jones, *Bessent [Again] on Nefarious "Far Left" Terrorists Posing as Nonprofits* (July 17, 2026), https://darryllkjones.substack.com/p/bessent-again-on-nefarious-far-left

[2] National Security Presidential Memorandum-7, Presidential Memoranda on Countering Domestic Terrorism and Organized Political Violence, 90 Fed. Reg. 47225 (Sept. 30, 2025) (memorandum dated Sept. 25, 2025; filed Sept. 29, 2025; published Sept. 30, 2025).

[3] Memorandum from Pamela Bondi, Att'y Gen., to All Fed. Prosecutors, Law Enf't Agencies & Dep't of Just. Grant-Making Components, Implementing National Security Presidential Memorandum-7: Countering Domestic Terrorism and Organized Political Violence, at §§ 1–2, 4–5, 8 (Dec. 4, 2025) (memorandum not affirmatively published by the Department; copy available at), https://www.washingtonexaminer.com/wp-content/uploads/2025/12/Attorney_General_Bondi_Memorandum_re_NSPM-7_AG_Guidance_12.4.2025.pdf. The memorandum's own supporting authority is telling: the contemporaneous news account it cites for the "anti-fascist" characterization is a report on a left-wing rally. See id. at n.5 (citing Emma Bowman, Scattered Violence Erupts at Large, Left-Wing Berkeley Rally, NPR (Aug. 28, 2017), https://www.npr.org/sections/thetwo-way/2017/08/28/546641577/scattered-violence-erupts-at-large-left-wing-berkeley-rally).

[4] *See* HSI Dallas Special Agent in Charge Travis Pickard, "This case marks a historic moment as it represents the nation's initial federal indictment targeting a coordinated group of Antifa cell members engaged in violent criminal activity." DOJ Press Release, *Press Release, U.S. Att'y's Office, N. Dist. of Tex., U.S. Dep't of Justice, Antifa Cell Members Convicted in Prairieland ICE Detention Center Shooting (Mar. 13, 2026), https://www.justice.gov/usao-ndtx/pr/antifa-cell-members-convicted-prairieland-ice-detention-center-shooting.*

[5] Order of September 22, 2025, Designating Antifa as a Domestic Terrorist Organization, 90 Fed. Reg. 46317 (Sept. 25, 2025). No statute authorizes the designation of a domestic entity as a terrorist organization; the Secretary of State's designation authority under 8 U.S.C. § 1189 reaches only foreign organizations. NSPM-7 § 3 provides only that the Attorney General "may recommend" that entities "merit" designation and submit a list to the President. See https://www.whitehouse.gov/presidential-actions/2025/09/designating-antifa-as-a-domestic-terrorist-organization/

pleaded guilty received sentences ranging from just under two years to fifteen years. *See infra* Section I.J; Attachment 1. Notably, far more serious conduct "calculated to influence or affect the conduct of government by intimidation or coercion"[6] in the January 6th prosecutions resulted in an average custodial sentence of 26 months.[7] This staggering difference in outcomes supports the need to limit the terrorist enhancement as the category of domestic terrorism continues to broaden**.**

MLFA welcomes the Commission's intention to focus on furthering the Commission's statutory purposes and missions as set forth in the Sentencing Reform Act, including:

- Establishing "sentencing policies and practices that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities." 28 U.S.C. § 991(b)(1)(B).
- Measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.
- Requesting such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law. 28 U.S.C. § 995(a)(8).
- Serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices. 28 U.S.C. § 995(a)(12)(A).
- Making "recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy." 28 U.S.C. § 995(a)(20).
- Holding "hearings and calling witnesses that might assist the Commission in the exercise of its powers or duties." 28 U.S.C. § 995(a)(21).

In response to the Commission's request for comment on: its proposed priorities, comment on additional priorities commenters believe the Commission should consider this amendment cycle and beyond, and for recommendations on specific avenues of research and policymaking that would serve to fulfill the above goals, the NSCDC respectfully submits:

1. Comment and proposals regarding proposed priorities 1, 3, 5, and an additional proposed priority to research and amend the Terrorism Enhancement (U.S.S.G. § 3A1.4) (Chapter 3, victim-related adjustment);

SUMMARY

In the last Amendment Cycle, MLFA submitted a comment regarding the Terrorism Enhancement and now again proposes, with additions, that it be an additional priority this Amendment Cycle. Last cycle, the Commission made an amendment to Application Note 4 of the Terrorism

[6] 18 U.S.C. § 2332b(g)(5) (definition of a "federal crime of terrorism" and the specific intent required for application of the terrorism enhancement or upward departure under the terrorism enhancement.)

[7] Average sentence calculated on June 17, 2026 using NPR's January 6th Archive Database, https://apps.npr.org/jan-6-archive/database.html (Average calculated to include only defendants who received custodial sentences. Probation- or fine-only sentences were excluded. If these sentences were included and counted as zero months, the average sentence would be even lower. Additionally, on Jan 20th, 2025 all January 6th cases were either pardoned or the sentences were commuted.)

Enhancement (§ 3A1.4), but it did not address the below issues and itself poses a concerning "solution" to the issue of discriminatory enforcement and results in additional discriminatory impact.

In the **first section** of this comment we address the impact of the Terrorism Enhancement; its intended versus actual application; lack of empirical evidentiary basis; its undermining of the purposes of sentencing and the objective factors under 18 U.S.C. § 3553(a); its discriminatory application and resulting disparate sentencing, and comment on the failings of the Application Note amendment made last cycle.

The Terrorism Enhancement (§ 3A1.4) is:

- the most severe sentencing guideline in use (second only to the genocide/crimes against humanity guideline, § 3A1.5, which is not in use);
- the Enhancement's arbitrary automatic designation as a career offender strips away any effective consideration of the 18 U.S.C. § 3553(a) factors and results in unwarranted sentence disparities for similarly situated defendants;
- it is a victim-related adjustment that is largely applied to defendants whose crimes had no victims (at its inception the Commission anticipated it would be rarely used, but it is applied in numerous cases annually, including nearly 100% of material support cases which include attempt and conspiracy offenses conducted entirely online in sting operations with FBI agents);
- it lacks any evidentiary basis to support its draconian treatment of Muslims and political dissidents convicted of terrorism-related offenses, recent data suggests that defendants who receive the enhancement have one of the lowest recidivism rates, which rebuts the unsubstantiated assumption of their inability to be rehabilitated;
- of significant concern is that the Terrorism Enhancement is discriminatorily applied largely to Muslims convicted of crimes "calculated to influence or affect the conduct of government", and now politically left-wing individuals. But the Enhancement is rarely sought for non-Muslim[8] and White individuals, or those politically right-wing and was found inapplicable where it has been sought.
    - In the last Amendment Cycle, the Commission amended Application Note 4 striking the upward departure provision that would allow the enhancement to apply to offenses not in the enumerated list but committed with the requisite intent. If the Application Note 4 change was collateral to a Manual-wide departures-to-variances cleanup rather than a considered judgment about terrorism sentencing, then the Commission has never once made a substantive policy determination about 3A1.4 in three decades.

Second, we propose an interim immediate amendment to the Terrorism Enhancement to curb its most discriminatory and harmful applications and limit the Enhancement to what was originally intended by the Commission, and recommend a research agenda for the Commission to study the Enhancement. After conducting the proposed research, the NSCDC recommends significantly reforming the Terrorism

[8] Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L. J. 1520, 1560 (2017), https://digitalcommons.law.yale.edu/ylj/vol126/iss5/5.

Enhancement by removing the automatic designation of Category VI criminal offender score, removing the mandatory offense level minimum of 32, and including an application note that explains the Enhancement is to be used only in cases of actual violence with victims.
Specifically, MLFA proposes:

- While conducting appropriate data collection, analysis, and research on the use of the Terrorism Enhancement (§ 3A1.4), amend the use of the Terrorism Enhancement via an Application Note to limit its application to the rare case of actual violence and terrorism with identifiable victims, as originally intended. Currently § 3A1.4 is applied in almost every single material support of terrorism case, including attempts and conspiracies of first-time offender, non-violent adults.
- A comprehensive research agenda for the Commission to collect and analyze data that is easily identifiable and available. The goals of this agenda should be to study the use and impact of the Terrorism Enhancement as compared to its originally intended application; collect data on the recidivism rate of various terrorism-related offenders and their actual criminal history score; study the lack of evidentiary basis for the Terrorism Enhancement's arbitrary career offender designation and its hindrance in effectively meeting the purposes of sentencing under 18 U.S.C. § 3553(a); collect and analyze data on the race, religion, ethnicity, and political beliefs of those whom the Terrorism Enhancement is applied to, and those whose conduct would qualify for the enhancement as currently applied but have not received it, in order to assess if the enhancement is being applied discriminatorily.
- Conduct hearings and call witnesses from relevant organizations (including MLFA's National Security Criminal Defense Center), impacted defendants, families, community leaders, etc. to understand the disproportionate impact and negative consequences of the enhancement.

This proposed additional priority is responsive to each of the following priorities the Commission has proposed for the cycle ending May 1, 2027:

- Proposed Priority (1): The 40th-anniversary evaluation of the guidelines and federal sentencing practices in light of the Commission's Sentencing Reform Act mission and the statutory purposes of sentencing in 18 U.S.C. § 3553(a)(2), including through regional public hearings, symposiums, roundtables, and conferences with stakeholders "including judges, Congress, the Executive Branch, Federal Public Defenders, victims, sentenced individuals, and others." No guideline is a more natural subject for that evaluation than § 3A1.4, which has never been empirically evaluated in the three decades since it was promulgated.
- Proposed Priority (2): The review of the Commission's Rules of Practice and Procedure, and in particular subpart (d), "what analyses supporting agency policymaking are conducted and released publicly." There is no published Commission analysis supporting § 3A1.4, because none was ever conducted. The data-collection and transparency measures proposed in Section II.3 below are directly responsive to this priority.

- Proposed Priority (3): Consideration of any amendments warranted in response to legislation or case law developments.
- Proposed Priority (5): Consideration of other miscellaneous issues coming to the Commission's attention.
- Continued reform of the Guidelines' treatment of youthful offenders; further study and reform of the sentencing differences due to the trial penalty; continued study regarding recidivism; evaluating infrequently applied specific offense characteristics and adjustments provisions (priorities identified by the Commission in a prior amendment cycle).

I. COMMENT REGARDING TERRORISM ENHANCEMENT

The Enhancement

A. The impact of the Terrorism Enhancement (§ 3A1.4) – an arbitrary auto-designation as a career offender and a 12-point increase to at least level 32.

Terrorism-related offenses have been aggressively prosecuted in the United States since 9/11. The leading statute in the anti-terror push is the material support statute, 18 U.S.C. § 2339B, which punishes knowingly providing material support or resources to a designated foreign terrorist organization ("FTO") or attempting or conspiring to do so. The government frequently uses the material support statute because convictions under the law do not require that the defendant engaged in terrorism, aided or abetted terrorism, or conspired to commit terrorism. This endlessly broad statute, along with many others (false statements, and obstruction of justice)[9], has resulted in unjust convictions and unjustifiably lengthy sentences.[10]

The statutory maximum of a § 2339B conviction is 20 years. The sentences prescribed for material support independently reflect Congress's intent to deter and punish terrorism-related crimes. If the offense results in the death of any person, the required prison sentence is any term of years or for life. The guideline for material support offenses, USSG § 2M5.3, carries a base offense level of 26. If the offense involved dangerous weapons, firearms, explosives, funds to purchase any of those items, or funds or other support believing they will be used to commit a violent act, 2 levels are added.[11] Assuming a Criminal History Category I and an offense level of 26, the advisory guideline range is 63 to 78 months; at offense level 28, the advisory guideline range is 78 to 97 months.

But these sentencing ranges are rarely ever the advisory guidelines ranges for individuals convicted under the material support statutes. The Terrorism Enhancement then, on top of the sentencing in § 2339B (and other statutes), increases the sentence for individuals convicted of "a federal crime of terrorism," i.e., crimes "calculated to influence or affect the conduct of government." *See* U.S.S.G §

[9] For example, 18 U.S.C. § 2339A and 18 U.S.C. § 2339C. But the Terrorism Enhancement is also applied to false statements (1001(a)), obstruction of justice, and other conduct that does not warrant the extreme treatment of the Terrorism Enhancement.

[10] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8-40 (2010) (upholding 18 U.S.C. § 2339B against First Amendment and vagueness challenges as applied to speech and advocacy coordinated with a designated organization, and construing "material support" to reach training, expert advice, service, and personnel without proof of intent to further unlawful activity). The breadth of the statute so construed is why a large share of prosecutions under §§ 2339A–C involve nonviolent, victimless, first-time conduct by youthful defendants.

[11] § 2M5.3(b).

3A1.4 (adopting the definition of "Federal Crime of Terrorism" in 18 U.S.C. § 2332b(g)(5)). This adds 12 more levels to the offense level, or increases the level to 32, whichever is higher. And regardless of the individual's actual criminal history, the enhancement assigns them to Criminal History Category VI, usually reserved for career offenders. *See United States v. Segura-Del Real*, 83 F.3d 275, 277 (9th Cir. 1996) ("Defendants are placed in category VI because they are the most intractable of all defendants."). The Terrorism Enhancement is the reason that individuals convicted of terrorism-related conduct, no matter how minor, receive abnormally long criminal sentences.

After applying the Terrorism Enhancement, the minimum possible Guidelines range for any offense is 210 to 262 months—that is, 17.5 to 21.8 years.[12] But more typically, the enhancement leads to a recommended sentence of thirty years to life or the statutory maximum, whichever is less. The result: it can put a criminal defendant away for thirty years to life for a crime that would otherwise result in a sentence of around five years.[13] In an internal analysis of each report on national defense-related federal offenders, the average increase of sentence length when applying the Terrorism Enhancement is approximately an additional 10.2 years.[14] This is regardless of any mitigating or aggravating factors, non-violence of the crime, the youth and rehabilitative capacity of the defendant, or any of the other factors or purposes of sentencing.

How the Enhancement Functions as Law: Shortcomings

B. The Terrorism Enhancement Functions as a Mandatory Minimum in Terrorism-Related Cases and is Presumed Necessary and Reasonable.

Although the Guidelines were deemed advisory in *Booker*, because sentencing courts are required to consider them and must provide a sufficient justification for departing from them, they largely continue

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[12] U.S. SENT'G GUIDELINES MANUAL § 2X1.1(b), sentencing tbl. (U.S. SENT'G COMM'N 2025)

[13] *Id.*

[14] More research, separated by offense type, violent or non-violent, race, and religion is necessary to see the disparate impact on young, non-violent, Muslim, first-time offenders, but the available data demonstrates at least an average 10-year increase in offenses where the Terrorism Enhancement is applied.

In FY 2013 the average sentence for a national defense offender without the Terrorism Enhancement was 94 months, with it it was 208 months, with a difference of 114 months between the two averages. In FY 2017 the average sentence for a national defense offender without the Terrorism Enhancement was 66 months, with it, it was 176 months, a difference of 110 months. In FY 2018 the average sentence for a national defense offender without the Terrorism Enhancement was 60 months, whereas with the Enhancement, it was 181 months, with a difference of 121 months between the two averages. In Fiscal Year 2021 the average sentence for a national defense offender without the Terrorism Enhancement was 40 months, whereas with the Enhancement, it was 134 months, with a difference of 94 months between the two averages. In Fiscal Year 2022 the average sentence for a national defense offender without the Terrorism Enhancement was 47 months, whereas with the Enhancement, it was 188 months, with a difference of 141 months between the two averages. After averaging the differences of the averages, the ultimate average difference between a sentence with and without the Terrorism Enhancement is estimated at 122.14 months or about 10.19 years. *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2013* (July 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_National_Defense.pdf; *See United States Sentencing Commission Quick Facts on national Defense Offenders Fiscal Year 2017* (July 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY17.pdf; *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2020* (July 2021), https://www.ussc.gov/research/quick-facts/national-defense#:~:text=(July%202023)%20In%20fiscal%20year,13.2%25%20since%20fiscal%20year%202018; *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2021* (July 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY20.pdf; *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2022* (July 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY21.pdf

to act as mandatory.[15] *See Rita v. United States*, 551 U.S. 338, 366 (2007) (Stevens, J., concurring) ("I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in Booker."). Perhaps nowhere is this more evident than with the Terrorism Enhancement.[16] Sentencing courts start from a place of little experience with terrorism-related cases, like the district judge noted in *United States v. Said Azzam Rahim* (N.D. Tex. 2019).[17] They rely on the Terrorism Enhancement in the Guidelines based on the assumption that the Commission, with superior knowledge and data, must have created the Terrorism Enhancement for some logical and substantiated reason. *See Gall v. United States*, 552 U.S. 38, 46 (2007) (explaining that the Guidelines are the "product of careful study based on extensive empirical evidence"). While this assumption is inaccurate,[18] terrorism defendants then receive severe punishments that, when reviewed by an appellate court, are given a "presumption of reasonableness." *See Rita*, 551 U.S. at 347.

In other words, because the sentences are within the Guidelines range, appeals courts typically defer. It seems that the only time appellate courts have stepped in is to overturn sentences as too lenient when district judges vary downward from the Guidelines range created by the Terrorism Enhancement.[19] *See United States v. Ressam,* 679 F.3d 1069 (9th Cir. 2012); *id*. at 1106 (Schroeder, J., dissenting) ("The majority's implicit assumption that terrorism is different . . . flies in the face of the Congressionally sanctioned structure of sentencing that applies to terrorism as well as all other kinds of federal criminal offenses."); *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011) (vacating sentence which varied downward from Guidelines range and remanding with instructions to increase sentence into range of 360 months to life). Thus, to call the Terrorism Enhancement "advisory" is to ignore reality—that no matter the route taken, we end up right back at applying the Terrorism Enhancement's automatic offense level and Criminal History Category increases without regard for the defendant's conduct or characteristics.

As this Commission has noted in other cases, mandatory minimums are counterproductive and inconsistent with the guideline system. The Terrorism Enhancement's mandatory minimum offense level of 32 and mandatory Criminal History Category VI violates the Commission's purposes and missions to: establish policies that assure meeting the purposes of sentencing, provide certainty and fairness, and avoid unwarranted sentencing disparities. 28 U.S.C. 991(b)(1)(A)-(b)(1)(C). The Guidelines are set up so that chapters two and three address the offense conduct; and Chapter Four captures the defendant's criminal history. Under the Terrorism Enhancement, every defendant has the same Criminal History Category, which renders Chapter Four meaningless and has resulted in unwarranted disparity between defendants with a serious criminal record and defendants with little to no criminal record.

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[15] *See* United States Sentencing Commission, *Federal Sentencing: The Basics*, 3 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf ("[T]he average sentence imposed for all cases has closely tracked the average guideline range—both before and after *Booker*.").

[16] George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts, 23 CORNELL J.L. & PUB. POL'Y 517, 547 (2014)* (Courts must not treat the Terrorism Enhancement as a mandatory minimum and must give it meaningful application).

[17] *United States v. Said Azzam Rahim*, 3:17-cr-00169 (N.D. Tex. 2019), Doc. 180, Transcript of Sentencing Hearing, 69 ("Mr. Rahim, we don't see many cases like this here. We might do maybe one case a year for the various courts…").

[18] *See* discussion *infra* Section I.E. (The Empirical Evidence Does Not Support Treating and Sentencing First-Time Terrorism Offenders like Career Offenders)

[19] *See* Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 525 (2014).

C. The Enhancement Also Drives Consecutive Stacking Under § 5G1.2(d).[20]

The Enhancement's effect is not limited to the length of the range on any single count. Because § 5G1.2(d) directs that where the sentence on the count carrying the highest statutory maximum is less than the total punishment, the sentences on all counts "shall run consecutively … to the extent necessary to produce a combined sentence equal to the total punishment," the range that § 3A1.4 generates is what authorizes stacking. The mechanism operates in sequence: § 3A1.4 raises the offense level to at least 32 and the criminal history category to VI; that produces a range of 360 months to life; and § 5G1.2(d) then allows the sentencing court to stack individual counts—each carrying a statutory maximum far below that figure—until the aggregate reaches it. That is how a defendant convicted of offenses carrying statutory maxima of fifteen and twenty years receives seventy years. *See infra* Section I.J (Case Study: Prairieland Sentences). This consequence is entirely a product of the Guidelines and is entirely within the Commission's power to correct.

Why the Severity Isn't Justified: The Career-Offender Comparison

D. The Sentencing Commission's Analysis and Recommended Reforms of the Career Offender Guideline Should be Applied to the Terrorism Enhancement.

Chapter Four of the Guidelines classifies defendants by Criminal History Category based on their number of past offenses because, according to the Commission, courts should impose a sentence that will "protect the public from further crimes of the defendant" (18 U.S.C. § 3553(a)), and "repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." USSG § 4A1.1, comment. (backg'd) "Prior convictions . . . serve under the Guidelines to place the defendant in one of six 'criminal history' categories; the greater the number of prior convictions, the higher the category. . . . the Guidelines seek to punish those who exhibit a pattern of 'criminal conduct.'" *Nichols v. United States*, 511 U.S. 738, 751 (1994) (Souter, J., concurring). In other words, the Criminal History Category is intended to increase sentences for "career offenders."

The Sentencing Commission has studied the career offender guideline (§ 4B1.1) which implements a Congressional directive instructing the Commission to set the guideline range for offenders with specified instant and prior convictions at or near the statutory maximum. A defendant qualifies as a career offender if (1) the defendant was at least eighteen years old at the time he or she committed the instant offense of conviction; (2) the instant offense is a felony that is a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[21]

In its analysis, the Sentencing Commission explored concerns that the career offender guideline does not meaningfully distinguish among career offenders. That same concern applies to the Terrorism Enhancement. The career offender portion of the Terrorism Enhancement is significantly more problematic than section 4B1.1 because it is applied to first-time, non-violent offenders regularly. Section 4B1.1, at least requires a present felony, as well as two prior felonies that were either a *crime of violence* or for a controlled substance offense.

Importantly, the Commission found clear differences between offenders who had drug trafficking only offenses, violent only offenses, and mixed offenses. The Commission found that "career offenders who have committed *a violent instant offense or a violent prior offense generally have a more serious and*

[20] United States Sentencing Commission, *Guidelines Manual,* § 5G1.2(d) (Nov. 2025)
[21] United States Sentencing Commission, *Guidelines Manual,* § 4B1.1 (Nov. 2025).

extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future."[22]

Based on its findings, the Sentencing Commission concluded that the career offender directive is best focused on those offenders who have committed *at least one "crime of violence."* The Commission recommended that "Congress amend the directive to reflect this principle by no longer including those who currently qualify as career offenders based solely on drug trafficking offenses" and noted that such "reforms would help ensure that federal sentences better account for the severity of the offenders' prior records, protect the public, and avoid undue severity for certain less culpable offenders."[23]
The same findings apply to the Terrorism Enhancement, which *pretends* that first-time offenders are career offenders.[24] There is no evidentiary basis for the harsh impact of the enhancement.[25] In fact the evidence in the aftermath of these prosecutions reveals what the Commission has already learned about "career offenders"—that past crimes of violence are better indicators of recidivism, and non-violence

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[22] U.S. SENT'G COMM'N, REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 26 (2016).
[23] *Id.* at 3.
[24] None of the other "Victim-Related Adjustments" result in an automatic Criminal History Category increase. *See* U.S.S.G §§ 3A1.1-3.
[25] Note that these defendants are also disqualified from consideration as zero-point offenders. The Commission stated that establishing § 4C1.1, Adjustment for Certain Zero-Point Offenders, "was informed by its studies of recidivism among federal offenders," among other extensive data analyses of offenders relating to their criminal histories. However, none of these studies or reports on recidivism establish an empirically proven basis for predicting that terrorism-related defendants are of higher likelihood to reoffend. In fact, the vast majority of these offenders are first-time offenders, and the vast majority of Muslim first-time offenders are non-violent—both traits the Commission have found correlate to the lowest likelihood for recidivism. *See Recidivism of Federal Offenders Released in 2010* (Released 2010, Updated Feb. 10, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220210_Recidivism-Violence.pdf; *See also Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf; *See also Recidivism and the "First Offender"* (May 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf; *See also A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf; *See also Recidivism Among Federal Offenders: A Comprehensive Overview* (March 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf; *See also United States Sentencing Commission Report to Congress: Career Offender Sentencing Enhancements* (August 2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf; *See also The Past Predicts the Future: Criminal History and the Recidivism of Federal Offenders* (Mar. 9, 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf; *See also Recidivism Among Federal Offends Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* (Mar. 28, 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf; *See also The Criminal History of Federal Offenders* (May 17, 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517_criminal-history.pdf; *See also Recidivism Among Federal Violent Offenders* (Jun. 21, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf; *See also Length of Incarceration and Recidivism* (April 29, 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220621_Recidivsm-SentLength.pdf; *See also An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* (July 11, 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf

indicates a much lower risk of recidivism. Below, MLFA requests that the Commission recommend a similar amendment to Congress regarding the terrorism enhancement as it begins a recommended research agenda that can inform a more complete amendment and reform of § 3A1.4 in the future.

E. The Empirical Evidence Does not Support Treating and Sentencing First-Time Terrorism Offenders like Career Offenders.

According to the Commission, "the guidelines represent an approach that begins with, and builds upon, empirical data." U.S.S.G. Part A Introduction and Authority (2025) at 5.[26] Indeed, the Supreme Court has repeatedly claimed that the reason courts should and do look to the Guidelines in imposing fair sentences is because the Commission develops the Guidelines by using empirical data. *See Rita*, 551 U.S. at 349 (outlining the "empirical approach" that the Sentencing Commission used to structure the Sentencing Guidelines); *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) (The Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience. . . .'"). Despite this imperative, there was little empirical data on terrorism sentences when the Commission promulgated the Terrorism Enhancement, which took effect on November 1, 1995 pursuant to a directive Congress enacted in 1994. See USSG App. C, amend. 526 (effective Nov. 1, 1995).

In nearly thirty years since the inception of the most extreme enhancement in the Guidelines, the Commission has not collected or studied the data to assess if any evidentiary basis exists to support its broad application, or whether it has resulted in unwarranted sentence disparities. Instead, the Terrorism Enhancement was created on the unsubstantiated assumption that terrorism defendants, no matter their individual situation, were so different from other defendants that an extreme increase in Criminal History Category was necessary across the board.[27] At the time, neither Congress nor the Commission could have envisioned how a group like ISIS would use the internet to ensnare individuals online into making verbal statements of support, offers of online financial support, or discussions about traveling abroad etc., thereby exposing first-time non-violent offenders to statutory maximum sentences.

Moreover, the evidence accumulated since then strongly discredits the logic of the Terrorism Enhancement's blanket increase in Criminal History Category, particularly where the defendant is a first-time offender. According to the Commission, individuals with no criminal record have the lowest rate of recidivism.[28] One study cited by the Commission in 2004 determined that 93.2% of first-time offenders

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[26] The United States Sentencing Commission maintains a "mission of implementing data-driven sentencing policies." *Amendment 821 to the United States Sentencing Guidelines* (Nov. 1, 2023), https://www.ussc.gov/guidelines/amendment/821

[27] The belief that defendants in terrorism-related cases cannot be rehabilitated because of how serious their conduct is presumably sourced in the outrage and rhetoric that officials of the United States government have used in reference to them. When President Bush signed the infamous Patriot Act of 2001 into law, he remarked that terrorists could not "be reasoned with" because they "have no conscience." *Bush Signs Anti-Terrorism Legislation*, Wash. Post. (Oct. 25, 2001), https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_102601.html. Courts have echoed these unsubstantiated claims. *See United States v. Segura-Del Real*, 83 F.3d 275, 277 (9th Cir. 1996) ("Defendants are placed in category VI because they are the most intractable of all defendants.").
See also Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 Yale L.J. 1520, 1537 (2017); *See also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303.

[28] *See* Sameer Ahmed, *Is History Repeating Itself: Sentencing Young American Muslims in the War on Terror*, 126 Yale L. J. (2017), https:// digitalcommons.law.yale.edu/ylj/vol126/iss5/5.

did not reoffend.[29] Based on this evidence, for non-terrorism defendants without a criminal history, courts regularly impose sentences below the advisory Guidelines range because they recognize that a lesser prison sentence is nonetheless a significant punishment and deterrent for someone who has never experienced prison.[30] There is *no evidence* however, that terrorism-related defendants are an exception, or reoffend at higher rates. To the contrary, the available data shows that individuals convicted of terrorism-related offenses do not reoffend at higher rates than those convicted of other crimes. Scott Shane, Beyond Guantánamo, a Web of Prisons for Terrorism Inmates, N.Y. TIMES (Dec. 10, 2011), https://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html.

Of more than 300 prisoners who had completed terrorism sentences since 2001 (up to 2011), "Justice Department officials and outside experts could identify only a handful of cases in which released inmates had been rearrested, a rate of relapse far below that for most federal inmates . . ." *Id.* Thus, "it appears extraordinarily rare for the federal prison inmates with past terrorist ties to plot violence after their release." *Id.* In fact, a recent 2021 publication reporting results from an ongoing Terrorism Recidivism Study (TRS) highlights the "surprisingly lower recidivism rates" among this population.[31] This Terrorism Study Database was established in response to the deficit of information available on the rate of recidivism for individuals who were convicted terrorism-related offenses in the United States following 9/11. In 2019, an article based on the TRS database reported a 1.6% recidivism rate among its subjects. At the time, out of the 561 offenders included in the TRS, only nine recidivated over the entire period of analysis. In other words, only 1.6% of the TRS sample recidivated between 2001 and 2018.[32]

Between 2001 and 2020 only 20, or 3.1 percent, recidivated over the two decades of analysis. "Of the 20 that recidivated, 11 re-offended following release and the remaining nine re-offended while still incarcerated. It is interesting to note that recidivism rates do not change when assessing the full sample (629) or the sample of releases (354); 3.1 percent re-offended in both samples." TRS at 31-32.

By significant contrast, the evidence shows that not only do terrorism defendants not offend more, they re-offend ***significantly less*** than apolitical/non-terrorism defendants:

> "Recidivism data released in 2018 of the 247 offenders showed a consistent recidivism rate of 1.6% which is 'stark when compared to a non-extremist or apolitical sample of offenders. The Department of Justice, for example, examined a state sample of released offenders, reporting a 44 percent re-arrest rate within the first year and a 68 percent arrest rate in the first three years." Page 31, referencing Department of Justice, "2018 update on prisoner recidivism: A 9-year follow-up period (2005–2014)."

Importantly, the Terrorism Recidivism Study also notes,

> "The type of recidivism is also important; many of the questions around terrorist recidivism are rooted in the concern that, upon release, they will re-engage in political

[29] *Recidivism and the "First Offender,"* U.S. SENT'G COMM'N 26 (May 2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/20040 5_Recidivism_First_Offender.pdf [http://perma.cc/MLD8-RQU8].

[30] *See, e.g.*, *United States v. Willis*, 479 F. Supp. 2d 927, 937 (E.D. Wis. 2007) (varying downwards because the "sentence provided a substantial punishment for someone . . . who had never before been to jail and who engaged in no violence").

[31] Omi Hodwitz, *The Terrorism Recidivism Study (TRS): An Update on Data Collection and Results*, 15 PERSPECTIVES ON TERRORISM, 27-38, 2021, https://www.jstor.org/stable/27044233

[32] The TRS is a longitudinal study that will continue to track the recidivism of individuals throughout their lives post-conviction. On the question of whether a delay characteristic could be present for terrorism-related offenders, the study has produced no such evidence.

> violence. Herein lies a particularly interesting outcome. Apart from one individual, the recidivists did not return to extremist activities following release. Instead, releasees engaged in apolitical activities, including parole violations, minor theft and fraud for personal gain, drugs, and domestic violence. The one exception has a tenuous connection to political activity, at best. This offender was originally convicted of human trafficking for profit, including smuggling members of Hezbollah. He resumed his old ways upon release, reengaging with a smuggling ring. Although his involvement was driven by profit, it is possible that he continued to do business with extremist organizations although this is not documented in his second set of convictions. Thus, crediting him with continued terrorist-related activities is generous and unconfirmed. Regardless, the data provide a clear picture of apolitical recidivism. This does not exclude the possibility that future releasees will re-engage with political violence, but this expectation is not borne out in the TRS sample." TRS at 34.

Because the Terrorism Enhancement automatically increases a defendant's Criminal History Category to VI, the fact that the defendant is a first-time offender with an extremely low likelihood of recidivism is not only ignored but actually erased.

Courts scrutinizing this issue agree that the complete lack of evidence is a weak basis for the Terrorism Enhancement. Senior Judge George O'Toole, Jr., presiding over *United States v. Mehanna*, Transcript of Disposition, No. 09-10017-GAO (D. Mass. 2012), criticized the mandatory Criminal History Category VI as "too blunt an instrument to have any genuine analytical value" and "fundamentally at odds with the design of the Guidelines" because it "imputes a fiction into the calculus." *Mehanna*, Sentencing Transcript (Doc. 480) at 8-9. Moreover, the Court in *United States v. Jumaev* refused to apply the enhancement because it "is not backed by any empirical evidence" and because "treating all 'terrorists' alike is impermissible under our sentencing paradigm." 2018 WL 3490886, *10, CR 12-0033 JLK (D. Colo. July 18, 2018). And the Judge Charles R. Breyer explained in *United States v. Alhaggagi:*

> [T]he enhancement's treatment of criminal history-automatically assigning to all terrorism defendants a criminal history category of VI is inappropriate based on the seriousness of the crime, inappropriate based on assumptions about recidivism, and inappropriate as to this Defendant, warranting a downward departure.

2019 U.S. Dist. LEXIS 37889, 2019 WL 1102991 at *16 (N.D. Cal. March 8, 2019). There, Judge Breyer noted that "criminal history category has nothing to do with how serious the crime is" and that there was no "evidence [that he was aware of] to show that the criminal history category should be increased to Level VI because of the seriousness of the crime". He concluded that §3A1.4(b) "[made] literally no sense." *United States v. Alhaggagi,* Sent. Tr. 3:17, No. 146, at 119-120; *see also United States v. Khan*, No. 4:15-cr-00263, Judgment at Doc. 126 (S. D. Tex. July 2, 2018), rev'd and remanded, 938 F. 3d 713 (5th Cir. 2019), resentenced (sentencing the defendant to 18 months because he had no criminal history and terminated his plans).[33]

Courts applying the Terrorism Enhancement, on the other hand, conspicuously fail to cite any evidence to justify imposing the Guidelines' harsh sentences in terrorism-related cases.[34] They seek to

[33] *United States v. Khan* (S.D. Tex. 2019) (initial Court did not apply the Terrorism Enhancement to Khan's sentence), rev'd, 5th Cir. (2021). The government appealed a second time, the Fifth Circuit reversed and remanded again, the original judge was recused, and the new sentencing judge sentenced the defendant to 12 years.
[34] McLoughlin, supra note 39, at 112–15.

justify its steep increase by arguing, with no evidence, that "terrorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *Jayyousi*, 657 F.3d at 1117; see also *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003). This belief, "that terrorism is different, maybe even exceptional" is premised on "a type of visceral outrage at all conduct linked to terrorists that can taint the individualized and careful process that is supposed to go into a criminal sentencing" and, despite the lack of evidence, and evidence to the contrary, is used to "justif[y] a departure from the normal standards."[35] Not only is this belief unsupported, its resultant sentencing enhancement also causes harm to the Muslim American community.[36]

Why the Commission's Own Reforms Have Never Reached This Guideline

F. The Commission Has Reformed Guidelines on These Grounds Three Times. It Has Exempted § 3A1.4 Each Time.

The Commission's institutional method is well established: identify a guideline that rests on assumption rather than data; collect the data; determine whether the guideline produces unwarranted disparity or undue severity; and narrow it accordingly. The Commission has applied that method to the career offender guideline, to the abusive crack cocaine guidelines (Amendment 706, Fair Sentencing Act 2010, Amendment 750, and Amendment 782), and to the treatment of offenders with no criminal history. In each instance § 3A1.4 presented the same defect in a more acute form. In each instance it was left untouched, and in the case of the zero-point offender reform, expressly carved out.

1. The career offender guideline.

In its 2016 Report to Congress: Career Offender Sentencing Enhancements, the Commission found that career offenders whose instant or prior offense was violent have more serious criminal histories and recidivate at higher rates than drug-trafficking-only career offenders, and concluded that the directive is best focused on offenders who have committed at least one crime of violence. It recommended that Congress narrow the directive so that federal sentences would "better account for the severity of the offenders' prior records, protect the public, and avoid undue severity for certain less culpable offenders." Every premise of that recommendation applies with greater force to § 3A1.4(b). Section 4B1.1 at least requires three felony convictions, two of them prior. Section 3A1.4(b) requires none. It assigns Criminal History Category VI, the category reserved, in the Ninth Circuit's description, for "the most intractable of all defendants," *United States v. Segura-Del Real*, 83 F.3d 275, 277 (9th Cir. 1996), to defendants with no criminal history whatever. It is a career offender designation without any of the career offender predicates, and the Commission's 2016 review did not reach it.

2. The crack cocaine guidelines.

The crack cocaine guidelines are the Commission's clearest precedent for revisiting a guideline that originated in a congressional directive rather than in empirical study and that produced severe demographic disparity. The Commission collected the data, reported repeatedly to Congress, and amended. The Supreme Court in turn confirmed in *Kimbrough v. United States*, 552 U.S. 85 (2007), that a sentencing court may vary from a guideline that does not exemplify the Commission's "characteristic

[35] Said, supra note 19, at 521.

[36] Ahmed, supra note 8, at 1556. "These [similar] negative effects include (1) increasing discrimination by reinforcing stereotypes of African Americans and Muslims as inherently dangerous, (2) furthering distrust of law enforcement among African Americans and Muslims, . . . and (3) failing to effectively rehabilitate drug and terrorism offenders and reintegrate them into society." *Id*.

institutional role" of basing its determinations on empirical data and national experience. Section 3A1.4 shares that pedigree: it originated in a congressional directive; it was promulgated without supporting data; and it is credibly alleged to produce severe demographic disparity. It differs in one respect only, the Commission has never collected the data that would confirm or dispel the allegation. District courts have accordingly begun to do under *Kimbrough* what the Commission has not done under 28 U.S.C. § 994(o): decline to apply it. *See United States v. Jumaev*, No. 12-cr-0033-JLK, 2018 WL 3490886, at *10 (D. Colo. July 18, 2018); *United States v. Alhaggagi*, 2019 WL 1102991, at *16 (N.D. Cal. Mar. 8, 2019); *United States v. Judd*, 579 F. Supp. 3d 1 (D.D.C. 2021); *United States v. Fitzsimons*, No. 1:21-cr-00158 (D.D.C.); *United States v. Worrell*, No. 1:21-cr-00292 (D.D.C.).

3. The zero-point offender adjustment: an express carve-out.

In 2023 the Commission promulgated § 4C1.1, providing a two-level reduction for defendants with no criminal history points. The Commission stated that the amendment "was informed by its studies of recidivism among federal offenders," which establish that offenders with no criminal history points reoffend at the lowest rates of any group the Commission tracks. The second eligibility criterion in § 4C1.1(a)(2) is that "the defendant did not receive an adjustment under § 3A1.4 (Terrorism)."

The Commission therefore excluded, from its most explicitly recidivism-driven reform, the one population for which the available recidivism evidence is strongest and most favorable. As set out in Section I.E above, the Terrorism Recidivism Study reports a 3.1 percent recidivism rate among terrorism-sentenced individuals across two decades, and finds that with a single equivocal exception those who did reoffend did not return to political violence but committed ordinary offenses, parole violations, minor theft, drug offenses. The Department of Justice's own study of a state sample of released offenders reported a 44 percent re-arrest rate within the first year and 68 percent within three years.

The carve-out compounds the harm. Because defendants who receive § 3A1.4 are ineligible under § 4C1.1, they also fall outside the alternatives-to-incarceration guidance the Commission added at § 5C1.1 keyed to § 4C1.1 eligibility. And because § 3A1.4(b) assigns Criminal History Category VI irrespective of points, the Commission's companion reform to status points in Amendment 821 has no application to them either. A defendant sentenced under § 3A1.4 is placed beyond the reach of every criminal-history reform the Commission has adopted in the last decade.

4. The pattern.

Across three reforms grounded in recidivism data and disparity findings, the Commission has consistently narrowed guidelines that punish by category rather than by conduct. Section 3A1.4 is the most categorical guideline in the Manual, applied to a population with, on the only evidence available, the lowest recidivism rate in the federal system. It has been exempted from every one of those reforms, and it has never itself been studied. MLFA does not ask the Commission to accept the Terrorism Recidivism Study findings uncritically. We ask the Commission to do for § 3A1.4 what it did for the career offender guideline in 2016 and for § 4C1.1 in 2023: collect the data, and let the data decide.

Unequal and Unindividualized Application in Practice

G. The Terrorism Enhancement does not consider, and actually undermines, the objective factors required under 18 U.S.C. § 3553(a).

Pursuant to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, § 212(a)(2), 98 Stat. 1837, 1989, Congress requires courts to consider seven delineated factors to "impose a sentence sufficient, but not greater than necessary to comply with the [law's] purposes . . ." 18 U.S.C. § 3553(a). *See also* 28 U.S.C. § 991(b)(1)(A) (requiring the Commission to develop guidelines that take into account the § 3553(a) factors). The Terrorism Enhancement violates 28 U.S.C. §

991(b)(1)(A) and 991(b)(1)(B)—and undermines 18 U.S.C. § 3553(a)—as its express language and application suggests the Commission does not advise courts to follow the § 3553(a) factors for terrorism-related cases. In fact, none of the § 3553(a) factors are encompassed within or referenced by the enhancement at all. Instead, the Terrorism Enhancement automatically increases the level of the offense and the Criminal History Category, neither of which are based on an evaluation of the defendant's conduct or characteristics or the need for the sentence imposed. *See* 18 U.S.C. § 3553(a).

In the context of a material support offense under 18 U.S.C. § 2339A or § 2339B, the Terrorism Enhancement would not direct a court to consider objective factors, such as the amount or kind of support given, whether the support was choate or inchoate, the defendant's actual role in the terrorist activity, or the extent of harm caused by the defendant's support. Rather, the Enhancement hinges on a single question: was "the offense a felony that involved, or was intended to promote, a federal crime of terrorism," with "federal crime of terrorism" defined as an offense calculated to influence or affect the conduct of government. U.S.S.G. § 3A1.4(a); 18 U.S.C. § 2332b(g)(5). If the court finds, by a preponderance of the evidence, that the defendant attempted to provide material support to a terrorist or terrorist organization, then the Guidelines oblige the sentencing court to apply the Terrorism Enhancement with no adjustment for mitigating or aggravating conduct. *See United States v. Awan*, 607 F.3d 306, 317 (2nd Cir. 2010) (citing 18 U.S.C. § 2332b(g)(5)(A)).

In reality, the type of criminal conduct subject to the Enhancement varies significantly: from planning and participating in a terrorist attack that kills many people (i.e. what would likely be accompanied by life in prison to capital punishment), to making false statements to law enforcement officials (i.e. punishable by a maximum five-year prison sentence). *See e.g., United States v. Benkahla*, 530 F.3d 300, 304, 307 (4th Cir. 2008) (applying the Terrorism Enhancement, the defendant's sentence for perjury was increased from approximately three years to 10-12 years, or up to four times the normal length for perjury). This variance in conduct is not accounted for in the Terrorism Enhancement and the resulting Guidelines range is thus often inconsistent with the statutes criminalizing and punishing the conduct. *Id.*[37]

Moreover, the Terrorism Enhancement directly contradicts the language of the material support statutes, which acknowledge that there are different levels of support requiring different punishments. For example, while § 2339A permits a maximum sentence of fifteen years, if death results from the support provided, the maximum sentence increases to life. Likewise, under § 2339C, if a defendant provides financial support with the intent or knowledge that the funds will be used in an act of terrorism, the

[37] A concerning trend that has emerged in national security prosecutions are cases brought after lengthy FBI sting operations conducted entirely online against minor, or young adult, Muslim teenagers— several with autism, who are then charged with attempted provision of material support based on statements they made to online covert agents agreeing to travel abroad to join a terrorist organization etc. These are speech crimes, non-violent, no victims, and instead of involving the family where there are concerns about online radicalization, FBI online agents take on an active role in online radicalizing speech aimed at these individuals. The Terrorism Enhancement then uniquely exposes these first-time, non-violent offenders to unwarranted lengthy sentences that lack any evidentiary basis. *See* Murtaza Hussain, *Undercover FBI Agents Helped Autistic Teen Plan Trip to Join ISIS*, THE INTERCEPT (Jan. 10, 2024, 3:37:00 PM), https://theintercept.com/2024/01/10/fbi-sting-isis-autistic-teen/; *see also* Austen Erblat, *Castle Rock teen with mental health issues arrested, accused of trying to join ISIS*, CBS News Colorado (July 19, 2023, 4:31:00 AM), https://www.cbsnews.com/colorado/news/castle-rock-teen-mental-health-issues-arrested-accused-trying-join-isis/; *see also* Murtaza Hussain, *The FBI Groomed a 16 year-old with "Brain Development Issues" to Become a Terrorist*, The Intercept (June 15, 2023, 9:01:00 AM), https://theintercept.com/2023/06/15/fbi-undercover-isis-teenager-terrorist/

maximum sentence is twenty years. But if someone only conceals, rather than provides, financial support, the maximum is just ten years. By contrast, the minimum recommended sentence under the Terrorism Enhancement is 17.5 years, *regardless of the type of material support provided*.[38] While the material support statutes' variation in sentencing shows that Congress intended for sentences to be "proportional to the culpability of the conduct, to the injury that can be directly attributed to a defendant's actions, and to the nature of the organization's actions," the Terrorism Enhancement treats an individual who provides any type of material support as harshly as the terrorist who himself commits violent acts.[39][40]

These concerns were shared with the Commission in 1997 when it sought public comment on codifying the emergency amendment that implemented § 3A1.4 to the Antiterrorism and Effective Death Penalty Act of 1996. In response, the American Bar Association Criminal Justice Section's Committee submitted a comment noting, "…we remain uncomfortable with U.S.S.G.§ 3A1.4 … because we see it as violative of the basic structure of the guidelines. We believe that the existing provisions in Chapter Two and Chapter Four, coupled with the ability to depart for relevant offense and offender characteristics, should be sufficient to address these clearly more serious crimes of terrorism. Further, in the absence of data and/or other evidence speaking to the inadequacy of the current provisions and mechanisms, we cannot support the establishment of a mandatory minimum of 210 months for all such crimes committed by all offenders (including those with no criminal history points)."[41] Those concerns have been born out in the uniquely harsh, disparate, and inequitable sentencing of these cases.

Discriminatory Application of the Terrorist Enhancement: Historic and Emerging Patterns

H. Historic Pattern: Discriminatory Application of the Terrorism Enhancement to Muslim Individuals and Court Refusal to Apply the Enhancement to Non-Muslim, White Offenders where Applicable.

While the Terrorism Enhancement is written for broad application, it has been largely applied only to Muslim defendants or offenses involving Muslim organizations.[42] The Terrorism Enhancement is intended to dramatically increase the punishment of offenses that were "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." This can apply to the list of enumerated statutes in § 3A1.4, but Application Note 4 to § 3A1.4 also allows for an upward departure—equivalent to what would result if the enhancement was applied—for any other offense that "was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." The upward departure can also apply to any of the

[38] U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2025) sentencing tbl.
[39] James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 100, 116 (2010).
[40] Attachment 1 is a table demonstrating the wide-ranging sentences for similar types of offenders subject to the Terrorism Enhancement. The result is disparate and dissimilar sentencing for *similar conduct*, as proscribed by 3553(a)(1).
[41] *See* American Bar Association Criminal Justice Section's Committee on the United States Sentencing Guidelines, Public Comment on March 1997 United States Sentencing Commission Proposed Amendment 5 (March 1, 1997), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/199703/199703_PCpt7.pdf.
[42] Trevor Aaronson & Margot Williams, *Trial and Terror*, THE INTERCEPT (last updated June 14, 2023), Trial and Terror (theintercept.com). This online database spotlights 992 terrorism-related prosecutions by the Department of Justice. Of these 992, only ~95 cases are against non-Muslim offenders/non-Muslim organizations.

enumerated statutes where the terrorist motive was to intimidate or coerce a civilian population, rather than influence the conduct of government.[43]

Many of the January 6th convictions were based on a clear and established intent to "influence or affect the conduct of government by intimidation or coercion, or retaliation," and would thus qualify for application of the Terrorism Enhancement or the upward departure it provides for in Application Note 4. On January 6, 2021, a mob of President Donald Trump's supporters went to the U.S. Capitol, attempting to interfere with the certification of electoral votes from the 2020 presidential election. The rioters assaulted the Capitol police force and looted and invaded the complex for several hours. They destroyed property and sent members of Congress and their staff into hiding in offices and bunkers. The riots resulted in multiple deaths, injured approximately 140 members of law enforcement, and caused $2,881,360.20 worth of property damage.[44]

The Justice Department, however, has not charged the vast majority of the rioters with any terrorism charges: of the more than 1,500[45] defendants charged, 332 received charges of corruptly obstructing, influencing, or impeding an official proceeding, or attempting to do so, 57 received charges of conspiracy to obstruct a congressional proceeding, obstruct law enforcement during a civil disorder, and/or injure an officer.[46] The Justice Department sought the Terrorism Enhancement in only a small fraction of the more than 1,100 prosecutions. As Attachment 1 reflects, the government sought the Enhancement against a limited set of January 6 defendants and courts applied it to fewer still, principally the Oath Keepers and Proud Boys leadership. Even where it was applied, courts varied downward sharply: of the January 6 defendants who received the Enhancement, sentences ranged from 12 months to 216 months, and in every instance fell well below the defendant's statutory maximum exposure. In eight further cases identified in Attachment 1—including Guy Reffitt, Kyle Fitzsimons, Christopher Worrell,

[43] In response to the 2024 request for comments, the United States Sentencing Commission implemented amendments in 2025 that simplified the sentencing guidelines. The Commission reduced the Guidelines to a two-step process that no longer includes official departures but allows the court to still vary upward or downward from the recommended range. Even though the official departures were done away with, the Commission compiled all departures in Part III, Appendix B of the 2025 Guidelines Manual. Included in Part III, Appendix B are the instructions that "the removal of departures from the Guidelines Manual does not reflect a determination by the Commission that the rationale underlying the deleted departure provisions is no longer informative or that a court should no longer consider such facts for purposes of determining the appropriate sentence." U.S. Sent'g Guidelines Manual app. B, pt. III, Compilation of Deleted Departure Provisions, at 133 (U.S. Sent'g Comm'n 2025). Meaning, courts may continue to rely upon the facts that would have been a basis for a departure as a basis for a variance instead. Far from removing these departures, the Commission has made it easier for the government to apply them by no longer requiring the explicit reference to a departure and instead only requiring that the government argue the facts.

[44] Amanda S. Nhek, *Judicial Uncertainty and Domestic Terrorism: Reforming the Sentencing Guidelines after January 6,* 11:2 NATIONAL SECURITY LAW JOURNAL. 270 (2024); U.S. Att'y's Office for D.C., 48 Months Since the Jan. 6 Attack on U.S. Capitol (Jan. 6, 2025), https://www.justice.gov/usao-dc/48-months-jan-6-attack-us-capitol.

[45] 48 Months Since the Jan. 6 Attack, supra note 44.

[46] Nhek at 278.

and David Judd—the government sought the Enhancement and the court declined to apply it at all.[47][48] The lack of sentencing enhancements sought for January 6th domestic extremists, however, is not an isolated case but rather a continuing disparity. Judges were reluctant to impose the terrorism enhancement in the case of January 6th because they were unsure if the actions qualified as "crimes of terrorism," they did not believe it fair to single out some January 6th offenders when the rest did not receive similar sentencing enhancements, and oftentimes because the prosecutors never requested the judges to seek the enhancement.[49] Judges were extremely inconsistent in their application of the terrorism enhancement as others "exhibited similar behaviors and held similar intentions, yet judges did not apply the enhancement in many of these cases."[50]

In the case of Capitol rioter Guy Reffitt, prosecutors described that "Reffitt sought not just to stop Congress, but also to physical attack, remove, and replace the legislators who were serving in Congress," a "quintessential example of an intent to both influence and retaliate against government conduct through intimidation or coercion."[51] Another Capitol rioter, Thomas Webster, tackled, choked, and assaulted an officer.[52] Lonnie Leroy Coffman drove to the Capitol with "282 Molotov cocktails, a 9mm handgun, a rifle, a shotgun, hundreds of rounds of ammunition, large-capacity ammunition feeding devices, a crossbow with bolts, machetes, camouflage smoke detectors and gas-filled Mason jars used to make napalm."[53] Reffitt's case, Webster's, Coffman's, and many others like them were strikingly similar to Tarrio, Biggs, and Rehl, the Judges refused to implement the terrorism enhancement for the vast majority of January 6 cases.[54] Yet, nonviolent offenses by Muslim, non-white defendants regularly receive the enhancement.

In September 2023, the University of Maryland's National Consortium for the Study of Terrorism and Responses to Terrorism (START) published research finding that sentencing enhancements were disproportionately applied to international terrorism cases, resulting in sentencing disparities between international and domestic terrorism defendants.[55] Despite the Terrorism Enhancement not requiring a transnational element to the crime, researchers found that that the Terrorism Enhancement was sought in

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[47] *United States v. Reffitt*, (D.D.C. 2022) Case number: 1:21-cr-00032 (tried to storm the Capitol while armed with a gun. The judge refused to apply the Terrorism Enhancement and sentenced Reffitt to just over 7 years*.); United States v. McCaughe*y, III et al (D.D.C. 2023), Case number: 1:21-cr-00040 (Judd launched a lit object at a tightly packed tunnel of law enforcement and the mob in an attempt to clear a path for rioters. The judge did not apply the Terrorism Enhancement, sentenced to 32 months.).
See also Josh Gerstein, *Why DOJ is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants*, POLITICO (Jan. 4, 2022, 4:30 AM), https://www.politico.com/news/2022/01/04/doj-domestic-terrorism-sentences-jan-6-526407.
[48] Nhek at 278, 283.
[49] Nhek at 279.
[50] Nhek at 285.
[51] Nhek at 280.
[52] Nhek at 282.
[53] Nhek at 282.
[54] Nhek at 283.
[55] Michael A. Jensen et al., *Prosecuting Terror in the Homeland: An Assessment of Sentencing Disparities in United States Federal Terrorism Cases* (2023), https://www.start.umd.edu/sites/default/files/publications/local_attachments/Prosecuting%20Terror%20in%20the%20Homeland%20Research%20Brief.pdf (START's findings come from an analysis of 344 federal terrorism prosecutions—118 international terrorism cases and 226 domestic terrorism cases—between 2014 and 2019; "Cases were classified as international terrorism if the defendants had links to, or were acting in support of, terrorist groups and movements whose bases of operations and primary activities are located outside of the territorial boundaries of the United States…Cases were classified as domestic terrorism if the defendants had links to, or were acting on behalf of, groups or other movements that operate primarily within the territorial jurisdictions of the United States.")

approximately 60% of international terrorism cases; similar sentencing penalties were sought only in 15.4% of domestic terrorism cases.

The discriminatory application of the Terrorism Enhancement to mostly Muslims, or offenses involving Muslim organizations, has long been established. From the available data it is also clear that Muslims are disproportionately prosecuted for attempt or conspiracy to provide material support to a foreign terrorist organization, often as the result of a sting operation; and the Terrorism Enhancement is applied in the overwhelming majority of material support cases.[56] Thus, in the face of the government's refusal to seek the enhancement against white, non-Muslims, and courts' refusals to apply the enhancement to white, non-Muslims whose conduct clearly warrants its application, the enhancement is now on its face discriminatory on the basis of religion.

The Sentencing Commission's tracking and reported data does not show this clear discrimination, however. The Commission only tracks race as commonly tracked in the U.S. Census. There is no category for Arab, Iranian, or Southwest Asian. More than 80% of individuals of Middle Eastern, Southwest Asian, or North African (Egypt, Morocco etc.) background, select themselves as "White."[57] Indeed, the Commission's own reporting records a substantial share of those receiving the Terrorism Enhancement as "white." This is inaccurate and results in an erasure of the discriminatory impact of the Enhancement on those of Southwest Asian, Arab, and North African descent.

The Commission also does not track religion. As a result, there is currently no data from the Sentencing Commission that would alert a clearly discriminatory application of the Terrorism Enhancement to Muslim Americans or other resulting unwarranted sentencing disparities. For the reasons discussed above, religion, race/ethnicity, and violent/non-violent conduct, should be clearly tracked for this enhancement and analyzed in the context of discriminatory application.

I. Emerging Pattern: Discriminatory Application of the Terrorism Enhancement to Undesirable Political Dissent/Government Criticism and Court Willingness to Apply the Enhancement

The pattern documented above is no longer confined to religion and national origin. In the last year the Executive Branch has directed, in writing, that the Terrorism Enhancement be sought in a category of cases defined by political viewpoint. MLFA asks the Commission to study that development and its sentencing consequences.[58]

In 2025, there was an increase of political violence on both the right and left ends of the political spectrums.[59] Despite this general increase, rhetoric from the executive branch and Department of Justice has zeroed in on left-wing ideology and political action. In addition to the Prairieland case, federal prosecutors have targeted other ICE protesters, labeling them as Antifa and domestic terrorists.

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[56] *United States Sentencing Commission Fiscal Year 2023 Guideline Application Frequencies Chapter 3 Adjustments* (April 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2023/Ch3_Guideline_FY23.pdf.

[57] Sarah Parvini & Ellis Simani, *Are Arabs and Iranians white? Census says yes, but many disagree*, LOS ANGELES TIMES (March 28, 2019), https://www.latimes.com/projects/la-me-census-middle-east-north-africa-race/. ; *See also* Abboud, Sarah et al. "The Contested Whiteness of Arab Identity in the United States: Implications for Health Disparities Research." *American journal of public health* vol. 109,11 (2019): 1580-1583. (Discussion on how "Arab classification as White leads to their cultural invisibility and perpetuates a cycle of undocumented health disparities.")

[58] *See* Madeline Johl, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 FORDHAM URB. L.J. 465 (2023).

[59] Special Report, Key Political Violence and Resilience Trends From 2025, Bridging Divides Initiative, Princeton Univ. (Feb. 11, 2026), https://bridgingdivides.princeton.edu/key-political-violence-and-resilience-trends-2025.

In September of 2025, President Trump issued NSPM-7 in which he ordered the DOJ to target political violence from those that "support [the] overthrow of the United States Government." The memorandum identifies the sources of political violence the government is to prioritize by reference to belief. It states that "[c]ommon threads animating this violent conduct include anti-Americanism, anti-capitalism, and anti-Christianity; support for the overthrow of the United States Government; extremism on migration, race, and gender; and hostility towards those who hold traditional American views on family, religion, and morality." It directs the Attorney General to issue guidance identifying "any behaviors, fact patterns, recurrent motivations, or other indicia" common to the organizations that coordinate such acts.

The significance of that formulation is that the criteria are not limited to violent conduct or to persons who seek the overthrow of the government. Support for overthrowing the government appears in the memorandum as one item in a list of ideological "common threads," alongside "anti-capitalism" and "anti-Christianity" and "hostility towards those who hold traditional American views on family, religion, and morality." Whatever conduct ultimately supplies the offense of conviction, the criterion that determines which conduct is routed to the Joint Terrorism Task Forces, charged as terrorism, and made the subject of an instruction to seek § 3A1.4 is a criterion of belief. The memorandum states that no investigation may be opened based solely on First Amendment-protected activity. That disclaimer does not answer the sentencing problem: even where the predicate conduct is unquestionably criminal, the Enhancement attaches on a finding about the defendant's political purpose rather than about what he did or whom he harmed.

The protest at the Prairieland ICE Detention Center took place July 4, 2025 and initial charges were brought three days later, July 7, 2025. A month after the President's memo (and other related executive orders) was published, an indictment was filed October 15, 2025, which brought new charges, including providing material support to terrorists in violation of 18 U.S.C. § 2339A.[60] The indictment outlined the existence of a North Texas Antifa Cell. The case was hailed as the "nation's initial federal indictment targeting a coordinated group of Antifa cell members" to "confront domestic terrorism."[61] Despite this designation, Antifa is not an organization with members, officers, or a hierarchical structure, and there is no statutory mechanism by which any domestic entity may be designated a terrorist organization. The Order of September 22, 2025 purported to designate Antifa as a "domestic terrorist organization," but no statute authorizes such a designation and none attaches any legal consequence to it. NSPM-7 itself provides only that the Attorney General "may recommend" that entities "merit" designation and submit a list to the President. Nor was any designation an element of the offenses charged: unlike 18 U.S.C. § 2339B, § 2339A requires no designated organization at all. The label thus carried no legal force—and it framed a prosecution that produced sentences of thirty to one hundred years.[62] Every defendant involved in the case, including the individuals who took plea deals, denied being part of an "antifa cell" and having any knowledge of an "antifa cell."

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[60] Indictment, United States v. Arnold, No. 4:25-cr-00259 (N. D. Tex. filed Oct. 15, 2025)

[61] Press Release, U.S. Att'y's Office, N. Dist. Of Tex., U.S. Dep't of Just., Antifa Cell Members Convicted in Prairieland ICE Detention Center Shooting (Mar. 13, 2026), https://www.justice.gov/usao-ndtx/pr/antifa-cell-members-convicted-prairieland-ice-detention-center-shooting (quoting HSI Dallas Special Agent in Charge Travis Pickard).

[62] The Secretary of State designates foreign terrorist organizations under 8 U.S.C. § 1189. See Foreign Terrorist Organizations, U.S. Dep't of State, https://www.state.gov/foreign-terrorist-organizations/ (last visited July 26, 2026). There is no corresponding statutory mechanism for designating a domestic organization, and no federal agency

In support of President Trump's memo, Pamela Bondi, U.S. Attorney General at the time, sent a separate memo to the DOJ in December 2025. In it, she reiterated the President's words and added a list of enumerated charges that prosecutors should be "particularly mindful" of using. Included in this list are 18 U.S.C. § 111 (assaulting, resisting, or impeding federal officers), 18 U.S.C. § 231 (obstruction during civil disorders), and 18 U.S.C. § 1361 (destruction of government property). In conjunction with these charges, A.G. Bondi instructed prosecutors to "seek all applicable enhancements under the United States Sentencing Guidelines, including the terrorism enhancement under U.S.S.G. § 3A1.4."

Many of the January 6th defendants self-identified as militia members and as anti-government.[63] These defendants "support[ed] the overthrow of the United States Government." They were charged with destruction of government property, assaulting federal officers, and obstruction during civil disorders, like the enumerated offenses in Bondi's December 2025 memo, as well as seditious conspiracy. See Attachment 1. The conduct of the defendants fits the Guideline's definition of a federal crime of terrorism, as outlined in the previous section. In January 2025, shortly after President Donald Trump was sworn into office, he pardoned (or, in a small handful of cases, commuted the sentences of) all Jan 6th defendants.[64]

Among the desired outcomes of the sentencing guidelines is "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); see also 28 U.S.C. § 991(b)(1)(B). January 6th and Prairieland defendants alike were motivated in their conduct by their political ideology.[65]

J. Case Study: Prairieland Sentences[66]

1. Section 3553(a) Factors

On July 4, 2025 a group of individuals met up at the Prairieland ICE Detention Center outside of Fort Worth, TX to participate in a planned noise demonstration.[67] In defendants' Signal group chat where they planned the demonstration, they discussed wanting to show solidarity with detainees and yell chants for them to hear. The group described the demonstration as a "low risk" activity.[68] A small group of the defendants met before the demonstration to discuss carrying their legal firearms in self-protection. Members of the group shot fireworks in the air and chanted for the detainees in the detention center to hear. Some individuals broke from the group and vandalized an ICE vehicle and guard post. Shortly after

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maintains a list of designated domestic terrorist organizations. Section 2339A, under which the Prairieland defendants were convicted, requires no designated organization at all.

[63] Kelly Meggs led members of the militia Oath Keepers against Congress members, such as Nancy Pelosi. Told Oath Keepers "To prepare for essentially government-on-government violence...engaging in street warfare." *United States v. Rhodes, III et al*, 610 F.Supp.3d 29 (D.D.C. 2022)

[64] Proclamation No. 10887, Granting Pardons and Commutation of Sentences for Certain Offenses Relating to the Events at or Near the United States Capitol on January 6, 2021, 90 Fed. Reg. 8331 (Jan. 20, 2025)

[65] *See NAACP v. Button*, 371 U.S. 415 (1963) (Political expression is constitutionally protected by the 1st amendment); *See also Oyler v. Boles*, 368 U.S. 448, 456 (1962) (prosecution cannot be based upon an unjustifiable standard such as race, religion, or other arbitrary classification such as political affiliation).

[66] *United States v. Arnold et al,* No. 4:25-cr-00259 (N.D. Tex.). Individual sentences are drawn from the judgments entered in that case and in the companion plea cases: Judgment, United States v. Rueda, No. 4:25-cr-00259-P-6 (N.D. Tex. entered June 23, 2026); Judgment, United States v. Sanchez-Estrada, No. 4:25-cr-00259-O-9 (N.D. Tex. entered June 23, 2026); Judgment, United States v. Song, No. 4:25-cr-00259-P-3 (N.D. Tex. entered June 23, 2026); Judgment, United States v. Sikes, No. 4:25-cr-00272 (N.D. Tex. entered July 1, 2026); Judgment, United States v. Baumann, No. 4:25-cr-00282-P-1 (N.D. Tex. entered July 1, 2026); Judgment, United States v. Gibson, No. 4:25-cr-00282-O-2 (N.D. Tex. entered July 1, 2026).

[67] Gov't Ex. 156 at 86, *United States v. Arnold* et al, No. 4:25-cr-00259 (N. D. Tex. trial held Feb. 17, 2026)

[68] Gov't Ex. 154 at 79, *United States v. Arnold* et al, No. 4:25-cr-00259 (N. D. Tex. trial held Feb. 17, 2026)

law enforcement arrived, a responding officer raised his gun and pointed it at a fleeing protester. Another protester saw this and discharged his firearm toward the ground and struck the officer. The officer was treated at a hospital, released the same day, and made a full recovery.[69] All protesters were ultimately arrested and charged in connection to "Antifa" domestic terrorism. The protesters participated in online communities associated with left-leaning ideology and were therefore labeled "Antifa" by the government.

In March of 2026, nine of the protesters, the Prairieland Nine, were convicted under 18 U.S.C. 2339a, Material Support of Terrorism, along with other charges. All nine received the statutory maximum on each count of conviction, imposed consecutively, yielding aggregate sentences of 360, 600, 840, and 1,200 months—that is, thirty to one hundred years. The terrorist enhancement enabled these sentences to be possible, as they put each defendant within the guideline range of 360 months to life, despite variation in the nature of their offenses and their personal characteristics.

Maricela Rueda – Maricela is a wife, mother to a young teenage daughter, and licensed doula. She had zero criminal history. She helped plan the protest but did not participate in the preparatory gear check in which firearms were discussed. She did not bring any firearms. Maricela carried no firearm and fired no shot; when law enforcement arrived she left the facility and was arrested approximately half a mile away with other defendants. As a result of this conduct, she was sentenced to 70 years in prison.

Daniel Estrada – Daniel is the husband of Maricela, step-father to her teenager daughter, and tattoo artist. He did not help plan the protest and was not even present at it. In a phone call while Maricela was detained, she and Daniel discussed towing her car, taking care of their pets, and preparing the house to sell. As part of this preparation, Daniel moved some boxes full of leftist zines. He was convicted of corruptly concealing a document and of conspiracy to conceal documents. He was sentenced to 360 months—thirty years.

Benjamin Song – Benjamin attended a gear check prior to the protest and discussed carrying firearms. He shot off fireworks outside the detention center. He was present when law enforcement arrived. A responding officer drew his gun. Benjamin fired his rifle toward the ground and a round ricocheted and struck the responding officer. The officer returned fire. This officer was then taken to the hospital, released a few hours later, and made a full recovery. Benjamin fled the scene after firing his rifle and evaded law enforcement for several days before he was discovered and arrested. He was sentenced to 1,200 months, one hundred years.

All nine defendants received sentences of thirty years or greater. Because the terrorist enhancement creates a recommended sentencing range of 360 months to life, the Court was able to stack the sentences consecutively.[70]

2. Trial Penalty

Beyond the nine defendants who went to trial, seven defendants pleaded guilty.[71]

Seth Sikes – Seth helped plan the protest but did not participate in the preparatory gear check in which firearms were discussed. He met up with the other protesters at the detention center and

[69] Trial Tr. Day 2 at 163:12-13, *United States v. Arnold* et al, No. 4:25-cr-00259 (N. D. Tex. Feb 24, 2026) (testimony of T. Gross)

[70] United States Sentencing Commission, *Guidelines Manual,* § 5G1.2(d) (Nov. 2025)

[71] Plea Agreement, *United States v. Arnold et al*, No. 4:25-cr-00272 (N. D. Tex. filed Nov. 19, 2025); Plea Agreement, *United States v. Baumann*, 4:25-cr-00282-P-1 (N. D. Tex. filed Nov. 19, 2025); Plea Agreement, *United States v. Baumann et a*l, 4:25-cr-00282-O-2 (N. D. Tex. filed Nov. 19, 2025)

participated in shooting off fireworks. When law enforcement responded, Seth ran down a residential road adjacent to the detention center and was arrested with other protesters. He was sentenced to six years.

Nathan Baumann – Nathan helped plan and attended the protest. While at the facility, he vandalized a guard station and facility car. He was arrested with other protesters at the facility. He was sentenced to 22 months.

Joy "Rowan" Gibson – Joy attended a gear check prior to the protest and discussed carrying firearms. She carpooled with other protesters to the detention center. She shot off fireworks and yelled chants for detainees in the center to hear. When law enforcement arrived, she was arrested at the facility. She did not cooperate with the government. She was sentenced to 180 months, fifteen years, the statutory maximum for the single count to which she pleaded guilty.

Under the Guidelines, defendants who plead guilty can receive a two-to-three-point deduction to their offense level for acceptance of responsibility. USSG §3E1.1. Further, where the government enters into a cooperation agreement, § 1B1.8 limits the use of self-incriminating information the defendant provides pursuant to that agreement in determining the applicable guideline range, subject to the exceptions the guideline specifies. At the offense levels the Terrorism Enhancement produces, that reduction is worth roughly five years: at criminal history category VI, offense level 38 yields a range of 360 months to life, while offense level 35 and criminal history VI yields a guidelines range of 292-365 months. The disparities that appeared in this case are an order of magnitude larger, and acceptance of responsibility cannot explain them.

Seth Sikes and Maricela Rueda had remarkably similar conduct, participation in the planning chat, presence at the detention center, leaving the scene with vastly different sentences. Rueda received a sentence more than ten times as long as Sikes'. Even Rueda's additional obstruction charges and Sikes' willingness to cooperate with the government does not account for the additional sixty-four years. The pattern repeats among the defendants who pleaded guilty to the identical single count of 18 U.S.C. § 2339A. Susan Kent and Rebecca Morgan each assisted Mr. Song after the shooting; Ms. Kent cooperated and testified at trial and received 72 months, while Ms. Morgan did not cooperate and received 180 months, the statutory maximum. The 108-month difference between them does not track any difference in their conduct. It tracks whether they cooperated.

3. Unwarranted Sentencing Disparity

Attachment 1 sets out, for each defendant, the offenses of conviction, whether the defendant's conduct qualified for the Terrorism Enhancement, whether the government sought it, whether the court applied it, the statutory maximum exposure, and the sentence imposed. The comparison is stark. Among the January 6 defendants to whom the Enhancement was actually applied, sentences ranged from 12 months to 216 months, and every one fell far below the defendant's statutory maximum exposure. Among the Prairieland defendants to whom the same Enhancement was applied, every sentence was the statutory maximum on every count, imposed consecutively, from 360 to 1,200 months. Elmer Stewart Rhodes III, convicted of seditious conspiracy as the leader of the Oath Keepers, received 216 months against a maximum exposure of 327 months. Maricela Rueda, who attended a protest, carried no weapon, and fired no shot, received 840 months. The Enhancement did not distinguish between them. The sentencing outcomes did, in the opposite direction from culpability.

K. The Common Denominator.

The two patterns described above are the same pattern. Section 3A1.4's operative question is not what the defendant did, whom he harmed, or what his record is. It is whether his offense was "calculated to influence or affect the conduct of government." That is a question about political purpose. A guideline keyed to political purpose will sort defendants by whichever purpose is currently disfavored, in 2005 a religious one, in 2026 a political one, and it will do so no matter who administers it. The Commission cannot cure that by policing how prosecutors and courts apply the Enhancement, because the Enhancement is working exactly as written. It can be cured only by re-anchoring the adjustment to conduct and to victims.

MLFA would file this comment in the same terms if the Enhancement were being directed at defendants on the political right. When it plainly could have been, in the January 6 prosecutions, where the intent to "influence or affect the conduct of government by intimidation or coercion" was established on the record, it was largely not sought, and where sought was largely not applied. That asymmetry is not an argument that the January 6 defendants should have received longer sentences. It is an argument that an adjustment capable of producing a seventy-year sentence for one protester and probation for another, on findings about political motive, is not performing a sentencing function that the Commission can defend.

II. PROPOSED PRIORITIES, AMENDMENTS, AND RESEARCH AGENDA RE TERRORISM ENHANCEMENT

Based on the above, MLFA makes the following **five recommendations**:

1. **Prioritize Data Collection, Research, and Amendment of Terrorism Enhancement to Bring it in Line with the Commission's Stated Missions and the Purposes of Sentencing.**

Make amending, researching, studying, and reforming the Terrorism Enhancement (§ 3A1.4) a priority in light of unwarranted sentence disparities, new studies of the career offender guidelines, lack of empirical evidentiary basis for the enhancement, and the stated purposes and missions of the Commission.

2. **Implement an Interim Application Note Limiting Application of the Terrorism Victim-Related Adjustment to Crimes with at least one Identifiable Victim suffering serious bodily injury, with additional points for multiple victims, directly attributed to the defendant's conduct.**

In the interim, as an injunctive measure based on the significant data presented here and the lack of any empirical evidentiary basis to support the enhancement, MLFA respectfully recommends that the Commission implement an Application Note to the § 3A1.4 (and any other amendments necessary to ensure consistency) that requires that as a victim-related adjustment the enhancement is "only applied in cases in which there are identifiable victim persons who suffered serious bodily injury, with additional offense levels for multiple victims." Attempts and conspiracies, false statements, obstruction offenses, and other offenses that do not involve actual violence (and thus no identifiable person victim) should be excluded from application of the Terrorism Enhancement. The enhancement should remove the Criminal History Category VI designation in line with other Commission reforms. Such an amendment is more in line with the original intention of the Terrorism Enhancement as a "victim-related adjustment".

Other offenses in the Guidelines list specific enhancements based on the severity of the offense. For example, USSG § 2Q1.4 "Tampering or Attempted Tampering with a Public Water System" has the same base offense level as USSG § 2M5.3 (Providing Material Support or Resources to Designated

Foreign Terrorist Organizations or Specially Designated Global Terrorists) (level 26). However, § 2Q1.4(b) of the November 1, 2025 Manual lists specific offense characteristics, such as adding 4 levels to the base offense level if a victim sustained permanent or life-threatening bodily injury, 2 levels for serious bodily injury, and 3 levels for injury between the two. The point holds whether or not that particular subsection survives: the Commission has just voted to delete § 2Q1.4(b), among twenty-six other specific offense characteristics, on the express ground that it examined application rates and found the provision infrequently applied. It has never conducted the equivalent examination of § 3A1.4, which is applied constantly and carries far greater consequence. There are already sufficient enhancements for murder and serious bodily injury. Those enhancements are less severe than the terrorism enhancement but the terrorism enhancement has been applied to far less serious conduct. That is an illogical outcome.[72]

3. Proposed Research Agenda and Data Collection on the Terrorism Enhancement.

MLFA proposes the following research priorities to assist the Commission in fulfilling its stated purposes and missions:

A. Comprehensive Data Collection for Terrorism-Related Offenses

While there is evidence of the discriminatory application of Terrorism Enhancement and the resulting unwarranted disparities, it needs to be analyzed through empirical evidence. Unfortunately, a comprehensive database of terrorism-related offenses and sentencing does not currently exist. The need for this data is more critical in light of the findings of the TRS study because findings across time and the two separate analyses show trends that bring into question what the guidelines understand about predicting future offending in apolitical (non-terrorism cases). With terrorism/political defendants, it appears that the low likelihood of offending remains consistent across different backgrounds, histories, and level of involvement of designated terrorist organizations. The Commission does not have any evidence to substantiate these lengthy sentences and terms of supervised release. Further, in order to substantiate this extreme enhancement and lengthy terms of supervised release would require evidence that these individuals are more likely to commit terrorist offenses and not merely engage in any type of non-terrorism offending that can include technical parole violations and nonviolent crimes. These latter, typical types of reoffending would not warrant such lengthy additions to the sentences under the enhancement since they do not pose any additional threat to society than other, apolitical, defendant would warrant. See TRS at 34.

The University of Maryland's 2023 study was the first of its kind to analyze disparities in international and domestic terrorism sentencing; however, the study does not approach whether sentencing disparities manifest along the lines of religion or race as well. Without comprehensive data and analysis, potential sentencing discrimination and disparities may stay hidden.

[72] Obstruction of Justice under § 2J1.2 is another example. The base offense level is 14, but it can be increased by 8 levels if the offense involved causing or threatening to cause physical injury to a person. Common sense reading of the Guidelines supports the need for specificity with the Terrorism Enhancement. Because the Terrorism Enhancement includes not just a 12-point increase, but also an automatic designation of Criminal History Category VI, the enhancement is much more severe than any other enhancement. If the Terrorism Enhancement is more severe than the guidelines for First-Degree murder (§ 2A1.1) or Tampering with Public Water System (§ 2Q1.4), it must be because it is reserved for conduct more severe than the conduct required for these other enhancements. Further, the Guidelines distinguish between permanent or life-threatening bodily injury and serious bodily injury, creating levels of severity of offenses. The Terrorism Enhancement does not recognize these distinctions.

In addition to demographic characteristics, there is also a need for improved data collection regarding offense characteristics, such as whether a terrorism offense was a victimless crime, was violent, etc.

The Sentencing Commission is in a unique position to gather this information through obtaining the Presentence Investigation Reports (PSRs) of defendants involved in terrorism-related cases by requesting them from each United States Attorney's Office.

Accordingly, we propose that the Sentencing Commission prioritize improving data collection and transparency by tracking the following variables for all terrorism-related offenses including specifically non-violent terrorism related offenses since 1994:

- Whether an offense involved domestic or international terrorism
- Type of charge (e.g., material support of a foreign terrorism organization, obstruction of justice, false statements in a terrorism investigation, etc.)
- Sentencing enhancements sought by the government
- Sentencing enhancements received by the defendant
- Whether the offense had a victim or was a victimless crime
- Whether the offense was violent
- Whether defendant went to trial or pled guilty
- Criminal history of the defendant prior to any enhancements
- Racial identification for the defendant accounting for the fact that those of Arab, North African, and Southwest Asian descent self-select as "White" for racial identification because of a lack of other options when collecting racial data
- Religious identification of the defendant
- If Indictment identified political belief or political activity as part of conduct and whether those beliefs were considered left wing or right wing, if applicable.

B. Transparency and Improved Accessibility of Terrorism-Related Offense Data

The NSCDC recommends the United States Sentencing Commission's dedication to providing public access to sentencing data via helpful online tools and reports. MLFA makes the following suggestions to increase accessibility of national security sentencing data:

- The United States Sentencing Commission's interactive data analyzer provides information regarding federal sentencing, including the number of defendants sentenced over time under a particular guideline. There is no data for offenses sentenced under the Terrorism Enhancement (U.S.S.G. § 3A1.4(a)). Incorporating this information will increase public accessibility to data regarding national security offenses.
- The United States Sentencing Commission publishes annual factsheets on National Defense offenses, including descriptive statistics. Currently, these factsheets, when reporting on the race of offenders, do not account for those of Arab, North African, and Southwest Asian descent who often self-select as "white" for racial identification because of a lack of other options.
- These factsheets also do not report on religion. Updating the descriptive statistics in these factsheets to include these variables will improve public access to relevant information

regarding terrorism offenses. We recommend that they also begin categorizing whether the offense was violent or non-violent (an essential factor for career offender guideline and recidivism rates).

C. Recidivism Studies for Terrorism Defendants and accurate risk assessment in light of recent studies/evidence.

As discussed above, there is no empirical evidence to support the Terrorism Enhancement and the data that exists demonstrates that contrary to the idea that terrorism-related defendants are different, and intractably incapable of rehabilitation, they have some of the lowest recidivism rates. The Commission should study the recidivism rates of those convicted of terrorism-related crimes, similar to the recidivism study for career offenders published by the Commission in 2016,[73] in order to gather empirical evidence on whether there is any evidentiary justification for the Terrorism Enhancement and to develop an accurate, evidence-based risk assessment that reflects whether these individuals are likely to engage in reoffending, and particularly in terrorism-reoffending. This information is necessary for the Commission to comply with its policy statements, and to reflect the level of deterrence that is needed and justified in these cases.

D. Examination and Comparison of Sentences Disposed of Through Trial Versus Plea where the Terrorism Enhancement was Sought

The Commission previously proposed prioritizing further examination and comparison of sentences imposed in cases disposed of through trial versus plea. The trial penalty in terrorism-related offenses is extraordinary because of the Terrorism Enhancement. The broad applicability of the Enhancement, and its severe impact, mean that defendants feel enormous pressure to plead guilty with a cap on the potential sentence, rather than facing a statutory maximum recommend sentence after trial because of the enhancement. The Enhancement is also used as a "bargaining chip to strong-arm a desired result" and "prosecutors sometimes seek the Terrorism Enhancement against a formerly cooperative defendant if they default on a cooperation agreement. Rather than determining 'who is and who is not…a terrorist, the enhancement's practical utility is often reduced to that of a tool used to punish a lack of cooperation."[74]

Given that many of these offenders are non-violent, first-time offenders, the impact of the trial penalty in these cases is particularly harmful to the defendants and their communities. The Commission should include a comparison of sentences imposed in terrorism-related cases that went to trial versus plead guilty.

This is a concrete reality now. Both of the Executive Branch directives described in Section I.I above (Emerging Pattern) instruct federal agents to build cooperators in exactly the category of cases in which prosecutors are simultaneously instructed to seek § 3A1.4. NSPM-7 directs that federal law enforcement agencies "shall question and interrogate … individuals engaged in political violence or lawlessness regarding the entity or individual organizing such actions and any related financial sponsorship of those actions prior to adjudication or initiation of a plea agreement." The Attorney General's December 4, 2025 memorandum directs that the FBI "shall aim to establish cooperators to provide information and

[73] U.S. SENT'G COMM'N, REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS (2016) https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

[74] Madeline Johl, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 FORDHAM URB. L.J. 465 (2023).

eventually testify against other members and leadership of domestic terrorist organizations," and further directs the establishment of a cash reward system for information leading to the identification and arrest of leadership. Read together with the same memorandum's instruction that prosecutors "seek all applicable enhancements … including the terrorism enhancement under U.S.S.G. § 3A1.4," these directives describe a charging and sentencing posture in which the Enhancement supplies the leverage and cooperation supplies the only exit. The Prairieland sentences bear that out: among defendants who pleaded guilty to the identical single count, the sentences imposed tracked cooperation status rather than conduct. The Commission should examine whether § 3A1.4 is functioning as a sentencing adjustment or as an instrument of cooperation leverage, and it should do so with the data it alone can obtain.

4. Recommended Hearings and Witnesses to Assist the Commission re Terrorism Enhancement

The NSCDC recommends that the Commission host hearings to better understand the disproportionate impact of the Terrorism Enhancement. Invited witnesses to these hearing should include stakeholders and leaders, including, but not limited to: defendants impacted by the Terrorism Enhancement, their families, Muslim community leaders, individuals sentenced under the Enhancement for political protest activity, and organizations and attorneys with expertise in terrorism cases and with the terrorism enhancement (such as MLFA's National Security Criminal Defense Center[75], author of this comment, Coalition for Civil Freedoms (works with many families impacted by the enhancement), Federal Defenders, and individuals who have received the enhancement).

5. Revision and Amendment of the Terrorism Enhancement Based on Results of Data Collection and Research

After conducting the proposed research, MLFA recommends significantly reforming the Terrorism Enhancement pursuant to 28 U.S.C. § 994(o) and 28 U.S.C. § 994(p), by submitting the following amendments to Congress:

a. The automatic designation of Category VI criminal offender score should be removed, along with the mandatory offense level minimum of 32. The Commission should also make permanent the proposed interim Application Note that explains the enhancement is to be used only in cases of actual violence with identifiable victim persons who suffered serious bodily injury.

b. The Commission should recommend that the 12 level increase be removed as statutory elements and other enhancements already adequately account for specific types of conduct. The arbitrary 12 level increase ignores these measures, and undoes the purposes of 18 U.S.C. § 3553(a).

c. Application Note 1 to § 3A1.4, states that a "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5), which in turn defines a "federal crime of terrorism" as "an offense that (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of [the enumerated statutes]."

d. The Commission should recommend that the Application Notes add a requirement to the enhancement that requires actual violence, a victim that suffered serious bodily injury, and conduct directly attributed to the defendant.

[75] MLFA's Federal Criminal Defense Department has specialized in defending against national security prosecutions of non-violent Muslim defendants for over 20 years and has significant experience, knowledge, and insight into the use and impact of the Terrorism Enhancement.

e. The Commission should also recommend that any amended Terrorism Enhancement should only apply to conduct in which there was at least one identifiable victim person,[76] and that the defendant specifically intended to himself "influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." Conduct in support of a foreign terrorist organization that is indirect and unconnected to any specifically known terrorist activities should not be included (i.e. an online agreement to travel to live in the territory of an FTO, or sending donations for food, clothing, other types of aid to an FTO, providing contact information for travel to the FTO, etc., political protest that results in property damage, Pinkerton liability where defendant themselves did not commit the violent act, etc.).

III. CONCLUSION

In conclusion, MLFA hopes that these issues regarding the Terrorism Enhancement are studied and reformed through amendment proposals in the coming amendment cycle. We look forward to submitting additional comments on such proposals and are available to assist the Commission as it may require.

/s/ Sufia M. Khalid

Sufia M. Khalid
Deputy Director
National Security Criminal Defense Center
Muslim Legal Fund of America[77]
[redacted]

(See Attachment 1 – Sentencing Comparison Table re Jan 6th, Material Support, and Prairieland Cases below)

[76] Many of the attempted provision of material support convictions state there were no victims of the offense in the PSR.

[77] Acknowledgement: Special thanks to Anna Lindh, our summer legal intern, for her significant contributions and thoughtful input.

Terrorist Enhancement Table

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
JANUARY 6TH CASES						
Laura Steele 1:21-cr-00028-APM	18 U.S.C § 1512(k); 18 U.S.C. § 1512(c)(2) and 2; 18 U.S.C. § 372; 18 U.S.C. § 1752(a)(1); 18 U.S.C. § 231(a)(3) 18 U.S.C. § 1361 and 2; 18 U.S.C. § 1512(c)(1)	Yes	Yes	Yes	12 months	Became a member of the Oath Keepers FL group chat around Jan 3rd. Received texts in GC about "Prepare to do whatever must be done to honor our oaths, defend the Constitution against all enemies, foreign and domestic." Brought a handgun. Wore a tactical vest. No leadership role in the Oath Keepers. Understood entering the Capitol was to stop the vote count. Passed the officers inside the Capitol, went to the Senate Hallway. Knew other Oath Keepers were using force against the police line.
David Moerschel 1:22-cr-00015-APM	18 U.S.C. § 2384; 18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2), 2; 18 U.S.C. § 372	Yes	Yes	Yes	36 months	Traveled in a caravan with other Oath Keepers to DC. Staged an AR-15 rifle and Glock .45 handgun in the QRF hotel. Was in the same group chat as Rhodes, Meggs, and Hackett. Moerschel planned to act himself if "all legislative options fail on Jan 6." "Lawyers always think the answer is legal. Warriors always think the answer is a gun battle." Went inside the Capitol as part of Stack One and stood outside of Nancy Pelosi's office. Hooked arms with co-conspirator Berry before marching toward the House chamber.
Edward Vallejo 1:22-cr-00015-APM	18 U.S.C. § 2384; 18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2), 2; 18 U.S.C. § 372	Yes	Yes	Yes	36 months	He was the Quick Response Force and came prepared to bring weapons into the city. Met up with other QRF members Jan 5th to be given firearms and ammunition. Expressed readiness for guerilla warfare on Jan 6th, if the Electoral College certified the vote. Messaged others at the Capitol that he was outfitted and ready for action.
Joseph Hackett 1:22-cr-00015-APM	18 U.S.C. § 2384; 18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2), 2; 18 U.S.C. § 372	Yes	Yes	Yes	42 months	Traveled in a caravan with other Oath Keepers with DC. Wore military gear, forced his way inside the United States Capitol. Some evidence of AR-15. Trained to be in a Community Preparedness Teams group, including firearm training. Positioned himself directly outside of Nancy Pelosi's office. "[We need to] show up on their doorsteps to

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
						make citizens arrests." (Gov. Ex. 6776, Msg. 1.S.656.7992).
Kenneth Harrelson 1:22-cr-00015-APM	18 U.S.C. §§ 1512(c)(2) and 2; 18 U.S.C. § 372; 18 U.S.C. § 1512(c)(1), 2	Yes	Yes	Yes	48 months	Part of Stack One who breached the Capitol in the East Rotunda. Yelled at and taunted officers, threatening them. Brought a semi-automatic rifle with him to DC. Yelled "Treason" multiple times while in the Capitol building. Assessed the level of body armor worn by Capitol police and lamented not having used rifles at the Capitol.
Roberto Minuta 1:22-cr-00015-APM	18 U.S.C. § 2384; 18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2), 2; 18 U.S.C. § 372	Yes	Yes	Yes	54 months	Posted videos shortly after the presidential election, expressed that the 2nd amendment would justify him and others in taking up arms against the government. "The last line in the sand is the second amendment, and we are fucking past midnight with the tyranny. It is just time to restore freedom." and "It's about tyranny and holding our government's feet to the fire. We have the right and the duty as able-bodied Americans to take up arms and revolt." pg. 31, quotes from Minuta. Anticipated having to use violence to disrupt the proceedings. Wore a vest and goggles. Went in the Capitol and berated police officers.
Jessica Watkins 1:22-cr-00015-APM	18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2), 2; 18 U.S.C. § 372; 18 U.S.C. § 231(a)(3), 2	Yes	Yes	Yes	102 months	Formed the Ohio State Regular Militia, worked with the Oath Keepers. Participated in a GoToMeeting call about plans for the Capital, asked about bringing less-lethal weapons (planned to personally bring weapons for violence). Messages to others before Jan 6th, including "Got to help a President stop this coupe." Directed groups at the Capitol to resist police and enter the Capitol. Helped push the bodies of other individuals physically pushing the police line.
Kelly Meggs 1:22-cr-00015-APM	18 U.S.C. § 2384; 18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2); 18 U.S.C. § 372; 18 U.S.C. § 111(a)(1)	Yes	Yes	Yes	144 months	Agreed early on that violence might be required to prevent President-Elect Biden from taking office. "It is easy to chat here. The real question is: Who's willing to die? That's what patriots did by the thousands." Signal chat, post-Dec 19 2020. "We need Trump because it will make our job easier. There's going to be blood in the streets, no matter what." pg. 18. Helped coordinate the bringing of weapons for the FL Oath

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
						Keepers and transported guns in the bed of his truck. “To prepare for essentially government-on-government violence...engaging in street warfare." Led Oath Keepers into the Capitol. Looked for Nancy Pelosi in the Capitol building. Threatened injury to the officers as he came through the Capitol door.
Elmer Stewart Rhodes III 1:22-cr-00015-APM	18 U.S.C. § 2384; 18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2); 18 U.S.C. § 372; 18 U.S.C. § 1361; 18 U.S.C. § 231(a)(3); 18 U.S.C. § 1512(c)(1);	Yes	Yes	Yes	216 months	Organizer. Tried to oppose by force the lawful transfer of power following the 2020 Presidential election Founder and leader of the Oath Keepers, a far-right anti-government extremist militia group. Directed the opposition at Congress. He and co-conspirators brought weapons to the Capitol area. Ordered 20-30 people to come to the Capitol after “things went to hell at the Capitol.” Gave orders and organized insurrectionists. Had a conversation on the phone with co-conspirators right before entering the Capitol. Talked about American Revolution and Civil War to inspire use of violence as means of resistance. Established an arsenal of weapons on the other side of the Potomac River that could be brought into the Capitol on notice.
Bennie Parker 1:21-cr-00028-APM	18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2); 18 U.S.C. § 372; 18 U.S.C. § 1752(a)(1)	Yes	Yes	No	6 months probation	An affiliate of the Oath Keepers. Participated in the broader conspiracy to disrupt the presidential election certification by operating as a supportive element on the ground. Traveled to Washington, D.C. from Ohio under the direction of an Oath Keepers leader. Brought their firearms. Stayed on Capitol grounds during breach. Told journalist "We just had a presidential election and it was stolen from us" and “that many Americans like himself were ‘willing to take up arms’ to address their grievances.”
William Isaacs 1:21-cr-00028-APM	18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2); 18 U.S.C. § 372; 18 U.S.C. § 1752(a)(1); 18 U.S.C. § 1361 and 2;	Yes	Yes	No	60 months probation	Affiliate of the Oath Keepers from Florida. Outfitted in full tactical gear—tactical vest, helmet, and communication equipment—joined the military-style "stack" formation to breach the Capitol. Used his body to forcefully push against officers who were actively trying to keep the doors shut. Breached the Capitol, entered the historic

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
	18 U.S.C. § 231(a)(3), 2					Rotunda. Shouted, "We're in the house now!" and "This is our house!" to celebrate the mob's takeover. Shouted at law enforcement, "You're protecting traitors! You're protecting a corrupt government!"
Connie Meggs 1:21-cr-00028-APM	18 U.S.C. § 1512(k); 18 U.S.C. § 1512(c)(2); 18 U.S.C. § 372; 18 U.S.C. § 1752(a)(1); 18 U.S.C. § 1361 and 2	Yes	Yes	No	15 months	An affiliate of the Oath Keepers. Wore a reinforced vest, safety gear, and a radio. Joined a highly structured, column-like "stack" formation and followed tactical commands to "move!" with her unit. Physically forced her way into the building through the Rotunda Doors, breaking them, and remained inside for approximately twenty-one minutes as part of the unified force. Responded to an acquaintance's warning about potential conflict through Facebook, saying "I'm ready for it". Warned a relative before Jan 6th that "it's about the election."
David Judd 1:21-cr-40-TNM	18 U.S.C. § 111(a); 18 U.S.C. § 1512(c)(2)	Yes	Yes	No	32 months	Threw a lit firecracker at the police line and encouraged others to push through the police line. Helped coordinate a shield wall to fight against the officers in the tunnel and use riot shields stolen from police officers. Joined his collective weight to push into police officers. Attempted to enter the Capitol building to “stop or prevent Congress from certifying the Electoral College vote results.”
Mitchell Todd Gardner 1:21-cr-622-APM	18 U.S.C. § 231(a)(3); 18 U.S.C. § 1512(c)(2) and 2; 18 U.S.C. § 111(a)(1) and (b)	Yes	Yes	No	55 months	Incited the crowd, encouraging them to "pull the cops out" and "break the fucking window" using a construction ladder. Unleashed Oleoresin Capsicum (OC) pepper spray onto officers inside the Lower West Terrace tunnel. Used the empty canister to break an adjacent window. Climbed inside. Handed a broken piece of furniture to another individual to be used as a weapon against the police. He refused to leave the restricted grounds, lingered outside the tunnel to cheer on continued assaults against law enforcement. Stood amidst the mob loudly chanting "drag them out" and urging the crowd to "fight for Trump.”

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
Guy Reffitt 1:21-cr-00032-DLF	18 U.S.C. § 231(a)(2); 18 U.S.C. § 1512(c)(2); 18 U.S.C. § 1752(a)(1) and (b)(1)(A); 18 U.S.C. § 231(a)(3); 18 U.S.C. § 1512(a)(2)(C)	Yes	Yes	No	60 months	A Three Percenters militia recruiter from Texas, marched to the Capitol carrying a holstered pistol. He stated before January 6 that he "would rather be tried by a jury of 12 than carried by six"—acknowledgment of use his weapon. Intent in coming to the Capitol was to "physically attack, remove, and replace" members of Congress.
Kyle Fitzsimons 1:21-cr-00158-RC	18 U.S.C. § 231(a)(3); 18 U.S.C. § 1512(c)(2) and 2; 18 U.S.C. § 111(a)(1) and (b) (3 counts); 18 U.S.C. § 1752(a)(2); 18 U.S.C. § 1752(a)(1); 40 U.S.C. § 5104(e)(2)(D); 18 U.S.C. §§ 1752(a)(4), (b)(1)(A); 40 U.S.C. § 5104(e)(2)(F)	Yes	Yes	No	87 months	Came to the Capitol on January 6th to join in the rally. When protestors began to invade the Capitol, Kyle joined. Pushed himself to the front of the crowd to threaten and harass the police line. Assaulted at least five officers, including throwing an unstrung bow like a spear and pulling officers into the angry crowd. One of the officers had to have shoulder surgery and retire early from the force. Only disengaged with the police line when he sustained an injury to his head and had to retreat into the crowd.
Christopher Worrell 1:21-cr-00292-RCL	18 U.S.C. §§ 1512(c)(2) and 2; 18 U.S.C. § 1752(a)(1) and (b)(1)(A); 18 U.S.C. § 1752(a)(2) and (b)(1)(A); 18 U.S.C. § 1752(a)(4) and (b)(1)(A); 40 U.S.C. § 5104(e)(2)(F); 18 U.S.C. § 231(a)(3); 18 U.S.C. § 111(a)(1) and (b)	Yes	Yes	No	120 months	An active member of the "Hurricane Coast" zone of the Florida Proud Boys. Equipped with tactical gear- radio, stab-proof vest, and a high-strength pepper spray. Joined a coordinated vanguard of Proud Boys pushing past multiple police barricades on the West Terrace. Deployed his pepper spray over the heads of the crowd directly toward a line of law enforcement officers and incapacitated multiple officers right before the perimeter was breached by the mob. Participated in Telegram group chats before Jan 6th; messaged "We're picking up your messages, and we're listening. We're ready to fight to defend our republic against all enemies, foreign and domestic". After his arrest, threatened "if he were to find out the name of the Twitter user who exposed" his

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
						participation, he would take personal retribution.
Riley Williams 1:21-cr-00618-ABJ	18 U.S.C. § 231(a)(3); 18 U.S.C. § 111(a)(1); 18 U.S.C. § 1752(a)(1); 18 U.S.C. § 1752(a)(2); 40 U.S.C. § 5104(e)(2)(D); 40 U.S.C. § 5104(e)(2)(G)	Yes	No	No	36 months	Pushed past barricades and organized other rioters into a "human battering ram" to breach police lines. Shouted commands at the mob to advance, directing "Go! Go! Go! Upstairs! Upstairs!" and guided crowds toward the Speaker's suite. Upon entering Pelosi's office, directed the theft of government technology. Instructed a fellow rioter to "put on gloves" before taking a laptop. Resisted Capitol police officers by pushing her back against police lines and screaming, "F[]k you. We'll remember your f[]king face" and "You're a traitor. You're a traitor to this country". Before Jan 6th, told her boyfriend that "something big is going to happen" to "stop Mike Pence from certifying" the election results, and later called the Vice President a "f[]king traitor" for fulfilling his constitutional duties.
Charles Donohoe 1:21-cr-00175-TJK	18 U.S.C. § 1512(k); 18 U.S.C. § 111(a)	Yes	No	No	40 months	Key lieutenant on the ground for the Proud Boys' "Ministry of Self-Defense" (MOSD). Joined the assault against law enforcement, pulled a rioter away from grappling police and threw two half-liter water bottles directly at a line of officers. Advanced past the barricades and up the scaffolding. He reposted messages declaring that "Congress needs a reintroduction" to the fact that the government is run for the people , acknowledged his awareness of leadership plans to "storm the US Capitol" to stop the transfer of power. Participated in leadership chats on the morning of January 6 with participants stating, "I want to see thousands of normies burn that city to ash today" and "I

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
						will settle with seeing them smash some pigs to dust."
Donald Hazard 1:22-cr-00117-RDM	18 U.S.C. §§ 111(a)(1) and (b)	Yes	No	No	57 months	Part of Texas-based militia called the Patriot Boys of North Texas. Wore a tactical vest, a helmet bearing a Confederate flag, and pepper spray. Announced to a photographer, "I want the enemy to know exactly who is coming after them." Fought a U.S. Capitol Officer down a flight of stairs. Left the officer unconscious with a concussion. Entered the Capitol building via the Parliamentarian Door. Before Jan 6th, declared "There's a Civil War coming and I for one will be on the front lines taking out as many of those sons of bitches as I possibly can." He also posted targeting political opponents, vowing, "I'm heading out to DC tomorrow. And you can bet I'm gonna bust as many antifa and BLM skulls as I possibly can for you"
Kenneth Thomas 1:21-cr-00552-DLF	18 U.S.C. § 231(a)(3); 18 U.S.C. § 1512(c)(2); 18 U.S.C. § 111(a)(1); 18 U.S.C. § 1752(a)(1); 18 U.S.C. § 1752(a)(2); 18 U.S.C. § 1752(a)(4); 40 U.S.C. § 5104(e)(2)(D); 40 U.S.C. § 5104(e)(2)(F)	Yes	No	No	58 months	Confronted law enforcement on front lines. Instructed his wife and daughter to stay behind but still marched up the Northwest stairs, entered the restricted inaugural stage area, and attempted to intimidate officers by repeatedly yelling, "POLICE STAND DOWN". Climbed under the grandstands, bypassed zip-tied tarps, and verbally harassed officers by name. Officer caught him pulling out a jackknife to cut the zip ties and ordered him to back up. Demanded, "Let us in!" and "I'm asking you... This is our house. This is our house. We're not backing down." Pushed back against police lines for hours and encouraged rioters to "hold the line". Weeks prior to Jan 6, he posted social media memes depicting lightning and bombs striking the Capitol building and declared online that "VP Pence could throw out the fraudulent electors Actually, he must throw out fraudulent electors".
Barry Bennet Ramey 1:22-cr-00184-DLF	18 U.S.C. § 231(a)(3); 18 U.S.C. § 111(a)(1) and (b);	Yes	No	No	60 months	Affiliated member of the Proud Boys. Positioned at the very front of the mob at the West Plaza, confronted a line of U.S. Capitol Police officers. Sprayed two officers directly in their eyes and faces, temporarily blinding

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
	18 U.S.C. § 1752(a)(1) and (b)(1)(A); 18 U.S.C. § 1752(a)(2) and (b)(1)(A); 18 U.S.C. § 1752(a)(4) and (b)(1)(A); 40 U.S.C. § 5104(e)(2)(F)					them and disabling their ability to defend the barricades. Enabled rioters to breach the police line and push deeper into restricted grounds. Pre-riot communications, Ramey sent a text message declaring, "I'm ready to cross swords," and followed it up on January 5 by texting an associate, "I'm ready for whatever tomorrow brings. If I gotta go down then so be it." Post-riot, mocked law enforcement, called and threatened the FBI special agent investigating him.
Douglas Austin Jensen 1:21-cr-00006-TJK	18 U.S.C. § 231(a)(3); 18 U.S.C. §§ 1512(c)(2); 18 U.S.C. § 111(a)(1); 18 U.S.C. 1752(a)(1) and (b)(1)(A); 18 U.S.C. § 1752(a)(2); 40 U.S.C. § 5104(e)(2)(D); 40 U.S.C. § 5104(e)(2)(G)	Yes	No	No	60 months	Scaled a 20-foot wall to break into the Capitol building. Once inside, led a mob in pursuit of U.S. Capitol Police Officer. Ignored commands to back up and demanded that police "go lock up the Vice President" and "Go arrest the Vice President". Outside Senator Chuck Schumer's office, threatened officers with force. After being escorted out, he forced his way back inside through the East Rotunda door for a second breach. A friend texted Jensen before the rally asking, "Everyone packing heavy? ... Pistols?", Jensen responded, "No but locked and loaded ... Yes". When the FBI asked if he regretted his actions, Jensen unrepentantly declared that "it would have been worth it" if his goal to "stop the steal" and keep the president in power had succeeded.
Ronald Colton McAbee; 1:21-cr-00035	18 U.S.C. § 111a(1) and (b), (2 counts); 18 U.S.C. § 231(a)(3); 18 U.S.C. § 1752(a)(1); 18 U.S.C. § 1752(a)(12); 18 U.S.C. § 1752(a)(4); 40 U.S.C. § 5104(e)(2)(F)	Yes	No	No	70 months	Talked to his travel companion before Jan 6th about the “fight for their children and future generations.” Wore a bullet proof vest and reinforced knuckles to the Capitol. Dragged an officer from the protection of the Capitol tunnel. Hit another officer twice with his reinforced knuckles. Then pinned the original officer to the ground. This officer was off duty for five months because of these injuries.
Sean Michael McHugh	18 U.S.C. § 111(a)(1) and (b); 18 U.S.C. §§ 1512(c)(2)	Yes	No	No	78 months	Came prepped with bear spray and used it against law enforcement. Encouraged rioters with his megaphone pass law enforcement into the Capitol building. Never entered the

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
1:21-cr-00453-JDB						Capitol building. "He actively planned to prevent Congress's certification of the Electoral College. He indicated in advance an expectation that they would storm Congress and rip people out of office." pg. 47 of Sentencing Hearing Transcript
MATERIAL SUPPORT CASES						
Jasmincka Ramic 4:15-cr-49	18 U.S.C. § 2339B	Yes	Sealed	Sealed, but part of Harcevic's case where TE was sought and applied	36 months	Defendant and co-defendants sent funds to fighter who had traveled to Syria to fight Assad and had joined ISIS.
Humzah Mashkoor 24-cr-0018-RMR	18 U.S.C. § 2339B	Yes	Sealed	Sealed	36 months	Mashkoor communicated intent to travel to join ISIS, to provide money to ISIS in support of their efforts, and to recruit others to support ISIS through travel and/or financial contributions. Planned to travel to the United Arab Emirates, where he would transfer funds to ISIS and stay until he continued on to either Afghanistan or Syria to serve as a fighter for ISIS. In advance of his travel, took steps to conceal the nature, source, or ownership of funds that would allow him to covertly transfer funds to ISIS via cryptocurrency upon his planned arrival in the UAE. Also is autistic.
Mohammed Hamzah Khan 1:14-cr-00564	18 U.S.C § 2339B(a)(1)	Yes	Yes	Yes	40 months	Defendant attempted to travel to Syria to join ISIS and work under their direction and control.
Sedina Unkic Hodzic 4:15-cr-49	18 U.S.C. § 2339B	Yes	Sealed	Sealed, but a part of Harcevic's case where TE was sought	48 months	Defendant and co-defendants sent funds to fighter who had traveled to Syria to fight Assad and had joined ISIS. She is a mom and had young kids at home.

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
				and applied		
Shannon Conley 1:14-cr-00163	18 U.S.C. § 2339B	Yes	Yes	Yes	60 months	Defendant received military training in order to provide support to Al-Qaeda/ISIS and planned to travel to Syria to marry an Al-Qaeda fighter.
Saltane Salim 3:18-cr-00186	18 U.S.C. 2339C(c)	Yes	Sealed	Sealed	60 months	Defendant and co-defendants raised over $20,000 for Anwar Al-Awlaki, a key leader of Al Qaeda.
Armin Harcevic 4:15-cr-49	18 U.S.C. § 2339B; 18 U.S.C. 2339A	Yes	Yes	Yes	66 months	Defendant and co-defendants sent funds to fighter who had traveled to Syria to fight Assad and had joined ISIS.
Georgianna Giampietro 2:19-cr-00013	18 U.S.C. 2339C(c)	Yes	Yes	Yes	66 months	Defendant attempt to help and conceal two individuals travel to Syria to join terrorist organization. FBI sting.
Anthony Hayne 1:12-cr-0238	Conspiracy to Use Weapon of Mass Destruction (bomb)	Yes	Yes	Yes	72 months	Defendant and co-defendants attempted to blow up the Brecksville-Northfield High Level Bridge near Cleveland, Ohio with an explosive device.
Mehida Medy Salkicevic 4:15-cr-49	18 U.S.C. § 2339B	Yes	Sealed	Sealed, but a part of Harcevic's case where TE was sought and applied	78 months	Defendant and co-defendants sent funds to fighter who had traveled to Syria to fight Assad and had joined ISIS.
Samantha El-Hassani 2:19-cr-00159	18 U.S.C. § 2339B	Yes	Yes	Yes	78 months	Defendant concealed and transported $30,000 of gold and cash to Hong Kong over three trips to help two men join ISIS. Defendant and her children ended up in ISIS and Kurdish camps.
Michael Todd Wolfe 1:14-cr-00213	18 U.S.C. § 2339B	Yes	Yes	Yes	82 months	Defendant attempted to travel to Syria to join and provide material support for ISIS.
Muhammad Dakhlalla	18 U.S.C. § 2339B	Yes	Yes	Yes	96 months	Defendant attempted to travel to Syria to join and provide material support for ISIS.

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
1:15-cr-00098						
Ramiz Hodzic 4:15-cr-49	18 U.S.C. 2339A; 18 U.S.C. 2339A	Yes	Sealed	Sealed, but a part of Harcevic's case where TE was sought and applied	96 months	Defendant and co-defendants sent funds to fighter who had traveled to Syria to fight Assad and had joined ISIS. Father, husband to Sedina.
Connor Stevens 1:12-cr-0238	18 U.S.C. 2332A	Yes	Yes	Yes	97 months	Defendant and co-defendants attempted to blow up the Brecksville-Northfield High Level Bridge near Cleveland, Ohio with an explosive device.
Wassim Mazloum 3:06-cr-00719	18 U.S.C. 956(a)(1); 18 U.S.C. 2339A	Yes	Yes	Yes	100 months	Defendant and co-defendants were convicted of conspiring to murder/maim abroad by supporting jihad training camps abroad including jihad training against American forces in Iraq.
Warren Clark 3:19-cr-00002	18 U.S.C. § 2339B	Yes	Yes	Yes	120 months	Defendant traveled to Syria and received military training from ISIS. In correspondence to his family, Clark indicated he was living happily abroad and would not return to the United States unless "the Islamic State conquers the US." He later called himself a citizen of the Islamic State and renounced his U.S. citizenship. (justice.gov)
Asher Abid Khan 4:15-cr-263	18 U.S.C. § 2339B(a)(1)	Yes	Yes	Original sentence – No, Resentence– Yes	144 months	Attempted to travel to Syria to join and provide material support to ISIS. Defendant's friend traveled to Syria and joined ISIS with defendant's assistance (providing friend with contact to ISIS fighting facilitator, gave friend travel instruction, money, and phone number).
Mohammad Zaki Amawi 3:06-cr-00719	18 U.S.C. 956(A)(1); 18 U.S.C. 2339A; Distributing Information Regarding Explosive (2)	Yes	Yes	Yes	240 months	Defendant and co-defendants were convicted of conspiring to murder/maim abroad by supporting jihad training camps abroad including jihad training against American forces in Iraq. Defendant also convicted of distributing information regarding the manufacture of weapons of mass destruction. Defendant distributed a

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
						guide for manufacturing chemical explosive compounds and a video entitled "Martyrdom Operation Vest Preparation."
Said Rahim 3:17-cr-00169	18 U.S.C. § 2339B; 18 U.S.C. § 2339B; 18 U.S.C. 1001 (six counts)	Yes	Yes	Yes	360 months	Defendant operated a social media channel recruiting fighters for ISIS, attempted to travel to join ISIS, and called for attacks.
			PRAIRIELAND CASES			
Nathan Baumann 4:25-cr-282-P-1	PLED GUILTY 18 USC 2339A	Yes			22 months	Present at Prairieland facility. Vandalized the guard structure and damaged facility vehicles. Arrested at facility. Youth cited as mitigating factor.
Seth Sikes 4:25-cr-272	PLED GUILTY 18 USC 2339A	Yes			72 months	Part of the 4th of July Party! planning chat. Joined the group at Prairieland later. The group shot off fireworks at the facility. When law enforcement arrived, ran down a residential road and was arrested as a group with other defendants.
Susan Elaine Kent 4:25-cr-282-P-3	PLED GUILTY 18 USC 2339A	Yes			72 months	Met at Arnold and Morris's home and discussed the Prairieland facility the day before the protest. Not at Prairieland at time of shooting. Helped Song evade capture and hide.
John Phillip Thomas 4:25-cr-282-P-6	PLED GUILTY 18 USC 2339A	Yes			110 months	Picked up Benjamin Song with Sharp after shots fired. Helped him evade capture and hide.
Lynette Sharp 4:25-cr-282-P-5	PLED GUILTY 18 USC 2339A	Yes			110 months	Initially part of the "4th of July Party!" planning chat, but left. Was not present at the facility. Picked up Benjamin Song with Thomas after shots fired.
Joy "Rowan" Gibson 4:25-cr-282-O-2	PLED GUILTY NON-COOPERATING 18 USC 2339A	Yes			180 months	Met at Arnold and Morris's home and discussed the Prairieland facility the day before the protest. Carpooled with Morris to Prairieland facility. The group shot off fireworks outside the facility fence. Arrested at facility.

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
Rebecca Morgan 4:25-cr-282-O-4	PLED GUILTY NON-COOPERATING 18 USC 2339A	Yes			180 months	Allowed Song to live in her apartment for 8 days after the shooting. Provided communication equipment, transportation, and other resources to avoid arrest.
Daniel Sanchez-Estrada 4:25-cr-259-O-9	18 USC 1512(c); 18 USC 1512(k)	Yes	Yes	Yes	360 months	Was not present at the Prairieland facility and was not in the 4th of July Party! planning chat. After a jail call with wife Rudea, he moved boxes containing zines from Rueda's house.
Zachary Evetts 4:25-cr-259-O-2	18 USC 2339A; 18 USC 2101; 18 USC 844(m); 18 USC 844(h)(1);	Yes	Yes	Yes	600 months	Part of 4th of July Party! planning chat. Drove to Prairieland facility separate from other defendants. Car found with AR-style rifle and loaded pistol. Spray-painted guard structure and damaged facility vehicle.
Bradford "Meagan" Morris 4:25-cr-259-P-5	18 USC 2339A; 18 USC 2101; 18 USC 844(m); 18 USC 844(h)(1);	Yes	Yes	Yes	600 months	Part of 4th of July Party! planning chat. Hosted "gear check" the day before protest with Bradford Morris (Meagan Morris). Carpooled with other defendants to ICE facility. Firearms present in the car. Parked in nearby neighborhood, not at Prairieland facility. Was not present at the facility at any point in time.
Cameron Arnold aka Autumn Hill 4:25-cr-259-O-1	18 USC 2339A; 18 USC 2101; 18 USC 844(m); 18 USC 844(h)(1);	Yes	Yes	Yes	600 months	Part of 4th of July Party! planning chat. Hosted "gear check"the day before protest with Bradford Morris (Meagan Morris). Carpooled with other defendants to ICE facility. The group shot off fireworks outside the facility fence.
Elizabeth Soto 4:25-cr-259-P-7	18 USC 2339A; 18 USC 2101; 18 USC 844(m); 18 USC 844(h)(1);	Yes	Yes	Yes	600 months	Drove to Prairieland facility with Inez Soto, parked near facility. Car contained a pistol and knife. Fled facility when law enforcement began to show up. Arrested half-mile away from the facility with other defendants.
Ines Soto 4:25-cr-259-O-8	18 USC 2339A; 18 USC 2101; 18 USC 844(m); 18 USC 844(h)(1);	Yes	Yes	Yes	600 months	Drove to Prairieland facility with Elizabeth Soto, parked near facility. Car contained a pistol and knife. Left facility when law enforcement began to show up. Arrested half-mile away from the facility with other defendants.
Savanna Batten 4:25-cr-259-O-4	18 USC 2339A; 18 USC 2101; 18 USC 844(m); 18 USC 844(h)(1);	Yes	Yes	Yes	600 months	Was NOT in the 4th of July Party! planning chat. The group shot off fireworks outside the facility fence. Fled when law enforcement began to show up. Arrested

Name/Case Number	Offenses of Conviction	Qual-ified	Sought	Applied	Sentence Given	Factual Summary
						half-mile away from the facility with other defendants.
Maricela Rueda 4:25-cr-259-P-6	18 USC 2339A; 18 USC 2101; 18 USC 844(m); 18 USC 844(h)(1); 18 USC 1512(k)	Yes	Yes	Yes	840 months	Part of 4th of July planning chat. Present and participated in noise demonstration. Left scene before the shooting occurred. Arrested half-mile away from the facility with other defendants.
Benjamin Song 4:25-cr-259-P-3	18 USC 2339A; 18 USC 2101; 18 USC 844(m); 18 USC 844(h)(1); 18 USC 114(a)(3); 18 USC 924(c)(1)(A)	Yes	Yes	Yes	1200 months	Met at Arnold and Morris's home and discussed the Prairieland facility before the protest. Part of 4th of July Party! planning chat. Carpooled with Morris to Prairieland facility. The group shot off fireworks outside the facility fence. When law enforcement responded to the disturbance, an officer drew his gun. Song fired bullets at the ground and one ricocheted and hit the police officer. Fled the facility after. Evaded arrest for 11 days.

/s/ Sufia M. Khalid

Sufia M. Khalid
Deputy Director
National Security Criminal Defense Center
Muslim Legal Fund of America[78]

[78] Acknowledgement: Special thanks to Anna Lindh, our summer legal intern, for her significant contributions and thoughtful input.

New England Aquarium

Protecting the blue planet

July 24, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Consideration of federal sentencing guideline for wildlife trafficking

Dear Members of the United States Sentencing Commission:

On behalf of the New England Aquarium, I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

The Aquarium respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle. Wildlife trafficking is a significant conservation threat that undermines biodiversity, species recovery, and ecosystem health. We encourage the Commission to consider whether existing federal sentencing guidelines adequately account for the ecological harm, scale, and organized nature of these offenses, as well as the substantial financial and personnel resources required to address their consequences.

As a leader in marine conservation, scientific research, and wildlife rescue and rehabilitation, the New England Aquarium has firsthand experience with the impacts of illegal wildlife trade. Wildlife trafficking extends beyond the initial removal of animals from their habitats. It threatens already vulnerable populations and creates significant animal welfare concerns. The collection and transport of wild animals under stressful and often inhumane conditions also increases the risk of disease transmission, creating additional threats to wildlife populations and complicating conservation and recovery efforts.

The Aquarium has participated in the rescue and rehabilitation of trafficked wildlife for many years. For example, our veterinarians assisted with the recovery of more than 4,000 critically endangered Palawan forest turtles confiscated from illegal trade in the Philippines; more than 100 illegally collected adult eastern box turtles that displayed signs of infectious disease were transferred to our facility to be treated; and a major confiscation of endangered radiated tortoises in Madagascar. Experiences like these continue to place substantial demands on animal care and conservation organizations such as ours. Responding to confiscated wildlife requires investments in trained personnel, specialized facilities, food and medication, long-term quarantine and disease management, diagnostic testing, and ongoing monitoring to protect both confiscated

animals and native wildlife populations. Disease risks associated with wildlife trafficking, including the potential spread of pathogens among stressed and densely confined animals, further increase the resources necessary for successful rehabilitation and release back into the wild or relocation to another facility. These are costs that conservation organizations continue to bear long after trafficking offenses have occurred.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the detrimental impacts of these offenses—ranging from environmental to financial—while supporting broader efforts to combat their occurrence and mitigate the lasting effects. Wildlife trafficking threatens decades of conservation investment and places additional burden on the organizations and agencies working to protect biodiversity.

We appreciate the Commission's consideration of this request to address serious wildlife trafficking offenses in its federal sentencing guidelines. Should the Commission determine that this issue warrants further consideration, the New England Aquarium would welcome the opportunity to provide additional information or expertise that may be helpful. Please contact Barbara Bailey, Vice President of Animal Care at [redacted].

Sincerely,

Vikki N. Spruill
President and CEO

July 27, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of the North American Primate Sanctuary Alliance (NAPSA), I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

NAPSA represents a coalition of eight reputable, accredited primate sanctuaries across North America, all dedicated to the lifelong care of nonhuman primates rescued from private ownership, research, and the entertainment industry. Our members collectively care for nearly 800 primates, many of whom have suffered trauma, injury, and chronic stress as a result of inappropriate public contact and exploitation. Each full member sanctuary is licensed and inspected by the United States Department of Agriculture (USDA) or its Canadian equivalent, licensed by relevant state and county authorities, and accredited by the Global Federation of Animal Sanctuaries.

NAPSA respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, NAPSA would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Amanda Gray
Director
North American Primate Sanctuary Alliance

ONE EARTH CONSERVATION

82-52 211 STREET
HOLLIS HILLS, NEW YORK 11427

July 15, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of One Earth Conservation I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

One Earth Conservation urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

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Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice,

penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

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We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

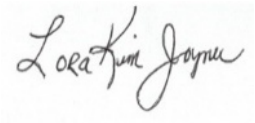
Combating the illegal wildlife trade is a high priority for One Earth Conservation. Our official mission states: One Earth Conservation promotes parrot well-being in the Americas by conducting transformative parrot conservation, **taking action to end the wildlife trade**, and encouraging in people a strong sense of human connection to all life that results in the well-being of all. We have documented the complete extirpation of certain parrot species in regions due to the wildlife trade. Poaching of nests reaches 100% of all active nests in many of our other project areas, and parrots are still present only due to the hard and risky work of local conservationists. In Guatemala, a friend of mine was murdered while protecting a nest of the critically endangered Yellow-naped Amazon Parrot and Indigenous people who I work with in Honduras have had assignation attempts because of their work in parrot conservation. In one instance, they survived even though the project truck they were driving was struck by the assassin’s bullets. The loss of parrots, the most endangered group of birds, and harm to people and ecosystems is a situation that countries of origin cannot successfully address alone. They need stiff regulation and prosecution in countries where trafficked birds are being sold. By addressing this issue, you will be helping the people and parrots of the Americas where parrots still natively fly free.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further

consideration, One Earth Conservation would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,



Rev. Dr. LoraKim Joyner
Codirector
One Earth Conservation

Paralegal Project
Paula Anthony, Paralegal
[redacted]

RE: proposed priorities comments

20 July 2026

United State Sentencing Commission
Chairman Judge Carlton Reeves
Vice Chairman Judge Luis Restrepo
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Dear Sirs:

First I want to thank you for the work you do. I know not many thank you. You have a job not many want. You have affected a few of my clients but not nearly enough.

We no longer have a judicial "system". No one can go to court and expect a fair and equitable proceeding. The prosecutors can tell lies, manufacture evidence, misconstrue facts and when a defendant speaks up and says that's not correct – the judge so rarely listens as the officers of the court think everyone lies but them. As an example, look at how many innocent people are put in prison because the officers of the court refused to believe the truth and because the prosecutors refused to abide by the rule that prosecution of a crime must meet ALL the elements of the law – not one or two but ALL. Now prosecutors are forcing waiver of Constitutional rights (specifically waiver of appeal and contesting sentence) in plea agreements (I started keeping a list) or no plea agreement. But that is not what you do (but should). They claim it is a move to reduce court cases – it really is a move to CYA. If you are controlling the sentence you should also control the method used to get them to the sentencing stage because the DOJ doesn't care how many lies the prosecutors tell – it permits prosecutors to lie – conviction at any cost. There is no degree of innocence – you cannot be innocent if you know **anything** about the crime. I know you can't fix the Judicial system. I know you can't control how Judges use the guidelines and I absolutely know you

cannot make prosecutors tell the truth. Is there NOT a level that SOMEONE can?

Treat addiction as a public safety issue **and** as a rehabilitation issue. There needs to be an equitable way to sentence addicts. 60% of prison population is drug convictions. Society makes allowances for drug addicts (oh isn't that a shame attitude) rather than being proactive in solving the problem. Oh, society has created a 'fix' - plush rehab centers that cost thousands of dollars that addicts can't afford and are nto required to stay. Addicts typically don't have college degrees, no skills and some not even a high school diploma therefore they're "flipping burgers". Addicts spend a great deal of the $$ they get on feeding their habit. Judges are partly responsible for this condition as they have addicts who have been in their court multiple times with no consequences (maybe a few days in county) and locking them up in county accomplishes nothing because there is no rehab in county. The purpose of sentencing is not only punishment but the reduction of future crime. A structured, mandatory, secure treatment program emphasizing addiction recovery, education, vocational training, and accountability has greater potential to reduce future drug trafficking than decades of incarceration without meaningful treatment. I am willing to bet there are companies that would provide vocational training and education free of charge for first dibs at the ones completing the program. Granted the BOP offers many classes but they are elementary – easily completed by even someone without a high school diploma. The idea is to offer not only GED but college course material that would induce companies to hire a 24 month mandatory lockdown rehab graduate after 2nd (or 3rd) visit to local court or anytime the Feds arrest an addict as part of a drug conspiracy. Then our Federal Budget would be less – the BOP neglect and abuse would be much less and their control over how their sentence is served because the BOP would be made to observe the law – and it would take all 3 to make our world safer and approach fairness in the Judicial system. The needs of the BOP would be less because there would be fewer mainstream population and hopefully a change in the way the BOP is operating. Addicts exacerbate the problems of the BOP - so why not do something about it instead of feeding the problem long term. The whole point to the 24 month mandatory lockdown as I explained to the commission the first time I wrote sentencing comments is life skills, job training, rehab - with consequences for misbehavior and violating the rules - the rules will be tough and in some ways tougher than mainstream BOP. Well known BOP abuse and mismanagement (ask the family of any AIC or a previously incarcerated individual) would be cut some by fewer population. A lockdown rehab run by experienced rehab people under the wing of the BOP but without all their convoluted, law avoiding policies and staff that doesn't know how to apply or enforce the policies or recognize the policies that violate Congressionally passed

laws. By recognizing the policies that actually violate the letter and spirit of the law, staff could refuse to violate the LAW instead of blindly following policy. The purpose of sentencing is not only punishment but the reduction of future crime. A structured, mandatory, secure treatment program emphasizing addiction recovery, education, vocational training, and accountability has greater potential to reduce future drug trafficking than decades of incarceration without meaningful treatment. And don't tell me about RDAP – a program that is overloaded – hard to get in and quickly denied by the BOP even when the court *recommends* (not brave enough to order) the drug program and easily signed out of when the facilitator is abusive – happens quite often just like mainstream society rehab.

Drug trafficking organizations frequently exploit addiction as a means of recruiting and controlling low-level participants. Individuals suffering from substance use disorders often perform the most visible and riskiest tasks because payment is made in drugs, debt forgiveness, or minimal cash sufficient to sustain addiction. Their participation is criminal and must be addressed, but their role is fundamentally different from those who organize, finance, direct, and profit from the enterprise. The current sentencing framework continues to overlook a fundamental distinction between addiction-driven conduct and leadership within a drug trafficking organization. An addict knows nothing about the organization. They are into their drug dealer (a situation the dealer fosters) so the dealer offers a way for the addict to get their fix for free and their debt forgiven. *Deliver these drugs, take this package to.... low level "errands".* Then when the drug organization gets brought down the addict goes with it. The dealer gets a rule 30 break and only gets a few years and the addict gets 20 years or more because the addict has no knowledge with which to make a deal. The federal sentencing system substantially rewards defendants who possess information valuable to the government. The federal system **heavily** rewards **information**, and doesn't consider (necessarily) culpability or lack thereof. Organizational leaders and higher-level participants often possess such information and may receive significant sentence reductions through cooperation. Lower-level participants—including couriers, addicts, street-level distributors, and individuals acting at the direction of others—frequently possess little or no information beyond their own limited involvement. Consequently, they are **usually** unable to obtain comparable sentence reductions despite being substantially less culpable. Not knowing how the system works, the prosecution gets the addict to spill what they know without a rule 30 deal and then the addict gets the full sentence. Low level participants have been consistently over-punished. A low level participant addict should never spend more time incarcerated than their dealer. **Addiction Is Not Leadership**. When an addict whose criminal conduct was driven by dependency receives a

substantially longer sentence than the dealer who directed the activity, financed it, and profited from it, the sentencing structure should be carefully examined for proportionality. Federal sentencing often punishes the person who is easiest to prosecute rather than the person who is most responsible. You may say you have already addressed that – and I understand sentencing is a guideline but the courts are quick to give the maximum guideline because of the zealous recommendations of the prosecution and very slow (snail slow) to use discretion to give a fair sentence. I don't want to hear about being able to get the sentence reduction based on proportionality because I've helped create hundreds of motions nationwide regarding proportionality for inmates (now AICs – adults in custody) with only a few - 1 to 5 - actually getting the reduction. I helped an AIC who was 26th on the indictment create a motion based on proportionality and the judge denied it within hours after it was filed. The prosecution wasn't even consulted. The motion was factually correct, had no emotion (except in the relief requested) in it. There is no reason an addict should get 240 months on hearsay and false testimony (ghost dope) when the dealer got 5 years. A LOT of the courts are not willing to address proportionality – a lot of that is due to the prosecutors wanting every month possible regardless of the role the addict played and use every addiction arrest in their PSR for enhancements. I have a client who got a **significant** amount of time just for letting someone use his garage. He didn't know his friend was a drug dealer – didn't even look to see what he was storing in his garage – he was a friend and didn't think to be nosy. He has been denied a sentence reduction (first time offender) 3 times even with the amendments as a base in each motion.

Create a separate federal sentencing structure for addiction-driven offenders consisting of:

- secure treatment
- education
- vocational training
- accountability
- graduated sanctions
- mandatory completion

  Completion gets time served – reoffense gets the whole time they would have had to serve if the program had not been completed.

Compassionate Release: Public safety is an issue used in sentencing. Prison record demonstrates reduced risk Many of the people I assist have:

- spotless disciplinary records,

- completed every available class,
- earned vocational certificates,
- maintained employment,
- become mentors,
- helped other inmates prepare legal work,
- shown genuine rehabilitation.

They are not the same people they were at sentencing. Yet, when they apply for compassionate release or sentence reduction after serving 10, 15, 20 years they are denied even when they are first time offenders and supply proof of change (compelling and extraordinary reasons). Many AICs even have family, health, and situational issues, provide proof, have completed ARP (Administrative Remedies) but are still denied. Your last compassionate release amendment said ARP did not have to be completed yet a lot of compassionate releases are denied for that and only that reason. The prosecution says nope you didn't do remedies so don't grant. Nothing is said about the merits of the motion.

There are more courts than not where a fair assessment of the situation is impossible. The BOP refuses to apply First Step Act (FSA) credits. A court in Connecticut refused to apply 6000 days of FSA credits for a client – she completed a culinary arts degree (2000 8 hr days)– those credits were enough for her to be released **and** complete her probation. Hers was a fraud case, she was very ill with Crohns disease the BOP would not treat and yet was refused adjudication by the BOP and the court. The Warden was particularly nasty in her denial. The prosecution was even worse.

In the last few years the Commission addressed compassionate release. It wasn't enough. The courts are still holding back. Even if an AIC would qualify under the old compassionate release standards, the new extraordinary and compelling reasons even when presented are largely ignored and the prosecutors still go into a diatribe why the AIC should not be released. I so rarely see a judge decide against the Prosecutor and the Warden even when ARP is completed and compelling and extraordinary reasons shown. Change and lack of public threat do not seem to be enough for anyone – Warden, Prosecutor or Judge. For them it's all about what brought the AIC to prison – not what the circumstance are now – what prison has doen to change the person. So 20-30 years incarcerated with no sentence reduction for disparity and no compassionate release for an addict seems more than harsh. Dying in prison (and many have) for being an addict should not be possible. I haven't checked recently so I don't know if the compassionate release rate is still less than 1% but the rate has been there for a LONG time.

Firearms: In this past year I have had 3 clients who did not possess a firearm – they were legally owned by: the driver of the car (gun in glove box), the owner of the house (gun in a dresser), the registered tenant in a rental (gun in a closet) yet the AIC was charged with the gun but the owner of the gun was not. Drugs at the time were not an issue in the immediate. And when the court was approached with a motion to dismiss the firearm enhancement the prosecution went into a diatribe about how the gun was used in the furtherance of drug trafficking – strange – the client had no contact with the gun yet was charged with it. These clients were NOT part of the drug organization. The gun was not in the possession of the AIC – the AIC just happened to be in the location when the warrant was served. - not even part of the drug organization – not even an addict – 120 months, 240 months, 120 months. So once again, the elements of the law were not followed yet conviction granted. I have a client, who has already been released after nearly 10 years, who was forced to go with her drug dealing very (physically) abusive boyfriend who had a gun in his backpack in the back seat of his car. She was charged with the gun (willfully blind – give me a break) - he was not charged at all. He made a rule 30 deal and got a couple of years. The prosecution refused to acknowledge the gun was not hers and she didn't do or deal drugs. They convicted her on felon in possession ove a cat fight in a bar when she was very young. She did not even know at the time that she had a felony conviction.These very real cases from all over the country are examples of how the sentencing guidelines did not accomplish what they were supposed to because prosecutors found reasons to skirt them and able to convince Judges they are right so got the huge sentence they pulled from the guidelines and no discretion was used.

Criminal History: More and more I see where the addicts got more and more time from the criminal history they have as addicts. The lower courts never did anything to enforce rehabilitation so the addiction continued and they wound up working for a dealer in an organization that got busted and the addict is charged with conspiracy. Then the writer of the PSR goes hog wild and goes back umpteen years to every offense committed – many under the age of 18 (recognized by the USSC as youthful offender - 25 (actually under 30) recognized by science as youthful offender. (The age of reason is 30 – Biblically) The prosecution is not willing to recognize age at commission of addiction charges and goes whole hog and adds 20 years in enhancements and gets 240 to 360 months (sometime 480 or life) for an addict who is somewhere between 15th and 35th on the indictment and the dealer and upper level people get 5-7 years or less. You have addressed disparity but it all comes down to the PSR and the prosecution going wild with crime commission facts addressing every offense but leaves out the age (under 20)

at which the early (and most probably the majority of the) offenses were committed. ANYTHING to prop up the budget of the BOP at the expense of the taxpayer. I'm retired but my children and grandchildren are not and they are paying for this over-inflated incarceration cost to support the BOP and that should be addressed within the DOJ who oversees (yeah right!) the BOP. Then when AIC petitions the court for youthful offender relief and a reduction of criminal history which would reduce their sentence, the prosecution once again goes into a litany of why it shouldn't happen and the Judge rides along agreeable to everything the prosecution says – true or not. The prosecution disagrees with the young and dumb adage. They are all for prosecute everything to the max and throw them in prison and throwaway the key regardless of age.

Career offender: as in the previous subject – many AICs have career offender status because of their non-violent youthful history with drugs, maybe includes shoplifting or other non-violent minor crimes. If the youthful offender offenses were removed, the AIC(s) would most probably lose their career offender status and the enhancements that get them there. That would then make them eligible for sentence reduction, FSA credits, possible home confinement and maybe even early release. Career offender should be reserved for violent offenders who have habitually offended using weapons and threats of violence. THOSE are the real threats to public safety not an addict who was caught in a conspiracy because of a drug habit.

Fraud: Ever since Enron, prosecution of fraud cases has exploded. Consider revising §2B1.1 to require stronger proof of actual knowledge before enhancements based upon foreseeable conduct. Many fraud cases are brought because someone “should have known” when in fact they didn't have a clue. There seems to be few guidelines to how these cases are prosecuted and what evidence needs to be available to PROVE knowledge. Proximity is not enough. Rank within the the company does not necessarily equate to knowledge. And sometimes lower level people hear things whether from eavesdropping or just doing their job. Most people limit their job knowledge to their responsibilities unless they are wanting to “climb” the ladder. Executive assistants have a great deal of knowledge but not always about what others think they know– or should. Just a prosecutor thinking someone at an executive level knows is not proof they actually do.

Your commission does an awesome job. You can't fix everything. Even I know that. You can't fix the BOP refusing to obey the law and you can't fix the courts refusing to fix over-sentencing even when in both instances someone can

and should fix those issues. You **can** bring fairness back to sentencing. You can approve retroactivity so that others who have abominably long sentences can be re- sentenced under current guidelines. Fairness is the only thing on my wish list from now until I die.

Thank you for your time and patience. I am hoping you understand I deal with AICs everyday pro bono regarding unfair prosecution and sentencing. The amendments are being ignored by the courts (business as usual) so extra long sentences remain. Many of the thoughts here are shared because you need to see what underlies the court and prosecution. A lot of you have been practicing Judges. If what I said is an insult it is not meant that way. It is what is seen from the outside looking in. As an individual in a position of power – sometimes you lose what you don't see directly so being able to correct what never should have happened is cloaked by the inability to see through the cover. A Judge's decision is controlled by the information from government prosecutors whose duty it is to influence them to decide in their favor. It is truly sad prosecutorial incentives frequently reward aggressive charging and "factual presentations" that later prove inconsistent with the complete record. I only can hope at some point in time the court learns not everyone before the bench is a liar. Scared yes – liar no.

Working under grace;
Kind regards,

Paula Anthony, Paralegal
[redacted]
Paralegal Project
[redacted]
[redacted]

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Paralegal Project Jul. 22, 2026

Topics:

5) Miscellaneous Issues

Comments:

yesterday I uploaded my 2026 comments letter - I left out one very important issue. Abuse suffered at the hands of BOP staff and other inmates. I currently have 18 sexual assault victims as clients. One of the victims had a SAM (special administrative measure) illegally put on her so she could be moved to max security where the staff member was unit manger and max was part of his "domain" giving him exclusive "use". An AIC is not sent to prison for abuse by staff - prison is a place for rehabilitation. FCI Dublin was closed by the courts for a large number of sexual assaults - those assaulted were supposed to be released according to the court but the BOP has yet to do so for all the victims. Sentencing guidelines need to address sexual assault and the remedies available not at Judge or Warden discretion but flat out available. The same for any inmate who is physically assaulted by staff or an AIC if the AIC assault requires hospitalization for more than 1 day. I have a client who was so badly beaten by a group of AICs that his face was literally rearranged and he had several more broken bones. The BOP did nothing to stop it and has yet to provide the medical care he needs to fix so many of the problems caused by the beating.
There needs to be remedies available in limited circumstances like these. Home confinement should be an automatic consideration for circumstances like these or time served (which would be better but may be too big an ask). Please consider this in the next set of priorities. There is way too much abuse within the prison by the BOP. There needs to be consequences.
Thank you for listening
Paula Anthony, Paralegal
Paralegal Project
[redacted]

Submitted on: July 22, 2026

Seek justice. Love mercy. Restore hope.

July 13, 2026

Honorable Carlton W. Reeves
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Chair Reeves and Members of the Sentencing Commission,

Thank you for the opportunity to offer recommendations on the Commission's policy priorities for the coming year. Prison Fellowship is the nation's largest Christian nonprofit serving prisoners, former prisoners, and their families, as well as a leading advocate for criminal justice reform. For 50 years, we have offered transformational programming, advocacy, and reentry support to bring hope and purpose to men and women in prison. Our mission is to encounter Jesus with those impacted by incarceration, and we envision a revival of the Church inside and outside prison that brings justice, mercy, and hope to our culture.

As the Commission sets its policy priorities, we encourage continued attention to three areas: advancing individualized supervision, recognizing evidence-based rehabilitation, and ensuring the Guidelines reflect developments in federal sentencing law.

Prison Fellowship appreciates the Commission's recent amendments to the federal supervised release guidelines.[1] By expanding judicial discretion and emphasizing individualized decision-making, the Commission has strengthened supervised release as a tool for successful reentry. The amendments also removed the prior recommendation that supervised release accompany most prison sentences longer than one year, allowing courts to determine whether supervision is appropriate in each case and to focus probation resources where they are most needed. As these amendments take effect, we encourage the Commission to evaluate their outcomes and continue examining how supervision tailored to individual risk and needs affects reentry success and revocation.

Additionally, evidence-based rehabilitation should remain central to federal sentencing policy. Prison Fellowship is grateful that the Prison Fellowship Academy became the first nonprofit program recognized by the Federal Bureau of Prisons as an evidence-based recidivism reduction program under the First Step Act.[2] Academy graduates experience more than a 60 percent reduction in reincarceration, demonstrating the public safety value of intensive rehabilitative programming.

The Academy's results are consistent with broader research showing that high-quality correctional programming can reduce recidivism, improve behavior, strengthen community stability, and lower future incarceration costs.[3] We ask the Commission to continue recognizing evidence-based programming as a vital tool for reducing recidivism. Sentencing policies should

[1] USSC, *2025 Amendment in Brief*, United States Sentencing Commission (April 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/amendments-in-brief/AIB_2025-supervised-release.pdf.
[2] *Prison Fellowship Becomes First Nonprofit to be Designated as an Evidence-Based Program by the Federal Bureau of Prisons*, Prison Fellowship (May 2026), https://www.prisonfellowship.org/2026/05/prison-fellowship-becomes-first-nonprofit-to-be-designated-as-an-evidence-based-program-by-the-federal-bureau-of-prisons/.
[3] Lois M. Daivs, *Higher Education Programs in Prison: What We know Now and What We Should Focus on Going Forward*, RAND (Aug. 2019), https://www.rand.org/pubs/perspectives/PE342.html; Robert Bozick, et. al., *Does Providing Inmates with Education Improve Post-release Outcomes?*, RAND (July 2018), https://www.rand.org/pubs/external_publications/EP67650.html.

Seek justice. Love mercy. Restore hope.

preserve meaningful incentives for rehabilitation, encourage participation in proven programs, and recognize demonstrated progress toward productive citizenship and successful reintegration.

Prison Fellowship applauds the Commission's decision to undertake a comprehensive evaluation of the Sentencing Guidelines as the Guidelines Manual approaches its fortieth anniversary. This review presents an important opportunity to ensure the Guidelines reflect decades of research and experience demonstrating the value of evidence-based rehabilitation and individualized sentencing. We encourage the Commission to use its planned hearings and stakeholder engagement opportunities to hear from correctional practitioners, researchers, victims, formerly incarcerated individuals, faith-based organizations, and community partners with firsthand experience advancing successful rehabilitation and reentry. Prison Fellowship would welcome the opportunity to contribute to this evaluation by sharing our experience in both advocacy and delivering evidence-based, faith-based programming in correctional facilities across the country.

Finally, the Supreme Court's recent decision in *Rutherford v. United States* underscores the importance of clear, lawful and evidence-based sentencing guidelines that respect Congress's role in setting federal sentencing policy.[4] As federal sentencing law continues to evolve, the Commission plays an important role in promoting consistency. As Congress considers reforms such as the First Step Implementation Act, the Commission should remain prepared to evaluate whether future guideline revisions are appropriate.

Every person is created in God's image and has inherent dignity and worth. Justice requires accountability for wrongdoing, and accountability is strengthened when paired with opportunities for transformation and redemption. Prison Fellowship appreciates the Commission's commitment to improving federal sentencing policy, and we look forward to continued progress toward a federal justice system that advances justice, mercy, and hope.

Sincerely,

Scott E. Peyton
Senior Director, Advocacy
Prison Fellowship

[4] *Rutherford v. United States*, 608 U.S. __ (2026).

July 27, 2026

Dear Judge Reeves and Members of the United States Sentencing Commission:

Right On Crime appreciates the opportunity to provide comments in response to the United States Sentencing Commission's (the "Commission") request for public input as it undertakes a comprehensive evaluation of the Federal Sentencing Guidelines ("Guidelines") in anticipation of the 40th anniversary of the *Guidelines Manual*. This milestone presents an important opportunity not simply to reflect on the history of the federal sentencing system, but also to thoughtfully assess whether the Guidelines continue to fulfill the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

The Commission's retrospective should be more than a commemoration of four decades of practice in federal sentencing. Rather, it should serve as an examination of what has worked, what has not, and how both the Guidelines and the Commission can better advance justice, public safety, and confidence in the federal criminal justice system.

Right On Crime has consistently supported sentencing policies that hold offenders accountable while ensuring that punishment is proportionate, evidence-based, and focused on improving public safety. We respectfully encourage the Commission to consider the following recommendations as it undertakes this historic review.

I. Recalibrate the Guidelines to Better Reflect Relative Culpability

One of the principal purposes of the *Sentencing Reform Act of 1984* is to promote proportionality by ensuring that similarly situated offenders receive similar sentences.[1] At the same time, the law works to recognize meaningful differences in culpability. This is not an easy balancing task, as the past 40 years have demonstrated. This objective is still sound, but continued refinement is necessary. Chief among them is for the Guidelines to better distinguish among – and punish – offenders based on their actual conduct and level of responsibility rather than broad categorical assumptions or unrefined measures.

Federal drug trafficking offenses illustrate both the need and the opportunity to improve the Guidelines. Currently, the statutory penalties and accompanying Guidelines are based on the quantity of drugs. These were largely created when plant-based drugs, such as cocaine and heroin, dominated the criminal justice system. But the quantities to trigger many of these

[1] 98 Stat. 1837, available at https://www.congress.gov/bill/98th-congress/house-joint-resolution/648/text.

mandatory minimums and associated sentencing ranges are not entirely effective for synthetic drugs like fentanyl, fentanyl-related substances (FRS), and methamphetamine. The quantity-based sentencing structure overlies on how much of a drug was found as opposed to the role an individual played in the drug trafficking operation. As currently written, quantity is often not the best measure of culpability.

Take, for example, methamphetamine. These drug offenders are subjected to different sentences based on the purity of the drug involved in the offense. The current statutory penalties effectively create a 10-to-1 ratio, where it takes ten times less pure methamphetamine to trigger the same penalty as it would for a more pure, detectable amount of methamphetamine.[2] The Guidelines similarly use drug purity as a proxy for a defendant's culpability.[3] This disparity results in longer sentences for offenders with similar culpability. This is particularly true since most of the methamphetamine in the market rarely tests less than 90% pure.[4] A growing number of federal courts have recognized the absurdity of this purity distinction.[5]

The imprecision of quantity-based sentences is also apparent in the sentencing discrepancy between the weight of a finished drug product and the amount of precursors or drug materials found. In general, once a drug is found and its identity is determined, the next step in a prosecution is to measure the drug quantity. The quantity may be a "mixture or substance containing a detectable amount of the controlled substance."[6] Determining this quantity is, unfortunately, an imprecise science. In fact, except in cases where the government seizes and measures all the drugs attributable to a defendant, the court must "approximate the quantity of the controlled substance."[7] Courts therefore have broad discretion to estimate drug quantities. This is in and of itself worrisome, illustrating the vast discrepancies that could unfurl from a discretionary determination about quantity. But two other considerations make this even worse. First, courts may rely on financial records to estimate drug quantity.[8] When cash is seized as part of a drug investigation, courts may equate it with a corresponding drug quantity. Second, courts may use the size or capability of a drug laboratory to estimate drug quantities.[9] The "theoretical mass yield" that can be calculated based on these two premises is bizarre and disconnected to actual drug quantities possessed by a defendant. Courts have signaled hesitancies with these

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[2] U.S. Sentencing Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 13, 2024).
[3] U.S.S.G. § 2D1.1 comment 27(C).
[4] *Supra* n. 2.
[5] *See, e.g., United States v. Robinson*, No. 21-14, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022); *United States v. Moreno*, 583 F. Supp. 3d 739 (W.D. Va. 2019).
[6] U.S.S.G. § 2D1.1, Notes to Drug Quantity Table (A); *see also* comment 1.
[7] *Id*. at comment 5.
[8] U.S.S.G. § 2D1.1 comment 5 ("[T]he court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant[.]").
[9] *Id*. ("[T]e court may consider . . . the size or capability of the laboratory involved.").

Guidelines provisions, urging that they must be applied "on the side of caution" when estimating drug quantities and that a court must determine the lesser punishment when possible.[10] In short, using the Guidelines to get a theoretical mass yield of a drug quantity for sentencing purposes has been "discouraged[,]" and deemed to be both "an inappropriate methodology to calculate drug quantity[,]" and "unreliable[.]"[11]

Methamphetamine sentencing and estimating drug quantities are two of the more egregious examples of where the conduct and role of the offender is unjustly insignificant. To that end, Right On Crime urges the Commission to eliminate the arbitrary and meaningless purity distinction for methamphetamine cases and instead apply the "mixture" Guidelines. The Commission should also remove financial records and laboratory capabilities language from the Guidelines—thus removing guess work and unreliable methodologies—so that criminal defendants are sentenced based on the quantity of drugs actually in their possession.

And, in a more comprehensive manner, a role-based approach to sentencing is likely a better long-term solution. The Commission should therefore evaluate whether existing Guideline provisions continue to distinguish appropriately among organizers and peripheral participants, violent and nonviolent offenders, repeat dangerous offenders and those presenting lower recidivism risks, and intentional criminal conduct versus conduct that is merely foreseeable. Such distinctions better fulfill the statutory command that sentences be "sufficient, but not greater than necessary,"[12] while improving consistency and public confidence in the federal sentencing system.

II. Ensure the Guidelines Reflect Current Evidence Rather Than Historical Assumptions

When the original Guidelines were adopted, the Commission necessarily relied upon the empirical information and policy assumptions available at the time. Four decades later, the federal criminal justice system possesses vastly more information regarding sentencing outcomes, offender behavior, recidivism, crime trends, and the effectiveness of various sentencing approaches, thanks in a large part to the Commission itself.

Likewise, crime has also changed dramatically. Technological advances have transformed fraud, financial crimes, cybercrime, identity theft, child exploitation offenses, and transnational criminal organizations. Drug trafficking organizations have changed in structure and operation,

[10] *United States v. Forrester*, 616 F.3d 929, 949 (9th Cir. 2010); *see also United States v. Chase*, 499 F.3d 1061, 1069 (9th Cir. 2007).
[11] *Id*. (citing *Chase*, 499 F.3d at 1069).
[12] 18 U.S.C. § 3553(a).

and emerging technologies, including artificial intelligence, present novel issues that were unimaginable when many Guideline provisions were originally drafted.

Consider synthetic drugs specifically. These lab-created drugs and an online illicit drug market were surely not on the minds of the Commission when it was created 40 years ago. However, the landscape of drug prosecutions has changed. When one drug is identified and classified, another variant takes its place. The clunky laws and Guidelines cannot keep up.[13] The Commission should consider how to better address the vast amount of and immense uncertainty about synthetic drugs moving forward. Dangerous drugs should continue to be punished appropriately, but the Guidelines should also avoid sweeping too broadly. Judges should be permitted to consider factors such as: type of drug; lethality of drug; scientific developments, research, or studies that call into question or undermine the lethality of the instant drug that could warrant the statutory mandatory minimum overly punitive; the role of the defendant in the manufacture, distribution, or importation of the drug; and the mens rea of the defendant.[14]

The Guidelines could also reflect current practice over historical frameworks when looking at white collar crimes. Currently, the Guidelines provide a sentencing enhancement if "sophisticated means" were used. This is defined as conduct that is "especially complex or especially intricate."[15] However, this two-level enhancement is easily overused in our modern, digital world. "Sophisticated means" is a subjective standard, particularly when looking at our highly–if not entirely–digitized world and what was once "sophisticated" is now mundane. The Commission should consider how to better refine the definition of and attendant examples for "sophisticated means." The Commentary language should be updated to better reflect modern business practices and issues. This sentencing enhancement is not wholly without purpose and should therefore be maintained. However, it is being overused and has the capacity for misuse. The Commission can and should proactively work to prevent this.

And similarly, the Commission must thoughtfully engage on how the Guidelines will approach the advent and growth of artificial intelligence (AI). AI is a force multiplier. It allows criminals to commit crimes more efficiently and with higher sophistication, while also allowing law enforcement to detect and stop criminal activity with more precision. For better or for worse, AI is here to stay. The question is whether—and when—the use of AI should affect sentencing. Right On Crime believes a thoughtful and intentional approach is necessary, where the equities

[13] The lengthy legislative process to schedule all FRS illustrates this well. From the time the Drug Enforcement Administration first identified and administratively placed all FRS into Schedule I to where Congress permanently scheduled them, seven years passed.
[14] Such factors could arguably be encompassed already in 18 U.S.C. §3553(a), but its inclusion specifically in reference to synthetic drugs could be beneficial for practitioners and judges alike.
[15] U.S.S.G. § 2B1.1(b)(10)(C) comment 9(B); *see also* 2T1.1(b), comment 5; 2T3.1(b)(2), comment 5.

of punishment and rehabilitation are balanced appropriately. There is no question that AI can make some crimes more dangerous and may justify tougher penalties in rare cases— such as crimes committed with a firearm. But applying harsh enhancements across the board could overwhelm the justice system and lead to excessive punishment. We need to be smart: reserve longer sentences for when AI clearly increases harm, while preserving room for accountability, rehabilitation, and judicial discretion. Our existing laws offer a firm foundation, one that may not need to be sub-categorized if AI is used. Identity theft using AI is still identity theft. Drug trafficking using AI is still drug trafficking. The means exacerbate efficiency, but the crime is often still the same. Simply put, the mere presence of AI – without an apparent and significant increase in danger – may not warrant sentences longer than currently authorized by Congress.

Right On Crime believes that the Commission should conduct research on the sentencing outcomes in cases involving AI. It would be helpful to know the scope of federal cases involving AI and the sentencing ranges, including any variances, stiffer penalties, and types of crimes typically committed. Also, the Commission could provide information on feedback from practitioners, judges, and advocates on conflicts in understanding how to hand down criminal sentences where AI is involved. Lastly, the Commission could consider adding language in Chapter 3 that would make it clear that enhancements should not be applied because of the presence of AI unless an act of Congress affirmatively permits it.[16]

In sum, the Commission's retrospective review should ensure that sentencing policy reflects today's realities rather than yesterday's assumptions. Incorporating updated empirical evidence, current criminal trends, and refined perspectives into the Guidelines will promote more effective sentencing policy, strengthen public confidence, and advance evidence-based decision-making without sacrificing accountability.

III. Reduce Reliance on Overbroad Enhancements

Over the past four decades, sentencing enhancements have made the Guidelines much more complex. Enhancements are important tools for identifying aggravating conduct and punishing serious offenders appropriately. At the same time, their continued expansion risks diminishing their intended purpose. The ubiquity of sentencing enhancements runs the risk of undermining the severity of the crime. By making them increasingly commonplace, they might fail to truly distinguish reprehensible criminal behavior.

[16] To be sure, this can and very well should change in the future depending on the types of crimes, victims, and outcomes of crimes committed using AI. But such language could be beneficial for consistency in sentences and to provide temporary clarity to litigators and judges navigating this developing landscape.

Before expanding enhancements, the Commission should ask several questions. Does the enhancement identify and punish conduct that is associated with greater culpability? Is that conduct already captured elsewhere in the Guidelines or criminal history calculation? Does application of the enhancement improve public safety outcomes?

Where enhancements routinely apply, they may cease functioning as meaningful aggravating factors and instead become baseline sentencing characteristics. Likewise, overlapping enhancements can produce unnecessarily complicated sentencing calculations while providing only marginal improvements in proportionality.

The Sentencing Guidelines were designed to be insulated from shifting political pressures, and the Commission's role is intentionally distinct from that of Congress. Guideline enhancements should not be driven by temporary public sentiment, calls for harsher punishment in response to high-profile cases, or the political priorities of a particular moment. Instead, as the Commission enters its next four decades, it should leave questions of political responsiveness to Congress and remain focused on its core mission: developing sentencing policies that are fair, consistent, evidence-based, and faithful to the purposes of federal sentencing.

IV. Expand Incentives for Accountability and Rehabilitation

Right On Crime has consistently supported policies that encourage offenders to earn opportunities through demonstrated accountability. Individuals who accept responsibility, complete evidence-based programming, and prepare for reentry are less likely to reoffend, improving public safety.

For example, Right On Crime has been supportive of the Commission's previous efforts to expand non-custodial sentencing options where appropriate.[17] Judges are best positioned to evaluate the unique risks and needs of individual defendants and the specific circumstances of a case. To that end, courts need to move away from the assumption that incarceration is the only and most meaningful response to crime. Alternatives such as home confinement, probation, and deferred prosecution can support non-violent offenders maintain normalcy while serving a sentence. Targeted rehabilitation is a sensible crime management policy that can reduce

[17] *See Proposed Amendments to the U.S. Sentencing Guidelines*, Jan. 30, 2026. https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf.

recidivism and costs to the Bureau of Prisons, all while maintaining public safety.[18]

Federal correctional resources are finite. Accordingly, sentencing policy should prioritize the incarceration of offenders who present the greatest threat to public safety while ensuring that lower-risk offenders are held accountable in ways that maximize opportunities for rehabilitation and lawful reintegration.

The Commission should continue examining whether the Guidelines appropriately recognize measurable rehabilitation and post-offense conduct that demonstrates genuine behavioral change. Rewarding accountability encourages personal responsibility while supporting one of the most important public safety objectives: reducing future victimization through lower recidivism. Likewise, the Commission should continue evaluating whether Guideline provisions appropriately reduce recidivism, improve victim safety, encourage successful reentry, and promote efficient use of taxpayer resources. A sentencing system focused on measurable public safety outcomes best fulfills the statutory purposes established by Congress.

V. Additional Guideline Amendments Warranting Consideration

Relevant Conduct: Uncharged conduct

Relevant conduct is a broad term encompassing "[a] range of conduct that is relevant to determining the applicable offense level."[19] Its extensive application in sentencing makes it a "cornerstone" of the Guidelines.[20] But such ubiquity is not always good. For instance, the Guidelines permit somewhat unlimited consideration of uncharged conduct for sentencing purposes. Such consideration can invariably lead to the imposition of a more severe sentence than what is necessary or fair. As the Guidelines currently permit, relevant conduct easily encompasses too much uncharged conduct and results in defendants being sentenced for acts not covered in a count of conviction. In fact, not only can prosecutors enhance sentences without having to prove the conduct beyond a reasonable doubt, but they can also increase sentence lengths without even bringing an indictment alleging that conduct. The Guidelines' wide berth acceptance of consideration of uncharged conduct unfortunately negates the need for a grand jury and findings of guilt. Simply put, "sentencing a defendant based on uncharged conduct is suspect

[18] *See, e.g.*, *Home Confinement Under the CARES Act*, 88 Fed. Reg. 19830 (Apr. 4, 2023) (codified at 28 C.F.R. § 0.96c), noting that the expansion of home confinement served as a sensible crime management policy by prioritizing targeted rehabilitation; this transition allowed the Bureau of Prisons to significantly reduce institutional costs and lower recidivism rates through stabilized community reentry, all while maintaining a rigorous standard of public safety via electronic monitoring and strict supervision.
[19] U.S.S.G. § 1B1.3, comment background.
[20] U.S. Sentencing Comm'n, *Simplification Draft Paper: Relevant Conduct and Real Offense Sentencing*.

as both a constitutional and policy matter."[21] To that end, the "Commission has the authority to address th[is] issue[], and it should."[22]

To remedy this problem, Right On Crime recommends that the Commission assesses how to narrow the scope and application of uncharged relevant conduct, similar to how it has addressed acquitted conduct sentencing to date.[23] Specifically, the Commission could narrow the scope of relevant uncharged conduct, moving closer to a charge-offense system where a defendant is sentenced only to those charges of which he or she is found guilty. Alternatively, the Commission could change the way relevant uncharged conduct is used. For instance, there could be a cap on the increases attributable to uncharged conduct or a bar on its consideration except for purposes of mitigation. A combination or individual consideration of either would greatly improve fairness, predictability, and consistency of sentencing.

Relevant Conduct: Acquitted conduct

Recently, the Commission amended the Guidelines to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the Guidelines.[24] This unanimous vote was a long-awaited and meaningful step towards ending the unfair practice of allowing federal judges to consider acquitted conduct to enhance a criminal defendant's sentence. However, the Commission's amendment did not forbid its use wholesale; rather, the prohibition of considering acquitted conduct by a sentencing court is limited to federal acquitted conduct that does not also establish the instant offense of conviction.

This curtailed approach is much appreciated and needed. But more can be done. To that end, Right On Crime recommends that the Commission proposes an amendment that would completely prohibit the use of acquitted conduct in federal sentencing except for the purposes of sentence mitigation. Such an approach has already been considered by this Commission[25] and in bipartisan legislation.[26] The Commission can use this amendments cycle to finish this important job and ban acquitted conduct from being considered in federal sentencing.

White Collar Crimes: Position of trust:

The Guidelines permit a sentencing enhancement when a defendant abuses his or her position of public or private trust, which is based on the notion that people who hold a position of trust

[21] *U.S. v. Brasher*, No. 23-1180 (7th Cir. June 28, 2024).
[22] *Id.*
[23] *See* more on this below; *see also supra* n. 41.
[24] Amendments to the Sentencing Guidelines, Amendment 1 (U.S. Sentencing Comm'n 2024).
[25] *Id.*; *see also* Proposed Amendments to the Sentencing Guidelines, Proposed Amendment 3 (U.S. Sentencing Comm'n 2023).
[26] "Prohibiting Punishment of Acquitted Conduct Act of 2023," S. 3483, 119th Cong. (2025).

relative to a victim are viewed as more culpable.[27] Based on the application notes, it is fair to say that this enhancement should apply when there is a professional or managerial discretion afforded to the defendant's role.

Right On Crime believes this sentencing enhancement serves an important role in holding certain defendants accountable. However, this language should be clarified to rectify confusion over when the enhancement applies. For instance, the current language–directed and limited almost entirely to those in professional or managerial positions–is too broad. Based on its text, prosecutors could argue that the enhancement applies to almost anyone. The argument could easily be made that someone in the human resources department holds a position of trust, even if not in a managerial role relative to a victim. The broad language of the amendment could also be read to encompass a manager at a fast-food restaurant, a substitute teacher, or mid-level manager at a paper company. Surely, this enhancement loses its intent and teeth when it can be over-applied.

To that end, the Commission should limit a "position of trust" to instances where a fiduciary or quasi-fiduciary obligation exists. Several courts have already interpreted "position of trust" to mean this.[28] In refining the language to encompass fiduciary or quasi-fiduciary relationships, the universe of eligible defendants will inevitably narrow, but the intent of the enhancement will importantly be clarified. This will result in far more consistency in handing down criminal sentences among circuits.

Right On Crime appreciates the Commission's consideration of these recommendations and looks forward to continuing to work with the Commission to improve the federal criminal justice system. Congratulations to the Commission on 40 years of dedication and hard work. We look forward to the next 40 years.

Sincerely,

Brett Tolman

Executive Director
Right On Crime

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[27] U.S.S.G. § 3B1.3.
[28] *See, e.g., United States v. Huggins*, No. 15-1676 (2d Cir. Dec. 19, 2016); *see also United States v. Ntshona*, 156 F.3d 318, 320 – 21 (2d Cir. Sept. 10, 1998); *United States v. Jolly*, 102 F.3d 46, 49 (2d Cir. Dec. 5, 1996); *United States v. Brunson*, 54 F.3d 673, 677 (10th Cir. 1995).

[redacted]

July 20, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of SEE Turtles, I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

SEE Turtles respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international

trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

SEE Turtles has worked for 7 years on the illegal tortoiseshell trade, tracking sales around the world, developing tools to identify illegal products, and working with local partners to address the trade in different hotspots. We've seen how the illegal trade can decimate sea turtle populations when uncontrolled, which also impacts coastal economies based on tourism.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, SEE Turtles would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Brad Nahill
President, SEE Turtles
[redacted]

July 20, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Priorities for Amendment Cycle

The Zoological Society of San Diego (d/b/a) San Diego Zoo Wildlife Alliance (SDZWA) on behalf of the San Diego Zoo and the San Diego Zoo Safari Park respectfully submits the following comments regarding proposed priorities for the U.S. Sentencing Commission's amendment cycle. We commend the Commission for its work and appreciate the opportunity to comment. We ask the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

SDZWA is an international, nonprofit conservation organization with two leading wildlife parks: the San Diego Zoo and the San Diego Zoo Safari Park. We integrate wildlife health and care, science, and education to develop sustainable conservation solutions. With a focus on the inter-connectedness of the health of wildlife, people, and the ecosystems we share, SDZWA aims to drive conservation outcomes benefiting both people and the planet. We partner with hundreds of communities and organizations to address conservation challenges using innovative strategies. We synergize skills honed at the Zoo and Safari Park with experience in the field to inspire and catalyze conservation action on behalf of wildlife, working toward a world where all life thrives. We are an accredited member of the Association of Zoos and Aquariums (AZA), a 501(c)3 non-profit organization setting the global gold standard for zoos and aquariums in animal care and welfare, conservation, education, science, and guest experience.

SDZWA is a platinum member of AZA's Wildlife Trafficking Alliance (WTA) and a founding member of the Wildlife Confiscations Network. WTA brings together the collective expertise and influence of zoos and aquariums, corporations, nonprofit organizations, and government agencies to reduce consumer demand for illegally traded wildlife and wildlife products, advance laws, regulations, and policies that combat wildlife trafficking, and coordinate responses to ensure the care and welfare of wildlife confiscated from illegal trade.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. These impacts can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities – particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, SDZWA would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Erika Kohler
Executive Director
San Diego Zoo

Pat McTigue
Executive Director
San Diego Zoo Safari Park

Nadine Lamberski
Chief Conservation Science &
Wildlife Health Officer
San Diego Zoo Wildlife Alliance

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ACCREDITED BY THE ASSOCIATION OF ZOOS & AQUARIUMS

July 23, 2026

Attn: Office of Public Affairs – Priority Comment
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: PROPOSED PRIORITIES FOR AMENDMENT CYCLE

Dear United States Sentencing Commission - Office of Public Affairs,

On behalf of the Santa Barbara Zoo, I respectfully submit the following comments regarding proposed priorities for the U.S. Sentencing Commission's amendment cycle. We commend the Commission for its work and appreciate the opportunity to comment. **We ask the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.**

Dedicated to conserving the natural world through education, science, and unforgettable guest experiences, Santa Barbara Zoo is a **$21.6 million annual operation with nearly half-a-million annual visits.** The Santa Barbara Zoo plays a critical role in the recovery programs to save local endangered and threatened species including the Arroyo toad (since 2003), California condor (since 2002), California red-legged frog (since 2003), island fox (since 1999), island skunk (since 2020), North American songbirds (since 2022), Oiled Wildlife Care Network (since 2015), southern sea otter (since 2012), unarmored threespine stickleback (since 2017), western monarch butterfly (since 2012), western pond turtle (since 2017), and western snowy plover (since 2015).

With a deep commitment to protecting wildlife and as an accredited member of the Association of Zoos and Aquariums (AZA), an organization that sets the global gold standard for zoos and aquariums in animal care and welfare, conservation, education, science, and guest experience, **Santa Barbara Zoo is a proud participating partner member of AZA's Wildlife Trafficking Alliance (WTA).**

WTA brings together the collective expertise and influence of zoos and aquariums, corporations, nonprofit organizations, and government agencies to reduce consumer demand for illegally traded wildlife and wildlife products, advance laws, regulations, and policies that combat wildlife trafficking, and coordinate responses to ensure the care and welfare of wildlife confiscated from the illegal trade.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. **These impacts can impose substantial economic harm on governments, industries, and communities, extending well beyond**

500 Niños Drive, Santa Barbara, CA 93103
(805) 962-5339 • sbzoo.org

Accredited by the Association of Zoos & Aquariums

the immediate conservation consequences of the crime. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities – particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense. We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. I appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, I would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Charles Hopper
President & CEO
Santa Barbara Zoo
[redacted]

Comment on the Commission's Proposed 2026-2027 Policy Priorities
National Council for Incarcerated and Formerly Incarcerated Women and Girls
July 27, 2026

Introduction

The National Council for Incarcerated and Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women and girls. It began in the prison yard at FCI Danbury, where women came together to challenge a criminal justice system shaped without the voices of those most affected. While the National Council's ultimate mission is to end the incarceration of women and girls, we advocate for policies that address the harms of incarceration, including trauma, family separation, and poverty, while supporting women seeking compassionate release and clemency.

Summary

The National Council is deeply concerned about the number of judges who are denying compassionate release motions based on an interpretation of "extraordinary and compelling" standard that is far more stringent than Congress or the Commission intended. Although Congress enacted the First Step Act to expand access to compassionate release and decrease incarceration, the courts have narrowly interpreted the Commission's guidance, resulting in a less than 17 percent grant rate and leaving too many deserving people behind bars.[1] In addition to revising the Guidelines after the *Rutherford* and *Fernandez* decisions, this Commission should provide more detailed commentary on the scope of "extraordinary and compelling." Further instruction is needed to prevent the courts and the Bureau of Prisons from gutting the First Step Act by making it impossible to reach the already-demanding standard needed for a reduction in sentence. *See, e.g.*, *United States v. McLean*, No. 4:93CR022, 2025 WL 1490165, at *6 (E.D. Tex. May 23, 2025) (misstating the guidelines to require "additional requirements" for parents of minor children including proving the parent would gain custody). This inconsistency undermines Congress's intent, and creates an inequitable system in which access to compassionate release depends more on the assigned judge than on the merits of an individual's circumstances.

New Commentary Needed to Implement Compassionate Release as Intended

Denial of Meritorious Motions Based on Unrealistic Assessment of Health Conditions

[1] Ames Grawert & Ram Subramanian, *What's Next After Supreme Court Limits Compassionate Release for Excessive Sentences*, Brennan Ctr. for Just. (June 17, 2026), https://www.brennancenter.org/our-work/research-reports/whats-next-after-supreme-court-limits-compassionate-release-excessive.

The Guideline commentary has not stopped courts from overlooking or downplaying multiple comorbidities to deny a reduction in sentence. The Sentencing Guidelines allow relief when the defendant is "(i) suffering from a serious physical or medical condition [or] . . . impairment" if the condition "substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility" and the defendant "is not expected to recover." U.S.S.G. § 1B1.13(b)(1)(B). This standard is meant to be demanding but not impossible to reach. Yet the courts have "interpreted substantial impairment narrowly," equating it with confinement to a bed or being unable to meet the BOP's guidance regarding activities of daily living. *United States v. Paulson*, No. 5:21-CR-50134-KES, 2025 WL 1666525, at *4 (D.S.D. June 12, 2025). Only 16% of compassionate release motions are granted, therefore it stands to reason that the courts are being unrealistic in what it takes to provide "self-care" in a prison. Specific examples are not hard to find.

- A paraplegic movant who was a wheelchair user and suffered from type 2 diabetes, neuropathy, anemia, a neurogenic bladder, pulmonary embolisms, and mental health disorders did not demonstrate that his ability to care for himself was "substantially diminished." because he was "self-sufficient except with regard to inability to stand and walk." *United States v. McMillan* No. 22-278, 2026 WL 67623, at *4-*5 (E.D. Pa. Jan. 21, 2026). This conclusion is particularly baffling because the court also rejected his request for release based on the need to care for his wife because of "his own significant physical impairments." *Id.* at *6.
- "Severe heart disease, hypertension, severe diabetes which has resulted in the amputation of body parts as well as continued neuropathy, and a broken elbow from a fall" did not meet the criteria for inability to provide self-care. *United States v. Ware*, No. 3:15-CR-494-B-2, 2025 WL 2880808, at *3 (N.D. Tex. Oct. 9, 2025). Mr. Ware, who also relies on a cane to walk, suffered a stroke that he claimed caused "episodes of confusion" and "greatly diminished capacity for daily physical activities." *Id.* at *3. Although amputation would be hard to fake, the court found his circumstances did not meet the criteria under (b)(1)(B) because he did not have medical records to substantiate a single condition: the effects of the stroke. *Id*. at *3-4.

Cases abound in which multiple comorbidities somehow did not add up to "serious deterioration in physical or mental health because of the aging process" for those who are over 65 and have served the required minimum amount of time. U.S.S.G. § 1B1.13(b)(2).

- Lazara Ordaz suffered from breathing problems, hypertension, hypothyroidism, and osteoporosis. ***United States v. Ordaz*, No. CR 98-587, 2024 WL 4880748, at *4-*5 (E.D. Pa. Nov. 25, 2024).**[2] The record demonstrated that her doctor had offered to declare her unfit to work, a concession she was too proud to accept. Numerous support letters described how she would attempt to clean her cell and would be physically unable to do

[2] Citations in bold indicated motions that The National Council filed.

so. Despite these serious age-related conditions which had reduced her from an active worker to an invalid, the court concluded that Ms. Ordaz's medical circumstances did "not present extraordinary and compelling reasons." *Id.* at *18.

- Luis Garcia suffered from multiple serious cardiac conditions including congestive heart failure, atherosclerotic heart disease, angina pectoris, and coronary vasospasms. *United States v. Garcia*, 758 F. Supp. 3d 47, 53-54 (E.D.N.Y. 2024). In addition to his cardiac issues, Mr. Garcia also suffered from hypertension, gastroesophageal reflux disease, hyperlipidemia, degenerative joint disease, morbid obesity, high cholesterol, gout, and glaucoma and has a history of cancer, liver disease, stroke, and memory loss.. *Id.* at *54. His cardiac conditions severely limited his daily activities, making it difficult and painful for him to complete tasks such as making his bed, washing his hair, watching TV, or having a conversation. *Id.* at *53. Despite his list of medical conditions, the court determined that Mr. Garcia was experiencing "unfortunate but common and non-serious age-related health conditions[.]" *Id.* at *55.
- Evidence of an "age-related macular degeneration diagnosis" and testimony that the movant's "vision loss impairs his daily life" and other health issues such as Stage 3 chronic kidney disease, cataracts, hypertension, and gastric issues were not sufficient to meet the criteria of "serious deterioration in physical or mental health because of the aging process." *United States v. Arbabsiar*, 2026 WL 1661993, at *3 (S.D.N.Y. June 9, 2026). Despite the testimony of another incarcerated individual that Mr. Arbabsiar struggled every day with his vision loss, the court determined his physical conditions not meeting the extraordinary and compelling standard. *Id.* at *4.

Overconfidence in BOP-Provided Medical Care

Similarly, too many judges are ignoring the obvious deficiencies in the BOP health care system and denying compassionate release when the movant "is suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death." U.S.S.G. § 1B1.13(b)(1)(C). Judges are overly forgiving of potentially devastating delays in care.

- Five month delay between diagnosis of a "70-80% probably [sic] of follicular or oncocytic cancer or NIFTP" in June 2024, a consult in November, and surgery the following January in spite of an "urgent" request for evaluation did not constitute failure to provide care. *United States v. Paulson*, No. 5:21-CR-50134-KES, 2025 WL 1666525, at *4 (D.S.D. June 12, 2025). Mr. Paulson's cancer was removed in spite of the delay, but the quality of medical care should not be determined by getting away with neglecting treatment.
- Mykell Hawes suffers from rheumatoid arthritis, a degenerative nerve condition which can be slowed by medication but which is irreversible. Ms. Hawes did not see a neurologist for nearly four years, although she is supposed to be checked every six

months, resulting in severe degeneration in her hands. When she finally saw a specialist, her medication was doubled. ***United States v. Hawes*, No. 2:20-cr-00187-MHW (S.D. Ohio Mar. 25, 2026).** The court denied her compassionate release, observing that "defendant's choice to commit crimes while she suffered from a known, long-term medical condition should not be rewarded with early release from prison" and finding that the BOP was providing adequate care in spite of the four-year hiatus in providing specialist care. *Id.* at *5.

- Mr. Schulman suffers from chronic inflammatory demyelinating polyneuropathy and atrial fibrillation and reports that his condition has "significantly deteriorated since his incarceration" as a result of the BOP's failures to provide him with appropriate treatment such that he will soon be wheelchair bound. *United States v. Schulman*, No. 6:24-cr-00466-JDA-1, 2026 WL 1878156, at *4 (D.S.C. June 30, 2026). In spite of a delay of 14 months for a neurology consultation because his request "slipped through the cracks," the court found that the BOP was providing adequate care. *Id.* at *5. Even if the delays to Mr. Schulman's medical care were accidental errors in scheduling, these delays still show that the medical care is not being provided.

The need to clarify the scope of the medical provisions in the guidelines is particularly urgent because the Bureau of Prisons does not have the resources or ability to care for incarcerated individuals who are ill. A DOJ Office of the Inspector General Report from a decade ago noted that "recruitment of medical professionals is one of the BOP's greatest challenges and staffing shortages limit inmate access to medical care and contribute to increases in medical costs."[3] In January 2026 in response to the death of Frederick Bardell, the OIG found that the government's assertions that "there was 'no indication' that Bardell could not 'receive adequate care in custody' were inconsistent with what we learned during the course of our investigation and review."[4] Therefore the assumption that the BOP can properly care for people with serious medical conditions is belied by reality.[5]

The Sentencing Commission did not intend for compassionate release to be limited to defendants on the verge of death but far too few elderly and ill people are being released. In order to stop judges from imposing impossible standards, the Commission should define key terms such as "serious medical condition" and "substantially diminishes the ability...to provide self-care."

[3] Off. Of the Inspector Gen., U.S. Dep't of Just., Review of the Federal Bureau of Prisons' Medical Staffing Challenges, at i (2016).

[4] U.S. Dep't of Just., Off. of the Inspector Gen., DOJ OIG Releases Report of Investigation and Review of the Federal Bureau of Prisons' Conditions of Confinement and Medical Treatment of Frederick Mervin Bardell and Related Representations to the Court (Jan. 6, 2026), https://oig.justice.gov/news/doj-oig-releases-report-investigation-and-review-federal-bureau-prisons-conditions-confinement.

[5] H.R. Comm. on the Judiciary, 119th Cong., Feb. 20, 2026 at 1, 3 (Letter to William K. Marshall, BOP Director) (confirming BOP acknowledgment of staffing shortages and , https://democrats-judiciary.house.gov/sites/evo-subsites/democrats-judiciary.house.gov/files/evo-media-document/2026-02-20-raskin-mcbath-et-al-to-marshall-bop-re-staffing-issues.pdf

Without clearer guidance, the current application of the standard continues to undermine the broader goal of reducing unnecessary incarceration and providing meaningful relief to defendants struggling with debilitating health conditions.

Creation of Additional Requirements to Hinder Release to Care for Children

The Sentencing Guidelines further recognize certain family circumstances as constituting extraordinary and compelling reasons for a sentence reduction. U.S.S.G. § 1B1.13(b)(3). Specifically, extraordinary and compelling circumstances exist upon "[t]he death or incapacitation of the caregiver of the defendant's minor child or the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition." The government often argues that parents should not be released if a caretaker becomes incapacitated because other candidates are available although that requirement is not in the guidelines for minor or incapacitated children (although it is for other family members). Some courts point out this misreading, but far too many impose this atextual requirement. *Compare United States v. Smith*, No. 2:21-CR-00279-CDS-EJY, 2024 WL 4556521, at *4 (D. Nev. Oct. 22, 2024) (stating whether movant was the only or best available caretaker "is irrelevant") ***with*** *United States v. Jah*, No. CR 19-00026 WHA, 2025 WL 1580868, at *3 (N.D. Cal. June 4, 2025) (requiring "robust evidentiary showing" that the movant is the only available caregiver).

- Mr. Kennedy's wife and the caregiver of his minor child passed away; two of his children were sent to foster care, where he was not allowed to contact them, and the third was left with his mother-in-law who could not take care of the child due to serious depression. *United States v. Kennedy*, No. CR 114-123, 2025 WL 1616366 at *2 (S.D. Ga. June 6, 2025). Although this child had suffered the trauma of the mother's death (as had the others) the court found "no evidence that the one remaining minor child . . . faces some tremendous hardship or need that Defendant can remedy." *Id.* The judge acknowledged that "the verbiage 'only available caregiver' is not present in the applicable subsection" but felt that he had "discretion" to substitute his judgment for the clear language of the guidelines. *Id.*
- Mr. Mann requested compassionate release in part because Ms. Watson, the mother of his minor daughter, suffered a brain aneurysm. *United States v. Mann*, No. 0:18-557-MGL-9, 2025 WL 2912892, at *5 (D.S.C. Oct. 14, 2025). The court denied Mr. Mann's compassionate release motion, reasoning, "Even assuming Watson currently remains incapacitated, Mann has failed to demonstrate other caregivers are unavailable to assist in raising [the daughter]. The record indicates Mann has several relatives, including an adult son and three brothers, who reside near [the daughter]. Yet, Mann has neglected to allege these individuals are unavailable to care for her. Nor has Mann established Watson's parents are either incapacitated or unable to render adequate care to [the daughter]." *Id.* at 6.

- Mr. Hatcher's motion for compassionate release was denied because, despite the death of his children's mother, he did not "demonstrat[e] that he is needed as a primary caregiver for [his] minor child." *United States v. Hatcher*, No. 2:17-CR-00012-23-JRG-CRW, WL 2098243, at *2 (E.D. Tenn. July 21, 2026).
- When Mr. Organes's minor children, including a severely autistic son, would be left without a caregiver because of their mother's arrest and impending deportation, the court did not find compelling and extraordinary circumstances because the children have a grandmother in Mexico who could care for them. *United States v. Organes*, No. 23 CR 27, 2026 WL 1864156, at *2 (N.D. Ill. June 29, 2026).

In addition to misreading the guidelines to conjure up grounds to deny compassionate release, these decisions show a callousness towards the children involved. Children suffering the trauma of the death or serious illness of a parent need the other parent, not an uncle who lives nearby. Furthermore, creating artificial barriers to family reunion perpetuates societal harm.[6] The Commission presumably had this in mind when deciding not to make the absence of an alternative caregiver a requirement for parents of young children. Family members have to submit affidavits explaining why they can't care for their niece, grandson, or cousin, an additional burden as they cope with the incapacitation of the original caregiver. No child should be told they are not wanted, yet this is what happens when judges make up the requirement of proving the negative that no one else can care for the child. This problem is prevalent, and the Commission should reiterate that the only thing the movant must show is that the caretaker is incapacitated. *See, e.g., United States v. Taylor*, No. 4:11-CR-501-1, 2025 WL 19872, at *5 (N.D. Ohio Jan. 2, 2025) (describing intra-circuit split in the Sixth Circuit over whether a parent must show they are the only available caregiver); *United States v. Head*, No. 2:08-CR-00093-KJM, 2025 WL 2229803, at *2 (E.D. Cal. Aug. 5, 2025) (describing 9th Circuit internal split).

Invention of Requirement that Parent "Prove" She Is a Suitable Caregiver

In addition to the other caregiver issue, courts have ignored the plain language of the guidelines by requiring movants to show that they are fit parents. As one judge put it "While not explicit under § 1B1.13(b)(3)(A), the family circumstances category is usually only considered an extraordinary and compelling reason for release when the defendant has proven she is a suitable caregiver, and that release is in the best interest of the child. *United States v. Watson*, No. 18-cr-40018, 2025 WL 2222987, at *3 (D.S.D. Aug. 5, 2025). Even assuming a usual practice could have developed in less than two years since the guidelines went into effect, the citation for

[6] A Meta-analysis of studies of parental incarceration show increased risk of antisocial behavior which can increase risk of a child's incarceration. Joseph Murray et al. *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis, 138 Psychological Bulletin 175-210 (2012), https://drive.google.com/file/d/1pxUFQndEm1S3l3QDvzhfJnniodTQQkdd/view*

this alleged commonplace consists of a case involving a movant seeking release to care for a parent, a pre-guidelines case regarding foster care, and a movant whose parental rights had been terminated. *Id.* (citing cases). Furthermore, screening to make sure that the parent does not have a history of abuse, which is a reasonable inference, is a far cry from demanding a person prove they are a suitable caregiver based on a record that touches on parenting history only in the person's PSR, if at all. This conjuring of requirements is not an outlier. *See, e.g., United States v. Morris*, No. 16-20022-JAR-3, 2026 WL 496623, at *3 (D. Kan. Feb. 23, 2026) ("Defendant has not shown that the court would deem her a suitable caretaker").

- When Diana Marcial sought compassionate release based on family circumstances, her 16-year-old daughter was living on the streets or with a 26-year-old "boyfriend." Her stepdaughter had just removed her two younger children, one of whom has severe hearing loss, from foster care and delivered them to their abusive grandmother who lived in Mexico, although they are American citizens. The grandmother sent the boy to live with his father who is a drug dealer and the 14-year-old girl back to the United States when her brother turned 18, a tenuous arrangement that ended when the brother was arrested. This child ended up living with her "boyfriend's" family in Mexico. When presented with the children's dire situation, the court stated it was "sympathetic" to the children's situation, but denied Ms. Marcial's motion because "the circumstances surrounding her children's lack of care preexisted her imprisonment and were brought" by her actions. ***United States v. Marcial,* No. 2:23-cr-00809-KG, 2025 WL 3653885, at *1 (D.N.M. Dec. 17, 2025).** The court ignored the fact that Ms. Marcial had provided for her children before she was incarcerated, had suffered from the illness of addiction, had become sober in prison, had taken parenting classes, and had struggled to keep her children housed and safe while incarcerated at FCI Dublin. The Guidelines do not require that a movant pass some sort of parenting test but simply that their caregiver be "incapacitated." Ms. Marcial's children continue to experience trauma and hardship because the judge hallucinated requirements in the guidelines that are not there.
- Boe Moore sought compassionate release to care for her minor son who was being abused by his uncles who are his caregivers. ***United States v. Moore*, No. 1:22-cr-00086-DCN-2, 2026 WL 1398657, at *4 (D. Idaho May 19, 2026).** The court acknowledged that one of the uncles "is disabled" and that "one (or both)" are less than ideal caregivers" because they stole the boy's food stamps, did not feed him, abused him and did not try to locate him after he ran away for five days. *Id.* at *9. Nevertheless, the court denied compassionate release, berating Ms. Moore because she "largely failed to care for her children due to her criminal activity and substance abuse." *Id.* It gave her no credit for her sobriety, drug programming, and efforts to parent her children from prison. By focusing on Ms. Moore's past conduct instead of the current needs of her child, the court engaged in a backward looking fault-finding exercise rather than analyzing whether extraordinary family circumstances existed at the time of the motion. Courts should not deny relief based on an incomplete understanding of the parent-child relationship or a

defendant's past struggles without meaningfully considering the present harm to the child and the defendant's ability to provide necessary care.

- A district court determined that even if Mr. Sierra-Serrano had satisfied the administrative exhaustion requirement, he would still not be granted compassionate release because he failed to show that his daughter being placed in foster care is an extraordinary and compelling circumstance. *United States v. Sierra-Serrano*, No. 19-cr-61-2 (ECT), 2025 WL 2462904, at *2 (D. Minn. Aug. 27, 2025). The court reasoned that if a "foster-care placement qualified as an extraordinary and compelling circumstance," Mr. Sierra-Serrano would have to prove that he is a suitable caretaker and that he would gain custody of his child upon release. *Id.* at 2. The court determined that Mr. Sierra-Serrano did not prove those issues. *Id.* at *2.

The Commission should make clear that criminal courts deciding compassionate release do not have the expertise or access to sufficient information to judge a parent's fitness. The perceived shortcomings of the parent, usually the mother, are irrelevant, especially when weighed against the needs of the children. Occasionally, a movant can pass muster with a judge but this standardless assessment should simply not be permitted. *United States v. Watson*, No. 18-cr-40018, 2025 WL 2222987, at *3 (D.S.D. Aug. 5, 2025). The Guidelines should state that incapacity of the caregiver is the **only** criterion that a court should consider when considering whether a 1B1.13(b)(3) motion. If it finds a caregiver is incapacitated yet has concerns about the fitness of a parent, then it should refer the case to family court, appoint a guardian ad litem, or notify child protective services to monitor the family upon release. This clarity is needed because subjective assumptions and implicit biases, which can disproportionately affect women of color, women living in poverty, and women with substance use disorders, are creating outcomes that harm families and undermine the purpose of the First Step Act.

Conclusion

The Sentencing Commission should provide more detailed guidance on the meaning of "extraordinary and compelling reasons" to ensure that meritorious requests for compassionate release cannot be brushed aside. As these cases demonstrate, too many courts have imposed requirements that do not appear in the Guidelines, interpreted existing standards far more narrowly than intended, or ignored parts of the the record favorable to the movant. The result is a compassionate release system in which relief often depends less on the merits of a defendant's circumstances than on the judge assigned to the case. By clarifying the scope of the medical and family circumstances provisions, the Commission can promote greater uniformity, better effectuate Congress's intent in enacting the First Step Act, and ensure that compassionate release remains a meaningful mechanism for addressing extraordinary and compelling circumstances.

July 24, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of The Wildlife Society (TWS), we appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026. TWS respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

Wildlife trafficking can result in significant population-level impacts and may impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. Additionally, the suffering experienced by many individual animals taken from the wild, often which are restrained and drugged for transport, is in and of itself an unacceptable atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine illegal trade through this lens as well.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

The Wildlife Society is an international organization of wildlife professionals dedicated to addressing issues that affect wildlife populations worldwide. Many of our members work to conserve species that are at risk of extirpation due, in part, to illegal wildlife trafficking. Our members also pioneer methods to combat illegal trafficking, creating new tools to improve our ability to combat wildlife laundering and prosecute wildlife traffickers.

In conclusion, we believe a comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, The Wildlife Society would welcome the opportunity to provide any additional information or expertise that may be helpful.

Respectfully,

Dr. Edward B. Arnett, CWB®

Chief Executive Officer

The Wildlife Society

July 25, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of Turtle Survival Alliance, I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

Turtle Survival Alliance respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

Turtle Survival Alliance (TSA) is a global conservation organization working across more than 30 countries to protect and restore wild populations of turtles and tortoises. Through an extensive network of field programs, assurance colonies, and conservation partnerships, TSA advances both in situ and ex situ conservation, supporting scientific research, species recovery, and direct conservation action. Many of the species with which TSA works are among the world's most threatened vertebrates and are frequently targeted by the illegal wildlife trade.

For more than two decades, TSA has worked to combat the illegal trafficking of turtles and tortoises, including coordinating and providing emergency response, rehabilitation, and long-term care for confiscated animals in the United States and internationally. TSA regularly assists local, state, federal, and international law enforcement and wildlife agencies with the intake, transport, identification, rehabilitation, and placement of turtles and tortoises confiscated through criminal investigations and enforcement actions. In doing so, TSA and its conservation partners routinely bear the substantial logistical, financial, veterinary, and long-term husbandry costs associated with caring for seized wildlife, providing firsthand knowledge of the operational, conservation, and financial consequences of wildlife trafficking.

TSA works closely with government agencies to strengthen and implement wildlife laws, regulations, and enforcement efforts addressing wildlife crime. TSA's work integrates conservation biology, veterinary medicine, husbandry, and collaboration with law enforcement to address the full spectrum of wildlife trafficking impacts. In addition, TSA is an active participant in the Association of Zoos & Aquariums' Saving Animals From Extinction (AZA SAFE) programs and a contributing member of the Collaborative to Combat the Illegal Trade in Turtles (CCITT). Collectively, this experience informs TSA's perspective on the conservation, enforcement, and resource impacts of wildlife trafficking and the importance of effective federal sentencing policies to deter these offenses.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, Turtle Survival Alliance would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Marc Dupuis-Desormeaux
President and CEO
Turtle Survival Alliance

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TZEDEK
ASSOCIATION

Save A Life, Save A World

By the Grace of G-d

July 16, 2026

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Tzedek Association Comments on the Commission's Proposed 2026-2027 Policy Priorities

Dear Judge Reeves and Members of the Commission,

Tzedek Association again welcomes the opportunity to suggest policy priorities for the upcoming cycle. Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian relief both in the United States and throughout the world. Tzedek is particularly committed to promoting reform of the current American sentencing system, informed by its deeply held belief in the dignity and worth of every human being. Tzedek seeks a system that is more humane, fair, and just.

While Tzedek has been heartened by the valuable, albeit incremental, reforms undertaken by the Commission in recent years, other significant reforms that have garnered support from individuals and groups across the ideological spectrum have not yet been implemented. Especially in light of data reflecting substantial, nationwide, long-term declines in many categories of crime, the Commission should seize every opportunity to foster a criminal justice system that tempers the need for punishment with compassion, and to ensure that sentencing policy is informed by empirical evidence rather than outdated and counterproductive policies that ignore the innate human capacity for growth and change.

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Over the past couple of years, Tzedek has proposed a compendium of reforms in response to the Commission's requests for public input. During the last amendment cycle, for example, the Commission considered proposals that could have fundamentally addressed various significant deficiencies in the application of the United States Sentencing Guidelines ("U.S.S.G.") to economic crimes and provided new sentencing reductions based on post-offense behavior and rehabilitative efforts. Unfortunately, many significant and broadly supported reform proposals have not yet been implemented. Nevertheless, Tzedek continues to respectfully urge the Commission to consider bold action to effectuate a much-needed paradigm shift to correct what Tzedek believes are fundamental flaws that have plagued federal sentencing for decades.

This year, Tzedek's principal new recommendation is that the Commission respond to recent decisions by the Supreme Court by clarifying and strengthening the compassionate release policy statement. In doing so, the Commission has an important opportunity not merely to conform the Guidelines to the Court's holdings, but also to reaffirm that compassionate release must remain a meaningful—and meaningfully available—mechanism for redressing prison terms that have become greater than necessary.

Reaffirmation of Previously Proposed Priorities

Apart from the new recommendation, which is articulated below, Tzedek summarizes and reiterates the priorities it has urged the Commission to consider in recent years. For each of these, a comprehensive supporting analysis and underlying rationale was provided in Tzedek's proposed priorities submitted on July 15, 2024, and July 18, 2025, which are appended to this submission as Exhibits 1 and 2, and which are also posted on the Commission's website.[1] The following is an annotated summary to highlight the nature and points of emphasis in those prior proposals.

- **Implement Fundamental *Mens Rea* Reform**

  In myriad ways, the Guidelines either overstate or fail to consider *mens rea*, motive, and individual culpability. To

[1] Tzedek Association, Proposed Priorities for the 2024–2025 Amendment Cycle (July 15, 2024); Tzedek Association, Proposed Priorities for the 2025–2026 Amendment Cycle (July 18, 2025), available at https://www.ussc.gov/policymaking/public-comment/public-comment-july-15-2024 and https://www.ussc.gov/policymaking/public-comment/public-comment-july-18-2025.

ensure that this vital moral anchor in the criminal law is preserved, numerous reforms are essential to correct this deficiency. Exhibit 1, pp. 18-19; Exhibit 2, pp. 2-8.

- **Reformulation of Base Offense Level Calculation for Economic Crime and Drug Offenses**

  To address arbitrary adjustments based upon external factors that often bear no relation to an individual's true culpability and establish presumptive sentences that are disproportionately harsh, the Commission should consider replacing and/or fundamentally reforming the operation of the loss table under U.S.S.G. § 2B1.1 and the Drug Quantity Table under § 2D1.1. Exhibit 1, pp. 5-7; Exhibit 2, pp. 4-8.

- **Expand Alternatives to Incarceration**

  Mounting evidence from states and select federal districts shows that non-prison sentences and alternative forms of punishment, including diversion and restorative justice programs, result in decreased recidivism. Yet, the Commission's data document the continued rarity of non-prison sentences, an undeniable fact at odds with Congress's directive that the Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or other serious offense." 28 U.S.C. § 994(j). Tzedek has proposed a litany of reforms that will expand the availability of alternatives to incarceration to encourage their greater use by judges at sentencing. Exhibit 1, pp. 22-25; Exhibit 2, pp. 22-25.

- **Implement Various Measures to Ameliorate the Trial Penalty**

  Tzedek and many others have noted the astonishingly high percentage of cases disposed of via guilty plea, a consequence of the significantly increased penalties imposed upon those accused persons who avail themselves of their fundamental

right to trial.[2] This trial penalty or trial tax, which emanates from the prosecution's unilateral control over charging decisions and its presentation of relevant conduct, should be addressed through a panoply of reforms that are within the Commission's purview. These reforms include changes related to acceptance of responsibility, obstruction, relevant conduct determinations, and substantial assistance. Exhibit 1, pp. 10-18; Exhibit 2, pp. 17-21.

- **Identify Collateral Consequences and Their Punitive Impact**

  Collateral consequences are the multitude of debarments, disabilities, and deprivations that flow from a criminal conviction, even though they are not ordinarily contained within the penalty provisions in criminal statutes. Tzedek has repeatedly urged the Commission to review and assess the prevalence, severity, and cumulative real-world impact of these inherently punitive consequences, and to propose mechanisms that enable courts to account for those consequences when calibrating other criminal sanctions. Exhibit 1, p. 25; Exhibit 2, pp. 25-26.

- **Establish Presumptive Maximum Sentences and Implement Reforms to Offense Level 43**

  Tzedek urges the Commission to implement reforms to prevent the imposition of life sentences on nonviolent offenders and curtail the use of life sentences, particularly with respect to individuals with little or no criminal history. Exhibit 2, p. 16.

[2] Notably, in their concurring opinion in *Hunter v. United States*, 608 U.S. ___ (2026), Justices Neil Gorsuch, Sonia Sotomayor and Ketanji Brown Jackson wrote at length about "plea bargaining's excesses" and urged corrective measures to address "coercive prosecutorial tactics designed to induce defendants to take plea deals." Slip op. at 1-16. Tzedek respectfully asserts that the Commission could and should take a leading role in "some of the work still ahead" to ensure our sentencing structures and practices do not unduly undermine our Nation's historical commitment to the right to trial.

- **Recommendation that Judges, DOJ Officials, and Others Visit Federal Prisons**

  Public officials whose work often requires them to seek or impose prison sentences should have a firsthand sense of the conditions in those institutions. The Commission should take steps to institutionalize the practice of bringing those public officials into federal prisons. Exhibit 1, p. 26; Exhibit 2, pp. 26-27.

The Commission Should Amend § 1B1.13 to Reflect the Supreme Court's Rulings and to Provide Guidance, by Articulating a Totality of the Circumstances Standard, to Encourage Increased Use of Compassionate Release

The Supreme Court recently issued two rulings providing guidance on what types of claims provide a basis for a sentencing reduction under the "extraordinary and compelling reasons" statutory standard set forth in 18 U.S.C. § 3582.[3]

Notwithstanding that 28 U.S.C. § 994(t) reflects Congress's intent to expressly vest the Commission with authority to "describe what should be considered extraordinary and compelling reasons for a sentence reduction," the Court reasoned in *Rutherford* that the nonretroactive provisions of amendments to 18 U.S.C. § 924(c) foreclosed reliance upon those provisions as an "extraordinary and compelling reason" for a sentence reduction. The Court in *Fernandez* held that, because the provisions of 28 U.S.C. § 2255 prescribe the means for a prisoner to collaterally attack a federal conviction, arguments that are based on the asserted invalidity of a conviction are not among the "extraordinary and compelling reasons" that can justify compassionate release.

Clearly, the Commission must amend U.S.S.G. § 1B1.13 to reflect the holdings in *Rutherford* and *Fernandez*, but in so doing it should not lose sight of its congressional responsibility and unique ability to exercise broad and data-informed judgment regarding "what should be considered extraordinary and compelling reasons for a sentence reduction." 28 U.S.C. § 994(t).

[3] *Rutherford v. United States*, 608 U.S. ___ (2026); *Fernandez v. United States*, 608 U.S. ___ (2026).

Drawing on data and experiences since Congress enacted the First Step Act, which had the express goal of "Increasing the Use and Transparency of Compassionate Release," the Commission not only can, but should, exercise its statutory authority to more fulsomely define what constitutes extraordinary and compelling reasons to ensure both that the totality of a prisoner's circumstances is considered and that compassionate release is employed more robustly. Particularly since the end of the COVID pandemic, and even given this Commission's efforts in 2023 to foster a justifiably broad understanding of the kinds of circumstances warranting a sentencing reduction, grants of compassionate release have remained extraordinarily rare, suggesting a systemic underappreciation of cases and circumstances in which Congress sought increased use of compassionate release.

The Commission's own data suggest that, despite Congress's directive to increase the use of compassionate release, the mechanism continues to be employed only in the rarest of circumstances. Consequently, the Commission should provide additional guidance through U.S.S.G. § 1B1.13 to effectuate the First Step Act's objective of increasing the use of compassionate release.

Indeed, according to the Commission's data analyzing compassionate release motions decided in fiscal year 2025, only 394 of the 2,795 motions were granted, while 2,401 were denied.[4] To put this in perspective, on an average weekday, federal courts nationwide granted fewer than two compassionate release motions while denying approximately nine. During that same period, the Commission's data show that 61,557 people were sentenced to federal prison,[5] an average of approximately 237 people on each and every weekday—underscoring just how extraordinarily rare compassionate release has become relative to how many are sent into the federal prison system.

Given that the total federal prison population exceeds 150,000 persons,[6] if only as few as 0.1 percent of the total federal prison population were to receive reductions each month, that would amount to 150 grants per month, and yet the latest data

[4] U.S.S.C., Compassionate Release Data Report: Fiscal Year 2025 (May 20, 2026), https://www.ussc.gov/research/data-reports/compassionate-release-data-reports
[5] U.S.S.C. 2025 Sourcebook of Federal Sentencing Statistics, Table 13, www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2025/2025_Sourcebook.pdf.
[6] Federal Bureau of Prisons, Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp.

show that less than 25 compassionate release motions are granted each month[7]—roughly one-sixth of the number that even a 0.1 percent monthly reduction rate would produce. Recent trends also show that fewer such motions are being filed, suggesting that federal prisoners have become understandably discouraged by the steadily declining number of compassionate release grants.

Surely, the present rate of compassionate release grants—approximately 0.014 percent per month relative to the total federal prison population of roughly 150,000—is not what the compassionate release framework was designed to produce when Congress enacted compassionate release provisions, vested the Commission with authority to define the applicable criteria for compassionate release, and later, through the First Step Act, sought to increase its availability by empowering defendants, rather than solely the Bureau of Prisons (BOP), to bring these applications. "Extraordinary" may mean 1 in 100 or even 1 in 1,000, but a "rounding error" rate of approximately one grant for every 7,200 incarcerated people each month approaches functional unavailability. In choosing the word "extraordinary," Congress did not mean for compassionate release to become functionally nonexistent. Although "extraordinary" necessarily denotes something beyond what is usual, regular, or customary,[8] there comes a point at which data persistently documenting the extreme rarity of compassionate release cease to reflect a demanding statutory standard and instead demonstrate that the mechanism is no longer functioning as Congress intended.

The underutilization of compassionate release becomes even more striking when considering data documenting that more than 10,000 people incarcerated by the BOP are 61 years or older,[9] many of whom suffer from chronic and often life-threatening medical conditions. *See generally* Emily Widra, Prison Policy Initiative, *The Aging Prison Population: Causes, Costs, and Consequences* (Aug. 2023); Office of the Inspector General, U.S. Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (revised Feb. 2016) [*Aging Inmate Population*]. Over a decade ago, the Justice Department's Inspector General urged the BOP to "facilitate the release of appropriate aging inmates."

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[7] U.S.S.C., Compassionate Release Data Report: Preliminary Fiscal Year 2026 Cumulative Data through 2nd Quarter (May 2026), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY26Q2-Compassionate-Release.pdf.

[8] The dictionary definition of "extraordinary" is "going beyond what is usual, regular, or customary," www.merriam-webster.com.

[9] Federal Bureau of Prisons, Inmate Age, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

Aging Inmate Population, p. 54. Given the size and medical vulnerability of this population, one would reasonably expect the BOP to initiate compassionate release on their behalf more frequently. Yet Commission data indicate that, in Fiscal Year 2025, only 16 prisoners of the 394 granted compassionate release motions were brought by the Director of the BOP. That only 16 granted motions originated with the BOP more than a decade after the Inspector General's recommendation—and after Congress sought to increase the use of compassionate release through the First Step Act—is difficult to reconcile with either development. Though the Commission cannot directly remedy the BOP's practices in this regard, it can and should approach revisions to U.S.S.G. § 1B1.13 with a full understanding of the problem before it. The current challenge is not overuse of compassionate release, but profound underuse.

Looking beyond the aging prisoner population, it must be underscored that all forms of second-look sentencing recognize every prisoner's capacity for human change and redemption. Even after eliminating parole, Congress preserved sentence reduction authority precisely because it recognized the indisputable fact that people can change and mature. Given that federal sentences of 10, 20, or 30 years—or even life imprisonment—are routinely imposed, it is inevitable that many prisoners will experience profound changes in their health or family circumstances, significant rehabilitation, or other consequential developments in their lives that may constitute "extraordinary and compelling circumstances" meriting compassionate release. A justice system that fails to recognize those changes approaches the barbaric. Compassionate release exists precisely to ensure that the justice system has an opportunity to assess whether continued imprisonment remains just and necessary in light of those changed circumstances.

Significantly, even as the Supreme Court determined that the existing statutory terms for sentence reductions do not include arguments based on the nonretroactive amendment to 18 U.S.C. § 924(c) at issue in *Rutherford* or an attack on a conviction's validity, it made abundantly clear that 18 U.S.C. § 3582(c)(1)(A), through the statutory label of "compassionate release" in the First Step Act, Congress "highlights its focus on granting mercy."[10] The *Rutherford* and *Fernandez* opinions emphasize that the primary focus of many compassionate release grants will involve relief based upon changes in a person's circumstances or other developments warranting a sentence reduction.

[10] *Fernandez*, *supra*, slip op. at p. 11.

Further, explained the Supreme Court, Congress's express direction that "rehabilitation alone" cannot constitute an extraordinary and compelling reason "suggests nothing about what other reasons might qualify as 'extraordinary and compelling.'"[11] And rehabilitation still may—and often should—form part of the totality of circumstances courts consider when ruling on sentence reduction motions. In fact, the Court in *Fernandez* expressly noted that "Congress has permitted the Sentencing Commission to treat a defendant's rehabilitation as a relevant consideration in granting compassionate release."[12] Likewise, while the type of statutory change that Congress has expressly made nonretroactive, such as the § 924(c) amendment at issue in *Rutherford*, cannot serve as an extraordinary and compelling reason, either alone or in combination with other factors, it may still, where otherwise permissible, serve as a "relevant consideration" in determining the extent of a reduction once a defendant has otherwise established extraordinary and compelling reasons.

Thus, in responding to *Rutherford* and *Fernandez*, the Commission should recognize that these decisions establish distinct limitations on compassionate release. As discussed above, *Rutherford* forecloses reliance on the disparity created by Congress's expressly nonretroactive amendment to § 924(c) as an extraordinary and compelling reason. *Fernandez* separately holds that compassionate release may not be used as a vehicle to attack the validity of a conviction—a form of relief Congress has channeled through 28 U.S.C. § 2255. Neither decision, however, forecloses the Commission from identifying other extraordinary changes in a defendant's personal circumstances, experiences during incarceration, or other sentencing-related circumstances. To qualify as extraordinary and compelling, such circumstances must not themselves rely on claims Congress has made nonretroactive or on a collateral attack on the validity of a conviction. Indeed, the Supreme Court specifically declined to address "whether there are reasons beyond personal circumstances that could qualify as 'extraordinary and compelling.'"[13] More generally, Tzedek submits that the Commission should adopt a robust view of "what should be considered extraordinary and compelling reasons for a sentence reduction," 28 U.S.C. § 994(t), because satisfying the Commission's policy statement is a necessary but not sufficient condition for relief; courts must also consider the applicable 18 U.S.C. § 3553(a) factors.

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[11] *Rutherford, supra*, slip op. at p. 13.
[12] *Fernandez*, *supra*, slip op. at p. 11.
[13] *Rutherford*, slip op. at p. 10.

Importantly, nothing in this proposal diminishes the paramount importance of protecting public safety. Compassionate release should remain available only where, after a comprehensive assessment of the defendant's circumstances and the overall purposes of sentencing, a court determines that compassionate release is consistent with public safety.

Ultimately, compassionate release is not an exception to justice; it is an essential component of justice. A justice system that cannot extend compassion when compassion is warranted is incomplete. Put differently, when the justice system extends compassion to incarcerated individuals, it affirms their humanity. That, in turn, fosters redemption and personal transformation—goals that lie at the heart of a just system of punishment. This mechanism has been deliberately preserved because our sentencing system recognizes that people change, circumstances change, and continued imprisonment can, over time, cease to serve the very purposes of sentencing. The Commission should ensure that its policy statement fully reflects that principle.

To effectuate these suggestions and to ensure that courts consider all reasons that might warrant compassionate release, the Commission should exercise its authority under 28 U.S.C. § 994(t) to promulgate the following amendments to § 1B1.13:[14]

- Add a new subsection (b) as follows:

  (b) Reasons That Do Not Alone Qualify as Extraordinary—Grounds advanced in support of a sentence reduction that functionally seek retroactive application of a statutory change Congress expressly made nonretroactive, or that functionally attack the validity of a conviction, do not qualify as "extraordinary" under 18 U.S.C. § 3582(c)(1)(A). If a defendant otherwise establishes extraordinary and compelling reasons, a statutory change that Congress expressly made nonretroactive may, to the extent permitted under 18 U.S.C. § 3553(a), inform the extent of any sentence reduction.

- Redesignate the prefatory language in current subsection (b) as subsection (c) as follows:

[14] This proposed revision draws, with significant modifications and additions, on Jonathan J. Wroblewski, What Compassionate Release Could Still Be, Sentencing Matters (June 4, 2026), https://sentencing.substack.com/p/what-compassionate-release-could.

EXTRAORDINARY AND COMPELLING REASONS—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof . . .

- Revise the current subsection (6) as follows:

  Totality of Circumstances After a Substantial Period of Incarceration.—Where a person has served more than 50 percent—and at least four years—of the imposed term of imprisonment, substantial changes in that person's circumstances, considered in their totality, may constitute extraordinary and compelling reasons. Relevant considerations may include new personal or family circumstances, experiences during incarceration, age, medical condition, contributions to the community, evidence that the sentence reflects a miscarriage of justice, rehabilitation, and any combination of these or other pertinent factors.[15]

This modification embraces the guiding principle that in considering a compassionate release application, courts must evaluate the totality of a defendant's circumstances as they exist at the time of the motion, rather than focusing on any single factor in isolation, rigid categories, or mechanical rules. Age, deteriorating health, extraordinary family circumstances, broad legal and policy developments such as relevant new constitutional rulings (which are not explicitly foreclosed by clear congressional enactments), sentencing disparities, evidence of exceptional post-sentence achievement, and other significant

[15] Tzedek includes as one of the non-exclusive bases for finding extraordinary and compelling circumstances that a "defendant's sentence reflects a miscarriage of justice," mindful of the Supreme Court's recent decision in *Hunter v. United States*, 608 U.S. ___, June 18, 2026. *Hunter* held that an agreement not to appeal a sentence is unenforceable when it would result in a miscarriage of justice, meaning that it would leave in place the kind of egregious error that would bring the judicial system into disrepute. The Court declined to say precisely what constitutes such a miscarriage of justice but that "some faults in sentencing can" constitute the kind of error likely to discredit the judiciary. *Id*. at 11-12. Justice Gorsuch's concurrence, joined by Justices Sotomayor and Jackson, posited that errors that "threaten to require individuals to linger longer in federal prison than the law demands" may be the kinds of errors that promote a "rightly diminished view of the judicial process and its integrity" such as would vitiate an appeal waiver. *Id*. Gorsuch, J. concurrence, p. 11. Tzedek submits that where a defendant's sentence reflects a miscarriage of justice, compassionate release may be appropriate when viewed in combination with other factors.

developments should not be viewed as isolated silos. Rather, the policy statement should make clear that these considerations may reinforce one another and, when viewed collectively, establish extraordinary and compelling reasons warranting relief through a comprehensive assessment of the defendant's current circumstances.

Conclusion

The Commission has an important opportunity during this amendment cycle to preserve compassionate release as a meaningful mechanism for proportionality, individualized justice, and second-look review while remaining fully faithful to the Supreme Court's recent decisions and the paramount importance of public safety. By adopting a totality-of-the-circumstances framework, the Commission can ensure that § 1B1.13 recognizes not only accountability, but also redemption, changed circumstances, and the enduring capacity for human growth.

Beyond compassionate release, the substantial reforms summarized in the first section of this letter are no less important priorities for the Commission to address well-established deficiencies in the application of the Guidelines.

Tzedek applauds the Commission's continued openness to public participation and respectfully submits that this amendment cycle presents an important opportunity to strengthen compassionate release and advance a more humane, evidence-based, and just federal sentencing system. Tzedek deeply appreciates the opportunity to share its perspective on the priorities for the 2026-27 cycle and looks forward to providing additional input and support for the Commission's work.

Sincerely,

Rabbi Moshe Margaretten[16]
President

[16] **Tzedek gratefully acknowledges the instrumental assistance and counsel of Norman L. Reimer and Professor Douglas A. Berman in the preparation of this submission.**

Exhibit ‘A’

TZEDEK
ASSOCIATION

Save A Life, Save A World

By the Grace of G-d

July 15, 2024

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities

Dear Judge Reeves and Members of the Commission,

Tzedek Association welcomes the opportunity to comment on the Commission's proposed priorities for the cycle ending May 1, 2025. Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian cases around the globe. Tzedek is committed to championing the civil rights of those mistreated by the criminal justice system, empowering individuals to be productive citizens and aiding the less fortunate. Tzedek seeks a society that values compassion and fairness.

In recent years, Tzedek has championed ground-breaking reforms such as the First Step Act and the provisions in the CARES Act, which allowed for home-confinement for incarcerated individuals vulnerable to COVID-19 based on CDC criteria, as well as other measures to ensure that the criminal justice system embraces fundamental core values that reflect a belief in the unbounded human capacity for atonement and redemption. Both the First Step Act and the CARES Act stemmed from efforts initiated by Tzedek. They reflect Tzedek's view that a criminal justice system worthy of our nation must temper the need for punishment with compassion and must be informed by empirical evidence rather than reflexive

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and arbitrary policies and mechanisms that ignore that innate human capacity for growth and change.

Introductory Comment Regarding the Current Priority Cycle

Tzedek commends the Commission for noting that this cycle coincides with the 40th anniversary of the Sentencing Reform Act of 1984 (SRA) and for its expressed intent to focus on furthering the array of statutory purposes and missions set forth in the Act, including the various responsibilities entrusted to the Commission by such statutes as 28 U.S.C. § 991, 28 U.S.C. § 995, and 18 U.S.C. § 3553. Tzedek construes this expression of intent as signifying that the Commission is interested in broad, if not bold, thinking and input that challenges the status quo, especially those areas in which federal sentencing practices can be considerably improved and corrected. Indeed, the criminal justice system today requires radical change, a complete paradigm shift. This cycle presents a critical opportunity to correct fundamental flaws that have plagued federal sentencing practices for the decades since the enactment of the SRA. If not now, when?

Although the federal prison population shrank somewhat over the last decade, especially during the peak of COVID-19, this 40th anniversary of the SRA presents an auspicious occasion to reflect upon and address the vast expansion of the federal prison population since its enactment. It defies logic that the United States is the "Land of the Free" and yet the nation incarcerates more people both per capita and quantitatively than any other country in the planet. Taking away a person's freedom is government's greatest power short of warfare; it should be exercised with a lot more care and restraint than it is today.

Tzedek urges the Commission to particularly note the relative scarcity of non-custodial sentences, the lack of empirical data showing that specific prior criminal adjudication is predictive of recidivism, and the irrefutable scientific evidence that has emerged concerning age and brain development. This evidence shows that even for more serious offenses, young people mature and age out of antisocial behavior and establishes the efficacy of diversionary programs to address the underlying pathologies that lead to criminal behavior as viable alternatives to lengthy incarceration. It is equally important to note the extraordinary increase in the elderly population, a result of irrationally long sentences that fail to account for the undeniable evidence that, for the most part, the continued incarceration of the elderly is an extremely costly endeavor with de minimis public safety benefits due to the low recidivism risk.

This anniversary is also an appropriate opportunity to recognize the established fact that minorities tend to endure disproportionate harshness under the sentencing process that has evolved since the enactment of the SRA.

Given that context, Tzedek encourages the Commission to use this cycle to initiate bold and transformative action to rectify fundamental flaws in the sentencing process and ensure that the latest scientific and empirical data is reflected in sentencing policy. Tzedek notes that even in an era of unprecedented ideological division, criminal justice policy reform has drawn interest and support from across the ideological and political spectrum. Many important national criminal justice reforms, including the most significant recent federal criminal justice reform legislation, the First Step Act, enjoyed broad bipartisan support, precisely because of an emerging consensus about the limits and harms of overly harsh, inflexible, and excessively punitive approaches to sentencing.

The Commission should approach this cycle armed with empirical data that shows that modifying harsh and rigid sentencing practices decreases recidivism and crime, and thereby contributes to public safety and heartened by the fact that there is broad ideological support for sound criminal justice reform. And it should do so recognizing that purging irrational disparities, which disproportionately burdens marginalized communities and fosters universal distrust, if not outright disdain for the criminal justice system, is a worthy goal.

A Menu of Proposed Priorities to Combat Excessive Harshness and Unwarranted Disparity

From Tzedek's perspective, an unfortunate legacy of the SRA has been 1) the proliferation of excessively punitive sentences and 2) systemic disparities that manifest themselves in various phases of the criminal justice process. With respect to sentencing, both these overarching problems are exacerbated by the current version of the United States Sentencing Guidelines (U.S.S.G.).

It is important to recognize that the flaws that Tzedek urges the Commission to address are intricate and interconnected. There are many contributing factors to these two foundational problems and thus there are many steps necessary to correct them. Tzedek also recognizes that the Commission and the U.S.S.G. can only go so far in addressing a criminal justice system that reflects a fundamental shift to ever increasing prosecutorial domination of sentencing outcomes at the expense of judicial discretion. The adoption of mandatory minimum sentences, the fact that charging decisions and plea offers are opaque and largely beyond the reach of the

judiciary, and that the most ubiquitous and powerful vehicle to moderate sentences (a downward departure for "substantial assistance") is solely within the control of the prosecution are matters largely beyond the power of the Commission to rectify. Additionally, well-established principles of federal conspiracy law and a growing tendency of Congress to enact criminal statutes without due regard for traditional notions of *mens rea* are similarly beyond the Commission's reach.

Nevertheless, there are many steps that the Commission can take to ameliorate many of the most egregious outcomes that arise from these trends. And, of course, to the extent that the Commission recognizes that certain laws contribute to unwarranted harshness and disparity, the Commission can and should exercise its authority pursuant to 28 U.S.C. § 994(w)(3) to recommend legislative reform.

To provide important context for the proposed priorities described below, it is useful to define what Tzedek references when it refers to "unnecessary harshness" and "systemic disparities."

The SRA establishes this benchmark for the imposition of sentence: "The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a). The Act then goes on to direct the court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1) and four distinct objectives of a sentence. 18 U.S.C. § 3553(a)(2)(A)-(D).

Tzedek joins the increasing array of stakeholders and observers who believe that sentences that far exceed what is necessary are routinely imposed, without appropriate regard for empirical data that shows that overly punitive sentencing is unnecessarily detrimental and destructive to individuals, families, and communities, and fails to promote public safety. Excessive harshness arises at various points in the sentencing process prescribed by the Application Instructions set forth in U.S.S.G. § 1B1.1. The proposals below are intended to address unwarranted severity in the calculation of base offense level, which in many cases rely upon false and misleading benchmarks to assess the severity of the crime, the application of adjustments related to acceptance of responsibility and obstruction of justice, the determination of criminal history, eligibility for various sentencing options, and misapplication and underutilization of U.S.S.G. departures.

Tzedek defines "systemic disparity" as a broad concept that not only embraces concerns that excessively harsh sentences tend to impact racial and ethnic

minorities more than others, but also includes irrational distinctions that overstate a person's criminal responsibility both individually and in relation to others whose criminal conduct is more severe – even in the same or a related case - but results in lesser punishment. These irrational distinctions arise from many factors, including inadequate consideration of criminal intent (*mens rea*), the use of arbitrary benchmarks to assess severity of the crime, unchecked prosecutorial charge and relevant conduct manipulation, the institutionalization of a "trial penalty," and a systemic failure to adequately consider mitigating factors.

The following menu of proposals seeks to address both excessive harshness and disparity, recognizing that these two outcomes are often inextricably interwoven in the application of the U.S.S.G. In some cases, the proposals overlap and in some cases, they are mutually exclusive. Tzedek's objective is to provide the Commission with an array of suggestions for its consideration. While some of the suggestions are quite specific, where the proposed revision clearly addresses a specific problem, others are presented more generally with the expectation that if the Commissions deems the proposal worthy of consideration, it will invite more specific input as the cycle unfolds.

Reformulate Base Offense Level Calculation for Theft and Drug Offenses

The single greatest driver of excessive harshness and disparity in federal sentencing derives from the formulaic approach to base offense level calculation. Driven by the application of arbitrary adjustments based on external factors that often bear no relation to an individual's true culpability, the U.S.S.G. establish presumptive sentences that are disproportionately harsh and overly excessive.[1] In particular, the use of the loss table for economic offenses in U.S.S.G. § 2B1.1 and the Drug Quantity Table under U.S.S.G. § 2D1.1 should be replaced. Tzedek believes that the current focus on quantification serves as an unreliable and unjust proxy for individual culpability and factors set forth in 18 U.S.C. § 3553(a), which a court should consider in imposing sentence.

[1] For example, sentences that are in essence a life sentence for nonviolent offenses are unacceptable. *See United States v. Rubashkin*, where a presidential commutation was granted to a man in his fifties who was sentenced to 27 years for fraud, a sentence "which many have called excessive in light of its disparity with sentences imposed for similar crimes." https://trumpwhitehouse.archives.gov/briefings-statements/president-trump-commutes-sentence-sholom-rubashkin/

By now the stories of individuals whose criminality is vastly overstated through the application of these provisions are well-established and are surely recognized by the Commission. Whether it is the individual who is recruited to participate in a narcotics conspiracy, with absolutely no knowledge of the quantities involved, or the mid-level bookkeeper, whose false entries contribute to a fraud whose scope is beyond her knowledge, the draconian presumptive sentences can be wholly excessive and disproportionate. It is time for the Commission to look at alternative approaches.

While in previous cycles Tzedek has proposed a revision of the loss table to rein in overly harsh sentencing,[2] a better approach is to identify key factors which a judge may consider in determining an individual's culpability. In the area of fraud, this approach is endorsed by the Task Force on the Reform of Federal Sentencing of Economic Crimes created by the *Criminal* Justice Section of the American Bar Association.[3] While the ABA proposal retains some consideration for loss value, it substantially shifts the emphasis to consideration of other factors reflecting individual culpability, an approach that is far more likely to result in a reasonable and proportionate sentence. And notably, to the extent that "loss" remains a relevant factor, the ABA proposal significantly adjusts the loss table to address the fact that the loss values in the current Guideline established years ago are poorly calibrated.

Tzedek similarly urges the Commission to formulate a completely revised culpability-focused approach to the determination of the base offense level for drug offenses. Given the pervasive statutory mandatory minimums that apply to many drug offenses, there is virtually no justification for the mechanistic application of the Drug Quantify Table to enhance the base level, rather than a more individualized assessment of culpability. The Commission should completely end the practice of determining the base level for drug offenses through a reference to the weight of the drugs and replace it with a guideline that directs the court to look at an array of factors to assess individual culpability. In combination with the next proposal, this would establish a regime in which any sentence for a nonviolent

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[2] *See* Tzedek Association, Public Comment to the U.S. Sentencing Commission's Request for Comment on Proposed Priorities for Amendment Cycle 2023-2024 (August 1, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=195

[3] *See* A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes (November 10, 2014), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf

controlled substance offense that did not carry a statutory minimum would be capped at 5 years, absent a substantial criminal history.

Establish Presumptive Maximum Sentences

As noted above, 18 U.S.C. § 3553(a) provides that a "court shall impose a sentence sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in the Act. Despite this statutory directive to avoid excessive sentences, the severity of federal sentences has increased dramatically since the advent of the SRA. In 1986, the year before the U.S. Sentencing Guidelines became effective, only just over half of all federal sentences included some term of imprisonment;[4] in Fiscal Year 2023, according to Commission data, 92.4 percent of all federal sentences included a prison term.[5] And the prison sentences are too long. Countless commentaries, reports and studies advancing a wide array of reform proposals support the proposition that the U.S. incarcerates too many people for too long, despite increasing evidence that overly harsh sentencing has disparate impact on some populations and no corresponding public safety benefits.[6]

A range of factors contribute to undue sentence severity in the federal system because the U.S.S.G. are suffused with a vast array of often overlapping and severe enhancements, some of which are specifically addressed in this submission, but all of which contribute to disproportionately harsh sentences, especially for those who exercise the right to trial. Tzedek proposes that for most criminal conduct, especially when committed by those with either no substantial or minimal history of prior criminal conduct, the Commission should promulgate presumptive maximum sentences. Judges would retain the authority to sentence above these presumptive sentencing caps provided specific reasons for doing so can be

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[4] Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, *Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90* (June 1992), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf.

[5] U.S. Sentencing Comm'n, *2023 Annual Report and Sourcebook of Federal Sentencing Statistics*, Figure 6. https://www.ussc.gov/research/sourcebook-2023.

[6] *See*, e.g., Council on Criminal Justice Task Force, *How Long is Long Enough?*, March 2023, https://counciloncj.foleon.com/tfls/long-sentences-final-report/ (defining "long sentences" as prison sentences of 10 years or more); Vera Institute of Justice, *A New Paradigm for Sentencing in the United States*, February, 2023, https://www.vera.org/downloads/publications/Vera-Sentencing-Report-2023.pdf; *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, UMKC Law Review, Vol. 87:1, 2018, also available at The Sentencing Project, https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/.

articulated based on factors that should be tied to the specific individual and the specific conduct which is the subject of the conviction.

Tzedek proposes a two-tier cap approach:

Category 1: 15-year presumptive maximum for all federal crimes other than acts of terrorism, treason, murder, rape, or any crime of violence if the defendant was previously convicted of any prior state or federal felony.

Category 2: 5-year presumptive maximum if the defendant is not convicted of a crime of violence, has no substantial criminal history, and makes efforts to ameliorate the harm caused by the criminal conduct, such as through restitution or community service, or takes other steps to reduce recidivism risk, such as successful completion of treatment, counseling and/or participation in a restorative justice program.

As necessary to effectuate these presumptive maximum categories, Tzedek urges the Commission to propose an advisory list of aggravating factors that may provide the basis for a court to be authorized to impose a sentence longer than the presumptive maximum and that the Commission recommend that Congress amend 18 U.S.C. § 3553 to provide the necessary statutory authority to implement the presumptive maximum sentence construct, notwithstanding other preexisting statutes.

Offense Level 43 Reform

Tzedek supports a specific reform to Base Offense Level calculation in the sentencing table to amend the U.S.S.G. to remove the recommendation that a base level of 43 should necessarily result in a life sentence. A defendant can get to that base level because of the severity of the conduct (e.g. First Degree Murder, Unlawful Manufacturing, Importing, Exporting or Trafficking, (if resulting in death or serious bodily injury and the defendant had prior conviction for a similar offense), and Treason (if tantamount to waging war against the United States)). But a defendant can also get to that level through aggravating factors based on such factors as drug weight, role in the offense, etc.

Tzedek joins other groups who share the strong view that life sentences should be spared for the most heinous of crimes, should almost never be imposed for non-violent offenses, and clearly should not be mandated for those with little or no criminal history. Accordingly, the Commission should amend the U.S.S.G. to

eliminate the level 43 life recommendation and substitute a sentencing range, especially for those with a Criminal History of less than IV.

Criminal History

Just as the mechanistic approach to loss calculation and drug quantity can distort and often exaggerate an individual's criminal responsibility, so too can the point system approach to criminal history lead to distorted outcomes. These distortions arise from multiple factors: variable sentencing practices among states, counties, and localities, which can result in arbitrarily overstated criminal history based upon local sentencing practices; over-policing of certain populations and communities, which results in higher criminal histories and therefore longer sentences for some groups; failure to adequately account for age at the time of the prior offenses, except for limited circumstances; failure to recognize that prior imprisonment itself may have contributed to subsequent criminality; and countless more intangibles such as the offender's current age, family circumstances, and employment history.

Tzedek proposes that the current point system be replaced with more adaptive categories that will provide the sentencing judge with an opportunity to make a qualitative assessment of a person's criminal history. To provide greater flexibility within a criminal history range and to underscore the importance of a court making a qualitative rather than a quantitative assessment of criminal history, Tzedek suggests that the current model, which has six criminal history categories, be condensed into four categories: 1) no or limited criminal history; 2) low criminal history; 3) moderate criminal history; or 4) extensive criminal history. The Commission should draw on its extensive recidivism research to promulgate empirically sound criteria to aid courts in making the necessary assessment. These criteria should include an evaluation of the age at the time of the prior offenses, the nature of the offense and the extent to which the conduct evinced a motive for personal gain or reflected impulsive or reactive behavior, the extent to which the offender intentionally caused significant harm to others, whether prior sentences included treatment or any ameliorative component to address underlying pathologies, and other criteria that objectively justify enhanced punishment.

To aid in the promulgation of these criteria, Tzedek urges the Commission to undertake a multifaceted study to assess whether and to what extent criminal history scoring is assessing points for past conduct that has little or no additional risk-predictive value. Such a study should also assess whether unique personal factors, such as age, employment history, family circumstances, community

support, and medical and mental health issues are more risk-predictive than a mere point-based quantification of criminal history standing alone.

Ameliorating the Trial Penalty

As reported in the 2023 Sourcebook, 97.2 percent of all cases were disposed of by a guilty plea.[7] This is relatively consistent with data from the past several years. It is generally now well-established that a principal reason why trials have virtually disappeared from the federal criminal justice system is a phenomenon known as the trial penalty.[8] The trial penalty has essentially so burdened the fundamental right to a trial and is so costly to the accused – in terms of the additional years of imprisonment one faces if convicted after trial – as to transform the system into a plea-bargaining assembly line. Indeed, if one were to eliminate from the data those cases that proceed to trial where the crime is so heinous that the government makes no offer, the frequency of meaningful trials is even more miniscule. It is beyond the scope of this submission to detail the many reasons why the loss of criminal trials, and the accompanying pre-trial litigation through which courts and juries can exercise a check on government excess, is detrimental to justice. Suffice it to say that this system of pleas is clearly not what was envisioned by the founders and is a development that has been decried by advocacy groups across the ideological spectrum.[9]

The various studies of the trial penalty rightly note that one of, if not the main driver of the trial penalty is the government's unilateral control over charging decisions and the impact of mandatory minimum sentences and the U.S.S.G., even since they were rendered advisory. Prosecutors alone can select the charges and have the power to determine what conduct to urge the court to consider in imposing sentence. It is established practice for prosecutors to bring superseding indictments, add new charges and threaten to withdraw prior offers for those who

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[7] *See:* FY 2023 Sourcebook, *supra*, note 5, Table 11. https://www.ussc.gov/research/sourcebook-2023

[8] American Bar Association/Criminal Justice Section, *Plea Bargaining Task Force Report*, 2023, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf; Federal Sentencing Reporter, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, Vol 31, Issue 4 -5, April/June 2019, https://online.ucpress.edu/fsr/issue/31/4-5; National Association of Criminal Defense Lawyers, *The Trial Penalty on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf

[9] *Id*., especially, Federal Sentencing Reporter, *Tyranny of the Trial Penalty.*

do not capitulate. It is also routine practice for prosecutors to extract all manner of waivers as the price of the plea, thereby preventing legitimate issues that implicate other constitutional rights from ever being subjected to judicial review.

While some of the contributors to the trial penalty are beyond the scope of the Commission, there are many factors that could be alleviated by the Commission. One such contributor has been the use of acquitted conduct to enhance a sentence. Tzedek lauds the Commission for partially addressing this factor in the last amendment cycle. Tzedek now urges the Commission to take additional steps and tackle several other factors, which overly burden the right to trial and incentivize even the arguably innocent defendant to "cut a deal" rather than risk the consequences of the trial to which they are theoretically entitled.

- **Relevant Conduct**

Last year, when Tzedek commented on the proposed revisions to address the use of acquitted conduct, it urged the Commission "to consider in future cycles reforms that address the pernicious impact of sentencing based upon uncharged conduct."[10] Tzedek now urges the Commission to tackle the extraordinary harshness and disparity that have arisen from the use of uncharged conduct under the rubric of determining Relevant Conduct pursuant to U.S.S.G. § 1B1.3.

The context for this proposed reform is the indisputable fact that the government pervasively and routinely uses the threat that a sentence will be enhanced with uncharged conduct to coerce defendants to plead guilty. Because of the operation of the U.S.S.G., the government exploits the current process that requires a court to consider relevant conduct under U.S.S.G. § 1B1.3 and directs the court to enhance the sentence, without the evidentiary safeguards of trial, if the other conduct is established by a preponderance of the evidence pursuant to U.S.S.G. § 6A1.3. This process makes a mockery of the fundamental constitutional right to a trial by jury. That right is so essential that it is mentioned multiple times in the Constitution and the Bill of Rights (e.g. Art. III, § 1 [3]; Amendment VI; Amendment VII). Indeed, even in the context of civil matters, the Supreme Court in the term just concluded struck down a statute that vested the executive branch with the power to impose a civil fine for fraud rather than afford the defendant the constitutional right to a jury

[10] *See* Letter from Tzedek Association, *Re: Proposed 2023-2024 Amendments and Issues for Comment* (February 20, 2024), https://www.ussc.gov/policymaking/public-comment/public-comment-february-22-2024#pa3 531, 533-53

trial.[11] It is hard to fathom and, in Tzedek's view, unacceptable that the federal criminal justice system has evolved to the point where one can be severely punished for conduct absent any finding or admission of guilt and upon the low preponderance of the evidence threshold.

While there are cases where the individual's responsibility for the full scope of the criminality is embraced within the count of conviction and the jury's finding of guilt beyond a reasonable doubt, in virtually all multi-defendant prosecutions, especially when (as is usually the case) there is a conspiracy charge, that is not so. The operation of § 1B1.3, which *inter alia* involves "all acts and omission reasonably foreseeable in connection with that criminal activity" (§ 1B1.3(a)(1)(B), and that provision's interaction with § 6A1.3 (and the accompanying commentary), which allow a court to rely on assertions without the procedural protections of a trial on a finding of "probable accuracy," truly allow the tail to wag the dog. Further, the current approach to uncharged conduct also implicates important concerns with respect to the evisceration of *mens rea* requirements, which are addressed later in this submission.

In sum, the Commission's efforts to adopt a real offense as opposed to a charge offense sentencing model to prevent the prosecution from "influenc[ing] the sentence by increasing or decreasing the number of counts in the indictment"[12] has been frustrated by how relevant conduct leads to the same problems of undue prosecutorial control over sentencing factors. In actuality, the process is even worse in terms of promoting excessive harshness and unwarranted disparity because it permits prosecutorial arguments that lead to sentencing enhancements based on conduct that is neither charged and nor proved beyond a reasonable doubt. Tzedek firmly believes that the U.S.S.G. should be restructured to minimize this bludgeon, which is routinely deployed to assert overbearing leverage to extract guilty pleas and to punish those who assert their right to a trial.

Tzedek urges the Commission to think broadly about how best to address this fundamental flaw. There are numerous possible approaches, each of which implicates other aspects of the current sentencing regime. For example, one approach might be to revise the U.S.S.G. to have far fewer offense levels, but with considerably wider ranges, essentially evolving into a system where the charged conduct is the anchor. If that were the case, then a solution that will constrain how

[11] *SEC v. Jarkesy,* No. 22-859 (S. Ct. June 27, 2024).
[12] *See* U.S. Sentencing Comm'n, Real Offense v. Charge Offense, Guidelines Manual 2023, Ch. 1, Pt A(1)(4)(a).

uncharged conduct drives the sentence might be to amend § 1B1.3 to limit relevant conduct to adjustments with the guideline range. Broader ranges, of course, could run afoul of the statutory 25 percent rule (28 U.S.C. § 994(b)(2)), and therefore would likely require legislative action.

Another possibility could be to revise §1B1.3 to limit the scope of any increase to the guideline established by the application of U.S.S.G. Chapter 2 for the offense conduct charged and admitted or proved at trial.

Yet another possibility is to amend U.S.S.G. § 6A1.3 to provide that when a relevant fact in dispute relates to uncharged conduct the court may not rely upon that fact unless admitted or found beyond a reasonable doubt.

Any of these approaches, or others, are obviously significant change - but significant change is necessary if the Commission is to curtail the pervasive trial penalty. Accordingly, Tzedek urges the Commission to prioritize a reconsideration of how uncharged and unproved conduct is taken into consideration and invite thoughtful and comprehensive proposals as part of the current amendment cycle.

- **Acceptance of Responsibility**

Not all individuals who proceed to trial do so as an act of defiance or stubborn denial. There are cases where an individual has a legitimate defense. This is especially true when the ultimate issue relates to intent. If the right to a jury trial is to have meaning, it should not be that merely because one puts the government to its constitutional duty to prove its case, they are automatically disqualified from receiving a third point for acceptance of responsibility.[13] Accordingly, Tzedek proposes that the Commission amend U.S.S.G. § 3E1.1 to provide that a court may award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

Additionally, in practice, proceeding to trial is not just about the third point, it about all three of the acceptance points. Proceeding to trial will almost always mean not getting any points off, especially since U.S.S.G. § 3E1.1 App. N.2

[13] This is all the more important if one believes that trial should be the norm and the default for the Government to take away somebody's freedom. In our system, a defendant is allowed to go to trial even if they lack a good defense and even if defiant or stubborn, and a decision to exercise a constitutional right alone should not be the basis for additional criminal punishment. Nor should proceeding to trial automatically support a finding that a person is without remorse or recognition of wrong-doing.

provide that it will be the "rare situation []" where a person "may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial," and unequivocally states that the adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial…" Tzedek believes this approach is flawed.

First, there is nothing inherently inconsistent in maintaining that the government cannot prove its case and yet sincerely express regret and accept responsibility for one's conduct. Second, it is fundamentally inconsistent with the constitutional right to a trial to cast that right as merely a "burden" that the government must shoulder rather than the norm that is contemplated by the Constitution. Third, while there certainly may be circumstances where a defendant's behavior or failure to express remorse may justify denial of an acceptance adjustment, Tzedek believes that the Commission should not put its finger on the scale with an Application Note that clearly states that denial of acceptance should be the norm whenever a defendant goes to trial.

Accordingly, Tzedek proposes that the Commission strike the first sentence of Application Note 2 to U.S.S.G. § 3E1.1 and strike "[i]n rare situations" from the beginning of sentence two. Additionally, the last sentence should be amended to make clear that post-trial statements or conduct, including the completion of any treatment programs, payment of restitution or other manifestations of remorse may also be considered in determining whether to grant an acceptance reduction following a conviction at trial.

- **Obstruction**

It is common practice to assess an obstruction enhancement when a defendant testifies at a hearing on a motion to suppress evidence or at trial. This practice chills fundamental constitutional rights by imposing an unwarranted tax merely for presenting a claim for consideration by the court or jury. In a sense, it uniquely places the defendant in a "double or nothing" dilemma. If the court or jury rejects their version, they not only lose the motion or the trial, but they get an additional penalty merely for presenting their version.[14]

The imposition of an obstruction enhancement <u>solely for testifying</u> should be contrasted with situations in which a defendant does more than provide their own

[14] Note that no corresponding penalty is imposed upon the government or the government's witnesses when their witnesses are not believed, or a jury renders a not guilty verdict.

account by taking independent steps to obstruct or impede justice, such as by presenting false evidence or any of the numerous others way that a defendant or a subject of an investigation may affirmatively engage in efforts to frustrate the administration of justice. In those situations, the assessment of the enhancement remains appropriate.

Accordingly, Tzedek proposes that the text of U.S.S.G. § 3E1.1 should be amended to make clear that the obstruction adjustment should not be assessed solely for testifying at a hearing or trial in support of the defendant's rendition of the facts. Similarly, Application Note 2 should also be amended to reflect this principle.

- **Departures for Substantial Assistance**

There may be no greater contributor to irrational disparity in federal sentencing practice that the current statutory and U.S.S.G. framework that vests the government with the sole power to seek a downward departure for a defendant who provides substantial assistance.

At the outset, Tzedek notes that as a matter of fundamental principle, there is something profoundly disturbing about a system of justice that pervasively relies upon the testimony of cooperating witnesses to initiate or buttress investigations and/or prosecutions of others. Further, courts, scholars and experience teach us that testimony of such witnesses is often unreliable.[15] Indeed, false testimony from cooperating witnesses is a major contributor to wrongful convictions in the very small subset of criminal cases in which DNA evidence is available to support an eventual exoneration.[16] For cases in which there is no biological evidence, which is the case the overwhelming majority of federal prosecutions, it is virtually

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[15] *See Giglio v. United States*, 405 U.S. 150 (1972); *On Lee v. United States*, 343 U.S. 747, 757 (1952); *United States v. Bernal Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 108, 108 (2006); Schatz, DeLoach, Hillgartner, Fessinger, Wetmore, Douglass, Bornstein, and LeGrant, *The Truth About Snitches: An Archival Analysis of Informant Testimony*, Psychiatry, Psychology and Law, (Nov. 10, 2020), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9090405/

[16] *See* Innocence Project, *Unregulated Jailhouse Informant Testimony Deeply Harms Our System of Justice*, https://innocenceproject.org/informing-injustice-the-disturbing-use-of-jailhouse-informants/ (last visited July 11, 2024), (False informant testimony contributed to nearly one in five of the 375 DNA-based exonerations); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 744 (2016) (The use of informant testimony is so pervasive throughout the criminal legal system, but only a fraction of wrongful convictions are challenged postconviction.)

impossible to establish the extent to which cooperator testimony contributes to an unwarranted conviction.[17]

Notwithstanding these concerns, Tzedek recognizes that the government use of and reward for cooperation is a key element of the current federal criminal justice system. According to the data from 2023, 10.2 percent of all sentences imposed involved U.S.S.G § 5K1.1 motions, with 100 percent of those sentences beneath the guideline range. The mean decrease in those cases was a sentence reduction of 56.3 percent.[18] The current application of this incredible power to avoid both mandatory minimum sentences and guideline sentencing ranges is highly problematic. There are all too many cases in which the determining factor as to who gets this benefit turns on such arbitrary factors as 1) who gets to the government first;[19] 2) who gets an attorney that is more inclined to promote or recommend an early guilty plea and cooperation rather than an attorney who is more deliberative and committed to assessing the evidence before providing a recommendation to plead and cooperate; or 3) who has the most information to offer.

The first two of these factors are determined by arbitrary factors that have little or nothing to do with an individual's state of mind and level of culpability. And the third factor is a manifestation of the most abusive aspect of the substantial assistance departure, namely that the most culpable defendants are often in the best position to provide truly substantial assistance and the least culpable are in the worst position. The Commission is no doubt aware of the many cases in which more culpable defendants cooperate and receive far lesser sentences that other co-defendant who ranked lower in the criminal enterprise, especially when the less culpable are convicted after trial.

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[17] The Guidelines, government, and judges should also pay attention to how dangerous cooperation often is and to how incredibly little the Federal Bureau of Prisons (BOP) does to actually protect cooperators. The Guidelines should remind judges of the possible dangers related to cooperation and to factor that in both in whether to depart for somebody who did not cooperate and/or for someone who did.

[18] *See* FY 2023 Sourcebook, *supra*, note 5, Tables 29 and 37., and Figure 9, (over the ten-year period of 2014 – 2023 § 5K1.1 departures have ranged between 10.2 and 12.87 percent of sentences imposed, only dropping below 10 percent during the peak COVID-19 years of 2020 and 2021).

[19] It must be noted that while it might be an indication of extreme contrition if a defendant cooperates early, it is just as likely that it may be because a defendant got counsel sooner than other co-defendants or that their attorney's workload was such that the attorney brought their client to the government before counsel could do so for co-defendants. That is hardly a legitimate basis to deprive the other defendants of access to this relief mechanism.

Additionally, there are some circumstances where an individual is willing to cooperate, but the government will not agree that the cooperation is substantial if it is does not include implicating a loved one, sometimes including parents, spouses, children or siblings. To mandatorily deny the departure when the sole reason why a cooperative individual cannot provide substantial assistance is a reluctance to cooperate against a close family member undercuts values which should be extolled rather than denigrated.

While it may seem like the current structure is necessary to ensure that the government secures cooperation to pursue other wrongdoers, those who practiced law before the U.S.S.G. know that this is not the case. Prior to the SRA, there was a time when the judge's authority to reduce a sentence pursuant to F.R. Cr. P. 35 was more than adequate to ensure that cooperators were rewarded. But it also left open the possibility that even a defendant who could not provide "substantial assistance" could nevertheless secure a sentence reduction for making good faith efforts to cooperate. There was no evidence that the government was unable to secure cooperation when the authority to determine who qualified for a benefit from cooperation was shared with the court.

Tzedek urges the Commission to address the disparity that results from the way the U.S.S.G. § 5K1.1 operates by amending the section to include a provision that would permit the court to grant a downward departure, notwithstanding the absence of motion by the government, provided a defendant made a good faith effort to cooperate, and that although the defendant could not truthfully provide substantial assistance it was not through any fault of the defendant.[20]

Tzedek further recognizes that pursuant to 18 U.S.C. 3553(e), a sentence below a mandatory minimum requires a motion by the government attesting to the defendant's substantial assistance.[21] Accordingly, Tzedek urges the Commission to recommend that Congress implement a statutory revision to similarly permit the court to consider imposing a sentence below a mandatory minimum by authorizing

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[20] Notably, there are sincerely held religious beliefs that certain people of faith have that prevent them from cooperating. Accordingly, courts should be advised to consider such a departure without motion of the government, when the defendant made a good faith effort in cases where the extent of their cooperation was limited by good faith religious boundaries.

[21] *S*ee *Melendez v. United States*, 518 U.S. 120 (1996) (holding that absent a motion by the government to depart from the mandatory minimum due to substantial assistance, a sentencing court lacks authority to do so).

a court to grant a departure where a defendant has made good faith efforts to provide substantial assistance.[22]

Aberrant Behavior Departure

There are circumstances in which a heretofore law-abiding individual, often with an exemplary background, encounters some kind of trauma which leads to criminal behavior. Where the behavior is impulsive, not well thought out and wholly out of character, it may be deemed aberrant. The current text of U.S.S.G. § 5K2.20 (b), however, limits the departure to "single criminal occurrence" or a "single criminal transaction." This tends to negate the other three criteria, most notably that the crime was of limited duration. Tzedek urges the Commission to amend this guideline to make clear that it is the limited duration, the lack of significant planning and the marked deviation from a law-abiding life, that is controlling – and that the mere fact that there were multiple acts is not a mandatory disqualifier.

***Mens Rea* Reform**

Mens rea, or criminal intent, is the moral anchor of a criminal code. An unintended consequence of the SRA, which has received far too little attention, is the extent to which the U.S.S.G. approach to sentencing has eviscerated traditional notions of *mens rea*.

The Honorable Judge Jack Weinstein & Fred Bernstein wrote[23]:

> "In the guidelines era, *mens rea* has been all but eliminated from the sentencing of drug offenders. This development is a disastrous departure from the great traditions of Anglo-American law…It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial…Punishing a defendant for facts she 'reasonably should have foreseen' is tantamount to punishing negligent conduct. This is a substantial departure from 2b1 traditional principles of *mens rea*. The Model Penal Code, for example, permits criminal liability

[22] As noted above, one of the more grotesques elements of cooperation is that often it requires a person to inculpate a loved one and thus choose between an extremely close relationship and longer prison terms. Accordingly, courts should be advised not to penalize a person when the inability to provide substantial assistance arises solely because it would require the inculpation of someone in such a relationship.

[23] Judge Jack Weinstein & Fred Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Federal Sentencing Reporter 121 (1994).

> only in cases of extreme negligence, and then only rarely. Moreover, punishments are 'proportional' to mental states."

The Honorable Judge Gerard E. Lynch similarly wrote[24]:

> "The guidelines significantly muddle questions of *mens rea* as applied to factors that can have a dramatic effect on culpability…The lack of attention to *mens rea* issues [means] the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases."

Tzedek believes that the need for the reform of *mens rea* is long overdue. As noted in the above sections, reliance upon arithmetic formulations related to loss amount or drug quantity, as well as reliance upon numerous other enhancing factors without proof of a defendant's knowledge and intent, are poor substitutes for an assessment of individual culpability.

Tzedek urges the Commission to review and revise the U.S.S.G. to ensure they properly incorporate and ensure courts properly consider *mens rea*, motive, purpose and personal culpability issues at sentencing. This review and revision of the U.S.S.G. should ensure: (a) that aggravating sentencing enhancements are imposed only in instances in which the defendant exhibited sufficient *mens rea* with respect to a sentencing factor to justify the corresponding sentencing enhancement, and (b) that the sufficient *mens rea* is adequately proven at the appropriate level of proof. The government should generally be required to prove a culpable state of mind with respect to any key offense facts that impact guideline ranges, such as the quantity of drugs or the amount of loss involved in the offense, and proof of a more culpable state of mind should generally be required for greater sentencing enhancements. This review and revision of the U.S.S.G. should also ensure that courts are fully and clearly instructed to consider any and all mitigating aspects of a defendant's *mens rea*, including motive, purpose, and personal culpability as a basis for a departure under the U.S.S.G.

Departures for Family Hardship

The incarceration of a parent can have devastating effects on children. Astonishingly, the number of minors with a parent in prison increased 500%

[24] Judge Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 Federal Sentencing Reporter 112 (1994).

between 1980 and 2000.[25] In 2007, there were 1.7 million children in America with a parent in prison, more than 70% of whom were children of color.[26] A study based on U.S. Department of Justice statistics found that between 1980 and 2019, the number of incarcerated women increased by more than 700% – and about 60% of these incarcerated women have children under age 18.[27]

Incarceration of a parent, and especially of a mother, is associated with a host of poor outcomes for children, including a substantially increased likelihood of being incarcerated themselves as adults. One study found that a majority of children with an incarcerated parent are subject to four or more risk factors.[28] Obviously, almost immediately, family income (already low among this group) drops sharply when a parent is incarcerated. About one-third of children with an incarcerated parent live in poverty.[29]

Children's behaviors also diverge dramatically from their peers who do not have an incarcerated parent. One study found that children with an incarcerated parent "had higher levels of problem behaviors between the 5th and 10th grades," with the differences being significant and increasing over the course of this time period. Moreover, "serious" delinquency – essentially, conduct that was otherwise a felony crime – was significantly higher for this group than for children without incarcerated parents.[30]

Overall, and not surprisingly, having an incarcerated parent was strongly correlated in children with increased rates of substance abuse, mental health disorders, violence, anti-social behaviors, learning disabilities, homelessness, and mental and physical health issues (including migraines, asthma, high cholesterol, depression, anxiety, and post-traumatic stress disorder).[31]

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[25] Leila Morsy & Richard Rothstein, *Mass incarceration and children's outcomes*, Economic Policy Institute (Dec. 15, 2016), https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/.
[26] D.H. Dallaire, *Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 Family Relations 440 (2007).
[27] The Sentencing Project, *Incarcerated Women and Girls* (Nov. 20, 2020), https://www.sentencingproject.org/publications/incarcerated-women-and-girls/.
[28] J. Poehlmann, *Children's family environments and intellectual outcomes during maternal incarceration*, 67 J. Marriage & Family 1275 (2005).
[29] Jean M. Kjellstrand & J. Mark Eddy, *Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior Across Adolescence*, 50 J. Offender Rehab. 18 (Jan. 1, 2011).
[30] Kjellstrand & Eddy, *supra* note 29.
[31] Morsy & Rothstein, *supra* note 25.

Incarceration of a mother especially seems to have an outsized impact on children. Adult children of incarcerated mothers were 2.5 times more likely to be incarcerated than the adult children of fathers. The risk of incarceration for the adult children of women who used drugs regularly was particularly high.[32] And nearly half of all children with an incarcerated mother live in poverty, as opposed to slightly less than one-third who have an incarcerated father.[33]

Given the deleterious impact of parental incarceration, it seems clear that reducing the number of parents and caregivers who are incarcerated is not just good criminal justice policy, it is a pro-family policy that can serve society's interests in many ways.

The Commission long ago promulgated a policy statement that mere "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted." (§ 5H1.6). Since nearly every person has some family ties and responsibilities, this old policy statement is understandable. But, before and since the *Booker* ruling, federal judges have recognized there are many situations in which family hardships are directly relevant to the sentencing purposes and considerations Congress set forth in 18 U.S.C. § 3553(a). Indeed, the Commission data show that family considerations are consistently one of the most commonly cited factors for traditional departures and for variances from the U.S.S.G.

Tzedek also stresses the imperative to have compassion, including compassion for a defendant's children, spouse or other family member who would be greatly affected by a long sentence. Examples may include a family member with a fatal illness, young children who would be essentially orphaned for a long period of time, special needs children who would surely regress due to the incarceration, and spouses who would not know how to feed their children. Contrary to the thinking of many, showing compassion is a strength, not a weakness. It is a sign of true leadership, and an idea fundamental to the American way. The fact that compelling family dynamics may be common is not a reason to ignore it at sentencing.

To more effectively guide federal judges toward appropriately considering family hardships at sentencing Tzedek urges the Commission to consider amending the U.S.S.G. § 5H1.6, and that the accompany commentary make clear that family ties

[32] Dallaire, *supra*.
[33] Kjellstrand, et al., *supra*.

and relationships are relevant and should be assessed by the court in determining whether a departure is warranted.

Expansion of Alternatives to Incarceration

Tzedek vigorously urges the Commission to undertake multiple steps to encourage the robust use of diversion and restorative justice programs as alternatives to incarceration, and to adopt the necessary amendments to make non-jail sentences more broadly available.

It is well-established in states and the federal districts which have started diversion and alternative to incarceration (ATI) programs that these initiatives promote less severe sentences and ultimately result in decreased recidivism. This should not be a surprise because criminal behavior is often the inevitable result of underlying pathologies, such as substance abuse and addiction, mental health problems, and other issues that can better be addressed through treatment, counseling, and community support rather than through imprisonment. Unfortunately, however, these alternatives are all too rare in the federal system. As reported in the 2023 Sourcebook of Federal Sentencing Statistics, only 5.9 percent of federal defendants received a sentence of probation, which stands in stark contrast to 63 percent in 1986.[34]

Tzedek passionately encourages the Commission to take all appropriate steps to promote the expansion of ATI programs. In addition to expanding the availability of information and best practices related to ATI, the Commission should more generally promote alternatives to incarceration, including the use of home confinement, electronic monitoring, intermittent (e.g. weekend) jail sentences, and other forms of supervision. There needs to be far greater emphasis on the criminogenic consequences of jail sentences and the cascading impact of incarceration on families. Sentencing practices that facilitate rehabilitation and minimize recidivism also promote public safety and respect for the law.

Accordingly, Tzedek proposes that the Commission plan a national convening in the form of a Commission-sponsored symposium, and/or conduct a series of regional hearings to give much needed attention to alternatives to prison. Federal judges, U.S. Probation, lawmakers, prosecutors, states and localities nationwide –

[34] *See* FY 2023 Sourcebook, *supra*, note 5, fig. 6 and Table 13; Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90 (June 1992), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf

as well as many other stakeholders and interested parties – could and would draw considerable guidance from a Commission-sponsored event that brought together leading researchers and scholars to discuss the role of alternatives to incarceration in promoting public safety. In addition to informing this Commission's work, one (or a series of major events) on this topic would help advance collective knowledge of whether and when incarceration is needed and appropriate as a response to a range of wrongdoing.

Concomitantly, the Commission should take steps to address the fact that over the 40 year history of the SRA, there has been marked decrease in the imposition of non-jail sentences, such as probation – a development that there is no empirical basis to conclude promotes public safety and is plainly at odds with the intent of the SRA. Congress, in the SRA, stated clearly that the Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense," and also provided that the U.S.S.G. should direct that imprisonment is generally appropriate only when persons are "convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j). Yet, the undeniable fact is that this mandate is almost entirely ignored in today's sentencing system. Indeed, the Commission's most recent data shows that in FY 2023 for the 43.9 percent of sentenced persons who had the lowest criminal history score (CHC 1),[35] the mean sentence imposed on that group, (many of whom would fit the category Congress indicated should generally receive a "sentence other than imprisonment"), was imprisonment for 45 months (nearly 4 years).[36]

Additionally, because there is empirical evidence showing that even individuals with a prior criminal history can benefit from ATI, there is no rational basis to categorically exclude such individuals from these beneficial approaches. To the contrary, ATI in many cases offers the best hope of reducing recidivism. Further, since higher criminal history scores are more common for defendants of color, which correlates to over-policing of certain communities, expanding the availability of these programs to include those with modest criminal histories will ensure that ATI does not exacerbate racial and ethnic disparity.

To ensure that the U.S.S.G. implement the statutory preference that first offenders qualify for non-jail sentences and to ensure the broadest availability of non-jail

[35]See FY 2023 Sourcebook, *supra*, note 5, fig. 7.
[36] See FY 2023 Sourcebook, *supra*, note 5, Table 28.

alternatives for all defendants who may benefit from ATI, Tzedek proposes the following array of reforms:

- The Commission should amend U.S.S.G. §§ 5B1.1 and 5C1.1 to make ATI sentences available for all sentences imposed pursuant to Zones A, B, and C of the Sentencing Table.

- The Commission should amend U.S.S.G. § 3E1.1 (Acceptance of Responsibility), Part 5F (Sentencing Options), and Part 5H (Specific Offender Characteristics) to provide for downward adjustments and departures for individuals who participate in court-approved ATI programs. Courts should be given broad discretion to consider the level and extent of participation in determining the extent of the adjustment and the departure.

- The Commission should consider promulgating best practices for ATI programs to ensure fair access and to ensure that they do not replicate pre-existing racial, ethnic, and economic disparities and that individuals who may not benefit from participation in such a program retain eligibility for a non-jail alternative sentence. Simply because a defendant does not have a condition that warrants participation in some kind of treatment program should not lead to imprisonment where a different alternative sentence is appropriate.

- The Commission should advise Congress to amend 18 U.S.C. § 3553(b) to insert a subsection that would address alternatives to prison sentences. The new subsection should establish that, at least for defendants with no prior felony convictions for federal or state criminal offenses, and no act of violence was involved in the offense for which they were convicted, it shall be presumed, absent a specific judicial finding of aggravating circumstances, that alternatives to prison shall be sufficient to satisfy justice and the other purposes set forth under § 3553(a) of Title 18. Such legislation should make clear that this provision applies irrespective of any pre-existing statute which prescribes a mandatory sentence of imprisonment.

Examples of alternatives to prison sentences should include: Home-confinement, supervised probation, community service, intermittent confinement (being home on weekends and in prison on weekdays or vice versa), fines, restitution payments

to victims, electronic monitoring, participation in rehabilitation programs, participation in faith-based programs, placement in residential confinement centers (centers based in communities for the purpose of confinement similar to Residential Reentry Centers currently contracted by the BOP), and other alternatives to prison.

Identify Collateral Consequences and Their Punitive Impact

It is now widely recognized that criminal convictions result in wide-ranging collateral sanctions. Often these sanctions bear no rational relationship to the nature of the crime nor are there any reasonable temporal limitations on these consequences. Collateral consequences can impact family rights, access to housing and education, immigration status, access to credit, all manner of prospective employment and countless other aspects of human endeavor. Nevertheless, when convicted of a crime these consequences are a component of the punishment suffered by the defendant and, because the sentencing court invariably lacks authority to eliminate them, they should be considered as such by a sentencing court and serve as a ground for downward departure.

Accordingly, Tzedek proposes that the Commission should review collateral sanctions imposed by federal and state laws to ensure courts properly consider the nature and impact of collateral consequences likely to be endured by federal defendants. The Commission should conduct research and issue a report concerning the array of collateral consequences faced by federal defendants. This report should give special attention to whether and how collateral consequences may undermine or otherwise impede the effectiveness of the recidivism reduction provisions in Title I of the FIRST STEP Act of 2018 and should include specific recommendations to Congress as to how to mitigate the harmful impacts of collateral consequences, as well as recommendations for courts as to how they should adjust sentencing practices in recognition of the punitive nature of collateral consequences.

Tzedek further proposes that the Commission create a new encouraged departure factor, perhaps as § 5H1.13, which would advise courts to consider departing downward based on factors relating to punitive collateral consequences resulting from the defendant's prosecution. Examples should include loss of employment and income, mandatory removal from the country, or other formal and informal societal sanctions, coupled with the defendant's demonstration of genuine remorse and sincere effort to make amends to any victims or the broader community.

Recommendation that Judges, DOJ Officials and Others Visit Federal Prisons

As an organization the works with prisoners, Tzedek is acutely aware of the conditions of confinement in our nation's prisons. The impetus for this proposal is simple: those involved in sentencing persons to imprisonment should be keenly aware of the conditions of those institutions and have some first-hand knowledge of what life in prison is like. The Commission conducts training sessions for judges and other court personnel throughout the year, and Commission staff speak at numerous circuit conferences and other like events. In line with such sessions Tzedek proposes that the Commission should make a concerted effort to make visits to prison an integral part of this training and other programming.

Additionally, Tzedek urges the Commission to recommend that Congress amend 28 U.S.C. § 134, mandating that within one year of their initial appointment, and every five years thereafter, all United States District Judges,[37] United States Magistrate Judges, United States Circuit Judges, United States Supreme Court Justices, all U.S. Attorneys, Assistant U.S. Attorneys, the U.S. Attorney General, the Deputy Attorney General, and all attorneys of the Criminal Division of the U.S. Justice Department, should visit at least one federal prison. The BOP should be required to help coordinate these visits and help ensure that these visitors shall have access to all areas within the prison and be permitted to speak with any prison staff and prisoners.

Conclusion

Through its regular review of the U.S.S.G., the Commission plays a pivotal role in enlightening our justice system. This Commission, in particular, has taken a number of important and exceedingly valuable steps toward an improved federal sentencing system through its Guideline amendments in the recent amendment cycles. But there is much more work to do, and significant and ambitious reforms are needed to more fully address the substantial and systemic problems of the current federal sentencing system. We pray that the above recommendations and input will serve the Commission well in its noble and critical endeavor to greatly improve our justice system in general and our sentencing system in particular.

[37] As a case in point, Judge Mark W. Bennett, former U.S. District Judge to the Northern District of Iowa, visited 400 inmates he had sentenced, encouraging other judges to follow suit. https://www.desmoinesregister.com/story/opinion/columnists/rekha-basu/2019/10/31/judge-pursued-justice-where-others-didnt-visiting-inmates-prison/4107681002/

Tzedek appreciates the opportunity to provide its input on priorities for the current amendment cycle and looks forward to continuing to work with the Commission in the pursuit of justice.

Sincerely,

Rabbi Moshe Margaretten[38]
President

[38] Tzedek wishes to express enormous gratitude to Norman L. Reimer and Professor Douglas A. Berman for their instrumental assistance and counsel to formulate this document.

Exhibit ‘B’

TZEDEK
ASSOCIATION

Save A Life, Save A World

July 18, 2025

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Tzedek Association Comments on the Commission's Proposed 2025-26 Policy Priorities

Dear Judge Reeves and Members of the Commission,

Tzedek Association is again exceedingly grateful for the annual opportunity to comment on the Commission's proposed priorities for the upcoming cycle. Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian cases around the globe. Tzedek is committed to championing the civil rights of those mistreated by the criminal justice system, empowering individuals to be productive citizens and aiding the less fortunate. Tzedek seeks a society that values compassion and fairness. To that end, Tzedek is proud of its efforts to champion the First Step Act and the home confinement provision within the CARES Act, and to provide input to the Commission via both written submissions and oral testimony.

In recent years, Tzedek has been heartened by the Commission's willingness to take steps that reflect Tzedek's view that a criminal justice system worthy of our nation must temper the need for punishment with compassion and must be informed by empirical evidence rather than reflexive and arbitrary policies and mechanisms that ignore the innate human capacity for growth and change.

More specifically, Tzedek extols the Commission for its thoughtful, principled, and impactful accomplishments over the past several years. From recent amendments addressing compassionate release and criminal history scoring, to the recent efforts to reevaluate the scope and structure of economic crime enhancements under § 2B1.1, and from the efforts to simplify the guideline calculation process to the limitations on the use of acquitted conduct, the Commission has demonstrated a deep commitment to data-driven reform and greater fairness in federal sentencing.

Tzedek is especially grateful for the Commission's willingness to engage with diverse stakeholders and to pursue policies that promote proportionality, rehabilitation, and public safety. Tzedek also extends heartfelt thanks for the opportunity for Norman Reimer to testify before the Commission earlier this year on behalf of Tzedek—an invaluable forum to share the organization's perspectives and advocate for a fairer justice system.

Introductory Comment Regarding the Current Priority Cycle

Overall, Tzedek commends the Commission for the breadth of the possible priorities for the 2025-2026 cycle. Despite meaningful progress through the Commission's adoption of recent amendments, Tzedek continues to believe there is still considerably more work to do to effectuate a much-needed paradigm shift in the application of federal criminal law to correct fundamental flaws that have plagued federal sentencing practices for decades. Tzedek's comments seek to address several potential priorities identified by the Commission and suggest additional priorities that are closely connected to those priorities.

As it has in the past, Tzedek strongly urges the Commission to act boldly to implement the kind of overarching course correction that can restore fairness and humanity, while remaining faithful to the statutory framework for sentencing.

I. The Continuing Need for *Mens Rea* Reform

Consistent with its recent submissions to the Commission, Tzedek continues to see a critical need to address the absence of adequate *mens rea* considerations in the sentencing process. *Mens rea*, or criminal intent, is the moral anchor of a criminal code and a just and effective scheme of criminal punishments. In general, the United States Sentencing Guidelines ("U.S.S.G.") as currently constructed tend to ignore and essentially eviscerate traditional notions of *mens rea* as a fundamental feature of a sound sentence system. Tzedek believes that the Guidelines should reflect the fundamental principles that punishment should be proportionate to the

offender's culpability, and *mens rea*, or criminal intent should be a key factor in determining that culpability.

Concerns about the undermining of *mens rea* principles have been expressed by astute jurists and commentators for many years. For example, the Honorable Judge Jack Weinstein & Fred Bernstein wrote[1]:

> "In the guidelines era, *mens rea* has been all but eliminated from the sentencing of drug offenders. This development is a disastrous departure from the great traditions of Anglo-American law…It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial…Punishing a defendant for facts she 'reasonably should have foreseen' is tantamount to punishing negligent conduct. This is a substantial departure from traditional principles of *mens rea*. The Model Penal Code, for example, permits criminal liability only in cases of extreme negligence, and then only rarely. Moreover, punishments are 'proportional' to mental states."

The Honorable Judge Gerard E. Lynch similarly wrote[2]:

> "The guidelines significantly muddle questions of *mens rea* as applied to factors that can have a dramatic effect on culpability…The lack of attention to *mens rea* issues [means] the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases."

Tzedek believes that the need for *mens rea* reform is long overdue, and that the issue merits sustained attention across many guidelines and in conjunction with this Commission's proposed priorities. Specifically, this issue is directly related to proposed priorities (2) and (3) focused on examining the drug and economic offense guidelines, §2D1.1 and §2B1.1; it is also related to broader priorities (1) and (6) examining how the guidelines can provide guidance to courts to select appropriate sentencing options and exploring means for continued simplification of the U.S.S.G.

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[1] Judge Jack Weinstein & Fred Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Federal Sentencing Reporter 121 (1994).

[2] Judge Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 Federal Sentencing Reporter 112 (1994).

As a general matter, Tzedek urges the Commission to review and revise all components of the U.S.S.G. to ensure they properly incorporate, and to ensure courts properly consider *mens rea*, motive, purpose, and personal culpability issues at sentencing. This review and revision of the U.S.S.G. should ensure: (a) that aggravating sentencing enhancements are imposed only in instances in which the defendant exhibited sufficient *mens rea* with respect to a sentencing factor to justify the corresponding sentencing enhancement, and (b) that the sufficient *mens rea* is adequately proven at the appropriate level of proof.

The government should generally be required to prove a culpable state of mind with respect to any and all key offense facts that impact guideline ranges, such as the quantity of drugs or the amount of financial loss involved in the offense, and proof of a more culpable state of mind should generally be required for greater sentencing enhancements. Review and revision of the U.S.S.G. to reflect these principles should also ensure that courts are fully and clearly instructed to consider all mitigating aspects of a defendant's *mens rea*, including motive, purpose, and personal culpability in determining the appropriate sentence.[3]

The two areas in which there is the greatest need for *mens rea* reform is with respect to §§ 2B1.1 and 2D1.1, two specific guidelines noted in the Commission's latest proposed priorities. Addressing the *mens rea* deficiencies in these sections will not only address unnecessary harshness but also help provide improved guidance to courts while simplifying the sentencing process.

A. Reformulate Base Offense Level Calculation for Economic Crimes and Drug Offenses

The single greatest driver of excessive harshness and disparity in federal sentencing derives from the dated formulaic approach to base offense level calculations that disregards *mens rea* considerations to focus on metrics that often

[3] The significant guideline simplification amendments now pending before Congress, which will remove most departure-related policy statements, creates a heightened risk that judges may not readily and regularly consider all mitigating *mens rea* matters. Though imperfect and incomplete, policy statements expressly addressing matters such as "Mental and Emotional Conditions" and "Aberrant Behavior" served to signal to the parties and to jurists that mental state issues are important matters in the sentencing process. The Commission can and should work on guideline revisions to ensure these matters and others related to culpability are never overlooked or slighted in the sentencing process.

serve as very poor proxies for actual culpability. Driven by the application of adjustments based on factors that often bear no relation to an individual's true culpability, the U.S.S.G. establishes presumptive sentences that are often disproportionately harsh and overly excessive for less serious offenders.[4] In particular, the use of the "Loss Table" for economic offenses in U.S.S.G. § 2B1.1 and the "Drug Quantity Table" under U.S.S.G. § 2D1.1 should be replaced—or at the very least modified—through reforms that tether sentence lengths to *mens rea* and other culpability criteria. Tzedek believes that the current focus on quantification serves as an unreliable and unjust proxy, and in a way contradictory to individual culpability and factors set forth in 18 U.S.C. § 3553(a). The Commission's own data shows that courts largely agree that these guidelines consistently fail to guide courts effectively. While judges sentence below the drug and fraud table guidelines in a significant majority of cases, reinforcing the idea that substantial reform is a bold but necessary step toward a more just sentencing system, judges (often those recently appointed to the bench) still lean too heavily on these drug and fraud tables.

In today's federal sentencing framework, numerical formulas tied to loss amounts and drug weights have largely supplanted the pursuit of individualized justice. The enhancement structures under §§ 2B1.1 and 2D1.1 have become increasingly disconnected from a defendant's actual culpability, relying instead on mechanical calculations and doctrinal intricacies that often fail to reflect the nuanced realities of true aggravating and mitigating factors for individual defendants. In particular, the interpretation of "loss" in § 2B1.1 has drawn criticism for reducing complex conduct into rigid mathematical estimates. As a result, defense attorneys frequently express frustration that their roles have shifted from advocates to calculators and number-crunchers, navigating a system where human storytelling and meaningful context are simply overshadowed by spreadsheets and point tables.

By now the stories of individuals whose criminality is vastly overstated through the application of these provisions are well-established and are surely well-known by the Commission. These have resulted in grossly unjust sentences. Whether it is

[4] For example, sentences that are in essence a life sentence for nonviolent offenses are unacceptable. *See United States v. Rubashkin*, where a presidential commutation was granted to a man in his fifties who was sentenced to 27 years for fraud, a sentence "which many have called excessive in light of its disparity with sentences imposed for similar crimes." https://trumpwhitehouse.archives.gov/briefings-statements/president-trump-commutes-sentence-sholom-rubashkin/

the girlfriend or a hired driver recruited to participate in a narcotics conspiracy, with absolutely no knowledge of the quantities involved, or the mid-level bookkeeper, whose false entries contribute to a fraud whose scope is beyond his or her knowledge, the draconian presumptive sentences, based on metrics that disregard *mens rea*, can be wholly excessive and disproportionate. (Notably, recent presidents from both parties have registered their judgment on these kinds of excessive sentences by commuting and/or pardoning a historic number of nonviolent drug and fraud offenders.) It is high time for the Commission to look at alternative approaches.

The optimum approach is to identify key culpability factors such as *mens rea*, motive and purpose, factors that judges already recognize are central in determining an individual's culpability but which currently do not find sound expression in the guidelines. Accordingly, Tzedek urges the Commission to formulate a completely revised culpability-focused approach to the determination of the base offense level for drug offenses and economic offenses. These comments address loss calculation in the next sub-section of this letter.

With respect to drug offenses, given the pervasive statutory mandatory minimums that apply to many drug offenses which the Commission cannot directly change, there is no sound justification for having the Drug Quantify Table drive guideline ranges, rather than a more individualized assessment of culpability. The Commission should completely end the practice of centering the base level for drug offenses through a reference to the weight of the drugs and develop a guideline that directs the court to focus on individual culpability factors, such as role, knowledge, motivation, external pressures, and other factors relevant to the circumstances pertaining in each case. While drug weight should still be a factor to consider in appropriate circumstances, especially when a defendant is knowing and purposeful about trafficking large quantities of drugs, it should no longer serve as the principal driver in the determination of the base offense level in § 2D1.1.

B. Alternative Approaches to Economic Offenses for § 2B1.1

The need for *mens rea* reform is especially acute with respect to proposed priority (3) (examination of § 2B1.1), and Tzedek supports significant and wholesale reform. The portions of the U.S.S.G. on federal fraud crimes—embezzlement, thefts, securities fraud, insider trading, and related crimes—have long been the subject of extensive and bipartisan criticisms. Due to the U.S.S.G. instructions to use the *higher* of "intended" or "actual" loss, numerous overlapping sentencing enhancements, and a tendency to treat similarly intentional conduct/results and

unintended conduct/results, there is a broad consensus that the fraud guidelines often recommend excessive punishment for many types of economic offenses. These guidelines often result in widely disparate sentences for like conduct, and federal judges regularly register their disapproval of these sentencing guidelines by varying from them in a wide range of cases.[5]

Though structured with various elements, this proposal fundamentally seeks to alleviate at least some of the excessive harshness of these fraud guidelines by focusing more closely on defendants' actual intent and directing judges to consider mitigating, as well as aggravating, factors. Reforms that better align the fraud guidelines with actual culpability and other sound sentencing factors will help reduce disparity as judges will be more likely to follow guideline recommendations.

Accordingly, Tzedek urges the Commission to fundamentally rethink and restructure the entire fraud Guideline by exploring amendments that would allow the Guideline to function without a Loss Table to focus on a defendants' *mens rea*, motive, culpability and the extent to which they deliberately inflicted economic hardship on discrete individuals. Under such an approach, there may be cases in which the intended loss is a more significant factor than the actual loss or gain; but the reverse may also be true in many cases. Thus, this new approach would jettison the notion that courts should rely upon the higher of either intended or actual loss in favor of one that focuses on the unique circumstances of the case and the true *mens rea* of the individual offender. In that context, loss amounts should be a factor—just as under the proposed revision to § 2D1.1 outlined above, drug weight should be a factor—but numerical benchmarks unconnected to real culpability would cease to be the principal driver in determining the guideline range and the severity of the recommended sentence.

If the Commission does not fundamentally rethink this Guideline as Tzedek proposes, then the Commission should at least significantly reform and simplify the Loss Table in § 2B1.1. With financial crimes now, it is the government's (sometimes fanciful) construction of loss amounts that (too greatly) drives the sentence. All too often, loss calculations are built on suppositions about intent or resulting harm and they often push a Guideline sentence to a length of time that the

[5] David DeBold & Matthew Benjamin. *"Losing Ground'—In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. Penn. L. Rev. 141 (2011).

average person would consider outrageously long and a punishment that does not sensibly meet the crime given the defendant's actual culpability.

Indeed, the current Loss Table is outdated, most certainly does not reflect inflation since its adoption, creates a false sense of precision, and is excessively complicated. A million dollars today is not what it was when the Table was created, and frauds that the government claims involve $975,000 and $1,005,000 are not meaningfully different because of the distinct "loss" amount. The Loss Table currently functions arbitrarily and results in human beings often losing their freedom for a greatly excessive amount of time. That is wrong, unjust and must be fixed. Taking away a citizen's freedom is the government's greatest power and thus must be exercised with fairness and with the utmost care. In the annexed attachment Tzedek proposes two alternatives for revision of the Loss Table but does so strongly urging the Commission to opt for the more sweeping change outlined above so that there is no need for a formal Loss Table.

II. Proposals Concerning Priority (5)

Tzedek lauds the Commission for identifying an examination of §§ 3E1.1 (Acceptance of Responsibility) and 5K1.1 (Substantial Assistance to Authorities) as potential priorities during this cycle and takes this opportunity to resubmit and augment its previous proposals in these areas.

A. Acceptance of Responsibility Reform

Not all individuals who proceed to trial do so as an act of defiance or stubborn denial. There are cases where an individual has a legitimate defense. This is especially true when the ultimate issue relates to intent. If the right to a jury trial is to have meaning, it should not be that merely because one puts the government to its constitutional duty to prove its case, they are automatically disqualified from receiving a third point for acceptance of responsibility.[6] Accordingly, Tzedek proposes that the Commission amend U.S.S.G. § 3E1.1 to provide that a court may

[6] This is even more important if one believes that trial should be the norm and the default for the Government to take away somebody's freedom. In our system, a defendant has a constitutional right to a jury trial even if they lack a good defense and even if defiant or stubborn, and a decision to exercise that right alone should not be the basis for additional criminal punishment. Nor should a defendant's decision to proceed to trial automatically support a finding that a person is without remorse or recognition of wrongdoing.

award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

Additionally, in practice, proceeding to trial is not just about the third point, it is about all three of the acceptance points. Proceeding to trial will almost always mean not getting any points off, especially since U.S.S.G. § 3E1.1 Application Note 2 provides that it will be the "rare situation []" where a person "may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial," and unequivocally states that the adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial…" Tzedek believes this approach is flawed.

First, there is nothing inherently inconsistent in maintaining that the government cannot meet its burden of proof and still sincerely expressing regret and accepting responsibility for one's conduct. Second, it is fundamentally inconsistent with the constitutional right to a trial to cast that right as merely a "burden" that the government must shoulder rather than the norm that is contemplated by the Constitution. Third, while there certainly may be circumstances where a defendant's behavior or failure to express remorse may justify denial of an acceptance adjustment, Tzedek believes that the Commission should not put its finger on the scale with an Application Note that clearly states that denial of acceptance should be the norm whenever a defendant goes to trial.

Accordingly, Tzedek proposes that the Commission strike the first sentence of Application Note 2 to U.S.S.G. § 3E1.1 and strike "[i]n rare situations" from the beginning of sentence three. Additionally, the last sentence should be amended to make clear that post-trial statements or conduct, including the completion of any treatment programs, payment of restitution or other manifestations of remorse may also be considered in determining whether to grant an acceptance reduction following a conviction at trial.

1. Contributions to the Community

Firm in the belief that no one should automatically be defined by a misdeed, particularly where it represents a single departure from an otherwise fruitful and law-abiding life, Tzedek urges the Commission to consider an additional qualifying factor under Acceptance of Responsibility. Specifically, where an individual has rendered extraordinary service to the community, such as, for example, serving as a volunteer Emergency Medical Technician, a volunteer at a homeless shelter or a soup kitchen, or any of the numerous ways that individuals provide service to the

community, either before or after the commission of an offense, the Commission should provide for an additional one-point reduction.

B. Obstruction Reform

Closely related to § 3E1.1 is § 3C1.1. Indeed, Application Note 4 to § 3E1.1 is a statement that conduct resulting in an enhancement under § 3C1.1 ordinarily indicates that a defendant has not accepted responsibility for criminal conduct. Because it is common practice to assess an obstruction enhancement when a defendant testifies at a motion hearing or at trial—and may be assessed just for filing an affidavit that contradicts a law enforcement account of a search, seizure, or alleged statement—meaningful reform of § 3E1.1 must necessarily include § 3C1.1 reform. This practice of imposing the obstruction enhancement merely for involvement in motion practice or asserting a right or defense chills fundamental constitutional rights by imposing an unwarranted tax merely for presenting a claim for consideration by the court or jury. In a sense, it uniquely places the defendant in a "double or nothing" dilemma. If the court or jury rejects their version, they not only lose the motion or the trial, but they get an additional significant penalty merely for presenting their arguments or version of events.[7]

The imposition of an obstruction enhancement solely for testifying should be contrasted with situations in which a defendant does more than provide their own account by taking independent steps that obstruct or impede justice, such as by presenting false evidence or any of the numerous others way that a defendant or a subject of an investigation may affirmatively engage in efforts to frustrate the administration of justice. In those situations, the assessment of the enhancement remains appropriate.

Accordingly, Tzedek proposes that the text of U.S.S.G. § 3E1.1 be amended to make clear that the obstruction adjustment should not be assessed solely for testifying at a hearing or trial in support of the defendant's rendition of the facts. Similarly, Application Note 2 of § 3C1.1 and Note 4 to § 3E1.1 should also be amended to reflect this principle.

C. Substantial Assistance to Authorities Reform

[7] Note that no corresponding penalty is imposed upon the government or the government's witnesses when their witnesses are not believed, or a jury renders a not guilty verdict.

There may be no greater contributor to irrational disparity in federal sentencing practice than the current statutory and U.S.S.G. framework that vests the government with the sole power to seek a downward departure for a defendant who provides substantial assistance.

At the outset, Tzedek notes that as a matter of fundamental principle, there is something profoundly disturbing about a system of justice that pervasively relies upon the testimony of cooperating witnesses to initiate, or buttress investigations and/or prosecutions of others. Further, courts, scholars and experience teach us that testimony of such witnesses is often unreliable.[8] Indeed, false testimony from cooperating witnesses is a major contributor to wrongful convictions in the very small subset of criminal cases in which DNA evidence is available to support an eventual exoneration.[9] For cases in which there is no biological evidence, which is the case in the overwhelming majority of federal prosecutions, it is virtually impossible to establish the extent to which cooperator testimony contributes to an unwarranted conviction.[10]

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[8] *See Giglio v. United States*, 405 U.S. 150 (1972); *On Lee v. United States*, 343 U.S. 747, 757 (1952); *United States v. Bernal Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 108, 108 (2006); Jeffrey S. Neuschatz, Danielle K. DeLoach, Megan A. Hillgartner, Melanie B. Fessinger, Stacy A. Wetmore, Amy B. Douglass, Brian H. Bornstein and Alexis M. Le Grand,, *The Truth About Snitches: An Archival Analysis of Informant Testimony*, 28 Psychiatry, Psychology and Law 508-530 (Nov. 10, 2020), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9090405/

[9] *See* Innocence Project, *Unregulated Jailhouse Informant Testimony Deeply Harms Our System of Justice*, https://innocenceproject.org/informing-injustice-the-disturbing-use-of-jailhouse-informants/ (last visited July 11, 2024), (False informant testimony contributed to nearly one in five of the 375 DNA-based exonerations); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 744 (2016) (The use of informant testimony is so pervasive throughout the criminal legal system, but only a fraction of wrongful convictions are challenged postconviction.)

[10] The Guidelines, government, and judges should also pay attention to how dangerous cooperation often is and to how incredibly little the Federal Bureau of Prisons (BOP) does to actually protect cooperators. The Guidelines should remind judges of the possible dangers related to cooperation and to factor that in both in whether to depart for somebody who did not cooperate and/or for someone who did.

Notwithstanding these concerns, Tzedek recognizes that the government use of and reward for cooperation is a key element of the current federal criminal justice system. According to the data from 2024, 9.9 percent of all sentences imposed involved U.S.S.G § 5K1.1 motions, with 100 percent of those sentences beneath the guideline range. The mean decrease in those cases was a sentence reduction of 56.5 percent and the median departure was 50.4 percent.[11] The current application of this incredible power to avoid both mandatory minimum sentences and guideline sentencing ranges is highly problematic. There are all too many cases in which the determining factor as to who gets this benefit turns on such arbitrary factors as 1) who gets to the government first;[12] 2) who gets an attorney that is more inclined to promote or recommend an early guilty plea and cooperation rather than an attorney who is more deliberative and committed to assessing the evidence before providing a recommendation to plead and cooperate; or 3) who has the most information to offer.

The first two of these factors are determined by arbitrary factors that have nothing to do with justice or an individual's state of mind and level of culpability. And the third factor is a manifestation of the most abusive aspect of the substantial assistance departures, namely that the most culpable defendants are often in the best position to provide truly substantial assistance and the least culpable defendants are in the worst position. The Commission is no doubt aware of the many cases in which more culpable defendants cooperate and receive far lesser sentences than other co-defendants who ranked lower in the criminal enterprise, especially when the less culpable are convicted after trial.

Additionally, there are some circumstances where an individual is willing to cooperate, but the government will not agree that the cooperation is substantial unless it includes implicating a loved one, sometimes including a parent, spouse, child, or sibling. To deny the departure when the sole reason why a cooperative

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[11] *See* U.S. Sentencing Comm'n, *2024 Annual Report and Sourcebook of Federal Sentencing Statistics*, https://www.ussc.gov/research/sourcebook-2024 U.S, Tables 29 and 37, and Figure 9, (over the ten-year period of 2015 – 2024 § 5K1.1 departures have ranged between 8.2 and 12.4 percent of sentences imposed, with 9.9 percent or 6,099 receiving this benefit in 2024).

[12] It must be noted that while it might be an indication of extreme contrition if a defendant cooperates early, it is just as likely that it may be because a defendant got counsel sooner than other co-defendants or that their attorney's workload was such that the attorney brought their client to the government before counsel could do so for co-defendants. That is hardly a legitimate basis to deprive the other defendants of access to this relief mechanism.

individual cannot provide substantial assistance is a reluctance to cooperate against a close family member undercuts values which should be extolled rather than denigrated, and are, at the very least, deeply understandable on a human level.

While it may seem like the current structure is necessary to ensure that the government secures cooperation to pursue other wrongdoers, those who practiced law before the U.S.S.G. know that this is not the case. Prior to the Sentencing Reform Act ("SRA "), there was a time when the judge's authority to reduce a sentence pursuant to F.R. Cr. P. 35 was more than adequate to ensure that cooperators were rewarded. But it also left open the possibility that even a defendant who could not provide "substantial assistance" could nevertheless secure a sentence reduction for making good faith efforts to cooperate. There was no evidence that the government was unable to secure cooperation when the authority to determine who qualified for a benefit from cooperation was shared with the court.

Accordingly, Tzedek urges the Commission to address the disparity that results from the way the U.S.S.G. § 5K1.1 operates by amending the section to include a provision that would permit the court to grant a downward departure, notwithstanding the absence of motion by the government, provided a defendant made a good faith effort to cooperate, and that although the defendant could not provide substantial assistance it was not through any fault of the defendant.[13]

Tzedek further recognizes that pursuant to 18 U.S.C. 3553(e), a sentence below a mandatory minimum requires a motion by the government attesting to the defendant's substantial assistance.[14] Hence, Tzedek urges the Commission to recommend that Congress implement a statutory revision to similarly permit the court to consider imposing a sentence below a mandatory minimum by authorizing

[13] Notably, certain people of faith hold sincere religious beliefs that prevent them from cooperating. Accordingly, courts should be advised to consider such a departure without motion of the government, when the defendant made a good faith effort in cases where the extent of their cooperation was limited by good faith religious boundaries.

[14] *S*ee *Melendez v. United States*, 518 U.S. 120 (1996) (holding that absent a motion by the government to depart from the mandatory minimum due to substantial assistance, a sentencing court lacks authority to do so).

a court to grant a departure where a defendant has made good faith efforts to provide substantial assistance.[15]

III. Suggested Additional Priorities

As has been conveyed in prior submissions, Tzedek believes that U.S. sentencing practices perpetuate the proliferation of excessively punitive sentences and systemic disparities that are manifest in various phases of the criminal justice process. To address these concerns, Tzedek urges the Commission to consider the following additional proposed priorities:

A. Establish Presumptive Maximum Sentences

18 U.S.C. § 3553(a) provides that a "court shall impose a sentence sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in the Act. Despite this statutory directive to avoid excessive sentences, the severity of federal sentences has increased dramatically since the advent of the SRA. In 1986, the year before the U.S. Sentencing Guidelines became effective, only just over half of all federal sentences included some term of imprisonment;[16] in Fiscal Year 2024, according to Commission data, 91.5 percent of all federal sentences included a prison term.[17] And the prison sentences are too long. Countless commentaries, reports and studies advancing a wide array of reform proposals support the proposition that the U.S. incarcerates too many people for too long, despite increasing evidence that overly harsh sentencing has disparate impact on some populations and no corresponding public safety benefits.[18]

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[15] As noted above, one of the more grotesques elements of cooperation is that often it requires a person to inculpate a loved one and thus choose between an extremely close relationship and longer prison terms. Accordingly, courts should be advised not to penalize a person when the inability to provide substantial assistance arises solely because it would require the inculpation of someone in such a relationship.

[16] Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, *Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90* (June 1992), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf.

[17] *See* FY 2024 Sourcebook, *supra*, note 11, Figure 6.

[18] *See*, e.g., Council on Criminal Justice Task Force, *How Long is Long Enough?*, March 2023, https://counciloncj.foleon.com/tfls/long-sentences-final-report/ (defining "long sentences" as prison sentences of 10 years or more); Vera Institute of Justice, *A New Paradigm for Sentencing in the United States*, February, 2023, https://www.vera.org/downloads/publications/Vera-

A range of factors contribute to undue sentence severity in the federal system because the U.S.S.G. are suffused with a vast array of often overlapping and severe enhancements, some of which are specifically addressed in this submission, but all of which contribute to disproportionately harsh sentences, especially for those who exercise the right to trial.

Tzedek proposes that for most criminal conduct, especially when committed by those with either no substantial or minimal history of prior criminal conduct, the Commission should promulgate presumptive maximum sentences. Judges would retain the authority to sentence above these presumptive sentencing caps provided specific reasons for doing so can be articulated based on factors that should be tied to the specific individual and the specific conduct which is the subject of the conviction.

Tzedek proposes a two-tier cap approach:

Category 1: 15-year presumptive maximum for all federal crimes other than acts of terrorism, treason, murder, rape, or any crime of violence if the defendant was previously convicted of any prior state or federal felony.

Category 2: 5-year presumptive maximum if the defendant is not convicted of a crime of violence, has no substantial criminal history, and makes efforts to ameliorate the harm caused by the criminal conduct, such as through restitution or community service, or takes other steps to reduce recidivism risk, such as successful completion of treatment, counseling and/or participation in a restorative justice program.

As necessary to effectuate these presumptive maximum categories, Tzedek urges the Commission to propose an advisory list of aggravating factors that may provide the basis for a court to be authorized to impose a sentence longer than the presumptive maximum and that the Commission recommend that Congress amend 18 U.S.C. § 3553 to provide the necessary statutory authority to implement the presumptive maximum sentence construct, notwithstanding other preexisting statutes.

Sentencing-Report-2023.pdf; *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, UMKC Law Review, Vol. 87:1, 2018, also available at The Sentencing Project, https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/.

B. Offense Level 43 Reform

Tzedek supports a specific reform to Base Offense Level calculation in the sentencing table to amend the U.S.S.G. to remove the recommendation that a base level of 43 should necessarily result in a life sentence. A defendant can get to that base level because of the severity of the conduct (e.g. First Degree Murder, Unlawful Manufacturing, Importing, Exporting or Trafficking, (if resulting in death or serious bodily injury and the defendant had prior conviction for a similar offense), and Treason (if tantamount to waging war against the United States)). But a defendant can also get to that level through aggravating factors based on such factors as drug weight, role in the offense, etc.

Tzedek joins other groups who believe that life sentences should be imposed for only the most heinous crimes, should almost never be imposed for non-violent offenses, and clearly should not be mandated for those with little or no criminal history. Accordingly, the Commission should amend the U.S.S.G. to eliminate the level 43 life recommendation and substitute a sentencing range, especially for those with a Criminal History of less than IV.

C. Criminal History Reform

Just as the mechanistic approach to loss calculation and drug quantity can distort and often exaggerate an individual's criminal responsibility, so too can the point system approach to criminal history lead to distorted outcomes. These distortions arise from multiple factors: variable sentencing practices among states, counties, and localities, which can result in arbitrarily overstated criminal history based upon local sentencing practices; over-policing of certain populations and communities, which results in higher criminal histories and therefore longer sentences for some groups; failure to adequately account for age at the time of the prior offenses, except for limited circumstances; failure to recognize that prior imprisonment itself may have contributed to subsequent criminality; and countless more intangibles such as the offender's current age, family circumstances, and employment history.

Tzedek proposes that the current point system be replaced with more adaptive categories that will provide the sentencing judge with an opportunity to make a qualitative assessment of a person's criminal history. To provide greater flexibility within a criminal history range and to underscore the importance of a court making a qualitative rather than a quantitative assessment of criminal history, Tzedek

suggests that the current model, which has six criminal history categories, be condensed into four categories: 1) no or limited criminal history; 2) low criminal history; 3) moderate criminal history; or 4) extensive criminal history. The Commission should draw on its extensive recidivism research to promulgate empirically sound criteria to aid courts in making the necessary assessment. These criteria should include an evaluation of the age at the time of the prior offenses, the nature of the offense and the extent to which the conduct evinced a motive for personal gain or reflected impulsive or reactive behavior, the extent to which the offender intentionally caused significant harm to others, whether prior sentences included treatment or any ameliorative component to address underlying pathologies, and other criteria that objectively justify enhanced punishment.

To aid in the promulgation of these criteria, Tzedek urges the Commission to undertake a multifaceted study to assess whether and to what extent criminal history scoring is assessing points for past conduct that has little or no additional risk-predictive value. Such a study should also assess whether unique personal factors, such as age, employment history, family circumstances, community support, and medical and mental health issues are more risk-predictive than a mere point-based quantification of criminal history standing alone. Tzedek especially believes that extenuating family circumstances should receive more attention than it currently does

D. Ameliorating the Trial Penalty

As reported in the 2024 Sourcebook, 97.2 percent of all cases were disposed of by a guilty plea,[19] precisely the same percentage as in the prior year and consistent with data from the past several years. It is generally now well-established that a principal reason why trials have virtually disappeared from the federal criminal justice system is a phenomenon known as the trial penalty.[20] The trial penalty has essentially so burdened the fundamental right to a trial and is so costly to the

[19] *See:* FY 2024 Sourcebook, *supra*, note 11, Table 11.

[20] American Bar Association/Criminal Justice Section, *Plea Bargaining Task Force Report*, 2023, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf; Federal Sentencing Reporter, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, Vol 31, Issue 4 -5, April/June 2019, https://online.ucpress.edu/fsr/issue/31/4-5; National Association of Criminal Defense Lawyers, *The Trial Penalty on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf

accused—in terms of the additional years of imprisonment one faces if convicted after trial—as to transform the system into a plea-bargaining assembly line. Indeed, if one were to eliminate from the data those cases that proceed to trial where the alleged crime is so heinous that the government makes no offer, the frequency of meaningful trials is even more miniscule.

It is beyond the scope of this submission to detail the many reasons why the loss of criminal trials, and the accompanying pre-trial litigation through which courts and juries can exercise a check on government excess, is detrimental to justice. Suffice it to say that this system of pleas is clearly not what was envisioned by this nation's founders and is a development that has been decried by advocacy groups across the ideological spectrum.[21]

The various studies of the trial penalty rightly note that one of, if not the main drivers of the trial penalty is the government's unilateral control over charging decisions and the impact of mandatory minimum sentences and the U.S.S.G., even since they were rendered advisory. Prosecutors alone can select the charges and have the power to determine what conduct to urge the court to consider in imposing sentence. It is established practice for prosecutors to bring superseding indictments, add new charges and threaten to withdraw prior offers for those who do not capitulate. It is also routine practice for prosecutors to extract all manner of waivers as the price of the plea, thereby preventing legitimate issues that other constitutional rights from ever being subjected to judicial review.

1. Acceptance of Responsibility, Obstruction, and Substantial Assistance Reform

While some of the contributors to the trial penalty are beyond the scope of the Commission, there are many factors that could be alleviated by the Commission. One such contributor has been the use of acquitted conduct to enhance a sentence. Tzedek lauds the Commission for partially addressing this factor in a prior amendment cycle. Other steps that can ameliorate the trial penalty include the proposals outlined above to implement reforms related to acceptance of responsibility, obstruction enhancements and substantial assistance departures.

2. Relevant Conduct Reform

[21] *Id*., especially, Federal Sentencing Reporter, *Tyranny of the Trial Penalty.*

Tzedek also urges the Commission to take an additional step to tackle a factor that overly burdens the right to trial and incentivizes even the arguably innocent defendant to "cut a deal" rather than risk the consequences of the trial to which they are theoretically entitled. Previously, when Tzedek commented on the proposed revisions to address the use of acquitted conduct, it urged the Commission "to consider in future cycles reforms that address the pernicious impact of sentencing based upon uncharged conduct."[22] Tzedek now urges the Commission to tackle the extraordinary harshness and disparity that have arisen from the use of uncharged conduct under the rubric of determining Relevant Conduct pursuant to U.S.S.G. § 1B1.3.

The context for this proposed reform is the indisputable fact that the government pervasively and routinely uses the threat that a sentence will be enhanced with uncharged conduct to coerce defendants to plead guilty. Because of the operation of the U.S.S.G., the government exploits the current process that requires a court to consider relevant conduct under U.S.S.G. § 1B1.3 and directs the court to enhance the sentence, without the evidentiary safeguards of trial, if the other conduct is established by a preponderance of the evidence pursuant to U.S.S.G. § 6A1.3. This process makes a mockery of the fundamental constitutional right to a trial by jury. That right is so essential that it is mentioned multiple times in the Constitution and the Bill of Rights (e.g. Art. III, § 1 [3]; Amendment VI; Amendment VII). Indeed, even in the context of civil matters, the Supreme Court recently struck down a statute that vested the executive branch with the power to impose a civil fine for fraud rather than afford the defendant the constitutional right to a jury trial.[23] It is hard to fathom and, in Tzedek's view, unacceptable that the federal criminal justice system has evolved to the point where one can be severely punished for conduct absent any finding or admission of guilt and upon the low preponderance of the evidence threshold.

While there are cases where the individual's responsibility for the full scope of the criminality is embraced within the count of conviction and the jury's finding of guilt beyond a reasonable doubt, in virtually all multi-defendant prosecutions, especially when (as is usually the case) there is a conspiracy charge, that is not so. The operation of § 1B1.3, which *inter alia* involves "all acts and omission reasonably foreseeable in connection with that criminal activity" (§

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[22] *See* Letter from Tzedek Association, *Re: Proposed 2023-2024 Amendments and Issues for Comment* (February 20, 2024), https://www.ussc.gov/policymaking/public-comment/public-comment-february-22-2024#pa3 531, 533-53

[23] *SEC v. Jarkesy,* No. 22-859 (S. Ct. June 27, 2024).

1B1.3(a)(1)(B), and that provision's interaction with § 6A1.3 (and the accompanying commentary), which allow a court to rely on assertions without the procedural protections of a trial on a finding of "probable accuracy," truly allow the tail to wag the dog. Further, the current approach to uncharged conduct also implicates important concerns with respect to the evisceration of *mens rea* requirements, addressed earlier in this submission.

In sum, the Commission's efforts to adopt a real offense as opposed to a charge offense sentencing model to prevent the prosecution from "influenc[ing] the sentence by increasing or decreasing the number of counts in the indictment"[24] has been frustrated by how relevant conduct leads to the same problems of undue prosecutorial control over sentencing factors. In actuality, the process is even worse in terms of promoting excessive harshness and unwarranted disparity because it permits prosecutorial arguments that lead to sentencing enhancements based on conduct that is neither charged nor proved beyond a reasonable doubt. Tzedek firmly believes that the U.S.S.G. should be restructured to minimize this bludgeon, which is routinely deployed to assert overbearing leverage to extract guilty pleas and to punish those who assert their right to a trial.

Tzedek urges the Commission to think broadly about how best to address this fundamental flaw. There are numerous possible approaches, each of which implicates other aspects of the current sentencing regime. For example, one approach might be to revise the U.S.S.G. to have far fewer offense levels, but with considerably wider ranges, essentially evolving into a system where the charged conduct is the anchor. If that were the case, then a solution that will constrain how uncharged conduct drives the sentence might be to amend § 1B1.3 to limit relevant conduct to adjustments with the guideline range. Broader ranges, of course, could run afoul of the statutory 25 percent rule (28 U.S.C. § 994(b)(2)), and therefore would likely require legislative action.

Another possibility could be to revise §1B1.3 to limit the scope of any increase to the guideline established by the application of U.S.S.G. Chapter 2 for the offense conduct charged and admitted or proved at trial.

Yet another possibility is to amend U.S.S.G. § 6A1.3 to provide that when a relevant fact in dispute relates to uncharged conduct the court may not rely upon that fact unless admitted or found beyond a reasonable doubt.

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[24] *See* U.S. Sentencing Comm'n, Real Offense v. Charge Offense, Guidelines Manual 2023, Ch. 1, Pt A(1)(4)(a).

Any of these approaches, or others, are obviously significant change—but significant change is necessary if the Commission is to curtail the pervasive trial penalty. Accordingly, Tzedek urges the Commission to prioritize a reconsideration of how uncharged and unproved conduct is taken into consideration and invite thoughtful and comprehensive proposals as part of the current amendment cycle.

E. A Proposed Role for the Commission in Assessing Presidential Clemency

The Commission last looked at presidential clemency with its September 2017 report titled *An Analysis of the Implementation of the 2014 Clemency Initiative*.[25] That report largely focused on who received sentence commutations under the Initiative, the effect of the commutations on the sentences for those offenders, and the extent to which it appears that the announced factors were followed. It also endeavored to identify offenders who may have met the stated criteria by the end of President Barack Obama's terms but did not receive clemency as of the end of his term.

Over the past three administrations, the first Trump Administration, the Biden Administration and now the current Trump Administration, many more commutations (and pardons) have been issued. Tzedek firmly supports the notion of "second chances" and believes in the robust, principled use of the clemency power by the President on the federal level and by Governors or other designated bodies on the state level. Tzedek also recognizes that clemency grants can be controversial and understands that the Commission should avoid offering judgment as to the wisdom of any specific clemency program or individual clemency grant. But particularly when it comes to commutations, Tzedek believes the Commission can play a vital role in helping to inform the use of the constitutional power of clemency by using its unique resources to provide an array of data analyzing past commutations patterns and possible future commutation grounds. For example, a profile of the cases in which commutations have been granted, in terms of the nature of the underlying crime, the prior criminal history, the sentence length, and myriad other factors can provide a treasure trove of information that can inform clemency policies and practices not only at the federal level, but also nationwide.

[25] https://www.ussc.gov/research/research-reports/analysis-implementation-2014-clemency-initiative

Additionally, a study of recidivism among commutation recipients, especially if compared to similar defendants who did not receive clemency, would be an invaluable resource for those who wield clemency power. To the extent possible, such a study should go back as far as data is readily available and certainly should reach back to include the 2014 Initiative.

Finally, the Commission may consider identifying individuals who are serving outlier and disparate sentences—i.e. sentences that seem aberrantly harsh and inconsistent with broad sentencing norms or in light of recent sentencing reforms based on the available data concerning the relevant crime and criminal history. This work could be invaluable information for the various groups that provide pro bono assistance to deserving clemency candidates and for the executive branch in the exercise of the clemency power. It also would, of course, help to advance a key purpose Congress gave to the Commission, namely helping to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B).

Because there is every reason to believe that clemency, especially commutations, is and should be an increasingly important feature of criminal justice in the United States, Tzedek believes that the Commission should consider data collection in this area as a priority for the upcoming cycle and should consider issuing and regularly updating the three reports suggested above.

F. Expansion of Alternatives to Incarceration

Tzedek vigorously urges the Commission to undertake multiple steps to encourage the robust use of diversion and restorative justice programs as alternatives to incarceration, and to adopt the necessary amendments to make non-jail sentences more broadly available.

It is well-established in states and the federal districts that have started diversion and alternative to incarceration ("ATI") programs that these initiatives promote less severe sentences and ultimately result in decreased recidivism. This should not be a surprise because criminal behavior is often the inevitable result of underlying pathologies, such as substance abuse and addiction, mental health problems, and other issues that can better be addressed through treatment, counseling, and community support rather than through imprisonment. Unfortunately, however, these alternatives are all too rare in the federal system. As reported in the 2024 Sourcebook of Federal Sentencing Statistics, only 6.9 percent of federal defendants received a sentence of probation, which stands in stark contrast to 63 percent in

1986. Indeed, even when adding sentences that involve fines and alternatives to incarceration to those receiving probationary sentences, 91.5 percent of defendants were sentenced to incarceration.[26]

Tzedek passionately encourages the Commission to take all appropriate steps to promote the expansion of ATI programs. In addition to expanding the availability of information and best practices related to ATI, the Commission should more generally promote alternatives to incarceration, including the use of home confinement, electronic monitoring, intermittent (e.g. weekend) jail sentences, and other forms of supervision. There needs to be far greater emphasis on the criminogenic consequences of jail sentences and the cascading impact of incarceration on families. Sentencing practices that facilitate rehabilitation and minimize recidivism also promote public safety and respect for the law.

Accordingly, Tzedek proposes that the Commission plan a national convening in the form of a Commission-sponsored symposium, and/or conduct a series of regional hearings to give much needed attention to alternatives to prison. Federal judges, U.S. Probation, lawmakers, prosecutors, states and localities nationwide—as well as many other stakeholders and interested parties—could and would draw considerable guidance from a Commission-sponsored event that brought together leading researchers and scholars to discuss the role of alternatives to incarceration in promoting public safety. In addition to informing this Commission's work, one (or a series of major events) on this topic would help advance collective knowledge of whether and when incarceration is needed and appropriate as a response to a range of criminal behavior.

Concomitantly, the Commission should take steps to address the fact that since the advent of the SRA, there has been a marked decrease in the imposition of non-jail sentences, such as probation—a development that there is no empirical basis to conclude promotes public safety and is plainly at odds with the intent of the SRA.

Congress, in the SRA, stated clearly that the Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense," and also provided that the U.S.S.G. should direct that imprisonment is generally appropriate

[26] *See* FY 2024 Sourcebook, *supra*, note 11, fig. 6 and Table 13; Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90 (June 1992), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf

only when persons are "convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j). Yet, the undeniable fact is that this mandate is almost entirely ignored in today's sentencing system. Indeed, the Commission's most recent data shows that in FY 2024 for the 47.1 percent of sentenced persons who had the lowest criminal history score (CHC 1),[27] the mean sentence imposed on that group, (many of whom would fit the category Congress indicated should generally receive a "sentence other than imprisonment"), was imprisonment for 46 months (nearly 4 years).[28]

Additionally, because there is empirical evidence showing that even individuals with a prior criminal history can benefit from ATI, there is no rational basis to categorically exclude such individuals from these beneficial approaches. On the contrary, ATI in many cases offers the best hope of reducing recidivism. Further, since higher criminal history scores are more common for defendants of color, which correlates to over-policing of certain communities, expanding the availability of these programs to include those with modest criminal histories will ensure that ATI does not exacerbate racial and ethnic disparity.

To ensure that the U.S.S.G. implement the statutory preference that first offenders qualify for non-jail sentences and to ensure the broadest availability of non-jail alternatives for all defendants who may benefit from ATI, Tzedek proposes the following array of reforms:

- The Commission should amend U.S.S.G. §§ 5B1.1 and 5C1.1 to make ATI sentences available for all sentences imposed pursuant to Zones A, B, and C of the Sentencing Table.

- The Commission should amend U.S.S.G. § 3E1.1 (Acceptance of Responsibility), and Part 5F (Sentencing Options), to encourage adjustments for individuals who participate in court-approved ATI programs. Courts should be given broad discretion to consider the level and extent of participation in determining the extent of the adjustment.

- The Commission should consider promulgating best practices for ATI programs to ensure fair access and to ensure that they do not replicate pre-existing racial, ethnic, and economic disparities and that

[27]See FY 2024 Sourcebook, *supra*, note 11, fig. 7.

[28] See FY 2024 Sourcebook, *supra*, note 11, Table 28.

individuals who may not benefit from participation in such a program retain eligibility for a non-jail alternative sentence. Simply because a defendant does not have a condition that warrants participation in some kind of treatment program should not lead to imprisonment where a different alternative sentence is appropriate.

- The Commission should advise Congress to amend 18 U.S.C. § 3553(b) to insert a subsection that would address alternatives to prison sentences. The new subsection should establish that, at least for defendants with no prior felony convictions for federal or state criminal offenses, and no act of violence was involved in the offense for which they were convicted, it shall be presumed, absent a specific judicial finding of aggravating circumstances, that alternatives to prison shall be sufficient to satisfy justice and the other purposes set forth under § 3553(a) of Title 18. Such legislation should make clear that this provision applies irrespective of any pre-existing statute which prescribes a mandatory sentence of imprisonment.

Examples of alternatives to prison sentences should include: Home-confinement, supervised probation, community service, intermittent confinement (being home on weekends and in prison on weekdays or vice versa), fines, restitution payments to victims, electronic monitoring, participation in rehabilitation programs, participation in faith-based programs, placement in residential confinement centers (centers based in communities for the purpose of confinement similar to Residential Reentry Centers currently contracted by the BOP), and other alternatives to prison.

G. Identify Collateral Consequences and Their Punitive Impact

It is now widely recognized that criminal convictions result in wide-ranging collateral sanctions. Often these sanctions bear no rational relationship to the nature of the crime nor are there any reasonable temporal limitations on these consequences. Collateral consequences can impact family rights, access to housing and education, immigration status, access to credit, all manner of prospective employment and countless other aspects of human endeavor. Nevertheless, when convicted of a crime these punitive consequences are a component of the punishment suffered by the defendant and, because the sentencing court invariably lacks authority to eliminate them, they should be considered as such by a sentencing court.

Accordingly, Tzedek proposes that the Commission should review collateral sanctions imposed by federal and state laws to ensure courts properly consider the nature and impact of collateral consequences likely to be endured by federal defendants. The Commission should conduct research and issue a report concerning the array of collateral consequences faced by federal defendants.

This report should give special attention to whether and how collateral consequences may undermine or otherwise impede the effectiveness of the recidivism reduction provisions in Title I of the FIRST STEP Act of 2018 and should include specific recommendations to Congress as to how to mitigate the harmful impacts of collateral consequences, as well as recommendations for courts as to how they should adjust sentencing practices in recognition of the punitive nature of collateral consequences.

H. Recommendation that Judges, DOJ Officials and Others Visit Federal Prisons

As an organization that works with prisoners, Tzedek is acutely aware of the conditions of confinement in our nation's prisons. The impetus for this proposal is simple: those involved in sentencing persons to imprisonment should be keenly aware of the conditions of those institutions and have some first-hand knowledge of what life in prison is like. The Commission conducts training sessions for judges and other court personnel throughout the year, and Commission staff speak at numerous circuit conferences and other like events. In line with such sessions Tzedek proposes that the Commission should make a concerted effort to make visits to prison an integral part of this training and other programming.

Additionally, Tzedek urges the Commission to recommend that Congress amend 28 U.S.C. § 134, mandating that within one year of their initial appointment, and every five years thereafter, all United States District Judges,[29] United States Magistrate Judges, United States Circuit Judges, United States Supreme Court Justices, all U.S. Attorneys, Assistant U.S. Attorneys, the U.S. Attorney General, the Deputy Attorney General, and all attorneys of the Criminal Division of the U.S. Justice Department, should visit at least one federal prison. The BOP should be required to help coordinate these visits and help ensure that these visitors have

[29] As a case in point, Judge Mark W. Bennett, former U.S. District Judge to the Northern District of Iowa, visited 400 inmates he had sentenced, encouraging other judges to follow suit. https://www.desmoinesregister.com/story/opinion/columnists/rekha-basu/2019/10/31/judge-pursued-justice-where-others-didnt-visiting-inmates-prison/4107681002/

access to all areas within the prison and be permitted to speak with any prison staff and prisoners.

Conclusion

Tzedek greatly appreciates the opportunity to share its perspective on the priorities for the 2025-26 cycle and looks forward to continuing to provide import and support for the Commission's important work.

Sincerely,

Rabbi Moshe Margaretten[30]
President

Attachment

Revision of Section 2B1.1 of the United States Sentencing Guidelines Regarding Fraud & Other Revisions to the Guidelines.

Note: The following proposals are offered solely as alternative considerations should the Commission not pursue the proposal outlined in the body of Tzedek's comments, which

[30] Tzedek wishes to express enormous gratitude to Norman L. Reimer and Professor Douglas A. Berman for their instrumental assistance and counsel to formulate this document.

would jettison the loss table approach in favor of one that more meaningfully on individual *mens rea* and the unique circumstances of each case.

1. The Loss Table in Section 2B1.1 is outdated, excessive and exceedingly unfair in creating a false sense of precision and in being excessively complicated. Moreover, loss is only a sound aggravating factor in a Guideline calculation if a defendant both intended ***and*** actually caused a significant loss Importantly, the current Guideline already rightly recommends a departure if and when the Guideline "substantially understates" or "substantially overstates" the seriousness of the offense, and so sentencing judges can and do have authority to look beyond the crude metric of loss. Assessment of loss should be just one component of determining a fair and effective sentence for an economic offense, and hence, we propose that the USSC revise Section 2B1.1 of the United States Sentencing Guidelines by amending and revising the Table in Section (b) to read as follows or similar:

"b) Specific Offense Characteristics

If the intended and actual loss roughly exceeded $100,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
Loss intended or actual loss is less than roughly $100,000	no loss-specific increase
Loss intended and actual loss is more than roughly $100,000 and less than roughly $1,000,000	add 3
Loss intended and actual loss is more than roughly $1,000,000 and less than roughly $50,000,000	add 6
Loss intended and actual loss is more than roughly $50,000,000 and less than roughly $250,000,000	add 9
Loss intended and actual loss is more than roughly $250,000,000 and less than roughly $1,000,000,000	add 12
Loss intended and actual loss is more than roughly $1,000,000,000	add 15.

If the Commission is disinclined to rework the structure of the Loss Table as recommended above, Tzedek recommends that the Commission revise the loss amounts in Section 2B1.1 as follow to provide greater fairness and consideration of current economic conditions and factors:

"b) Specific Offense Characteristics

If the loss exceeded $100,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
$100,000 or less	no increase
More than $100,000	add 2

More than $250,000	add 3
More than $500,000	add 4
More than $1,000,000	add 5
More than $10,000,000	add 6
More than $50,000,000	add 8
More than $100,000,000	add 10
More than $150,000,000	add 12
More than $200,000,000	add 14
More than $250,000,000	add 16
More than $375,000,000	add 18
More than $500,000,000	add 20
More than $750,000,000	add 25
More than $1,000,000,000	add 30.

UP DOPPLER CONSULTING LLC

40868 Cooper Drive, Leonardtown, MD 20650 | [redacted]

Veteran-Owned Small Business | CAGE 89EX8 | UEI MKE6DJS36BJ1

July 25, 2026

United States Sentencing Commission

One Columbus Circle NE, Suite 2-500

Washington, DC 20002-8002

Attention: Public Affairs, Priorities Comment

Submitted electronically via https://comment.ussc.gov

Re: Public Comment on Proposed Priorities for the 2026-2027 Amendment Cycle, 91 Fed. Reg. 35802 (June 12, 2026)

Dear Commissioners:

Up Doppler Consulting LLC is a veteran-owned small business in Leonardtown, Maryland providing Department of War acquisition, human systems integration, and test and evaluation advisory services to firms in the Defense Industrial Base. We respond to the Commission's invitation to propose "any additional priorities commenters believe the Commission should consider in the upcoming amendment cycle and beyond." We sell no cybersecurity or compliance services and have no financial interest in the subject of this comment.

We ask the Commission to add a narrow technical priority: review of the guideline provisions applicable to offenses under 18 U.S.C. 1030 that involve critical infrastructure or systems supporting the national defense. We do not ask the Commission to raise any penalty, and we do not ask Congress to raise any statutory maximum. We ask the Commission to make an existing enhancement operable, because the Commission's own application data indicate that it is not.

Why this matters now

On July 13, 2026 the Department of War suspended implementation of Cybersecurity Maturity Model Certification Phase II and convened a reform task force, on the stated ground that compliance cost and administrative burden were driving small, medium, and nontraditional firms out of the Defense Industrial Base. That review is now weighing how much protective obligation to place on the victims of these intrusions. The other half of that equation, the consequence delivered to the intruder, is written into these guidelines. A firm of our size, deciding whether to remain in the defense market, is responding to both halves. We think the Commission should look at its half while the executive branch is looking at the other, and we think the finding will be that the guideline provisions Congress created for exactly this purpose are not reaching anyone.

The application data

The Commission's own FY2025 guideline application frequencies, guideline-calculation-based table, report the following for USSG 2B1.1(b)(19)(A):

> Subparagraph (iii), the six-level increase for an offense that "caused a substantial disruption of a critical infrastructure," was applied to zero defendants in fiscal year 2023, zero in fiscal year 2024, and zero in fiscal year 2025.
>
> Subparagraph (i), the two-level increase for an offense involving 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, was applied to one defendant nationwide in fiscal year 2025. The Commission's parallel sentenced-individual-based table reports zero for that same provision, a discrepancy we note rather than resolve.

A six-level enhancement with a floor of level 24, enacted at the direction of Congress in the Cyber Security Enhancement Act of 2002 and unamended in substance since 2018, that has applied to no defendant in three consecutive years is not a severity problem. It is an applicability problem. Whatever the reason, the provision is not doing the work Congress assigned it, and no increase in its magnitude would change that.

Three requested items, in order of leverage

First, define "substantial disruption of a critical infrastructure." The guideline supplies a definition of "critical infrastructure" but none of the disruption threshold that triggers subsection (b)(19)(A)(iii). The Department of Justice has observed that the Commission "provides little guidance" here. Three years of zero applications is consistent with a provision that prosecutors and courts cannot confidently apply. A definition, or an application note supplying factors such as duration of outage, population or mission affected, cost of restoration, and cascading effect on dependent systems, would convert an inert provision into a live one without changing a single statutory maximum or increasing any offense level. This is the item we urge most strongly.

Second, consider whether subsection (b)(19)(A) should remain an "apply the greatest" provision rather than a cumulative one. The Department of Justice identified the consequence in its own prosecutors' manual:

> *"Oddly, this provision is not cumulative with the enhancements for computers used to operate critical infrastructures, so intentional damage to an electrical grid earns the defendant the same four-level increase as intentional damage to a home computer."*

That passage appears in Prosecuting Computer Crimes, second edition, chapter 5, at page 141, and uses the 2010 subsection numbering, in which today's (b)(19) appears as (b)(16). The manual is dated, but the "apply the greatest" structure it describes is unchanged in the 2025 Manual, and so is the result. An offense that both targets a national defense system and causes intentional damage draws the same adjustment as one that does only the latter. We do not presume the correct answer; we ask that the question be examined.

Third, restore a guideline anchor for debilitating critical-infrastructure harm. Amendment 836, effective November 1, 2025, struck Application Note 21 to 2B1.1 in its entirety as part of the Commission's simplification of the departure structure. Note 21(B) had provided that an upward departure "would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters," and Note 21(A)(ii) had identified death resulting from a section 1030 offense as a departure ground. We understand the Commission's position that the amendment is outcome neutral because the same facts remain available under 18 U.S.C. 3553(a), and we note that the deleted text is preserved at Appendix B, Part III of the 2025 Manual. Our concern is narrower: these two considerations were removed as a side effect of a manual-wide structural change rather than through a judgment about cyber sentencing specifically, and sentencing courts now reach them, if at all, without a guideline anchor. A policy statement or application note preserving them in the new two-step framework would correct that without reopening the simplification.

Two additional considerations

The Commission has issued no report to Congress on computer crime since May 2003 and has carried no cyber policy priority in four consecutive amendment cycles. In that 2003 report, submitted at the direction of section 225(c) of the Homeland Security Act, the Commission itself found that "because the guideline penalties already approach or exceed the statutory maximum term of ten years, the terrorism adjustment will have limited or no effect in section 1030(a)(1) cases involving terrorism," and recommended that Congress increase the statutory penalties for those offenses. Congress did not act. We raise it because it establishes that the Commission has previously identified structural defects in this corner of the guidelines on its own initiative, and because the intervening twenty-three years have transformed the threat the provisions address.

Separately, we note that Amendment 2 of the 2026 cycle, submitted to Congress on April 30, 2026 and effective November 1, 2026 absent congressional action, inflation-adjusts the monetary tables, moving the 2B1.1(b)(1) threshold from more than $6,500 to more than $9,000. Because offense levels for section 1030 offenses are driven almost entirely by the loss table, that adjustment mechanically lowers offense levels for any given nominal loss. That is a defensible outcome of a general inflation adjustment, but it is a further reason to examine whether the cyber-specific provisions are calibrated as Congress intended.

What we are not asking

We are not asking the Commission to double or triple any penalty. Section 1030(c)(4)(F) already reaches life imprisonment; section 1030(c)(4)(A)(i)(V) already elevates damage to computers used for the national defense; and section 1030 offenses are already predicates for a federal crime of terrorism under 18 U.S.C. 2332b(g)(5)(B), triggering the twelve-level adjustment at 3A1.4. The severity exists. What the data show is that the cyber-specific provisions are not being applied, and we believe the Commission is the right body to determine why. We recognize, further, that the criminological literature holds certainty of apprehension to be a far more powerful deterrent than severity of punishment, and we do not argue otherwise. Our request is confined to coherence and applicability, which are properly the Commission's concern regardless of deterrent effect.

We appreciate the Commission's consideration and are available to provide any further perspective from the small-business segment of the Defense Industrial Base that would be useful.

Respectfully submitted,

Chris A. Grable
Founder and Chief Executive Officer
Up Doppler Consulting LLC

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July 27, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
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Dear Members of the United States Sentencing Commission:

The Wildlife Conservation Society (WCS) appreciates the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending 1 May 2027, as published in the Federal Register on 12 June 2026.

On behalf of WCS, a global conservation organization headquartered in New York, I am writing to respectfully urge the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife Conservation Society
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WCS.org

The Wildlife Conservation Society (WCS) harnesses the power of four zoos and an aquarium in New York City and a global conservation program to protect wildlife and wild places. We work to prevent and combat wildlife trafficking through on-the-ground conservation, law enforcement support, and policy engagement. Across the globe and here in the U.S., WCS has witnessed firsthand the growing sophistication and transnational nature of these crimes. In fact, our New York facilities have been requested by the U.S. government to care for record numbers of confiscated wildlife.

The trafficking of wild fauna and flora—including of high value timber and fish—has effectively evolved into a form of organized resource theft that deprives countries of valuable natural assets and harms legitimate businesses, while enriching criminal enterprises. Amongst the most profitable forms of transnational crime, wildlife trafficking relies on many of the same trafficking routes, fraudulent documentation, and money laundering mechanisms used to traffic narcotics, firearms, and other illicit commodities. By undermining the rule of law, distorting legitimate markets, and strengthening transnational criminal organizations, wildlife trafficking threatens U.S. economic, security, and foreign policy interests.

Despite the dedicated efforts of U.S. federal investigators and prosecutors, wildlife trafficking cases frequently result in probation or relatively short custodial sentences that may not adequately reflect the seriousness of the offense or provide sufficient deterrence. As a result, wildlife trafficking often remains a high-profit, low-risk enterprise - a dynamic that contrasts with sentencing outcomes for many other forms of organized crime, where penalties more consistently reflect the seriousness and profitability of the offense.

A comprehensive review of the federal sentencing guidelines applicable to wildlife trafficking offenses would represent an important step toward ensuring that penalties accurately reflect the seriousness, sophistication, and transnational nature of these crimes. Such a review would also support the Administration's broader efforts to dismantle transnational criminal organizations, protect lawful trade, and strengthen the rule of law.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats.

Sincerely,

John F. Calvelli
Executive Vice President, Public Affairs

Wildlife Justice Commission

10 July 2026

United States Sentencing Commission
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One Columbus Circle, NE
Suite 2-500, South Lobby
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Dear Members of the United States Sentencing Commission:

On behalf of the Wildlife Justice Commission (WJC), I am grateful for the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

The WJC respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is an estimated USD 20 billion a year criminal industry involving criminal networks that cross nations and continents. Only the trafficking of drugs, humans and arms is a more lucrative crime. The illegal exploitation of wild flora and fauna destroys our planet's biodiversity and ecosystem stability by targeting the most vulnerable of species, such as pangolins, tigers, rhinos, elephants, turtles, and sharks, that are already on the edge of survival. It is increasingly linked with armed violence, terrorism, corruption, and other forms of organized crime, fueling criminal networks, government instability and corruption, and threatens the rule of law, global security, economies, local communities, and animal and human health.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, security and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

Wildlife Justice
Commission

The WJC is an international organization with a representation in the United States of America, dedicated to disrupting and dismantling transnational criminal networks involved in wildlife trafficking globally through intelligence-led investigations, conducted in partnership with law enforcement authorities, and support to criminal justice authorities. Through our operational work, we have observed that serious wildlife trafficking is frequently perpetrated by highly organized criminal networks that exploit international supply chains and generate substantial illicit profits. Meaningful sanctions, especially for those at the head of organized crime groups involved in wildlife trafficking, as well as brokers, financiers, and corrupt facilitators, are an important component of deterrence and disruption to the organizational structures of criminal groups. A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, the WJC would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Olivia Swaak-Goldman
Executive Director
Wildlife Justice Commission

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24 July, 2026

United States Sentencing Commission
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Dear Members of the Sentencing Commission:

On behalf of Wildlife Rescue & Rehabilitation, I appreciate the opportunity to comment on federal sentencing for serious wildlife trafficking offenses. As an organization that has received many of the victims of this cruel and illegal activity, we have direct experience with the harms it does to individual animals who have been trafficked and are well aware of the costs to the species and habitats from which they came. Since I know you are already fully cognizant of the consequences of this criminal endeavor and the profitability that fuels it, I won't go into that here. Instead, I want to focus on two other matters: wildlife trafficking's not being treated with the seriousness it deserves and making more real to you the casualties of the vile business.

Despite its scale and impact, penalties for trafficking offenses often do not match the scope and harm associated with them. As a result, wildlife trafficking is allowed to continue to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for the international nature of wildlife trafficking, the scale of financial gain and criminal enterprise involved, its broader harms, including threats to biodiversity, agriculture, animal, plant, and public health, and the need for meaningful deterrence, particularly for the worst offenders.

As mentioned above, Wildlife Rescue & Rehabilitation has dealt with the casualties of wildlife trafficking for a long time (our 50th anniversary is next year). Over just the last two years we have received 25 victims of the trafficking trade: Scarlett Macaws (2), Capuchin Monkeys (6), one each of

Mandrill, Rhesus Macaque, and Ring-tailed Lemur, Spider Monkeys (9), Red-lored Amazons (4), and one Red-crowned Amazon. The following is only one small snapshot of what I have seen.

Over recent months Wildlife Rescue & Rehabilitation has been called on by USF&W to take several infant and juvenile spider and capuchin monkeys who were confiscated from wildlife trafficking situations. Though we have rescued primates from many dire circumstances for close to 40 years, none of us was prepared for what we learned about the history of these vulnerable young monkeys. To have read about the horrific practices of taking baby primates from the wild had not revealed the full reality of this trade. They are imported in duffle bags or sacks where they are found terrified and crying. What we have seen in the eyes of these babies, in listening to their constant whimpers, witnessing their refusal to accept food or water, their clinging to anything or anyone nearby, their look of utter loss and sadness…there is nothing that can prepare you for this. And there is but one reason that this cruelty, and the slaughter of entire troops of primates to obtain offspring, is carried out—which is of course profit.

I hope for and will appreciate the Commission's commitment to ensuring that the federal sentencing guidelines are effective in addressing criminal activities, not the least of which is what is happening to native creatures and the ecosystems from which they are ripped. If it will help, Wildlife Rescue & Rehabilitation would welcome the opportunity to provide any additional information or expertise that you might need.

Sincerely,

Lynn Cuny

Lynn Cuny
Founder/President

WORLD TRAVEL & TOURISM COUNCIL

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

July 27, 2026

Dear Members of the United States Sentencing Commission:

On behalf of the World Travel and Tourism Organisation (WTTC), I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

WTTC respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

At the macro-level, wildlife trafficking can impose substantial economic harm on governments, industries, and communities, extending well beyond the immediate conservation consequences of the crime. And, at the micro-level, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and we urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively

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attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

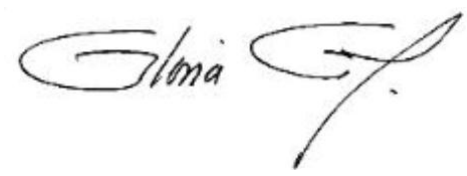
Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further consideration, WTTC would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,



Ms. Gloria Guevara
President and CEO
World Travel and Tourism Council

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Qusai Alfakhri
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worldwildlife.org

July 24, 2026

United States Sentencing Commission
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Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

On behalf of World Wildlife Fund (WWF), I appreciate the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026. WWF respectfully urges the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

Wildlife trafficking is a serious transnational organized crime that generates tens of billions of dollars annually in illicit financing and has strong convergence with other serious crimes, including narcotics trafficking and money laundering. This large-scale criminal enterprise poses a major threat to wildlife and biodiversity while fueling corruption and instability in many parts of the world and posing significant threats to U.S. security and economic interests. It also facilitates the introduction of invasive species and wildlife diseases into the U.S., posing major risks to animal, plant, and public health, native ecosystems, and agriculture. Because legal and sentencing frameworks often fail to recognize wildlife trafficking as the serious crime that it is, criminal organizations see it as low-risk and high-reward, given the significant prices that can be obtained for many illicit wildlife products for relatively small outlays. This is why many of the transnational criminal organizations trafficking in wildlife are the same ones engaging in other illicit activities such as narcotics trafficking, money laundering, and human exploitation, often using the same routes and networks.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains. The failure to reflect the seriousness of these crimes in the

sentences that are imposed ultimately undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

Over the past two decades, the United States government has been a global leader on efforts to combat wildlife trafficking, with multiple Administrations and Congresses taking significant steps to address it. Executive Order 13648 mandated the creation of both a Presidential Task Force and National Strategy on Combatting Wildlife Trafficking, as well as a President's Advisory Council to inform these efforts. The Task Force, of which the Department of Justice is a cochairing agency, was subsequently codified and then made permanent by Congress in the END Wildlife Trafficking Act of 2016 and the END Wildlife Trafficking Reauthorization and Improvements Act of 2022. The role of the federal government was further affirmed in Executive Order 13773, issued by President Trump in February 2017, which directed federal agencies to prioritize the dismantling of transnational criminal organizations and explicitly recognized trafficking networks—including those involved in wildlife and natural resources crime—as part of this threat landscape.

Since 2014, Congress has also appropriated significant, dedicated funding for these purposes. Over the years, the U.S. government has invested hundreds of millions of dollars to support foreign countries in tackling wildlife trafficking, including through reforms to their judicial systems, criminal penalties and sentencing guidance. And yet, in significant respects, the U.S. is itself lacking in this regard.

In its 2014 recommendations to the Presidential Task Force, the President's Advisory Council on Wildlife Trafficking specifically cited the need for the Sentencing Commission to "…review the provisions of the U.S. Sentencing Guidelines applicable to wildlife trafficking and evaluate potential revisions to the Guidelines to better reflect society's increased appreciation of the harms caused by wildlife trafficking and to increase appropriately both general and specific deterrence."[1] This recommendation was subsequently adopted as part of the Task Force's implementation plan for the National Strategy on Combatting Wildlife Trafficking, which also identified the need to "Assess whether sentencing guidelines applicable to wildlife trafficking crimes provide appropriate deterrence and adequately reflect society's increased appreciation of harms done by such crimes."[2]

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[1] The President's Advisory Council on Wildlife Trafficking. (2014, June 9). Recommendations to implement the National Strategy for Combating Wildlife Trafficking. https://www.awf.org/sites/default/files/advisory-council-recommendations-06-09-14.pdf

[2] 2 U.S. Department of State. (2015). National strategy for combating wildlife trafficking: Implementation plan. Presidential Task Force on Wildlife Trafficking. https://2009-2017.state.gov/documents/organization/237592.pdf

In the decade since the National Strategy on Combatting Wildlife Trafficking was adopted and the END Wildlife Trafficking Act was signed into law, the recognition of the seriousness of wildlife trafficking and the need to elevate the law enforcement response to bring it in line with the approach to other forms of transnational organized crime has continued to grow; yet the sentencing guidelines for these crimes have not kept pace and have yet to be updated to reflect this understanding and evidence. We recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises and as part of related serious offences, including money laundering.

Designating this issue as a priority for review would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the connection and convergence of wildlife trafficking with other serious crimes;
- the broader harms associated with wildlife trafficking, including threats to biodiversity and native ecosystems, animal, plant, and public health, agriculture, the economy, local communities, and U.S. security interests;
- the need for meaningful deterrence, particularly for high-level offenders.

WWF is one of the leading organizations working globally to address the illegal trade in wildlife and to counter wildlife trafficking, with a network of dozens of national offices and an on-the-ground presence in nearly 100 countries. Our approach is a multi-faceted one, including policy advocacy, support for wildlife law enforcement and customs, public awareness and demand reduction campaigns, research and data sharing, and partnerships with government, the private sector, international institutions, and like-minded non-governmental organizations. Key among these is the Wildlife Crime Initiative, a decade-long campaign launched jointly by WWF and TRAFFIC to make illegal wildlife trade a higher priority on the international policy agenda and advocate for stronger government responses. Among these is the need to elevate the seriousness of wildlife crime and to strengthen the tools and penalties available to address it.

In the case of the U.S., a comprehensive review of wildlife trafficking sentencing guidelines would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime. We ask that you designate this as a priority for the upcoming amendment cycle.

Thank you for your consideration of this request. We appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. Should the Commission determine that this issue warrants further

consideration, WWF would welcome the opportunity to provide any additional information or expertise that may be helpful.

Sincerely,

Crawford Allan
Vice President, Nature Crimes and Policy Advocacy
World Wildlife Fund

The Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC, 20002-8002

Re: Federal Register Notice of Proposed 2026-2027 Priorities, 91 Fed. Reg. 35802

Dear Judge Reeves,

Thank you for the opportunity to comment on the United States Sentencing Commission's proposed priorities for the 2026-2027 year. We are a group of constitutional and administrative law scholars and clinicians who study and litigate good governance and government transparency issues. We welcome the Commission's engagement with these matters, especially its consideration of possible amendments to its Rules to improve public access to the Commission's records and meetings.[1]

I. Public Access to Criminal Justice Records Is Crucial to the Legitimacy of the Criminal Justice System and to Broader Democratic Processes

Openness is not only a hallmark of the American criminal system; it is an essential ingredient with roots dating back to the Founding.[2] As the Supreme Court explained in *Richmond Newspapers*: "When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion."[3] Without such an outlet, the "natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help.'"[4] And these negative effects only grow when the criminal system withdraws from public scrutiny.

The *Richmond Newspapers* Court was writing about the public's right to observe criminal trials. But in the modern era, trials are vanishingly rare. They occur in only a minuscule proportion of criminal cases. According to the latest data maintained by the federal judiciary, more than 98% of criminal defendants convicted and sentenced in 2025 entered guilty pleas.[5] They did so to avoid incurring the "trial penalty"— the statistical reality that defendants who choose to exercise their constitutional right to a trial are sentenced significantly more harshly if they are convicted than defendants who plead guilty to the same crimes.[6] A 2018 data analysis by

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[1] *See* Proposed Priorities for Amendment Cycle, 91 Fed. Reg. 35802 (June 12, 2026) (request for comment).
[2] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").
[3] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (citations omitted).
[4] *Id.*
[5] *U.S. District Courts–Criminal Defendants Terminated, by Type of Disposition and Offense, During the 12-Month Period Ending December 31, 2025*, U.S. CTS., https://www.uscourts.gov/data-news/data-tables/2025/12/31/statistical-tables-federal-judiciary/d-4 [https://perma.cc/ZZM4-YLJ6]. According to this data, 77,447 federal criminal defendants were convicted and sentenced during the 12-month period ending on December 31, 2025. Of those 77,447 individuals, 76,154 entered guilty pleas.
[6] NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 20-21 fig.1 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/J57J-54DD].

the National Association of Criminal Defense Lawyers calculated the average post-trial sentence as 227% higher than the average post-plea sentence, resulting in an average sentence that was longer by 7.5 *years*.[7]

In short, our modern criminal system has largely replaced open-to-all trials with an inscrutable process of closed-door plea negotiations. In this system, criminal sentences are among the *only* aspects that provide the opportunities for public catharsis and a sense of collective justice that the Founders were focused on. These sentencing decisions have an incalculable effect on the lives of criminal defendants and their families.

The First Amendment right of access guarantees the public's right to attend any single criminal sentencing hearing.[8] But the sentencing hearings themselves offer little insight into how the decision was reached.[9] Those most affected by criminal justice decisions—defendants and victims alike—do not have sufficient information about how these sentencing decisions are produced.[10] It is crucial that the public also understand how the broader sentencing process functions.[11] This requires access to the records and proceedings of the United States Sentencing Commission.

Sentencing decisions are dominated by the Commission's Sentencing Guidelines. According to the Sentencing Commission's most recent quarterly report, judges sentence within the Guidelines' range approximately 60% of the time. This figure, in fact, significantly underrepresents the Guidelines' influence, because the vast majority of above- or below-Guidelines sentences are driven by deviation regimes, not solely judicial discretion.[12] When sentencing comes down to judicial discretion, "the guidelines exert a *greater* influence" than they do in cases where less discretion is available.[13] When courts impose within-Guidelines sentences, those sentences are also extremely difficult to overturn on appeal. As the Congressional Research Service has explained, "trial courts are afforded considerable deference," unless the sentence imposed was "shockingly high, shockingly low, or justified on a ground which the law will not accept."[14]

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[7] *Id.*

[8] *See, e.g.*, United States v. Alcantara, 396 F.3d 189, 196 (2d Cir. 2005) ("There is little doubt that the First Amendment right of access extends to sentencing proceedings . . . ."); *In re* Washington Post Co., 807 F.2d 383, 389 (4th Cir. 1986); *In re* Hearst Newspapers, L.L.C., 641 F.3d 168, 177 (5th Cir. 2011).

[9] Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2191 (2014) (citing Nancy Gertner, *From "Rites" to "Rights": The Decline of the Criminal Jury Trial*, 24 YALE J.L. & HUMANS. 433, 436-37 (2012)).

[10] *Id.*; Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 916 (2006).

[11] Bibas, *supra* note 10 (observing that using "low-visibility procedures run by insiders," including decision-making around sentencing, obstructs substantive law and "obstructs victims' sense of vindication, catharsis, and healing").

[12] U.S. SENT'G COMM'N, QUARTERLY DATA REPORT, 1ST QUARTER RELEASE, PRELIMINARY FISCAL YEAR 2026 DATA, THROUGH DECEMBER 31, 2025, at 11 tbl.8 (2026), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_1st_FY26.pdf [https://perma.cc/VM9M-GAZW]. These deviations include below-guidelines sentences that are driven by the federal-cooperator adjustments in § 5K1.1 or the Early Disposition Program set out in § 3F1.1. *Id.* Only around 18% of sentences imposed in 2025 were below the applicable guidelines range without being driven by either the government's request for a lower sentence or by the formalized adjustments. *Id.*

[13] U.S. SENT'G COMM'N, THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING 6 (2020) (emphasis added), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf#page=9 [https://perma.cc/W2SM-F8C5].

[14] CONG. RSCH. SERV., HOW THE FEDERAL SENTENCING GUIDELINES WORK: AN OVERVIEW 40 (2015) (internal quotation marks omitted), https://www.congress.gov/crs_external_products/R/PDF/R41696/R41696.9.pdf [https://perma.cc/TNP6-A992].

Put differently, the current criminal system affords the public an extraordinarily narrow window for public participation and scrutiny. The narrowness of this window demands correspondingly deep and broad transparency measures, especially because the stakes for public participation are so high. Without sufficient public access, the criminal system risks losing its legitimacy and falling into pervasive and corrosive public distrust.

Recent studies suggest that this is already occurring. A 2024 Gallup poll demonstrated that Americans' confidence in the judicial system recently plummeted to a record-low 35%—a sharper drop than for any other institution, including the national government, the military, and financial institutions.[15] These effects are particularly prominent among racial minorities, especially Black Americans.[16] But confidence in the courts has dropped across the ideological spectrum—the effect holds both among people who believe the system is too harsh and among people who believe the system is not tough enough.[17]

By contrast, improving the transparency of the criminal system has a strong, positive impact on the public's perception of its fairness and legitimacy. For example, jurors—who have the opportunity to see the operation of the criminal system firsthand—consistently report that the experience increases their perception of the judicial system and its fairness.[18] Importantly, the positive effects of "procedural justice" improvements remain in some studies even when the substantive decisions are held constant.[19]

II. Enhanced Public Records Disclosures by the Sentencing Commission Would Improve Sentencing Commission Decision-Making Processes

Public records disclosures play a meaningful role in cultivating this kind of transparency and boosting the public's perceptions of legitimacy and fairness. Studies show that public records disclosures not only serve as a powerful check against corruption,[20] but they also substantively

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[15] Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024), https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx [https://perma.cc/5AR3-XMEJ].

[16] KIANA COX, PEW RSCH. CTR., MOST BLACK AMERICANS BELIEVE U.S. INSTITUTIONS WERE DESIGNED TO HOLD BLACK PEOPLE BACK 16-17 (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/06/RE_2024.06.15_Black-Americans-and-US-Institutions_REPORT.pdf [https://perma.cc/T7ZN-8J9E].

[17] *See* Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023), https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx [https://perma.cc/88JJ-TLUX].

[18] Shawn Patterson Jr. et al., *To Know Courts Is to Love Them?*, 109 JUDICATURE, no. 3, 2026, at 25, https://judicature.duke.edu/articles/jury-service-civic-education-public-trust-courts/ [https://perma.cc/X2UP-JMTL].

[19] *See, e.g.*, Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, NAT'L INST. JUST. J., no. 248, Mar. 2002, at 23, 28 (citing L.W. Sherman, H. Strang, & G.C. Barnes, Stratification of Justice: Legitimacy of Hierarchical and Egalitarian Sentencing Procedures (1999) (unpublished manuscript) (on file with Fels Center of Government, University of Pennsylvania), https://www.ojp.gov/pdffiles1/jr000248e.pdf [https://perma.cc/R6AM-U2CJ]; CLAIRE HAMILTON & LYNSEY BLACK, IR. DEPT. OF JUST. & EQUAL., AN EVIDENCE REVIEW OF CONFIDENCE IN CRIMINAL JUSTICE SYSTEMS 80-81 (2019) (finding that the more information a person has about a criminal sentence and why it was imposed, the more likely they are to agree it was fair); Juan Pablo Ripamonti, *Does Being Informed About Government Transparency Boost Trust? Exploring an Overlooked Mechanism*, 41 GOV'T INFO. Q., no. 3, 2024, at 6 (concluding that government disclosures of information significantly boosted trust among some members of the public).

[20] Adriana S. Cordis & Patrick L. Warren, *Sunshine as Disinfectant: The Effect of State Freedom of Information Act Laws on Public Corruption*, 115 J. PUB. ECON. 18 (2014) (presenting evidence that strengthening freedom of information laws increases corruption conviction rates in the short term and may deter corruption in the long term).

improve on-the-ground decision-making in ways that promote the public good.[21] Journalists routinely rely on federal and state public records laws to engage in deep and sustained reporting on government. One study of submissions to the Investigative Reporters and Editors' annual journalism prize, for example, found that approximately one-quarter of stories about government wrongdoing relied on a federal or state public records request.[22]

Further, improving the public's access to the Sentencing Commission's records would bring the Commission in line with the practices of many peer agencies and decision-making bodies. The Administrative Office of the U.S. Courts, for example, discloses records related to every stage of its rulemaking process, including agendas, meeting minutes, committee reports, preliminary drafts of proposed rule changes, Congressional and Supreme Court rules packages, rules suggestions, and public comments received about proposed amendments.[23] It also publishes detailed information regarding caseloads, wiretap applications, and judicial business, including strategic planning resources for the judiciary and judges' own financial disclosures.[24]

These disclosures mirror transparency measures undertaken by myriad other legislative and judicial bodies that, like the Sentencing Commission, are exempt from most provisions of the Freedom of Information and Administrative Procedure Acts. The Government Accountability Office, for instance, voluntarily promulgated its own FOIA-like transparency regime,[25] and it posts nearly all of its audit and evaluation reports and legal decisions on GAO.gov.[26] When the GAO's reports contain confidential or sensitive information, the GAO discloses the existence of a "restricted version" and separately prepares an unclassified version that it releases publicly.[27] The Library of Congress and the Congressional Budget Office likewise publish vast quantities of information about their decision-making and analytical processes.[28]

III. The Sentencing Commission Should Consider Enacting Affirmative Disclosure Policies for Certain Categories of Records

The Sentencing Commission has an opportunity to reverse the growing sense of public distrust by adopting and maintaining transparency mechanisms that will assure the public that the system is working fairly. We urge the Commission to adopt the following transparency measures and policies:

1. Extend transparency measures to nonpublic meetings where feasible

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[21] Stephen Kosack & Archon Fung, *Does Transparency Improve Governance?*, 17 ANN. REV. POL. SCI. 65 (2014) (collecting studies).
[22] JAMES T. HAMILTON, DEMOCRACY'S DETECTIVES 158 tbl. 5.2 (2016).
[23] *Records of the Rules Committees*, U.S. CTS., https://www.uscourts.gov/forms-rules/records-rules-committees [https://perma.cc/7QVL-EX5F].
[24] *Statistical Reports*, U.S. CTS., https://www.uscourts.gov/statistical-reports [https://perma.cc/XMD6-NU3X].
[25] 4 C.F.R. pt. 81 (2025).
[26] *Reports & Testimonies*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/reports-testimonies [https://perma.cc/FP76-QCD7].
[27] *Restricted Reports*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/reports-testimonies/restricted [https://perma.cc/4Q54-J8V6].
[28] *See, e.g.*, 36 C.F.R. pt. 703 (2025); *Annual Reports*, LIBR. OF CONG., https://www.loc.gov/about/reports-and-budgets/annual-reports/ [https://perma.cc/ZA2V-U4VR]; *Legal Reports*, LIBR. OF CONG., https://www.loc.gov/research-centers/law-library-of-congress/legal-reports/ [https://perma.cc/B6HU-4ZZP]; *Transparency*, CONG. BUDGET OFF., https://www.cbo.gov/about/transparency [https://perma.cc/83L6-XCTY].

The public's trust in agency decision-making extends only as far as its oversight measures, and the Commission has left a significant gap by failing to disclose information related to its nonpublic meetings. The Commission should adopt disclosure policies that extend to these nonpublic meetings so that the public can monitor and understand the Commission's decision-making processes. At a minimum, the Commission should disclose the dates of any nonpublic meetings held, their attendees, the matters discussed, the details of any votes taken,[29] and any materials prepared for or reviewed at the nonpublic meeting, including those addressed in point 4, below. To the extent disclosure would reveal sensitive information or have a chilling effect on policymaking discussions, the Commission could safeguard parts of these records through segregation and redaction measures.[30]

2. Make Prison Impact Assessments available to the public before proposed amendments to the Guidelines are considered and adopted

Prison Impact Assessments provide invaluable information to the public about the impact that a proposed amendment is likely to have on the number of people in federal prison and the length of time they will spend there. Making these assessments available *before* the proposed change is adopted will ensure that public comment on the policy is accurately informed and will communicate to affected stakeholders that the Commission has fully considered the impact an amendment will have before deciding to adopt it. To the extent that formal Prison Impact Assessments are not prepared before a proposed amendment is adopted, the Commission should release any preliminary prison impact assessments that are created and considered in connection with proposed amendments.

3. Make available to the public records of all votes or actions by Commissioners

The Commission should consider making public all records of minutes, actions, decisions, or votes by the Commission, including those taken at nonpublic meetings. Under 28 U.S.C. § 995(e), the Commission is obligated to "maintain and make available for public inspection a record of the final vote of each member on any action taken by it."[31] Making all final decisions public—not just those adopted in public meetings—allows the public to better understand and monitor the Commission's policymaking work. It also brings the Commission's operations in line with the statutory transparency obligations that bind other federal agencies.[32]

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[29] 28 U.S.C. § 995(e) ("Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.").

[30] For a discussion of best practices for segregating and redacting documents in related contexts, such as under FOIA, see, for example, DEP'T OF JUST., GUIDE TO THE FREEDOM OF INFORMATION ACT: PROCEDURAL REQUIREMENTS 73-79 (2025), https://www.justice.gov/oip/page/file/1199421/dl?inline [https://perma.cc/3DW4-SY29]; and *OIP Guidance: The "Reasonable Segregation" Obligation*, OFF. OF INFO. POL'Y, DEP'T OF JUST. (Jan. 1, 1993), https://www.justice.gov/archives/oip/blog/foia-update-oip-guidance-reasonable-segregation-obligation [https://perma.cc/765C-CQYN].

[31] 28 U.S.C. § 995(e).

[32] *See* 5 U.S.C. § 552(a)(5) ("Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding."). *See also id.* at § 552(a)(2) (requiring that federal agencies publish "final opinions" and "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register").

4. Release decision-making materials developed for both public and nonpublic meetings to the greatest extent possible

The Commission considers numerous sources of information when evaluating potential changes to the Sentencing Guidelines, including data briefings, data supplements, presentations by internal and external experts, comments submitted by the public, and ex parte communications. To the greatest extent possible, the Commission should disclose (1) the existence of these materials or communications, (2) their dates, (3) their contents, and (4) the identities of who created, presented, and/or participated in them. This obligation should extend to materials developed for use in both public and nonpublic meetings. Although certain redactions or confidentiality measures may be needed to protect sensitive information and to encourage frank conversation among federal judges and the Commission, it is essential for the public to understand what pieces of information—and whose voices—played a role in the Commission's decisions.

We encourage the Commission to formalize its policies regarding what decision-making materials it makes available to the public rather than rely on ad hoc decisions about whether to approve materials for public release. Clear expectations will benefit all parties involved. Stakeholders who communicate with the Commission will know in advance whether their materials and communications will be available to the public, and the public will feel more confident that the Commission is presenting an accurate picture of the information it considered.

5. Improve data collection and reporting

The Commission currently compiles and releases substantial data about the workings of the federal criminal system.[33] These disclosures are invaluable to researchers who study the federal criminal courts, as well as to advocates who litigate within the criminal justice system. The Commission should continue to disclose this data, and it should work to ensure that it is maximally useful to researchers and members of the public. To this end, the Commission should seek input from the researchers and advocates who rely most heavily on the Commission's data to determine whether there are high-impact, low-effort ways to improve the Commission's data—for example, by reporting sentencing information by judge[34] or by compiling information about a criminal defendant's charges in addition to the information about their sentence.[35]

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[33] *See, e.g.*, *Interactive Data Analyzer*, U.S. SENT'G COMM'N, https://ida.ussc.gov/analytics/saw.dll?Dashboard [https://perma.cc/D7US-JHSV].

[34] *See* Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 717 (2008) ("[T]ransparency in sentencing data—in particular, data on the identity of sentencing judges—could be useful in identifying sources of judicial sentencing disparity that would inform the types of reform necessary to improve consistency.").

[35] *See* Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 394 (2010) (combining Administrative Office of the U.S. Courts charging data with U.S. Sentencing Commission sentencing data to "overcome[] [the] limitations of each" dataset alone).

Thank you for your time and attention to these matters.

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July 20, 2026

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RE: Public comment for the United States Sentencing Commission's Proposed Priorities for the 2026-2027 Amendment Cycle.

Dear Mr. Reeves and the United States Sentencing Commission,

On behalf of myself and my colleague, we thank you for the opportunity to comment on the United States Sentencing Commission's Proposed Priorities for the 2026–2027 Amendment Cycle. My name is Melissa Brock and I am a Research Fellow with the Initiative for Gender Equity in the Public Sector (IGEPS) and hold a Master of Public Administration with a concentration in Criminal Justice Policy Analysis. My research examines incarcerated women, family-centered correctional policy, and evidence-based correctional practice. In addition to my research, I have worked in corrections for approximately twenty-five years. I am also submitting this comment alongside my colleague, Dr. Colleen Berryessa, who is an Associate Professor at the School of Criminal Justice at Rutgers University, whose research examines how psychological processes, perceptions, attitudes, and social contexts influence the criminal justice system, particularly in relation to courts, sentencing, and forms of punishment broadly defined. She also is a current member of the Commission's Ad Hoc Advisory Group on Research and Data Practices (RDPAG). We submit these comments in our personal capacity; the views expressed are our own and do not represent those of any employer or affiliated organization.

We commend the Commission's intent to conduct a comprehensive evaluation of federal sentencing guidelines. While the Commission is engaged in this important work, we encourage it to include the collateral effects of incarceration on dependent children, caregivers, and family stability as a focused area of empirical research. While the guidelines necessarily focus on the specific offense and individual defendant, **sentencing decisions often produce unintended effects** that extend beyond the person serving the sentence. **These consequences are particularly salient when defendants are primary caregivers and may have implications not only for family stability but also for successful reentry and public safety**.

A robust body of literature exists describing the effects of incarceration on families and children. A sentenced individual does not serve their time alone; families and children bear the weight and consequences of parental incarceration during and after confinement. **Incarceration may negatively affect the parent-child relationship, disrupt caretaking arrangements, destabilize housing, and impede education** [1, 2, 3], while increasing economic hardship and emotional stress for the child [3, 4]. Family

separation may also weaken or reduce the social support necessary for successful community reintegration upon release. In contrast, **policies that support maintaining the parent-child relationship during periods of incarceration may be a deterrence from future offending** [5]. Though these outcomes are frequently discussed in the criminal justice and social science literature, they have received comparatively less attention in the context of sentencing policy.

Indeed, while courts are tasked with considering mitigating factors in sentencing, **almost all state and federal sentencing guidelines currently prevent or limit the use of family responsibilities to reduce or alter a defendant's sentence** [6]. Further, jurisdictions where they can be presented as mitigating evidence assess familial responsibilities using disparate standards–including those that do not fully highlight the explicit, adverse impacts that a defendant's incarceration may have on certain dependents [7]. Some U.S. courts only recognize family circumstances that are "extraordinary" as allowable for lower sentences, with the analysis of the "extraordinariness" of a situation not clearly defined and not necessarily allowing the consideration of the actual value of a defendant's support for their dependents [8]. However, other U.S. courts use an "irreplaceability" test that explicitly addresses dependents' needs to determine if a defendant's support of them is so "irreplaceable" that it necessitates downward departures; however, "irreplaceability" is not clearly defined nor uniformly applied [6]. Overall, current sentencing practices, particularly mitigation, do not appropriately address the needs of defendants and their families**.** Therefore, **revised sentencing policies (particularly the adoption of clearer, more holistic, and consistent standards to weigh familiar responsibilities as mitigating evidence) are needed to better reduce the collateral harms of incarceration in the U.S. moving forward** [7].

Finally, all the issues discussed thus far may be particularly important in cases involving women offenders. **Women are substantially more likely than men to have been primary caretakers prior to incarceration** [2, 9], meaning **sentencing decisions may produce distinct, disproportionate consequences** for dependent children and their family's stability. My own research examining the intersection of correctional policy, incarcerated women, and family-centered correctional policy [7-10] suggests that **recognizing and understanding family impacts of incarceration is not only a matter of compassion: it is sound public policy**.

Accordingly, I respectfully encourage the commission to **prioritize additional research** examining:

1. **Sentencing outcomes of primary caretakers;**
2. **The collateral effects of incarceration on dependent children and family stability;**
3. **Whether existing sentencing practices adequately account for family needs and responsibilities (where permitted by law);**
4. **Whether revised mitigation practices and standards are needed to fully and appropriately weigh family needs and responsibilities in sentencing outcomes;**
5. **The relationship between correctional programming, family stability, successful reentry, and long-term public safety outcomes.**

Expanding the base of empirical data in these areas would support the Commission in its goal of crafting data-driven policy while providing valuable information for future guideline evaluation.

Thank you for inviting the public to participate in setting the Commission's policy priorities and thank you for considering our comments. We appreciate the Commission's support for evidence-based sentencing policy and respectfully encourage the Commission to expand research on the impacts of sentencing decisions on primary caregivers, dependent children, and families.

Sincerely,

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Positive Criminology for Environmental Crimes?

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Keywords: biodiversity loss | conservation crime | illegal fishing | illegal logging | illegal mining | illegal wildlife trade | innovation | transformative change

ABSTRACT

Environmental crimes pose harms and risks to socioecological systems, driving biodiversity loss. A 2024 resolution at the Conference of the Parties to the United Nations Convention against Transnational Organized Crime prompted stakeholders to discuss a new international framework for addressing crimes that affect the environment. Advocates say existing multilateral efforts are insufficient for addressing environmental crime; opponents say creating a new framework could dilute efforts to reduce environmental harms, and other approaches are more suitable for the nuances of environmental crime. These debates encouraged us to probe the concept of positive criminology for environmental crime. We review the concept and present key theories informing the harm-reduction processes central to positive criminology's theory of change. Five positive criminology inputs have touchpoints with conservation that could result in desired outcomes and impacts for harm reduction, halting and reversing loss of biodiversity: community policing, crime desistance, problem-solving courts, restorative justice, and strength-based programs. Regardless of whether the framework is updated or includes environmental crime, positive criminology is an intriguing theory of change with broad potential applicability to conservation policy and practice focused on halting and reversing loss of biodiversity.

1 | Introduction

All indicators tracking the state of nature at a global scale signal decline. Available data from the Intergovernmental Panel on Biodiversity and Ecosystem Services indicate that the risk of species extinction is increasing and the health and integrity of ecosystems are decreasing. One driver of biodiversity loss is environmental crime. Many forms of environmental crime are relevant to biodiversity loss and thus conservation: wildlife trafficking, illegal logging, illegal fishing, illegal mining, and trafficking in waste. These crimes target the species, habitats, ecological systems, and local livelihoods that conservation seeks to conserve. Environmental crimes can both create new and be part of existing landscapes of harm (i.e., harmscapes) (van Uhm 2024). Reducing harms and repairing damage caused are high-priority change objectives for conservation policy and practice.

A 2024 resolution at the Conference of the Parties (COP) to the UN Convention against Transnational Organized Crime (UNTOC) prompted discussion among members about a new international framework for addressing crimes that affect the environment. Over the past 30 years, environmental crime has been included in 46 resolutions by seven international forums (Global Initiative Against Transnational Organized Crime (GITOC) 2025; Tennant et al. 2025). Crimes that affect the environment are the only category of organized crime not explicitly covered by the UNTOC and its additional protocols so far (Tennant et al. 2025). Proponents of a new UNTOC have identified a lack of efficacy in existing multilateral environmental agreements to accommodate the diversity and interlinkages of environmental crime, as well as the rapid pace of market development and evolution (Tennant et al. 2025). Opponents have identified a lack of willingness among member states to politically prioritize a new framework because of low general awareness of environmental crime relative to other environmental issues, endless cycles of COPs, lack of consistent mandate and engagement on behalf of national environmental ministries, and concerns about gaining consensus (GITOC 2025; Tennant et al. 2025). The combination

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TABLE 1 | One driver of biodiversity loss is environmental crime. The term is often used alongside conservation, green, and nature crime. These differences can be important in building conservation-relevant theory and thus inform policy and practice. This paper considers a theory of change relevant to the focus of all four forms and considers a complementary and somewhat divergent path to harm reduction.

Crime term	Legal basis	Focus	What makes it a crime	Common usage
Environmental (South 2014)	Yes, strong	Lawbreaking that directly harms environment	Violates law defined by governments and international treaties, based on law	UN, Interpol, law enforcement, prosecuted in court
Conservation (Zahnow 2021)	Yes, no, partial	Illegal or socioecologically harmful acts that threaten biodiversity and ecosystem integrity	Sometimes violates laws but may also include harmful legal actions, defined by law and conservation ethics, based on law and harm	Conservation science and criminology, not recognized by all courts
Green (Nurse 2017)	No, not required	All environmental harms, including moral, ecological, and social harm, regardless of legality	Includes legal but harmful actions, defined by scholars and activists, based on harm	Critical criminology, not relevant to court
Nature (Epstein et al. 2023	No, emerging	Harms to nature, often with rights-based framing and planetary health	May violate new or proposed rights of nature, not always codified in law, defined by indigenous worldviews and environmental justice movements, based on harm and rights of nature	Earth law, environmental justice

of increasing rates of biodiversity loss and associated harms, debates about a new framework for environmental crime, and the upcoming 2026 COP encouraged us to probe the concept of positive criminology as a theory of change for conservation policy and practice.

Environmental crimes are globally distributed phenomena and are socioecologically agnostic. The term is often used alongside conservation crime, green crime, and nature crime, although they are discrete in their legal basis, focus, and common usage (Table 1). These crimes rarely take place in isolation and are often accompanied by offences linked to organized and financial crime, interpersonal violence, human rights, and animal welfare (Dore et al. 2022). The victims and perpetrators of environmental offences typically fall into three categories: individual people, ecosystems including species of wild flora and fauna, and society. Policy and practical responses to actors in these categories can be highly skewed (i.e., disproportionate to the problem seeking to be addressed, often resulting in overreaction or underreaction), as can be incentives for actions and consequences for inaction (Commission on Crime Prevention and Criminal Justice 2025). Examples include disproportionate intervention investments focused on charismatic over noncharismatic megafauna or toward low-level/supply-side offenders over corporate actors.

Criminology is the discipline focused on crime, crime response, and crime reduction; criminologists have been interested in environmental crime for decades. A repeated claim in criminology is that despite progress in our knowledge regarding rule-breakers and rule-breaking, there has been no meaningful shift in offending rates and thus harm. This claim has great relevance to accelerating rates of biodiversity loss and multilateral environmental agreements designed to reduce rates of loss. Despite knowledge about environmental crime drivers, impacts, and interventions, its role in biodiversity loss persists, and in some countries, the rates of offenders convicted and imprisoned for non-conservation-related crimes have increased over time (Ronel and Elisha 2020). As criminology and conservation have both been transitioning to consider complementary paths toward reducing harms (e.g., Gore 2011), positive criminology may be more relevant than ever before for policy and practice.

Positive criminology grew as an offshoot of mainstream criminology as a response to the lack of meaningful shift in offending rates and harm reduction; it is one approach for preventing repeat and future harms, repairing relationships through transformation, and promoting desistance from crime (Olson et al. 2023). This theory of change is well suited to accommodate the demand by the conservation community for transformative action (e.g., Massarella et al. 2021) to help reduce accelerating rates of biodiversity loss and associated harmscapes. It links to discussions about a new UNTOC framework on environmental crime, as it accommodates points repeated in policy discourse: environmental crime is an intergenerational justice issue whose solutions must ensure effective restitution and compensation for victims and repair damage caused to the environment (UNEP 2016). Positive criminology offers discrete and potentially novel change pathways that appear absent from current discourse. Here, we probe the concept as an enabling theory of change (O'Brien et al. 2024) for more effective conservation outcomes, specifically harm reduction, with relevance to debates about a new UNTOC framework on environmental crime.

1.1 | Mainstream and Extant Criminology

Criminology is traditionally associated with negative aspects of people's lives that are associated with or lead to deviance and

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crime (Ronel et al. 2013; Ronel and Elisha 2020). Many theories of change focus on the dominant role of "the bad" in criminology, such as social rejection, social strain, or conditions of risk. Criminal systems are mostly based on the notion of deterrence via the severity, celerity, and swiftness of punishment as well as the notion of free choice (Wickert 2019). Crime desistance, correction, and rehabilitation are established concepts in criminology (Ronel et al. 2013) that can be outcomes of change processes; however, based on our review of literature, they are much less commonly applied in conservation sciences. Traditional criminology has revealed a great deal about the causes and processes that lead individuals to develop deviant and criminal behavior, but provides little information about the factors that may help at-risk individuals or convicted offenders desist from deviance and crime or stop the behavior. Traditional criminology has dealt very little with the significant positive experiences that can potentially prevent individuals and groups from engaging in crime and deviance (Ronel and Elisha 2011). The dominant societal response to crime has been to threaten or increase risk for potential offenders (Olson et al. 2023) through formal and informal guardianship (e.g., park rangers, women's cooperatives), as well as criminal justice systems. Criminal measures and sanctions are common forms of punishment in traditional crime situations, yet they do not encourage positive action. Examples of criminal measures within formal criminal justice processes include imprisonment or probation; examples of sanctions as penalties in various contexts include asset freezes or trade restrictions. Criminal law aims to prevent crimes from occurring via deterrence; remediation via monetary remedies; or truth, justice, and reparations when dealing with crimes against humanity. Criminal law also aims to mitigate harm (e.g., not releasing from prison offenders posing high societal threats). These measures require well-resourced and capable enforcement authorities to be effective because control functions are time-consuming and expensive.

1.2 | Positive Criminology

Positive criminology is a relatively new theory of change that has evolved since its conception (e.g., 2010s, building on Ronel and Elisha's early 2010s work) (Ronel and Elisha 2020). Its creators confirm the approach was never designed to refute or replace classical criminological approaches but rather represent another aspect for balance and support development of more effective programs for intervention, prevention, therapy, and rehabilitation for offenders, victims of crime, and the community (Ronel and Elisha 2020). Integrating criminological perspectives based on a positive perspective offers added value via a broader understanding of the different facets and complexity of so-called deviant human behavior, so that associated harms and risks may be reduced or prevented. Key to human behavior and its development is regression, halting, and delaying behavior that is considered deviant (Ronel and Elisha 2011). Positive criminology offers a perspective that positive and integrating experiences may help enable individuals to shift away from criminality (Ronel et al. 2013; Ronel and Elisha 2011). The concept is associated with a group of theories of change (e.g., peacemaking, sociology of acceptance) that share at least two characteristics. First, the theories frame stakeholders of interest as "good" even if they have inflicted harm. Second, these same individuals may be assisted in refraining from repeat or future criminal/deviant behavior (Ronel and Elisha 2011). Crime desistance and refraining from, and non-regression into, criminal behavior are the desired change process outcomes of the positive experiences proposed by positive criminology. In this way, positive criminology focuses on the positive characteristics, processes, and influences in an individual's life that can emerge from crime and deviance.

Positive criminology may be implemented anywhere for individuals and groups who have demonstrated deviant or criminal behavior by emphasizing positive experiences that may potentially prevent or discourage criminal behavior. The approach can be integrated with offender rehabilitation (Robinson 2008); transformation occurs by building individuals' strengths rather than controlling their faults, and focuses on the future, not the past. Rehabilitative models have long been part of correctional practices worldwide, with varied documented effectiveness. Some practices based on positive criminology may be controversial because of political dimensions, such as prisoner rehabilitation (Windzio 2006), although in conservation, "poacher to protector" programs have been used with apparent localized great enthusiasm. Some positive criminology approaches have a risk of being washed by punitive systems that use positive criminology in language only. Punitive positive criminology approaches could re-victimize or punish people—or worse—who otherwise believe they are entering into a nonpunitive process (e.g., programs labeled as restorative but used primarily for coercion) (Olson et al. 2023).

1.3 | Positive Criminology With Relevance to Environmental Crime?

A range of theories, models, and practices associated with positive criminology have relevance to reducing harms associated with environmental crime, conservation, and debate over a new UNTOC framework (Table 2) (Ronel and Elisha 2011, 2020; Ronel and Segev 2014). Positive psychology (Seligman and Csikszentmihalyi 2000), peacemaking (Barak 2005), and the sociology of acceptance (Bogdan and Taylor 1987) are three theories that have been linked with positive criminology because they help explain relationships and transformative processes associated with harm reduction. These theories, as a whole or in part, involve change indicators such as dynamic human relationships and diverse exogenous drivers of interactions between people and ecosystems, and seek positive outcomes such as reduced violence, health and well-being, justice, and stakeholder collaboration (Ogletree et al. 2022). These indicators could align with discourse about a new UNTOC because they consider intergenerational justice, effective restitution and compensation for victims, and diverse harms. In practice, they may be operationalized in a new UNTOC via restorative sentencing, rehabilitation, or offender reintegration mechanisms. Criminologists have identified a range of practices that can be associated with positive criminology. Among them, five stand out as having clear synergies with conservation because they offer links to existing practices such as prevention (e.g., species extinction), community engagement (e.g., community-based management), restoration (e.g., ecosystem regeneration), community policing, crime desistance, problem-solving courts, restorative justice, and strength-based programs (Table 2).

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TABLE 2 | Selected theories, models, and practices associated with positive criminology that may have relevance to conservation, each with a unique focus and range of possible inspirations for conservation crime.

Select theories and models linking to positive criminology	Definition, description, and/or focus	Possible deployments in environmental crime contexts
Positive psychology	Positive experiences, traits, and institutions enhance individual's well-being and quality of life. Focus on fostering factors like happiness, hope, and resilience that contribute to thriving individuals, communities, and societies.	- Support positive factors or personal strengths that deter individuals involved in environmental crime from repeated offending. - Laud interventions that promote hope and well-being in communities. - Foster positive environmental identities, where individuals and communities see themselves as protectors of nature.
Peacemaking	Compassionate and nonviolent approach to crime prevention is optimal. Focus on mutual support to address the root causes of criminal behavior. Critiques punitive, adversarial approaches and emphasizes reflection, reciprocity, and holistic solutions to crime.	- Increase support and compassion for environmental crime offenders. - Address various strains and human–nature conflicts that drive offending. - Prioritize education, dialogue, and collaboration instead of confrontational approaches.
Sociology of acceptance	Fostering positive relationships between "ordinary" and "deviant" individuals is optimal. Emphasis on strengthening inclusion and mutual acceptance over stigmatization. Understanding how relationships contribute to social integration promotes the acceptance of differences and positive interactions at individual, group, and societal levels.	- De-stigmatize offender groups by acknowledging socioeconomic challenges and cultural traditions instead of labeling them as criminals. - Promote inclusive relationships between stakeholders and their knowledge, including individuals involved in conservation crime, indigenous ecological knowledge, and local management practices. - Foster social integration and cooperative solutions that include reformed offenders in environmental efforts. - Provide training, job opportunities, and participatory crime-prevention.
Select practices associated with positive criminology		
Community policing	Law enforcement-based approach fostering collaboration between police and community members as co-producers of public safety. Focus should be on building trust and problem-solving through partnerships, organizational transformation, and community involvement, which strengthens police–community relations and crime prevention.	- Engage community members, particularly experienced hunters in patrols in partnership with law enforcement. - Build and maintain trust with communities to promote use of local knowledge for environmental crime monitoring. - Co-management in protected areas with local communities to foster collective responsibility.
Crime desistance	Process by which offenders stop engaging in criminal behavior because of positive emotions like hope and self-efficacy. Focus should be on transitioning offenders from delinquent to normative social networks and supporting them using social inclusion and positive human encounters, like addiction recovery.	- Transform offenders' self-identity through long-term mentoring and counseling, fostering accountability, hope, and a sense of belonging to reposition them as conservation contributors. - Support ex-offenders' reintegration with career development, conservation training, and community acceptance, addressing the root causes of their past illicit activities.

(Continues)

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TABLE 2 | (Continued)

Select theories and models linking to positive criminology	Definition, description, and/or focus	Possible deployments in environmental crime contexts
		- Build support networks where family and community reinforce lawful, pro-conservation behaviors, celebrate rehabilitation milestones, and sustain positive change.
Problem-solving courts	Specialized courts for nonserious crimes. Focus should be on the underlying socioeconomic issues driving criminal behavior. Emphasis should be on rehabilitation and community-based solutions aiming to reduce recidivism while strengthening offenders' reintegration and community trust in law enforcement.	- Establish environmental crime problem-solving courts using sentencing focused on recovery, solutions, and social support through individualized rehabilitation plans. - Support courts providing continuous monitoring and supervision to ensure rehabilitation plan compliance, possibly in collaboration with local conservation authorities, NGOs, or civil service. - Support connecting with extra-judicial support systems like reparative justice, community outreach, or mental health support.
Restorative justice	Process that brings all parties together to resolve harm caused by crime, including offenders, victims, and communities. Process encourages offender accountability, victim healing, mediation, conflict settlement, rehabilitation, and social inclusion of criminals into the community.	- Prioritize environmental restoration over punishments, involving offenders in efforts to repair harm and prevent future environmental crimes. - Implement community service projects involving offenders and diverse stakeholders, focusing on environmental restoration or enhancement and on educating and rehabilitating offenders through active participation. - Establish compensation mechanisms for unrepaired environmental harm(s) when restoration is not feasible or is delayed, holding offenders accountable for long-term ecological impacts.
Strength-based programs	Building offenders' personal, interpersonal, and social skills supports their rehabilitation and reintegration. Focus should be on promoting positive behaviors, fostering hope, and developing self-esteem to help offenders transition into prosocial lifestyles and reduce offending.	- Offer offenders tailored skill-building programs and career consultancies, matching personal traits and interests with opportunities in fields like sustainable agriculture, eco-tourism, or conservation while promoting positive re-engagement. - Cultivate offenders' strengths and build skills in leadership or teamwork for environmental restoration projects, which are also transferable to other sectors. - Encourage offenders to develop a pro-conservation identity, helping them transition to prosocial behaviors, ultimately reducing future engagement in conservation crimes.

Practically, we believe that if positive criminology is to be applied more broadly for environmental crime prevention on the ground or included into a new UNTOC as a global aggregator against environmental crime, there are at least four characteristics to consider, as the outcomes would change: (1) repair and responsibility, (2) transformative education, (3) rehabilitation, and (4) holistic support systems (Figure 1A). Conservation has already mainstreamed several practices on the ground that incorporate these change outcomes, suggesting we do not have to start from scratch (Figure 1B) if they were to be scaled up into policy

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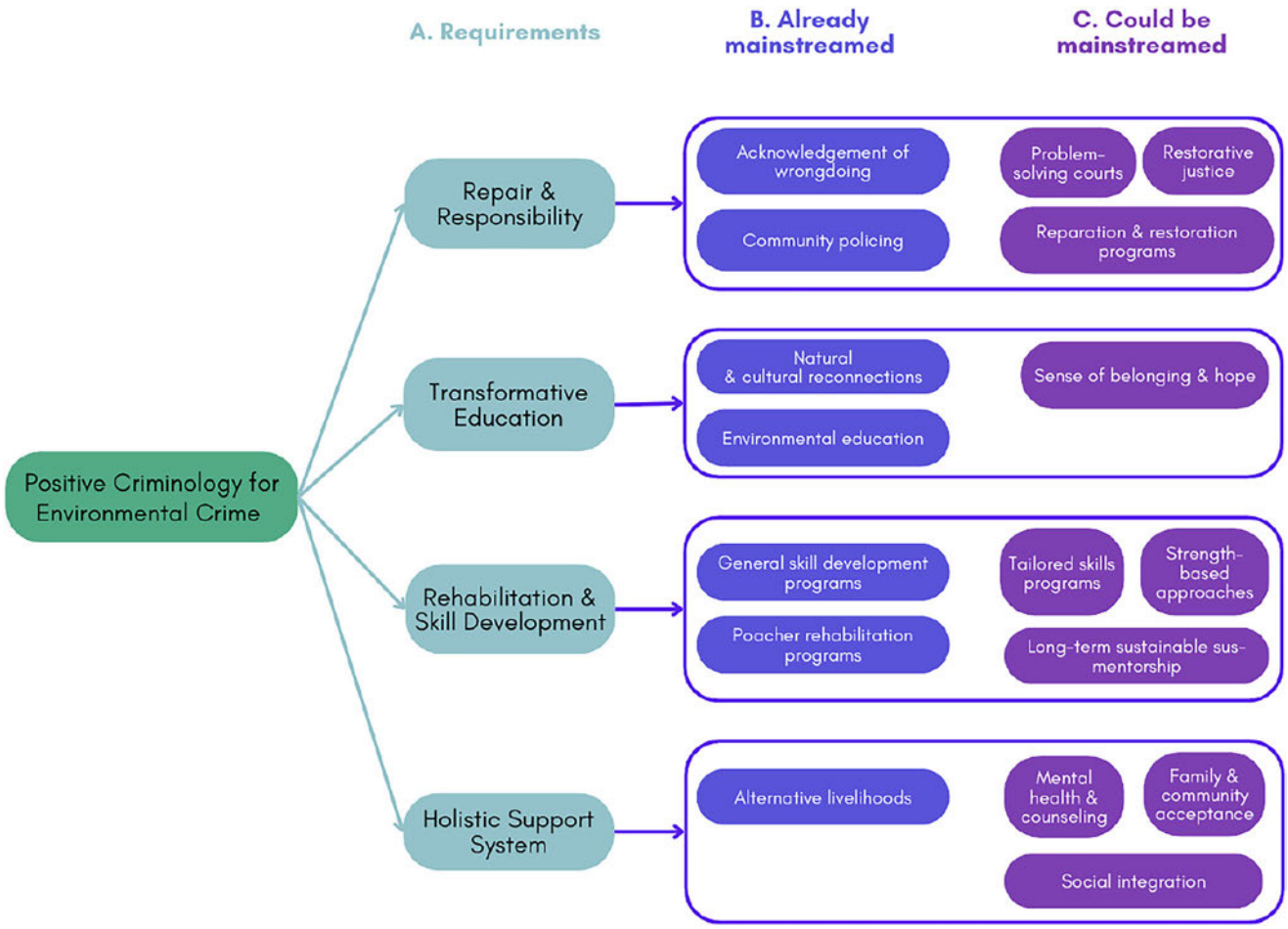

FIGURE 1 | Applying positive criminology to crimes that affect the environment would require at least four elements (A). In many ways, conservation has already mainstreamed these requirements (B); however, there remain additional opportunities for further mainstreaming (C).

and over into transnational spaces. For example, employment training in eco-tourism and sustainable agriculture may provide offenders with legitimate, conservation-related job opportunities and reduce reliance on illegal activities while functioning as a mechanism for crime desistance or reducing recidivism, such as poacher-to-protector programs (Cooney et al. 2017). Empirical evidence from Brazil (Flesher and Laufer 2013) and Iran (Ghoddousi et al. 2016) documented increased mammal encounters and decreased hunting pressure compared to baseline years after the introduction of patrols by community members, demonstrating increased wildlife abundance as an effective conservation outcome. Cross-border conservation initiatives have demonstrated that collaborative approaches can foster peace and cooperation even in conflict-affected regions like the Middle East. These outcomes align with calls for a new UNTOC to include new partnerships and more effective and stronger collaboration (Tennant et al. 2025), recognizing that nonviolent approaches can transcend traditional boundaries to build peace and conservation awareness among diverse stakeholders (Cooney et al. 2017, Roulin et al. 2017). Community policing, participatory monitoring/patrolling, and law enforcement partnerships that already involve community members may include former offenders, offering them conservation-based jobs that simultaneously promote stewardship and deterrence at a community level (Roe and Booker 2019). Conservation initiatives have implemented awareness-raising programs aimed at educating communities about conservation laws and fostering a cultural connection to environmental protection, like Eco-Justice Radio's Kenya Community Legal Awareness project, implementing community outreach in areas with newly protected ecosystems, or Fauna & Flora's Legal Awareness Program in Cambodia and Liberia. Positive criminology offers a perspective that may help grow scientific understanding about how people thrive or function across harmscapes and how they recover when exposed to harmscapes. These concepts are relevant to possible UNTOC language on damage and community service; they could apply to monitoring and evaluation of restorative sentencing or rehabilitation mechanisms.

Despite having many touchpoints with conservation and the environment, positive criminology does not appear to have been fully deployed as a theory of change on the ground and appears to be missing from UNTOC discourse about pushing forward ambitious ideas for change (Figure 1C). Mental health linkages remain widely absent based on our review of the literature. Social support and acceptance programs promoting rehabilitation or reintegration (e.g., skills building, long-term mentoring) are also overlooked, with stigmatization and condemnation of offenders being a de facto deterrence approach. The short-term nature and limited resources associated with many environmental crime projects and overseas development assistance pose challenges

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like recidivism as offenders return to illegal activities for myriad reasons.

1.4 | Matters Arising in Positive Criminology for Decision-Making

The relevance of positive criminology to environmental crime and a new UNTOC protocol may vary depending on the specific contexts and offender populations addressed. The possibilities of integrating positive criminology raise more questions than they provide answers, including those associated with the range of stakeholders for which positive criminology may be best intended, the potential for conflicts with existing efforts, and the suitability of positive criminology for addressing high-level organized crime, UNTOC's focus. Ideally, these questions are asked and answered holistically during intergovernmental process conversations associated with the upcoming COP.

1.4.1 | Stakeholders Involved in Positive Criminology

Positive criminology focuses on deterring recidivism from existing offenders and preventing at-risk offenders from committing a crime, often by data-driven identification of vulnerable groups. The approach emphasizes offenders' acknowledgment of responsibility while recognizing that deviant behavior can be detached from the individual's identity, supporting positive experience, which in turn aids societal reintegration. Restorative justice aims to bring the offender, the victim, and the community together for healing and accountability. However, applying these approaches to environmental crimes may present specific challenges. For example, these crimes are characterized by low prosecution levels and even fewer convicted offenders, raising questions about whether sufficient data exist for effective decision-making when transforming to positive criminology. The geographical dispersion of potential offenders across remote rural areas and covert environments complicates the identification of at-risk individuals. Furthermore, environmental crimes involve nonhuman victims, creating complex questions about victim identification, representation, and appropriate reparation. Who speaks for nonhuman victims, and how can damages to ecosystems and wildlife be meaningfully repaired?

1.4.2 | Potential, Emergent, or Unintended Conflicts With Existing Efforts

Conservation has a dynamic and mixed legacy of environmental justice, community engagement, and applying social science to practice. More recently, conservation has mostly endorsed policy and programmatic efforts increasing the severity of crimes, awareness raising in the transportation and banking sectors, andlinking these efforts to intelligence, national security, and transnational organized crime policies. Law enforcement and criminal justice stakeholders have pursued policy convergence with violent extremist organizations, drug trafficking, human smuggling, financial crime, online crime, state capture, and corruption. This punitive turn creates potential tensions with positive criminology approaches. In an evolving crime landscape with diverse definitions relevant to the environment (Table 1), fundamental questions arise about authority and legitimacy: who defines acceptable versus deviant behavior, and who has the authority to make or change determinations? Can positive criminology cope with the tension between the law violations that are condoned by social norms? Might positive criminology conflict with the efficacy of existing efforts, such as co-design with Indigenous people and local communities? Can diverse notions of justice be accommodated by positive criminology for conservation? How can positive criminology, if at all, accommodate serious crimes when it has usually been applied to nonserious offenses?

1.4.3 | Suitability for Addressing High-Level Organized or Corporate Crime

Environmental crimes can occur across multiple geopolitical and other boundaries (e.g., language, currency), involve large-scale volumes, and signal the involvement of organized criminal professionals, networks, and sometimes syndicates. Some high-level conservation crimes function in similar ways to other illicit markets and supply chains and are thereby distinct from the low-level community activities, which often involve involuntary exploitation of already marginalized groups. Corporate crime actions are often associated with large-scale illegal actions like illegal, unreported, or unregulated fishing, land grabbing, and illegal logging for meat production or timber concessions. Corporate crime is a matter of organizational structure, systemic power, and profit maximization rather than individual dispositions or socioeconomic strain. Corruption, either as an omission of duty or a commission of a crime, is a major enabling condition for organized crime. Legal trade and use of biodiversity and natural resources, along with a growing number of compliance obligations, can inadvertently enable corruption for environmental crimes. Applying positive criminology to high-level organized crime raises important questions about proportionality, deterrence, and victim justice, particularly whether nonpunitive approaches adequately address organized offenses and their societal impacts. For example, during UNTOC's COP Working Group, Colombian policy makers highlighted crime prevention initiatives that encompass positive criminology approaches but emphasized the need for strong international criminal legal frameworks to deal with complex environmental crimes such as illegal gold mining, largely governed by former FARC members, ELN guerrilla, and sophisticated organized crime groups (e.g., *Autodefensas gaitanistas de Colombia*). Given the heterogeneity of offender motivations, positive criminology may be most suitable for specific populations, such as marginalized communities seeking economic necessity (Leal 2025). Positive criminology may not perform as desired in universal contexts where traditional measures are potentially required for recalcitrant or profit-driven offenders with intrinsic criminal motivations (Hazbun 2025). How can positive criminology contribute to community support-based interventions working to combat corruption? Can positive criminology scale up to reduce harms associated with groups of individuals, such as corporate crime actors and organized crime syndicates, and/or scale over to virtual spaces that are exploited by syndicates for financial crime? How can positive criminology explain how corporate culture itself becomes a criminogenic environment where illegal acts are learned, normalized, and justified (e.g., denying harm to a vast ecosystem or condemning

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regulators)? These questions highlight the need for research to determine when graduated responses may be warranted (Zahnow 2021). Geospatial analyses using satellite imagery and remote sensing tools could help quantify illegal deforestation hotspots and be overlaid with public land registry maps to identify illegal clearances violating environmental legislation. Laundering analysis could help document how illegal commodities are disguised so as to appear legitimate or how corporate actors exploit regulatory loopholes.

2 | Practical Considerations Associated With Environmental Crime

Beyond these matters arising for high-level policymakers and decision-making, we see practical opportunities to enhance existing efforts designed to reduce harms from environmental crime on the ground, with strong relevance to conservation.

Retrofit existing programs for positive criminology by adding new or replacing ineffective activities or revising quantitative and qualitative evaluation measures to focus on positive criminology impacts. Manage expectations for being able to detect impacts of retrofitting from the short to the medium or long term.

Upskill personnel for the greater technical and knowledge fluency required for positive criminology via mentoring, partnerships, and internships both within and outside organizations. Effective ways to upskill could include online courses and certifications, hands-on learning, networking, reading, and higher education.

Normalize creative thinking by replacing conventional round-the-room staff meetings with white-boarding and brainstorming sessions or elevating creativity in annual reviews. Make it clear that all ideas are welcome and there are no "bad" ideas in brainstorming, incorporate creativity into daily workflows, and hire and promote creativity.

Share lived experiences with positive criminology in practice in multiple languages, particularly the most locally relevant non-English language.

Outsource to rehabilitation professionals with existing experience and resources, in addition to or instead of assigning responsibility to conservation law enforcement officials who already have specialized training in areas sometimes beyond the scope of positive criminology. Develop co-management programs where local communities take a more active role in protection or offer first-time offenders opportunities to participate in prevention rather than facing prosecution.

We recognize positive criminology may not always represent a viable perspective for environmental crime policymaking or practice, as the sector works to cope with conflicting priorities like reducing accelerating rates of biodiversity loss, changes in overseas development assistance, dynamic geopolitical support, and conflicting organizational priorities. Our hope is that ideas herein represent a theoretical contribution, even though our focus is somewhat narrow in scope, and there remain data availability constraints and political feasibility challenges, particularly with high-level organized or corporate crime. Drivers of environmental crime can be social, ecological, economic, or normative in nature and vary by space and time. However, in some instances, positive criminology may present itself as a key transformative theory of change for addressing the social dimensions of conservation crime and is available for deployment.

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The Supreme Court Draws a Murky Line; The Sentencing Commission Should Help Clarify It

Guideline errors, appeal waivers, and the case for Commission action after Hunter v. United States

JONATHAN J. WROBLEWSKI AND DAB
JUN 22, 2026

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In *Hunter v. United States*, the Supreme Court ruled that defendants can sometimes appeal a sentence even when they waived their right to do so. But as with many Supreme Court rulings, *Hunter* left the defining legal line murky, here the line demarcating appealable and unappealable sentencing rulings where there is a bargained-for appeal waiver.

In 2024, Munson Hunter pleaded guilty to one count of aiding and abetting wire fraud. There was a written plea agreement in the case; the government agreed to dismiss nine other charged counts, and Hunter agreed not only to plead guilty to the one count but also to waive his right to appeal his not-yet-imposed sentence. That was the gist of the bargain.

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Some months later, the district court sentenced Hunter to over four years in prison. But most relevant to the Supreme Court case, the district court also required him, as conditions of his supervised release, to receive mental health treatment and to take all mental-health medications prescribed by his treating physician. Hunter was adamant that he did not want to take any medication, and he appealed that supervised-release condition. The Fifth Circuit dismissed the appeal, ruling that the appeal waiver in the plea agreement barred further review.

Last week, the Supreme Court reversed the Fifth Circuit. Writing for an eight-member majority, Justice Elena Kagan explains that "an agreement not to appeal a sentence is unenforceable when it would result in a miscarriage of justice — meaning, when it would leave in place the kind of egregious error that would bring the judicial system into disrepute." Kagan does not say if the supervised release condition to take the prescribed medicine was such a miscarriage of justice. While she does give a few examples of circumstances that would negate an appeal waiver, she leaves the line defining a miscarriage of justice murky. If you doubt that, take a look at the two competing concurring opinions among six of the justices that take different positions — and begin the next debate — about exactly where that line is.

We think the Sentencing Commission has a role to play in defining the line, and we urge it here to take up the issue and fulfill that role.

As Expected, Justice Kagan Follows Lisa Blatt's Concession at Oral Argument About the Guidelines

Back in April, we published a Substack essay about the case after the Court heard oral argument. We raised concern then about a concession made by Hunter's counsel, Lisa Blatt of Williams & Connolly.

While Blatt argued vigorously that courts must retain a safety valve for "repugnant and manifestly unjust sentences," she readily — and quite openly — conceded that sentencing guideline calculation errors fell entirely outside any exception she was advocating. "A lot of defendants are unhappy with their sentences," she acknowledged. But when that unhappiness stems from the Guidelines, Blatt said, "courts have universally said tough luck, that part of the appeal waiver is the assumption that the court will make ordinary errors in sentencing guidelines." As long as the sentence imposed falls within the statutory maximum, she maintained, the appeal waiver was enforceable even if there was a manifest legal error in the guideline calculation.

That concession was troubling to us then, and it's now taken on greater significance. It lumped all guideline errors together — trivial and massive alike. And as we said back in April, if adopted wholesale, it would insulate appeal waivers from challenge whether a guideline miscalculation resulted in a few additional months of imprisonment or additional decades.

Blatt's position sat uneasily, we thought, with the Supreme Court's own decision in *Peugh v. United States*, 569 U.S. 530 (2013), where the Court found the Guidelines sufficiently "law-like" to trigger the Ex Post Facto Clause, recognizing that "district courts must begin their sentencing analysis with the Guidelines" and "use them to calculate the sentencing range correctly." The Court in *Peugh* further acknowledged that "[t]hose Guidelines will anchor both the district court's discretion and the appellate review process." The empirically well-documented "gravitational pull" of the advisory Guidelines — their persistent influence on the sentences judges actually impose, even after *United States v. Booker*, 543 U.S. 220 (2005) made them advisory — means that when a guideline miscalculation is large, the sentencing consequences can be severe and unjust.

Our Earlier Recommendation

We suggested back in April that the Court not follow Blatt's reasoning to its logical conclusion by placing all guideline errors in appellate waiver cases permanently beyond appeal regardless of their magnitude or impact. A better standard, we proposed, would borrow from the plain-error doctrine first articulated in *United States v. Olano*, 507 U.S. 725 (1993), and reaffirmed in *Puckett v. United States*, 556 U.S. 129 (2009). Under that standard, to be cognizable on appeal despite being forfeited, an error must be clear or obvious, must affect substantial rights, and must "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings." Applied to the appeal waiver context, the argument was that when guideline errors are obvious and substantial — not merely minor technical miscalculations — they too should be cognizable on appeal notwithstanding a waiver. Such a standard would be consistent with the "careful balance" the Court struck in *Olano* and *Puckett* "between judicial efficiency and the redress of injustice," and would honor *Peugh*'s recognition of the Guidelines' law-like character and empirical influence.

Justice Kagan's Reasoning and the Treatment of Guideline Errors

In her opinion, Justice Kagan endorses the "miscarriage of justice" standard already adopted by most courts of appeals in appeal-waiver cases. In doing so, she articulates a framework with clear implications — yet significant remaining ambiguity — for guideline calculation errors.

Her opinion's starting premise is that enforcing appeal waivers is not simply a matter of honoring a contractual bargain between the defendant and the government. The court itself is enmeshed in the approval and implementation of plea agreements, Kagan says, and its own institutional integrity is at stake when it enforces a waiver that locks in a fundamentally lawless sentence. Drawing on the Court's prior recognition in *United States v. Mezzanatto*, 513 U.S. 196 (1996), that some rules are "so fundamental" that they could not be waived "without irreparably discrediting the federal courts," Kagan concludes that automatic enforcement of appeal waivers "risks institutional harm" and that federal courts have an "independent" "institutional interest" in ensuring that legal proceedings "appear fair to all who observe them."

The majority's examples of miscarriages of justice are instructive but leave many questions unanswered. The examples include: a sentence exceeding the statutory maximum; a sentence premised on a blatant constitutional error, such as a judge who unconstitutionally considers a defendant's race or religion; a condition of supervised release prohibiting a female defendant from becoming pregnant; and, in perhaps the most vivid formulation offered at oral argument, a judge who "let an orangutan pick a sentence out of a hat." Kagan acknowledges that these examples do not exhaust the category but declines to enumerate more.

Kagan speaks directly to the question of ordinary guideline miscalculations, and here the Court's holding carries its most consequential practical message. "Sentencing is a complex affair in our criminal justice system," Kagan writes, "involving for example the detailed calculation of a Sentencing Guidelines range and the mandatory consideration of multiple sentencing factors. In that endeavor, it is unfortunate but inevitable that mistakes will occur. Such standard-fare errors in misapplying sentencing law cannot cancel an appeal waiver." [Aside #1 – Kagan's opinion is quite an indictment of the complexity of the federal sentencing process and the Guidelines, in particular.] Her reasoning is pragmatic and not particularly one to inspire courts towards justice for all: if ordinary guideline errors could vitiate an appeal waiver, she says, "the utility of waivers in plea negotiations could plummet," reducing their value as a prosecutorial concession and potentially chilling defendants' ability to obtain favorable plea deals. Moreover, she observes, routine guideline errors are not the kind of mistakes "likely to discredit the judiciary's commitment to law." [Aside #2 – This is not exactly full-throated faith in —and endorsement of — the Guidelines as an important part of the sentencing process.]

Defense counsel's concession at argument thus found its echo in the majority opinion: "standard-fare" guideline errors, clearly and firmly, do not satisfy the miscarriage of justice standard. "Tough luck" remains the rule for ordinary guideline miscalculations in the face of an appeal waiver. The Court's endorsement of that position — anticipated in our earlier essay — comes as little surprise, and it has the consequences that the essay warned about: cementing the power of appeal waivers already in widespread use, reducing the leverage defense counsel can exercise in plea negotiations, and leaving defendants who plead guilty with no recourse for some unlawful sentences.

Room Remains: Guideline Errors That Are a Miscarriage of Justice

But the majority's conclusion that standard-fare guideline errors cannot void an appeal waiver does not mean that *no* guideline error can ever constitute a miscarriage of justice. Justice Kagan is explicit: "A high bar is not the same as an insurmountable one." It is in the space between the ordinary and the egregious that the most significant unresolved questions now reside.

Justice Gorsuch, concurring together with Justices Sotomayor and Jackson, makes this point forcefully and with important doctrinal support. While acknowledging that standard-fare errors in applying the advisory guidelines "will not often clear the 'high bar' the Court sets today," he emphasizes that "some errors may." He points specifically to *Rosales-Mireles v. United States*, 585 U.S. 129 (2018), where the Court held that the failure to correct a plain and non-harmless error in calculating an advisory guidelines range ordinarily "will seriously affect the fairness, integrity, and public reputation of judicial proceedings." Justice Gorsuch quotes the memorable challenge posed in that case: "'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?'" He also suggests that a miscarriage of justice would arise when a sentence is so substantively unreasonable as to fail even the deferential abuse of discretion standard applicable in ordinary sentencing appeals.

Justice Kavanaugh, joined by Justices Alito and Barrett, concurs in the full majority opinion but registers his disagreement with Justice Gorsuch's approach. In his view, the Gorsuch concurrence would set a "lower bar" for the miscarriage of justice exception than the majority intends and may not be "entirely consistent with the Court's opinion." The majority's language, he emphasizes, limits the exception to "extreme cases" involving sentencing errors that are "egregious" and "obvious" and that "undermine public confidence in the judiciary."

Justice Thomas dissents entirely, arguing that Hunter had knowingly and voluntarily waived his appeal rights and that no legal principle justifies the Court's creation of an exception — and warning that, however difficult it may be to *succeed* on a miscarriage of justice claim, it will always be easy to *allege* one, resulting in a potential flood of appeals.

The significant tension between the Gorsuch and Kavanaugh concurrences — and neither justice's expression of it in the majority opinion — leaves the lower courts with real work to do. The follow-on debate has begun. The precise boundary between a standard-fare guideline error and one so egregious that it constitutes a miscarriage of justice is, to put it plainly, unresolved. As the Fifth Circuit takes up Hunter's case on remand, and as other circuits apply the majority's standard, that line will become clearer case by case, or it may not. But there is a critical additional lawmaker in the federal sentencing system that should help in this process.

The Sentencing Commission Should Act

Though at least one of us remains concerned about the legal basis for, and lawfulness of, enforcing any sentencing appeal waivers, see, e.g., *Appeal waivers, Hunter and a kind of lawlessness all the way down?*, we both believe the Supreme Court's articulated enforcement framework — and the justices' disagreements about the application of that framework to guideline error cases — creates an important role for the U. S. Sentencing Commission. The *Hunter* decision tells us that the miscarriage of justice exception exists, sets a high bar, and offers illustrative examples — but it deliberately declines to catalog every (or any) circumstance in which a guideline error will clear that bar. The Commission has both the institutional expertise and the statutory authority to bring greater clarity to this space, and it should do so.

In this context, it is worth remembering that the Supreme Court in *Booker* debated whether and how appellate review would and should be preserved as part of the remedy making the Guidelines advisory. Speaking for a majority, Justice Breyer not only stressed that Congress would have wanted to preserve appeals as a means to "iron out sentencing differences," but also championed the roles of the Sentencing Commission continuing "to collect and study appellate court decisionmaking [in order] to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process." We have suggestions for the Commission in this context.

As a first step, the Commission should undertake a systematic study of the cases in which lower courts have declined to enforce appeal waivers on miscarriage of justice grounds. Even before *Hunter* resolved the circuit split, most courts of appeals had been applying some version of the miscarriage of justice standard for years, and their decisions have produced a body of case law that ought to help inform a more principled and consistent approach nationwide. The Commission should prepare a report cataloging those decisions, identifying the types of guideline errors that courts have found to rise to the level of a miscarriage of justice, and examining the factual and legal patterns that distinguish egregious errors from ordinary ones.

Armed with that evidence, the Commission should then consider amendments to Chapter Six of the Sentencing Guidelines — the chapter governing sentencing procedures and, in particular, plea agreements. Chapter Six currently includes policy statements on the acceptance of plea agreements and their components under Federal Rule of Criminal Procedure 11. The Commission should add to those policy statements and speak directly to the miscarriage of justice question in the wake of *Hunter*. It should provide guidance identifying the categories of guideline calculation errors that are sufficiently obvious, substantial, and consequential as to bring into question the fairness, integrity, and public reputation of the sentencing process and that should therefore be cognizable on appeal notwithstanding an appeal waiver.

Such a new policy statement would serve several important functions. It would give appellate courts — and litigants before those courts — a principled framework for distinguishing the standard-fare errors Justice Kagan describes from the more egregious errors, reducing inconsistency across the case-by-case follow-on consideration and subsequent decisions of the circuit courts. It would also provide notice to defendants, prosecutors, and district courts at the time a plea agreement is negotiated about the kinds of sentencing errors that remain reviewable, making appeal waivers more genuinely knowing and voluntary. And it would bring the Guidelines' treatment of plea agreements into alignment with the Court's recognition — most fully elaborated in *Peugh* — that a correct guideline calculation is legally required and that the Guidelines, though advisory, exert a powerful gravitational pull on the sentences courts impose.

The Commission has acted before in response to significant Supreme Court decisions affecting sentencing practice. *See, e.g.,* Amendment 798, in response to *Johnson v. United States*, 576 U.S. 591 (2015). *Hunter v. United States* calls for a similar response. The "tough luck" rule for ordinary guideline errors is now settled law. But the line between an ordinary error and a miscarriage of justice is not, and the Sentencing Commission is the institution best positioned to help bring clarity to it. In *Booker*, the Supreme Court made clear that the Commission has a role in guiding circuit courts as well as district courts in advancing fair, just, and effective sentencing practices. The Commission should embrace that role ASAP.

Comment Regarding U.S. Sentencing Commission Proposed Priorities for the 2026-2027 Amendment Cycle (submitted by Bernard W. Bell, July 23, 2026)

Thank you for the opportunity to comment on the Commission's 2026-2027 priorities.

By way of introduction, for over 15 years I have researched and written and given presentations on issues regarding government information. That work includes my research and consultation on two Administrative Conference of the United States ("ACUS") projects: (1) *The Government in the Sunshine Act in the 21st Century* (March 10, 2014),[1] and (2) *Disclosure of Agency Legal Materials* (June 2, 2023).[2] I have taught and written on the broader subject of administrative law for approximately 30 years.

I applaud the Commission for putting a high priority upon comprehensively reviewing its Rules of Practice and Procedure relating to transparency and public participation. Granted, much of the Commission's work, at least the best-known part, deals with sentencing guidelines that assist federal judges in exercising sentencing discretion. However, that work and other adjacent issues with which the Commission deals is not solely of interest to judges and other direct participants in the sentencing process. Issues of sentencing are issues of importance to the general public, as the Commission is no doubt quite aware. This means that the Commission's work should be as transparent to the public as practicable, and that public participation should be encouraged.

I set out below some general principles that the Commission should consider, assuming it pursues review of its procedural and practice rules.

General Principles

First, the Commission's Rules should continue to accord Commission members the ability to interact directly with each other informally regarding preliminary, administrative, or housekeeping matters by way both nonpublic "meetings" and notational voting, as the currently provided in Rule 2.2(c). Other government commissions and boards have long complained that the strictures of the Government in the Sunshine Act hamper informal communication between members in seeking to work through problems, reach compromises, or understand each other's positions. To address the need for such communications, some government commissions have employed strategies that provide less effective communication between board/commission members while providing no greater transparency. One example of such a strategy is using staff to

[1] https://www.acus.gov/document/final-report-sunshine-act

[2] Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, *Disclosure of Agency Legal Materials* (June 2, 2023) (report to the Admin. Conf. of the U.S.). I am currently a public member of ACUS, but submit these comments solely as my person views, and not on behalf of ACUS.

negotiate matters with and seek clarification from other commissioners. In addition, of course, even the Government in the Sunshine Act has some exceptions that would cover some of the matters mentioned in Rule 2.2(c).

On the other hand, section 2.2(c)'s list of matters subject to Commission decision without a public meeting is quite broad, and includes at least one seemingly odd subject for non-public resolution – decisions on publishing reports and making recommendations to Congress. Publishing reports and making legislative recommendations would, at first blush, seem matters that should be debated and resolved in a public meeting.

Perhaps the Commission would consider a rule that requires *some* matters of the sort listed in Rule 2.2(c) to be discussed and resolved in a *public* session if at least one member of the Commission requests that the matter be heard in public. Of course, some specific matters should not be discussed in a public meeting. Thus, some provision might be made for a Commission majority to reject a member's request for a public meeting, with some record of the reasons the majority believes discussing the matter at a public meeting will cause some identified foreseeable harm.

Second, *agency legal materials* should be affirmatively disclosed and should be easy to access, preferably online.[3] By agency legal materials, I mean "documents produced by an agency that establish, interpret, apply, explain, or address the enforcement of legal rights and obligations, along with constraints imposed, implemented, or enforced by or upon an agency."[4] ACUS has made such a recommendation to Congress with regard to executive branch agencies. I do not mean to suggest that the Commission does not currently follow this principle; I simply am not sufficiently aware of the agency's practices in this regard.

Moreover, the Commission, in providing advice to judges and probation officers, who are outside its administrative umbrella, sits in a different position from the administrative agencies addressed in the ACUS report and recommendation to Congress. That said, "agency legal material" may encompass more material than one might expect. For example, some training material might conceivably be viewed as "agency legal material" because such material provides further refinements for use by judges in deciding upon sentencing and by probation officers in preparing probation reports.[5]

Third, the Commission may understandably have concerns about revealing the comments individual judges and perhaps some others offer to the Commission. I would

[3] Id. All legal material that agencies are obligated to disclose upon request by a member of the public should be affirmatively made accessible to the public on agency websites.
[4] Id., at 4.
[5] This is not to say that interactions with participants in training sessions need be disclosed or that such sessions be accessible to the public.

assume, for example, that judges might not wish to elaborate upon their thought processes with respect to the sentencing of particular defendants beyond their statements for the record at the sentencing hearing. For the purposes of allowing judges to share more candidly with the Commission their concerns about sentencing, particularly in individual cases, the Court might consider more broadly applying the "Chatham House Rule" (referenced n Rule 3.3(5)), which I take to mean a rule that dictates that meeting participants can freely use the information they receive, but cannot reveal the identity or affiliation of the speaker or any other participant.[6] However, in the context of the Commission, unless the communication is among a small number of people, it is not clear to me why the identity of the *attendees* at a meeting should be kept secret.[7]

Fourth, the Commission should consider modifying its limitation on disclosing records, in Rule 3.3(4), by adding a "foreseeable harm" standard to be applied in considering disclosure of information nominally deemed inappropriate for public disclosure. Rule 3.3(4) largely seems to replicate the Freedom of Information Act (FOIA) provisions permitting agencies to withhold records falling into certain categories. The definition of most FOIA exemptions sweep more broadly than the exemption's supporting rationale. In the FOIA Improvement Act of 2016, Congress provided that agencies should withhold from FOIA requesters records covered by an exemption *"only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption . . . or disclosure is prohibited by law."*[8] This is a salutary principle with respect to information described in Rule 3.3(4). Of course, those sharing information with the Commission should be made aware of this approach, so that they have fair warning that material they share with the Commission may be shared in some form, which might in a manner that does not disclose the identity of the person sharing the information.

Fifth, the Commission should consider establishing some mechanism to identify which, if any, of the records it does not already disclose are of interest to the public. And, when it does so, the Commission should proactively disclose such records unless their disclosure would be of a type generally considered inappropriate for disclosure and cause some "foreseeable harm," as the term is used in the FOIA Improvement Act.

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[6] https://www.chathamhouse.org/about-us/chatham-house-rule .

[7] Of course, judges understandably often shy away from public attention, and federal judges are not elected officials with conventional obligations to represent a constituency. Nevertheless, judges are public officials who wield great authority and should not expect that the general views they share in an open forum, such as in connection with notice and comment process, will be treated any more confidentially than others that participate in such open fora.

[8] FOIA Improvements Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538 (codified at 5 U.S.C. §552(a)(8)(A)(i)(I)). For a discussion of how the "foreseeable harm" standard applies in the context of FOIA's exemptions, see S. Rep. 114-4, 7-10, accessible at https://www.congress.gov/committee-report/114th-congress/senate-report/4 .

Such a proactive approach would be preferable to creating a reactive regime, under which individuals must formally request records and the Commission must formally respond, which causes much delay, controversy, and expenditure of agency resources in the FOIA context. The Commission should have some mechanism for ensuring that its responses to informal requests for documents are consistent.

Sixth, the Commission should reconsider its notice period with respect to its meetings and the material to be considered at its meetings. A seven-day period, as specified in the Commission's rules, seems a relatively short notice period. And making documents available less than seven days in advance, and in some cases only at the start of the meeting or after it concludes, makes it difficult for attendees to prepare to comment on the matters to be discussed at the meeting. It may also even make it difficult for attendees to follow the Commission members' public deliberations.

Conclusion

Again, I complement the Commission on placing reviewing the transparency provisions regarding its rules on the list of priorities and fully support it doing so. I hope that the process for reviewing its transparency provisions will itself be transparent, and welcome the opportunity to participate further as you consider these issues.

Re: Proposed Priorities for Amendment Cycle.
https://www.federalregister.gov/documents/2026/06/12/2026-11906/proposed-priorities-for-amendment-cycle

To: Jennifer Dukes, Senior Public Affairs Specialist, USSC

From: Mitchell Berger, (comments made in personal capacity), [redacted]

Dear Ms. Dukes: I write in my personal capacity to offer the following suggestions regarding mental health, substance use disorder, and intellectual and developmental disabilities (I/DD) as they relate to the Guidelines Manual, the Rules of Practice and Procedure, relevant case law and legislative developments, and other issues before the US Sentencing Commission (hereafter, 'Commission'). The views expressed here are mine alone and not those of any agency, organization, or other individual.

Overall, I urge the Commission to ensure that its forthcoming work meaningfully addresses the intersection of federal sentencing, substance use disorders, mental health conditions, and I/DD. I also encourage the Commission to more consistently address the issue of expungement. These matters are directly implicated in several of the proposed 2026–2027 priorities, including the comprehensive evaluation of the Guidelines Manual, the review of departure and variance practices, and the Commission's broader efforts to promote fairness and proportionality in sentencing.

Mental Health and Addiction Considerations: The 2025 Guidelines Manual made significant structural changes by removing all departure provisions related to personal characteristics—including mental and emotional conditions and diminished capacity. The Commission explained that these amendments "better align the requirements placed on the court and acknowledge the growing shift away from the use of departures provided for within the Guidelines Manual in the wake of Booker and subsequent decisions" and that "[t]he removal of departures from the Guidelines Manual does not limit the information courts may consider in imposing a sentence nor does it reflect a view from the Commission that such facts should no longer inform a court for purposes of determining the appropriate sentence." [1] However, shifting these issues entirely to variance practice has also reduced the amount of practical guidance available to judges, probation officers, attorneys, and other system actors. Important considerations related to mental health, substance use disorders, and intellectual and developmental disabilities, previously addressed in §§5H1.3 and 5K2.13, now lack clear, uniform direction. (These sections previously focused on mental and emotional conditions and diminished capacity, respectively). As the Commission undertakes a full review of the Manual, it should consider whether new commentary, application notes, or structural guidance are needed to promote consistency and fairness in variance practice for these issues.

With respect to §2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy, even with recent changes, the Guidelines continue to emphasize drug quantity, even though in many cases the conduct is driven by an individual's low-level participation to support their own addiction,

[1] https://www.ussc.gov/guidelines/amendment/836; https://www.law.cornell.edu/uscode/text/18/3553; https://www.ussc.gov/guidelines/2025-guidelines-manual/annotated-2025-chapter-1

rather than their intent to have a primary role in a drug trafficking enterprise. Many nonviolent individuals receive lengthy sentences and face supervision conditions that increase the risk of reincarceration. As part of its review, the Commission should continue examining the drug quantity tables, role adjustments, and the role of participation in drug treatment and mental health programs in sentencing determinations (see, e.g., §5D1.1 imposition of term of supervised release).

The Commission also can add a new application note in this section focused on Recognition of Treatment and Recovery Support Participation. This note, perhaps added after application note 20, in section 2.D.1.1 could state that: "In determining the appropriate sentence under 18 U.S.C. § 3553(a), the court may consider evidence of the defendant's post-offense rehabilitation, including engagement in evidence-based treatment, medication-assisted treatment, or peer-support recovery programs. Such programs may include, but are not limited to, structured clinical treatment, mutual-aid groups, faith-based and secular recovery programs, or other community-based recovery supports. Participation in these programs may be relevant to assessing the defendant's progress toward recovery, reduced risk of recidivism, and suitability for alternatives to incarceration or conditions of supervised release. Participation in any faith-based or spiritually oriented program should be voluntary, and courts should ensure that secular alternatives are available." Similar language could be added to §5D1.3 (Conditions of Supervised Release) and §5B1.2 (Term of Probation) to ensure consistent treatment of recovery-support participation across sentencing and supervision contexts.

Additionally, in reviewing criminal history/livelihood rules (§4A1.1), the Commission could consider adding guidance encouraging courts to assess whether and to what extent mental health conditions or a history of substance use contributed to the defendant's prior conduct. While such conditions do not automatically mitigate culpability or harm, they may be relevant to individualized sentencing. It is also important to recognize that many individuals with substance use disorders have co-occurring mental health conditions, and untreated mental illness can itself contribute to substance use.[2] Persons with co-occurring disorders are considerably more likely to be arrested than those with only substance use disorders or mental health conditions.[3]

Recognizing the importance of mental health and substance use disorder treatment the Commission in Chapter 1, Part A, could add the following language: "Consistent with federal public health policy, the Commission recognizes the importance of evidence-based mental health and substance use disorder treatment and prevention efforts. Courts may consider a defendant's treatment needs and rehabilitative progress under 18 U.S.C. § 3553(a) when determining an appropriate sentence." Such treatment can reduce recidivism and support reentry, and acknowledging its relevance within the introductory commentary would enhance the Manual's clarity while remaining fully consistent with statutory authority and the Commission's mission.

I/DD: The Commission should also specifically address I/DD within the federal sentencing framework. Individuals with I/DD are disproportionately likely to be victims of crime and also

[2] https://www.samhsa.gov/resource/ebp/advisory-substance-use-disorder-treatment-people-co-occurring-disorders-based-tip-42

[3] https://www.pew.org/en/research-and-analysis/issue-briefs/2023/02/over-1-in-9-people-with-co-occurring-mental-illness-and-substance-use-disorders-arrested-annually

disproportionately likely to face arrest and prosecution.[4] Yet, the Guidelines Manual does not meaningfully address I/DD-related considerations. Treatment needs for individuals with I/DD differ significantly from those with mental health conditions, and the impact of I/DD on culpability, comprehension, and vulnerability is distinct. The Commission should consider creating a dedicated section in the guidelines addressing I/DD, including how such disabilities may affect *mens rea*, role in the offense, victim-related adjustments, and other relevant factors.

Victim-related adjustments could add enhancements for those who intentionally target those with I/DD, mental health conditions or substance use disorders: Victim-related adjustments could be improved by adding sentencing enhancements for defendants who intentionally target individuals with I/DD, mental health conditions, or substance-use disorders. As noted, people with these conditions are more likely to be victims of crime than perpetrators. A subset of offenders appears to target such individuals, perhaps viewing them as less likely to be believed or to receive full consideration from law enforcement, judges, or prosecutors.

In Application Note 2(B) following §3A1.1 (Hate Crime Motivation or Vulnerable Victim), I urge that the current note be amended to read:

"A 'vulnerable victim' means a person who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct. For purposes of this guideline, 'mental condition' includes, but is not limited to, autism spectrum disorder, intellectual or developmental disabilities, serious mental illness, or substance-use disorders that substantially impair the individual's ability to recognize danger, avoid coercion, or protect themselves."

Adding express language to §3A1.1(b) or its commentary would promote consistency across courts, ensure that these vulnerabilities are reflected in sentencing, and align the Guidelines with current clinical understanding and federal disability policy.

Expungement: I also recommend that the Commission expressly address expungement in its forthcoming work. First, the Commission should develop a clear definition of expungement, as definitions vary widely across states, territories, and federal contexts.[5] Second, although expunged convictions are not counted directly under the Guidelines, courts may consider them through variances.[6] This is particularly important because many expunged convictions may relate to conduct driven in part by addiction or mental health conditions.[7] The Commission

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[4] Stancliffe RJ, Frantz BL. Criminal Justice and People With Intellectual and Developmental Disabilities. Intellect Dev Disabil. 2024 Jun 1;62(3):211-224. doi: 10.1352/1934-9556-62.3.211; https://policyimpactproject.org/autism-criminal-justice/; Chester V, Bunning K, Tromans S, Alexander R, Langdon P. The Prevalence of Autism in the Criminal Justice System: A Systematic Review. BJPsych Open. 2022 Jun 20;8(Suppl 1):S45–6. doi: 10.1192/bjo.2022.179; https://www.autism.org.uk/what-we-do/news/criminal-justice-joint-inspectorate; https://autisminnocenceproject.org/;https://thearc.org/our-initiatives/criminal-justice/

[5] The distinction between expungement and sealing in some states also raises complex issues.

[6] See e.g., §4A1.2. Definitions and Instructions for Computing Criminal History, https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?app_gl_id=%C2%A74A1.2

[7] https://recoveryreview.blog/2024/09/13/as-federal-government-supports-recovery-it-should-encourage-expungements-of-substance-use-disorder-related-arrests-and-convictions/; https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside-2-2/

should consider clarifying how expunged convictions should be treated. Similar to Amendment 821, [8] the Commission could revise §4C1.1 (Zero-Point Offenders) to specify that individuals whose only prior convictions have been expunged or sealed under state or territorial law automatically qualify as zero-point offenders. This would promote consistency across jurisdictions with differing expungement laws.

Other ways to address mental health, substance use and I/DD: The Commission's commitment to addressing "resolution of circuit conflicts as warranted" provides a pathway for providing additional guidance and working toward fair sentencing when addressing mental health, substance use and I/DD. Clarifying how these issues should be considered when applying specific offense characteristics, enhancements, or supervised release conditions would reduce inconsistencies and improve outcomes.

With respect to the Rules of Practice and Procedure,[9] the Commission should work to obtain input from individuals with mental health and substance use disorders and I/DD, family members and caregivers, health providers and other experts to inform its work. The Commission could consider establishing an ad hoc advisory group on mental health, substance use, and I/DD to explore these issues in depth and ensure that sentencing policy is fair to crime victims, defendants, and communities.[10]

Thank you for considering these views and suggestions. Through such efforts to support those with mental health conditions, I/DD and substance use, the Commission can meet its goals of promoting fairness and consistency within the criminal justice system.

Sincerely,

Mitchell Berger

Digitally signed by Mitchell Berger
DN: cn=Mitchell Berger, c=US, email=mazrula@hotmail.com
Date: 2026.06.12 20:14:16 -04'00'

Mitchell Berger

Note: I am submitting these suggestions in my personal/private capacity. The views expressed are mine only and should not be imputed to other individuals nor to any public or private entity.

[8] https://www.ussc.gov/guidelines/amendment/821; https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?APP_GL_ID=%C2%A74C1.1

[9] https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf

[10] https://www.ussc.gov/about/who-we-are/advisory-groups

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July 20, 2026

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This submission responds to the U.S. Sentencing Commission's request for comment on possible policy priorities for the amendment cycle ending May 1, 2027. Following the Supreme Court's rulings in *Fernandez v. United States*, No. 24-556 (U.S. May 28, 2026) and *Rutherford v. United States*, No. 24-820 (U.S. May 28, 2026), the Commission likely will view potential amendments to U.S.S.G. § 1B1.13 as a priority for this amendment cycle. I urge the Commission to pursue a robust "second-look sentencing" agenda which extends beyond just responding to these decisions and prioritizes broad research regarding federal and state experiences with compassionate release and other second-look sentencing laws.

I have appended to this letter an essay published on the Sentencing Matters Substack and my co-authored submission from 2024 which are part of my long-standing advocacy for laws that enable courts to review and revise lengthy prison terms. Notably, this past January, President Donald Trump signed into law a new federal statute providing authority for federal courts to "reduce the term of imprisonment" for prisoners whose offenses were "a direct result of … having been a victim of trafficking." Trafficking Survivors Relief Act (TSRA), 18 U.S.C. § 3771A(e). The TSRA, which passed both chambers of Congress in December 2025 by voice vote and unanimous consent, is not only a notable doctrinal development, but also a critical signal of the bipartisan political support and varied policy justifications for authorizing reconsideration of prison sentences in light of new understandings of fair and effective justice.

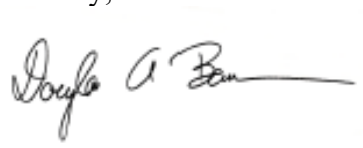
Because the TSRA requires courts to consider "the factors set forth in section 3553(a)," the Commission has a duty under 28 U.S.C. § 994(a)(2) to explore promulgating general policy statements regarding the sentence reduction authority in the TSRA. In discharging this duty, the Commission would be well advised to conduct in-depth research on the federal system's experiences with sentence reduction processes as well as state laws that provide prisoners various means to secure sentence review. This research should not only focus on identifying best practices to "further the purposes set forth in section 3553(a)(2)," *id.*, but also explore "recommendations to Congress concerning modification or enactment of statutes … advisable to carry out an effective, humane and rational sentencing policy." 28 U.S.C. § 995(a)(20). The TSRA's enactment suggests congressional interest in second-look sentencing mechanisms beyond so-called "compassionate release"; the Commission should prioritize research and policy recommendations that advance the goals of the TSRA and also recommend to Congress further second-look sentencing reforms.

The 2024 submission (appended here) outlined various actions this Commission could take to advance robust second-look sentencing research. Those recommendations remain timely, especially given the growing number of jurisdictions enacting an array of new second-look sentencing laws. Particularly valuable would be a public conference to collect information about, and get stakeholder input on, the development and implementation of second-look sentencing mechanisms nationwide. Such a national convening conducted would enable the Commission and policy makers nationwide to develop a richer and more informed understanding of second-look sentencing best practices.

A second-look sentencing research agenda should, of course, include a direct, deep and dynamic review of the processes, outcomes and stakeholder experiences surrounding sentencing reduction motions under 18 U.S.C. § 3582(c)(1)(A)(i). The rulings in *Fernandez* and *Rutherford* risk focusing the Commission's attention on what grounds may not serve as the basis for a statutory sentence reduction. But Commission data showing declines in the number of motions and grants in Fiscal Year 2026 suggest that the underutilization of grounds that can serve as the basis for a statutory sentence reduction should be a main concern for the Commission. Reviewing FY 2025 data, Jonathan Wroblewski has highlighted concerns about "tremendous disparities in the application of compassionate release, strongly suggesting that compassionate release is not being implemented with the 'certainty and fairness in meeting the purposes of sentencing' required by the Sentencing Reform Act." Jonathan J. Wroblewski, *Sentencing Matters Substack*, "What's Really Going on with Compassionate Release?" (March 19, 2026). In addition to potential revisions to applicable policy statements, the Commission should make it a priority to advance research, reports and guidance for the broader federal sentencing community to improve the sentence-reduction processes and decision-making under § 3582(c)(1)(A)(i).

Aside from specific agenda items, my primary comment is to urge the Commission to prioritize a robust approach to research and policy recommendations regarding sentence reduction opportunities for federal prisoners. In addition to providing a means for "[c]onsideration of any amendments that may be warranted in response to any legislation or case law developments," thorough and thoughtful research on sentence reduction law and policy can provide a particularly valuable and informative lens for reviewing "federal sentencing practices in light of the Commission's mission set forth in the Sentencing Reform Act, the statutory purposes of sentencing in 18 U.S.C. § 3553(a)(2), and relevant legal developments that have occurred in the past four decades."

Sincerely,



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From the Archive: Reviewing Again Why the U.S. Sentencing Commission Should Pursue a Robust Second-Look Agenda

This is the second in a series of essays we're revisiting to mark two years of the Sentencing Matters Substack

DAB
JUL 16, 2026

Last month, the U.S. Sentencing Commission published its proposed policy priorities for the coming guideline amendment year. Perhaps influenced by the possibility it could lose is quorum in 2027, the Commission's priorities indicate that it plans to take a broad look at both federal sentencing and its own operations: (1) "the Commission intends to undertake an evaluation of the guidelines and federal sentencing practices in light of the Commission's mission set forth in the Sentencing Reform Act, the statutory purposes of sentencing in 18 U.S.C. 3553(a)(2), and relevant legal developments that have occurred in the past four decades"; (2) "the Commission expects to undertake a comprehensive review of the Rules and consider whether any amendments to such Rules may be appropriate to further the agency's statutory purposes and enhance public engagement with and understanding of the Commission's work."

The Commission set forth somewhat similar broad priorities in mid-year 2024, which was also around the time this Substack got started. In one of my first posts here, I detailed my thinking (and writing) about modern second-look sentencing mechanisms and highlighted a co-authored letter submitted to the Sentencing Commission urging it to embrace "a robust 'second look' agenda." That letter urged the Commission to seize a leadership role in advancing research and sound policymaking with respect to resentencing opportunities

for prisoners in both federal and state systems. In the subsequent two years, the nationwide development, application, and discussions of various second-look sentencing mechanisms has increased considerably, and recent Supreme Court decisions in Rutherford *and* Fernandez *have added another layer of legal and practical uncertainty regarding federal statutory sentence reduction authority.*

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We are reprinting here my prior post not only because it remains timely, but also because I am especially eager to advocate again for the Commission to pursue a major convening (or two) "to collect information about, and get stakeholder input about, the development and implementation of second-look sentencing mechanisms nationwide." Even if — perhaps especially if — the Commission finds itself without a quorum, it would be valuable and appropriate for the Commission to use its considerable staff, resources, and expertise to bring together policy makers, jurists, and litigants from across the country, from state and federal justice systems, to advance and enhance an informed understanding of second-look sentencing best practices. To that end, the Commission might also find useful some of the other writings on this Substack from an array of folks on this important topic:

From Douglas Berman, "Should Second Look Efforts Focus Particularly on Drug Offense Sentences?"

From Marta Nelson, "Second Look Laws Are Passing — When Advocates Frame Them as Righting a Wrong"

From Norman L. Reimer, "First Steps and Second Chances"

From Jonathan Wroblewski, "What's Really Going on with Compassionate Release?"

Click here for a list of all our Substack essays on second-look sentencing.

- - -

Envisioning a second-look sentencing agenda for the U.S. Sentencing Commission

With growing use and interest in second-look sentencing in state and federal systems, the time is right for research on, and expansion of, second-look best practices

July 12, 2024

Responding in part to the modern realities of mass incarceration and massively long sentences in the United States, I have long been an advocate for all sorts of second-look sentencing mechanism. As I have stressed in a number of past articles, various forms of second-look sentencing have been important parts of the American sentencing tradition. Executive clemency powers, enshired in the US Constitution and all state constitutions, is a mechanism for second-look sentencing. So too has been traditional parole review and release, which was a fundamental part of every American sentencing system through most of the 20th Century.

In the 21st Century, perhaps in part because of new restictions or diminished use of parole and clemency, other mechanisms for second-look sentencing have emerged and been garnering great attention. In particular, reform advocates (including the American Law Institute and the American Bar Association) have urged jurisdictions to create or expand judicial authority to revisit past prison sentences, and a growing number of legislatures are enacting or actively considering judicial second-look sentencing authority. Notably, a number of different types

of laws and concerns are often (properly) included within the "second look" sentencing discussion, ranging from compassionate release laws that allow for sentence review under certain special circumstances, to doctrines focused on giving youthful offenders serving extreme prison terms a chance for parole or sentence review, to laws allowing prosecutors to initiate resentencing for all prisoners for any reason, to laws requiring judges to review all long prison terms after a certain period.

For anyone interested in broader reading on these topics, I can recommend many new resources. The Sentencing Project has this new report on the "Second Look Movement" and has created a "Second Look Network." The goup For the People, which is focused particularly on prosecutor-initiated resentencing, has assembled here publications and resources. Some notable long reading lists on these topics have been assembled by FAMM here and NACDL here and the Seattle Clemency Project here. And, for a somehwhat more dated and academic discussion of these topics, here is a partial sampling of some of my major second-look related writings:

- "Exploring the Theory, Policy and Practice of Fixing Broken Sentencing Guidelines" (2009)
- "Encouraging (and Even Requiring) Prosecutors to be Second-Look Sentencers" (2010)
- "Re-Balancing Fitness, Fairness, and Finality for Sentences" (2014)
- "Reflecting on Parole's Abolition in the Federal Sentencing System" (2017)

I find all the recent reform and advocacy in the second-look space quite exciting, but also a bit overwhelming and now needing more systematic and sustained review. Though I view the general argument for many second-look sentencing mechanisms to be compelling, assessing the particulars and determining best practices conceptually and practically is quite challenging. For that reason (and others), I was very pleased to

have the chance to work recently with Jeremy Haile, Director of Policy for For The People, and Erica Zunkel, Clinical Professor of Law at The Law School at The University of Chicago, on a letter we submitted to the U.S. Sentencing Commission urging it to embrace "a robust 'second look' agenda." Here is how our letter concludes, explaining what we have in mind:

> In part because this Commission has recently given focused consideration to one aspect of sentence reconsideration through recent amendments to §1B1.13, we believe this Commission is now uniquely positioned and able to develop and advance a robust "second look" sentencing agenda in the months and years ahead. Many activities might comprise such an agenda, and here we will propose just a few possibilities for Commission consideration:
>
> • **Convene a national second-look sentencing conference:** To establish sentencing laws reflecting the "advancement of knowledge of human behavior as it relates to the criminal justice process," 28 U.S.C. § 991(b)(1)(C), this Commission should hold a public conference in order to collect information about, and get stakeholder input about, the development and implementation of second-look sentencing mechanisms nationwide. Given the variety of "second look" laws being proposed and implemented in states and localities across the country — ranging from "traditional" compassionate-release laws to laws enabling resentencing of youthful offenders, to broad prosecutor-initiated and universal second-look resentencing laws — the policies and practices surrounding the review and reconsideration of prison sentences are quite dynamic and yet still quite opaque. A national convening conducted by the Commission to consider these laws would help not just this Commission, but also policy makers nationwide, have a more informed understanding of "second-look" best practices.
>
> • **Broadening federal resentence reductions:** To effectuate the "purposes of sentencing" and to avoid "unwarranted sentencing

disparities," 28 U.S.C. § 991(b)(1)(A-B), this Commission should conduct workshops to assess and improve the functioning of the sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A). Though Commission data indicate more sentence reductions motions have been filed since Congress sought to expand their use in the First Step Act of 2018, recent data also show that, on a monthly basis, far less than 0.05% of all federal prisoners are able to secure a sentence reduction. Particularly given data showing remarkably low recidivism rates for persons released early from federal prison during the COVID pandemic, Commission data suggest federal sentence reduction could and should be expanded. Potential approaches to expansion might include statutory reform for second looks for long-serving federal prisoners (as Senator Corey Booker proposed in 2019), reforms enabling federal prosecutors to initiate sentence reductions for a wide range of reasons, a right to counsel and funding for representation for federal prisoners bringing sentence reduction motions, careful study and review of Department of Justice opposition to sentence reduction motions, and further expansion of the Commission's categories of cases in policy statement §1B1.13 that can justify sentence reductions.

• **Analyzing processes of federal sentence reductions:** Though this Commission has started providing data about sentence reduction motions brought under 18 U.S.C. § 3582(c)(1)(A)(i) since Congress sought to expand their use in the First Step Act of 2018, these data raise a host of questions about who is seeking and who is securing sentence reductions. First, just when, how, and why federal prosecutors and/or BOP officials support or oppose these motions are unclear. Second, the patterns of grants and denial of these motions in different districts and circuits raise further questions about whether local cultures, rather than consistent national policies and practices, may unduly shape the outcome of sentence reduction motions. Third, federal prisoners do not have a constitutional right to counsel for bringing these motions, and it is unclear whether and

how prisoners who may merit sentence reductions are obtaining sufficient representation. This Commission could and should produce a series of reports about ways to improve the sentence-reduction process and decision-making.

We can readily imagine a range of additional activities that could be part of a sound robust “second-look” sentencing agenda for this Commission. We sincerely hope you find some of these specific suggestions helpful, but the main goal of this letter is to urge this Commission to seize a leadership role in advancing research and sound policymaking with respect to resentencing opportunities for prisoners in both federal and state systems. Even if the United States did not have a massive prison population, such leadership on these issues would be valuable. Given that the federal prison system is the largest in a nation with a massive number of persons behind bars, we consider such leadership a true moral and constitutional imperative.

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Subscribed

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Columbus, OH 43210

July 11, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This submission responds to the U.S. Sentencing Commission's request for comment on possible policy priorities for the amendment cycle ending May 1, 2025. We are lawyers who share not only a long-standing interest in improving sentencing laws and policies, but also a long-standing belief that robust second-look resentencing mechanisms are essential to fair and just sentencing systems. We write to encourage the Commission, especially in the wake of its important recent work expanding the Sentencing Guidelines' sentence reduction policy statement, to continue enhancing federal resentencing tools in its efforts to advance congressional goals and in service to "effective, humane and rational sentencing policy." 28 U.S.C. § 995(a)(20).

Background on "second look" sentencing mechanisms

For much of the Twentieth Century, parole was a fundamental component of nearly every sentencing system in America, and it served as a primary means for regular and often repeated reconsideration and reduction of prison sentences. But in recent decades many jurisdictions, including the federal system, eliminated parole entirely and replaced it with determinate sentencing as part of modern sentencing reforms. The elimination of parole came during a period that also saw increases in the length of long prison terms imposed. With lengthy prison terms increasing dramatically in the absence of traditional parole review, many sentencing experts and advocates have urged jurisdictions to create or expand judicial authority to revisit past sentences, and a growing number of legislatures are enacting or actively considering judicial second-look sentencing authority.[1]

The expansion of resentencing authority has strong support. Notably, the American Law Institute's 2017 revision of the Model Penal Code's sentencing provisions calls for all jurisdictions to "authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications

[1] *See, e.g.*, Becky Feldman, The Sentencing Project, *The Second Look Movement: A Review of the Nation's Sentence Review Laws* (May 2024), https://www.sentencingproject.org/reports/the-second-look-movement-a-review-of-the-nations-sentence-review-laws/; Nazgol Ghandnoosh, The Sentencing Project, *A Second Look at Injustice* (May 2021), https://www.sentencingproject.org/reports/a-second-look-at-injustice/.

for modification of sentence" from ***all*** prisoners after 15 years of imprisonment.[2] The commentary for this proposal explains the fundamental wisdom and multiple policy and practical justifications for providing a means for lengthy prison sentences to be reviewed and potentially modified:

> The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods…. It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values.…
>
> On utilitarian premises, lengthy sentences may also fail to age gracefully. Advancements in empirical knowledge may demonstrate that sentences thought to be well founded in one era were in fact misconceived…. For example, research into risk assessment methods over the last two decades has yielded significant (and largely unforeseen) improvements. Projecting this trend forward, an individualized prediction of recidivism risk made today may not be congruent with the best prediction science 20 years from now. Similarly, with ongoing research and investment, new and effective rehabilitative or reintegrative interventions may be discovered for long-term inmates who previously were thought resistant to change.[3]

Put more simply, times change and people change, so it is not wise (nor cost-effective) to lock in long prison sentences without robust mechanisms in place to systematically reconsider who still needs to be incarcerated. Of course, widespread calls for second-look sentencing reforms, which have also been made by prominent groups representing prosecutors and defense attorneys,[4] do not expect or advocate for every prisoner to automatically get resentenced upon request; rather, the call is for giving prosecutors and judges explicit discretionary authority to determine whether a sentence reduction would be consistent with public safety and the interests of justice.

As this Commission knows, on this front, Congress was ahead of the modern sentencing reform curve: through 18 U.S.C. § 3582(c) of the Sentencing Reform Act of 1984 (SRA), Congress expressly recognized that, with the abolition of parole, there needed to be authority for judges to modify a "term of imprisonment" in certain situations, for example where "extraordinary and compelling reasons" are present (§ 3582(c)(1)(A)(i)), the individual is aging and has served the majority of their prison sentence (§ 3582(c)(1)(A)(ii)), or there has been a retroactive decrease in the Sentencing Guidelines range (§ 3582(c)(2)). Recognizing that parole historically played a key

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[2] *See* REVISED MODEL PENAL CODE: SENTENCING § 305.6 (Final Draft, April 2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

[3] *Id.* The ALI proposes jurisdictions adopt broad second look sentencing authority ***in addition to*** provisions permitting "judicial modification of prison sentences under circumstances of advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons." *Id.*

[4] *See* Fair and Justice Prosecution, *Statement On Sentencing Second Chances* (Apr. 2021), https://fairandjustprosecution.org/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf ("[W]e urge our state legislatures and the federal government to adopt measures permitting prosecutors and judges to review and reduce extreme prison sentences imposed decades ago and in cases where returning the individual to the community is consistent with public safety and the interests of justice."); JaneAnne Murray et al., *Second Look = Second Chance: Turning the Tide through NACDL's Model Second Look Legislation*, 33 FED. SENT'G REP. 341, 341 (2021) ("By providing an orderly procedure for all sentences to be revisited after appropriate lengths of time, the model legislation proposed by NACDL provides a safe and effective means for legislators to meet the challenge of the moment.").

role in responding to changed circumstances after sentencing, the SRA's legislative history explained why some cases would warrant resentencing: "there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment."[5] And, as this Commission has soundly effectuated through its recent amendments to its sentence reduction policy statement § 1B1.13, Congress adopted expansive statutory language in 1984 ("extraordinary and compelling reasons") – and made further amendments to the provisions of 18 U.S.C. § 3582(c)(1)(A) in the First Step Act to allow defense-initiated motions – that make evident that Congress envisions robust use of sentence reduction authority. Indeed, the only limitation set out by Congress is that an individual's rehabilitation "alone" may not serve as an "extraordinary and compelling" reason for motions filed under § 3582(c)(1)(A)(i).[6]

Recent state and local experiences with prosecutor-initiated resentencing

An important addition to second-look sentencing mechanisms has emerged in recent years in a number of states in the form of prosecutor-initiated resentencing laws. The nation's first prosecutor-initiated resentencing law was enacted in California in 2018.[7] Spearheaded by former prosecutor Hillary Blout, who had served in the San Francisco District Attorney's Office, this law expressly authorizes prosecutors to file a motion requesting that the court resentence an individual if "continued incarceration is no longer in the interest of justice."[8] When deciding the motion, the court considers post-conviction factors such as disciplinary record and rehabilitation, recidivism risk, and whether circumstances have changed since the person's original sentencing.[9] The process also ensures that victims have proper notice and an opportunity to participate. Under the law and after consideration of the factors listed above, the court is authorized to resentence the incarcerated person to any lesser sentence.[10]

California has expended ample resources to ensure the success of its prosecutor-initiated resentencing law. In 2021, California appropriated $18 million for a multi-year pilot program to support the law's implementation in nine counties throughout the state.[11] Midway through the pilot, a RAND examination of case-level data in the nine counties found that 684 case reviews

[5] Senate Report No. 98-225, at 55–56 (1983).
[6] 21 U.S.C. § 994(t).
[7] A.B. 2942, 2017-18 Reg. Session. (Cal. 2018).
[8] *Id.* at d(1). *See also* Press Release, Phil Ting, California Assemblymember, District 19, *Governor Signs Ting Bill That Could Help Inmates Get a Second Chance* (Sept. 30, 2018), https://a19.asmdc.org/press-releases/20180930-governor-signs-ting-bill-could-help-inmates-get-second-chance.
[9] *See generally* For The People, *Prosecutor-Initiated Resentencing: California's Opportunity to Expand Justice and Repair Harm* (Dec. 2021), https://www.fortheppl.org/s/ForThePeople_Report_121321.pdf.
[10] *Id.*
[11] *See* Phil Ting, California Assemblymember, District 19, *California County Resentencing Pilot Program Fact Sheet* (2021), https://a19.asmdc.org/sites/a19.asmdc.org/files/2021-09/Resentencing%20Pilot%20Program%20Fact%20Sheet.pdf.

were initiated by prosecutors with 105 cases referred to the court for resentencing.[12] Of the 94 cases for which courts ruled on a resentencing motion, 91 resulted in resentencing in the nine pilot counties.[13] More than half of the cases initiated by prosecutors involved incarcerated people who were over the age of 50, with more than 40% involving three-strikes sentences and more than 75% having a sentence enhancement present.[14] Among the cases selected for review, the most common categories of controlling offenses in the nine pilot counties were robbery, assault, and burglary.[15] San Diego County Assistant District Attorney Dwain Woodley said that, in a number of cases, "these sentences were excessive – way excessive – for what the person did. People should have a chance to reunite with their families and be back in community."[16]

Since 2018, prosecutor-initiated resentencing laws have also been enacted in Illinois, Minnesota, Oregon, and Washington, and have been proposed or introduced in Georgia, Maryland, Massachusetts, New York, Texas, and Utah, among other states.[17] To date, hundreds of incarcerated people in states with prosecutor-initiated resentencing laws have been released from prison pursuant to these laws.[18] In liberal and more conservative counties alike where prosecutor-initiated resentencing laws have been implemented, prosecutors are generally embracing the opportunity to ensure that their role as ministers of justice should not end once they have finished processing a case.[19] As the Ramsey County (Minnesota) Attorney has explained, he is working to identify cases for resentencing "because for some people sentenced to prison in the past, their sentence may no longer serve the interests of justice; may no longer be needed to protect public safety; and may not be a good use of critical correctional and public safety resources."[20]

Recognizing the wisdom of second-look sentencing mechanisms and also the positive experiences of state reforms, the American Bar Association's House of Delegates in 2023 approved a resolution calling on governments nationwide to adopt prosecutor-initiated resentencing legislation and to provide resources to support implementation.[21] This resolution built on a previous resolution urging a "second look" for incarcerated people serving long

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[12] Davis, Lois M. et al., RAND Corporation, *Evaluation of the California County Resentencing Pilot Program, Year 2 Findings* (Sept. 27, 2023), https://www.rand.org/pubs/research_reports/RRA2116-2.html

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Christina Carrega, *This Law Gives Prosecutors Authority to Reduce Mass Incarceration,* Capital B (Oct. 6, 2023), https://capitalbnews.org/prosecutor-resentencing-law/.

[17] *See* Marco Poggio, *Minnesota Joins Prosecutor-Led Resentencing Law Movement*, Law360 (June 23, 2023), https://www.law360.com/articles/1680599/minnesota-joins-prosecutor-led-resentencing-law-movement.

[18] *See* Julia Marnin, *Prison Guard Beatings of Women are 'Rampant,' Experts Say. Push Underway to Free Some*, Sacramento Bee (June 14, 2024), https://www.sacbee.com/news/nation-world/national/article289251140.html.

[19] *Id.*

[20] Ramsey County Attorney's Office, Prosecutor-Initiated Sentence Adjustment, https://www.ramseycounty.us/your-government/leadership/county-attorneys-office/news-updates/prosecutor-initiated-sentence-adjustment (last visited July 6, 2024).

[21] ABA Resolution 504 (2023), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/504-annual-2023.pdf (adopted Aug. 7, 2023).

sentences, placing prosecutor-initiated resentencing among several important tools in the broader second-look movement.[22] The ABA report that accompanied the resolution concluded its advocacy for prosecutor-initiated resentencing (PIR) this way:

> Through PIR, prosecutors can initiate a thorough and methodical review of the prison population in their jurisdiction to identify people who can be safely released from prison and ask the court for recall and resentencing. PIR gives prosecutors a tool to provide redress for people where confinement is no longer in the interest of justice while keeping victims and community safety at the forefront of their decisions. When done with care, the PIR process can have lasting benefits for prosecutor offices, incarcerated people, families, and communities, and will positively contribute to public safety.[23]

Proposing a robust "second look" agenda for the U.S. Sentencing Commission

In part because this Commission has recently given focused consideration to one aspect of sentence reconsideration through recent amendments to § 1B1.13, we believe this Commission is now uniquely positioned and able to develop and advance a robust "second look" sentencing agenda in the months and years ahead. Many activities might comprise such an agenda, and here we will propose just a few possibilities for Commission consideration:

- **Convene a *national* second-look sentencing conference:** To establish sentencing laws reflecting the "advancement of knowledge of human behavior as it relates to the criminal justice process," 28 U.S.C. § 991(b)(1)(C), this Commission should hold a public conference in order to collect information about, and get stakeholder input about, the development and implementation of second-look sentencing mechanisms nationwide. Given the variety of "second look" laws being proposed and implemented in states and localities across the country – ranging from "traditional" compassionate-release laws to laws enabling resentencing of youthful offenders, to broad prosecutor-initiated and universal second-look resentencing laws – the policies and practices surrounding the review and reconsideration of prison sentences are quite dynamic and yet still quite opaque. A national convening conducted by the Commission to consider these laws would help not just this Commission, but also policy makers nationwide, have a more informed understanding of "second-look" best practices.

- **Broadening *federal* resentence reductions:** To effectuate the "purposes of sentencing" and to avoid "unwarranted sentencing disparities," 28 U.S.C. § 991(b)(1)(A-B), this Commission should conduct workshops to assess and improve the functioning of the sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A). Though Commission data indicate more sentence reductions motions have been filed since Congress sought to expand their use in the First Step Act of 2018, recent data also show that, on a monthly basis, far less than 0.05% of all federal prisoners are able to secure a sentence reduction. Particularly given data showing remarkably low recidivism rates for persons released early from federal prison during the COVID pandemic, Commission data suggest federal sentence reduction could and should be expanded. Potential approaches to expansion

[22] ABA Journal, *Let courts consider a prosecutor's recommendation to reduce a sentence, ABA House says* (Aug. 7, 2023), https://www.abajournal.com/web/article/resolution-504.
[23] Report to accompany ABA Resolution 504 (2023), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/504-annual-2023.pdf.

might include statutory reform for second looks for long-serving federal prisoners (as Senator Corey Booker proposed in 2019), reforms enabling federal prosecutors to initiate sentence reductions for a wide range of reasons, a right to counsel and funding for representation for federal prisoners bringing sentence reduction motions, careful study and review of Department of Justice opposition to sentence reduction motions, and further expansion of the Commission's categories of cases in policy statement § 1B1.13 that can justify sentence reductions.

- **Analyzing processes of federal sentence reductions:** Though this Commission has started providing data about sentence reduction motions brought under 18 U.S.C. § 3582(c)(1)(A)(i) since Congress sought to expand their use in the First Step Act of 2018, these data raise a host of questions about who is seeking and who is securing sentence reductions. First, just when, how, and why federal prosecutors and/or BOP officials support or oppose these motions are unclear. Second, the patterns of grants and denial of these motions in different districts and circuits raise further questions about whether local cultures, rather than consistent national policies and practices, may unduly shape the outcome of sentence reduction motions. Third, federal prisoners do not have a constitutional right to counsel for bringing these motions, and it is unclear whether and how prisoners who may merit sentence reductions are obtaining sufficient representation. This Commission could and should produce a series of reports about ways to improve the sentence-reduction process and decision-making.

We can readily imagine a range of additional activities that could be part of a sound robust "second-look" sentencing agenda for this Commission. We sincerely hope you find some of these specific suggestions helpful, but the main goal of this letter is to urge this Commission to seize a leadership role in advancing research and sound policymaking with respect to resentencing opportunities for prisoners in both federal and state systems. Even if the United States did not have a massive prison population, such leadership on these issues would be valuable. Given that the federal prison system is the largest in a nation with a massive number of persons behind bars, we consider such leadership a true moral and constitutional imperative.

Sincerely,

Douglas A. Berman
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Executive Director, Drug Enforcement and Policy Center
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Jeremy Haile
Director of Policy
For The People

Erica Zunkel
Clinical Professor of Law
Criminal and Juvenile Justice Clinic
The Law School at The University of Chicago

Good afternoon:

I would like to submit the attached article for consideration for amendments to the organizational sentencing guidelines.

In short, the Commission should consider amendments to the organizational sentencing guidelines to address the use of DPAs, NPAs, and perhaps also declinations in organizational criminal enforcement. Namely, these resolutions should be considered in addition to prior convictions when an organization that has prior criminal resolutions is subsequently sentenced.

As stated in my article, in my view, these resolutions should be treated equally to plea agreements when the organization's culpability score is calculated. The government uses these agreements when plea agreements are equally appropriate, and DPAs and NPAs in particular often include the very same terms that plea agreements in the same situation do. The organizations that commit offenses resulting in DPAs and NPAs are just as culpable, they are in just as much need of deterrence, and their offenses are just as (indeed, often more) severe.

I believe these amendments are particularly timely for a number of reasons. For one, the DOJ recently issued guidelines that will increase the use of DPAs, NPAs, and declinations when organizations voluntarily disclose their misconduct, which they often do. (See https://whitecollarprof.com/new-doj-corporate-criminal-enforcement-and-voluntary-self-disclosure-policy/). Moreover, recent legislation proposed or considered in Congress seeks to address the rising use of DPAs, NPAs, and declinations. (See, e.g., https://scanlon.house.gov/news/documentsingle.aspx?DocumentID=2017; https://www.judiciary.senate.gov/committee-activity/hearings/cleaning-up-the-c-suite-ensuring-accountability-for-corporate-criminals).

My article proposes a few other amendments and provides significantly more reasoning for these amendments as well.

I really appreciate the Commission's work, and I am happy to discuss these potential amendments more.

Thanks for your consideration!

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RECIDIVIST ORGANIZATIONAL OFFENDERS AND THE ORGANIZATIONAL SENTENCING GUIDELINES

KALEB BYARS

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RECIDIVIST ORGANIZATIONAL OFFENDERS AND THE ORGANIZATIONAL SENTENCING GUIDELINES

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Abstract: Despite congressional hearings and public attention, the question of how to fairly and efficiently punish recidivist organizational offenders remains unresolved. Any discussion regarding the most optimal legal response to recidivist organizational crime is incomplete without a solution accounting for the use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). These tools allow criminal defendants to resolve charges without sustaining convictions that attach to the defendants' criminal records, and they are used often in the organizational context.

This Article recognizes that the federal sentencing scheme fails to promote deterrence and fairness in the context of organizational sentencing and offers a practical solution to this problem. The federal sentencing scheme currently does not require an increase in an organizational defendant's sentence when the defendant previously executed DPAs or NPAs before its subsequent criminal conduct. Yet the federal sentencing guidelines do require an increase in an individual defendant's sentence if the individual previously executed a DPA. Meanwhile, the existence of prior DPAs and NPAs is a hallmark of organizational recidivism that demonstrates an organization is more culpable than other organizational defendants. Accordingly, this Article recommends that the Sentencing Commission amend the federal sentencing guidelines to require sentencing courts to increase organizations' sentences based on prior DPAs and NPAs. This Article offers specific amendments for consideration. Finally, until the sentencing guidelines are amended, sentencing courts can use tools already in place to begin imposing more fair organizational sentences.

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INTRODUCTION

> *Failing to aggressively prosecute [corporate] crimes weakens our democratic institutions by undermining public trust in the rule of law. The essence of the rule of law is that like cases are treated alike; that there is not one rule for the powerful and another for the powerless; one rule for the rich and another for the poor. To fail to aggressively prosecute corporate crime leads citizens to doubt that their government adheres to this principle.*
>
> —Merrick B. Garland[1]

In November 2023, Binance, Inc., the world's largest cryptocurrency exchange, agreed to plead guilty and pay $4 billion to settle criminal charges against it for violations of the Bank Secrecy Act and other offenses.[2] A few months later, in a deferred prosecution agreement, eBay agreed to pay a $3 million fine to settle criminal charges against it for cyberstalking and other offenses.[3] Binance's and eBay's offenses were both serious and drew national attention.[4] Because Binance entered a guilty plea, Binance's offenses may provide a basis to enhance its sentence if Binance is convicted for another offense in the future.[5] The same would be true for almost every individual defendant because nearly all individual defendants resolve their criminal cases with guilty pleas.[6] But if eBay is convicted again in the future, even for another cyberstalking offense, a sentencing court could ignore eBay's prior offenses

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[1] Merrick B. Garland, *Attorney General Merrick Garland Delivers Remarks to the ABA Institute on White Collar Crime*, DEP'T OF JUST., https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime [https://perma.cc/V3R7-B2LF] (Feb. 5, 2025).

[2] Press Release, Off. of Pub. Affs., Dep't of Just., Binance and CEO Plead Guilty to Federal Charges in $4B Resolution (Nov. 21, 2023), https://www.justice.gov/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution [https://perma.cc/3SBT-93CT].

[3] Press Release, U.S. Atty's Off., Dist. of Mass., eBay Inc. to Pay $3 Million in Connection with Corporate Cyberstalking Campaign Targeting Massachusetts Couple (Jan. 11, 2024), https://www.justice.gov/usao-ma/pr/ebay-inc-pay-3-million-connection-corporate-cyberstalking-campaign-targeting [https://perma.cc/SDW8-7MBG].

[4] *See* Allison Morrow, *Binance Founder Is Sentenced to 4 Months in Prison on Money-Laundering Violations*, CNN, https://www.cnn.com/2024/04/30/business/binance-founder-sentenced-money-laundering/index.html [https://perma.cc/KQE7-GWRU] (May 1, 2024) (providing coverage of Binance fines and charges by the federal government); David Streitfeld, *U.S. Criminally Charges EBay in Cyberstalking Case*, N.Y. TIMES (Jan. 11, 2024), https://www.nytimes.com/2024/01/11/technology/ebay-cyberstalking-charges.html [https://perma.cc/KKZ2-KRB8] (providing coverage of federal government charges against eBay in cyberstalking case).

[5] *See infra* Part II.

[6] *See* Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice [https://perma.cc/5ULM-5RAF] (explaining that nearly "98% of criminal cases in the federal courts end with a plea bargain").

simply because eBay executed a deferred prosecution agreement rather than a formal guilty plea.[7]

The question of how to best counter recidivist organizational criminal conduct is a longstanding issue that has received significant public and bipartisan congressional attention.[8] In December 2023, the U.S. Senate Committee on the Judiciary held a hearing to consider the best ways to promote accountability in corporate criminal enforcement.[9] Judiciary Committee Chair Dick Durbin expressed concerns about the lack of transparency of corporate criminal enforcement actions, that such actions are often resolved outside the formal judicial process without oversight, and about the waning use of criminal actions against organizations in recent years under both the Trump and Biden administrations.[10]

The concerns expressed by Senator Durbin are ultimately related to the government's use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) in the organizational crime context.[11] In nearly every criminal case, the defendant is an individual, and the case is resolved only after the government secures a conviction (following a guilty plea or a trial) or the defendant secures an acquittal.[12] Nonetheless, organizations may be prosecuted as well. And when organizations are prosecuted, at least for the last few decades, the Department of Justice (DOJ) has regularly used DPAs and NPAs rather than plea agreements.[13] DPAs and NPAs are similar to plea agreements in that they resolve charges against criminal defendants, but importantly, unlike plea agreements, DPAs and NPAs result in no formal convictions.[14]

There will be no end to the use of DPAs in the organizational crime context in the near future. These tools have become a staple in the corporate crim-

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[7] *See infra* Part II.

[8] *See generally Cleaning Up the C-Suite: Ensuring Accountability for Corporate Criminals: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. (2023).

[9] *Id.*

[10] *Id.* at 32:20–35:20 (statement of Sen. Dick Durban, Chairman, S. Comm. on the Judiciary).

[11] *See* Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 544 (2015) (examining the increasing prevalence of DPAs and NPAs).

[12] RICK CLAYPOOL, PUB. CITIZEN, SOFT ON CORPORATE CRIME: DOJ REFUSES TO PROSECUTE CORPORATE LAWBREAKERS, FAILS TO DETER REPEAT OFFENDERS 11 (2019) (noting that corporations and other business organizations are rarely prosecuted).

[13] *See* Renae Merle, *Repeat Offenders: Corporate Misdeeds Often Settled with Deferred Prosecution Agreements*, WASH. POST (Sept. 26, 2019), https://www.washingtonpost.com/business/2019/09/26/repeat-offenders-corporate-misdeeds-often-settled-with-deferred-prosecution-agreements/ [https://perma.cc/ATU8-JATU].

[14] *See* GIBSON DUNN, NEGOTIATING CLOSURE OF GOVERNMENT INVESTIGATIONS: NPAS, DPAS, AND BEYOND 9 (2020), https://www.gibsondunn.com/wp-content/uploads/2020/10/WebcastSlides-Negotiating-Closure-of-Government-Investigations-NPAs-DPAs-and-Beyond-01-OCT-2020.pdf [https://perma.cc/C5SD-BGZG] (analyzing the similarities and differences between DPAs and NPAs).

inal environment, and despite their shortcomings, they offer advantages to both the government and the defendants who receive them.[15] But as with many things in life, moderation in offering DPAs and NPAs seems to be key if deterrence and fairness in corporate criminal enforcement are legitimate goals. Organizations often receive the benefit of not only one or even two but numerous DPAs or NPAs before the government finally brings criminal charges to seek formal convictions.[16] The fact that organizations continuously reoffend after receiving multiple DPAs and NPAs suggests that the use of these agreements alone does not promote deterrence.[17]

A significant portion of scholarship addressing corporate crime focuses on the use of DPAs and NPAs in the organizational context.[18] Primarily, this scholarship posits ideas for the optimal ways to deter and punish corporate misconduct in a world where DPAs and NPAs are the norm. Professor Brandon Garrett, for example, has called for greater transparency regarding the process of executing DPAs and NPAs in the organizational crime context.[19] Professor Jennifer Arlen has asserted organizational DPAs and NPAs contravene the rule of law.[20] Professor Peter Reilly has advocated for greater judicial oversight over DPAs and NPAs.[21]

This Article accepts the truisms that the government will continue to offer DPAs and NPAs in the organizational crime context and that organizations will continue to accept the benefit of these agreements. Unlike other scholarship that primarily focuses on the transparency and procedure surrounding DPAs and NPAs, this Article focuses on ensuring that other aspects of our system of criminal procedure fairly account for the use of DPAs and NPAs.[22] And this

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[15] *Id.* at 11 (presenting potential benefits and risks of entering DPAs and NPAs).

[16] *See generally* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 12–13 (D.D.C. 2015).

[17] *See, e.g.*, Dylan Phillips, *JPMorgan Chase's $920 Million Spoofing Settlement: Do DPAs and NPAs Encourage Recidivism?*, FCPA BLOG (Oct. 20, 2020), https://fcpablog.com/2020/10/20/jpmorgan-chases-920-million-spoofing-settlement-do-dpas-and-npas-encourage-recidivism/ [https://perma.cc/6QZ2-WQFC] (arguing that JPMorgan's repetitive illegal conduct begs the question of whether DPAs and NPAs alone promote deterrence).

[18] *See* Peter R. Reilly, *Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts*, 50 ARIZ. ST. L.J. 1113, 1140–45 (2018) (discussing other nations' approaches to corporate criminal settlements).

[19] *See, e.g.*, Brandon Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 139–40 (2020) (advocating for greater transparency regarding the use of DPAs and NPAs).

[20] *See, e.g.*, Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 220 (2016) (questioning the permissibility of organizational DPAs and NPAs to the extent they require corporate governance reform).

[21] *See, e.g.*, Peter R. Reilly, *Corporate Deferred Prosecution as Discretionary Injustice*, 2017 UTAH L. REV. 839, 840 (critiquing recent federal appellate decisions for providing for insufficient judicial review of DPAs); *see also* Brandon Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1490–92 (2017) (advocating for an expanded use of the federal courts' equitable power in assessing corporate settlements).

[22] *See infra* Part III.

Article specifically sets its sights on a court's consideration of (or more appropriately, ambivalence toward) an organization's prior DPAs and NPAs when the court is sentencing that organization for a subsequent offense.[23]

This Article recognizes that the federal sentencing scheme fails to promote deterrence and fairness in the context of organizational sentencing because it fails to adequately account for the use of DPAs and NPAs. By statute, before imposing a sentence, a sentencing court must consider the federal sentencing guidelines, which provide a mathematical framework for calculating an appropriate sentence for the defendant, whether that defendant is an individual or an organization.[24] As the number of prior convictions of the defendant increases, the guidelines generally recommend a more severe sentence.[25] Nonetheless, the organizational sentencing guidelines, unlike the individual sentencing guidelines, do not require sentencing courts to consider an organization's prior DPAs and NPAs.[26]

This incongruity has grave consequences. Because the government frequently uses DPAs and NPAs in the organizational crime context in lieu of plea agreements and uses them to respond to serious offenses, an organizational DPA or NPA is the functional equivalent of a plea agreement.[27] But, as noted, plea agreements result in convictions while DPAs and NPAs do not.[28] Consequently, the failure of the organizational guidelines to account for prior DPAs and NPAs while accounting for prior convictions causes the guidelines to understate a defendant's culpability. The result is that the guidelines ultimately recommend fines for organizations that are less than necessary to deter the organizations from committing future offenses following DPAs or NPAs. Moreover, the failure of the organizational guidelines to account for prior DPAs and NPAs raises fairness concerns because unlike organizational defendants, individual defendants do receive greater sentences based on all of their prior DPAs and criminal convictions. Further, many organizational offenses are as serious and harmful as individual offenses (if not more so).

This Article offers two practical solutions. First, the United States Sentencing Commission (Sentencing Commission) should amend the organizational sentencing guidelines.[29] These amendments must fairly account for organizations' prior DPAs and NPAs at sentencing while not under- or over-penalizing recidivist organizational offenders.[30] Specifically, the Sentenc-

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[23] *See infra* Part III.

[24] *See* 18 U.S.C. § 3553.

[25] CHARLES DOYLE, CONG. RSCH. SERV., R41697, HOW THE FEDERAL SENTENCING GUIDELINES WORK: AN ABRIDGED OVERVIEW 3 (2015).

[26] *See infra* Part II.

[27] *See* Reilly, *supra* note 18, at 1116 (comparing DPAs and NPAs to plea agreements).

[28] *Id.*

[29] *See infra* Part III.

[30] *See infra* Part III.

ing Commission should amend the guidelines to treat DPAs and NPAs as prior criminal convictions in the organizational defendant context.[31] These amendments should require sentencing courts to account for the quantity of prior total criminal convictions, DPAs, and NPAs because organizations that have committed multiple offenses despite prior leniency are generally more culpable.[32] Relatedly, for parity with the individual guidelines and to appropriately conform to norms in corporate governance, amendments should require sentencing courts to account for prior convictions, DPAs, and NPAs of organizations so long as they occurred no longer than fifteen years prior to the instant offense.[33] Although less desirable, as an alternative to these specific amendments, the Sentencing Commission could simply modify the guidelines to recommend an upward departure at sentencing when organizational defendants have prior DPAs or NPAs.[34]

Second, until the Sentencing Commission adopts acceptable amendments (or if it never does so), sentencing courts may begin to ameliorate these issues themselves.[35] Sentencing courts should use their discretion to impose sentences above the guidelines by granting upward "variances" or "departures" to account for the increased culpability of recidivist organizational defendants as represented by their prior DPAs and NPAs.[36] Although amending the guidelines is preferable because it would require all courts to consider organizations' prior DPAs and NPAs, using upward variances or departures will at least allow sentencing courts to fashion fair and effective sentences for some recidivist organizational offenders as well.[37]

This Article proceeds in three Parts. Part I provides background on organizational criminal liability and recidivism.[38] For decades, organizational criminal enforcement has trended toward the use of DPAs and NPAs instead of plea agreements, including in cases involving severe conduct.[39] Consequently, an organizational DPA or NPA is the functional equivalent of a guilty plea in the organizational defendant context. Concerningly, statistics and case studies demonstrate organizations commonly recidivate and receive at least one formal conviction after receiving at least one DPA or NPA.

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[31] *See infra* Part III.

[32] *See infra* Part III.

[33] *See infra* Part III.

[34] *See infra* Part III.

[35] *See infra* Part III.

[36] *See* Ioana Vasiu & Lucian Vasiu, *Riders on the Storm: An Analysis of Credit Card Cases*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 185, 196 (2019) (distinguishing between variances and departures).

[37] *See infra* Part III.

[38] *See infra* Part I.

[39] *See infra* Part I.

Part II provides background on federal sentencing law.[40] The federal sentencing guidelines require sentencing courts to consider a number of important factors when sentencing defendants.[41] Notably, the sentencing guidelines for individual defendants increase an individual defendant's sentence if the defendant has a prior DPA.[42] Yet the organizational sentencing guidelines do not address how sentencing courts should consider organizations' prior DPAs and NPAs.[43]

Part III recognizes that the failure of the organizational guidelines to account for an organizations' prior DPAs and NPAs creates deterrence and fairness concerns and offers two solutions to resolve these concerns.[44] Primarily, the Sentencing Commission should amend the organizational guidelines to require sentencing courts to increase an organizational defendant's sentence based on the organizations' prior DPAs and NPAs.[45] Alternatively, though less desirably, sentencing courts should use their authority to vary or depart from the guidelines and increase organizational defendants' sentences when the organizations have prior DPAs and NPAs.[46]

I. Organizational Criminal Liability and Recidivism

This Part provides background on organizational criminal liability and recidivism. First, Section A explores the origins of organizational criminal liability and describes the rise of the use of DPAs and NPAs in the organizational crime context.[47] Second, Section B addresses the advantages and disadvantages of using DPAs and NPAs in this context.[48] Finally, Section C illustrates the problem of organizational recidivism by focusing on data and examples that show organizations commonly reoffend after receiving at least one DPA or NPA.[49]

A. Organizational Criminal Liability

Organizational criminal liability originated in the Supreme Court's 1909 decision in *New York Central & Hudson River Railroad Co. v. United States*.[50] In *New York Central*, the government prosecuted a manager of a railroad company and the railroad company itself for paying illegal rebates on sugar ship-

[40] *See infra* Part II.
[41] *See infra* Part II.
[42] *See infra* Part II.
[43] *See infra* Part III.
[44] *See infra* Part III.
[45] *See infra* Part III.
[46] *See infra* Part III.
[47] *See infra* Part I.A.
[48] *See infra* Part I.B.
[49] *See infra* Part I.C.
[50] 212 U.S. 481, 497 (1909); *see also* Ellen S. Podgor, *Corporations: Stuck with the White Collar Crime Check*, 2 Belmont Crim. L.J. 32, 34–35 (2019) (describing the *New York Central* case and the origins of white collar crime generally).

ments.[51] The railroad company defended itself on the ground that Congress lacked the authority to impose criminal liability on a corporation.[52] Relying on the Commerce Clause and principles of vicarious liability, the Court disagreed, holding that a corporation may be held criminally liable.[53]

Of course, unlike an individual, an organization is a legal fiction and thus cannot be imprisoned. Consequently, when organizations commit criminal offenses, criminal sanctions are largely in the form of monetary sanctions, reputational harm, and suspension or loss of government licenses.[54] Ultimately, the goals of corporate criminal enforcement resemble the goals of criminal enforcement generally: to punish, rehabilitate, and deter.[55]

Over one hundred years have passed since *New York Central*, and in the meantime, the public interest in criminal prosecution has intensified. Scholars have called for an increased use of criminal prosecution against organizations, pragmatically reasoning that organizations, unlike individuals, have the capital to pay significant fines and have fewer constitutional and evidentiary protections.[56] Likewise, in 2022, Deputy Attorney General Lisa Monaco issued a memorandum (Monaco Memorandum) emphasizing that corporate criminal enforcement will "always be a core priority for the [DOJ]."[57]

Organizations can be and often are formally convicted for their criminal offenses.[58] Nevertheless, today, a substantial percentage of criminal cases against organizational defendants are resolved with DPAs or NPAs.[59] DPAs and NPAs are creatures of contract law and criminal law, and they are similar to plea agreements in many respects in that all of these tools are criminal set-

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[51] *See N.Y. Cent.*, 212 U.S. at 489.

[52] *Id.* at 492.

[53] *Id.* at 493–96; *see also* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 61–63 (2007) (discussing *New York Central* in greater detail).

[54] *See generally* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 3–4 (2014) (discussing the primary forms of punishment for corporations).

[55] *See* John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, *Board Compliance*, 104 MINN. L. REV. 1191, 1209 (2020) (stating the general aims of criminal punishment); David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1241–42 ("Companies do not want to be labeled corporate criminals and therefore may have more incentives to avoid criminal sanctions than otherwise comparable civil or administrative sanctions.").

[56] *See generally* Daniel L. Cheyette, *Policing the Corporate Citizen: Arguments for Prosecuting Organizations*, 25 ALASKA L. REV. 175 (2008) (arguing for greater corporate criminal liability in Alaska).

[57] Memorandum from Deputy Att'y Gen. Lisa Monaco on Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group 1 (Sept. 15, 2022).

[58] *See, e.g.*, Alison Durkee, *Trump Organization Ordered to Pay $1.6 Million for Tax Fraud*, FORBES, https://www.forbes.com/sites/alisondurkee/2023/01/13/trump-organization-ordered-to-pay-16-million-for-tax-fraud/?sh=4366b91f370e [https://perma.cc/7BXF-Q7DV] (Jan. 13, 2023).

[59] *See infra* Part I.B.

tlement mechanisms that prosecutors use to pursue justice.[60] Plea agreements, DPAs, and NPAs all allow the government and defendants to avoid the costs of formal prosecution by resolving cases without trials.[61]

When the government utilizes a DPA, the government agrees to dismiss existing criminal charges against the defendant. When the government utilizes an NPA, the government agrees not to charge the defendant; that is, the parties settle the matter before an indictment or other charging document is filed.[62] Thus, unlike plea agreements that result in formal convictions, DPAs and NPAs do not result in formal convictions and sentences.[63]

Turning to the similarities between DPAs and NPAs, when the government executes either a DPA or an NPA, as noted, the government agrees to temporarily forego seeking a final conviction of the defendant.[64] In exchange, the defendant agrees to comply with a variety of conditions.[65] In the organizational context, these conditions vary based on the context and the goals of the government, but common conditions include that the defendant will cooperate with the government; accept responsibility for a statement of facts setting forth the offense conduct; agree to refrain from committing future criminal offenses; revise its business and compliance programs; reorganize its governance structure; and pay a fine, restitution, and forfeiture.[66] Another condition DPAs and

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[60] *See* Reilly, *supra* note 21, at 839 (describing a DPA as a "negotiated contract between the federal government and [the] defendant").

[61] Alexander & Cohen, *supra* note 11, at 544.

[62] *See* Ellen S. Podgor, *The Challenge of White Collar Sentencing*, J. CRIM. L. & CRIMINOLOGY 731, 751 n.124 (2007); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 413 n.2 (2007). The distinction between DPAs and NPAs is important in some contexts. *See, e.g.*, Mark K. Schonfeld, *2011 Mid-Year Securities Enforcement Update*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 13, 2011), https://corpgov.law.harvard.edu/2011/08/13/2011-mid-year-securities-enforcement-update/ [https://perma.cc/LH58-D4SJ]. But it is largely semantic for purposes of this Article because neither DPAs nor NPAs affect an organizational defendant's culpability score or fine at sentencing. *See infra* Part III.

[63] United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 12–13 (D.D.C. 2015).

[64] DPAs and NPAs ordinarily have a term of between one and five years. *See* Ryan D. McConnell, Jay Martin & Charlotte Simon, *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 HOUS. J. INT'L L. 509, 558 (2011). *But see* GIBSON DUNN, 2021 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS 17–19 (2022) (collecting terms for DPAs and NPAs entered during 2021 that ranged from eighteen to thirty-six months).

[65] *Saena Tech Corp.*, 140 F. Supp. 3d at 13.

[66] Andrea Amulic, *Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States*, 116 MICH. L. REV. 123, 132 (2017) (offering exemplary DPA conditions); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation through Nonprosecution*, 84 U. CHI. L. REV. 323, 325 (2017) (same); Arlen, *supra* note 20, at 200 (discussing financial sanctions in DPAs); Frederick T. Davis, *Judicial Review of Deferred Prosecution Agreements: A Comparative Study*, 60 COLUM. J. TRANSACTIONAL L. 751, 756–58 (2022); McConnell et al., *supra* note 64, at 558; Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 4 (2007). An organizational

NPAs often include is that the defendant will receive a "monitor," an individual that oversees and advises the organization's compliance efforts.[67]

If the defendant complies with the agreed conditions, the government will permanently dismiss (or never assert) formal charges against the defendant.[68] This benefit is key for the defendant. Because a defendant that receives a DPA or an NPA avoids formal prosecution, the defendant necessarily also avoids any conviction that could result from the dismissed (or never asserted) charges.[69] Without that conviction, the government might be less likely to prosecute the defendant in a future case, and if the defendant is convicted for a different offense in the future, the defendant will necessarily have a lower culpability score at its sentencing,[70] which means the defendant will face a lower potential fine under the sentencing guidelines.[71] As a result, all things equal, a defendant would generally prefer entering a DPA or an NPA rather than a plea agreement. Of course, if the defendant breaches the DPA or NPA, the government remains free to prosecute the defendant.[72] Further, defendants often agree that in the event of their breach, the defendants will not dispute that statements made during settlement discussions are admissible in future proceedings.[73]

The government enters DPAs and NPAs with both individual and organizational defendants for a wide range of offenses.[74] DPAs and NPAs were created to

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plea agreement may include many of the same terms. *See, e.g.*, GARRETT, *supra* note 54, at 11 (discussing Siemens's plea agreement).

[67] *See* Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 694–95 (2009) (describing corporate monitorships)*; see also* Lindsey A. Gallo, Kendell V. Lynch & Rimmy E. Tomy, *Out of Site, Out of Mind? The Role of the Government-Appointed Corporate Monitor*, J. ACCT. RSCH. 1633, 1634 (2023). The success of corporate monitors is contested. *See id.* at 1639 (concluding that while the imposition of a corporate monitor somewhat positively correlates with a reduction in violations, the short-term improvements do not persist in the long run).

[68] Amulic, *supra* note 66, at 124–25.

[69] *Saena Tech Corp.*, 140 F. Supp. 3d at 12–13.

[70] *See* Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1299 n.36 (2014); *infra* Part II.C (discussing the organizational sentencing guidelines).

[71] *See infra* Part II.C.

[72] *See generally* 1A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 182 (5th ed. 2023).

[73] *See, e.g.*, Deferred Prosecution Agreement ¶ 22, United States v. Freepoint Commodities LLC, No. 3:23-cr-00224 (D. Conn. Dec. 14, 2023); Deferred Prosecution Agreement ¶ 22, United States v. H.W. Wood Ltd., No. 23-cr-20414 (S.D. Fla. Nov. 20, 2023).

[74] *See, e.g.*, BDG Gotham Residential, LLC v. W. Waterproofing Co., Inc., 631 F. Supp. 3d 76, 79 (S.D.N.Y. 2022) (assault and reckless endangerment); State v. Kaczmarski, 772 N.W.2d 702, 705 (Wisc. Ct. App. 2009) (second-degree sexual assault); Press Release, Off. of Pub. Affs., Dep't of Just., Second Pharmaceutical Company Admits to Price Fixing, Resolves Related False Claims Act Violations (Dec. 3, 2019), https://www.justice.gov/opa/pr/second-pharmaceutical-company-admits-price-fixing-resolves-related-false-claims-act [https://perma.cc/L25V-TXHW] (conspiracy to fix prices).

convey leniency to first-time, nonviolent individual offenders.[75] Nonetheless, albeit with criticism from scholars and courts,[76] DPAs and NPAs are modernly used most frequently in the organizational crime context.[77] As this Section demonstrates, DPAs and NPAs are the functional equivalent of plea agreements (resulting in criminal convictions) in the organizational defendant context.

Historically, criminal enforcement against organizations resembled criminal enforcement against individuals.[78] That is, corporate prosecution occurred almost unanimously through formal judicial processes that culminated in trials or plea agreements and thus formal convictions or acquittals.[79] Yet, in the 1990s, the government began offering organizations DPAs and NPAs, and these tools quickly became a leading vehicle for corporate criminal enforcement in the 2000s.[80] Within recent years, approximately one hundred organizational criminal cases have proceeded through formal judicial processes and resulted in convictions and sentencings each year.[81] Meanwhile, approximately thirty organizational criminal cases are resolved with DPAs or NPAs annually.[82] By contrast, approximately 0.6% of individual defendants receive DPAs or NPAs.[83]

Between 2022 and 2024, there was a mild decrease in the use of DPAs and NPAs in the organizational defendant context and a decrease in the total

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[75] RICK CLAYPOOL, PUB. CITIZEN, ENFORCEMENT UPTICK: IN 2023, DOJ CORPORATE CRIME PROSECUTIONS INCREASED SLIGHTLY 2 (2024).

[76] *See, e.g.*, United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 45–46 (D.D.C. 2015) ("The Court is . . . extremely dismayed that despite all of the focus on providing tools for prosecutors to reduce over-incarceration, attack the root causes of crime, and mitigate where possible the collateral consequences of criminal convictions, deferred-prosecution agreements for individuals and other similar tools have gone largely unmentioned . . . . The Court is of the opinion that people are no less prone to rehabilitation than corporations."); Paola C. Henry, Note, *Individual Accountability for Corporate Crimes After the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform*, 6 AM. U. BUS. L. REV. 153, 157 (2016) (criticizing the modern use of DPAs in the corporate context as being inconsistent with the purpose of their creation).

[77] *See* Henry, *supra* note 76, at 158 ("DPAs are now widely used for Foreign Corrupt Practices Act . . . violations, product safety and securities violations, environmental crimes, money laundering, fraud, and other corporate crimes.").

[78] *See* Alexander & Cohen, *supra* note 11, at 544 (noting the shift in criminal enforcement strategies against organizations).

[79] *Id.*

[80] *See* Davis, *supra* note 66, at 755; *see also* Alexander & Cohen, *supra* note 11, at 559 (compiling data on corporate plea agreements, DPAs, and NPAs entered between 1997 and 2011). Gibson Dunn's annual report on corporate DPAs and NPAs reflects a preference for the use of DPAs over NPAs. *See, e.g.*, GIBSON DUNN, *supra* note 64, at 1–4; *see also* Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61, 71–78 (presenting a more detailed historical background on DPAs and NPAs in the corporate context).

[81] U.S. SENT'G COMM'N, QUICK FACTS: ORGANIZATIONAL OFFENDERS 1 (2023).

[82] GIBSON DUNN, *supra* note 64, at 2.

[83] CLAYPOOL, *supra* note 12, at 19.

amount of penalties paid by organizational defendants.[84] Indeed, in 2022, the total number of criminal actions against organizational offenders was the lowest it has been since 1994 when the popularity of using organizational DPAs and NPAs began to accelerate.[85] But during these years, there was also a relative decrease in the number of total criminal enforcement actions filed against organizational defendants.[86] Ultimately, although overall corporate criminal enforcement has waned in recent years, the government still regularly prosecutes organizations and regularly uses DPAs and NPAs to resolve cases.[87]

The prosecutor's discretion in each case determines whether the government will seek a formal conviction against an organization rather than offer a DPA or an NPA.[88] Nonetheless, DOJ guidance tempers that discretion by requiring prosecutors to consider several factors in determining whether to prosecute an organization, including the seriousness of the offense, "the pervasiveness of wrongdoing within" the organization, and the adequacy of any compliance program the organization employed at the time of the offense.[89] Prosecu-

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[84] *See generally* GIBSON DUNN, CORPORATE RESOLUTIONS 2024 YEAR-END UPDATE 4–6 (2025); GIBSON DUNN, CORPORATE RESOLUTIONS UPDATE 1–2 (2023); Chris Prentice, *US DOJ Unit's Penalties Fall in 2023 as Trial Backlog Bites, Data Shows*, REUTERS (Feb. 22, 2024), https://www.reuters.com/world/us/us-justice-dept-corporate-penalties-plunge-2023-trial-backlog-bites-data-shows-2024-02-22/ [https://perma.cc/5RHY-W8SU].

[85] RICK CLAYPOOL, PUB. CITIZEN, CORPORATE PROSECUTION DOLDRUMS: IN 2022 DOJ CORPORATE CRIME PROSECUTIONS REMAIN NEAR RECORD LOW 3–4 (2023).

[86] *Id.* The decrease can be credited in part to an increase in the use of declinations, which are formal guarantees of the government that it will not prosecute defendants. *Id.* at 6. The increase in declinations has resulted from internal DOJ policy changes that encourage using declinations if organizations voluntarily self-disclosed their offense conduct. *See* Kenneth A. Polite, Jr., *Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy*, DEP'T OF JUST., https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law [https://perma.cc/HEB7-YE6R] (Feb. 5, 2025); U.S. Dep't of Just., Just. Manual § 9-28.300(A) (2023) (presuming a company suspected of an FCPA violation will receive a declination absent aggravating circumstances if the "company [has] voluntarily self-disclose[d] misconduct, fully cooperate[d], and timely and appropriately remediate[d]"); *see, e.g.*, CLAYPOOL, *supra* note 75, at 4–5 (discussing Safran and Corsa Coal, two companies that received declinations following self-disclosure).

[87] *See* Brandon L. Garrett, *Corporate Crimmigration*, 2021 U. ILL. L. REV. 359, 371–72 [hereinafter Garrett, *Corporate Crimmigration*]. The rise of DPAs and NPAs in the United States has sparked a global interest in them. *See* Liz Campbell, *Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales*, 43 SYDNEY L. REV. 187, 190–91 (2021) (discussing various nations' approaches to DPAs and NPAs); Brandon L. Garrett, *The Changing Face of Corporate Prosecutions*, THE CHAMPION, Sept./Oct. 2016, at 48, 62 [hereinafter Garrett, *The Changing Face of Corporate Prosecutions*] (same). Several nations now either use DPAs and NPAs or are considering doing so. Garrett, *The Changing Face of Corporate Prosecutions*, *supra*, at 62.

[88] *See* Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 378 (2014).

[89] U.S. Dep't of Just., Just. Manual § 9-28.300(A)(2) (2023). A compliance program is a set of internal procedures that an organization employs to prevent and detect violations of law. *See What Is Corporate Compliance and Why It's Important?*, CRI GRP., https://crigroup.com/importance-of-

tors must also consider the organization's prior unlawful conduct represented by its prior criminal convictions, DPAs and NPAs, and civil and regulatory resolutions.[90]

Furthermore, recent guidance makes clear that prosecutors should heavily consider the extent to which the organization disclosed its own misconduct to enforcement authorities.[91] Namely, DOJ corporate enforcement policy revisions promise leniency to organizations that voluntarily disclose their own wrongdoing.[92] Moreover, the Monaco Memorandum directs each DOJ component that prosecutes corporate crime to create a policy on self-disclosure, and prosecutors must consider whether organizations self-disclosed their misconduct.[93] All of these same factors are necessarily relevant when deciding to offer a DPA or an NPA in lieu of formal prosecution.[94]

B. Pros and Cons of Using DPAs and NPAs in the Organizational Crime Context

Although DPAs and NPAs are regularly used in the organizational context, commentators debate the propriety of their use.[95] Proponents of DPAs and NPAs assert they serve many of the purposes of traditional criminal enforce-

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corporate-compliance [https://perma.cc/VDJ3-52AG] (explaining the concept and purposes behind corporate compliance). The purpose of a compliance program is to allow an organization to avoid significant losses that may follow violations. *Id.*

[90] U.S. Dep't of Just., Just. Manual § 9-28.600(A) (2023).

[91] *See* Phillip Bantz, *The 3 Biggest White-Collar Enforcement Buzzwords of 2023*, LAW360 (Jan. 1, 2024), https://www.law360.com/articles/1775438/the-3-biggest-white-collar-enforcement-buzzwords-of-2023 [https://perma.cc/9BN2-GUMJ].

[92] *See* Lindsey Collins & Kate Rumsey, *Self-Disclosure Lessons from Exemplary Corp. Resolutions*, LAW360 (Sept. 13, 2023), https://www.law360.com/articles/1719945/self-disclosure-lessons-from-exemplary-corp-resolutions [https://perma.cc/CX4K-B78D] (discussing the revised policy and providing examples of DOJ leniency).

[93] Memorandum from Deputy Att'y Gen. Lisa Monaco, *supra* note 57, at 7. Relatedly, the U.S. Attorneys' Office for the Southern District of New York recently implemented a policy allowing individual defendants to receive NPAs in exchange for "early and voluntary self-disclosure of criminal conduct." Joshua A. Naftalis, Anastasia Cembrovska, Brianna Hills Simopoulos & Jingxi Zhai, *SDNY Announces Whistleblower Pilot Program to Incentivize Self-Disclosure of Financial Fraud and Public Corruption*, PROGRAM OF CORP. COMPLIANCE & ENF'T AT N.Y.U. SCH. OF L. (Jan. 23, 2024), https://wp.nyu.edu/compliance_enforcement/2024/01/23/sdny-announces-whistleblower-pilot-program-to-incentivize-self-disclosure-of-financial-fraud-and-public-corruption/ [https://perma.cc/KG5U-VAUH].

[94] *See* Memorandum from the Deputy Att'y Gen. to the Assistant Att'y Gen. et al. on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies 3 (Oct. 28, 2021), https://www.justice.gov/d9/pages/attachments/2021/10/28/2021.10.28_dag_memo_re_corporate_enforcement.pdf [https://perma.cc/Z476-E4Z9] ("[W]hen making determinations about criminal charges *and resolutions* for a corporate target, prosecutors are directed to consider *all* misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it . . . ." (first emphasis added)).

[95] *See, e.g.*, Arlen, *supra* note 20, at 231 (critiquing the use of DPAs and NPAs).

ment tools, including retribution and deterrence.[96] Advocates also assert DPAs and NPAs permit prosecutors to combat corporate offenses that are serious enough to warrant at least some action of the government but are not severe enough to warrant formal charges.[97] DPAs and NPAs also allow the government to resolve criminal cases more quickly and efficiently than if the government utilized plea agreements or trials, and this result frees judicial and executive resources that may be allocated to other cases.[98]

Another persuasive argument supporting DPAs and NPAs is that they have the flexibility to provide organizational defendants with opportunities and incentives to correct their negative behavior before receiving hefty fines that may cause them to cease operations.[99] When an organization must close its doors due to managerial wrongdoing, shareholders and other nonmanagerial investors suffer the cost.[100] Of course, when an organization closes due to corporate misbehavior, negative economic consequences follow, particularly in highly-concentrated markets where fewer firms operating means less desirable consumer choice, product quality, and innovation, which are characteristics of an economically-efficient market.[101]

While DPAs and NPAs have some advantages, several commentators question whether DPAs and NPAs are used effectively in the organizational context. Professor Peter Reilly avers that using DPAs and NPAs prevents meaningful judicial oversight as they place the charging and adjudicative func-

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[96] *See* Lanny A. Breuer, *Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association*, DEP'T OF JUST., https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association [https://perma.cc/8HK3-8PXZ] (Feb. 5, 2025) ("[W]hen a company enters into a DPA with the government, or an NPA for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. All of these components of DPAs are critical for accountability.").

[97] *See id.* ("When the only tool we had to use in cases of corporate misconduct was a criminal indictment, prosecutors sometimes had to use a sledgehammer to crack a nut. More often, they just walked away.").

[98] *See* Kaal & Lacine, *supra* note 80, at 63–64, 70.

[99] *See* Alexander & Cohen, *supra* note 11, at 539 ("DPAs and NPAs are sometimes regarded as enabling some companies to avoid insolvency.").

[100] *See* Patrick R. Baker, Paula Hearn Moore & Kaleb Paul Byars, *Nonprofit College Crash: Enforcing Board Fiduciaries Through Increased Accountability and Transparency in the IRS Form 990 Procedure*, 2019 BYU EDUC. & L.J. 167, 187 (describing how malfeasance of higher education institutions' directors and officers causes the institutions to close); *see also* Patrick Baker, Paula Hearn Moore, Kaleb P. Byars & Christie G. Aden, *Covid Closing Down Colleges: How the Covid-19 Pandemic Accelerated Nonprofit College Closings*, 2020 BYU EDUC. & L.J. 101, 101 (describing how the COVID-19 pandemic exacerbated the closure rate).

[101] *See* Kaleb Byars, *An "Essential" Solution: Reworking the Essential Facilities Doctrine to Address Big Tech's Harm to the Marketplace of Ideas*, 91 MISS. L.J. 263, 267 (2023); *see also id.* at 302 (recognizing that harm to these market characteristics constitutes antitrust harm).

tions of the criminal justice system in the hands of prosecutors alone.[102] Professor Jennifer Arlen asserts DPAs and NPAs are inconsistent with the rule of law to the extent prosecutors use them to impose contractual duties on defendant firms that prosecutors otherwise have no authority to impose.[103] Professor Brandon Garrett and others have criticized the lack of public transparency that surrounds the negotiations and terms of DPAs and NPAs.[104] Others claim using DPAs and NPAs against organizations inadvisably incentivizes prosecutors to ignore the culpable conduct of individual white-collar offenders within the organizations.[105] Some commentators claim DPAs and NPAs falsely portray the message that organizational crime is not serious (or else it would have warranted formal criminal proceedings).[106] Scholars have also asserted that while

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[102] *See* Reilly, *supra* note 18, at 1116–17, 1119–20, 1122–23; Peter Reilly, *U.S. Corporate DPA Program: International Embarrassment?*, CLS BLUE SKY BLOG (Mar. 5, 2019), https://clsbluesky.law.columbia.edu/2019/03/05/the-u-s-corporate-dpa-program-an-international-embarrassment/ [https://perma.cc/M74X-V7GA]; *see also* Reilly, *supra* note 21, at 879–83 (advocating for legislative and judicial change regarding corporate DPAs); Henry, *supra* note 76, at 165–67 (same); *cf.* Gregory M. Gilchrist, *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*, 64 HASTINGS L.J. 1121, 1124, 1155 (2013) (explaining that "[c]orporations have strong incentives to avoid indictment," that "some may be willing to settle matters through DPAs and NPAs that they otherwise would have fought through trial," and that an "indictment itself can have a dramatic impact on share price or even the ability of the corporation to continue business as usual" (citation omitted)). *See generally* John Gleeson, *Judicial Scrutiny of DPAs, NPAs, and Monitorships*, GLOB. INVESTIGATIONS REV. (Apr. 25, 2022), https://globalinvestigationsreview.com/guide/the-guide-monitorships/third-edition/article/judicial-scrutiny-of-dpas-npas-and-monitorships [https://perma.cc/L8QU-ZWK2] (providing background information and a brief commentary on the leading cases on this issue).

[103] *See* Arlen, *supra* note 20, at 215–16 (providing several examples of ultra vires duties prosecutors may impose via DPAs and NPAs).

[104] *Cleaning Up the C-Suite: Ensuring Accountability for Corporate Criminals: Before the S. Comm. on the Judiciary*, *supra* note 8 (written statement of Professor Brandon Garrett); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1835 (2015); Garrett, *supra* note 19, at 139–40; *see* Reilly, *supra* note 88, at 399; Mike Scarcella, *DOJ Non-Prosecution Records Are Target of Law Librarian's Suit*, REUTERS, https://www.reuters.com/legal/government/doj-non-prosecution-records-are-target-law-librarians-suit-2021-11-08/ [https://perma.cc/HJ7K-59X9] (Nov. 8, 2021); *see also* Ellen S. Podgor, *Disruptive Innovation in Criminal Defense: Demanding Corporate Criminal Trials*, 69 MERCER L. REV. 825, 829 (2018) ("Because NPAs are entered into directly between the government and the entity, the number and existence of these agreements can be difficult to ascertain.").

[105] *See, e.g.*, Henry, *supra* note 76, at 160–62.

[106] *See, e.g.*, Christopher Modlish, Note, *The Yates Memo: DOJ Public Relations Move or Meaningful Reform That Will End Impunity for Corporate Criminals?*, 58 B.C. L. REV. 743, 760–61 (2017); *see also* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) ("[W]hen society deliberately forgoes answering the wrongdoer through punishment, it risks being perceived as endorsing his valuations; hence the complaint that unduly lenient punishment reveals that the victim is worthless in the eyes of the law."); Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 24, 2017), https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail [https://perma.cc/RV7A-3XJ4] (criticizing the DOJ's allegedly-insufficient response to particular organizational offense conduct).

using DPAs and NPAs allows for a larger quantity of enforcement actions, the quality of those enforcement actions is diminished.[107]

Another negative consequence of using DPAs and NPAs is that the government may use them to unduly pressure corporations into settling their cases. Professor Ellen Podgor has noted that corporations are quick to resolve cases outside of the formal adjudicatory process for a number of reasons.[108] Irrespective of its guilt, a criminal conviction may lead to the organization's dissolution. Arthur Andersen, LLP, a global accounting firm in the early 2000s, refused to resolve its case with the government.[109] Shortly afterwards, Arthur Anderson was convicted, and although the Supreme Court later reversed its conviction, it was bankrupt by that time.[110] Whatever the merit of the critiques of DPAs and NPAs, they remain prevalent in corporate criminal enforcement actions, and this prevalence is only increasing.

C. Organizational Recidivism

This Article opines that organizational offenders often receive disproportionately-low sentences when they receive formal convictions because the organizations' prior DPAs and NPAs do not receive appropriate consideration under the federal sentencing guidelines.[111] Part III of this Article proposes solutions to this problem.[112] To establish the need for these solutions, this Section demonstrates that organizational offenders commonly reoffend, including after they have executed DPAs and NPAs.[113]

First, Subsection 1 describes statistics and trends regarding organizational recidivism that demonstrate that organizational offenders commonly reoffend after sustaining DPAs and NPAs.[114] Then, Subsections 2 and 3 discuss the cases of JPMorgan Chase & Co. (JPMorgan) and Deutsche Bank AG (Deutsche

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[107] *See, e.g.*, Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 552, 557–58 (2015) (noting that a lack of involvement of the judicial process prevents a neutral, judicial decision maker from facilitating the presentation of evidence and reaching an unbiased resolution after receiving opposing viewpoints and ensuring the elements of the offense have been established).

[108] *See* Podgor, *supra* note 104, at 831–34, 838.

[109] *See* Mark Maurer, *Arthur Andersen's Legacy, 20 Years After Its Demise, Is Complicated*, WALL ST. J. (Aug. 31, 2022), https://www.wsj.com/articles/arthur-andersens-legacy-20-years-after-its-demise-is-complicated-11661938200 [https://perma.cc/A6P9-KKW9].

[110] *See* Podgor, *supra* note 104, at 831 (noting that the Arthur Anderson collapse showcases the risk of corporate criminal conviction); Fred Barbash, *Corporate Crime and "Collateral" Damage*, POLITICO (May 5, 2010), https://www.politico.com/story/2010/05/corporate-crime-and-collateral-damage-036762 [https://perma.cc/P8ME-8JM3] (same).

[111] *See infra* Part III.

[112] *See infra* Part III.

[113] *See infra* Part I.C.

[114] *See infra* Part I.C.I.

Bank).[115] These two organizations, like many organizations, continue to commit new and serious offenses despite having received the benefit of prosecutorial leniency via multiple prior DPAs and NPAs.[116]

1. Organizational Recidivism Following DPAs and NPAs

Although deterrence seems as though it should be a logical consequence of corporate criminal liability, evidence of organizational recidivism demonstrates that deterrence has not been a practical consequence.[117] A 2019 Public Citizen report informs that as of 2019, thirty-eight organizations that had received DPAs or NPAs subsequently faced additional federal criminal enforcement actions.[118] Public Citizen reports from 2023 and 2024 inform that organizational recidivism following DPAs and NPAs continues to persist.[119] Concerningly, many recidivist organizations are well-known Fortune 500 companies whose offenses have had devastating impacts.[120]

It is striking that approximately sixty-three percent of organizations that are subject to federal criminal enforcement actions have already received the benefit of multiple DPAs and NPAs before the new actions.[121] In addition to JPMorgan and Deutsche Bank, which are discussed in more detail below, Pfizer Inc.[122] and Credit Suisse[123] are a few of the numerous globally prominent

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[115] *See infra* Part I.C.II.

[116] *See infra* Part I.C.III.

[117] *See* W. Robert Thomas & Mihailis E. Diamantis, *A Marketing Pitch for Corporate Criminal Law*, 2 STETSON BUS. L. REV. 1, 17–18 (2022).

[118] *See* CLAYPOOL, *supra* note 12, at 29 (cataloguing firms that previously entered DPAs and NPAs and later faced criminal enforcement actions); *see also* Merle, *supra* note 13 (discussing the report). Thirty-eight may seem like a small number of reoffenders, but since at least 2018, there have been only approximately one hundred organizational offenders sentenced each year. *See generally* U.S. SENT'G COMM'N, THE ORGANIZATIONAL SENTENCING GUIDELINES: THIRTY YEARS OF INNOVATION AND INFLUENCE 13 fig.1 (2022).

[119] CLAYPOOL, *supra* note 85, at 3–5; CLAYPOOL, *supra* note 75, at 4.

[120] *See* CLAYPOOL, *supra* note 12, at 43–44. Smaller organizations are even more likely to be prosecuted. CLAYPOOL, *supra* note 75, at 3.

[121] CLAYPOOL, *supra* note 12, at 31. Professor John Coffee recognizes that causes of corporate recidivism may be that corporate culture is difficult to change or that large companies have the capital to pay fines and simply accept "them as a cost of doing business." JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 132 (2020).

[122] *See Pfizer to Pay $35 Mln in Genotropin Settlements*, REUTERS, https://www.reuters.com/article/idUSWNAS5447/ [https://perma.cc/9FAK-6ZHX] (Aug. 9, 2007) (2007 DPA); Press Release, Off. of Pub. Affs., Dep't of Just., Justice Department Announces Largest Health Care Fraud Settlement in Its History (Sept. 2, 2009), https://www.justice.gov/opa/pr/justice-department-announces-largest-health-care-fraud-settlement-its-history [https://perma.cc/TRP3-QTWD] (2009 guilty plea); Press Release, Off. of Pub. Affs., Dep't of Just., Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 7, 2012), https://www.justice.gov/opa/pr/pfizer-hcp-corp-agrees-pay-15-million-penalty-resolve-foreign-bribery-investigation [https://perma.cc/9AG5-5LWA] (2012 DPA).

[123] Press Release, Off. of Pub. Affs., Dep't of Just., Credit Suisse Agrees to Forfeit $536 Million in Connection with Violations of the International Emergency Economic Powers Act and New York

entities that have received multiple DPAs and NPAs in addition to at least one formal conviction.[124] Boeing provides another example. Boeing executed an NPA in 2006[125] and a DPA in 2021.[126] Further, as of the date of this Article's publication, Boeing is in negotiations to reach an additional agreement to resolve criminal charges.[127] Large companies continue to receive leniency via multiple DPAs and NPAs despite guidance from federal authorities (like the Monaco Memorandum) that suggests a successive DPA or NPA for an organization is "generally disfavored."[128]

In addition to organizations that have executed multiple DPAs and NPAs prior to formal prosecution, several other organizations have received formal criminal convictions after executing a single DPA or NPA.[129] British Petroleum (BP), a global oil and gas company, provides a prime example.[130] In 2007, BP executed a DPA following offense conduct leading to charges for conspiracy to violate the Commodity Exchange Act, mail fraud, and wire fraud.[131] Later, in 2013, BP received a conviction and a then-historic four billion dollar fine after it pled guilty to charges for felony manslaughter, various environmental offenses,

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State Law (Dec. 16, 2009), https://www.justice.gov/opa/pr/credit-suisse-agrees-forfeit-536-million-connection-violations-international-emergency [https://perma.cc/UC3V-5GJ3] (2009 DPA); Dominic Rushe, *Credit Suisse Pleads Guilty to Criminal Charges in US Tax Evasion Settlement*, THE GUARDIAN (May 19, 2014), https://www.theguardian.com/business/2014/may/19/credit-suisse-plead-guilty-criminal-charges-us-tax-evasion [https://perma.cc/9EWB-ULGY] (2014 guilty plea); Press Release, Off. of Pub. Affs., Dep't of Just., Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme That Violated the FCPA (July 5, 2018), https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt [https://perma.cc/2RKP-PABR] (2018 NPA); Press Release, Off. of Pub. Affs., Dep't of Just., Credit Suisse Resolves Fraudulent Mozambique Loan Case in $547 Million Coordinated Global Resolution (Oct. 19, 2021), https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global [https://perma.cc/66MP-PJP2] (2021 DPA).

[124] *See* Armour et al., *supra* note 55, at 1224 (discussing Las Vegas Sands, another large organization that has recidivated and entered into multiple NPAs).

[125] *See generally* Boeing Non-Prosecution Agreement (June 30, 2006) (NPA and civil resolution) (on file with author).

[126] *See generally* Deferred Prosecution Agreement, United States v. The Boeing Co., No. 4:21-cr-00005 (N.D. Tex. Jan. 7, 2021).

[127] Criminal Division, *United States v. the Boeing Company*, DEP'T OF JUST., https://www.justice.gov/criminal/criminal-fraud/case/united-states-v-boeing-company [https://perma.cc/325H-Y4X3] (Dec. 5, 2024); *see also* Mike Volkov, *DOJ and Boeing Propose Criminal Plea Agreement—Boeing to Plead Guilty to Felony and Pay $243 Million Penalty (Part I of III)*, JDSUPRA (July 30, 2024), https://www.jdsupra.com/legalnews/doj-and-boeing-propose-criminal-plea-9608216/ [https://perma.cc/FT42-9ZUK] (noting that Boeing's failed 2024 plea agreement resulted from its breach of its 2021 DPA "by failing to design, implement, and enforce a compliance and ethics program to prevent and detect violations of the U.S. fraud laws").

[128] Memorandum from Deputy Att'y Gen. Lisa Monaco, *supra* note 57, at 6.

[129] CLAYPOOL, *supra* note 12, at 43–44 tbl.6.

[130] *See id.* at 112–15 (describing the corporate misconduct of BP).

[131] *See generally* Deferred Prosecution Agreement, United States v. BP Am. Inc., No. 1:07-cr-00683 (N.D. Ill. Oct. 25, 2007).

and obstruction of justice.[132] These convictions resulted from BP's conduct that resulted in the Deepwater Horizon oil rig explosion in 2010, which caused eleven deaths and extensive environmental pollution in the Gulf of Mexico.[133]

2. JPMorgan Chase & Co.

One of the most egregious examples of organizational recidivism involves JPMorgan. JPMorgan's recidivism is particularly concerning given that it is one of the highest-revenue-generating companies in the United States and that much of its criminal history involves similar misconduct.[134]

JPMorgan's criminal history began in 2011 when it executed a two-year NPA with the DOJ.[135] The NPA followed JPMorgan's participation in a bid-rigging scheme between 2001 and 2006 in violation of the Sherman Act and other federal statutes.[136] JPMorgan's offense conduct harmed competition, and it agreed to pay $228 million in restitution, sanctions, and disgorgement as a result of its offense.[137]

In 2014, JPMorgan executed a two-year DPA with the DOJ.[138] This DPA resulted from JPMorgan's decades-long negligent oversight of Bernie Madoff's accounts at JPMorgan, which Madoff used to operate one of the largest and most publicized Ponzi schemes in history.[139] In the DPA, JPMorgan admitted to violations of the Bank Secrecy Act for failing to maintain an effective money laundering program and failing to file a suspicious activity report

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[132] *See Summary of Criminal Prosecutions*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2468 [https://perma.cc/7U5Y-AHTU].

[133] *Id.*

[134] *See List of "Fortune 500" Companies*, 50PROS, https://www.50pros.com/fortune500 [https://perma.cc/7MFC-JDNM] (Jan. 22, 2025) (showing JPMorgan as twelfth in overall revenue as of 2025).

[135] *See* Letter from Christine A. Varney, Asst. Att'y Gen., to Thomas Mueller, Wilmer Cutler Pickering Hale and Dorr ¶¶ 3, 6–7 (July 6, 2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/07/07/272815a.pdf [https://perma.cc/FTB9-D7AM].

[136] *See id.* ¶ 5(a).

[137] *See generally* Press Release, Off. of Pub. Affs., Dep't of Just., JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $228 Million to Federal and State Agencies (July 7, 2011), https://www.justice.gov/opa/pr/jpmorgan-chase-admits-anticompetitive-conduct-former-employees-municipal-bond-investments [https://perma.cc/JN4P-DU5N].

[138] *See* Letter from Preet Bharara, U.S. Att'y for the S. Dist. of N.Y., to John F. Savarese, Stephen R. DiParma, Emil A. Kleinhaus & Steven R. Peikin ¶ 12 (Jan. 6, 2014) (on file with author).

[139] *See generally* Press Release, U.S. Atty's Off., S. Dist. of N.Y., Manhattan U.S. Attorney and FBI Assistant Director-in-Charge Announce Filing of Criminal Charges Against and Deferred Prosecution Agreement with JPMorgan Chase Bank, N.A., in Connection with Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme (Jan. 7, 2014), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-assistant-director-charge-announce-filing-criminal [https://perma.cc/G3A9-65RZ]; *see also* Adam Hayes, *Bernie Madoff: Who He Was, How His Ponzi Scheme Worked*, INVESTOPEDIA, https://www.investopedia.com/terms/b/bernard-madoff.asp [https://perma.cc/E943-H76K] (June 23, 2024) (offering further background information about the Madoff Ponzi scheme).

despite its reason to know of Madoff's conduct.[140] JPMorgan agreed to pay $1.7 billion to the DOJ as a result of the offense.[141]

In 2015, before the 2014 DPA even expired, JPMorgan was convicted for yet another antitrust violation.[142] Between 2010 and 2013, a JPMorgan trader conspired with traders from other banking institutions to influence foreign exchange rates.[143] Consequently, JPMorgan and the other institutions pleaded guilty to violations of the Sherman Act.[144] JPMorgan entered into a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement with the government in which JPMorgan agreed to a sentence of a term of probation of three years and a fine of $550 million.[145]

In 2016, through a subsidiary, JPMorgan executed a new, three-year NPA.[146] This time, employees at a JPMorgan subsidiary implemented a hiring scheme favoring children of Chinese executives in violation of the Foreign Corrupt Practices Act (FCPA).[147] JPMorgan received over $100 million in profits from its violations. Though, it paid more than $264 million in monetary sanctions to federal enforcement authorities.[148]

In 2020, JPMorgan executed another three-year DPA with the government.[149] Between 2008 and 2016, traders at JPMorgan engaged in a "spoofing"

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[140] *See* Letter from Preet Bharara, *supra* note 138, at Exhibit B.

[141] *Id.* ¶ 3.

[142] *See generally* Press Release, Off. of Pub. Affs., Dep't of Just., Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas [https://perma.cc/ZTQ2-LP3Z].

[143] Press Release, JP Morgan, JPMorgan Chase Announces Settlements with the U.S. Department of Justice and the Federal Reserve Related to Foreign Exchange Activities (May 20, 2015), https://www.jpmorganchase.com/ir/news/2015/id-914105 [https://perma.cc/Z736-3GZK].

[144] *See* Press Release, Off. of Pub. Affs., Dep't of Just., *supra* note 142.

[145] *See generally* Plea Agreement ¶ 9, United States v. JPMorgan Chase & Co., No. 3:15-cr-00079 (D. Conn. May 20, 2015). In a Rule 11(c)(1)(C) plea agreement, the government agrees to recommend a particular sentence, and, if the court accepts the plea agreement, the court must impose the recommend sentence. FED. R. CRIM. P. 11(c)(1)(C).

[146] *See* Bruce E. Yannett, Andrew M. Levine & Philip Rohlik, *Beyond "Sons and Daughters": JPMorgan Resolves Hiring Practices Probe*, 8 FCPA UPDATE, Nov. 2016, at 1, 1; *see also* Letter from Robert L. Capers, U.S. Att'y for the E. Dist. of N.Y, to Mark F. Mendelsohn (Nov. 17, 2016).

[147] *See* Letter from Robert L. Capers, *supra* note 146, ¶¶ 10–67; *see also* Beverley Earle & Anita Cava, *Examining the JPMorgan "Princeling" Settlement: Insight into Current Foreign Corrupt Practices Act (FCPA) Interpretation and Enforcement*, 17 WASH. U. GLOB. STUD. L. REV. 365, 373–79 (2018) (describing JPMorgan's 2016 DPA and underlying offense conduct in further detail).

[148] *See generally* Thomas Fox, *JPMorgan Sons and Daughters FCPA Enforcement Action: Part I—Venice and Fog*, JDSUPRA (Nov. 21, 2016), https://www.jdsupra.com/legalnews/jpmorgan-sons-and-daughters-fcpa-48004/ [https://perma.cc/3TEY-HALM]; Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Chase Paying $264 Million to Settle FCPA Charges (Nov. 17, 2016), https://www.sec.gov/news/press-release/2016-241 [https://perma.cc/BR3Q-7N4L] (noting that JPMorgan paid $130 million to the Securities and Exchange Commission, $72 million to the DOJ, and $61.9 million to the Federal Reserve Board of Governors as a result of its conduct).

[149] *See generally* Deferred Prosecution Agreement, United States v. JPMorgan Chase & Co, No. 3:20-cr-00175 (D. Conn. Sept. 29, 2020); Press Release, U.S. Sec. & Exch. Comm'n, J.P. Morgan

scheme, simultaneously placing non-bona fide trade orders and bona fide trade orders to manipulate prices in the U.S. Treasury and precious metals futures markets.[150] This scheme led the government to charge JPMorgan with two counts of wire fraud.[151] In the DPA, JPMorgan agreed to pay $920 million in penalties, restitution, and disgorgement to federal enforcement authorities.[152] The individual traders involved were also convicted and incarcerated for their conduct.[153]

In sum, JPMorgan, like many other institutions, has repeatedly engaged in criminal conduct over decades. One would think the repeated criminal enforcement and substantial monetary sanctions JPMorgan has faced would incentivize it to cease its unlawful conduct. Yet JPMorgan has continued to violate the law, often engaging in conduct similar to that which resulted in its prior sanctions.[154] Recent events exemplify JPMorgan's continuing unlawful conduct, including securities law violations resulting in a settlement with the Securities and Exchange Commission (SEC) in January 2024[155] and involvement in processing funds related to Jeffrey Epstein's sex trafficking empire.[156] This

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Securities Admits to Manipulative Trading in U.S. Treasuries (Sept. 29, 2020), https://www.sec.gov/news/press-release/2020-233 [https://perma.cc/XR9S-N9J7].

[150] Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 148; Abhishek Manikandan & Michelle Price, *JPMorgan to Pay $920 Million for Manipulating Precious Metals, Treasury Market*, REUTERS (Sept. 29, 2020), https://www.reuters.com/article/idUSKBN26K321/ [https://perma.cc/RJ3K-XHHG].

[151] *See generally* Information, United States v. JPMorgan & Chase Co., No. 3:20-cr-00175 (D. Conn. Sept. 29, 2020).

[152] *See generally* Press Release, Off. of Pub. Affs., Dep't of Just., JPMorgan Chase & Co. Agrees to Pay $920 Million in Connection with Schemes to Defraud Precious Metals and U.S. Treasuries Markets (Sept. 29, 2020), https://www.justice.gov/opa/pr/jpmorgan-chase-co-agrees-pay-920-million-connection-schemes-defraud-precious-metals-and-us [https://perma.cc/E9D2-N592].

[153] *See* Press Release, Off. of Pub. Affs., Dep't of Just., Former J.P. Morgan Precious Metals Traders Sentenced to Prison (Aug. 22, 2023), https://www.justice.gov/opa/pr/former-jp-morgan-precious-metals-traders-sentenced-prison#:~:text=In%20September%202020%2C%20JPMorgan%20admitted,U.S.%20Treasury%20notes%20and%20bonds [https://perma.cc/9J4M-VLWX].

[154] *See, e.g.*, Earle & Cava, *supra* note 147, at 373–79 (describing JPMorgan's 2016 DPA and underlying offense conduct in further detail).

[155] *See* Benjamin Calitri, *SEC Continues to Elevate Its Enforcement of Rule 21F-17(a)*, PROGRAM ON CORP. COMPLIANCE & ENF'T AT N.Y.U. SCH. OF L. (Feb. 11, 2024), https://wp.nyu.edu/compliance_enforcement/2024/02/11/sec-continues-to-elevate-its-enforcement-of-rule-21f-17a/ [https://perma.cc/2YF9-FYWF]; Kanishka Singh, *CFTC Orders Three Major US Banks to Pay Over $50 Million for Swap-Reporting Failures*, REUTERS (Sept. 29, 2023), https://www.reuters.com/business/finance/us-cftc-orders-3-major-us-banks-pay-over-50-mln-swap-reporting-failures-2023-09-30/ [https://perma.cc/46SW-WVLZ].

[156] *See, e.g.*, Elliot Weld, *JPMorgan to Pay $75M to US Virgin Islands Over Epstein Ties*, LAW360 (Sept. 26, 2023), https://www.law360.com/articles/1725729?e_id=b28ee56c-814c-4ae2-ae9e-89c47dc83ce9&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates&detected=1 [https://perma.cc/U24E-X3DG]; Ava Benny-Morrison, *JPMorgan Found $1 Billion in Epstein Activity, USVI Says*, BLOOMBERG L. (Sept. 1, 2023), https://www.bloomberg.com/news/articles/2023-09-01/jpmorgan-found-1-billion-in-suspicious-epstein-activity-usvi [https://perma.cc/4EAS-KTF2]; *see also* Jon Hill, *JPMorgan Fined Nearly $350M Over Trade Surveillance*, LAW360 (Mar. 14,

conduct suggests that it is only a matter of time before JPMorgan faces additional criminal charges.

3. Deutsche Bank AG

Like JPMorgan, Deutsche Bank is a quintessential organizational recidivist, repeatedly committing similar offenses.[157] Deutsche Bank is a German-based bank and one of the largest banks in Europe.[158]

In 2010, Deutsche Bank executed a two-year NPA with the DOJ.[159] Between 1996 and 2002, Deutsche Bank utilized fraudulent tax shelter transactions to assist wealthy U.S. citizens in claiming billions of dollars in false tax benefits and avoiding billions of dollars in tax liability.[160] Deutsche Bank agreed to pay $553 million in penalties as a result of the offense, and the DOJ agreed not to prosecute Deutsche Bank for conspiracy to commit tax evasion and conspiracy to make fraudulent statements on a tax return.[161]

In 2015, through a subsidiary, Deutsche Bank executed a three-year DPA.[162] Between 2003 and 2010, Deutsche Bank traders requested and received false LIBOR and EURIBOR benchmark interest rate submissions to improve their trading positions.[163] Deutsche Bank and the DOJ utilized the

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2024), https://www.law360.com/articles/1813794/jpmorgan-fined-nearly-350m-over-trade-surveillance-[https://perma.cc/U2GN-W9MS] (discussing fines JPMorgan agreed to pay to the Federal Reserve and the Office of the Comptroller of the Currency for JPMorgan's failure to "to surveil billions of instances of trading activity on at least 30 global trading venues").

[157] James B. Stewart, *These Are the Deutsche Bank Executives Responsible for Serving Jeffrey Epstein*, N.Y. TIMES (July 13, 2020), https://www.nytimes.com/2020/07/13/business/deutsche-bank-jeffrey-epstein.html [https://perma.cc/EQG7-YTZR] ("Deutsche Bank is a symbol of corporate recidivism: It has paid more than $9 billion in fines since 2008 related to a litany of alleged and admitted financial crimes and other transgressions, including manipulating interest rates, failing to prevent money laundering, evading sanctions on Iran and other countries and engaging in fraud in the run-up to the financial crisis.").

[158] *See generally* Meaghan Yuen, *Here Are the Top 50 Biggest European Banks in 2024*, EMARKETER (Nov. 4, 2024), https://www.insiderintelligence.com/insights/largest-banks-europe-list/ [https://perma.cc/VG6M-PFDE].

[159] *See* Letter from Preet Bharara, U.S. Att'y for the S. Dist. of N.Y. to Mark F. Pomerantz 2 (Dec. 21, 2010) (on file with author).

[160] David Bario, *Paul Weiss Steers Deutsche Bank to $554 Million Tax Shelter Settlement with Government*, AM. LAW. (Dec. 21, 2010), https://www.law.com/americanlawyer/almID/1202476577982/ [https://perma.cc/Y6FY-SXWL].

[161] Press Release, U.S. Att'y for the S. Dist. of N.Y., Deutsche Bank to Pay More than $550 Million to Resolve Federal Tax Shelter Fraud Investigation (Dec. 21, 2010), https://www.justice.gov/archive/usao/nys/pressreleases/December10/deutschebankpr.pdf [https://perma.cc/XUD7-A2HK]; *see also* Letter from Preet Bharara, *supra* note 159, at 1.

[162] Jaclyn Jaeger, *Libor Scandal Costs Deutsche Bank $2.5 Billion in Penalties*, COMPLIANCE WEEK (Apr. 23, 2015), https://www.complianceweek.com/libor-scandal-costs-deutsche-bank-25-billion-in-penalties/12333.article [https://perma.cc/HGB5-QBFP].

[163] *See* Deferred Prosecution Agreement at 42, United States v. Deutsche Bank AG, No. 3:15-cr-00061 (D. Conn. Apr. 23, 2015). The LIBOR rate was the benchmark interest rate at which banks issued short-term loans to other banks in the international market. *See* Julia Kagan, *LIBOR: What Was*

DPA to resolve the resulting wire fraud and antitrust charges resulting from this conduct.[164] In exchange, Deutsche Bank agreed to pay approximately $2.5 billion to federal enforcement authorities to resolve the charges.[165]

Also in 2015, only a few months after entering its first DPA, Deutsche executed a second NPA,[166] this time with a four-year term.[167] Through conduct markedly similar to the conduct leading to its 2010 NPA, between 2001 and 2013, Deutsche Bank maintained accounts that allowed its clients to avoid tax liability in the United States.[168] As it did in Deutsche Bank's 2010 NPA, the DOJ agreed not to prosecute Deutsche Bank for any tax-related offenses for its misconduct.[169] Deutsche Bank agreed to pay a $31 million penalty to settle the case.[170]

In 2021, Deutsche Bank executed a three-year DPA.[171] The criminal conduct giving rise to this DPA was two-fold. First, between 2009 and 2016, Deutsche Bank executed contracts with third-party business consultants in foreign countries to make illegal payments to government officials.[172] Second, between 2008 and 2013, Deutsche Bank commodities traders engaged in a spoofing scheme affecting the market for precious metals futures.[173] The for-

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the London Interbank Offered Rate, and How Was It Used?, INVESTOPEDIA, https://www.investopedia.com/terms/l/libor.asp [https://perma.cc/FQ7H-ARE2] (June 21, 2024). EURIBOR rates are interest rates that represent the average interest rate at which European banks issue short-term loans to one another. *See generally* Adam Hayes, *Euro Interbank Offer Rate (Euribor) Definition, Uses, Vs. €STR*, INVESTOPEDIA, https://www.investopedia.com/terms/e/euribor.asp [https://perma.cc/C2YL-RC5P] (Aug. 16, 2024).

[164] Press Release, Off. of Pub. Affs., Dep't of. Just., Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR (Apr. 23, 2015), https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation [https://perma.cc/N9SX-JQXQ].

[165] Ben Rooney, *Deutsche Bank in $2.5 Billion Settlement Over Interest Rate Manipulation*, CNN MONEY, https://www.cnn.com/2015/04/23/news/deutsche-bank-libor-settlement/index.html [https://perma.cc/5FNN-WKNN] (Apr. 23, 2015).

[166] *See* Press Release, Off. of Pub. Affs., Dep't of Just., Justice Department Announces Deutsche Bank (Suisse) SA Reaches Resolution Under Swiss Bank Program (Nov. 24, 2015), https://www.justice.gov/archives/opa/pr/justice-department-announces-deutsche-bank-suisse-sa-reaches-resolution-under-swiss-bank [https://perma.cc/RR6Q-CE6P].

[167] Letter from U.S. Dep't of Just., Tax Div. to Michael N. Levy 5 (Nov. 24, 2015) (NPA).

[168] *Id.* at 9–12.

[169] *Id.* at 1. The government also agreed not to pursue any charges for monetary transaction offenses under 31 U.S.C. §§ 5314 and 5322. *Id.*

[170] Zacks Equity Rsch., *Deutsche Bank Suisse Resolves Tax Case; to Pay $31M*, YAHOO! NEWS, https://finance.yahoo.com/news/deutsche-bank-suisse-resolves-tax-202508310.html [https://perma.cc/7FSV-JYNM] (Nov. 25, 2015).

[171] Deferred Prosecution Agreement at 3, United States v. Deutsche Bank, No. 1:20-cr-00584 (E.D.N.Y. Jan. 7, 2021).

[172] *Deutsche Bank Settles FCPA Investigation*, WILKIE COMPLIANCE (Jan. 8, 2021), https://complianceconcourse.willkie.com/articles/news-alerts-2021-01-january-20210108-deutsche-bank-settles-fcpa-investiga/ [https://perma.cc/WXP6-HGRH].

[173] *See* Press Release, Off. of Pub. Affs., Dep't of Just., Deutsche Bank Agrees to Pay Over $130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case (Jan. 8, 2021), https://www.justice.

mer conduct resulted in charges for violations of the FCPA while the latter conduct resulted in a charge for wire fraud.[174]

In short, like JPMorgan and other institutions, Deutsche Bank has repeatedly committed often-similar criminal offenses and received the benefit of multiple DPAs and NPAs. Prior efforts to deter Deutsche Bank have been unsuccessful. And, like JPMorgan, recent events suggest Deutsche Bank will continue to violate the law. In 2022, for example, Deutsche Bank violated its 2021 DPA by failing to timely report a complaint from a whistleblower who alleged Deutsche Bank overstated its environmental, social, and governance investments by hundreds of billions of dollars.[175]

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Like an individual, an organization is not destined to reoffend simply because it has committed an offense in the past. But as this Section demonstrates, many organizational offenders like JPMorgan and Deutsche Bank do commonly reoffend, particularly after receiving initial prosecutorial leniency via at least one DPA or NPA.[176] The statistics, trends, and case examples discussed in this Section show that the current use of DPAs and NPAs fails to adequately deter organizational defendants from reoffending. Meanwhile, as organizations continue to commit new criminal offenses, victims endure the severe consequences of those offenses[177] and organizational stakeholders pay the price via lay-offs and lost investments due to a decrease in the organizations' stock price.[178] The law surrounding the use of DPAs and NPAs in the organizational

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gov/opa/pr/deutsche-bank-agrees-pay-over-130-million-resolve-foreign-corrupt-practices-act-and-fraud [https://perma.cc/G2E3-WBW4].

[174] *See* Deferred Prosecution Agreement, *supra* note 171, at 1–2.

[175] Brian Monroe, *Deutsche Bank Admits Breach of 2021 DOJ DPA Tied to EST Reporting Failures, Has Current Compliance Monitor Extended to 2023*, ASS'N OF CERTIFIED FIN. CRIME SPECIALISTS (Mar. 14, 2022), https://www.acfcs.org/deutsche-bank-admits-breach-of-2021-doj-dpa-tied-to-esg-reporting-failures-has-current-compliance-monitor-extended-to-2023/ [https://perma.cc/PAM8-8JVQ]. The only recourse for Deutsche Bank's violation was an extension of its corporate monitor. Steven Arons, *Deutsche Bank Violated Deferred Prosecution Deal with U.S.*, BLOOMBERG L. (Mar. 11, 2022), https://www.bloomberglaw.com/bloomberglawnews/banking-law/X5SUPBRC000000?bna_news_filter=banking-law#jcite [https://perma.cc/VDM2-DG8E].

[176] *See infra* Part I.C.

[177] Professor Paul Cassell has written extensively about crime victims' rights, including in the organizational crime context. *See, e.g.*, Paul G. Cassell & Michael Ray Morris, Jr., *Defining "Victim" Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments*, 61 AM. CRIM. L. REV. 329, 382–83 (2024) (discussing Boeing's criminal conduct relating to two crashes that killed 346 passengers).

[178] *See* John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 47 J. CORP. L. 963, 973 (2022) (recognizing reputational loss from a prospective criminal prosecution has a negative effect on a corporation's stock price); James B. Stewart, *SAC: A Textbook Case of Corporate Prosecution*, CNBC (Nov. 5, 2013), https://www.cnbc.com/2013/11/05/sac-a-textbook-case-of-corporate-prosecution.html [https://perma.cc/SDZ9-7R7F] (noting that employees of a charged company "may lose their jobs as the firm winds down").

context must adapt to fairly and adequately deter organizations from reoffending while also preventing these harms.[179] Implementing the proposed solutions discussed in Part III will begin to promote deterrence and ensure fairness in this space.

II. Federal Sentencing of Individuals and Organizations

This Section provides background on federal sentencing. First, Section A discusses federal sentencing generally, focusing on the most important federal sentencing regimes.[180] Second, because Part III of this Article references the federal sentencing guidelines provisions for sentencing individuals, Section B provides background on the individual guidelines.[181] Finally, to understand the shortcomings in the current organizational guidelines that prompt the need for the solutions proposed in Part III, Section C provides background on relevant organizational guidelines provisions.[182]

A. Federal Sentencing Generally

Federal sentencing of both individuals and organizations is governed by statute and the U.S. Sentencing Guidelines Manual.[183] The most pertinent statute for federal sentencing is 18 U.S.C. § 3553(a). Section 3553(a) requires a federal district court to consider various factors in imposing "a sentence sufficient, but not greater than necessary" to achieve several sentencing goals.[184] The factors a court must consider include: "the nature and circumstances of the offense[;]" "the history and characteristics of the defendant[;]" the sentencing guidelines; and "the need for the sentence . . . to promote respect for the law[,] . . . provide just punishment[,] . . . protect the public[,] . . . afford adequate deterrence[,]" and provide rehabilitation.[185] After weighing these factors in light of the circumstances, a court may impose a sentence that includes a combination of

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[179] *See infra* Part III.

[180] *See infra* Part II.A.

[181] *See infra* Part II.B.

[182] *See infra* Part II.C.

[183] *See generally* U.S. Sent'g Comm'n, Guidelines Manual (2024). This Article focuses on the federal sentencing guidelines, but a number of states have also adopted sentencing guidelines. *See* Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, 81 Fed. Prob. J. 28, 28 (2017) (analyzing various state sentencing guidelines).

[184] 18 U.S.C. § 3553(a).

[185] *Id.* § 3553(a)(1)–(2); *see also* Pepper v. United States, 562 U.S. 476, 488 (2011) (noting that there is no limitation on the information concerning a defendant's background, character, or conduct a district court may consider at sentencing). Deterrence comes in two forms: specific deterrence and general deterrence. The goal of specific deterrence is to discourage the particular offender from committing future offenses. David Oliwenstein & John Van Son, *The Declining Need for General Deterrence in Insider Trading Sentencing*, White Collar Crime Comm. Newsl., Summer/Fall 2023. The goal of general deterrence is to discourage other members of the public from committing future offenses. *Id.*

a term of imprisonment[186] or probation,[187] a fine,[188] a term of supervised release following any imprisonment,[189] restitution,[190] and forfeiture.[191]

The federal sentencing guidelines are as important in federal sentencing as § 3553(a) and other sentencing statutes.[192] Congress created the Sentencing Commission as part of the Sentencing Reform Act of 1984.[193] The Sentencing Commission promulgated the first edition of the federal sentencing guidelines in 1987,[194] and the Sentencing Commission is responsible for regularly amending the guidelines.[195] Before amending the guidelines in any given year, the Sentencing Commission considers legal developments, publishes priorities, conducts research, and receives feedback from the public regarding proposed amendments.[196]

Ultimately, the guidelines provide an objective, significantly mathematical framework for computing a defendant's sentence.[197] This framework enables a sentencing court to compute a recommended sentencing range (in months for terms of imprisonment and in dollars for fines) based on factors about the offense conduct and the characteristics of the defendant that are set forth in the guidelines.[198] The purpose of the guidelines is to promote uniformity and proportionality in federal sentencing that would not exist in a strictly indeterminate sentencing regime.[199]

Although § 3553(a) requires a federal judge to consider the guidelines when fashioning an appropriate sentence,[200] the guidelines range calculated is

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[186] 18 U.S.C. § 3581(a).

[187] *Id.* § 3561(a).

[188] *Id.* § 3571(a).

[189] *Id.* § 3583(a).

[190] *Id.* § 3556.

[191] *Id.* § 3554.

[192] *See* Pepper v. United States, 562 U.S. 476, 490 (2011) (explaining that "the Guidelines should be the starting point and the initial benchmark" for federal courts in sentencing (quoting Gall v. United States, 552 U.S. 38, 49–51 (2007))).

[193] *About*, U.S. SENT'G COMM'N, https://www.ussc.gov/about-page [https://perma.cc/9KPN-5UEC].

[194] U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 2 (2020).

[195] *Amendment Process*, U.S. SENT'G COMM'N, https://www.ussc.gov/amendment-process [https://perma.cc/95PD-3S5L]; *see also* 28 U.S.C. § 994(p) (providing the Sentencing Commission's statutory authority to issue amendments).

[196] *See Amendment Process*, *supra* note 195.

[197] *See* Matt Zapotosky, *Maureen McDonnell Sentencing Guidelines Call for 5 to 6 1/2 Years in Prison*, WASH. POST (Jan. 20, 2015), https://www.washingtonpost.com/local/virginia-politics/maureen-mcdonnell-sentencing-guidelines-call-for-5-to-6-and-12-years-in-prison/2015/01/20/58a76486-a0bb-11e4-903f-9f2faf7cd9fe_story.html [https://perma.cc/BJB9-FSYD].

[198] *See* DOYLE, *supra* note 25, at 1.

[199] *See* John A. Richter, *Pulling Over the United States Sentencing Guidelines: Defining "Arrest" Under Section 4A1.2(a)(2)*, 101 IOWA L. REV. 435, 442 (2015).

[200] 18 U.S.C. § 3553(a)(4).

not itself binding on federal judges.[201] Rather, a court may vary or depart from the guidelines range to impose a sentence above or below the recommended guidelines range at the court's discretion based on its consideration of the guidelines and weighing of the § 3553(a) factors.[202] Furthermore, a court may refuse to apply any particular guideline based on a policy disagreement with the guideline.[203] For example, in 2007, in *Kimbrough v. United States*, the Supreme Court affirmed a sentencing court's decision to award a downward variance in sentencing a defendant based on the court's view that the then-existing guidelines recommended disproportionately-severe sentences for crack cocaine offenders.[204] Furthermore, regardless of the recommended guidelines range, courts are restrained by statutory sentencing limits.[205] Thus, a sentencing court cannot impose a term of imprisonment or fine that is within the guidelines range if the sentence would violate an applicable statutory maximum or minimum.[206]

B. Individual Sentencing

Most of the federal sentencing guidelines assist in calculating sentences for individual (i.e., not organizational) defendants.[207] Under the individual guidelines, courts must calculate preliminary inputs before arriving at final sentencing range.[208]

First, a court must compute the defendant's "offense level."[209] The offense level is a numerical score from 1 to 43 determined by the defendant's

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[201] *See id.* § 3553(b)(1); *see also* Press Release, Dep't of Just., Fact Sheet: The Impact of *United States v. Booker* on Federal Sentencing (Mar. 15, 2006), https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf [https://perma.cc/MMR9-QL47] (noting that *United States v. Booker*, 543 U.S. 220 (2005), rendered the sentencing guidelines advisory).

[202] *See* U.S. SENT'G COMM'N, DEPARTURES AND VARIANCES 1–2 (2023). A "departure" refers to a deviation from the guidelines range based on a provision within the guidelines. *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C4.5 (recommending a departure "[i]f the offense presented a risk to the integrity or continued existence of a market"). In contrast, a "variance" refers to a deviation from the guidelines range based on the court's consideration of the § 3553(a) factors. *See* Vasiu & Vasiu, *supra* note 36, at 196 (explaining the differences between departures and variances).

[203] *See* Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing* Kimbrough *Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 877 (2014).

[204] 552 U.S. 85, 111 (2007); *see also* United States v. Wroten, 744 F. App'x 245, 247–49 (6th Cir. 2018) (considering a policy argument against the two-level upward adjustment in child pornography cases for the use of a computer).

[205] *See* 18 U.S.C. § 3551(a) ("[A] defendant . . . shall be sentenced in accordance with the provisions of this chapter . . . .").

[206] *See* THOMAS W. HUTCHINSON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 5G1.2 (2023).

[207] *See* DOYLE, *supra* note 25, at 6 (noting that the guidelines contain a separate chapter for calculating the sentences of organizational defendants).

[208] *Id.* at 1.

[209] *Id.*

statute of conviction and specific offense characteristics.[210] Logically, more severe offense conduct generally results in a greater offense level. For example, a defendant who commits insider trading is assigned an offense level that is proportional to the amount of financial loss the defendant's offense caused.[211]

Second, the court must calculate the defendant's "criminal history category."[212] The criminal history category is a numeral of I to VI derived from the defendant's criminal record.[213] The guidelines recognize that "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[214] Therefore, the guidelines increase a defendant's criminal history category if the defendant committed any prior felonies within fifteen years or any misdemeanors within ten years of the instant offense.[215]

The individual guidelines explicitly address how an individual's DPAs are counted. The guidelines provide that in calculating the defendant's criminal history category, "[d]iversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted."[216] On the other hand, a diversionary disposition is counted if it resulted "from a finding . . . of guilt . . . in a judicial proceeding."[217] Stated differently, a defendant's prior DPAs will increase the defendant's criminal history category just as convictions would as long as the DPAs resulted in findings of guilt. The policy behind this treatment of DPAs is the recognition of the guidelines that a defendant who is factually guilty but has received the benefit of a diversionary disposition generally should not be free to reoffend without consequences that attach to other repeat offenders.[218]

Finally, after a sentencing court has calculated the defendant's offense level and criminal history category, the court may then utilize the guidelines "sentencing table."[219] Using these inputs, the sentencing table recommends a tailored sentencing range for a term of imprisonment in months.[220]

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[210] *Id.*

[211] U.S. SENT'G COMM'N, *supra* note 183, §§ 2B1.1, 2B1.4.

[212] DOYLE, *supra* note 25, at 3.

[213] *Id.* at 1.

[214] U.S. SENT'G COMM'N, *supra* note 183, ch. 4, pt. A, introductory cmt.

[215] *Id.* § 4A1.1 & cmts. 1–3.

[216] *Id.* § 4A1.2(f); *see also id.*, ch. 1, pt. A, n.1 (recommending "a sentence other than a sentence of imprisonment" for a "nonviolent first offender," which would include a defendant who has no prior convictions but who has had a deferred disposition not resulting in a finding of guilt).

[217] *Id.* § 4A1.2(f); *see also* United States v. Martinez-Melgar, 591 F.3d 733, 737 (4th Cir. 2010) (noting a diversion disposition is counted only if it resulted in "(i) a finding or an admission of guilt (ii) in a judicial proceeding (iii) in open court").

[218] U.S. SENT'G COMM'N, *supra* note 183, § 4A1.2(f) cmt. 9.

[219] *Id.*, ch. 5, pt. A.

[220] *Id.*

C. Organizational Sentencing

Organizational sentencing shares some common characteristics with individual sentencing, but there are key distinctions. Originally promulgated in 1991,[221] Chapter Eight of the federal sentencing guidelines contains the provisions relevant in determining the appropriate sentence for an organizational defendant.[222] The essential purpose of the organizational guidelines is to "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[223] Obviously, an organization is not susceptible to imprisonment like an individual. Thus, Chapter Eight provides for organizational sentences primarily in the form of monetary exactments, including fines,[224] for the purpose of deterring corporate wrongdoing and encouraging organizations to adopt prophylactic compliance programs.[225]

Chapter Eight's provisions provide a mathematical basis for calculating a recommended sentencing fine range, at least with respect to most organizations.[226] First, the court must calculate the defendant's "base fine."[227] The base fine amount is determined by the greatest of: (1) "the pecuniary gain to the organization from the offense"; (2) if the loss was caused "intentionally, knowingly, or recklessly," the pecuniary loss the organization's offense caused; or (3) an amount set forth in the guidelines Offense Level Fine Table, which corresponds to the particular organization's offense level.[228]

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[221] *See* U.S. SENT'G COMM'N, *supra* note 118, at 8 (explaining the origins of the organizational sentencing guidelines chapter).

[222] *See generally* U.S. SENT'G COMM'N, FINES UNDER THE ORGANIZATIONAL GUIDELINES 1 (2020); U.S. SENT'G COMM'N, *supra* note 183, ch. 8. An "organization" is any association that is not an individual and includes a corporation and a partnership. *See* U.S. SENT'G COMM'N, *supra* note 183, § 8A1.1 cmt. 1.

[223] U.S. SENT'G COMM'N, *supra* note 118, at 8.

[224] *See* Timothy A. Johnson, *Sentencing Organizations After* Booker, 116 YALE L.J. 632, 643 (2006) (documenting the use of fines to punish and deter corporate crime); *see also* Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 265 (1993) (noting the guidelines encourage including restitution orders in organizational sentences to remedy the harms caused). *But see* W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 919–22 (2019) (discussing nonmonetary sanctions, including probationary measures, available under the guidelines).

[225] *See* Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIA. L. REV. 321, 323–24, 324 n.8 (2012) (arguing that a critical goal of corporate punishment is to "reward firms that adopt an effective compliance program, self-report, and cooperate").

[226] U.S. SENT'G COMM'N, *supra* note 183, § 8C1.1 (providing that an organization operated for a criminal purpose or by criminal means shall incur a fine "sufficient to divest the organization of all its net assets").

[227] *Id.* § 8C2.4.

[228] *See id.* § 8C2.4(a).

Second, the court must calculate the defendant's culpability score, which is the criterium most important for this Article's proposals.[229] Like an individual defendant's criminal history category, an organizational defendant's culpability score serves as a proxy for the organization's criminal blameworthiness.[230] By default, an organization's culpability score is 5;[231] however, the guidelines provide criteria that can decrease the culpability score to as low as 0 or increase it beyond 10. Each culpability score from 0 to "10 or more" corresponds to a particular "multiplier range."[232] Although the culpability score may exceed 10, any culpability score at or above 10 will result in a multiplier range from 2.00 to 4.00.[233]

Factors that will decrease the organization's culpability score include that the organization had an effective compliance program "in place at the time of the offense"[234] and that the organization self-reported its criminal conduct, cooperated with the government's investigation, or accepted responsibility for its conduct.[235] Conversely, factors that will increase the organization's culpability score include a corporate officer's participation in the offense,[236] that the organization's offense violated an already-existing probation condition,[237] and that the organization obstructed justice.[238]

Most importantly, under sentencing guideline § 8C2.5(c), an organization's prior adjudications for "similar misconduct" is a factor that can increase its culpability score.[239] Stated generally, the more recent the organization's prior misconduct, the greater the increase in its culpability score. Thus, more specifically, if the organization committed the instant offense within ten years after receiving a prior criminal conviction based on "similar misconduct" or two prior civil adjudications based on "similar misconduct," the court must increase the organization's culpability score by one point.[240] And if the organiza-

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[229] *See id.* § 8C2.5–6.

[230] *See* Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thought About Their Future*, 71 WASH. U. L.Q. 205, 239 (1993) ("[R]ecidivism can indicate an ambivalent corporate attitude toward violations of the law under certain circumstances . . . .").

[231] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(a).

[232] *See id.* § 8C2.6.

[233] *See id.* §§ 8C2.6, 8C2.8(a)(8). An upward departure, however, may be appropriate if the organization's culpability score exceeds 10. *Id.* § 8C4.11.

[234] *Id.* § 8C2.5(f); *see also* McConnell et al., *supra* note 64, at 530–31, 553–54 (discussing the elements of an effective compliance program).

[235] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(g).

[236] *Id.* § 8C2.5(b).

[237] *Id.* § 8C2.5(d).

[238] *Id.* § 8C2.5(e).

[239] *Id.* § 8C2.5(c). In determining whether an organization's prior history will increase its culpability score, a court must consider the organization's conduct in business and not the organization's formal business association structure. *See id.* § 8C2.5 cmts. 5–6.

[240] *Id.* § 8C2.5(c)(1).

tion committed the instant offense within five years of such criminal or civil adjudications, the court must increase the organization's culpability score by two points.[241] No increase in the organization's culpability score will occur if the organization's criminal or civil adjudications occurred more than ten years before the instant offense.[242]

Finally, to arrive at the appropriate fine range, the court must multiply the organization's base fine by its multiplier range.[243] The product of these inputs determines the organization's guidelines fine range.[244] It is important to note that because culpability scores range from 0 to "10 or more" for purposes of determining the applicable multiplier range, even a one- or two-point increase in an organization's culpability score can impact the ultimate fine range.[245]

After the court has computed the applicable fine range, the court must determine the actual fine to impose. The guidelines require that a court consider several factors in determining the fine.[246] Importantly, the court must consider "any prior civil or criminal misconduct by the organization other than that counted under § 8C2.5(c)."[247] Other factors the court must consider include whether the offense "involved a vulnerable victim" and whether the organization had an effective compliance program when it committed the offense.[248]

Aside from the guidelines, the court must consider the various sentencing purposes under § 3553(a) in imposing a fine, including the need to promote respect for the law and provide deterrence.[249] The court must also consider other statutory factors, such as the defendant's income, financial resources, any pecuniary loss the offense caused, and the organization's size.[250]

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[241] *Id.* § 8C2.5(c)(2).

[242] *Id.* § 8C2.5 cmt. 7.

[243] *See id.* §§ 8C2.6–7.

[244] *Id.*

[245] For example, an organization with a culpability score of 2 with no prior history would have a multiplier range of 0.40 to 0.80. *Id.* § 8C2.6. But the same organization with a two-point increase for recent criminal or civil adjudications would have a multiplier range of 0.80 to 1.60. *Id.* Thus, under such facts, the organization's fine would double based on the existence of prior history.

[246] *Id.* § 8C2.8(a).

[247] *Id.* § 8C2.8(a)(7).

[248] *Id.* § 8C2.8(a)(1), (5), (11).

[249] *See* 18 U.S.C. § 3553(a)(2); *see, e.g.*, United States v. Credit Suisse Sec. (Eur.) Ltd., No. 21-cr-00520, 2022 WL 2906202, at *2 (E.D.N.Y. July 22, 2022).

[250] 18 U.S.C. § 3572. The quantitative formula described above for calculating an organization's fine applies in most but not all cases. *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C2.1 (listing the offenses to which the formula applies). For example, the guidelines do not apply in calculating sentences for environmental offenses. *See, e.g.*, United States v. Evridiki Navigation Inc., No. 22-2032, 2023 WL 3734961, at *1–2 (3d Cir. May 31, 2023) (declining to apply the formula to violations of federal law implementing treaties governing ocean pollution). Where the formula does not apply, a court has broad discretion under 18 U.S.C. §§ 3553 and 3572 in fashioning an appropriate fine within the statutory sentencing range. *See, e.g.*, United States v. Oceanic Illsabe Ltd., 889 F.3d 178, 200 (4th Cir. 2018) (affirming district court's sentence that was determined without regard to formula for calculating fine); United States v. Comprehensive Env't Sols., Inc., No. 7-20037-1, 2009 WL 1856228,

After considering all of these factors, the court has discretion in determining the amount of a fine within the applicable fine range as well as in deciding whether to vary or depart from the fine range.[251] Chapter Eight provides over a dozen grounds for departure that are unique to organizational defendants.[252] For example, a downward departure may be appropriate if the organization provided substantial assistance to law enforcement in investigating an offense, if the organization is a public entity, or if the victims of the offense are stakeholders of the organization.[253] On the other hand, an upward departure may be appropriate if the offense involved a "risk of death or bodily injury"; public corruption; or a threat to national security, the environment, or the market.[254] Furthermore, an upward departure may be appropriate if the organization's culpability score exceeds 10,[255] which makes sense given that a multiplier of 2.00 to 4.00 applies for any culpability score at or above 10.[256]

The grounds for a departure listed in Chapter Eight are not exhaustive. The guidelines clarify that certain grounds for departure contained in Chapter Five (which addresses grounds for departure for individual defendants) may also support a departure in the organizational defendant context.[257] For example, an upward departure may be warranted if the offense involved "a significant disruption of a governmental function"[258] or if the organization committed the offense to conceal another offense.[259] Chapter Five also includes a broad, residual ground for departure, permitting a court to depart based on circumstances not identified in the guidelines that are relevant in sentencing.[260] Of course, even if a court finds that a departure ground exists, the court still may impose a fine within the applicable fine range.[261]

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at *4 (E.D. Mich. June 29, 2009) ("[S]ince the Guidelines do not apply, there is no offense level computation, base fine calculation, culpability score assessment, or fine range."). *See generally* U.S. SENT'G COMM'N, *supra* note 183, § 8C2.10.

[251] *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C3.3 (recommending a downward departure if the court finds the organization is financially unable to pay the fine without "jeopardizing the continued viability of the organization").

[252] *See id.* ch. 8, pt. 4.

[253] *Id.* §§ 8C4.1, 8C4.7–8.

[254] *Id.* §§ 8C4.2–8C4.6.

[255] *Id.* § 8C4.11.

[256] *Id.* § 8C2.6.

[257] *Id.* ch. 8, pt. 4.

[258] *Id.* § 5K2.7.

[259] *Id.* § 5K2.9.

[260] *Id.* § 5K2.0(a)(1)(A), (a)(2)(B). Chapter Five prohibits departures based on several grounds, including a defendant's acceptance of responsibility (which is taken into account under § 3E1.1) or decision to plead guilty. *Id.* § 5K2.0(d). None of the prohibited grounds for departure in Chapter Five would prevent a court from imposing a departure as recommended in Part III of this Article.

[261] *See* 18 U.S.C. § 3571(c) (providing statutory maximum fines for organizations).

This Part has provided background on federal sentencing law necessary to understand the need for reform proposed in Part III. Most importantly, while the organizational guidelines require a sentencing court to consider an organizational defendant's prior adjudications that occurred within ten years of the instant offense, the organizational guidelines (unlike the individual guidelines) do not inform sentencing courts whether or how to account for an organization's prior DPAs and NPAs. A sentencing court may consider an organizational defendant's prior DPAs and NPAs in considering the organization's history and characteristics under § 3553(a). Nevertheless, the guidelines do not explicitly require or preclude consideration of prior DPAs and NPAs when computing the defendant's culpability score.

III. Proposed Solutions: Amending the Guidelines and Using Upward Variances or Departures

Organizational recidivism is a serious and ongoing problem. Despite multiple DPAs and NPAs, organizations like JPMorgan, Deutsche Bank, and others continue to commit serious criminal offenses with no real consequences.[262] Recidivist organizational offenders like recidivist individual offenders must be held accountable for repetitive criminal behavior if deterrence and fairness are serious goals of enforcement authorities.[263]

Of course, a prosecutor considering whether to charge an organization with a subsequent offense may consider the organization's prior DPAs and NPAs just as it may consider prior convictions. Indeed, Justice Department guidance for prosecuting corporations recommends that prosecutors consider whether seeking a successive DPA or NPA instead of a formal conviction would be appropriate.[264] Further, the Monaco Memorandum informs prosecutors that when making a charging decision, prosecutors should consider a corporation's past criminal resolutions, including "non-trial resolutions, such as plea agreements, non-prosecution agreements [and] deferred prosecution agreements."[265] But while prosecutors may consider prior dispositions, prosecutors also have discretion to afford little weight to prior resolutions when making their charging decisions.

Importantly, no legal mechanism ensures that an organization's prior DPAs and NPAs receive appropriate consideration when the organization is sentenced for a subsequent offense. The sentencing statutes and the guidelines allow a court to consider an organization's prior DPAs and NPAs in the court's

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[262] *See supra* Part I.

[263] *See* Merle, *supra* note 13 (quoting Professor Ellen Podgor for the proposition that repeat organizational offenders should face increasing fines).

[264] U.S. Dep't of Just., Just. Manual § 9-28.600(A) (2023).

[265] Memorandum from Deputy Att'y Gen. Lisa Monaco, *supra* note 57, at 5 n.4.

consideration of the defendant's history and characteristics.[266] Nonetheless, nothing requires a court to uniformly consider and weigh the organization's prior DPAs and NPAs in imposing a fine.[267] To date, commentators and the Sentencing Commission have been silent on the appropriate consideration that prior DPAs and NPAs should receive at sentencing. This Part fills in that gap in the literature.

First, Section A asserts that the current sentencing guidelines do not account for prior DPAs and NPAs, addresses a counterargument to this assertion, and avers the failure of the guidelines to specifically respond to organizational DPAs and NPAs raises issues of deterrence and fairness.[268] Second, Section B asserts the Sentencing Commission may resolve these issues by adopting a number of amendments to the guidelines to account for an organization's prior DPAs and NPAs.[269] Third, Section C notes that alternatively, the courts may resolve these issues by using their discretion to vary or depart from the guidelines.[270] Finally, Section D addresses anticipated critiques to the proposed solutions.[271]

A. The Failure of the Guidelines to Address DPAs and NPAs

As suggested in Part II, the organizational guidelines, unlike the individual guidelines, do not address how a sentencing court should weigh an organization's prior DPAs and NPAs at sentencing.[272] Before accepting this point and moving forward, it is necessary to address an ambiguity in the guidelines that may lead some readers to believe the guidelines actually already address this issue. Specifically, under § 8C2.8(a)(7) of the guidelines, in determining the appropriate fine within the calculated fine range, a district court should consider "any prior civil or criminal misconduct by the organization other than that" already counted.[273]

Research demonstrates that this guideline does not require a sentencing court to appropriately consider an organization's prior DPAs and NPAs. First, the text of the guideline supports this interpretation. Section 8C2.8(a)(7) allows a sentencing court to consider only misconduct that resulted in a formal proceeding against the organization, and misconduct resulting in a DPA or an NPA does not meet this requirement.[274] As noted, § 8C2.8(a)(7) specifically allows a sentencing court to consider "civil or criminal misconduct" in select-

[266] 18 U.S.C. § 3553(a)(1)–(2).
[267] *See supra* Part I.
[268] *See infra* Part III.A.
[269] *See infra* Part III.B.
[270] *See infra* Part III.C.
[271] *See infra* Part III.D.
[272] *See supra* Part II.
[273] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.8(a)(7).
[274] *Id.*

ing a fine within the fine range.[275] Meanwhile, § 8C2.8(a)(7) indicates that the type of "misconduct" that may be considered is "other than" the type referred to in § 8C2.5(c).[276] The latter guideline allows a sentencing court to increase a defendant's culpability score if the defendant previously engaged in prior misconduct that resulted in "criminal," "civil," and "administrative" proceedings.[277] Because words used in the same textual scheme generally have the same meaning, by using the same words (i.e., "civil," "criminal," and "misconduct,") in multiple sections of the guidelines, it appears the Sentencing Commission intended for § 8C2.8(a)(7) to allow a sentencing court to increase a defendant's culpability score only based on prior misconduct that resulted in a formal proceeding.[278]

Importantly, as noted, § 8C2.5(c) itself allows for consideration of certain "misconduct" resulting in proceedings.[279] But § 8C2.5(c) limits the misconduct a court may consider by the age of the misconduct.[280] Thus, in sum, it seems the Sentencing Commission likely intended § 8C2.8(a)(7) to allow a sentencing court deciding on the fine to impose to consider misconduct that cannot be considered under § 8C2.5(c) because the attendant conviction is too old. The fact that organizations facing proceedings due to white-collar crimes often face parallel civil and criminal proceedings supports the interpretation that § 8C2.8(a)(7) allows a sentencing court to consider misconduct resulting in a proceeding but not a DPA or an NPA.[281]

Even if uncharged misconduct underlying prior DPAs and NPAs constituted "civil or criminal misconduct" under § 8C2.8(a)(7) such that either the parties or the court could consider prior DPAs and NPAs in the guidelines cal-

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[275] *Id.*

[276] *Id.*

[277] *Id.* § 8C2.5(c).

[278] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012) (explaining the textual canon of presumption of consistent usage); GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING: WITH ELEMENTS AND CLAUSES FOR CONSIDERATION 36 (5th ed. 2020) ("Use the same words for the same meanings every time." (emphasis omitted)); *see, e.g.*, United States v. Jones, 60 F.4th 230, 234–35 (4th Cir. 2023), *judgment vacated* 144 S. Ct. 1091 (2024) (mem.) (applying the presumption of consistent usage to 18 U.S.C. § 3553 and explaining that the canon "provides that '[i]dentical words used in different parts of the same statute are generally presumed to have the same meaning'" (quoting IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005))).

[279] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(c).

[280] *Id.*

[281] *See* Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1068 (2021) (noting the prevalence of parallel civil and criminal proceedings); *see also* Press Release, Off. of Pub. Affs., Dep't of Just., Wells Fargo Agrees to Pay $3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts Without Customer Authorization (Feb. 21, 2020), https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices [https://perma.cc/M3BA-EUHZ].

culation, prior DPAs and NPAs still would not receive appropriate consideration under the guidelines. This is because § 8C2.8(a)(7) only allows other "civil or criminal misconduct" to be considered in determining an organization's fine within an already-calculated fine range, not in calculating the fine range itself.[282] Because an organization with multiple DPAs and NPAs is significantly more culpable than an organization without these prior resolutions, the prior resolutions (just like prior convictions) should have an impact on the organization's culpability score and the applicable fine range itself.

Second, the government's own practice in executing DPAs and NPAs supports this interpretation. In more recent DPAs and NPAs, the government and the defendants have agreed to the specific guidelines calculations and fine ranges that would apply if the organizations were sentenced for the offenses being settled. Although the sample size is small and the data is difficult to analyze because it is impossible to know the parties' bases for conducting their calculations, a review of several recent DPAs and NPAs executed by organizations that had at least one prior DPA or NPA suggests that the parties do not believe prior DPAs and NPAs are counted in the guidelines calculation.

A few examples illustrate the point. In 2018, Credit Suisse, a Swiss financial institution, executed an NPA following violations of the FCPA deriving from its conduct in hiring persons with connections to foreign officials to create business opportunities.[283] Nonetheless, when Credit Suisse executed a DPA in 2021 for committing wire fraud also to influence foreign government officials to generate business, the 2021 DPA did not account for the 2018 NPA.[284] Similarly, in 2015, Société Générale, another Swiss banking institution, executed an NPA to resolve charges following Société Générale's deceptive conduct in aiding U.S. taxpayers in avoiding tax liability.[285] Yet when Société Générale executed a subsequent DPA in 2018 for deceptive conduct leading to charges for violations of the FCPA and for delivering false reports concerning market information, the 2018 DPA's calculation of the fine range added no increase to the culpability score or fine range based on Société Générale's 2015 DPA.[286] Again, the fact that the government and defendants have not account-

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[282] *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C2.8 cmt. 5 ("The civil and criminal misconduct counted under § 8C2.5(c) increases the guideline fine range.").

[283] Press Release, Off. of Pub. Affs., Dep't of Just., *supra* note 123.

[284] *See* Deferred Prosecution Agreement at 1, 8–9, United States v. Credit Suisse Grp., AG, No. 21-cr-00521 (E.D.N.Y. Oct. 19, 2021) (ignoring Credit Suisse's 2015 NPA).

[285] Press Release, Off. of Pub. Affs., Dep't of Just., Two More Banks Reach Resolutions Under Justice Department's Swiss Bank Program (June 9, 2015), https://www.justice.gov/opa/pr/two-more-banks-reach-resolutions-under-justice-departments-swiss-bank-program-0 [https://perma.cc/B9PR-384W].

[286] *See* Deferred Prosecution Agreement at 1–2, 12–13, United States v. Société Générale, No. 18-cr-000252 (E.D.N.Y. June 6, 2018) (not accounting for Société Générale's 2015 NPA). One might assert the 2018 DPA does not account for the 2015 NPA because the conduct involved in each offense was not "similar misconduct" under § 8C2.5(c). But a court would almost certainly find these offenses

ed (or at least have not consistently accounted) for prior DPAs and NPAs when conducting formal guidelines calculations supports the proposition that the guidelines do not require courts to consider them.

It is possible the government and the defendant could simply account for an organization's prior DPAs and NPAs by treating them as prior adjudications, which would result in a one- or two-point increase under the guidelines.[287] But relying on the parties to do so is not an optimal solution. Without clear guidelines setting forth in detail exactly how prior DPAs and NPAs should affect the fine range or fine, courts are unlikely to treat prior DPAs and NPAs consistently. Furthermore, every organizational defendant facing potential or actual charges is under pressure to settle its case and avoid the risk of prosecution if it does not comply with the prosecutor's proffered calculation. Every organizational defendant, then, for no reason other than duress, might assent to an erroneous calculation.

In short, the current organizational guidelines do not require courts to consider prior DPAs and NPAs. And even if an argument can be made that they do, amendments are warranted to clarify exactly how prior DPAs and NPAs should weigh in the sentencing determination. Without these amendments, courts at sentencing and the government in negotiating DPAs and NPAs will diverge in their treatment of similar offenders, which undermines the primary purpose of the guidelines: promoting uniformity in sentencing.[288]

The failure of the guidelines to require consideration of organizations' prior DPAs and NPAs is ill-advised for two main reasons: (1) it undermines deterrence in organizational criminal enforcement; and (2) it creates perceptions of unfairness. First, as Part I's discussion of recidivist organizational offenders demonstrates, using DPAs and NPAs alone does not deter organizational offenders from reoffending.[289] JPMorgan and Deutsche Bank, for example, have repeatedly violated the law over the last decades despite having already executed multiple prior DPAs and NPAs.[290] More reform is needed if deterrence is a legitimate goal and if the Sentencing Commission desires to force recidivist companies to view criminal fines as more than a small cost of doing business. This Article's proposals in the following Sections provide a concrete way for the Sentencing Commission or the courts to deter organiza-

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involved "similar misconduct" because they both involved intentional deceptive conduct affecting or relating to financial markets.

[287] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.6.

[288] *See* Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 CIN. L. REV. 749, 749 (2006) (noting that all nine justices agreed that uniformity was a primary goal of Congress in adopting the sentencing guidelines).

[289] *See Do NPAs and DPAs Deter?*, FCPA PROFESSOR (Mar. 12, 2023), https://fcpaprofessor.com/do-npas-and-dpas-deter/ [https://perma.cc/GZ9E-9MX8] ("[T]he 'actual deterrent effect [of NPAs and DPAs have] not been quantified.'" (alteration in original)).

[290] *See supra* Part I.C.

tional offenders from reoffending following DPAs or NPAs.[291] The threat of not only criminal proceedings following a repeat offense but also enhanced penalties resulting from those proceedings will contribute toward general and specific deterrence.

Second, the current regime raises fairness concerns and undermines the public's perception of the judiciary and justice system, important factors to consider when creating sentencing policy. As noted, individual defendants' prior DPAs and NPAs are considered at sentencing when calculating the defendants' criminal history scores.[292] But the same is not true of organizational defendants.[293] Of course, there are many differences between individual offenders and organizational offenders that may justify different treatment of individual and organizational defendants in various contexts. But commentators regularly consider the law's treatment of individuals when postulating regime changes in the corporate enforcement realm,[294] and it is reasonable to do so here. In brief, it is inherently and optically unfair that defendants who each share the same types of prior diversionary dispositions receive different treatment under the law, particularly when the organizational defendants that receive better treatment are often large organizations with wealth and close ties to the government. The policy reason the guidelines offer for permitting consideration of an individual's prior DPAs is that a defendant who was guilty but received the benefit of a diversionary disposition should not be free to reoffend without consequences that attach to other repeat offenders who were convicted.[295] That same logic applies to organizational defendants.

B. Amending the Guidelines

The Sentencing Commission can easily address the concerns of deterrence and fairness described above by amending the guidelines to require courts to fairly and consistently consider an organization's prior DPAs and NPAs at sentencing. However, the Sentencing Commission's recent amendments to the guidelines have not addressed these concerns, and there seems to be no plan for the Sentencing Commission to resolve these concerns anytime soon.[296] This Section proposes practical amendments that the Sentencing

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[291] *See infra* Part III.B.

[292] *See* U.S. SENT'G COMM'N, *supra* note 183, § 4A1.2(f) ("Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted.").

[293] *See* Kaleb Byars, Bostock*: An Inevitable Guarantee of Heightened Scrutiny for Sexual Orientation and Transgender Classifications*, 89 TENN. L. REV. 483, 515 (2022) ("[T]he law should be consistent where possible as such promotes confidence and trust in the judicial system.").

[294] *See, e.g.*, Garrett, *Corporate Crimmigration*, *supra* note 87, at 388–89.

[295] *See* U.S. SENT'G COMM'N, *supra* note 183, § 4A1.2(f) cmt. 9 ("[D]efendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.").

[296] *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 134–35 (2023).

Commission may adopt to achieve these goals, and it describes the rationale underlying each proposed amendment.

First, the Sentencing Commission should amend the guidelines to allow for an increase in an organizational defendant's culpability score if the defendant has executed prior DPAs and NPAs. Currently, the guidelines increase a defendant's culpability score by two points for prior misconduct that occurred within five years of the instant offense and resulted in an adjudication.[297] Alternatively, a modest one-point increase applies if the prior misconduct occurred between five and ten years before the instant offense and resulted in an adjudication.[298] Again, these guidelines do not require an increase in the culpability score based on prior DPAs and NPAs because no formal proceedings correspond with DPAs and NPAs.[299]

The Sentencing Commission must recognize that, as a practical matter, in the organizational context, a DPA or an NPA is the functional equivalent of a prior conviction. Individual defendants in federal court only rarely receive DPAs and NPAs while organizational defendants commonly receive DPAs and NPAs. Because the government disproportionately uses DPAs and NPAs in the organizational context, they (in addition to formal convictions) are the best indicators of an organization's culpability, at least insofar as the organization's prior wrongdoing is concerned.

Moreover, the government uses DPAs and NPAs to address extremely serious organizational misconduct that has extremely serious consequences.[300] Consider, for example, Boeing's 2021 DPA that resulted from Boeing's fraud that led to two plane crashes and 346 deaths.[301] Consider also General Motors's 2015 DPA that resulted from General Motors's fraud that led to vehicle accidents and 174 deaths.[302] There is no question the government would seek formal prosecution and not diversions in the same cases in the individual context. Consequently, the Sentencing Commission should amend the guidelines to require courts to increase an organization's culpability score (and consequently its fine range) if the organization has prior DPAs or NPAs.

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[297] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(c)(2).

[298] *Id.*

[299] *See supra* Part II.

[300] *See, e.g.*, Cassell & Morris, Jr., *supra* note 177, at 382–83. *But see generally* Peter R. Reilly, *Outlawing Corporate Prosecution Deals When People Have Died*, 55 ARIZ. ST. L.J. 1351 (2023) (arguing that Congress should prohibit the government from offering DPAs and NPAs when corporate crime causes death).

[301] Press Release, Off. of Pub. Affs., Dep't of Just., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion [https://perma.cc/5RY3-VYY3].

[302] *See* Peter R. Reilly, *When Corporate Misconduct Leads to Death, Deferred Prosecution Should Not Be Permitted*, CLS BLUE SKY BLOG (Oct. 2, 2023), https://clsbluesky.law.columbia.edu/2023/10/02/when-corporate-misconduct-leads-to-death-deferred-prosecution-should-not-be-permitted/ [https://perma.cc/QX9Q-28FW].

Second, and relatedly, the Sentencing Commission should amend the guidelines to require a progressive increase in a defendant's culpability score when the defendant has multiple prior criminal settlements. This increase must be sufficient to adequately punish and deter recidivist organizational defendants. The current guidelines offer a mere one or two-point increase for prior misconduct resulting from an adjudication, depending on the age of the prior misconduct.[303] However, the guidelines do not account for the quantity of adjudications. Thus, absent a variance, an organization cannot receive an increased fine based on the existence of multiple prior adjudications.[304]

This framework is untenable given the existence of recidivist organizational defendants that continue to reoffend despite having already received multiple DPAs and NPAs. Just as an individual defendant is generally more culpable (and thus is placed in a higher criminal history category) if he or she has numerous prior convictions,[305] an organizational defendant is more culpable when it has repeatedly violated the law despite receiving leniency via multiple DPAs and NPAs. Amending the guidelines to account for the quantity of prior resolutions rather than just the age of the most recent adjudication would encourage courts to associate greater culpability with and impose greater penalties on organizational defendants that have repeatedly disregarded the law despite prior leniency.

Third, the Sentencing Commission should adjust the appropriate age cutoff for prior resolutions that may be considered. Currently, the guidelines do not allow for an increase in the culpability score based on misconduct that occurred more than ten years before the instant offense.[306] For parity with the individual guidelines treatment of a defendant's prior felony convictions, this Article proposes that only a DPA, an NPA, or a conviction of an organization that occurred more than fifteen years before the organization's instant offense should not increase the organization's culpability score.[307]

The proffered fifteen-year cutoff is not arbitrary; it is the same cutoff used for individual defendants. After a fifteen-year period, an organization, like an individual, is likely to be different in character. Given the frequency with which an organization's board of directors, members, partners, or other man-

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[303] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5.

[304] *See id.* § 8C2.5(c) ("If more than one applies use the greater . . . .").

[305] *See* United States v. Rivera, 494 F. App'x 707, 712 (8th Cir. 2012) (explaining that a sentencing disparity between codefendants is not unwarranted when one defendant has a greater criminal history than the other); *see also* U.S. SENT'G COMM'N, *supra* note 183, ch. 4, pt. A, introductory cmt. ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment . . . . Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.").

[306] *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(c).

[307] *See id.* § 4A1.2(e)(1) (indicating that individual defendants' felony convictions within the prior fifteen years are counted).

agers may change, an offense the organization committed over fifteen years before the instant offense is less indicative of the defendant's culpability than a more recent offense would be. Indeed, almost eighty-five percent of a corporation's board members will be different fifteen years after a given point in time.[308] Further, just as an individual defendant's recidivism decreases with age because of education earned in prison, physical disabilities, maturation, or any other reasons, an organizational defendant's risk of recidivism naturally decreases as organizational culture changes, which occurs as members of the organization's decision-making body are terminated and replaced.[309]

Rather than a specified cutoff age, an alternative approach could be to implement amendments directly requiring courts to consider whether a substantial change in the organizational culture has occurred since any given prior DPA, NPA, or conviction. But such an approach would require sentencing courts to receive evidence on and conduct factfinding into the quantitative and qualitative change in the organization's directors and officers since the prior adjudication or disposition. Sentencing courts are certainly capable of conducting this type of factfinding, but judicial efficiency favors a cutoff-based approach instead. A factfinding-based approach would require sentencing courts to take significant time to receive relevant evidence and make findings as to whether a change of control has occurred since each and every prior adjudication or disposition. The resources to take these steps would be substantial when, like JPMorgan, the prior entity has numerous prior adjudications.

What is more, under a factfinding approach, courts would be troubled with making the difficult determination of whether a "real" change in organizational leadership has occurred since the prior resolutions and is a significant enough change to conclude that the organization should not receive a heightened penalty for its prior conduct. For example, consider if half of the members of a corporate defendant's board of directors have changed since the prior disposition. Should the court conclude this change is significant enough? Should the court receive evidence from the remaining directors to determine

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[308] *See* Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 18, 2020), https://corpgov.law.harvard.edu/2020/10/18/corporate-board-practices-in-the-russell-3000-and-sp-500/ [https://perma.cc/S2K2-B4UW] (noting that the average tenure of seated directors of the United States's largest corporations is roughly ten years, that only one third of seated directors had served for at least twelve years, and that only 15.9% of seated directors had served for at least sixteen years).

[309] *See* MATTHEW R. DUROSE & LEONARDO ANTENANGELI, DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 34 STATES IN 2012: A 5-YEAR FOLLOW-UP PERIOD (2012–2017), at 5 (2021) (cataloguing rates and demographics of recidivist offenders); German Lopez, *Why Prisoners May Be Less Likely to Reoffend Than You Think*, VOX (Oct. 28, 2015), https://www.vox.com/2015/10/28/9631218/recidivism-rate-prison [https://perma.cc/947X-7TAS] (recognizing research demonstrating that recidivism decreases with age). *See generally* U.S. SENT'G COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS (2017) (collecting and summarizing statistics on the relationship between recidivism rates and age).

whether the attitude of the board as a whole has changed? Although theoretically answerable, these and other questions illustrate the need for a cutoff-based standard. These same concerns are likely the reason that the individual defendant guidelines also impose a hard cutoff date rather than requiring factfinding into whether the defendant has had a change of character since his or her prior fifteen-year-old offenses.

Assuming the Sentencing Commission accepts that these three changes are needed,[310] the next task is to decide exactly how much each qualifying prior resolution should increase a defendant's culpability score. This is a normative inquiry to some degree, and the Sentencing Commission will need to conduct research to determine the answer to this question. Ultimately, the amount of the increase must be sufficient to afford specific deterrence.

After the Sentencing Commission makes this determination, however, the final task is determining how to amend the guidelines from a procedural perspective. The Sentencing Commission can rely on its incorporation of specific offense characteristics tables from the individual guidelines in adopting the proposed amendments. By way of background, several guidelines for individual defendants utilize tables that incrementally increase the defendant's total offense level depending on specific characteristics of the offense that make the offense objectively more serious.[311] Similarly, the organizational guidelines should include a table that incrementally increases an organizational defendant's culpability score based on the number of the organization's qualifying prior convictions, DPAs, or NPAs. Thus, for example, the guidelines could provide that: (1) an organization with one to two prior convictions, DPAs, or NPAs will receive a one-point increase to its culpability score; (2) an organization with three or four prior convictions, DPAs, or NPAs will receive a two-point increase to its culpability score; and (3) an organization with five or more prior convictions, DPAs, or NPAs will receive a three-point increase to its culpability score.[312]

If these amendments are adopted, separate amendments will need to address how courts should consider prior misconduct that resulted in civil or ad-

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[310] By no means are these three amendments the only amendments that are needed. Consider, for example, that an individual defendant may face an increased criminal history category based on dissimilar prior offenses. *See generally* U.S. SENT'G COMM'N, *supra* note 183, §§ 4A1.1–1.2. By contrast, organizations may face an increased culpability score only based on "similar" prior misconduct. *Id.* § 8C2.5(c). Amendments addressing this incongruity are beyond the scope of this Article; though, a future article may explore the topic.

[311] *See, e.g.*, *id.* § 2B1.1(b)(1) (increasing a defendant's offense level based on the amount of the loss resulting from the theft); *id.* § 2K1.3(b)(1) (increasing a defendant's offense level based on the amount of explosive materials involved in the offense); *id.* § 2K2.1(b)(1) (increasing a defendant's offense level based on the number of firearms involved in the offense).

[312] The precise number of prior adjudications, DPAs, or NPAs that should result in any particular increase from a normative perspective is beyond the scope of this Article.

ministrative adjudications but not criminal convictions, DPAs, or NPAs. Conduct giving rise to civil or administrative adjudications is presumably less culpable than conduct giving rise to criminal charges, a DPA, or an NPA.[313] Thus, the current guidelines effectively require two civil or administrative adjudications for every criminal conviction to increase the organization's culpability score.[314] Retaining this view, the guidelines should specify that if an organization has no criminal adjudications or diversionary dispositions but civil or administrative adjudications during the relevant time period, then the organization may receive an increased culpability score as follows: (1) a one-point increase if the organization has two to four prior civil or administrative adjudications; (2) a two-point increase if the organization has five to eight prior civil or administrative adjudications; and (3) a three-point increase if the organization has more than eight civil or administrative adjudications.

From a formatting perspective, the Sentencing Commission should adopt the proposed amendments in § 8C2.5. Section 8C2.5 makes pragmatic sense to host these amendments because it provides the current guidance for calculating an organizational defendant's culpability score.[315] Furthermore, the amendments logically fit within § 8C2.5(c) because that subsection currently provides for an increase in a defendant's culpability score based on its prior misconduct resulting in criminal, civil, or administrative adjudications[316] and because organizational DPAs and NPAs are the practical equivalent of organizational criminal convictions.

The Sentencing Commission may consider specifically amending § 8C2.5(c) to read as follows:

§ 8C2.5. Culpability Score

* * * * *

(c) PRIOR HISTORY.

(1) If the organization (or separately managed line of business) committed any part of the instant offense less than 15 years after at least one criminal adjudication, diversionary disposition, or non-prosecution agreement based on similar misconduct, increase the organization's culpability score as follows:

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[313] *See supra* Part II.

[314] *See generally* U.S. SENT'G COMM'N, *supra* note 183, § 2B1.1(b)(1).

[315] *See generally id.* § 8C2.5.

[316] *Id.* § 8C2.5(c).

Number of Prior Criminal Adjudications, Diversionary Dispositions, or Non-Prosecution Agreements	Increase in Culpability Score
(A) 1–2	add 1
(B) 3–4	add 2
(C) 5 or more	add 3

(2) If the organization (or separately managed line of business) committed any part of the instant offense less than 15 years after at least one civil or administrative adjudication based on similar misconduct but the organization has no prior criminal adjudication, diversionary disposition, or non-prosecution agreement under subparagraph (1), increase the organization's culpability score as follows:

Number of Prior Civil or Administrative Adjudications	Increase in Culpability Score
(A) 2–4	add 1
(B) 5–8	add 2
(C) 9 or more	add 3

These amendments are preferred for the reasons explained, but the Sentencing Commission has a simpler (albeit less desirable) amendment option to achieve some of the same purposes. That is, the Sentencing Commission may simply amend the organizational guidelines provisions on departures to provide that a court may grant an upward departure if the organization has prior DPAs or NPAs. If the Sentencing Commission were to adopt this amendment, it could incorporate the amendment in Chapter Eight, Part C, Subpart 4 of the guidelines, where the other grounds for departures for organizational defendants currently reside. Such an amendment could read as follows:

§ 8C4.11. Prior Diversionary Dispositions

If the organization committed the instant offense after entering into at least one diversionary disposition or non-prosecution agreement with a governmental entity based on similar misconduct, an upward departure may be appropriate.

One benefit of a departure-based solution is that it would allow sentencing judges greater discretion to increase the applicable fine depending on all of the circumstances, such as the number of prior DPAs and NPAs and the severity of the underlying conduct. Another benefit is its relative simplicity. Unfortunately, the primary drawback of this solution necessarily follows from its main benefit. Different sentencing judges are likely to use their discretion to

weigh the circumstances in different ways in different cases, causing sentencing disparities.

If the Sentencing Commission adopts either of the amendments proposed above, it should also clarify potential ambiguities of some of the terms used. For example, the Sentencing Commission may define the term "misconduct" to clarify the current ambiguity surrounding that term described in Part III.A. The Sentencing Commission should also define the terms "diversionary disposition" and "non-prosecution agreement" to ensure that courts may consider DPAs and NPAs as they are commonly understood in the organizational context. Additionally, given that courts often rely on the commentary to the guidelines in interpreting their meaning,[317] the Sentencing Commission should adopt commentary reflecting the reasons for the amendments, and the policy discussions in this Article may be used for this purpose.

In closing, it should be reemphasized that even under the current regime, courts may consider a defendant's prior DPAs and NPAs, especially considering the non-binding nature of the guidelines.[318] A sentencing court has free rein to consider any relevant information regarding a defendant's background, which certainly includes an organization's prior DPAs or NPAs.[319] But without clear guidelines delineating how DPAs and NPAs should be considered, judges and the parties will be free to weigh them heavily, lightly, or not at all in calculating sentences. If the primary purpose of the guidelines is to promote uniformity in federal sentencing (and it is),[320] allowing for differential treatment of prior DPAs or NPAs is not a just result.

C. Using Upward Variances or Departures

Amending the sentencing guidelines as proposed is the most effective way to promote deterrence and fairness in organizational sentencing. Nonetheless, until the Sentencing Commission adopts these amendments (or if it never does), courts may act to achieve the same goals.

Because the federal sentencing guidelines are not binding, district courts have authority to vary or depart from the guidelines to impose above-guidelines

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[317] Some courts treat commentary as "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of," the guideline at issue. United States v. Fields, 608 F. App'x 806, 812 (11th Cir. 2015) (quoting United States v. Contreras, 739 F.3d 592, 594 (11th Cir. 2014)).

[318] *See supra* Part II.

[319] *See* Pepper v. United States, 562 U.S. 476, 488 (2011) (noting that there is no limitation on the information concerning a defendant's background, character, or conduct a district court may consider at sentencing).

[320] *See* Richter, *supra* note 199, at 442; *see also* O'Hear, *supra* note 288, at 749 (stating that the Supreme Court characterized uniformity in sentencing to be "'Congress' basic goal' in adopting the guidelines").

sentences.[321] Nevertheless, rather than considering whether to grant a variance or departure based on prior DPAs and NPAs, sentencing courts routinely just adopt the parties' sentencing recommendations, even when the instant misconduct is similar to the misconduct that led to prior DPAs and NPAs.[322] District courts should begin using their authority to vary or depart when an organization being sentenced has prior DPAs and NPAs.

First, a court may impose an upward variance when an organizational defendant has prior DPAs and NPAs based on the defendant's unique history and characteristics.[323] An organizational defendant's prior DPAs and NPAs are relevant to its history and characteristics because they reflect an unusual disregard for the law and a greater need for specific deterrence. Alternatively, a court may impose an upward variance based on the sentencing court's policy disagreement with the guidelines. For the reasons stated in this Part, the failure of the guidelines to account for an organization's prior DPAs and NPAs causes the guidelines fine range to understate the organizational defendant's culpability. A sentencing court may rely on that fact in expressing a policy disagreement with the guidelines to support an upward variance.

Second, a sentencing court may impose an upward departure when an organizational defendant has prior DPAs and NPAs. Ideally, at minimum, the Sentencing Commission should amend the guidelines to create an upward departure based on an organization's prior DPAs and NPAs. If the Sentencing Commission makes that amendment, a court may use the new departure ground to impose an above-guidelines sentence. If the Sentencing Commission refuses to make this change, however, a sentencing court may still grant an upward departure based on a departure ground already contained in the guidelines. As noted, § 5K2.0 (contained in Chapter Five, Part K, which is explicitly referenced in the organizational guidelines) permits a court to depart based on circumstances not identified in the guidelines but that are relevant to sentencing.[324] An organization's prior DPAs and NPAs are relevant to its sentencing because they are the functional equivalent of prior convictions, which are indicative of the organization's culpability and recidivism risk. Thus, a court

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[321] *See supra* Part II.A.

[322] *See* Sentencing Transcript at 27, United States v. Royal Bank of Scot., No. 3:15-cr-00080 (D. Conn. Jan. 5, 2017) (considering the guidelines calculation in a summary fashion when adopting the parties' recommendations from a Rule 11(c)(1)(C) plea agreement deriving from antitrust law violations); Deferred Prosecution Agreement, United States v. Royal Bank of Scot. PLC, No. 3:13-cr-00074 (D. Conn. Feb. 5, 2013) (prior DPA also partially based on antitrust law violations).

[323] *See supra* Part II.A.

[324] U.S. SENT'G COMM'N, *supra* note 183, § 5K2.0(a)(1)(A), (a)(2)(B), (b)(1). None of Chapter Five's prohibited grounds for departure would prevent a court from imposing a departure as recommended in this Article. *See supra* note 260.

may use § 5K2.0 to issue an above-guidelines sentence to account for the failure of the guidelines to address organizational DPAs and NPAs.[325]

D. Addressing Critiques

This Section addresses a few potential critiques to this Article's solutions. First, one may question how the proposed amendments will provide any benefit when, in practice, the DOJ rarely seeks formal convictions against organizational defendants and thus sentencing courts would only rarely apply the proposed amendments. There is some merit to this counterargument. After all, if the government only occasionally seeks formal convictions, it is true the proposed guidelines will only occasionally be used by sentencing courts.

There are two responses to this counterargument. In the first place, if the DOJ genuinely wishes to deter organizational crime, it must seek formal criminal convictions more often.[326] If the DOJ seeks more convictions, the proposed amendments will apply more often. In the second place, even without formal criminal proceedings, as discussed, when the government and an organization negotiate the fine to be imposed in a DPA or an NPA, the parties consider the fine range that would apply to the organization if formally prosecuted.[327] Thus, even if the proposed amendments would only rarely apply at formal sentencings, they will frequently be considered and applied by the parties to the numerous DPAs and NPAs executed each year.

Second, one may question whether adopting this Article's solutions would deter organizations from entering into DPAs and NPAs. Indeed, a primary benefit of DPAs and NPAs to organizations is that they do not result in convictions. But it must be remembered that DPAs and NPAs provide several other benefits to organizations, such as avoiding the risk and expense that would accompany proceeding to trial.[328] Moreover, treating DPAs and NPAs like convictions for purposes of sentencing would not require them to be treated as convictions for all purposes. Thus, for example, there is no reason to believe

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[325] Neither of the proposed solutions will present any constitutional issues associated with using a defendant's prior relevant conduct to increase its sentence so long as the increased sentence does not exceed the authorized statutory maximum sentence. *See generally* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

[326] *See* CLAYPOOL, *supra* note 85, at 5–6 (arguing that deterrence requires more frequent criminal charges against corporations). *See generally* Peter T. Edelman, *Corporate Criminal Liability for Homicide: The Need to Punish Both the Corporation and Its Officers*, 92 DICK. L. REV. 193 (1987) (arguing corporate criminal prosecution deters future corporate crime).

[327] *See, e.g.*, Deferred Prosecution Agreement at 5–6, United States v. Recology S.F., No. 3:21-cr-00356 (N.D. Cal. Sept. 9, 2021); Deferred Prosecution Agreement at 7–8, United States v. Samsung Heavy Indus. Co., Ltd., No. 1:19-cr-00328 (E.D. Va. Nov. 22, 2019).

[328] *See supra* Part I.

that adopting the proposed solutions would cause organizations to suffer collateral consequences such as reputational harm, debarment, or delicensing that apply to convicted organizations.[329]

Third, a critic may note that DPAs and NPAs, unlike convictions following plea agreements, do not result from a court finding that the defendants committed the offense beyond a reasonable doubt. Thus, the critic may argue that DPAs and NPAs are less evident of true guilt than convictions and thus are not really the functional equivalent of guilty pleas. However, this criticism ignores that this concern applies to all criminal resolutions, including plea agreements. True, organizational defendants are under pressure to settle their cases to avoid negative publicity and consequences. And this Article does not dispute that wrongful DPAs or NPAs can occur. This Article simply suggests that the lack of a judicial finding of guilt is not a sufficient reason to distinguish DPAs and NPAs from convictions under the guidelines. As a practical matter, if DPAs and NPAs were subject to judicial review like plea agreements, the courts would routinely find the facts support the convictions.[330] Even if this is a legitimate concern, the Sentencing Commission could alleviate it by requiring the government to prove the truth of the conduct underlying prior DPAs or NPAs at sentencing before using the DPAs or NPAs to enhance the sentencing range.

Finally, some may question whether allowing courts to use uncharged conduct to enhance a subsequent sentence creates unfairness or due process concerns. The response is two-fold. In the first place, the guidelines already require courts to use individual defendants' DPAs to enhance their sentences. There is nothing unfair about holding organizations to the same standard. If due process concerns exist, they should be resolved as to both individual and organizational defendants. In the second place, one may argue that in some cases, the government uses DPAs or NPAs in lieu of formal prosecution because the organizational defendants' conduct is less blameworthy. Thus, the critic may argue the prior agreement should not be used to enhance a subsequent sentence. As explained, though, the government regularly uses DPAs and NPAs based on prudential concerns aside from the severity of the defendant's conduct.[331] Because organizational DPAs and NPAs are often used when plea

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[329] *See* Arlen & Kahan, *supra* note 66, at 333 (noting that DPAs and NPAs allow organizations to avoid the collateral consequences of criminal convictions).

[330] *See generally* Kaleb Byars, *A Concrete Standard of Judicial Review for Corporate Deferred Prosecution Agreements*, 78 FLA. L. REV. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5139547 [https://perma.cc/7ZN8-8WHZ] (arguing for a standard of judicial review of DPAs that would require courts to make specific findings, including that the charges are adequately supported by the facts).

[331] *See supra* Part I.

agreements would be used in the individual defendant context, it is appropriate to treat DPAs and NPAs as prior convictions for sentencing purposes.[332]

* * *

Adopting either of the proposed solutions—amending the guidelines or relying on variances or departures—will contribute to resolving the issues of deterrence and fairness that revolve around organizational sentencing. Yet adopting either solution, while necessary, is not sufficient to resolve these issues. In addition, the DOJ and other federal agencies must start diligently prosecuting organizations that reoffend, particularly after first receiving the benefit of DPAs and NPAs.[333] If the government continues to utilize successive DPAs and NPAs rather than seeking formal criminal convictions, adopting this Article's proposals will have a more minimal effect.[334] Federal charging authorities should closely consider the disadvantages of offering multiple DPAs and NPAs, and enforcement agencies should consider implementing a one-and-done or similar rule for DPAs and NPAs with organizational defendants.[335]

Nevertheless, implementing either of the proposed solutions will be a step toward achieving deterrence and fairness in organizational criminal enforcement. Prosecutors consider the organizational sentencing guidelines in deciding whether to prosecute an organization, and the government and defendants consider the guidelines in executing DPAs and NPAs.[336] Moreover, diligent companies must consider their potential exposure when deciding how to respond to government investigations. If an organization's agents are aware the organization might receive a higher sentence because of its prior DPAs and

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[332] Other potential criticisms include that reform should focus on issues other than improving the sentencing regime. Some critics might argue the focus should be on preventing corporate misconduct by improving compliance requirements or greater private enforcement through fiduciary duty or other civil liability. Others might assert the focus should be on ensuring that individual wrongdoers within organizations are held accountable because they (and not intangible organizations) actually commit violations. This Article does not dispute that reform in other areas is needed to optimally reduce corporate recidivism broadly. This Article simply posits that sentencing law might be one avenue through which to improve our system of organizational criminal justice. At minimum, in a system where DPAs and NPAs are used as frequently as they are, the guidelines should fairly respond to their use.

[333] *See* GARRETT, *supra* note 54, at 17 ("Corporate criminal prosecutions serve a distinct purpose—to punish serious violations and grossly deficient compliance—and this purpose is not served if companies obtain kid-glove non-prosecution deals in exchange for cosmetic reforms. Corporate convictions should be the norm, and in special cases in which prosecutors defer prosecution, they should impose deterrent fines and stringent compliance requirements.").

[334] *See* Phillips, *supra* note 17 (arguing that JPMorgan's repetitive illegal conduct begs the question of whether DPAs and NPAs alone promote deference).

[335] *See* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1302 (2013) (arguing that the government should avoid using DPAs and NPAs unless criminal prosecution would harm third parties aside from the organization or the offense conduct is less serious and there are no alternative civil or administrative remedies).

[336] *See supra* Part I.

NPAs because of amended guidelines or the possibility of an upward variance or departure, then the government will have settlement leverage. At minimum, the government may use this leverage to seek a resolution against a recidivist organization on more just terms.

CONCLUSION

Organizations, like individuals, commit criminal offenses. Indeed, organizations, like individuals, commit multiple criminal offenses. But organizations, unlike individuals, regularly receive the benefit of DPAs or NPAs instead of criminal convictions following their offenses. As a result, organizations, unlike individuals, fail to have their criminal history appropriately considered under the sentencing guidelines. It is axiomatically unfair when two similarly-situated entities receive differential treatment. The current sentencing guidelines perpetuate unfairness by failing to require courts to uniformly consider organizations' prior DPAs and NPAs.

The DOJ and Congress have already made substantial strides toward corporate criminal enforcement reform. Nevertheless, further reform is needed to tackle the problem of corporate crime economically and fairly. Amending the sentencing guidelines to require appropriate consideration of organizations' prior DPAs and NPAs would be meaningful reform. As the Sentencing Commission is developing and implementing acceptable amendments, courts may use their discretion to impose upward variances and departures for organizations that have significant criminal history. These steps will lead to greater deterrence and fairness in corporate criminal enforcement.

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Joshua Coleman, Virginia, Eastern

Topics:

5) Miscellaneous Issues

Comments:

There has been some question in our district regarding the appropriate way to list the fine in the sentencing options table under the guideline provisions section when the fine for one or more of the Counts is greater than $500,000. The consensus has been to amend the guideline provisions so that the maximum fine is reflects as the stat max based on the language at 5E1.2(c)(4). There has been some discussion that this may be some pre-Booker language and that the language contained in that section is really not needed as the last sentence speaks to the Courts ability to fine someone up to the maximum authorized by the statute. I don't know that I would say this qualifies as a priority, but I wasn't sure where else to submit this.

Submitted on: June 11, 2026

UF | UNIVERSITY of FLORIDA

College of Journalism and Communications
Joseph L. Brechner Freedom of Information Project

1204 Weimer Hall
PO Box 118400
Gainesville, FL 32611
[redacted]

July 27, 2026

To whom it may concern,

I write with enthusiastic support for updating open meeting and record policies for the United States Sentencing Commission in order to increase credibility among the public and take the lead in a path toward greater transparency in the federal judiciary.

As director of the Joseph L. Brechner Freedom of Information Project at the University of Florida, I provide research and education in the public's right to know. I've served three terms on the federal Freedom of Information Act (FOIA) Advisory Committee under the National Archivist, have testified three times before Congress regarding FOIA, authored dozens of peer-reviewed research articles about government transparency, co-authored several books on the subject, and have taught courses about freedom of information for 25 years for students, public officials, and judges.

First, it is worth noting the hundreds of studies that have shown the tangible benefits of strong transparency practices. While not a panacea, public record and open meeting laws empower people to find out what their government is up to, which is foundational to exercise their First Amendment right to speech, assembly, and the press.[1] Without factual information, civic discourse withers and materially harms average people. Research has shown, for example, that transparency practices lead to cleaner drinking water,[2] safer restaurants,[3] less corruption,[4] lower taxes,[5] sex offenders less likely to reoffend,[6] and more informed parents in choosing the right

[1] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (arguing that access to information is essential for self-government); Vincent Blasi, *The Checking Value in First Amendment Theory,* 2 LAW & SOC. INQUIRY 521 (1977) (arguing that "the First Amendment may require that journalists have access as a general matter to some records").
[2] *See* Lori S. Bennear & Sheila M. Olmstead, *The Impacts of the "Right to Know": Information Disclosure and the Violation of Drinking Water Standards,* 56 J. ENVTL. ECON. & MGMT. 117-30 (2008) (requiring disclosure of drinking water contaminants reduces health violations).
[3] *See* Barbara A. Almanza, Joseph Ismail & Juline E. Mills, *The Impact of Publishing Foodservice Inspection Scores,* 5 J. FOODSERVICE BUS. RES. 45-62 (2002) (showing that publicized food safety inspections decrease consumer complaints).
[4] *See* Maria Cucciniello, Gregory A. Porumbescu & Stephan Grimmelikhuijsen, *25 Years of Transparency Research: Evidence and Future Directions,* 77 PUBLIC ADMIN. R. 1, 32-44 (2017).
[5] *See* Pengjie Gao, Chang Lee & Dermot Murphy, *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance,* 135 J. FINANCIAL ECON. 2, 445-467 (2020), https://doi.org/10.1016/j.jfineco.2019.06.003.
[6] *See* Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration,* 21 J. CONTEMP. CRIM. JUST. 1, 49-66 (2005), https://doi.org/10.1177/1043986204271676.

schools for their children.[7] Simply, transparency makes for a better government, and ultimately a better society.

The Commission has the advantage of observing others' approaches to transparency. Many entities similar to the Commission operate under the 1976 Government in Sunshine Act, which is consistent with open meeting laws throughout the states, as well. The processes are standard – notice for meetings, quorum requirements, and exceptions for executive sessions to discuss matters that require discretion. It's a good model to emulate.

Traditionally, most transparency laws – whether at the federal level, in all the states, and in 141 other nations – have been imposed on the executive branch of government. Yet, many jurisdictions apply the same rules to the judiciary, and of late there is interest in expanding transparency practices in the federal government. For example, the FOIA Advisory Committee recommended in 2021 that Congress apply FOIA-like rules to some legislative-branch agencies, such as the Capitol Police.[8] This month, Sen. Adam Schiff introduced the Judicial FOIA Expansion Act[9] to promote transparency in the judiciary.

In addition to "reactive" transparency, which allows the public to observe meetings and inspect records, I encourage the Commission to explore "proactive" transparency through policies that require affirmative disclosure. For example, some state laws require agencies to post meeting agendas and minutes online, as well information about policy makers and the agency's budget. Proactive transparency has been found to increase credibility in an agency, as experienced by the Social Security Adminstration when it began proactively providing people their social security statements online rather than through a Freedom of Information Act request.[10]

The Commission may benefit from creating a working group to craft model transparency policies based on FOIA and the Sunshine Act, as well as proactive policies enacted in other federal and state agencies. It stands to become a leader in the judiciary, building the public's trust at a time when all branches of government face greater skepticism from the citizenry.

Sincerely,

Dr. David Cuillier, director
Joseph L. Brechner Freedom of Information Project

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[7] *See* Silvia Palmaccio, Fritz Schiltz & Kristof De Witte, *Information Shocks and Parental Response in Education. A Case Study of an Open Government Initiative,* 39 GOV. INFO. Q. 3 (2022), https://doi.org/10.1016/j.giq.2022.101702.

[8] Thomas M. Susman, *Increasing Access to Information in the Legislative Branch,* FOIA Advisory Committee, (June 13, 2021). https://www.archives.gov/files/ogis/assets/fac-rec-2021-01.pdf#page=2.

[9] S.5033, https://www.congress.gov/bill/119th-congress/senate-bill/5033/all-info.

[10] *See* Fay Lomax Cook, Lawrence R. Jacobs & Dukhong Kim, *Trusting What You Know: Information, Knowledge, and Confidence in Social Security,* 72 J. POLI. 2, 397-412 (2010), doi:10.1017/S0022381610000034.

Proposed amendment to USSG §2T1.4, comment. (n.2)

Pursuant to USSG §2T1.4, comment. (n.2), if a defendant receives an enhancement under §2T1.4(b)(1) for being a tax preparer, an enhancement under USSG §3B1.3, Abuse of Position of Trust, is no longer applicable. I feel this rule should not be absolute. I had a case where a defendant was convicted of violating 26 U.S.C. § 7206(d), because he was a tax preparer filing fraudulent tax returns. In addition to his tax preparation business, he also worked as a bookkeeper for a daycare and stole the social security numbers of the daycare employees to file additional fraudulent returns. The employees were unaware of this conduct and were not customers of the defendant's tax preparer business. Thus, he abused his position as a bookkeeper to commit additional tax fraud that was relevant conduct. However, I could not apply §3B1.3 because of the all-inclusive comment note. I propose the following language be included to comment note 2: "If an enhancement from this subsection applies, do not apply §3B1.3 unless there is additional conduct unrelated to the business of preparing or assisting in the preparation of tax returns that resulted in an enhancement under §2T1.4(b)(1), and that conduct qualifies as relevant conduct pursuant to USSG §1B1.3.

Advocacy Letter Regarding Bureau of Prisons Policies Affecting U.S. Citizen Children and Families

To Whom It May Concern,

My name is Caleb Gaines, and I write this letter not only as a pastor of the last 15 years advocating for the unspoken and concerned citizens, but as someone who has personally witnessed the devastating emotional, mental, financial, and spiritual damage caused to **United States citizen children** and families by **current** Bureau of Prisons (BOP) policies affecting non-U.S. citizen inmates.

This letter is written on behalf of a family with **eight U.S. citizen children** whose father came to the United States **legally** as a child, lived here lawfully for more than thirty-five years, built a family, and became **deeply rooted** in his community. The focus of this letter is not simply about discrimination against incarcerated non-citizens. The true focus is the **innocent children left behind**. Current BOP policies affecting non-U.S. citizen inmates directly impact thousands of U.S. citizen children, damaging their **mental stability, emotional development, financial security, and future**. These policies create trauma that reaches far beyond prison walls and into homes, churches, schools, and communities across America.

Research estimates approximately **2.7 million children** in the United States currently have an incarcerated parent, while nearly 10 million children have experienced parental incarceration during their lifetime. Studies consistently show these children experience **significantly higher** rates of anxiety, depression, emotional instability, educational setbacks, behavioral struggles, and long-term trauma. The effects often **continue into adulthood** and can contribute to generational cycles of instability and incarceration.

The man I write about entered the United States legally as a child and became a lawful permanent resident. His parents, brothers, wife, and children are **U.S. citizens.** Before incarceration, he was a provider, father, husband, mentor, and active member of his family. During incarceration, he has demonstrated rehabilitation, spiritual growth, faith, discipline, and consistent good behavior. Yet despite these efforts, he remains excluded from meaningful opportunities under the First Step Act because of his immigration status and ICE detainer thus further affecting his family.

The First Step Act of 2018 was created to encourage rehabilitation, reduce recidivism, and reward inmates participating in evidence-based programming and productive activities. Eligible inmates can earn 10 to 15 days of time credits for every 30 days of successful participation in approved programming. However, many non-U.S. citizen inmates with immigration detainers **cannot** meaningfully apply those credits toward prerelease custody, halfway houses, or home confinement.

This creates a **deeply unequal system impacting U.S. citizen children with a non-U.S. citizen parent serving time**. A U.S. citizen inmate serving ten years may return home significantly earlier — sometimes after approximately five and a half to six years — while similarly situated children with a non-U.S. citizen parent are punished by being unable to see their father for nearly eight and a half years despite **equal** rehabilitation and good conduct.

This becomes **generational trauma** affecting children, families, communities, and the future of our country.

Personal Family Testimony

The family's testimony reveals the true human cost of these policies. His children have endured **years of emotional pain, fear, instability, and trauma because of prolonged separation from their father**. His wife described nights filled with anxiety, uncertainty, and emotional exhaustion while trying to provide stability for their children alone.

One of the **deepest wounds** came when he was transferred **far away from his family, making visitation nearly impossible due to financial hardship and distance**. The **children lost regular access to their father** during some of the most important developmental years of their lives.

The family described living with constant emotional distress, financial instability, and fear of permanent separation because of possible deportation. His children struggled mentally and emotionally from the absence of their father, and the burden placed on the family affected every area of their lives — emotionally, spiritually, socially, and financially. As a pastor with a keen eye of discernment and a great judge of character, I have personally witnessed his growth and sincere desire to become a restored father, husband, and man of faith. I have seen his concern for his children, his accountability for his actions, and his commitment to rehabilitation. His children do not speak about him as a criminal statistic — they speak about him as "Dad."

Punishment should not erase a person's humanity, nor should immigration status erase the value of redemption.

Policies create unnecessary barriers that deepen cycles of trauma for innocent children and families.

Fairness, equal protection, rehabilitation, and human dignity should apply equally to all families and children affected by incarceration.

Relevant Cases and Legal Challenges

• Arellano-Cigfuego v. Warden (Eastern District of California, 2023–2024): challenged BOP policies preventing inmates with ICE detainers from meaningfully applying earned First Step Act credits despite rehabilitation and program participation.

• Case No. 2:22-cv-01735-TLN-AC (Eastern District of California): involved an inmate who earned First Step Act credits but alleged he was denied meaningful prerelease benefits because of an immigration detainer.

• Case No. 1:22-cv-00638-JPW-EW (Middle District of Pennsylvania): involved a rehabilitated inmate who completed educational and faith-based programming yet still faced restrictions because of immigration classification.

• Case No. 1:23-cv-04939-RMB (District of New Jersey): involved claims that years of discipline, rehabilitation, and positive conduct became meaningless because immigration status prevented equal benefit from earned credits.

These cases demonstrate this issue is **systemic, not isolated**.

The United States has long claimed to uphold principles of f**airness, rehabilitation, family unity, and equal justice under the law.** Yet **current policies** often create **two different systems of rehabilitation — one for citizens and another for lawful residents with American spouses and children.**

Children should not lose years of their lives with their father because of **unequal administrative barriers**. Every birthday missed, every graduation absent, every family milestone lost, and every year of emotional trauma inflicted upon children creates **wounds** that can last generations.

Research consistently shows maintaining family connection reduces recidivism, strengthens rehabilitation outcomes, and improves long-term reintegration into society.

I respectfully **urge** policymakers, advocacy organizations, legislators, faith leaders, and human rights groups to review and **reform BOP policies that disproportionately harm U.S. citizen children and families connected to non-U.S. citizen inmates**.

Specifically, I ask leaders to:
• Expand meaningful access to earned time credits and prerelease opportunities where rehabilitation has been demonstrated.
• Reconsider blanket restrictions preventing non-citizen inmates from fully benefiting from the First Step Act.
• Prioritize family-centered placement decisions to reduce harmful separation from children.
• Recognize the devastating emotional and developmental harm prolonged incarceration causes to innocent U.S. citizen children.
• Ensure rehabilitation incentives are applied fairly and consistently.

True justice recognizes accountability while still allowing room for redemption, restoration, and family healing.

Sincerely,

Caleb Gaines

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Rhonda Grunther, MCCD Jul. 20, 2026

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

2) Review of the USSC Rules of Practice & Procedure

3) Legislation & Case Law

4) Circuit Conflicts

5) Miscellaneous Issues

Comments:

First-time federal offenders caught in online sting operations—where no actual child was involved—often face the same 10-year mandatory minimum sentence as offenders with real victims. Mandatory minimums leave judges with little discretion to consider an individual's background, lack of criminal history, or the specific facts of the case. Many legal scholars and sentencing experts have argued that this one-size-fits-all approach can produce unnecessarily harsh and disproportionate sentences.
congress.gov +1

Submitted on: July 20, 2026

Stanford Law School

David J. Hayes
Professor of Practice, Doerr School of Sustainability
Affiliated faculty at Stanford Law School

[redacted]

July 22, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Sentencing Commission Priorities Should Include Penalties for Wildlife Trafficking

Dear Members of the United States Sentencing Commission:

I am writing in my personal capacity regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

I was the Deputy Secretary and Chief Operating Officer of the U.S. Department of the Interior from 2009 and 2013—the cabinet agency that leads the U.S.'s efforts to address international wildlife trafficking. In that role, I worked to raise awareness about—and combat—the devastating impacts that international criminal wildlife trafficking syndicates are having on wildlife populations around the world. In particular, I worked with President Obama to develop his Executive Order 13648 on Combatting Wildlife Trafficking (issued in July 2013) and, after leaving the U.S. government, I served on the Presidential Task Force on Wildlife Trafficking's Advisory Council and helped to found the U.S. Wildlife Trafficking Alliance—which was later reconstituted as the Wildlife Trafficking Alliance, under the auspices of the Association of Zoos and Aquariums.

I respectfully urge the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle.

As you know, wildlife trafficking is a multi-billion-dollar transnational criminal enterprise that threatens biodiversity, undermines global security, fuels corruption and instability worldwide, and creates significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Wildlife trafficking is widely recognized as one of the most profitable forms of organized crime, often operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation.

Wildlife trafficking is imposing substantial economic harm on governments, industries, and

communities, extending well beyond the immediate conservation consequences of the crime. In addition, the suffering experienced by individual animals that are taken from the wild, and often restrained and drugged for transport, is in and of itself an atrocity. Advancing animal welfare has been named as an Administration priority across agencies--including the Department of Justice, Health and Human Services, and the US Department of Agriculture—and I urge the Commission to examine this cruel and inhumane illegal trade.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains.

As a result, wildlife trafficking continues, in many cases, to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

I recognize and commend the important work of U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, the sentences that follow do not always reflect the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.
Thank you for your consideration of this request. I appreciate the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats.
Sincerely,

David J. Hayes

PUBLIC COMMENT ON PROPOSED PRIORITIES FOR THE AMENDMENT CYCLE ENDING MAY 1, 2027

To: United States Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs, Priorities Comment

Submitted via: https://comment.ussc.gov

Re: Proposed Priorities for Amendment Cycle, 91 FR 35802 (June 12, 2026), FR Doc. 2026-11906

Date: July 24, 2026

Submitted by: Trayden Kamprath, CCEP
Johnson City, TN
Submitted in an individual capacity. The views expressed are my own and are not offered on behalf of any employer, client, or organization.

I. Summary of Request

I respectfully request that the Commission expressly include Chapter Eight, Part B (§8B2.1, Effective Compliance and Ethics Program) and §8C2.5(f) (Culpability Score, Effective Compliance and Ethics Program) within the scope of Proposed Priority 1, the comprehensive evaluation of the guidelines announced in anticipation of the fortieth anniversary of the *Guidelines Manual*.

I am not asking the Commission to promulgate amendment text this cycle. I am asking it to study a specific question: whether the compliance and ethics provisions of Chapter Eight are operating as the ex ante incentive the Commission designed them to be, or whether they have become an ex post grading rubric applied only after an organization has already been convicted.

The Commission's own data suggests the latter.

II. The Commission's Data Establishes the Problem

Chapter Eight's Introductory Commentary states that the chapter is designed to provide "incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct," and that the guidelines "offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct."

The Commission's own thirty-year retrospective, *The Organizational Sentencing Guidelines: Thirty Years of Innovation and Influence*, reports that of 4,946 organizational offenders sentenced from fiscal year 1992 through fiscal year 2021, **11 received a culpability score reduction under §8C2.5(f) for**

having an effective compliance and ethics program. That is roughly 0.2 percent. The same report finds that **89.6 percent of organizational offenders had no compliance and ethics program at all,** and that 58.3 percent received a culpability score increase for involvement in or tolerance of criminal activity.

Two readings of that data are available, and the Commission should test both rather than assume either:

1. **Selection effect.** Organizations with genuinely effective programs are rarely prosecuted, so the sentenced population is inherently unrepresentative. On this reading the incentive is working upstream and the low application rate is evidence of success, not failure.

2. **Structural inoperability.** The reduction is written so that it is very difficult to obtain, and organizations therefore do not treat it as a meaningful design target when building programs. On this reading the incentive is nominal.

These readings have opposite policy implications, and the Commission is the only institution positioned to distinguish between them. It holds the organizational datafile. No outside commenter can resolve this question.

III. A Structural Feature Worth the Commission's Attention

I want to identify one provision precisely, because it illustrates the ex post pattern better than any general argument.

Section 8B2.1(b)(2)(C) already requires that individuals with day-to-day operational responsibility for the compliance program be given "adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority." Section 8B2.1(b)(5)(C) already requires a reporting system through which employees and agents may report or seek guidance "without fear of retaliation."

Those elements are therefore not missing from Chapter Eight. That is a point I want to state plainly, because it is sometimes argued otherwise. The elements are present. What is absent is any operational content giving them meaning.

The guideline does not define what makes resources "adequate," what distinguishes "direct access" from nominal access, or what a system operating "without fear of retaliation" looks like in practice as distinct from one that merely exists on paper.

Meanwhile, §8C2.5(f)(3) disqualifies an organization from the reduction entirely when high-level personnel participated in, condoned, or were willfully ignorant of the offense, subject to the exception at §8C2.5(f)(3)(C). That exception turns, first, on whether the compliance function had "direct reporting obligations to the governing authority." Application Note 11 then supplies the operational definition that §8B2.1 itself never provides: express authority to communicate personally to the governing authority promptly on any matter involving criminal conduct, and no less than annually on program effectiveness.

The structure is therefore this. The specific, testable definition of a board reporting line appears in the guidelines exclusively as a rescue provision, available at sentencing, to an organization that has already been convicted. The forward-looking provision that organizations actually consult when designing a program contains only the general phrase.

That asymmetry is worth the Commission's examination. It means the most concrete governance standard in Chapter Eight is legible primarily to defense counsel calculating a culpability score, and only faintly to a compliance officer trying to build something before anything goes wrong.

IV. The Definitional Vacuum Has Been Filled Elsewhere

Because §8B2.1 supplies general terms without operational content, that content has been supplied by other instruments: the Department of Justice's Evaluation of Corporate Compliance Programs, deferred and non-prosecution agreements, and Corporate Integrity Agreements negotiated by the HHS Office of Inspector General. These instruments routinely specify reporting lines, resourcing, independence, and executive certification obligations with a precision Chapter Eight does not attempt.

I offer this as an observation about institutional sequencing rather than a criticism of those instruments, which serve their own purposes well. The observation is that the detailed articulation of what an effective program requires now attaches predominantly to organizations that have already been caught, and is negotiated case by case rather than stated once, publicly, in advance.

Whether that is the right allocation is a policy question the Commission has not revisited since Amendment 744 took effect in 2010. Sixteen years is a reasonable interval at which to ask.

V. Specific Requests

1. **Include Chapter Eight within Proposed Priority 1.** The fortieth-anniversary evaluation is the natural vehicle. Chapter Eight has received no substantive review of its program elements since 2010, and the organizational guidelines are the portion of the *Manual* with the widest influence outside federal sentencing.

2. **Publish application data for §8C2.5(f).** Specifically: how often the reduction has been sought; how often granted; and, where denied, whether denial rested on failure to satisfy §8B2.1 or on the §8C2.5(f)(3) disqualification. Disaggregation by organization size would be informative given the differential treatment of small organizations at §8C2.5(f)(3)(B) and Application Note 2(C) to §8B2.1.

3. **Consider an issue for comment on operational content.** Whether commentary to §8B2.1 should give the terms “adequate resources,” “appropriate authority,” and “direct access” the same operational specificity that Application Note 11 to §8C2.5 already supplies in the post-conviction context.

4. **Consider whether §8B2.1 should address retaliation against compliance personnel.** Section 8B2.1(b)(5)(C) protects employees and agents who report. It does not separately address the position of the individuals charged with operating the program, whose independence the guideline elsewhere treats as material to effectiveness. A survey of 328 compliance professionals published in June 2026 by Radical Compliance and Compliance Week found that 70 percent had experienced retaliation at some point in their careers, that more than one third are presently reluctant to raise concerns at their current employer, and that roughly 24 percent identified their direct manager as primarily responsible. That survey is a self-selected professional sample rather than a probability sample, and I do not offer it as a precise population estimate. I offer it as sufficient basis for the Commission to ask the question.

5. **Consider whether Chapter Eight should reference executive attestation.** Certification by senior leadership as to program resourcing and independence is now common in negotiated resolutions. The Commission should examine whether an analogous element belongs among the §8B2.1(b) requirements, including the arguments against it.

VI. On Feasibility

The Commission's notice acknowledges that a possible loss of a voting quorum may affect its ability to complete identified priorities, and 28 U.S.C. §994(a) requires four affirmative votes to promulgate an amendment. I have framed these requests accordingly. Requests 1 and 2 are research and evaluation activities within the Commission's ordinary authority and do not depend on the votes required for promulgation. Requests 3 through 5 are proposed as issues for comment in a future cycle rather than as amendments this one.

A research agenda that clarifies whether Chapter Eight's central incentive functions is valuable regardless of what the Commission ultimately decides to do about it. If the data show the incentive is working, that finding deserves to be published. If it shows otherwise, the Commission will have established the record any future amendment would require.

VII. Conclusion

Chapter Eight was built on the premise that organizations respond to incentives, and that the prospect of mitigation would cause them to invest in prevention before anything went wrong. Thirty-four years later the Commission has better evidence about whether that premise held than anyone else does. The fortieth-anniversary review is the right occasion to examine it.

I appreciate the Commission's consideration.

Respectfully submitted,

Trayden Kamprath, CCEP
Johnson City, TN
Submitted in an individual capacity

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Amy Kearse, Penn state

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

I respectfully urge the Commission to make the 2026 fraud loss amendment retroactive and to act as promptly as practicable so that eligible individuals are not required to spend unnecessary additional months or years incarcerated under a guideline the Commission has already determined should be revised.

The purpose of sentencing is not only punishment, but also fairness, proportionality, respect for the law, and rehabilitation. If the Commission has concluded that the prior fraud loss guideline no longer reflects the best sentencing policy, then fairness requires that those already serving sentences under the previous guideline have the opportunity to benefit from that updated judgment.

Many nonviolent fraud offenders received guideline ranges that were driven primarily by calculated loss amounts rather than a complete assessment of their actual conduct, personal gain, intent, or individual role in the offense. In some cases, the loss calculation became the single most influential factor in determining the advisory guideline range. Updating the guideline for future defendants while leaving those already incarcerated under the former guideline without any opportunity for review creates unnecessary disparities.

Retroactivity would not guarantee anyone's release. It would simply allow federal judges to conduct individualized reviews after considering the amended guideline, the statutory sentencing factors, institutional conduct, rehabilitation, restitution efforts, acceptance of responsibility, victim impact, and public safety. Judges are well equipped to determine whether a sentence reduction is appropriate in a particular case.

Many incarcerated individuals have used their time productively by completing educational and vocational programs, maintaining excellent institutional records, mentoring others, and preparing to return to their families and communities as law-abiding citizens. A retroactive amendment would recognize those efforts while preserving judicial discretion to deny relief where it is not

warranted.

For individuals serving relatively short, nonviolent fraud sentences, even a modest reduction can have a profound impact. It can accelerate family reunification, reduce unnecessary incarceration costs, encourage rehabilitation, and reinforce public confidence that the federal sentencing system is willing to apply updated policy fairly to those already serving sentences.

I respectfully encourage the Commission to consider retroactivity as soon as reasonably possible. Every day that passes under a guideline the Commission has chosen to revise is another day that similarly situated individuals may be serving sentences that current policy no longer views in the same way.

Justice is strongest when it is both accountable and willing to evolve. I respectfully ask the Commission to make the fraud loss amendment retroactive and provide federal judges with the opportunity to review eligible cases under the updated guideline.

Submitted on: July 15, 2026

July 24, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Members of the United States Sentencing Commission:

As the former Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, thank you for the opportunity to provide comments regarding the Commission's proposed priorities for the amendment cycle ending May 1, 2027, as published in the Federal Register on June 12, 2026.

With the deepest respect, I urge the Commission to designate federal sentencing for serious wildlife trafficking offenses as a priority for the upcoming amendment cycle. Wildlife trafficking negatively impacts the interests of the United States globally, feeding billions of dollars per year into the coffers of criminal organizations that are a priority target for U.S. law enforcement. This criminal activity needs to be prioritized because addressing it is increasingly critical to the larger effort to deter transnational organized crime.

Wildlife trafficking, one of the most highly profitable forms of organized crime, has converged with other forms of transnational criminal activity, increasingly operating alongside other illicit activities such as narcotics trafficking, money laundering, and human exploitation. This isn't surprising. Transnational criminal organizations have built reliable unlawful pathways for moving products and their illicit financial gains. Why wouldn't they also use this criminal infrastructure to diversify across criminal markets like wildlife trafficking where the profit margins are strong?

Everything the U.S. is working for globally is harmed by transnational criminal wildlife trafficking. Wildlife trafficking undermines the rule of law, corrupts institutions, distorts economies, and destroys habitats and animal populations that are often the key to economic opportunity for countries, thereby feeding instability. We should also be mindful that these activities create significant risks to animal, plant, and public health, as well as native ecosystems, through the introduction of invasive species and wildlife diseases. Addressing wildlife trafficking should also speak to our sense of decency, as it is a brutal activity offering no mercy for animals plucked or poached from the wild.

Despite its scale and impact, wildlife trafficking is not consistently treated within the U.S. federal sentencing framework in a manner that reflects the seriousness of the crime. In practice, penalties for significant trafficking offenses often do not align with the scope, sophistication, or harm associated with these activities—particularly for the high-level actors who orchestrate complex, transnational supply chains. Make no mistake: this is transnational organized crime, and it is increasingly interconnected with other transnational criminal activity.

Without greater negative consequences, wildlife trafficking will continue to operate as a high-reward, low-risk crime. This imbalance undermines deterrence, weakens enforcement outcomes, and risks positioning the United States as a comparatively attractive environment for international trafficking networks. This dynamic stands in stark contrast to sentencing outcomes for other forms of organized crime, where penalties more consistently reflect the scale and impact of the offense.

Amazing work has been done by U.S. federal investigators and prosecutors, who have successfully brought complex wildlife trafficking cases before the courts. However, their work would have deeper impact if the sentences that follow ultimately reflected the magnitude of the trafficking activity or the defendant's role within broader criminal enterprises.

Designating this issue as a priority would enable the Commission to evaluate whether current sentencing guidelines adequately account for:

- the organized and transnational nature of modern wildlife trafficking networks;
- the scale of financial gain and criminal enterprise involved;
- the broader harms associated with wildlife trafficking, including threats to biodiversity, agriculture, animal, plant, and public health, native ecosystems, and the economy;
- the negative impact to U.S. economic and security goals and interests globally; and
- the need for meaningful deterrence, particularly for high-level offenders.

A comprehensive review of wildlife trafficking sentencing would represent an important step toward ensuring that federal penalties more accurately reflect the seriousness of these offenses while supporting broader efforts to combat transnational organized crime.

Thank you for your consideration of this request and for the Commission's continued commitment to ensuring that the federal sentencing guidelines remain effective in addressing evolving criminal threats. I would welcome the opportunity to provide any additional information or expertise that may be helpful to the Commission as it undertakes its important work.

Sincerely,

Kirsten D. Madison

Former Assistant Secretary of State, International Narcotics and Law Enforcement Affairs

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Mary Claire Mulligan, Criminal Defense Lawyer

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

I am concerned that the Commission has once again chosen not to correct the meth purity disparity. The original intent of what I will call the "purity increase" was apparently to equate culpability to purity. The assumption was that those closest to the source of the controlled substance would have access to the purest product, although I'm not aware that the Commission received any data on this topic. We now see anecdotally that this is false--extraordinarily pure methamphetamine is everywhere and is being handled by users and low-level street dealers daily. And this purity increase is affecting our Latinx clients disproportionately.

Submitted on: June 15, 2026

UNIVERSITY OF MINNESOTA

Twin Cities Campus

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[redacted]

July 27, 2026

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: University of Minnesota Law School Clemency Project Comment on Proposed Priorities for the Commission – 26-27 Cycle

Dear Judge Reeves:

Thank you for this opportunity to address the Commission's proposed priorities for the 26-27 Amendment Cycle. I am writing to address the Commission's proposed evaluation of the guidelines and federal sentencing practices in light of the upcoming 40th anniversary of the Guidelines Manual and the Commission's mission as set forth in the Sentencing Reform Act, informed by the statutory purposes of sentencing in 18 U.S.C. 3553(a).[1] In particular, I am mindful of the Commission's foundational mission to promulgate guidelines that promote certainty and fairness and reduce unwarranted sentencing disparities, *see* 28 US.C. 944(f), and "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A) & (C).

For more than four decades, the United States Sentencing Commission has compiled one of the nation's most comprehensive databases of federal sentencing outcomes. Yet its analyses remain focused primarily on the endpoint of the criminal process – the sentence ultimately imposed. Modern statistics, causal inference, and the broader social science literature caution against drawing conclusions from outcome data without accounting for the data-generating process that produced those outcomes. Even

[1] This letter expresses the personal views of the signatory, not the official views of the University of Minnesota.

complete and accurate outcome data can yield misleading inferences when they omit the institutional decisions and discretionary practices that shape the observed results.

It is an elementary proposition, but federal sentences are not produced by judges alone. They emerge from a complex sequence of discretionary decisions, including prosecutorial charging practices, the decision whether to invoke mandatory minimum statutes, plea bargaining strategies, cooperation agreements, the pursuit of sentencing enhancements, the quality of defense sentencing advocacy, the sentencing philosophies of individual judges, and the characteristics of defendants. Many of these factors vary substantially across districts, United States Attorneys' Offices, individual prosecutors, defense counsel, and judges. Because the Commission's datasets largely observe only the final sentence, while capturing comparatively little about the upstream discretionary decisions that generated it, they necessarily provide an incomplete account of sentencing disparities. As a consequence, analyses based solely on sentencing outcomes risk attributing disparities to judicial decision-making or overlooking them altogether, when they may instead reflect systematic differences in charging practices, advocacy, or sentencing philosophies that precede the final judgment.

The Commission's excellent 2018 report on the application and impact of the statutory penalty enhancement for drug offenders with a prior felony drug conviction, 21 U.S.C. § 851, demonstrates precisely why analyses confined to sentencing outcomes are incomplete.[2] By examining a single upstream prosecutorial decision, the Commission uncovered dramatic disparities in sentencing severity that would have been invisible had it looked only at final sentences. The report thus provides a concrete illustration of the importance of modeling the data-generating process rather than merely describing the dependent variable. If the exercise of discretion surrounding a single charging enhancement can produce such pronounced intra- and inter-district disparities, then any comprehensive account of sentencing disparity must also examine the many other discretionary decisions that precede sentencing – including charging choices, the pursuit of mandatory minimums, plea bargaining practices, sentencing enhancements, cooperation decisions, and other prosecutorial, judicial, defense and institutional policies practices that shape the sentence long before a judge enters the courtroom at sentencing.

(a) Prosecutorial Discretion

Prosecutorial discretion is perhaps the single most important independent variable influencing sentencing outcomes in the federal criminal justice system. Long before a sentencing judge exercises any sentencing discretion, prosecutors make a series of decisions that largely determine the sentencing landscape within which the judge must operate. These decisions include what charges to file, whether to seek mandatory minimum penalties, whether to pursue statutory sentencing enhancements, how to structure plea agreements, which guideline enhancements to seek, whether to offer cooperation opportunities, whether to recommend sentence reductions based upon substantial assistance, and whether to oppose downward departure/variance motions. Each of these discretionary decisions alters the range of legally available sentencing outcomes, often long before the sentencing hearing occurs.

[2] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf.

The Sentencing Commission has devoted considerable attention to sentencing disparities reflected in final judgments, but comparatively little attention to the prosecutorial decisions that generate those outcomes. Yet, as noted in my introduction, modern principles of statistics and causal inference recognize that outcome data cannot be fully understood without examining the data-generating process that produced them – in particular, the numerous discretionary decisions made by prosecutors through the pendency of the case. Analyses that observe only the sentence imposed, while overlooking the prosecutorial decisions that constrained or expanded the range of possible sentences, necessarily provide an incomplete account of sentencing disparity.

This principle is illustrated well in several of the Commission's own studies. We highlighted one above – prosecutorial use of sentence enhancements under 21 U.S.C. § 851. In that study, the Commission found dramatic variation among federal districts in the frequency with which prosecutors sought recidivist enhancements, despite similar statutory eligibility. Those differences translated into substantial differences in sentence length, demonstrating that prosecutorial charging practices – not merely judicial sentencing decisions – can be a significant source of unwarranted sentencing disparity. But the influence of prosecutorial discretion extends well beyond the use of statutory enhancements. Differences among United States Attorneys' Offices in charging philosophies, plea bargaining practices, cooperation policies, mandatory minimum charging decisions, and the routine use of guideline enhancements all shape sentencing outcomes in ways that are not readily observable from sentencing data alone. The Commission has highlighted, for example, that certain districts are more likely to test methamphetamine for purity, thus yielding far more severe sentencing guidelines.[3] Other Commission studies have highlighted inter-district disparities in the application of particular guideline adjustments, such as the mitigating role reduction.[4]

Because these discretionary practices vary across districts, offices, supervisors, and individual prosecutors, they introduce substantial variation into the sentencing process before a case ever reaches the sentencing judge. Any comprehensive empirical analysis of sentencing disparity must account for prosecutorial discretion as a principal component of the data-generating process that ultimately produces the sentence imposed.

(b) Judicial Philosophy

Judicial sentencing philosophy likewise constitutes an important independent variable influencing sentencing outcomes. Although the Sentencing Commission has devoted considerable attention to judicial sentencing outcomes, those differences should be understood as one component of a broader data-generating process rather than the sole source of sentencing disparity. Judge Myron Bright vividly illustrated this point in his

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[3] *See Federal Sentencing Snapshot: Methamphetamine Trafficking*, U.S. SENT'G COMM'N 2 (Jan. 8, 2026), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/data-snapshot_2026-methamphetamine.pdf (

[4] *See* https://www.ussc.gov/guidelines/amendment/794 (referring to the Commission's study of §3B1.2 (Mitigating Role), in which the Commission "conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony," concluding that "mitigating role is applied inconsistently and more sparingly than the Commission intended").

dissent in *United States v. Brewer*.[5] At the time, criminal cases arising on opposite sides of an interstate highway in the Northern District of Iowa were assigned to different district judges. Because one judge routinely rejected the then-prevailing crack cocaine guideline ratio while another generally adhered to it, Judge Bright observed that "the location of the crime relative to the interstate is a significant factor in crack cocaine sentencing," and that similarly situated defendants received materially different sentences depending upon which judge happened to receive the case.[6] He concluded that "the assignment of a case to a specific judge" had become "a meaningful and significant factor at sentencing,"[7] – a statement that could apply to the federal sentencing nationally.

Judge Bright's observation demonstrates that judicial assignment, like prosecutorial charging practices and the quality of defense advocacy, is an independent variable capable of materially influencing sentencing severity. Yet it also illustrates the limits of focusing on judges alone. Judicial philosophy affects only those cases in which the judge retains meaningful sentencing discretion. By contrast, prosecutorial charging decisions, mandatory minimums, plea negotiations, and effective defense advocacy (more of which below) frequently determine the sentencing range before the case ever reaches the courtroom. A comprehensive empirical account of sentencing disparity therefore requires examination of all of these interacting variables, rather than treating the sentence itself as though it were generated principally by judicial decision-making.

(c) Defense Advocacy

The quality of defense advocacy constitutes another important independent variable influencing sentencing severity, yet one that is largely invisible in the Commission's empirical analyses. As David Patton, former Attorney-in-Chief of the Federal Defenders of New York, observed, modern federal sentencing has fundamentally altered the role of defense counsel.[8] Because prosecutorial charging decisions frequently determine the applicable mandatory minimums, guideline ranges, and career offender exposure, the most consequential defense advocacy often occurs before sentencing, through mitigation presented to prosecutors, negotiations over charging decisions, plea agreements, and cooperation. Patton explains that, for many clients facing career offender treatment, even the least severe available statutory charge yields an extraordinarily long advisory guideline range, leaving defense counsel with little opportunity to obtain meaningful relief from the sentencing judge.[9] Instead, the lawyer's most effective advocacy may consist of persuading the prosecutor to select the charge carrying the lowest available sentencing consequences. Thus, effective defense representation can substantially influence the ultimate sentence, but it does so by affecting the data-generating process that precedes sentencing rather than the sentencing proceeding itself. Any empirical model that measures only the sentence imposed, while failing to account for the quality and timing of defense advocacy, necessarily omits another significant determinant of sentencing outcomes.

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[5] 624 F.3d 900 (8th Cir. 2010).
[6] *Id.* at 910.
[7] *Id.* at 911.
[8] David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 Yale L.J. 2578 (2013).
[9] *Id.* at 2592.

(d) Defendant Characteristics

The characteristics of the defendant likewise constitute important independent variables influencing sentencing outcomes. Defendants do not enter the criminal justice system with equal opportunities to obtain sentencing leniency. Rather, individual characteristics often determine whether a defendant can benefit from the very mechanisms that federal sentencing law recognizes as mitigating punishment.

Most notably, the opportunity to receive a substantial assistance reduction depends not only upon a defendant's willingness to cooperate but also upon the defendant's ability to provide information of value to the government. Low-level participants frequently possess little information capable of assisting prosecutors, while organizers and higher-ranking participants often have substantial bargaining leverage. Thus, similarly situated defendants may receive dramatically different sentences because one possesses valuable information and another does not.

Mental illness, intellectual limitations, substance use disorders, trauma, and other cognitive or psychological impairments may likewise affect a defendant's ability to recognize the significance of an early opportunity to cooperate, to make informed strategic decisions, or to maintain the sustained engagement often necessary to obtain substantial assistance credit. Likewise, defendants whose criminal conduct arises from close family, marital, or intimate relationships with more culpable offenders may face extraordinary practical and emotional barriers to cooperation that are absent for other defendants.

The defendant's custodial status may also influence sentencing outcomes. Defendants released pending sentencing often have opportunities to pursue treatment, employment, education, family responsibilities, and community service that may later support requests for downward variances based upon extraordinary rehabilitation. Defendants detained before sentencing frequently lack comparable opportunities, despite possessing equal motivation for rehabilitation.

Other personal characteristics may likewise influence the sentencing process. Differences in education, cognitive ability, cultural background, socioeconomic resources, gender, and access to experienced counsel may affect a defendant's capacity to understand legal advice, evaluate plea offers, make informed strategic choices, and present compelling mitigating evidence. These characteristics do not determine the sentence directly. Rather, they influence the defendant's ability to benefit from the discretionary decisions made by prosecutors, defense counsel, and judges throughout the criminal process.

Accordingly, defendant characteristics should be understood not merely as background demographic information but as independent variables that interact with every stage of the sentencing process. Any empirical model that focuses exclusively on sentencing outcomes, while overlooking the ways in which defendants differ in their ability to obtain sentencing leniency, necessarily provides an incomplete account of the forces producing sentencing disparities.

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In sum, we encourage the Commission to harness its extensive analytical resources during this 40-year retrospective to explore how systemic practices, discretionary decisions and human variables shape sentencing outcomes well before formal pronouncement.

Thank you again for the opportunity to submit this comment and please do not hesitate to contact the undersigned for additional information.

Respectfully submitted,

Prof. JaneAnne Murray
Clinical Professor of Law

Ed Newcomer, JD
[redacted]
Los Angeles, California 90247
[redacted]

July 21, 2026

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle NE, Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Comment for the US Sentencing Commission

Dear Members of the United States Sentencing Commission:

Thank you for this opportunity to submit my comment. This comment is intended to strongly encourage the US Sentencing Commission to review and adjust the Federal Sentencing Guidelines §2Q2.1 – Offenses Involving Fish, Wildlife, and Plants.

My name is Ed Newcomer and I was a special agent for the US Fish and Wildlife Service (USFWS) for over twenty years. During that time, I worked on many high-profile wildlife trafficking investigations involving wildlife and criminal violators from all over the world. For most of my career, I worked in Los Angeles, a hotspot for international and interstate wildlife trafficking, but, from 2015-2020, I served overseas as the senior law enforcement representative of the USFWS in nine African countries while officially attached to various US Embassies. I am also a licensed attorney and practiced law for ten years prior to joining the Service as a special agent. I am currently a member of the faculty at California State University, Dominguez Hills, where I teach courses on criminal justice and administrative law.

I have extensive experience working with the Federal Sentencing Guidelines and frequently used them during my career to calculate the likely sentence that could be applied to criminal violators of fish, wildlife, or plant statutes. Repeatedly during my career, I watched as serious criminals involved in wildlife crime were under-sentenced in the federal courts. A common complaint I heard expressed from the bench was that the sentencing judge regretted that the sentencing guideline calculations did not call for incarceration or that the guidelines did not call for sufficiently long incarceration. This was true even in cases where the sentencing judge had already departed upward as far as they were comfortable doing so.

Background: The current §2Q2.1 has not been substantively amended for twenty-five years. Even then, the amendment was minor, only raising the possible penalties when the market value of the involved wildlife or plants exceeded $5,000. The only other substantive change to the penalties occurred in 1989 (37 years ago) when the base offense was fixed at 6. In the time since 1989 and 2001, much has changed in the world. The majority of credible sources agree that

wildlife trafficking is now the third or fourth most lucrative illegal activity in the world. The International Criminal Police Organization (INTERPOL) estimates the value of the illegal wildlife trade at up to $20 billion annually, the World Bank Group, which includes timber in their calculations, estimates the costs of illegal logging, fishing, and wildlife trade at $1–2 trillion per year, and the UN Office on Drugs and Crime (UNODC) has documented more than 7,000 different species involved in annual global seizures.[1]

Meanwhile, the US Government has recognized that wildlife trafficking is a significant crime impacting US domestic and international interests. In July 2013, President Obama signed Executive Order 13648 – Combating Wildlife Trafficking. The Order was issued to address the significant effects of wildlife trafficking on the national interests of the United States and notes that "[p]oaching operations have expanded beyond small-scale, opportunistic actions to coordinated slaughter commissioned by armed and organized criminal syndicates."[2] The order also established the Presidential Task Force on Wildlife Trafficking (which is still in operation today) consisting of the heads of 14 separate US Government agencies including Treasury, Department of Homeland Security (DHS), and the National Security Agency (NSA).[3] Essentially, the Executive Order directed an "all of government approach" to addressing wildlife trafficking. In February 2017, President Trump issued Executive Order 13773 - Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking. President Trump's order directed US law enforcement to focus on dismantling organized criminal organizations involved in the most serious crimes, including wildlife trafficking as one of those serious offenses.[4]

Impact of Sentencing Guidelines: The current US Sentencing Guidelines, Section 2Q2.2, are out of step and out of date with the current state of wildlife and plant crimes in 2026. The Guidelines are one of the few places in the US system of justice that has not adjusted to address the problem. Under the current guidelines, the base offense level for a wildlife crime is 6. It increases to an 8 where commercialization is a driver, as is the case in many trafficking cases but certainly not all serious wildlife crimes. If the value of the wildlife exceeds $5,000, then the guideline sentencing number can increase incrementally (under §2B1.1) based on the value of the wildlife involved, which is often difficult to determine because in many cases there is no legal market. However, in practice, the low base value of 6, unchanged for more than 25 years (arguable 37 years), is resulting in sentences that lack serious deterrence. Some specific examples include:

(continued)

[1] UNEP-INTERPOL Report: The Rise of Environmental Crime (2016); World Bank Group, *Illegal Logging, Fishing, and Wildlife Trade: The Costs and How to Combat It* (2019); and, United Nations Office on Drugs and Crime, World Wildlife Crime Report: Trafficking in Protected Species (2016).
[2] Exec. Order No. 13,648, 78 Fed. Reg. 40,621 (July 5, 2013).
[3] Id.
[4] Exec. Order No. 13,773, 82 Fed. Reg. 10,691 (Feb. 14, 2017).

1. USA v. I.Z. – CR09-00805 (Central District of California)
   Total Offense Level: 8 (Base 6 / Pecuniary Gain +2)
   Criminal History: I
   Sentencing Range: 0-6 months.
   Final Sentence: 12 months + 1 day (upward departure)

   A major trafficker in invasive and protected fish, convicted of smuggling species protected by the Convention on the International Trade of Endangered Species (CITES) and the Endangered Species Act (ESA) with documented involvement in the smuggling and trafficking of invasive fish species over a period of five years, who also engaged in smuggling while on pre-trial release. The value of the wildlife could not be agreed upon by the parties or easily determined.

2. USA v. T.M. - CR-00235-JGB (Central District of California)
   Total Offense Level: 10 (Base 6 / Pecuniary Gain +2 / Endangered Wildlife +4 / Acceptance of Responsibility -2)
   Criminal History: II
   Sentencing Range: 8-12 months
   Final Sentence: 6 months probation.

   T.M. was considered by the USFWS to be one of the most prolific traffickers in live primates and big cats in the Southwestern United States. The offenses charged in this case involved the sale of a live endangered jaguar cub across state lines. T.M. was documented as being involved in additional illegal jaguar, primate, and other big cat interstate sales and had a criminal history involving wildlife offenses.

3. US v. J.N. – CR-00537-E (Central District of California)
   Total Offense Level: 6 (Base) +2 (Organizer under §3B1.1) -2 (Acceptance of responsibility)
   Criminal History: I
   Sentencing Range: 0-6 months
   Final Sentence: 180 days – suspended / Five years probation.

   J.N. was a significant defendant in Operation High Roller, a 14-month undercover operation conducted by the USFWS that exposed the wanton and intentional killing of federally protected hawks and falcons. J.N. served as the leader of a nationwide group of pigeon fanciers and openly advocated for the trapping and killing of protected migratory birds. He provided undercover agents with instructions on how to effectively kill, posted similar instructions online, and bragged to have personally killed more than forty birds per year for at least five years in a row. Investigating agents conservatively estimated that the group he led killed more than 2,500 hawks and falcons in the Los Angeles metropolitan area <u>every</u> year. There was no monetary value associated with the wildlife; they simply wanted to eliminate native predatory birds from the landscape.

4. Operation CRASH

   Between approximately 2013 and 2020, the USFWS conducted a nationwide enforcement action known as Operation CRASH. The focus of the operation was to target individuals involved in the illegal sale and shipment of rhino horns. The black-market value of a single rhino horn can exceed $50,000.[5] The operation consumed massive amounts of resources from the USFWS budget and diverted the efforts of many of their special agents away from other cases. It is often referred to by the USFWS as one of the largest investigative operations ever conducted by the agency. As of 2021, the US Department of Justice reported that "… 50 individuals and companies have been charged… [and the] sentences imposed totaled more than 40 years' incarceration."[6] The cited 40 years of incarceration is an average. Obviously, some defendants received higher sentences but, looking at the average, it is clear that there is a fundamental problem with sentencing. The average sentence for the single largest, most resource intensive criminal investigation conducted in the history of the USFWS resulted in an average sentence of less than one year. Hardly something for the agency to tout in furtherance of deterring one of the most serious and damaging wildlife crimes of this Century.

Interesting Comparative Examples: A simple perusal of the Federal Sentencing Guidelines Manual leads a reader to some glaring examples of how the guidelines with respect to wildlife and plant crimes are woefully out of step with the realities threatening the world's wildlife and plant resources today. For example:

§2B6.1 – Altering or Removing Motor Vehicle Identification Numbers – Base Level 8
§2E4.1 – Unlawful Conduct Relating to Contraband Cigarettes – Base Level 9
§2N3.1 – Odometer Laws and Regulations – Base Level 6

It seems incongruent that we are placing more emphasis on the enforcement of our laws related to vehicle identification and contraband cigarettes than we place on irreplaceable wildlife and plants.

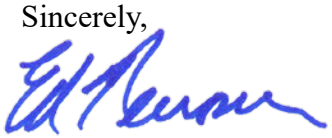
(continued)

[5] U.N. Off. on Drugs & Crime, *World Wildlife Crime Report 2020: Trafficking in Protected Species* 120 (2020).
[6] U.S. Dep't of Just., Env't & Nat. Res. Div., *Annual Accomplishments Report* 14 (2020), https://www.justice.gov/d9/pages/attachments/2020/02/09/enrd_narr_fy21_2.7.2020_final.pdf

Recommendation: Based on my experience as a special agent with the US Fish and Wildlife Service, having personally witnessed countless criminal prosecutions of serious wildlife offenders result in puzzlingly low sentences, I respectfully request that the Commission take up a review of §2Q2.1 and consult with experts in the fields of conservation, wildlife trade, and environmental law enforcement and prosecution.

Thank you for this opportunity to comment.

Sincerely,



Ed Newcomer, JD

United States Sentencing Commission
Attention: Public Affairs — Priorities Comment
One Columbus Circle NE, Suite 2-500
Washington, DC 20002-8002

Re: Public Comment on Proposed Priorities for the Amendment Cycle Ending May 1, 2027 (91 FR 35802)

July 22, 2026

Dear Chair Reeves and Members of the Commission:

I write to recommend that the Commission add to its policy priorities for the amendment cycle ending May 1, 2027 a review of **§2Q2.1 (Offenses Involving Fish, Wildlife, and Plants)**.

I am an environmental crime researcher at Farmingdale State College SUNY who studies the federal prosecution of environmental and wildlife crime using case-level court records. I offer this comment because two of my studies bear directly on how sentences under this guideline are distributed, and because I do not believe this evidence has previously been before the Commission.

1. Federal wildlife sentences cluster at zero across nearly every sanction

In a study published in *Frontiers in Conservation Science* (Sosnowski, Kim, Petrossian & Asner, 2022), I analyzed charging and judgment documents for 176 federal wildlife prosecutions adjudicated between 2014 and 2018, identified through the Department of Justice's Environment and Natural Resources Division (ENRD) monthly bulletins and retrieved through PACER.

Among the 163 individual defendants:

- Median incarceration was **zero months**; approximately 64% received **no custodial sentence**.
- Median restitution, forfeiture, community service, and supervised release were each **zero**.
- The median fine was **$750**.

Two further findings are relevant to guideline design. Thirty (30) cases involved wildlife imported from abroad, spanning fifteen (15) identified source countries; comparing those to domestic cases, we found no statistically significant difference in imprisonment, fine, or restitution. And among individual defendants, fine amount and custodial length were *negatively* correlated – larger fines accompanied shorter sentences.

2. Wildlife offenses are the least punished category within federal environmental enforcement

In a manuscript currently under peer review ("Uncovering the Green Docket: A Systematic Case-Level Analysis of U.S. Federal Environmental Crime Prosecutions"), I extend this work considerably: 589 federal environmental *and* wildlife prosecutions adjudicated between 2006 and 2022, coded at the defendant level from charging and judgment documents. That manuscript has not yet completed peer review, and its findings should be treated as provisional.

This study is directly relevant to the Commission's work because offenses were into four categories – wildlife, pollution, hazardous waste, and regulatory/fraud – and wildlife is used as the reference category in every model. Each result is therefore a statement about how wildlife defendants fare relative to other environmental defendants sentenced in the same federal courts.

Among federally prosecuted individual defendants (n = 445):

Offense category	% incarcerated
Wildlife	26.9
Regulatory / fraud	28.4
Pollution	34.4
Hazardous waste (RCRA)	68.8

The gap survives multivariate controls. Controlling for offense type, year, and case complexity, *hazardous waste was the only significant offense-type predictor of incarceration*, with defendants roughly **5.9 times more likely** to be incarcerated than wildlife defendants (OR = 5.86, $p < .001$) and serving sentences approximately **143% longer** (B = 0.887, $p < .001$). Pollution and regulatory/fraud offenses did not differ significantly from wildlife on either measure.

I also found that custodial punishment declined across the study period, independent of offense type and case complexity (incarceration OR = 0.83, $p < .001$; sentence length B = −0.096, $p < .001$), and that wildlife offending is overwhelmingly individual rather than organizational – relative to wildlife cases, hazardous waste offenses were 8.10 times and regulatory/fraud offenses 9.59 times more likely to involve a corporate defendant (both $p < .001$).

3. What this means for the Commission

I am a researcher rather than a sentencing practitioner, and I offer the following as observations from the data rather than as drafted guideline suggestions.

The comparison my second study makes empirically, the Guidelines Manual appears to make structurally. Hazardous waste offenses are sentenced under §2Q1.2 and wildlife offenses under §2Q2.1 – adjacent guidelines within the same Part of Chapter Two. Section 2Q1.2 carries a base offense level of 8, which the Commission's background commentary attributes to the inherently dangerous nature of hazardous and toxic substances; §2Q2.1 retains the base offense level of 6 used for regulatory violations generally. I would not claim the disparity I measure is attributable to that two-level difference alone – charging practice, relevant conduct, and the richer enhancement structure of §2Q1.2 all contribute, and my models do not separate them. The narrower point is that the Manual encodes an ordinal judgment about the relative seriousness of these two offense categories, the sentencing record shows a gap considerably wider than two offense levels would predict, and I am not aware that the calibration has ever been examined.

I would also note that §2Q2.1 keys offense seriousness primarily to the retail market value of the wildlife involved. Market value is difficult to establish for species whose trade is illegal, and it does not track

ecological harm in any consistent way — a bulk shipment of a common species may be worth more than a small number of critically endangered animals.

4. Limitations

Both studies identify cases through ENRD's monthly bulletins; if those releases are incomplete, that incompleteness carries into my samples. Both are limited to federally prosecuted matters and say nothing about civil, administrative, or state-level enforcement, or about conduct resolved before adjudication. Judgment documents were unavailable for approximately 7% of cases in the second study. Coding was performed manually with the assistance of document-reading tools and is subject to error.

I would be glad to provide the Commission with the full manuscript, the coded datasets underlying either study, or a more detailed breakdown of any result described above. I am equally willing to respond to questions from Commission staff.

Thank you for the opportunity to comment.

Respectfully submitted,

Monique Sosnowski, PhD
Assistant Professor
Farmingdale State College SUNY
[redacted]

Institutional affiliation is provided for identification only; the views expressed are my own.

MICHIGAN STATE
UNIVERSITY

July 23, 2026

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Affairs – Priorities Comment

Dear Commissioners,

I am writing in response to your request for public comments on how to "enhance public participation with and understanding of the Commission's work" in connection with a comprehensive review of the Commission's Rules of Practice and Procedure. I submit these brief comments as a law professor with expertise on public engagement with regulation who has served as a consultant on two major research projects for the Administrative Conference of the United States (ACUS) and published related law review articles on this topic.[1]

I commend you for undertaking this valuable and important work and I am grateful for the opportunity to provide this input. My goal is simply to bring to your attention recent sources that identify best practices for public engagement with agency policymaking, which may be of value to the Commission as you consider potential improvements to your Rules of Practice and Procedure. In addition to my own co-authored work and the related recommendations cited above, I heartily recommend ACUS's Statement of Principles for Public Engagement in Agency Rulemaking.[2] The Biden-Harris Administration and its Office of Information and Regulatory Affairs (OIRA) strongly supported meaningful public engagement efforts,[3] and a description of its efforts and related recommendations for improving public participation within federal agencies can be found in Richard Revesz's recently published article, *The Evolution of Regulatory Review*.[4]

MSU College of Law

Glen Staszewski
Professor of Law &
The A.J. Thomas Faculty Scholar

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[1] *See* Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.); Michael Sant'Ambrogio & Glen Staszewski, Public Participation in Agency Adjudication (May 16, 2025) (report to the Admin. Conf. of the U.S.); Michael Sant'Ambrogio & Glen Staszewski, Democratizing Rule Development, 98 WASH. U. L. REV. 793 (2021). For ACUS's Recommendations based on this research, see Admin. Conf. of the U.S., Recommendation 2018-7, Public Engagement in Rulemaking (Dec. 14, 2018); Admin. Conf. of the U.S., Recommendation 2025-3, Public Participation in Agency Adjudication (June 12, 2025). *See also* Anya Bernstein, Glen Staszewski, & Wendy E. Wagner, Sidelining the Public, 68 ARIZ. L. REV. 295 (2026) (providing a comparative institutional analysis of the public engagement practices and capacities of Congress and federal agencies).

[2] *See* Admin. Conf. of the U.S., Office of the Chairman, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Feb. 5, 2026).

[3] *See, e.g.,* Memorandum from Richard L. Revesz, Ad'r, Off. Info. & Regul. Affs., to the Heads of Exec. Dep'ts and Agencies, Broadening Public Participation and Community Engagement in the Regulatory Process (July 19, 2023).

[4] *See* Richard L. Revesz, The Evolution of Regulatory Review, 77 ADMIN. L. REV. 131, 198-214 (2025).

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The preceding sources (and literature cited therein) provide a wealth of information about the value of public participation and available tools and best practices for federal agencies to engage effectively with unaffiliated experts, interested persons with situated knowledge of the relevant issues, and affected stakeholders who have not typically participated in agency decisionmaking. I hope that you find this research useful as you embark on this vitally important project.

Thank you again for providing me with this opportunity to offer these suggestions. Please let me know if you have any questions or would like additional information.

Sincerely,

Glen Staszewski
Professor of Law & The A.J. Thomas Faculty Scholar

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Michelle Suleiman, Virginia, Eastern

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

Those who work in the criminal justice system—including judges, probation officers, correctional staff, and reentry professionals—often have a unique perspective on rehabilitation. They see firsthand that many nonviolent fraud offenders mature significantly during incarceration, complete educational and vocational programming, maintain excellent institutional records, and present a much lower risk of reoffending than they did at sentencing.

For that reason, I strongly support making the fraud loss guideline amendment retroactive. If the Commission has concluded that the prior loss table frequently overstated offense seriousness, individuals sentenced under the earlier guideline should have the opportunity to seek relief.

I also encourage the Commission to consider broader mechanisms that would allow courts greater flexibility in reviewing sentences for nonviolent fraud offenders, including those who may not qualify under a strict loss threshold. While eligibility criteria are important, rigid cutoff points can produce disparities where similarly situated individuals receive dramatically different treatment because of relatively small differences in calculated loss.

Where appropriate, courts should have discretion to consider meaningful sentence reductions based on the totality of the circumstances, including rehabilitation, institutional conduct, acceptance of responsibility, victim restitution efforts, public safety, and the purposes of sentencing under 18 U.S.C. § 3553(a). In some cases, that review may support a substantial reduction in sentence; in others, it may not. The decision should remain with the sentencing judge after an individualized assessment.

A retroactive amendment that preserves judicial discretion would promote fairness, encourage rehabilitation, reduce unnecessary incarceration, and strengthen confidence that federal sentencing policy reflects current evidence and sound judgment.

Honestly all sentences should be cut in half.

Tina C. Tolliver, M.Jur., CCEP, CHPC, LPEC, CHCQM-PSRM

TCT14 Integrity Partner

Greenville, North Carolina

July 13, 2026

United States Sentencing Commission

One Columbus Circle, N.E., Suite 2-500

Washington, D.C. 20002-8002

Attention: Public Affairs — Priorities

Re: Public Comment on Proposed Priorities for the Guidelines Amendment Cycle Ending May 1, 2027 (Federal Register Doc. 2026-11906)

Dear Members of the Commission:

I. Introduction

I write to urge that the Commission's priorities for the amendment cycle ending May 1, 2027, include a focused examination of Chapter Eight's organizational sentencing guidelines — specifically the effective compliance and ethics program criteria at §8B2.1, and the culpability-score credit those criteria support under §8C2.5(f) — with respect to the structural independence of the compliance and ethics function within regulated organizations. I offer this comment as an individual, drawing on decades of practice as a chief ethics, compliance, risk, and privacy officer across hospital, physician-practice, behavioral health, managed care, and pharmacy settings, and on subsequent work developing structural reform proposals for the compliance and ethics profession.

II. The Gap Between Stated Standard and Assessed Practice

Section 8B2.1 identifies the hallmarks of an effective compliance and ethics program in general terms, including that an organization's governing authority and high-level personnel exercise reasonable oversight, and that compliance personnel be given adequate authority and direct access to the governing authority. In practice, however, the specific structural conditions that would make that authority and access real — an unfiltered reporting line to the board or a board committee, protection from removal or material demotion without board notice, resource and budgetary parity with other risk-bearing functions, and periodic written certification of the officer's independence — appear almost exclusively as remedial conditions imposed after the fact, through Corporate Integrity Agreements and comparable settlement instruments negotiated once an organization has already been found to have failed.

The Department of Health and Human Services Office of Inspector General's May 2026 overhaul of its Corporate Integrity Agreement framework is the clearest current illustration of this pattern.

That overhaul, for the first time, requires an independent board compliance expert in every Corporate Integrity Agreement, embeds information-technology expertise on compliance committees, and imposes new generative-AI governance and reporting obligations. Structural independence, in other words, is arriving in real time — but only as the negotiated price of a settlement already reached, not as a standard organizations are expected to meet in advance.

These conditions are not, at present, criteria the guidelines ask courts or prosecutors to weigh in assessing whether a program was effective before misconduct occurred. The result is a framework that can credit an organization for installing structural independence only after violation and investigation, while offering little basis in the record for the Commission, courts, prosecutors, or the organizations themselves to examine whether that independence existed beforehand. An effective-program credit that can be earned largely through post-violation remediation does not test the proposition it purports to test.

III. Requested Priority

I respectfully ask the Commission to examine, as part of its priorities for the coming cycle, whether §8B2.1's effective-program criteria should be clarified or strengthened to identify specific, verifiable structural independence factors, including:

(a) a direct reporting line from the compliance and ethics officer to the governing authority or a designated committee of it, without a requirement of pre-clearance by executive management or the general counsel;

(b) protection from removal or material demotion of the compliance and ethics officer without prior notice to, and an opportunity to be heard by, the governing authority;

(c) resource and budgetary parity commensurate with the organization's other significant risk-bearing functions; and

(d) periodic written certification, by the chief executive officer and the governing authority, attesting to the compliance and ethics officer's independence and access — comparable in concept to the certification obligations imposed on financial reporting under Sections 302 and 906 of the Sarbanes-Oxley Act.

These factors are not novel. Each has precedent in existing government frameworks, including the Government Accountability Office's Green Book (GAO-14-704G) — specifically Principle 2, that the oversight body should oversee the entity's internal control system, and Principle 3, that management should establish an organizational structure, assign responsibility, and delegate authority to achieve objectives — and in the independence and reporting provisions the Department of Health and Human Services Office of Inspector General now regularly imposes in Corporate Integrity Agreements. What is presently missing is their incorporation into the guidelines that shape an organization's incentive to build these structures before misconduct occurs, rather than after.

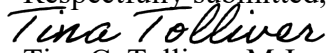
IV. Why This Warrants Priority Now

This concern is not speculative. A June 2026 survey of 328 compliance and ethics professionals, conducted by Compliance Week and Radical Compliance, found that 70 percent of respondents had experienced retaliation at some point in their careers for raising a compliance or ethics concern, and that 48 percent had been deterred by fear of retaliation from raising a concern at all. Most relevant to this comment: among those who reported the retaliation to management, 53 percent said management took no action whatsoever. That last figure is the point — even where an internal reporting channel exists and is used, the guidelines currently supply no structural consequence for an organization's failure to act on retaliation against its own compliance function. I would be glad to provide the full survey report, additional sourcing, and case patterns if useful to the Commission's consideration of this priority.

V. Conclusion

I appreciate the Commission's ongoing work to reduce disparity and strengthen the guidelines' underlying purposes, and I respectfully request that structural independence of the compliance and ethics function be included among the priorities considered for the amendment cycle ending May 1, 2027. I am available to provide further written comment, data, or testimony should the Commission find it useful.

Respectfully submitted,



Tina C. Tolliver, M.Jur., CCEP, CHPC, LPEC, CHCQM-PSRM

TCT14 Integrity Partner

Public Comment - Proposed 2026-2027 Priorities

Submitter:

G. D'Anne Weise

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

The Honorable Chair and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002

Re: Petition Requesting a Comprehensive Study of Drug-Induced Homicide Prosecutions and Mandatory Minimum Sentencing

Dear Chair and Commissioners:

I respectfully request that the United States Sentencing Commission undertake a comprehensive empirical study of federal drug-induced homicide (DIH) prosecutions and the role of mandatory minimum sentencing in these cases.

Although the Commission has devoted considerable attention to fentanyl, drug trafficking, compassionate release, sentencing disparities, and mandatory minimum penalties generally, one area of federal sentencing policy has received comparatively little systematic examination: the rapidly expanding use of drug-induced homicide statutes against individuals connected to fatal overdoses.

Over the past decade, DIH prosecutions have become one of the federal government's most severe responses to the opioid crisis. Defendants convicted under 21 U.S.C. § 841(b)(1)(C) frequently receive mandatory minimum sentences of twenty years or more when a death results from the use of a distributed controlled substance. These prosecutions have increased at a time when overdose deaths have continued to rise, and illicit drug markets have become increasingly dominated by fentanyl and other synthetic opioids.

The Commission is uniquely positioned to evaluate whether current sentencing practices are achieving their intended purposes and whether they remain consistent with the principles of proportionality, deterrence, and individualized sentencing embodied in federal sentencing policy.

My interest in this issue arises from both scholarly research and personal experience. Over the past several years, I have published a series of papers examining drug-induced homicide prosecutions from legal, criminological, neuroscientific, and public policy perspectives. These include:

Hancock, G.D. "The Illusion of Victimhood In Overdose Deaths," Charleston Law Review, (forthcoming Fall 2026).

Hancock, G.D. "The Myth of the Addict-Dealer," Journal of Law & Policy, (forthcoming in Dec. 2026).

Hancock, G.D. The Criminalization of Addiction: The Case of US vs Gary Scott Hancock. (Ingram-
Sparks, 2024).

Hancock, G.D. "For a Motive of Kindness...20 years in Federal Prison," Novel Research in Sciences, Vol. 13, No. 3, (February 2023), pp. 1-12.

A forthcoming manuscript examines the Department of Justice's enforcement-centered approach as the nation's de facto drug policy. Collectively, these papers raise important empirical questions that cannot be answered through individual case studies alone and instead require the type of national sentencing analysis that only the Commission can perform.

The expansion of DIH prosecutions presents several issues that merit careful study.

First, little information is available at the national level regarding the defendants prosecuted under these statutes. Public discourse often assumes that such prosecutions target major traffickers or organized criminal enterprises. Yet many reported federal cases involve individuals with severe substance use disorders, friends, family members, intimate partners, or low-level participants operating within informal networks of shared addiction. A comprehensive Commission study could determine whether these observations are representative of federal practice or merely anecdotal.

Second, relatively little is known about sentencing outcomes in DIH cases. The Commission is ideally situated to examine sentence length, mandatory minimum application, plea bargaining practices, departures, variances, criminal history, district-level variation, and judicial sentencing patterns. Such information would provide policymakers with an objective understanding of how these prosecutions operate in practice.

Third, the Commission could evaluate whether current sentencing practices appropriately distinguish among varying levels of culpability. Existing statutes broadly define "distribution" to include virtually any transfer of a controlled substance. Consequently, individuals who share drugs among acquaintances may be subject to the same mandatory sentencing framework as those operating sophisticated trafficking organizations. Whether current sentencing practices adequately distinguish between these fundamentally different forms of conduct deserves careful empirical evaluation.

Fourth, the Commission is uniquely positioned to examine whether mandatory minimum sentences imposed in DIH cases advance the traditional purposes of sentencing identified in 18 U.S.C. § 3553(a). These purposes include deterrence, protection of the public, just punishment, and rehabilitation. Existing research raises questions regarding whether increasingly punitive responses to overdose deaths have produced measurable reductions in overdose mortality or opioid addiction. At the same time, evidence suggests that illicit drug markets have adapted to enforcement pressures through the increasing distribution of highly potent synthetic opioids. A careful assessment of the relationship between sentencing policy and public safety outcomes would provide valuable guidance for Congress and the federal judiciary.

Fifth, a Commission study could contribute substantially to ongoing discussions concerning proportionality and sentencing consistency. Traditional criminal law distinguishes among intentional, reckless, negligent, and accidental conduct based upon differing levels of culpability. Drug-induced homicide prosecutions often arise in situations involving complex questions of addiction, causation, shared participation, and foreseeability. Understanding how these cases fit within broader federal sentencing policy would assist future policymakers in evaluating whether current mandatory sentencing structures appropriately reflect individualized culpability.

I respectfully suggest that the Commission consider examining several research questions:

- Who is being prosecuted under federal drug-induced homicide statutes?
- What proportion of defendants have documented substance use disorders?
- How frequently are mandatory minimum sentences imposed?
- What demographic, criminal history, and offense characteristics distinguish DIH defendants?
- How much sentencing variation exists across judicial districts?
- How frequently are departures or variances granted?
- What role do plea agreements play in determining sentencing outcomes?
- How do DIH prosecutions compare with other federal homicide and drug-trafficking offenses?
- Is there empirical evidence that increasingly severe sentencing has reduced overdose mortality or improved public safety?
- Are punitive U.S. drug laws the reason for the very high incarceration rates in the U.S. relative to all other countries?

These questions are fundamentally empirical. They require comprehensive sentencing data that

are available to the Commission but largely unavailable to independent researchers. The resulting analysis would significantly improve public understanding of one of the most consequential developments in contemporary federal drug enforcement.

My purpose in submitting this petition is not to advocate for any predetermined policy outcome. Rather, I urge the Commission to undertake an objective, evidence-based examination of this rapidly expanding area of federal sentencing. Regardless of one's views concerning drug policy, effective sentencing policy should be informed by reliable empirical evidence rather than assumptions regarding deterrence or offender characteristics.

The United States Sentencing Commission has long served as the nation's principal source of objective research on federal sentencing practices. A comprehensive study of drug-induced homicide prosecutions would continue that tradition and provide Congress, the judiciary, practitioners, and the public with information essential to evaluating the effectiveness, proportionality, and fairness of current federal sentencing policy.

Thank you for your consideration of this request and for your continued commitment to evidence-based sentencing policy. I would be pleased to provide copies of my published research or any additional information that may assist the Commission in evaluating this proposal.

Respectfully submitted,
G. D'Anne Weise, Ph.D.
Emerita Professor of Finance
University of Missouri−St. Louis

Submitted on: July 16, 2026

From the Archive: Considering Again When the U.S. Sentencing Commission Should Apply Guideline Amendments Retroactively?

The third in a series of essays we're revisiting to mark two years of the Sentencing Matters Substack

JONATHAN J. WROBLEWSKI
JUL 23, 2026

Share

Two years ago, we created this Substack to try to make sense of sentencing doctrine, data, and practice. To mark this anniversary — and to respond to the Commission's recently published proposed policy priorities — we went to the archive, and we have been reprinting several early essays published here back in 2024. We think these essays are timely in part because they address the Commission's intent, as outlined in its recently published priorities, to undertake a renewed study of the building blocks of federal sentencing policy and policymaking.

Each of our original essays grapples with a systemic question that sits at the heart of the Commission's policy agenda: the first, on how a federal advisory guideline system might be better structured; the second, on the place for second-look sentencing in the federal system, now especially timely in light of the recent Supreme Court decisions in Rutherford *and* Fernandez*; and in this essay, why the Commission should issue a detailed, written, and reasoned opinion on when it applies guideline amendments retroactively.*

The Commission's recent notice of proposed priorities included this –

> *Beyond the consideration of possible policy priorities this year, the Commission has chosen to not solicit public comment or hold a hearing on retroactivity. When the Commission submits amendments to Congress, it may decide to publish an issue for comment and hold a hearing on whether to make some or all of those amendments retroactive. See USSC Rules of Practice and Procedure 4.1. The Commission is not taking these steps for any of the amendments submitted to Congress on April 30, 2026. While three Commissioners may have voted in favor of making retroactive Amendment 2 (relating to inflationary adjustments) of the amendments submitted by the Commission to Congress on April 30, 2026, those votes alone would not have met the Sentencing Reform Act's four-vote threshold for retroactivity. See 28 U.S.C. 994(a)(2).*

This essay from 2024 argues that the Commission has never adequately explained how the factors it considers in deciding retroactivity — the factors mentioned in its current policy statement — are measured and assessed against one another and against other factors. The Commission has never articulated how they lead to a set of "general principles" of retroactivity that can be applied in a consistent and principled way to future circumstances.

Since the essay was first published, the Commission has not applied any of its amendments that reduce penalties retroactively, although in the recent notice, it revealed that "three Commissioners may have voted in favor of making retroactive Amendment 2 (relating to inflationary adjustments) of the amendments submitted by the Commission to Congress on April 30, 2026." And the Commission still has not publicly grappled with how retroactivity decisions are made.

Our hope is that the Commission will make it one of its priorities this year to hold a structured hearing on retroactivity. It could invite leading advocates or academics and have them argue — in a serious and rigorous way — what the Commission's general principles of retroactivity should be and how they should be applied. The Commission then might write an opinion (or more likely, two competing opinions) explaining its thinking and analysis. Subsequently, the Commission could hold a facilitated conversation among stakeholders, using the opinion(s) as a starting point, to guide consideration of what an amended policy statement on retroactivity might look like. The participants would have a mandate to produce a structured report documenting the points of agreement, disagreement, and the tradeoffs at stake.

- - -

Is it Time for the U.S. Sentencing Commission to Issue a Detailed, Written, and Reasoned Opinion on When it Applies Guideline Amendments Retroactively?

July 17, 2024

Earlier this week, the U.S. Sentencing Commission held a public hearing to receive testimony from invited witnesses on whether to apply retroactively guideline amendments promulgated in April related to acquitted conduct, firearms, and drug offenses. The Sentencing Reform Act gives the Commission the responsibility, when it reduces the term of imprisonment recommended in the guideline applicable to a particular offense or category of offenses, to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). In other words, the Commission must decide whether to apply guidelines that reduce imprisonment terms retroactively.

Since 1989, the Commission has indicated that "[a]mong the factors" it considers in making retroactivity decisions are "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range." These are the criteria the Commission has publicly identified — in the Background Commentary to §1B1.10 of the Guidelines — for its retroactivity decisions.

These factors must have seemed quite sensible to the Commission when it first added them to the Guidelines Manual, for they are not unlike the standards the U.S. Supreme Court set forth in *Linkletter v. Walker*, 381 U.S. 618, 622-24 (1965) and *Stovall v. Denno*, 388 U.S. 293, 297 (1967) for determining retroactivity of new rules of criminal procedure. In *Linkletter*, the Court faced the question of whether *Mapp v. Ohio*, which made the exclusionary rule for illegal searches and seizures applicable to the States, should be applied retroactively to cases on collateral review. The Court determined that retroactivity of *Mapp* should be determined by examining the purpose of the exclusionary rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the exclusionary rule. 381 U.S. at 636-640. The Commission's retroactivity factors are echoes of the Court's in that era.

But the *Linkletter* standard was quickly and roundly criticized, both in the academy and in the Supreme Court itself, for being overly opaque and for not leading to consistent outcomes. Justice Harlan repeatedly criticized the standard in various concurring and dissenting opinions. *See, e.g., Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting). The standard led to a hodgepodge of disparate treatment. Before too long, the Supreme Court changed course.

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court rejected as unprincipled and inequitable the *Linkletter* standard for cases pending on direct review at the time a new rule is announced and adopted the first part of the retroactivity approach advocated by Justice Harlan. Later, in *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that new rules should receive very limited retroactivity in cases on collateral review. In those instances, the Court held, a new rule applies retroactively only if (1) the rule is substantive and not procedural or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

Whether you agree or disagree with the Court's decisions in *Linkletter, Griffith*, and *Teague*, the Supreme Court should be commended for having directly wrestled with — in its written and reasoned opinions — how and why new rules should be applied retroactively. It laid out the factors, certainly, just as the Commission has. But then, the Court grappled openly with how to apply them. For example, in its inquiry into how the purpose of a new rule plays into the retroactivity decision, the Court weighed whether and to what degree the new rule was an effort to ensure "the fairness of the trial — the very integrity of the fact-finding process." *Linkletter*, 381 U.S. at 628 n.13, 639 & n.20 (1965).

The Court also continued to openly wrestle with how the interests of finality are to be weighed in determining whether a new rule should be applied retroactively and when those interests are outweighed by, for example, a new "substantive" or "watershed procedural" rule. For example, in *Montgomery v. Louisiana*, Justice Kennedy reasoned for the Court that "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. [Citations omitted.] It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." 577 U.S. 190, 203 (2016). And in *Edwards v. Vannoy*, Justice Kavanaugh, writing for the Court, concluded that decades of experiences applying the *Teague* standard must lead to the conclusion that "no new rules of criminal procedure can satisfy the watershed exception." 593 U.S. 255, 271 (2021).

The Commission has not done similar work explaining how the factors it considers in deciding retroactivity are measured and assessed against one another — and against other factors — in particular circumstances and how they lead to a set of "general principles" of retroactivity that can be applied to future circumstances. While individual commissioners have made statements at public hearings of their reasons for supporting or opposing retroactivity for individual amendments, the Commission as a body has never explained it's approach to retroactivity beyond the bland and unhelpful statement in the Background Commentary to §1B1.10 that "[t]he listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants." Doesn't the reduction of a guideline range always reflect a policy determination by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing?

The lack of explanation has led to what looks — to me anyway — like a rather silly notice and comment exercise each time the Commission considers a new amendment for possible retroactivity. The Commission publishes an issue for comment, seeking input into the retroactivity decision, and the stakeholders interpret the three factors listed in §1B1.10 in diametrically opposite ways. This is not surprising, as the listed factors can reasonably point in any direction. If the "magnitude of the change in the guideline range made by the amendment" is small, advocates for retroactivity can argue that the disruption to the system will likewise be small. If the magnitude is large, they can argue that the cost savings to the Bureau of Prisons will likewise be large, and that justice demands action in light of the enormity of the impact. Either way — small or large — the magnitude factor points both ways.

So, for the amendments passed in April, where the Federal Defender Sentencing Guidelines Committee can reasonably conclude that "[t]hese factors favor retroactivity for each amendment", *Letter from Heather Williams, Chair Federal Defender Sentencing Guidelines Committee to the Honorable Carleton W. Reeves*, June 21, 2024, the Department of Justice can reasonably come to the exact opposite conclusion. *Letter from Scott Meisler, U.S. Department of Justice ex-officio Member, U.S. Sentencing Commission to the Honorable Carleton W. Reeves*, June 21, 2024. Both can quote from individual commissioners –

> As Commissioner Gleeson observed last year during the vote on retroactivity of Parts A and B of Amendment 821 (the 2023 Criminal History Amendment), remedying overly punitive sentencing policies and practices that have a disproportionate effect on Black and Brown people implicates fundamental fairness concerns within the sentencing guidelines and the criminal justice system, more broadly.

Letter from Heather Williams at p. 3.

> As then-Commissioner Howell observed in 2011, "the Commission has over its history used its authority under 28 U.S.C. § 994(u) infrequently to [make] retroactive guideline amendments that reduce sentencing ranges." That same year, then-Chair Saris explained that, "because of the importance of finality of judgments and the burdens placed on the judicial system when a change to the guidelines is applied retroactively, the Commission takes this duty very seriously and does not come to a decision on retroactivity lightly."

Letter from Scott Meisler at p. 2.

Both can reasonably analyze the §1B1.10 factors and come to opposite conclusions. And while prosecutors and defense attorneys coming to such opposite conclusions is not something novel or unexpected, the factors listed in §1B1.10 are particularly unhelpful in creating any cognizable and applicable standard for retroactivity, at least without further explanation by the Commission about how and why it applies those factors and how and why they interact with one another and with the principle of finality.

The Commission has expressed no principles for the application of the §1B1.10 factors listed and especially how they weigh against the interests of finality. While §1B1.10 has been amended many times to address the mechanics and application issues of amendments that have been applied retroactively, the Commission has not addressed its decision-making on which amendments to apply retroactively.

Should retroactive application of guideline amendments be limited to instances "when an amendment would rectify an inequity," as suggested by the Criminal Law Committee of the Judicial Conference? *Letter from the Honorable Edmond E. Chang Chair, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable Carleton W. Reeves*, pp. 4-5, June 21, 2024. Should retroactivity be used "to rectify past unwarranted disparity in applying [an] enhancement" as suggested by the Federal Defender Sentencing Guidelines Committee? *Letter from Heather Williams* at p. 12. How does the Commission weigh the complexity of applying an amendment retroactively? How does it weigh the impact of retroactivity on the federal criminal justice system generally and how does that analysis relate to the legislative history of 28 U.S.C. § 994(u) which states: "the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983). How did the Commission decide to apply the "status points" amendment retroactively last year when the amendment leads in the vast majority of cases to the equivalent of a one-level adjustment and how is that consistent with Congress' direction not to apply an amendment retroactively when it is "only a minor downward adjustment in the guidelines?"

These and so many other questions deserve answers from the Commission. Over ten years ago, my colleague, Professor Berman, published an article discussing finality considerations, *Re-Balancing Fitness, Fairness, and Finality for Sentences*. Wake Forest J. L. & Pol'y, Volume 4:1, 151, 2014. In it, he identified some of the similarities and differences in the analysis of sentencing finality on the one hand and judgment finality on the other. Among other points, Professor Berman suggests different sentence finality concerns are implicated for crimes that create "lasting victims whose personal repose and psychic peace may only be well served by bestowing sentences with heightened certainty and predictability." His article and others engaging with distinct sentence finality concerns flag components of the work the Commission ought to do and then explain to stakeholders and the public.

None of this is to suggest that developing a reasoned Commission opinion — and set of principles from the §1B1.10 factors — on how it implements § 994(u) will be simple. Last year's 4-3 vote on retroactivity by members of the Commission regarding criminal history amendments suggests there may be majority and dissenting opinions. There will certainly be differences of views among the commissioners, some of which will be reconcilable and some of which will not. Nonetheless, the Commission owes it to the rest of us to wrestle with these issues, first privately, but then in a detailed, written, and reasoned accounting of its decision-making. Congress wisely gave the Commission the responsibility for retroactivity decisions. But the Commission owes it both to Congress and the rest of us, to exercise its expertise more deliberately, explicitly, and transparently.

Reimagining How the U.S. Sentencing Commission Makes Policy

Moving away from parochial advocacy and towards public interest deliberations

JONATHAN J. WROBLEWSKI
JUL 20, 2026

2 Share

The Sentencing Reform Act of 1984 established the U.S. Sentencing Commission as an independent agency "in the judicial branch of the United States." More than forty years later, the full implications of that judicial branch placement are still far from clear. But one thing we do know is that the Commission has always been led by a federal judge, and for most of its history, there has been a statutory mandate that no fewer than three of the seven voting commissioners "shall be Federal judges."

There is a tendency in all of us to believe that whatever expertise we have in one field will translate naturally to others. Our mastery of something gives us a false sense of universal competence. Elon Musk believed it would be so easy to run the federal government because of his success starting and running an electric car company. But I keep checking my bank account for my DOGE dividend check he promised, and nothing ever arrives.

Judges, unfortunately, are not immune from this tendency. As Carol Leonnig and Aaron Davis well documented in their book, *Injustice: How Politics and Fear Vanquished America's Justice Department*, Merrick Garland brought a judicial mindset with him to the Department of Justice (DOJ) in 2021, both in the way he ran the Attorney General's office and in an overly cautious approach to the job he took to avoid the appearance of being political. The consequences of that judicial approach made history.

At the Commission, which has been chaired by seven different judges, a judicial mindset has been the dominant institutional culture, shaping not just who sits on the Commission but how it approaches its work. Judges are trained and experienced in deciding disputes between adversaries. In doing that, they receive written submissions from opposing parties, hold hearings at which those parties make their best arguments, and then retreat to chambers, perhaps to discuss the dispute with their clerks, but certainly to render a judgment of their own. It's a tried-and-true process for resolving disputes of law and fact between two parties. It can be a very poor process for making sustainable sentencing policy.

The Commission's overall professional diversity problem compounds this judicial orientation. We have written on the Substack before about Judge Marvin Frankel's vision for a sentencing commission filled with "lawyers, judges, penologists, and criminologists . . . sociologists, psychologists, business people, artists, and, lastly for emphasis, former or present prison inmates."

But the U.S. Sentencing Commission's membership has never matched that vision; it has been dominated by judges and lawyers. Unlike most state sentencing commissions that typically have between one and two dozen members of varying backgrounds and experiences, the U.S. Sentencing Commission has only seven seats, and they're almost always filled with just lawyers and judges. [1]

The most tragic illustration of what happens when a sentencing policy making body thinks and acts like a court came in the mid-1990s, when the Commission was confronting the important sentencing question of what to do about the 100-to-1 quantity ratio that once defined the crack and powder cocaine sentencing disparity. The Commission had unanimously concluded that the disparity could not be justified; that the racial consequences were unwarranted; and that the Guidelines could account for differences in aggravating factors associated with individual cases without a broad-brush sentencing scheme based solely on drug type and quantity. But there was disagreement about whether to eliminate the differential ratio entirely or merely reduce it.

The Commission structured its decision-making then as it has done for most of its history. It solicited written briefing from the various parties and held a public hearing resembling an oral argument, at which various interest groups made their most forceful case. Then, Chair Richard Conaboy, a federal judge from the Middle District of Pennsylvania, asked each commissioner to reflect in private on what they had heard and to then vote their conscience. If Congress disagreed, he said without any concern, it could reverse the Commission's decision as appellate courts reverse lower court decisions. No big deal, he surmised. After virtually no deliberation, the Commission voted four to three in a public meeting to equalize the quantity-based penalties for crack and powder offenses. The vote came as much of a surprise to the commissioners as to the public. The Clinton Administration almost immediately came out against the Commission action. Congress later formally rejected it. A historic opportunity was lost. The Commission would soon lose its quorum and then all of its commissioners. A big deal after all.

The Sentencing Commission announced last month that it will undertake a comprehensive review of its Rules of Practice and Procedure — the document that in theory governs how the Commission conducts its business, engages the public, develops guideline amendments, and manages its relationships with Congress, the courts, and the Executive Branch. Those Rules were last amended in 2016, and before that in 2007. The last truly comprehensive rethinking dates to the Rules' original adoption in 1997. This new review, therefore, represents not merely a housekeeping exercise but a genuine opportunity to ask fundamental questions about whether the Commission's institutional design and policymaking processes are actually adequate to the consequential work the Commission performs.

Fundamental to the task is a recognition that the U.S. Sentencing Commission is not a court. It is a policymaking body. It makes sentencing policy that, at its core, like much policymaking, is a balancing of competing values — proportionality against deterrence, just punishment against rehabilitation, uniformity against the need for individualized justice, granularity against workability. The Commission's processes have been designed in many ways to look like courtroom adjudication: written briefing from interested parties, public hearings with each witness setting forth its preferred policy alternative, no public deliberation, and then a vote. That architecture is not designed to produce the kind of shared and careful consideration that good sentencing policy requires.

What is missing from the policy development process held in public — structurally absent — is the public and reasoned weighing of competing interests against each other, the reasoning toward a solution that serves not any particular constituency but the public as a whole. Commissioners listen to sequential advocacy, not structured deliberation. As a member of the Commission for ten years, I found this the most excruciating part of being a commissioner. I wrote about in the context of retroactivity decision here —

Reasoned Agency Decisionmaking and the Upcoming Announcement of the U.S. Sentencing Commission's Policy and Research Priorities for the 2024-25 Guideline Amendment Year

The Commission receives not a balanced assessment of the relevant considerations but a series of maximally one-sided presentations, each designed to push it in a particular direction. This is the way lawyers are trained. It would have been extraordinary if good policy had consistently emerged from that process.

The Structural Limits of the Current Policy Development Process

Nowhere is this structural problem more apparent than in the Commission's advisory group structure and, to a significant extent, its representation by the Department of Justice. The Commission maintains standing advisory groups organized around individual constituencies — practitioners, probation officers, tribal issues, victims. Each presents its preferred outcomes to the Commission. And each does so without ever being required to sit across the table from the other groups, hear their arguments, acknowledge the legitimacy of competing interests, or explain how its preferred outcome serves the public interest rather than merely its own.

The single-stakeholder advisory group model is perfectly designed to produce advocacy. It is almost perfectly designed to prevent deliberation. Members don't hear each other's arguments until those arguments have been cemented into and presented as written comments or oral hearing testimony. They are never required to confront the costs their preferred positions impose on other constituencies. They are never asked to prioritize, to trade off, to explain how their preferred outcome fully serves the public interest. The result is that the Commission receives a series of maximally opposed position statements and is left entirely on its own to bridge the gap.

What is structurally absent from the Commission's public policy development process is any mechanism for weighing competing interests against each other — for reasoning toward a solution that serves the public as a whole.

When I served as the Attorney General's representative to the Commission, we were often part of the problem. I found the most valuable part of the role was its intelligence-gathering function. The Department of Justice encompasses United States Attorney's offices in ninety-four districts, each with its own caseload, its own prosecutorial culture, and its own ground-level experience of how the Guidelines work and where they fall short. Surveying this vast operational enterprise, as we did about this time each year — asking line prosecutors, supervisors, and also agency officials what was working, what was not, and what they would change — consistently produced insights that no amount of Washington-based consideration could replicate.

The frustrating part came when proposed amendments were published for comment. What happened — at DOJ and across Commission stakeholder groups, with a regularity that came to feel almost mechanical — was for every stakeholder to argue for the outcome that best served its own institutional interests. DOJ argued mostly for positions that favored prosecutorial flexibility and punishment. Victims' organizations argued for the interests of victims. Defense organizations argued for decreased punishment. Each side marshaled whatever data supported its preferred position, ignored what did not, and presented its case with complete confidence that its preferred outcome was also the just one. Nobody in the room was required to fully confront the competing interests against each other. The task was not structured to find the answer that best served the American people.

As the Commission takes on its review of its rules and procedures, it need not start from scratch. It is blessed with a remarkable body of knowledge about how rulemaking agencies can do better. This knowledge base includes much information on how the Commission can engage more diverse constituencies, ground policy in stronger empirical foundations, conduct more genuine deliberation, and produce decisions that are more legitimate and more durable.

The Administrative Conference of the United States (ACUS) has produced a library of recommendations on effective rulemaking practice, covering everything from advanced notice procedures to the use of negotiated rulemaking, from digital engagement platforms to plain-language communication. State sentencing commissions — particularly those in Minnesota, North Carolina, Washington State, and Pennsylvania — have developed sophisticated practices for empirical guideline development, racial equity monitoring, post-implementation evaluation, and structured public engagement that the federal Commission has never systematically examined. Federal agencies like the Consumer Financial Protection Bureau, the Environmental Protection Agency, and the Federal Trade Commission have developed stakeholder engagement models and comment-response practices that go far beyond what the Commission currently utilizes. The Model Penal Code's sentencing provisions (MPC:S), approved by the American Law Institute in 2017, represent the most comprehensive scholarly synthesis of best practices in sentencing commission governance ever produced. Interestingly, it includes a directive that "Commission members should be selected for their wisdom, knowledge, and experience and their ability to adopt a systemwide policymaking orientation. Members should not function as advocates of discrete segments of the criminal-justice system."

None of this knowledge has been systematically brought to bear on the Commission's institutional design and its policymaking processes. The Commission should begin its rules review by conducting a formal study — perhaps in partnership with ACUS or with a leading academic institution — that catalogs these best practices, assesses their applicability to the federal sentencing context, and identifies the specific reforms most likely to improve the quality and legitimacy of the Commission's policymaking. To proceed with rules revision without this foundation would be to navigate without a map that is readily available.

When it does this review, the Commission will discover that one best practice that it should consider utilizing is negotiated rulemaking. The Negotiated Rulemaking Act of 1990 provides a framework, regularly used by other federal regulatory agencies, in which all significantly affected interests are convened at the same table, under the guidance of a trained neutral facilitator, to negotiate the content of a proposed rule by consensus. The core insight is that bringing parties together — requiring them to hear each other's arguments, to acknowledge the legitimacy of competing interests, and to understand that the alternative to agreement is a rule they have no hand in shaping — transforms the dynamic from advocacy to problem-solving.

Applied to the Commission's processes, the model might work like this. The existing single-stakeholder advisory groups — and any new groups added to fill current representational gaps — could continue to serve a vital function: fact-finding. They would gather and transmit to the Commission the knowledge, experience, and practical wisdom of their constituencies. They would tell the Commission what the Guidelines look like from the ground. That is genuinely valuable work, and those groups should likely be preserved and strengthened for that purpose.

But the deliberative function — the work of weighing those inputs against each other and reasoning toward balanced policy recommendations — would be taken up by a separate, structured process: a negotiated rulemaking panel, convened for each significant proposed amendment, comprising representatives of all relevant constituencies, working under the guidance of a professional facilitator, with a mandate to produce either a consensus recommendation or a structured report documenting the points of agreement, disagreement, and the tradeoffs at stake.

The facilitator's role is critical and often underappreciated. A skilled facilitator does not merely manage process, she helps parties move from positional bargaining to interest-based negotiation, distinguishing what each party is demanding from what each party actually cares about and why. She creates conditions in which stakeholders can acknowledge privately held uncertainties, explore creative options that no party would propose unilaterally, and build the trust necessary for genuine compromise. She holds participants accountable — to each other and to the public — for the quality of their reasoning.

The goal of this process is not consensus for its own sake. It is to find, through structured deliberation among those who best understand the relevant considerations, the public interest compromise that best serves the American people — not the solution that best serves victims' organizations, not the solution that best serves DOJ, not the solution that best serves the defense bar, but the solution that most faithfully reflects what justice actually requires when all of those legitimate interests are weighed honestly against each other.

There is already a model in the sentencing field that captures the spirit of this approach. The Villanova Sentencing Workshop (VSW), developed by Professor Steven Chanenson, now in its twenty-fourth year, is described in Steve's essay here —

Immersive Sentencing Education: The Villanova Sentencing Workshop Example

STEVEN L. CHANENSON · JUN 29

Read full story →

The VSW, like the Yale, Minnesota, and other sentencing workshops, brings together sitting judges, prosecutors, public defenders, parole board members, corrections experts, and law students to work through real sentencing cases in an immersive, multi-day setting. The key to its success is precisely what the Commission's advisory process lacks: participants from across the system, with genuinely different perspectives and institutional roles, are required to engage directly with each other's reasoning — not to present their positions to a passive audience, but to deliberate together. As one federal judge who participated in a predecessor workshop reflected, issues that had seemed simple suddenly revealed many complex layers, and the conversations proved more sophisticated and nuanced than any she had encountered in her own courtroom. The VSW has already served as a policy sandbox for the Pennsylvania Commission on Sentencing, allowing it to test drive ideas in a confidential deliberative setting before they are ready for formal consideration. The federal Commission could develop analogous structured deliberative processes — not as educational exercises, but as genuine inputs to its policymaking.

The goal of all of this is to find, through structured deliberation among those who best understand the relevant considerations, the public interest compromise that best serves the American people.

The Stakes Are High; the Moment is Now

The stakes are high. The Commission's Sentencing Guidelines govern the fate of approximately sixty thousand federal defendants each year. The decisions embedded in those Guidelines — about the relative severity of punishment for different offenses, the weight given to criminal history, the proper balance of sentencing purposes, and much more — are consequential policy choices that impact, directly or indirectly, all of us. They determine who goes to prison and for how long, who returns to their families and communities, and how the vast coercive power of the federal government is distributed across the American population in service of public safety. And yet the processes by which those decisions are made remain, in important respects, remarkably thin.

The Commission should approach this review with both humility and ambition: humility because the problems with the current model are deep and structural, and ambition because there is an extraordinary wealth of experience — from other federal regulatory agencies, from the Administrative Conference of the United States, from state sentencing commissions, and from the academic literature on deliberative governance — that the Commission has never systematically drawn upon. As mentioned, the first step is to develop a comprehensive report cataloging best practices and the hard-won lessons before drafting or amending a single rule.

The Commission's rules review is an opportunity that should not be wasted on modest adjustments to notice periods and comment deadlines. The deeper questions — about who has voice in the Commission's deliberations, about how competing interests are weighed, about whether the Commission's processes are designed to produce deliberation or merely advocacy — are questions that the current rules have never adequately engaged. There is now enough experience, from enough different sources, to know that better models exist. The Commission should begin its review by learning from them and then build a new procedural architecture worthy of the consequential work it is called to perform.

Public Comment on Proposed Priorities for the 2026–2027 Amendment Cycle

Thank you for the opportunity to provide public comments regarding the United States Sentencing Commission's proposed priorities for the amendment cycle ending May 1, 2027. I submit these comments as an interested citizen and as a sociologist with a professional interest in evidence-based criminal justice policy and rehabilitation.

I respectfully encourage the Sentencing Commission to make a comprehensive reevaluation of the federal sentencing guidelines governing non-production child sexual abuse material (CSAM) offenses a central component of its broader evaluation of the guidelines in light of the Sentencing Reform Act, the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), and the significant legal and empirical developments that have occurred over the past four decades.

Nothing in these comments should be interpreted as minimizing the seriousness of child sexual exploitation or the profound and lasting harm experienced by victims. The question presented here is not whether these offenses warrant offender accountability and punishment. Rather, it is whether the current sentencing framework effectively advances the statutory purposes of sentencing for which it was designed.

Congress directed that federal sentencing should accomplish several distinct objectives: to provide just punishment, afford adequate deterrence, protect the public from future crimes, and provide defendants with meaningful rehabilitation. A sentencing framework should be evaluated not only by the severity of its punishments, but also by whether those punishments effectively advance these objectives. As applied to most non-production CSAM offenses, there is increasing reason to question whether the current guideline structure satisfies that standard.

The Sentencing Commission has already recognized many of the structural concerns surrounding Guideline §2G2.2, including the widespread application of enhancements that no longer distinguish meaningfully among offenders because they now apply in the overwhelming majority of cases. Since the Commission's comprehensive 2021 report, additional legal scholarship and empirical research have continued to raise concerns.

The purpose of these comments is to encourage a renewed evidence-based assessment of whether current sentencing policy remains aligned with the statutory goals Congress established. The Sentencing Commission has consistently demonstrated a willingness to evaluate sentencing policy in light of emerging research and changing circumstances. The present review offers an important opportunity to continue that tradition.

Rehabilitation and Public Safety

Among the statutory purposes of sentencing, rehabilitation warrants particular attention. Congress expressly recognized rehabilitation as an important objective of federal sentencing, yet the current framework for many non-production CSAM offenses often operates in ways that undermine the very factors research has consistently associated with successful desistance from crime.

For many first-time offenders without prior histories of interpersonal violence, lengthy periods of incarceration remove individuals from stable employment, family relationships, educational

opportunities, and community support systems for years or decades. These same protective factors are repeatedly identified in research as among the strongest predictors of successful reintegration following release. Extended imprisonment beyond what is reasonably necessary to protect the public may diminish rather than strengthen the long-term conditions associated with reduced recidivism.

This concern is compounded by the practical realities of correctional administration. Although legislation sought to expand evidence-based programming, incentivize rehabilitation, and facilitate successful reentry, implementation has frequently been constrained by staffing shortages, limited program availability, and institutional capacity. As a result, many individuals spend years in correctional settings without meaningful access to the very interventions intended to reduce future offending, and significant collateral consequences continue long after release. The practical effect is often the opposite of the rehabilitative goals articulated in §3553(a)(2).

The Sentencing Commission is well positioned to examine whether current sentencing practices appropriately balance punishment with rehabilitation and whether alternative sentencing structures for carefully defined categories of low-risk, non-production offenders could better promote public safety while preserving accountability. When sentencing structures are insufficiently evidence-based and calibrated to distinguish among levels of culpability and empirically demonstrated risk, they not only raise concerns regarding proportionality but also diminish opportunities for rehabilitation without a corresponding increase in public safety.

Proportionality and Guideline Structure

A sentencing system should distinguish meaningfully among offenders based upon culpability, demonstrated risk, and the statutory purposes of sentencing. The Sentencing Commission's own prior research documented that several enhancements contained in Guideline §2G2.2, including those related to computer use and other offense characteristics, now apply in most federal cases for non-production CSAM offenses. As a result, these enhancements frequently fail to distinguish among offenders in the manner originally intended. Rather than identifying unusually aggravated conduct, they have largely become standard components of the guideline calculation, contributing to sentencing ranges that many federal judges have concluded warrant downward variances.

Recent scholarship continues to identify additional concerns arising from the interaction between technological change and guideline application (Harvard Law Review, 2026; Shephard, 2023). For example, contemporary digital forensic methods are capable of distinguishing between fundamentally different forms of digital evidence, yet current sentencing practices treat these similarly for purposes of guideline calculations. This raises important questions regarding proportionality, offender culpability, and the appropriate treatment of evolving digital forensic evidence. Likewise, image-count calculations continue to exert substantial influence on sentencing ranges despite ongoing debate regarding whether these formulas accurately reflect comparative harm or future risk.

These developments do not suggest that non-production CSAM offenses are less serious than previously understood, but they do suggest that technological advances have outpaced portions of the existing guideline framework. The Sentencing Commission's present review provides an opportunity to evaluate whether these provisions continue to serve their intended purpose of distinguishing among offenders based upon meaningful differences in conduct, culpability, and risk, or whether revisions are warranted to better align sentencing outcomes with contemporary evidence and the statutory objectives of federal sentencing.

Evidence-Based Opportunities for Reform

A review of the current guideline structure offers an opportunity to examine whether the federal sentencing framework remains connected to the purposes it was designed to serve. An evidence-based reassessment of non-production CSAM sentencing would promote more proportionate sentencing, encourage meaningful rehabilitation, and better align practice with the Sentencing Commission's longstanding commitment to empirical research and public safety.

One area for consideration is whether several enhancements within Guideline §2G2.2 continue to serve their intended purpose of distinguishing among offenders while maintaining accountability for serious offenses. Where enhancements have become commonplace rather than exceptional, recalibration may improve the guidelines' ability to differentiate meaningfully among varying levels of culpability without diminishing the seriousness of the underlying offense.

The Sentencing Commission may also wish to evaluate whether greater flexibility for carefully defined categories of low-risk, first-time, non-production offenders could better promote rehabilitation while maintaining public safety. Structured alternatives such as expanded use of residential reentry centers, graduated home confinement, intensive supervised release, electronic monitoring, and treatment may more effectively support successful reintegration than continued incarceration alone. Such approaches should not be viewed as substitutes for accountability, but as mechanisms for achieving the objectives Congress identified as central purposes of sentencing.

An additional area warranting careful examination is the relationship between sentencing policy and the elements intended to encourage rehabilitation following conviction. Recent federal criminal justice reforms such as the First Step Act have emphasized evidence-based programming, successful reentry, and reduced recidivism through earned incentives. However, broad categorical exclusions affecting certain groups of offenders, including those convicted of non-production CSAM offenses, limit access to some of these rehabilitative mechanisms regardless of individual risk, institutional conduct, or demonstrated progress.

The existence of these categorical exclusions illustrates the broader disconnect between the stated objectives of federal sentencing and the means available to encourage and achieve them. If rehabilitation is a meaningful objective of federal sentencing policy, opportunities to encourage sustained program participation and successful reintegration should be evaluated in light of current evidence. Although decisions regarding statutory eligibility ultimately rest with Congress, the Sentencing Commission is uniquely positioned to evaluate whether existing

policies remain aligned with contemporary research and provide evidence-based recommendations for future legislative consideration where appropriate.

Four decades after the Sentencing Reform Act envisioned a system guided by consistency, proportionality, and empirical evaluation rather than static assumptions, the Sentencing Commission has undertaken a comprehensive review of whether the guidelines continue to fulfill those objectives. The Sentencing Commission has long emphasized that sentencing policy should evolve in response to empirical evidence rather than remain fixed despite changing legal, technological, and social realities. If evidence now demonstrates a meaningful disconnect between the purposes Congress established and the practical operation of the current framework for non-production CSAM offenses, the Sentencing Commission's review presents an important opportunity to restore that alignment. Evidence-based sentencing should be viewed not as a departure from accountability, but as accountability informed by evidence.

Thank you.

Angela M. York, Ph.D.

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Ussc final

1 message

4GOD FELON [redacted] Tue, Jul 21, 2026 at 10:45 PM
To: 4GOD FELON [redacted]

Comment Submitted to the United States Sentencing Commission
Proposed 2026–2027 Amendment Priorities
Resolution of Circuit Conflicts, Evaluation of the Federal Sentencing Guidelines, Relevant Conduct, Methamphetamine Sentencing, an Retroactivity

I. Introduction

The United States Sentencing Commission was created by Congress to establish sentencing policies and practices that promote fairness, proportionality, transparency, and uniformity throughout the federal criminal justice system. As the Commission considers whether amendments are necessary to resolve circuit conflicts under 28 U.S.C. § 991(b)(1)(B) and consistent with the Supreme Court's guidance in Braxton v. United States, 500 U.S. 344 (1991), it should take this opportunity to address several guideline provisions that continue to produce significant sentencing disparities.

The federal sentencing system has undergone substantial legal and practical developments since the adoption of the original Sentencing Guidelines. The Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005) transformed the Guidelines fro mandatory rules into advisory considerations, requiring sentencing courts to evaluate the factors contained in 18 U.S.C. § 3553(a). Since that time, the Commission has recognized the importance of continuously evaluating whether guideline provisions continue to serve the purposes of sentencing and whether they result in sentences that are "sufficient, but not greater than necessary."

This comment respectfully requests that the Commission consider amendments addressing three related areas:

The use of relevant conduct to increase sentencing ranges beyond the offense of conviction;
The continued distinction between methamphetamine mixture and "actual" methamphetamine ("Ice") under the Drug Quantity Table;
The need for retroactive application of guideline reductions where the Commission determines that existing sentencing provisions n longer reflect sound sentencing policy.

These reforms are consistent with Congress's directive that sentencing policy should reduce unwarranted disparities, consider the resources available for incarceration, and ensure that punishment is proportionate to individual culpability.

II. Statutory Authority and the Commission's Responsibility to Promote Fair and Uniform Sentencing

Congress directed the Commission to establish sentencing policies that meet several objectives, including avoiding unwarranted sentencing disparities among similarly situated defendants and maintaining sufficient flexibility to permit individualized sentencing decisions. 28 U.S.C. § 991(b)(1)(B).

The Supreme Court recognized in Braxton v. United States, 500 U.S. 344 (1991), that Congress assigned the Sentencing Commission the primary responsibility for resolving conflicts involving the interpretation and application of the Guidelines. The Commission therefore has both the authority and responsibility to examine guideline provisions that create inconsistent results among federal courts.

The continued existence of unresolved guideline conflicts undermines one of the central purposes for which the Commission was created: ensuring that similar defendants receive similar sentences regardless of the judicial circuit in which they are sentenced.

The Commission's review should also be guided by the sentencing purposes contained in 18 U.S.C. § 3553(a)(2):

Reflecting the seriousness of the offense;
Promoting respect for the law;
Providing just punishment;
Affording adequate deterrence;
Protecting the public; and
Providing needed educational, vocational, and medical care.

A guideline that routinely produces sentences greater than necessary, creates regional disparities, or relies on outdated assumptions should be reconsidered.

III. Relevant Conduct and the Need for Greater Reliability Before Increasing Sentencing Ranges

The Commission should amend U.S.S.G. §1B1.3 to ensure that relevant conduct used to increase a defendant's guideline range is supported by reliable evidence and appropriately reflects individual culpability.

Under the current framework, sentencing courts may consider conduct beyond the offense of conviction when determining the advisory guideline range. Although relevant conduct serves an important purpose in some cases, its broad application has created concerns because sentencing exposure may be increased substantially based on allegations that were never charged, never present to a jury, or never proven beyond a reasonable doubt.

This issue is particularly significant in drug cases where alleged quantities attributed as relevant conduct can dramatically increase the advisory guideline range.

The Commission should consider adopting a requirement that when relevant conduct substantially increases a sentencing range, the government must establish that conduct through reliable and corroborated evidence. This would not prevent courts from considering legitimate additional conduct; rather, it would ensure that significant increases in punishment are based upon dependable information.

Such an amendment would promote:

Accuracy in sentencing;
Greater consistency among federal courts;
Reduced reliance on unreliable testimony;
Increased public confidence in sentencing outcomes.

The proposed reform would also recognize the importance of the jury's role in determining criminal liability while preserving the sentencing court's ability to consider relevant circumstances.

IV. Reform of Methamphetamine Sentencing and the Distinction Between "Actual" Methamphetamine and Methamphetamine Mixtur
The Commission should reconsider the continued distinction between methamphetamine mixture and "actual" methamphetamine under U.S.S.G. §2D1.1. The current guideline structure imposes substantially higher penalties for "actual" methamphetamine based primarily upon purity levels. This distinction was originally adopted based upon the assumption that purity was a reliable indicator of defendant's role, sophistication, and culpability within the drug distribution system.
However, the modern methamphetamine market has changed significantly since the creation of this distinction. High-purity methamphetamine is now commonly available throughout the United States, and purity alone may no longer provide a reliable measurement of an individual's position within a trafficking organization or level of criminal responsibility.
The Commission's own empirical reviews of methamphetamine offenses demonstrate that the federal methamphetamine market ha evolved and that the historical assumptions underlying the "actual" versus mixture distinction warrant reconsideration.
The Commission should evaluate whether the current guideline structure continues to advance the purposes of sentencing identified 18 U.S.C. § 3553(a) or whether it creates unwarranted disparities by imposing significantly different sentences based primarily upon purity rather than an individual's actual conduct.
A sentencing system that relies heavily on purity distinctions risks imposing disproportionate punishment where purity is a characteristic of the overall drug market rather than a reliable indicator of a particular defendant's culpability.
Accordingly, the Commission should consider amending §2D1.1 to:
Eliminate or substantially reduce the sentencing distinction between methamphetamine mixture and actual methamphetamine;
Adopt a single methamphetamine guideline calculation based upon total weight; or
Create a more balanced approach that considers individual role, conduct, and culpability rather than purity alone.
Such reform would promote greater uniformity among the circuits and better align federal sentencing policy with the principle that punishment should be individualized and proportionate.
V. Resolution of Circuit Conflicts and Promotion of National Sentencing Uniformity
The Commission's responsibility under 28 U.S.C. § 991(b)(1)(B) includes reducing unwarranted sentencing disparities. The continued existence of conflicting interpretations of guideline provisions creates uncertainty and undermines confidence in the federal sentencing system.
The distinction between methamphetamine mixture and actual methamphetamine has contributed to significant litigation regarding the proper application of the Guidelines. Different approaches among courts have resulted in inconsistent sentencing outcomes for similarly situated defendants.
Under Braxton v. United States, 500 U.S. 344 (1991), the Commission is uniquely positioned to address guideline interpretation conflicts because it possesses the institutional expertise and authority to amend the Guidelines when judicial decisions reveal ambiguity or disagreement.
Rather than allowing circuit conflicts to continue producing inconsistent sentences, the Commission should provide clear guidance through amendment.
A uniform guideline approach would:
Reduce unnecessary litigation;
Promote consistent sentencing outcomes;
Preserve judicial discretion under Booker and §3553(a);
Increase confidence that federal sentences are based upon culpability rather than geography.
The Commission should prioritize amendments that provide clear national standards while maintaining appropriate judicial discretio
VI. Congressional Directive to Consider the Costs of Incarceration and Federal Prison Capacity
Congress directed the Commission to consider the practical consequences of sentencing policy, including the capacity of correction facilities and the costs associated with imprisonment.
Under 28 U.S.C. § 994(g), the Commission is required to consider "the nature and capacity of the penal, correctional, and other facilities and services available" when developing sentencing policies.
This statutory responsibility recognizes that sentencing decisions have consequences beyond the courtroom. Federal sentencing policy affects prison populations, correctional resources, rehabilitation opportunities, and taxpayer costs.
The Commission should therefore consider whether certain guideline provisions continue to result in sentences that are greater than necessary to accomplish the purposes of punishment.
Long sentences for many nonviolent drug offenses have contributed substantially to the growth of the federal prison population. Wh serious drug trafficking offenses require appropriate punishment, sentencing policy should distinguish between major organizationa actors and lower-level participants.
The Commission should also evaluate whether guideline enhancements in certain firearm cases, including offenses involving possession of a firearm by a prohibited person, frequently result in sentences that exceed what is necessary for deterrence and publ safety when viewed in the context of the individual's actual conduct and criminal history.
The goal of federal sentencing should not simply be increased punishment. The goal should be a balanced system that protects the public while avoiding unnecessary incarceration.
VII. The Need for Retroactive Application of Sentencing Reform
Any amendment adopted by the Commission that reduces sentencing ranges or corrects outdated guideline assumptions should be made retroactive.
Retroactivity is consistent with the Commission's responsibility to promote fairness and uniformity. If the Commission determines th a guideline provision no longer reflects sound sentencing policy, individuals sentenced under that provision should have the opportunity to seek review.
Failing to apply reforms retroactively creates two separate classes of federal prisoners:
Individuals sentenced under the updated guideline; and
Individuals who remain incarcerated under a guideline the Commission has determined requires correction.
Such unequal treatment undermines confidence in the sentencing system.

Retroactive application would also advance Congress's directive to consider incarceration costs and prison capacity by allowing cou to review sentences that may no longer be necessary to achieve the purposes of punishment.
Retroactivity does not require automatic release. It simply provides an opportunity for courts to determine whether a sentence reduction is appropriate under the updated guideline and the factors contained in 18 U.S.C. § 3553(a).

VIII. Proposed Guideline Amendments
To accomplish the objectives described above, the Commission should consider the following amendments to the United States Sentencing Guidelines.
A. Amendment to Relevant Conduct — U.S.S.G. §1B1.3
The Commission should amend §1B1.3 to provide additional safeguards when relevant conduct is used to substantially increase a defendant's sentencing range.
The amendment should provide:
"Where alleged relevant conduct increases the applicable guideline range by a substantial degree, such conduct shall be supported b reliable evidence demonstrating a sufficient connection to the defendant and shall not be based solely upon uncorroborated allegations or unreliable testimony."
The purpose of this amendment is not to prevent courts from considering legitimate relevant conduct. Rather, it ensures that sentencing enhancements are based upon accurate and dependable information.
Because relevant conduct can increase a sentence far beyond the offense of conviction, additional reliability protections are necessa to maintain fairness, proportionality, and confidence in the sentencing process.
B. Amendment to Methamphetamine Sentencing — U.S.S.G. §2D1.1
The Commission should amend §2D1.1 to reconsider the separate treatment of actual methamphetamine and methamphetamine mixture.
The amendment should provide:
"For purposes of determining the base offense level for methamphetamine offenses, the sentencing calculation shall not distinguish between methamphetamine mixture and actual methamphetamine based solely upon purity."
Alternatively, the Commission should establish a revised framework that gives greater weight to:
The defendant's actual role;
The quantity directly attributable to the defendant;
Whether the defendant acted as an organizer, manager, or leader;
The defendant's intent and knowledge;
Other relevant factors reflecting individual culpability.
This approach would better serve the objectives of sentencing because it would focus punishment on the individual's conduct rather than a characteristic of the drug market.
C. Retroactive Application Amendment
The Commission should amend U.S.S.G. §1B1.10 to ensure that reductions resulting from amendments addressing methamphetamine sentencing, relevant conduct, or other sentencing disparities are considered for retroactive application.
The Commission should recognize that fairness requires consideration of individuals currently serving sentences under guideline provisions that have since been determined to produce excessive or disproportionate punishment.
IX. Relationship Between These Reforms and the Purposes of Sentencing Under 18 U.S.C. §3553(a)
The proposed amendments are consistent with the statutory purposes of sentencing.
1. Seriousness of the Offense and Just Punishment
A fair sentencing system must distinguish between defendants based upon their actual conduct and level of responsibility. Sentence that are driven primarily by drug purity, uncharged conduct, or broad assumptions about criminal involvement risk imposing punishment greater than necessary.
2. Deterrence
The effectiveness of deterrence depends upon proportional and rational sentencing policies. Excessively severe sentences may not provide additional deterrent value when compared with appropriately tailored sentences.
3. Protection of the Public
Public safety is best served by focusing correctional resources on individuals who pose a genuine danger to the community. Excessi incarceration of lower-level offenders consumes resources that could otherwise be devoted to prevention, treatment, supervision, an rehabilitation.
4. Rehabilitation
Long sentences should be evaluated in light of whether they continue to serve a legitimate rehabilitative purpose. Individuals who demonstrate rehabilitation and personal growth should have meaningful opportunities for sentence review when sentencing policies change.
X. Conclusion and Request for Commission Action
The United States Sentencing Commission has both the authority and responsibility to ensure that the Federal Sentencing Guidelines continue to reflect fairness, proportionality, and uniformity.
The Commission's review of circuit conflicts under 28 U.S.C. §991(b)(1)(B) and Braxton v. United States provides an important opportunity to address guideline provisions that have contributed to inconsistent sentencing outcomes.
The Commission should:
Amend §1B1.3 to ensure that relevant conduct used to increase sentencing ranges is supported by reliable and sufficiently corroborated evidence;
Resolve conflicts concerning methamphetamine sentencing by reconsidering the distinction between actual methamphetamine and methamphetamine mixture;
Evaluate whether purity-based enhancements continue to reflect modern drug markets and individual culpability;
Consider the congressional directive to reduce unnecessary incarceration costs and address federal prison capacity concerns;
Apply appropriate guideline reductions retroactively to promote equal treatment and fairness;
Continue evaluating the Guidelines under the purposes of sentencing contained in 18 U.S.C. §3553(a).

A sentencing system is strongest when it is consistent, evidence-based, and focused on individual responsibility. Reforming outdate guideline provisions will promote public confidence, reduce unwarranted disparities, and ensure that federal sentences remain sufficient, but not greater than necessary, to accomplish the goals of sentencing.

XI. Supporting Empirical Data and Federal Appellate Authority Regarding Methamphetamine Purity and Relevant Conduct

A. The Commission's Own Data Demonstrates That the Original Purity-Based Rationale Has Changed

The current methamphetamine sentencing structure was developed at a time when purity levels varied significantly and purity was viewed as a possible indicator of a defendant's position within the drug distribution chain. However, the federal methamphetamine market has changed substantially.

The United States Sentencing Commission's recent methamphetamine research demonstrates that purity levels are now consistentl high across categories of methamphetamine offenses. The Commission found that methamphetamine tested in federal cases was, average, over 90 percent pure, including methamphetamine sentenced as mixture, actual methamphetamine, and Ice. ﷺ

U.S. Sentencing Commission +1

The Commission's data further demonstrates that methamphetamine purity does not necessarily distinguish between levels of criminal responsibility. The Commission reported that high purity levels appear across different functions within trafficking organizations, raising questions about whether purity remains an accurate measure of culpability. ﷺ

U.S. Sentencing Commission

The continued distinction between methamphetamine mixture, methamphetamine actual, and Ice therefore creates a risk that defendants may receive significantly different sentences based upon a characteristic of the drug supply chain rather than their individual conduct.

The Commission's own data supports reconsideration of the current framework and supports adoption of a more individualized approach focused on role, conduct, and responsibility.

B. Federal Appellate Decisions Recognize the Significant Impact of the Purity Distinction

Federal courts have repeatedly recognized that the Guidelines create a significant sentencing difference between methamphetamine mixture and actual methamphetamine.

The Seventh Circuit explained that the Guidelines recognize three categories of methamphetamine:

Methamphetamine mixture;

Methamphetamine actual; and

Ice methamphetamine.

The court noted that actual methamphetamine and Ice are effectively treated at a substantially higher ratio than methamphetamine mixture, with purity carrying major sentencing consequences. United States v. Yates, 58 F.4th 665 (7th Cir. 2023). ﷺ

Seventh Circuit Court of Appeals

Likewise, courts have recognized that the Guidelines apply a 10-to-1 ratio between methamphetamine mixture and actual methamphetamine or Ice. United States v. Johnson, 812 F. App'x 329 (6th Cir. 2020). ﷺ

Justia

These cases demonstrate that the purity distinction is not a minor technical calculation; it can substantially increase a defendant's advisory guideline range and resulting sentence.

The Commission should therefore examine whether the current purity-based structure remains consistent with the purposes of sentencing after considering the modern drug market and current empirical evidence.

C. Relevant Conduct Requires Additional Reliability Safeguards

Federal appellate courts have also recognized the importance of reliability when relevant conduct is used to increase a defendant's sentencing range.

The Seventh Circuit has emphasized that sentencing courts must rely on reliable evidence when calculating drug quantities attributable as relevant conduct. In United States v. Carnell, 972 F.3d 932 (7th Cir. 2020), the court explained that relevant conduct evidence must have sufficient reliability and that the government bears the burden of proving relevant conduct by a preponderance o the evidence. ﷺ

Seventh Circuit Court of Appeals

Similarly, in United States v. Johnson, No. 22-2174 (7th Cir. 2024), the Seventh Circuit reversed a drug quantity calculation where the sentencing court assumed purity levels that were not supported by the record. The court emphasized that unsupported assumptions regarding drug purity can improperly increase a defendant's sentence. ﷺ

Seventh Circuit Court of Appeals

These decisions support the Commission adopting clearer standards requiring reliable evidence before relevant conduct dramaticall increases a guideline range.

D. The Commission Should Use Its Authority Under Braxton to Resolve These Conflicts

The Supreme Court recognized in Braxton v. United States, 500 U.S. 344 (1991), that the Sentencing Commission possesses the institutional authority and expertise to address guideline conflicts and ambiguities.

The Commission should exercise that authority by clarifying:

The reliability required before relevant conduct substantially increases a sentencing range;

The continued justification for distinguishing methamphetamine mixture from actual methamphetamine and Ice;

Whether current guideline calculations produce sentences greater than necessary under 18 U.S.C. §3553(a).

The Commission's own empirical research, combined with federal appellate decisions recognizing the significant sentencing consequences of purity-based calculations, supports amendment of the Guidelines.

Authorities to add to the prior Authorities Cited section:

Braxton v. United States, 500 U.S. 344 (1991).

United States v. Booker, 543 U.S. 220 (2005).

United States v. Carnell, 972 F.3d 932 (7th Cir. 2020).

United States v. Johnson, 812 F. App’x 329 (6th Cir. 2020).

United States v. Yates, 58 F.4th 665 (7th Cir. 2023).

United States Sentencing Commission, Methamphetamine Trafficking Offenses (2024).

United States Sentencing Commission, Supplemental 2026 Methamphetamine Offenses Data Briefing.

United States Sentencing Commission, Methamphetamine Offenses Data Snapshot.

Respectfully Submitted by:
Teresa Naylor
Mikel Reed
Marcus Jones
Maurice owens
Sederick Owens
Vernard Nelson
Shirley Nelson
Vanessa White
Jayden McGee
David Cross
Reneesha Owens
Latonya Owens
Derrick Owens
Carol pitts
Lisa Reynolds
Deon Jones
Dasia Turner
Lasheena Owens
Yvette Brown
Yvonne Brown
Anthony Jefferson Jr.

From: [redacted]
Subject: (External) ***Request to Staff*** AHMED, SEBASTIAN,
Date: Wednesday, June 10, 2026 1:18:58 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: U.S. Sentencing Commission
Inmate Work Assignment: RDAP

ATTENTION

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Inmate Message Below

Dear Sentencing Commission:

As you consider revisions to the United States Sentencing Guidelines ("USSG") for this year, I write to respectfully outline the following factors for your review:

1) AUTISM & OTHER UNTREATABLE COGNITIVE DISABILITIES: Currently, the BOP does not offer any treatment for Autism and other cognitive disabilities that are federally recognized by Department of Justice ("DOJ"), pursuant to 28 C.F.R. 35.108(d)(2)(iii). As in my case, these were not factored in at Sentencing due to extraordinary conditions related to COVID-19 lockdowns. I believe that the Sentencing Commission should consider revisions to the USSG for specific DOJ recognized disability factors, not adjusted at sentencing, as extraordinary and compelling reasons considered in conjunction with extraordinary rehabilitation.

2) RETROACTIVITY: Given recent decisions from the Supreme Court which extensively limit availability of relief under the First Step Act, the Sentencing Commission should seriously consider making all USSG changes retroactive, including the 2-point adjustments.

Thank you for your kind consideration.

Sebastian Ahmed, [redacted]

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Ryan Anderson

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

Dear Chair Reeves and Members of the United States Sentencing Commission,

I am writing as someone who has been directly affected by federal sentencing policies and their long-term consequences. Because of a past sexual offense conviction, I am required to register. I understand that this comment period focuses on federal sentencing policy, sentencing guidelines, supervised release, rehabilitation, reentry, and public safety. I am not asking the Commission to address state registry laws, SORNA, law enforcement practices, sting operations, or the legal definition of criminal offenses.

I respectfully urge the Commission to make sexual offense sentencing policy a priority during the upcoming amendment cycle. In particular, I encourage the Commission to focus on proportionality, individualized assessment, supervised release practices, rehabilitation, and the lasting effects that a sentence can have on a person's life.

Sentencing should serve several important goals: holding people accountable, protecting the public, and creating a path toward rehabilitation. However, in sexual offense cases, sentencing policies can sometimes treat individuals as if they all pose the same level of future risk. Factors such as age, criminal history, conduct, treatment progress, years spent offense-free in the community, and successful completion of a sentence are not always given enough weight. As a result, some individuals may receive punishments, supervision requirements, or restrictions that are more severe than necessary.

I encourage the Commission to review whether current federal sentencing guidelines adequately distinguish between different levels of culpability and risk. Sentencing decisions should be based on evidence and the facts of each individual case rather than assumptions or broad labels. The Commission should also examine whether current guideline ranges and supervised release recommendations sometimes result in punishment that exceeds what is necessary to satisfy the goals outlined in 18 U.S.C. § 3553(a).

I also believe supervised release conditions deserve careful review. Conditions should be tailored to the individual and tied to legitimate public safety concerns. Broad or automatic restrictions can create barriers to housing, employment, education, family relationships, internet access, and successful reintegration into society. When restrictions are not connected to an individual's actual risk, they may undermine stability rather than improve public safety.

Rehabilitation and reentry should remain central goals of federal sentencing policy. Individuals who have completed their sentences should have meaningful opportunities to build stable and productive lives. Access to housing, employment, treatment, family support, and community involvement are important factors that help reduce future harm and support long-term public safety. Encouraging rehabilitation does not excuse past conduct; it recognizes what is most effective in preventing future offenses.

I also ask the Commission to consider the cumulative impact of imprisonment, supervised release, special conditions, and other consequences that often follow a conviction. While some consequences fall outside the Commission's authority, they still affect a person's ability to successfully reenter society. Sentencing policy should acknowledge these realities to ensure that punishment remains proportionate and no greater than necessary in practice.

As the Commission evaluates future reforms, I respectfully suggest the following priorities:

• Conduct a data-driven review of federal sexual offense guidelines to determine whether they are proportionate, evidence-based, and consistent with available recidivism research.

• Review supervised release terms and special conditions to encourage individualized and narrowly tailored supervision rather than broad, automatic restrictions.

• Encourage courts to consider factors such as age, criminal history, treatment participation, time spent offense-free, offense conduct, and demonstrated rehabilitation when determining sentences and supervision requirements.

• Study how collateral consequences affect housing, employment, family stability, successful reentry, and long-term public safety.

• Promote sentencing approaches that protect the public while also recognizing the importance of rehabilitation and successful reintegration.

I fully recognize the seriousness of sexual offenses and the harm they can cause. At the same time, sentencing policy should leave room for growth, rehabilitation, and evidence-based decision-making. A system that recognizes positive change and individual circumstances can better support both accountability and public safety.

Thank you for taking the time to consider the perspective of someone who has experienced the long-term effects of sentencing policy firsthand. I appreciate the Commission's work and your willingness to consider public input on these important issues.

Respectfully,
Ryan Anderson

Submitted on: June 11, 2026

From: [redacted]
Subject: [External] ***Request to Staff*** ARBAUGH, JAMES, [redacted] FTD-Q-C
Date: Saturday, July 18, 2026 9:04:45 AM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To:
Inmate Work Assignment: FPI ASMBL1

ATTENTION

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Inmate Message Below

This is in response to your latest request for comments concerning the Sentencing Guidelines.

SENTENCING GUIDELINES SHOULD REPRESENT THE STATUTORY MINIMUM/MAXIMUM
The sentencing guidelines currently do not correspond with the statutory minimum and maximum sentences. The base guidelines score should equal the statutory minimum. The base score plus all enhancements -- representing the most egregious conduct -- should equal the statutory maximum.

For example, a conviction under 18 U.S.C. Section 2423(c) for illicit sexual conduct in foreign places has no mandatory minimum incarceration. It has a statutory maximum of 30 years. When calculating the guidelines, the base score (of which two are possible) is not zero (0). The base score plus all of the enhancements is currently lifetime. In this particular example, the base score should be zero (since there is no mandatory minimum). Likewise, when all of the possible enhancements are applied, the base score plus the enhancements should fall at 30-years incarceration.

SENTENCING GUIDELINES DO NOT CONSIDER THE SEXUAL CONDUCT
When providing the sentence for a sexual crime, the guidelines fail to consider the motivation and specific conduct committed. For example, a defendant who touched the genitals' to arouse the victim to cause them pleasure currently receives the same sentence as a person who engages in forced sodomy or rape causing physical damage. There should be a sentencing enhancement to represent the nature of sexual conduct committed.

LIFETIME SUPERVISED RELEASE IS NOT A TRANSITION TO LIBERTY
Congress provided for supervised release to facilitate a transition to community life. See Mont v. United States, 587 U.S. 514, 523 (2019); Johnson v. United States, 529 U.S. 694, 708-709 (2000). Application Note 1 to Section 5D1.2, a policy statement recommends that a life term of supervised release be imposed. See Section 5D1.2(b), p.s. The guideline recommendation of lifetime supervised release does not provide a transition as congress intended. It further fails to consider the history and characteristics of the defendant. Is there any empirical evidence that suggests that sex offenders specifically require lifetime supervised relief. Is it impossible for them to transition to the community?

Implementing these changes -- especially if they are retroactive -- will help address the commission's current considerations to reduce prison population and save governmental resources. It will also make for a more just justice system.

Thank you for your continued work and consideration of these guidelines.

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Sabrina Atta

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

3) Legislation & Case Law

Comments:

To the Honorable Members of the United States Sentencing Commission,

My name is Sabrina Atta, and I am writing to you not only as a member of the public, but as the sister of Nameer Atta. I respectfully ask that you consider both the broader sentencing policies surrounding 21 U.S.C. § 841(b)(1)(C) and the very real human impact these laws have had on my brother and our family.
Nothing prepares you for watching your sibling face the possibility of spending twenty years in federal prison as a first-time offender. My brother is not someone who intended to harm another person, yet under the current law he faces the same mandatory minimum sentence as individuals who intentionally commit violent crimes. The law required that outcome without allowing meaningful consideration of his age, his lack of criminal history, his character, or the absence of any intent to cause harm.
As I have learned more about the laws surrounding his case, I have become deeply concerned by several aspects of the current sentencing framework.

First, 21 U.S.C. § 841(b)(1)(C) imposes a mandatory minimum sentence of twenty years when a drug offense results in a death, leaving judges with virtually no discretion to impose a sentence that reflects the individual circumstances of the case.

Second, unlike many other first-time, non-violent federal drug offenders, individuals charged under this statute are excluded from Safety Valve relief. Even where someone has no prior criminal history and presents little risk of future violence, the court cannot consider a sentence below the mandatory minimum.

Third, this statute does not require proof that a person intended to cause harm. While intent is a fundamental component of many serious criminal offenses, this law imposes severe punishment regardless of whether an individual knew a substance was contaminated or intended for anyone

to be injured. The result is that people with vastly different levels of culpability can receive the same mandatory sentence.

Finally, because of the classification of this offense, individuals are generally excluded from important rehabilitation opportunities, including earned-time credits under the First Step Act and sentence reductions through the Residential Drug Abuse Program (RDAP). These programs were created to encourage rehabilitation, personal growth, and successful reintegration into society, yet people like my brother are categorically denied the opportunity to earn those benefits.

These policies have affected far more than one individual. They have affected an entire family.

As his sister, it has been incredibly painful to watch someone I have known and loved my entire life face the loss of two decades of his future. Every milestone, every holiday, every family gathering is overshadowed by the reality that he may spend much of his young adulthood behind bars under laws that leave little room for individualized justice or rehabilitation. Our family believes in accountability, but we also believe accountability should be proportional, should recognize intent, and should leave room for redemption.

I respectfully ask the Commission to carefully review the sentencing framework that governed my brother's case and to consider reforms that would create a more balanced and just system. Specifically, I urge the Commission to prioritize:
Expanding Safety Valve eligibility for youthful, first-time offenders charged under 21 U.S.C. § 841(b)(1)(C).
Encouraging sentencing policies that distinguish between intentional acts of violence and cases where there was no intent to cause harm.
Re-evaluating the classification of these offenses so appropriate individuals may earn First Step Act credits and participate in rehabilitation programs such as RDAP.
Supporting greater judicial discretion so courts can consider a person's background, criminal history, level of intent, and potential for rehabilitation when imposing sentence.

My brother's case is only one among many, but it illustrates the profound consequences of laws that do not allow courts to distinguish between intentional violence and unintended tragedy. I respectfully ask that you review both these policies and cases like my brother's as you determine your future priorities.

Thank you for taking the time to consider my comments and for your commitment to ensuring that our federal sentencing system is both fair and just.

Respectfully,
Sabrina Atta
Sister of Nameer Atta
San Diego / Orange County, California

From: [redacted]
Subject: [External] ***Request to Staff*** CLOUSE, JEFF, [redacted] FOR-W-C
Date: Sunday, July 19, 2026 10:04:36 AM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: US Sentencing Commission
Inmate Work Assignment: Unicor

ATTENTION

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Inmate Message Below

In light of the 40th anniversary you mentioned in your release, I would like to submit the following for consideration.

As a convicted sex offender, I realize my opinion carries no weight. However, I would ask for a review of the rules and guidelines governing sentencing of sex offenders since it doesn't appear they have been updated in the past 30 years.

More specifically, crimes such as mine that were internet only crimes are adjudicated the same way as "hands-on" offenders are. This seems to be the equivalent of treating equally someone who watches a crime on the internet vs someone who is actually committing the crime (i.e. watching a murder as opposed to committing it). I am not trying to wash away my guilt. What I did was wrong and I will never repeat it. My 20 years in prison is punishment for that. But those of us who refused to take it "a step further" are lumped in and sentenced as those that did. Actually, some "hands on" offenders have an advantage since they qualify for time off from the First Step Act (FSA) and internet based sex offenders do not. I don't begrudge them for that. It just seems to be backwards.

In conclusion, I feel a separate category needs to be created in the guidelines for internet only sex offenders for ease of use for any future legislation that may come down. Thank you for your time and I wish you success in your endeavors.

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Sarah Fonseca

Topics:

4) Circuit Conflicts

5) Miscellaneous Issues

Comments:

Would absolutely love for career offender to finally be addressed and for you guys to stop gaslighting us on this year after year.

Submitted on: June 11, 2026

PUBLIC COMMENT TO THE UNITED STATES SENTENCING COMMISSION

Re: Federal Sentencing Policy Priorities

Submitted to:
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Priorities Comment

I respectfully submit the following comments regarding federal sentencing policy and the Commission's future priorities. The United States continues to maintain the largest incarcerated population in the world, and federal sentencing policy plays a critical role in shaping both incarceration rates and long-term public safety outcomes. Evidence from the Commission's own research and from national criminal-justice studies demonstrates that **excessive sentences, limited judicial discretion, and broad collateral consequences do not produce proportional public-safety benefits**.

The following recommendations are grounded in empirical data and recent research.

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1. Reevaluate Sentences for Non-Violent and First-Time Offenders

Federal sentencing data show that sentence lengths have steadily increased in many categories without corresponding public-safety gains. For example, in Michigan, average minimum sentences increased from **3.8 years in 2020 to 4.7 years in 2023**, nearly a full year longer, despite no evidence of improved outcomes. Prison Policy Initiative

Research across multiple states demonstrates that **earned-sentence credit expansions reduce recidivism**, indicating that shorter, incentive-based sentences can improve community safety. Prison Policy Initiative

For non-violent and first-time offenders, lengthy incarceration imposes substantial costs on families and taxpayers while producing diminishing returns. Alternatives such as community supervision, treatment, and restorative-justice programs consistently outperform incarceration in reducing reoffending.

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2. Strengthen Individualized Sentencing and Judicial Discretion

The Commission's 2023 report on demographic differences confirms that **sentencing disparities persist**, with Black males receiving sentences **19.1% longer** than similarly situated White males. United States Sentencing Commission

These disparities underscore the need for **greater judicial discretion** and individualized assessments rather than rigid guideline structures. Indeterminate sentencing frameworks allow judges to consider risk, history, and rehabilitation potential—factors that cannot be captured by formulaic enhancements.

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3. Address the Distortions Created by Plea Bargaining

The Commission's data show that the majority of federal cases are resolved through plea agreements, where the difference between a plea offer and a post-trial sentence can be extreme. Although the Commission has not yet quantified the exact disparity in recent years, research consistently shows that **large plea-to-trial gaps exert coercive pressure**, discouraging defendants from exercising their constitutional right to trial.

Sentencing policy should ensure that punishment remains proportionate regardless of plea status.

---

4. Reduce Collateral Consequences and Promote Reintegration

Collateral consequences—employment barriers, housing restrictions, and civic exclusion—continue long after a sentence ends. Research shows that individuals released under resentencing or "second look" policies have **extremely low recidivism rates**, with one-year new-conviction rates ranging from **3% to 29%**, mostly for misdemeanors. Prison Policy Initiative

Similarly, a study of 178 elderly individuals released from life sentences in Maryland found that **none were rearrested for a crime more serious than a traffic offense** in the four years following release. Prison Policy Initiative

These findings demonstrate that **successful reintegration is the norm**, not the exception, when barriers are reduced.

---

5. Modernize and Tailor Supervised Release Conditions

Supervised release should be evidence-based and individualized. Overly broad conditions—particularly those unrelated to risk—can undermine employment, family stability, and lawful community participation.

The Commission's recidivism series shows that risk varies dramatically across offender groups. For example, federal drug-trafficking offenders, firearms offenders, and violent offenders all exhibit **distinct recidivism patterns**, underscoring the need for tailored supervision. United States Sentencing Commission

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6. Reaffirm Rehabilitation as a Central Objective

The Commission's 2022 report on incarceration length and recidivism found **no consistent relationship** between longer prison terms and reduced recidivism. United States Sentencing Commission

In fact, the Commission's broader recidivism series demonstrates that participation in **Bureau of Prisons vocational and drug-treatment programs** significantly reduces reoffending. United States Sentencing Commission

Rehabilitation—education, vocational training, mental-health care, and structured reentry—should remain central to federal sentencing policy.

---

7. Address the Unique Injustices Faced by Individuals Convicted of Sexual Offenses

The Sentencing Project's 2024 policy brief documents several critical findings:

- **Recidivism rates for crimes of a sexual nature have declined by roughly 45% since the 1970s**, well before public registration and notification laws. The Sentencing Project
- National victimization data show a **65% decrease in rape and sexual-assault victimizations** from 1993 to 2021. The Sentencing Project
- Individuals convicted of sexual offenses serve **a greater percentage of their sentences** than those convicted of other violent crimes, including murder. The Sentencing Project

These findings demonstrate that **extreme sentences and lifelong restrictions are not evidence-based** and do not contribute to public safety. Sentencing policy should reflect actual risk rather than stigma, particularly for **non-violent, first-time offenders** who complete treatment and demonstrate low risk.

Thank you for your attention.

Respectfully,

Robert Gass

COMMENT ON PROPOSED 2026–2027 PRIORITIES

Evidence-Informed Review of U.S.S.G. §2G2.1, Fictitious-Minor Attempts, Government-Created Offense Conduct, and Prison Placement

Dear Commissioners:

I respectfully submit this comment concerning proposed Priorities One and Two and request an additional priority focused on U.S.S.G. §2G2.1 and attempted-production cases under 18 U.S.C. §2251(a).

Child sexual exploitation is grave conduct. But just punishment is not advanced by treating materially different conduct as though it caused identical harm. Section 3553(a) requires a sentence sufficient, but not greater than necessary, to provide just punishment, deterrence, public protection, and effective correctional treatment. The forty-year review should distinguish actual from intended harm, completed abuse from an unsuccessful attempt, and a defendant's own conduct from aggravating circumstances supplied or escalated by the government.

I. ADD A PRIORITY TO REVIEW §2G2.1 AND FICTITIOUS-MINOR ATTEMPTS

The Commission should make §2G2.1 an additional priority, particularly attempts involving a fictitious minor and communications only with a law-enforcement-controlled adult intermediary.

Section 2G2.1 uses a base offense level of 32 and defines "minor" to include a fictitious individual represented by an officer as under eighteen. U.S.S.G. §2G2.1 cmt. n.1. It therefore encompasses both completed abuse and recording of an actual child and a remote sting in which no child existed, no child was contacted, no image was produced, and the defendant had no access to a child.

Attempt liability may punish culpable intent and a substantial step. But without an actual child, no child was touched, coerced, photographed, recorded, or revictimized through a newly produced image. Intended harm is serious; it is not completed harm. The guideline should recognize both truths.

The Commission's own production study shows why differentiation is necessary. In fiscal year 2019, the typical production offender had physical access to an actual victim or a position of trust; 80.9 percent of cases involved sexual contact; the average sentence was 275 months; and 57.2 percent nevertheless received a below-guideline variance. U.S. Sentencing

Commission, *Federal Sentencing of Child Pornography: Production Offenses* (2021). A guideline developed around actual victims, access, contact, and completed images should not mechanically measure a fictitious, internet-only attempt as though those facts existed.

The Commission should require §2G2.1 to distinguish at least:

(1) completed production from attempted production;
(2) an actual minor from a fictitious minor;
(3) direct communication with a child from communication solely with an adult intermediary;
(4) physical access, custody, travel, or proximity from none;
(5) creation of actual abusive imagery from a nonexistent, empty, corrupted, synthetic, or otherwise non-victim file; and
(6) aggravating facts initiated by the defendant from facts selected, prompted, or escalated by the government.

These distinctions would not excuse conduct; they would measure what occurred and the culpability demonstrated.

II. CALIBRATE THE GUIDELINE INDEPENDENTLY OF THE STATUTORY MINIMUM

The Commission should reconsider §2G2.1's base offense level without designing the calculation to reproduce the fifteen-year mandatory minimum.

Amendment 664 raised the base offense level from 27 to 32 after Congress raised §2251(e)'s minimum from ten to fifteen years. The Commission explained that level 32, combined with enhancements expected in almost every production case, would ensure that the 180-month minimum was reached through the Chapter Two calculation in almost every case. U.S.S.G. app. C, amend. 664 (effective Nov. 1, 2004).

That history creates circularity. Congress enacted a mandatory minimum; the Commission raised the guideline to approximate it; and the resulting guideline range may then appear to independently confirm that the statutory floor reflects a proportionate sentence. The review should break that circle and ask what level is independently supported by culpability, actual harm, deterrence, public risk, and data.

The Commission may calculate below a statutory minimum although the court remains bound by it. U.S.S.G. §5G1.1(b) applies the statutory floor only after the otherwise applicable range is calculated. The Commission should therefore establish a lower alternative base offense level or a substantial mitigating adjustment for narrowly defined fictitious-minor attempts. It should also require presentence reports and Commission datasets to identify separately:

(a) the range produced by the offense-level calculation before application of a statutory minimum; and
(b) the final range after §5G1.1 is applied.

The Guidelines should tell the empirical and proportionality truth even when a statutory floor controls. If evidence supports a lower sentence, the guideline should show that Congress—not independent guideline analysis—has removed discretion.

III. ACCOUNT FOR GOVERNMENT-CREATED OR GOVERNMENT-AMPLIFIED CONDUCT

The Commission should adopt a generally applicable policy and a specific §2G2.1 application note addressing aggravating circumstances created or amplified during undercover operations.

This need not depend on entrapment, outrageous conduct, or agent misconduct. A lawful investigation and valid conviction may still produce a distorted measure of seriousness. Sentencing should separate what the defendant independently brought from what the government introduced, selected, supplied, or escalated.

Courts have recognized the underlying principle. In *United States v. Poehlman*, 217 F.3d 692, 701–05 (9th Cir. 2000), an adult-intermediary scenario involving a purported consenting parent demonstrated how the government's relationship, representations, and repeated suggestions could shape the resulting conduct. In *United States v. Cortes*, 757 F.3d 850, 864 (9th Cir. 2014), the court stated that government agents may not structure a sting to maximize punishment without regard to the defendant's culpability or independent ability to commit the aggravated crime. These doctrines are narrow and vary by circuit, supporting a uniform guideline rule.

I propose language substantially as follows:

"Government-Created or Amplified Offense Conduct.—If, during an undercover investigation, a government agent or cooperator introduced, selected, or materially escalated a circumstance that increased the offense level or the apparent seriousness of the offense, and the record does not show that the defendant independently sought or was reasonably capable of causing that circumstance, the court should reduce the offense level to the level that most accurately reflects the defendant's independently demonstrated conduct, intent, and capability."

For §2G2.1 attempts, relevant considerations should include whether:

• no actual minor existed, was contacted, or was endangered;
• no new abusive image was produced;
• the defendant lacked custody, access, proximity, or travel toward a child;
• all communications were with a government-controlled adult intermediary;
• the agent selected or escalated the represented age, sexual acts, production scenario, payment, or requested "instructions";

• the defendant had not independently sought the aggravating circumstance before it was introduced;
• any represented file was nonexistent, empty, corrupted, synthetic, modified, or contained no victim imagery; and
• investigators used or distributed actual victim imagery when a non-victim substitute could have served the investigative purpose.

This deserves separate study. When agents pose as willing sellers, producers, or custodial intermediaries; accept payment; solicit increasingly specific instructions; or supply actual or purported material, an operation may simulate or sustain the market the law seeks to suppress. The Commission should determine which facts show defendant culpability and which reflect investigative choices.

IV. MAKE RULEMAKING EVIDENCE-INFORMED, TRANSPARENT, AND PERIODICALLY VALIDATED

The Commission's review of its Rules of Practice and Procedure should require a public supporting memorandum for every major guideline amendment. The memorandum should:

(1) identify supporting empirical evidence and important contrary evidence;
(2) disclose material uncertainty and data limitations;
(3) identify whether the proposal originated in Commission research, a congressional directive, case law, or stakeholder advocacy;
(4) explain how it advances each relevant purpose in §3553(a)(2);
(5) estimate effects on sentence length, prison population, capacity, and cost;
(6) compare less restrictive alternatives;
(7) distinguish realized harm, intended harm, and government-created aggravation where relevant; and
(8) establish a three- or five-year retrospective review using actual sentencing and recidivism data.

The governing standard should be "evidence-informed, transparent, and periodically validated." Evidence cannot alone decide every moral judgment about punishment, but neither offense labels nor political assumptions should substitute for evidence about deterrence, incapacitation, proportionality, and public safety.

The past four decades reinforce this approach. *United States v. Booker*, 543 U.S. 220, 245 (2005), made the Guidelines advisory; *Gall v. United States*, 552 U.S. 38, 49–50 (2007), required individualized review; and *Kimbrough v. United States*, 552 U.S. 85, 101–10 (2007), recognized policy disagreement with a guideline. *Tapia v. United States*, 564 U.S. 319, 335 (2011), further holds that imprisonment may not be imposed or lengthened to promote rehabilitation. Treatment needs may support treatment, but not added prison years.

The Commission should also conduct controlled international comparisons of sentences, time served, recidivism, treatment outcomes, and public safety.

V. ISSUE A POLICY STATEMENT ON EFFICIENT, INDIVIDUALIZED PRISON PLACEMENT

Reducing incarceration costs and overcapacity also concerns where people are confined. Under 18 U.S.C. §3621(b)(5), the Bureau of Prisons must consider pertinent Commission policy statements issued under 28 U.S.C. §994(a)(2), which authorizes policy statements concerning sentence implementation.

The Commission should issue a policy statement favoring the least restrictive suitable placement based on individualized security risk, institutional conduct, treatment needs, family proximity, and program access. It should discourage categorical exclusion from lower-security placement based solely on an offense label where validated risk and conduct evidence support placement at a lower level. BOP would retain designation authority, while the statement could conserve higher-security beds, reduce costs, and align capacity decisions with actual risk.

VI. REQUESTED RESEARCH

The Commission should publish data separating completed offenses from attempts; actual from fictitious minors; direct-minor contact from adult-intermediary operations; actual production from nonexistent or unusable files; physical access or travel from remote-only communications; defendant-originated facts from agent-prompted escalation; actual victim material from substitutes; and pre-minimum ranges from ranges restricted by §5G1.1. It should report sentence length, variances, recidivism, treatment outcomes, and correctional cost for each category.

CONCLUSION

The Commission should reserve the most severe guideline punishment for conduct involving the greatest actual harm, the clearest culpability, and the greatest demonstrated danger. An unsuccessful attempt involving no real child may remain serious without being declared factually equivalent to completed abuse of an actual victim. Respect for law is strengthened when sentencing distinguishes a defendant's independently demonstrated conduct from circumstances created by the government.

I respectfully request that the Commission:

1. make review of §2G2.1 and fictitious-minor attempts an additional priority;
2. recalibrate the guideline independently of §2251's mandatory minimum and recognize ranges below the floor;

3. adopt mitigation for government-created or government-amplified offense conduct;
4. require evidence-informed, transparent, and periodically validated rulemaking;
5. issue an individualized prison-placement policy statement under §§994(a)(2) and 3621(b)(5); and
6. conduct and publish the proposed research.

Proportional differentiation does not minimize child exploitation. It directs punishment and resources toward the greatest actual harm, culpability, and danger while preserving sentencing legitimacy.

Public Comment to the United States Sentencing Commission

Dear Members of the United States Sentencing Commission,

My name is Prajna Kakumani, and I am a high school student. I am writing because after researching the criminal justice system, I think young people deserve more of a chance at rehabilitation rather than just long prison sentences.

One thing that really changed how I think about thus is brain development. The National Institute of Mental Health says the parts of the brain that control decision making and impulse control aren't fully developed until mid-20s. So a lot of teenagers who end up in the system are still literally growing up. That has to count for something.

I also looked into racial disparities in sentencing. According to The Sentencing Project, Black Americans are incarcerated in state prisons at nearly five times the rate of White Americans, and it's not because of differences in crime rates. That's a pretty alarming gap and I think it shows why sentencing policies need to keep being reviewed.

I know accountability is important. But programs like education, mental health treatment, and job training actually give people a real path forward. That's better for everyone in the long run.

Thank you for reading this. I appreciate that the Commission takes public input seriously.

Sincerely,

Prajna Kakumani

Dear Judge Reeves,

As we celebrate the United States' 250th birthday, we remember how far the country has come since its founding, and how much work is left before us to ensure that the principles on which it was founded can be realized. I am writing to urge you to remember the values of life, liberty, and the pursuit of happiness— which must necessarily include equal treatment under the law.

The U.S.'s approach to incarceration, as it stands, does not meet those standards, and as a concerned U.S. citizen, I ask you to consider the following as you carry out your duty at the USSC.

The criminal justice system would benefit from increased emphasis on community service over long prison sentences for nonviolent crimes. This strategy has been shown to reduce the likelihood and number of repeated offenses; this is a particularly important point, given that around half of released offenders relapse and are re-incarcerated shortly after release. Strategies that center rehabilitation over mere extended punishment, which save (a lot of) money compared to costly and ineffective extended prison sentences, also protect the public by minimizing trauma the offenders experience in the judicial system. In addition, either states or the federal government (I would choose the latter, to improve equality of outcome across states) should fund organized, research-backed re-entry programs, which improve chances of a former inmate's healthy reintegration into public life.

Secondly, it is in everyone's best interests to prioritize mental/behavioral healthcare for current inmates and all citizens and residents, including care for substance use disorders, with the purpose of reducing crime in communities and improving outcomes for individual offenders. The so-called "war on drugs" has essentially penalized substance use addiction as a crime rather than preventing or treating it as a mental illness. In practice, the heavily racially biased and aggressive tactics have been weaponized primarily against communities of color, leading to mass incarceration. For instance, use of the cheaper crack cocaine has been punished much more harshly than the powder version of the same substance, a policy that has rendered poor people and people of color more vulnerable to incarceration for using the same drug as wealthy or white drug users. Instead of punishing drug use or possession and providing no treatment options, policymakers should invest in in-person outreach centers and mobile facilities that emphasize harm reduction[1]. To combine offering these services to the general public, hopefully preventing crime before it starts; and to the currently incarcerated, to mitigate existing issues, is in my opinion the best approach.

Finally, to the extent that it is possible, financial incentives should remain separate from the justice system. The United States ought to completely end the system of monetary bail, which unfairly allows wealthier offenders to avoid jail time while enforcing the same upon others. Furthermore, we should continue to prohibit for-profit prisons, which have (literally) capitalized

[1] There are, of course, various ways to accomplish this based on regional context. One example lies in Portugal, which has made impressive progress in the area of drug policy reform. Hakimi Zapata, N. (2025). *Another World is Possible: Lessons for America from Around the Globe*, ch. 5. The New Press.

on mass incarceration, exploiting legitimate fears about public safety for monetary ends. President Trump recently overturned a Biden executive order ending government use of privately operated carceral facilities, reopening the door for the continuation of an unjust penal system that incentivizes imprisonment over public safety. This should be unilaterally discouraged.

I appreciate you taking the time to read my comments and I hope you will consider them in future judicial actions in order to support public safety and private well-being. I also trust that, where my advice is found wanting or incomplete, your expertise and that of your colleagues can fill the gaps, and that you can work jointly with citizens to produce better outcomes for us all.

Best,

Linda K.
Beltsville, MD

From: [redacted]
Subject: [External] ***Request to Staff*** KOONTZ, RANDY, [redacted] BUT-G-B
Date: Tuesday, July 14, 2026 1:33:52 PM

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To: Commissioners
Inmate Work Assignment: A & O Complete

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Inmate Message Below

Reform of the enhancements for 18 U.S.C 2252 is overdue. Computer use should be made a standard element of the offense, and acquisition of CSAM through other means enhanced for 2 points. Realistic image quantity triggers for the enhancements would be welcome, as a single video is considered 75 images, and with high-speed internet connections a person can download more than 8 videos (600 images) in a matter of minutes. Caselaw shows many cases of individual defendants with total image quantities in the thousands for mere mouse clicker consumers of images that have existed for decades online. If the quantity threshold for enhancements were raised to begin with, say 400 images, and top out with five points for, say, 2500 or more images, the vast majority would still receive some enhancement.

From: [redacted]
Subject: [External] ***Request to Staff*** LACKLAND, PETER, [redacted] YAM-D-A
Date: Monday, July 13, 2026 3:04:55 PM

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To:
Inmate Work Assignment: unicor

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Inmate Message Below

In light of the recent decision in Rutherford vs. United States, can the Commission consider any policy amendments that may address the glaring sentencing disparities that were created by section 403 of the First Step Act?

From: [redacted]
Subject: [External] ***Request to Staff*** LINDSEY, JEREMIAH, [redacted] BAS-A-A
Date: Monday, July 20, 2026 10:18:55 PM

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To:
Inmate Work Assignment: Ind Office

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Inmate Message Below

United States Sentencing Commission
Attn: Public Affairs Priorities Comment
One Columbus Circle, N.E. Suite 2-500
Washington, D.C. 20002-0002

July 20, 2026

Re: Suggested Policy Priority for Amendment Cycle Ending 5/1/2027

To Whom It May Concern:
I and many others believe the commission should once again consider prioritizing sentencing guidelines relating to purity of methamphetamine for the amendment cycle ending May 1, 2027.

Many stakeholders were devastated the commission failed to reform methamphetamine guidelines in 2026. The previous cycle's proposed amendments consisted of four options. Included with the multiple options was lengthy commentary citing the government's own studies which offer all the evidence needed for one to see a change is over due. Circumstances have changed since law and guidelines were enacted to distinguish between methamphetamine "actual" and "mixture". The governments own studies show more than enough to support the needed change (reducing all meth to mixture penalties if not less).

For the 2027 amendment cycle this issue is even more important. According to Derek Glina, director or research at Federal Prison Legal News there is plenty of case law to support potential sentence relief in compassionate release petitions. Glina also cites ATF's newest studies show that ALL meth now meets the definition of "pure" and as such the increased sentences are violative of due process. Glina also alleges that dozens of new cases from virtually all circuits are now recognizing this fact. Based on this information people with my charge are banding together to do research. If the arguments are feasible (and we believe they will be) then we will be flooding the District Courts petitioning for relief.

We are also seeking other judicial procedures to obtain relief due to the denial of due process issue relating to meth purity. It is likely new case law will be developing as many push this issue. As people from all over the country participate and appeal decisions (when appropriate) there might even be a circuit conflict.

Although the USSC acting on this issue during the 2027 cycle will be too late to avoid many judicial proceedings it is nonetheless ideal. If the commission prioritizes and acts implementing the much needed changes it will help clear

up Court dockets, avoid unnecessary circuit conflicts and ensure justice to all who are entitled rather than many individuals having to fight independently.

Thank you for your time and attention in this matter. Have a blessed day!

/s/Jeremiah Lindsey

Sources

Federal Prison Legal News (June 15, 2026)
https://www.dea.gov/sites/default/files/2021-f02/DIR008-21 2020 National Drug Threat Assessment_Web

From: [redacted]
Subject: [External] ***Request to Staff*** LOCKMAN, AARON, [redacted] ELK-E-B
Date: Monday, July 20, 2026 10:48:48 AM

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To: USSC
Inmate Work Assignment: Chapel Orderly

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Inmate Message Below

This message is in response to the posting requesting inputs of possible resolutions to overcapcity and under funding of the Federal Bureau of Prisons.

I believe there will always be a biased respons to this request for input, from all angles. Inmates will have a biased opinion, public will have theirs, congress will have theirs, and so on. I do believe that to find a true, long-lasting solution that works, the solution would need to be found from looking at the root problems from all sides.

My solution to this involves looking over a majority of the FBOP/USSC, like analyzing the current sentencing guidlines, correct staffing, funding that goes directly to programming, and mor - not just a single issue.

In the 1990's the USSC and US Congress implemented the currect, advisory guideline ranges for US Federal Offenses. Minus a few changes every year or two, those guidelines have not been overhauled or changed significantly since the 90's. I do believe that certain guidelines and enhancements that applied in the 90's are not equivelant to what would require an enhancement, now approaching the 2030's. Enhancements are to separate the base level offender for a certain offense, from an offender who caused more harm, or had more intriquite details in their case, that would label them as a 'worse offender' compared to the base level. Certain offenses carry enhancements that 90%+ of individuals receive. While these enhancements did separate these offenders in the 90's, if 90% of defendants receive an enhancement, it no longer is separating - it is now only applying almost automatically, to all offenders.

I believe that an intense look into the sentencing guideline ranges and enhancements should receive a strong analyzation. From an unbiased position, the guideline ranges and enhancements should also be studied to learn what actually needs MORE time than what was originally prescribed by the USSC and Congress.

A major issue with overcapacity is the lack of programming for incarcerated individuals. Actual, case specific programming that reduces recidivism and rehabilitates the rehabilitable are basically non-existent. While the BOP implemented programs that followed the goal of the First Step Act, passed by congress in 2018, due to staffing shortages and waitlists that are longer than some individuals sentences, they have turned into 'ghost programs.' These programs are posted each month and lets all incarcerated individuals know the current FSA programs, which locations these are offered at, etc. - but are never given as options for individuals to actually take. Once again this leads to a higher recidivism rate, which in turn, increases prison populations, nation wide.

The BOP has and utilizes grading scales of recidivism risk and security levels for every single federal prisoner. These range from high risk to recrecidivated high security needs to minimum risk to recrecidivated low/minimum security needs. I believe a way to reduce overcapacity and help funding is to have individuals that the BOP deems as

low to minimum risk of recidivism AND low to minimum of security needs, place on home incarceration with an ankle monitor for the remainder of their sentence. These individuals would be allowed to work, make money, pay off restitution quicker, and pay for the monitoring software of the ankle device - and should require these individuals to successfully complete a rehabilitative, high-intensity, case specific program on the outside. This would clear thousands of beds immediately, by removing those who are the lowest to reoffend and the lowest risk to cause harm to the community.

With this, federal prisoners who are in need of actual, behind-bar programming and security would receive what they actually need. Which once again, lowers their recidivism rates.

Every 10 years or so some sort of sentencing reform is implemented: Guidelines of the 90's, Second Chance Act of 2008, and First Step Act of 2018. With these going into place every 10 years, and there still being an issue of overcapacity, I believe it needs to be looked at from a different angle than what it has been.

Could those with minimum recidivism risk qualify for 65% after good time credit? Low for 75%? Medium 80%? I don't know the exact solution, and maybe AI can help. But the biggest help would be actual programming that is active all year round without waitlists of YEARS that actually help develop skills of reentry and living for all incarcerated individuals instead of ghost programs that only get people out the door sooner.

Thank you,
Aaron Lockman

From: [redacted]
Subject: [External] ***Request to Staff*** LOZADA-ALVAREZ, MIGUEL, [redacted] OXF-S-A
Date: Friday, July 17, 2026 12:04:54 PM

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To: Comment
Inmate Work Assignment: REC

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Inmate Message Below

Immgration inmates sentenced to the same time as others do not get halfway house time or home confinement. As a result, I was recommending that immigration inmates get 2 pts reduction, if they have clear conduct, low recidivisim rating, and are programing. This will reduce over population and will be fair between inmates with same offenses. Thanks

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Babar Malik

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

Comment on Proposed Priorities for the 2026–2027 Amendment Cycle

To the United States Sentencing Commission:

I respectfully submit this comment regarding the Commission's proposed priorities for the 2026–2027 amendment cycle.

I urge the Commission to prioritize continued reform of economic crime sentencing, expansion of retroactive relief for guideline amendments, and increased recognition of post-sentencing rehabilitation.

For many years, federal fraud sentences have been driven primarily by loss calculations under U.S.S.G. §2B1.1. While loss amount is a relevant factor, it often becomes the dominant factor in determining the advisory guideline range. In many cases, enhancements tied to intended loss can dramatically increase sentencing exposure even when they do not accurately reflect a defendant's personal gain, actual conduct, level of sophistication, or true culpability.

The Commission's recent work examining economic crime sentencing represents an important acknowledgment that loss amount alone may not always be the best measure of offense seriousness. I encourage the Commission to continue evaluating whether the current framework produces sentences that are greater than necessary to achieve the purposes of sentencing under 18 U.S.C. §3553(a).

I also urge the Commission to make fairness and retroactivity a central priority. When the Commission determines that guideline provisions should be reduced or revised because they produce excessive or disproportionate punishment, individuals already serving sentences under the prior framework should not be excluded from relief solely because they were sentenced earlier.

Many incarcerated individuals are serving lengthy sentences that would likely be lower if imposed today. This is particularly true in economic crime cases where guideline ranges were heavily influenced by loss-driven enhancements. The Commission should continue studying and expanding opportunities for retroactive application of significant guideline amendments so that similarly situated defendants are treated similarly regardless of sentencing date.

Additionally, I encourage the Commission to prioritize greater recognition of rehabilitation. Thousands of incarcerated individuals have completed educational, vocational, and cognitive programming, maintained clear disciplinary records, worked institutional jobs, earned vocational certifications, and demonstrated meaningful personal growth. These efforts reflect reduced risk of recidivism and should carry greater weight when sentence reductions are considered.

Finally, I urge the Commission to study sentencing disparities among co-defendants and similarly situated offenders. Significant differences in sentences often arise from disputed guideline enhancements, intended-loss calculations, and varying interpretations of leadership roles. Greater consistency and proportionality would improve confidence in the federal sentencing system.
The federal sentencing guidelines should continue evolving to reflect fairness, proportionality, public safety, and rehabilitation. I respectfully ask the Commission to make economic crime reform, retroactivity, sentencing disparity reduction, and rehabilitation-based relief key priorities during the 2026–2027 amendment cycle.

Thank you for your consideration.

Respectfully submitted,
Babar Malik

Submitted on: June 11, 2026

Public Comment on the U.S. Sentencing Commission's Proposed Priorities for the 2026–2027 Amendment Cycle

To the Honorable Members of the United States Sentencing Commission:

I respectfully submit this comment as a family member of a federal inmate. I appreciate the Commission's willingness to receive comments from members of the public regarding future sentencing priorities.

I encourage the Commission to consider two related areas for study and possible amendment.

1. Greater Recognition of Post-Offense Rehabilitation

Federal sentencing serves many important purposes, including punishment, deterrence, protection of the public, and rehabilitation. While rehabilitation is often discussed after sentencing, I respectfully suggest that documented post-offense rehabilitation should receive greater consideration throughout the federal sentencing framework.

Many incarcerated individuals spend years completing educational programs, vocational training, cognitive behavioral treatment, substance abuse treatment when appropriate, faith-based programming, and maintaining exemplary institutional records. These efforts demonstrate personal growth, accountability, and a commitment to lawful conduct.

I encourage the Commission to study whether the Guidelines should provide greater recognition for:

- sustained educational and vocational achievement;
- successful completion of evidence-based treatment programs;
- long-term disciplinary compliance;
- documented acceptance of responsibility beyond the initial guilty plea; and
- measurable reductions in recidivism risk supported by validated research.

Recognizing genuine rehabilitation promotes institutional safety, encourages positive behavior, and supports successful reintegration into society.

2. Study of Proportionality in Non-Contact Sexual Offense Cases

I also respectfully request that the Commission study whether the current Guidelines sufficiently distinguish among different factual circumstances in non-contact sexual offense cases.

This comment is not intended to minimize the seriousness of any offense or the harm suffered by victims. Every offense involving the exploitation of children deserves meaningful punishment and accountability.

However, sentencing policy should also ensure that advisory guideline ranges appropriately distinguish among varying degrees of conduct. The Commission may wish to study whether

current enhancements sometimes overlap or accumulate in ways that produce advisory ranges that do not always reflect meaningful differences in offense conduct.

Specifically, I encourage the Commission to examine whether greater distinction should be made between cases involving:

- direct physical abuse;
- direct communication or grooming of minors;
- production offenses involving personal contact;
- and cases in which there was no direct physical or online contact with a minor.

Studying these distinctions does not lessen accountability. Rather, it promotes proportionality, consistency, and confidence in the federal sentencing system.

Conclusion

The federal sentencing system has evolved significantly over the past several decades. Continued research into rehabilitation, proportionality, and recidivism can strengthen public safety while ensuring that sentences remain fair, evidence-based, and individualized.

The Commission should evaluate whether current categorical exclusions from certain rehabilitative incentives appropriately reflect individualized assessments of rehabilitation and risk, or whether a more evidence-based approach would better promote public safety and successful reentry.

Thank you for your consideration of these comments and for your continued work on improving the federal sentencing system.

Respectfully,

Narcedalia McClung
Fort Worth, Texas

From: [redacted]
Subject: [External] ***Request to Staff*** MIRABAL, GABRIEL, [redacted] HAZ-E-B
Date: Monday, July 20, 2026 3:18:53 PM

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To:
Inmate Work Assignment: education

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Inmate Message Below

I am writing about the (Equal act).The sentencing disperitys in crack vs cocaine are crazy.The purity levels in crack are not tested to prove that it is more pure then cocaine.In my case the CI testified that crack was whipped and it was a way to get more crack from the cocaine,it is a way to cut cocaine when making crack.It is the same drug just with water and baking soda,but is smoked in a pipe.cocaine can be smoked on a foil so it is the same just different methods of drug use.

Also the sentencing on ghost dope is outragous.I went to trial and the jury deliberated only on conspiracy not the amount of drugs in the conspiracy.When it states 500grams or more doesnt mean(or more) being open to whatever amount they belive it to be.The jury does not diliberate on what the government belives the amount to be during the life of the conspiracy only on the 1 or 2 transactions they can prove or off of a few phone calls.They are sentencing us to unrealistic amounts of drugs(Ghost Dope) that they cant prove had happened just multiplying a few transactions throughout the life of the conspiracy.The government uses a vague loophole to impose harsh sentences.The defendent should be sentenced to only the crime that he/she commited and a jury found him guilty on. The (or more) in drug charges should state a specific amount for the jury to deliberate on and a judge to give the proper sentence on.

From: [redacted]
Subject: [External] ***Request to Staff*** NABI, SHERIDA, [redacted] ALI-B-A
Date: Thursday, July 23, 2026 11:18:47 AM

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To: USSC
Inmate Work Assignment: AW Orderly

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Inmate Message Below

Dear USSC,

This writing respectfully urges the Commission to use its statutory power under 28 USC par. 994 to advance sentencing policies that reduce prison overcrowding, support humane and rehabilitative conditions, narrow unwarranted sentencing disparities, due process, a special provision for non-US offenders.
The Commission is directed by statute to consider the nature and capacity of correctional facilities and to work toward reducing recidivism; the concerns below fall squarely within that mandate.

1. Prison overcrowding and its link to Sentencing policies
Lengthy prison terms and broad mandatory minimums and Prosecution overreach drive prison population pressure. One avenue is for the Commission to expand alternatives-to-incarceration options in the guidelines, broaden safety-valve-style relief, and reassess offense levels that at the moment produce terms longer than necessary to meet the purposes of sentencing. Reducing unnecessary length directly relieves population strain.
A special provision needs to be made for non-US offenders, who will face deportation in the majority of cases. This group should be allowed to have the full benefits of First Step, Second Act and other Acts, all to add to relieving the mass incarceration and overcrowded prisons. The process of deportation should be simplified to avoid lengthy detention at ICE prisons, an incarceration that is unjustly added to an offender's statutory sentence.

2. Conditions of Confinement and Medical Care
Overcrowding worsens medical care, chronic-care management, and safety for aging and ill individuals. While facility conditions are administered by the Bureau of Prisons, the Commission can document these downstream effects in its research and account for them when calibrating guideline severity, and can strengthen policy statements on compassionate release and elderly/medical release pathways.

3. Rehabilitation
Rehabilitation is undercut when programming space and staffing cannot meet demand.
One avenue is for the Commission to further encourage recognition of post-offense and in-custody rehabilitation in the guidelines, and to support alternatives that prioritise treatment, education and re-entry readiness over incarceration length.

4. Sentencing guideline reviews and disparities
The comment asks the Commission to continue reviewing guidelines that produce unwarranted disparities, including disparate outcomes tied to non-citizen status, criminal history calculation in economic cases, and application of unnecessary enhancements. Consistent evidence-base calibration reduces disparity and promotes proportionality.

Actions sought:
1) Expand alternatives-to-incarceration and safety-valve type relief
2) Study and report on the correctional-capacity and health-care effects of guideline severity
3) Strengthen policy statements on compassionate, elderly and medically warranted releases, especially since the BOP does NOT provide the care constitutionally required de minimis
4) Continued targeted review of guidelines that generate unwarranted disparities
5) Consider retro-activity where amendments lower sentence ranges, consistent with par 1B1.10 and 28 USC par. 994(u)

All of the above is based on first-hand experiences, living in prisons which are infested with drugs, staffing issues, negligence, dehumanising conditions, third world health care, rehabilitation being provided in the poorest form or non-existent, non-US citizens are treated sub par, religious rights are trampled upon and more.

Respectfully submitted and praying for adjustments along the above mentioned,

Sherida Nabi

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Jessie Nettles

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

Good evening,
I believe it is very important for the federal guidelines for sentences, especially on drug charges to be reformed. I believe the guidelines are to harsh for offenders. When violence is not committed during a drug charge, why should the guidelines be so harsh. A lot of offenders have longer sentences than offenders that have committed violent crimes. There are sex offenders that get lesser sentences the offenders that commit drug offenses. This doesn't make sense to me.

Submitted on: July 13, 2026

From: [redacted]
Subject: [External] ***Request to Staff*** PERRY, RANELLE, [redacted] SST-F-A
Date: Monday, July 13, 2026 5:33:32 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: Priorities
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The Sentencing Commission should prioritize career offender reform. The Commission has made career offender reform a part of several past amendment proposals, but has not acted on reform. Now is the time to act. I am serving a 30-year term of imprisonment, the length of which was driven by the career offender guidelines. I had prior firearm discharge and robbery convictions from when I was 14 and a flight to avoid arrest from when I was eighteen. I was convicted in federal court on a 924(c) (use of a firearm in connection with a drug trafficking offense) when I was 20. Without the career offender guidelines, my guideline range would have been 59-72 months. I am seving a 360 month sentence. I have been in prison 13 years. Since that time, I have met many people who were more recently sentenced and were sentenced from districts that have rejected as a policy matter the career offender guideline enhancement (e.g., the District of Minnesota, which decided to abandon the career offender guideline when Magistrate Judge Elkins, a former federal defender, was appointed as a Magistrate Judge). The courts are all over the place on career offender and I believe it is past due for the Sentencing Commission to pass career offender reforms. However well intentioned, the career offender guidelines lead to shocking disparate outcomes for people like me. I am ready to get back to my family. Please reform career offender and make it retroactive. Judges still have the power to disregard the guidelines and vary upwards when they feel like the ordinarily calculated guidelines do not fully capture the gravity of the offense.

Public Comment on the United States Sentencing Commission's Proposed Priorities for the 2026–2027 Amendment Cycle

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A Case Study Based on *U.S. v. Peters*, No. 6:09-cr-082-JA (M.D. FL)

By

Sean Peters, MPA

Dear Chair Reeves and Members of the United States Sentencing Commission:

I respectfully submit this public comment to present a documented case study confirming the Commission's own findings that U.S.S.G. § 2G2.2 requires comprehensive revision that should be a priority for the Amendment Cycle in 2026-2027. Please note, the information I present herein is not intended to relitigate my case. My intent is simply to comment based on my unique knowledge and experience using undisputed facts with the added hope that this commentary will be useful in determining your priorities for the upcoming amendments.

U.S.S.G. § 2G2.2 REMAIN EMPIRICALLY FLAWED

On February 11, 2009, United States District Judge Gregory A. Presnell of the Orlando Division of the Middle District of Florida appeared before this Commission and publicly warned that U.S.S.G. § 2G2.2 "is not based on any empirical data or institutional analysis" and is "inherently illogical." Judge Presnell further cautioned that the Commission itself risked becoming "irrelevant" if it continued to "promulgate sentencing formulae perceived by the judiciary as arbitrary and lacking empirical foundation." He urged the Commission to observe and incorporate "the collective wisdom of the actual sentencing process" rather than rely upon sentencing policy unsupported by empirical experience or evidence. **See Exhibit A (showing judicial conclusion nearly two decades old that the Guideline is empirically flawed).**

During the same period of controversy over the Guidelines that Judge Presnell summarized, I was indicted (see Docket# 1, Indictment), convicted (see Docket # 88, Jury Verdict), and sentenced (see Docket # 110-111, Judgement and Sentence) for knowingly violating 18 U.S.C. § 2252A(a)(5)(B). The federal prosecutor's disclosure (see Docket# 77, Judicial Disclosure Order) of the grand jury transcripts revealed that the venire heard testimony from a single federal agent stating that I was "the only one [living] there" when that agent searched my home. The prosecutor did not call witnesses familiar with my living arrangements who knew that I rented my home to an adult male tenant. See Docket# 63 (Government's Witness List). I was not permitted to object or present any evidence that would show my living arrangements due to Fed. R. Crim. P. 6(d)(1), which limits who is allowed in grand jury

proceedings. These undisputed facts are part of the public record and provide context for my comments on the need to amend U.S.S.G. § 2G2.2.

REAL-WORLD CONSEQUENCES OF FLAWED SENTENCING GUIDELINES

On January 15, 2010, United States District Judge John Antoon of the Orlando Division of the Middle District of Florida, who presided over my trial, determined that my Guideline calculation should be made primarily on a base offense level of 18, a +2-computer enhancement, and a +4-image enhancement. This calculation was driven by enhancements that this Commission has since recognized are commonplace or technologically outdated. Nevertheless, those enhancements contributed to my total offense level of 24 and the Guideline's most severe supervised-release recommendation: lifetime supervision. What empirical basis justified imposing the Guideline's most severe supervised-release recommendation on a defendant whose total offense level was near the bottom?

My defense at trial was supported by many credible alibi witnesses who placed me elsewhere when the computer in question was used, and that I did not knowingly possess the files in question, and that I was not the person responsible for downloading them. The same prosecutor from the grand jury proceedings called my former tenant to testify against me. See Docket# 63. The jury's guilty verdict, Docket # 88, was also based on the testimony of the federal agent who testified in the grand jury proceedings when he stated under oath that he did not know about my adult male tenant until "[a]fter the search" of my home. **See Exhibit B (demonstrating that criminal cases often involve factual complexities or conflicts with other evidence or judicial conclusions that cannot be captured by offense labels or standardized enhancements alone).**

Congress expressly directed sentencing courts to impose a sentence that is "sufficient, but not greater than necessary" under 18 U.S.C. § 3553(a), recognizing that the factual circumstances of individual cases are often more nuanced than generalized offense characteristics or categorical assumptions. **In my case, subsequent judicial findings and other evidence highlighted factual complexities that were not before Judge Antoon when he imposed my sentence. See Docket # 147 at 6 (Judge Antoon's post-conviction ruling on the inevitable discovery and independent source doctrines concerning information about my tenant).** The prosecutor did not disclose the evidence from the "independent" witness prior to trial contrary to Judge Antoon's pre-trial order. See Docket # 77. This means that Judge Antoon did not have all the facts and evidence that later emerged, illustrating why standardized enhancements and categorical assumptions may not always accurately reflect culpability, risk, or the purposes of sentencing embodied under 18 U.S.C. § 3553(a).

Consider these two established facts: (1) Judge Antoon sentenced me in 2010 under the very Guideline that Judge Presnell publicly criticized to this Commission in 2009; and (2) both federal judges work in the same courthouse. Judge Presnell cited several cases in his

commentary to this Commission that show sentencing disparities at footnote 1. All of those cases preceded mine in the Middle District of Florida. The resulting sentencing disparities warrant careful consideration.

The prosecutor who handled my case sought a lifetime punishment under the Guidelines for a non-production offense and in a case where many aggravating characteristics identified by U.S.S.G. § 2G2.2 did not exist. My defense presented evidence from Federal Defender Troy Stabenow who authored Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines showing flaws in U.S.S.G. § 2G2.2. These Guidelines – already known to be empirically flawed and causing sentencing disparities – presented Judge Antoon with only two supervised-release recommendations: 5 years, or life.

THE EIGHTH AMENDMENT NEEDS TO BE CONSIDERED

I spent more than 136 months under the legal custody and supervision of the United States, consisting of both imprisonment and supervised release. Although supervised release is distinct from imprisonment, it nevertheless constitutes a significant restraint on liberty imposed pursuant to a criminal judgment and recognized by federal law as a form of custody for numerous legal purposes. This is contrasted by the maximum term of imprisonment for violating 18 U.S.C. 2252A(a)(5)(B) and (b)(2) which is 120 months.

Has this Commission considered whether recommending lifetime supervised release for non-production offenses may, in some circumstances, produce punishments greater than necessary and raise concerns under the Eighth Amendment? For example, what happens if a defendant is sentenced to the full 120-month term of imprisonment and is also ordered to a term of supervised release? The Eight Amendment expressly prohibits "...cruel and unusual punishments inflicted." By definition, cruel and unusual punishment includes deliberately degrading punishment or punishment that is too severe or unnecessary for a specified offense. See *Dictionary.com*.

Whether lifetime supervision for non-production offenses is consistent with the Eighth Amendment has important policy implications that warrant careful consideration whenever this Commission recommends lifetime supervision as an advisory Guideline.

THE 2009 GUIDELINE SAID THAT LIFETIME SUPERVISION WAS APPROPRIATE BUT THE UNITED STATES DISAGREES IN THE PRESENT

The United States Probation Office correctly determined in 2023 that I am not a recidivism risk, and they asked Judge Antoon to terminate my lifetime supervision early. See Exhibit C (Official Request and Court Order Granting the Request). The United States Attorney's Office did not oppose the probation officer's request, and did not appeal Judge Antoon's Order. This means the federal government's final agreement on my punishment was

and remains contrary to every argument these offices made prior. See Docket #s 109, 152, 161, 170, 194, 222 (Governmental Opposition to Relief from Unnecessary Punishment).

Please note that the last entry on the publicly available docket shows only a limited appearance by one of my formerly retained attorneys whom I hired to handle the early termination proceedings. See Docket # 259 (Notice of Limited Appearance). This turned out to be waste of resources because Judge Antoon granted the probation officer's request without holding a public hearing. I learned from the Clerk of the Court that Judge Antoon subsequently sealed the record of his Order **(see Exhibit C)** terminating my supervised release early. The probation officer who made the request for early termination gave me a copy, which I have attached for your review to prove what I am conveying herein is true and correct.

Accordingly, this submission is not merely the opinion of a former defendant or graduate student of public administration. It is a documented case study in which:

* A federal district judge publicly condemned the empirical validity of U.S.S.G. § 2G2.2 in 2009 and cited multiple cases from the Middle District of Florida showing sentencing disparities;

* An officer of the court from the federal defender's office published the flaws of U.S.S.G. § 2G2.2 in 2009;

* Another federal district judge in the Middle District of Florida nevertheless imposed the Guideline's most severe supervised-release recommendation in 2010;

* And, after more than 136 months of combined federal custody and supervision, well beyond the statutory maximum term of imprisonment authorized, the United States Government itself concluded that my continued punishment was unnecessary, contrary to the position taken at my sentencing and when I requested relief from a punishment that was greater than necessary.

As someone holding an Associate Degree in Paralegal Studies, a Bachelor's Degree with double majors in Criminal Justice and Public Administration, and a Master of Public Administration, and who was federally sentenced under flawed Guidelines, I respectfully submit that this sequence of events and incontrovertible facts mentioned herein validate concerns the Commission itself identified more than a decade ago in its publication titled 2012 Report to the Congress: Federal Child Pornography Offenses. The Commission reported that it has the ability to amend these Guidelines on its own *without* congressional action. **See Exhibit D (Noting the U.S.S.C. can exercise its own authority).** This demonstrates why evidence-based reform remains both legally appropriate and administratively necessary.

Public administration teaches that governmental policies should be evaluated according to measurable outcomes rather than assumptions. When empirical observations repeatedly produce results materially different from those predicted by a policy, responsible governance requires policymakers to reevaluate the policy rather than continue relying upon outdated

assumptions. Failure to act despite decades of empirical evidence risks perpetuating ineffective policy, unnecessary punishment, and inefficient use of taxpayer-funded governmental resources.

My purpose here is to offer my documented experience as a data point supporting continued revision of U.S.S.G. § 2G2.2 so that federal sentencing policy remains proportional, individualized, empirically grounded, and faithful to the U.S. Constitution and Congress' directive that every sentence be "sufficient, but not greater than necessary" under 18 U.S.C. § 3553(a). The time for further study has passed. The time to fix this problem is now. The Commission has already assembled the empirical foundation necessary to act.

In my case, and likely many others, the categorical assumptions embedded in U.S.S.G. § 2G2.2 predicted one outcome but the individualized federal observation produced another. My experience also illustrates the danger of categorical assumptions. Public policy should be based on individualized facts, empirical evidence, and measured outcomes rather than generalized beliefs that an entire class of offenders presents the same level of risk or is incapable of rehabilitation. Moreover, the constitutional structure of the United States rejects punishment based upon status or generalized assumptions. My documented experience demonstrates why that individualized inquiry remains essential.

The question now is whether the Commission will complete the work that it, members of the federal judiciary, and decades of sentencing experience have already demonstrated is necessary. I therefore urge the Commission to complete the comprehensive revisions that its own research and 2012 Report to the Congress shows, along with the observations made by Judge Presnell and others, and my real-world sentencing experience have long supported.

Respectfully, the Commission has already identified the problems with U.S.S.G. § 2G2.2. Members of the federal judiciary identified those same problems before my sentencing. My documented experience confirms them. The time for further study has passed; the time for comprehensive revision is now.

Exhibit A

Comments to the United States Sentencing Commission
Atlanta, Georgia
February 11, 2009

by Gregory A. Presnell
United States District Judge
Middle District, Florida

I appreciate the opportunity to appear before you today to share my thoughts about federal sentencing issues.

For those of you who have read my opinions, you know that I have been a vocal critic of the Sentencing Guidelines.[1] My objections have been twofold:

(1) Under mandatory Guidelines, the role of the judiciary was minimized to the point that it threatened judicial independence, and reduced district judges to a mere figurehead, rubber-stamping its imprimatur on the predetermined sentence chosen by the government. In essence, the Court became irrelevant in our criminal justice system; and

(2) The Guideline score often produced arbitrary and grossly unjust sentences.

My first concern has largely been resolved by a series of recent Supreme Court cases: *Booker*, *Kimbrough*, and now *Spears*.

But the lesson from these cases is not only that trial judges now have discretion in the sentencing process.

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[1] *See US v. Belvett*, 2005 U.S. Dist. LEXIS 4659, 18 Fla. L. Weekly Fed. D 372 (M.D. Fla. March 17, 2005); *US v. Hamilton*, 428 F. Supp. 2d 1253 (M.D. Fla. 2006); *US v. Williams*, 481 F. Supp. 2d 1298 (M.D. Fla. 2007); *US v. Delgado*, 2005 U.S. Dist. LEXIS 29966 (M.D. Fla. June 7, 2005); *US v. Miranda-Garcia*, 2006 U. S. Dist. LEXIS 26574 (M.D. Fla. May 4, 2006); *US v. Vasquez*, 2008 U.S. Dist. LEXIS 6984 (M.D. Fla. January 30, 2008).

More importantly, from the Commission's standpoint, judges are now free to consider the weight or effect to be given a particular Guideline based on the Court's view the Guideline's vitality.

And that brings me to my second point. It is now the Sentencing Commission which may become irrelevant, if it continues to promulgate and promote sentencing formulae which the judiciary disregard because of their perceived arbitrariness and lack of empirical foundation. Let me give three examples.

(1) The crack/powder cocaine disparity. The sentencing variance between two substances which are chemically identical and which adversely affects a racial minority defies logic and promotes disrespect for the law, contrary to the mandate of 18 U.S.C. 3553(a).[2] Amendment 706 does little to correct this imbalance.

(2) Illegal re-entry under 2L1.2. The enhancements from 4 to 16 points based upon arbitrary steps of prior criminal conduct often produce grossly unjust results.[3] It would be far better, in my opinion, to simply apply an enhancement range (*e.g.* 2-16 levels) based on the Court's assessment of the seriousness of the prior criminal conduct.

(3) Possession of child pornography under 2G2.2. Sec. 2G2.2 of the United States Sentencing Guidelines has been the subject of much recent criticism by scholars and judges because it is not based on any empirical date or institutional analysis. Thus, because the Guideline is not the product of the Sentencing Commission's institutional strength, and because the Guideline is inherently illogical, many courts have afforded it less deference than it would with an empirically-grounded Guideline. *See e.g. US v.*

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[2] *U.S. v. Hamilton*, 428 F. Supp. 2d 1253 (M.D. Fla. 2006)

[3] *U.S. v. Salazar-Pacheco*, No. 6:05-CR-137 (M.D.Fla. Jan. 20, 2006)

Baird, 580 F. Supp. 2d 889 (D.C. Neb. 2008); *US v. Hanson*, 561 F. Supp. 2d 1004 (E.D. Wis. 2008); *U.S. Shipley*, 560 F. Supp. 2d 739 (SD Iowa 2008); *U.S. Grober*, 2008 WL 5395768 (D. NJ. 2008).

In conclusion, the common law of federal sentencing must be allowed to evolve, and the Commission, if it is to maintain its relevance, must observe and take into account what trial judges are doing and saying.[4] After all, it is the district bench that is on the front line of these issues. We are the ones who have to make the daily hard decisions that affect people and society as a whole in our sentencing decisions.

Judges in my view want guidance. No one wants a return to the pre-Guideline free-for-all which produced vastly different sentences for the same criminal conduct. But, the guidance must be based on the collective wisdom of the actual sentencing process, and not simply a mandate derived from the Commission's notion of sentencing policy, or the desire to placate the apparent will of Congress.

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[4]*See U.S. v. Williams*, 481 F. Supp. 2d 1298 (M.D. Fla. 2007)

Exhibit B

Q. Why not?

A. If the devices have any memory in them, it is such a small amount, and the apparent age of them, I did not feel it was needed.

Q. You did prepare a report of the search itself, is that right?

A. That's correct.

Q. And so that encompassed the activities of the other agents involved?

A. That is correct.

Q. And when did you learn that Matthew Morrison rented a room from Mr. Peters, before or after the search?

A. After the search.

MR. AMBROSE: That's all.

THE COURT: You may step down, sir.

Who's your next witness?

MR. AMBROSE: Jacqueline Metzger.

Whereupon:

JACQUELINE METZGER,

called as a witness, having been first duly sworn according to law, testified as follows:

THE COURT: Ma'am, what is your full name?

THE WITNESS: My name is Jacqueline Metzger. I'm a senior special agent with Immigration and Customs Enforcement.

Exhibit C

Sealed
Document

Exhibit D

each of the three factors. Such a revision should reflect recent changes in offense conduct and knowledge gained from emerging social science research and also better account for the variations in offenders' culpability and their sexual dangerousness.[54]

Consistent with the position of the Department of Justice,[55] the Commission believes that Congress should enact legislation providing the Commission with express authority to amend the current guideline provisions that were promulgated pursuant to specific congressional directives or legislation directly amending the guidelines.[56] If such legislation were enacted, the Commission would proceed to draft a comprehensive revision of the child pornography guidelines according to the Commission's regular procedures for amendment pursuant to 28 U.S.C. § 994(o). Public comment would be sought, a public hearing would be held, and the proposed revision would be submitted for congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p). The Commission requests Congress to provide the Commission with authority to revise the entire guideline structure.

Without congressional action, the Commission is able nevertheless to amend the child pornography guidelines in a more limited manner that better reflects the three sentencing factors discussed above. As shown in Appendix E of this report, which contains an analysis of the provenance of each section of the current version of §2G2.2, a number of its provisions were promulgated on the Commission's own initiative — not as a result of a specific congressional directive or by direct statutory amendment — and, thus, could be amended pursuant to 28 U.S.C. § 994(o) (subject to congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p)).

The Commission outlines below its broader vision of revisions to the guidelines to better reflect the Commission's findings and conclusions above.

a. Offenders' Collecting Behavior

The current penalty scheme in non-production cases focuses primarily on an offender's child pornography collection. Three of the six enhancements in §2G2.2 concern the content of offenders' collections: (1) a 2-level enhancement for possession of images of a pre-pubescent minor, (2) a 4-level enhancement for possession of sado-masochistic images or other depictions of violence, and (3) a 2- to 5-level enhancement for collections of a certain number of images (with increments ranging from ten or more images to 600 or more images).[57] Because these

[54] *See generally* 28 U.S.C. § 991(b)(1)(C) (requiring the Commission to promulgate guidelines that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

[55] *See* Letter from Jonathan Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 6 (June 28, 2010) ("We think the report to Congress ought to recommend legislation that permits the Sentencing Commission to revise the sentencing guidelines for child pornography offenses.").

[56] *See* U.S. SENT'G COMM'N, HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 11-49 (2009) (discussing how the current guidelines have been influenced by both a series of congressional directives since 1991 and also the direct amendments to the guidelines in the PROTECT Act of 2003).

[57] *See* USSG §2G2.2(b)(2), (4) & (7). While the Commission has generally defined the term "image" consistently with the statutory definitions of "visual depiction" and "child pornography" in 18 U.S.C. § 2256(5) & (8) and specifically defined the term to take account of child pornography videos, *see* §2G2.2, comment. (n. 4) (citing 18

23 July 2026

Matthew Roberts
[redacted]

Judge Carlton W. Reeves
Thurgood Marshall United States Courthouse
501 East Court Street, Suite 5.500
Jackson, MS 39201

Regarding your position on the United States Sentencing Commission, I would like to make a few comments. I am a moderate Republican and I was recently reading some articles about federal sentencing and time served, and it is seriously one of the most unfair and depressing things I have ever read. It is rigid, unfair and ultimately not humane.

First, the stacking of charges, mandatory minimums, trial penalty, and the acquitted conduct sentencing are so incredibly inhumane, especially for non-violent offenders. It is like reading something out of a Kafka novel.

And the absence of any real system of parole is truly disheartening. The 85% rule is truly a travesty. I read about a non-violent offender who had charges stacked and is now serving a minimum of 12 years, with no hope of parole other than the 85% rule and the possible early 12 month discharge into half-way house or home release. At the state level, this same person, I read, would proably have gotten 4 years and would have been released in 2 years.

Why is the federal system so unfair and inhumane? Will it ever be reformed?

Non-violenet offenders need more leniant sentencing and they need more options to be released early – much earlier. They need to be treated as humans.

Best,

Matthew

Public Comment - Proposed 2026-2027 Priorities

Submitter:

David Runyon

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

Dear Chair Reeves and Members of the United States Sentencing Commission:

I respectfully submit these comments regarding federal sentencing policy for sexual offense cases. I understand that this public comment period concerns federal sentencing guidelines, supervised release, proportional punishment, rehabilitation, reentry, and public safety. I am not asking the Commission to address state registration laws, offense definitions, law enforcement practices, or other matters outside its authority.

I urge the Commission to make federal sexual offense sentencing policy a priority in the upcoming amendment cycle, with particular attention to proportionality, individualized assessment, supervised release, rehabilitation, and successful reentry.

The purposes of sentencing include punishment, deterrence, protection of the public, and rehabilitation. Those goals are best served when sentencing policy is grounded in evidence and recognizes meaningful differences among offenders and offenses. Factors such as age, criminal history, offense conduct, treatment participation, time offense-free in the community, and demonstrated rehabilitation can all be relevant to assessing future risk and determining an appropriate sentence.

The Commission's own research has found that recidivism is not uniform across offenders and that age is strongly associated with differing rates of recidivism. In its report, "The Effects of Aging on Recidivism Among Federal Offenders" (2017), the Commission found that older offenders recidivate at substantially lower rates than younger offenders. These findings underscore the importance of sentencing and supervision policies that recognize meaningful differences among individuals rather than relying on assumptions of uniform risk. Evidence-based sentencing is best served when courts have guidance that allows them to distinguish among varying levels of culpability, risk, and demonstrated rehabilitation.

I encourage the Commission to examine whether current guideline provisions and policy statements in sexual offense cases adequately distinguish among varying levels of culpability and risk. The Commission has previously undertaken extensive reviews of federal sexual-offense-related guideline provisions, including its reports to Congress on federal child pornography offenses (2012 and 2021), which examined whether existing guideline structures continue to reflect empirical evidence, technological developments, and meaningful distinctions among offenders. Continued review of these and related issues would be consistent with the Commission's longstanding commitment to ensuring that the Guidelines remain evidence-based, proportionate, and responsive to real-world outcomes.

The Commission should also review supervised release practices in sexual offense cases. Conditions of supervision are most effective when they are individualized, clearly connected to legitimate sentencing goals, and supported by the facts of the particular case. Broad or automatic restrictions may, in some circumstances, create unnecessary barriers to housing, employment, education, family stability, and community reintegration without providing corresponding public-safety benefits.

In addition, the Commission should continue to prioritize rehabilitation and reentry. Research consistently demonstrates that stable housing, lawful employment, treatment participation, family support, and community integration contribute to reduced recidivism and improved public safety. Sentencing policy should encourage accountability while also supporting successful reintegration.

I also encourage the Commission to study the cumulative effects of imprisonment, supervised release, special conditions, and other consequences that affect reentry after a sentence has been imposed. Even where certain consequences fall outside the Commission's direct authority, understanding their practical effects can help ensure that federal sentencing policy remains proportionate and consistent with the statutory requirement that sentences be sufficient, but not greater than necessary, to achieve the purposes of sentencing.

I respectfully ask the Commission to:

• Conduct a comprehensive, data-driven review of federal sexual offense guideline ranges to determine whether they remain proportionate, evidence-based, and consistent with current recidivism research and sentencing outcomes.

• Review supervised release terms and special conditions in sexual offense cases to encourage individualized and narrowly tailored conditions that are linked to demonstrated risk and legitimate sentencing goals.

• Encourage courts to consider relevant factors such as age, criminal history, offense conduct, treatment participation, time offense-free, and demonstrated rehabilitation when imposing sentence and supervision.

• Study the cumulative effects of imprisonment, supervised release, special conditions, and reentry barriers on long-term public safety outcomes.

• Examine whether guideline provisions continue to meaningfully distinguish among varying levels of culpability and risk.

• Promote sentencing approaches that protect the public while supporting rehabilitation, accountability, successful reentry, and long-term community stability.

I submit these comments as someone directly affected by the long-term consequences of a sexual offense conviction and related supervision requirements. I fully acknowledge the seriousness of sexual offenses and the harm they can cause. At the same time, I believe sentencing policy is strongest when it remains grounded in evidence, proportionality, individualized assessment, and the possibility of rehabilitation. Public safety is best served when sentencing practices both hold individuals accountable and create realistic opportunities for lawful, stable, and productive lives after punishment has been completed.

Thank you for considering these comments and for your continued work to promote fair, effective, and evidence-based federal sentencing policy.

Respectfully submitted,

David Runyon

References:

United States Sentencing Commission, The Effects of Aging on Recidivism Among Federal Offenders (2017).

United States Sentencing Commission, Report to the Congress: Federal Child Pornography Offenses (2012).

United States Sentencing Commission, Federal Sentencing of Child Pornography: Non-Production Offenses (2021).

Submitted on: June 12, 2026

FROM: [redacted]
TO: Scott, Wayne
SUBJECT:
DATE: 06/12/2025 06:42:36 AM

Charles Edward Scott [redacted]
[redacted]

Meth Reform Pushed Back , USSC Also Needs To Consider Reform For MDMA/Synthetic Cathinones Converted Drug Weight Ratio's

My name is Charles Edward Scott , im 31 years old , a father of three little girls and this article is to bring awareness to the (USSC) AND anyone who is willing to help push sentencing reform. Im directly affected by this problem with the marijuana equivalency (CDW) ratio's. I was sentneced to 156 months imprisonment for less than 2.5 kilo grams of "EUTYLONE" a synthetic cathinone with a 380:1 (CDW) ratio. If i was convicted of selling cocaine which has a 200:1 (CDW) ratio i would have recieved a reduction in my sentence.This article is going to explain how over the last 25 years the (USSC) has overlooked a very simple fix in the guidelines. I also plan to use this problem for my commutation petition because my sentence was just too harsh for this type of controlled substance.There is no emperical data out there showing that this is the correct marijuana equivalency (CDW) ratio, ive looked everywhere and i only see emperical data showing the opposite please help me push this.

Meth reform is at the top of the United States Sentencing Commission's (USSC) list of guideline amendments. The (USSC)'s also should consider reform for the MDMA/Synthetic Cathinone Marijuana equivalency ratio. The MDMA/Synthetic Cathinone (CDW) ratio is not based on emperical data nor is it based on national experience with the substance. A few district courts judges across the nation have agreed with this notion and a appeal courts in the third circuit conceded that the ratios are flawed, they even went so far as to apply a replacement ratio in a few cases.
In United States V. MCcarthy ,2011 U.S LEXIS 54930 ... jUDGE William H. Pauley III criticized the (USSC)'s selective analysis in formulating the so called correct marijuana equivalency (CDW) Ratio. I invite you read the oppinion that JUDGE Pauley wrote , shining light on the (USSC)'s raising the MDMA (CDW) Ratio from 35:1 to 500:1 a substantial increase , without any competent expertise.
NEXT, when it comes to Synthetic Cathinones the marijuana equivalency (CDW) Ratio is 380:1 , if you read "Amendment 807" it explain's how the (USSC) came to this marijuana equivalency and how that conclusion was based partially on the flawed ratio for "Amphetamines" which should have been lower than 200:1. I also invite you to read a very important oppinion out of the third circuit court of appeals by JUDGE Mckee ,where he vigorously cites the (MCcarthy) oppinion. Plus he cites statements from the Drug Enforcement Agency (DEA) claiming that "Methylone" a Synthetic Cathinonne is half a potent as MDMA.

In conclusion , the (USSC) has put out statement's claiming that they will be proritizing a few separate categories for the year 2025 under the new D.Trump admin. Those categories are (1) Simplifiying the guidelines and clarifiying their role in sentencing, including revising the categorical approach for purposes of the career offender guideline... (2) Reducing the cost of unnecessary incarceration...(3) Improving community supervison...(4) * Expanding the commission's use of expertise evidence and best practice...(5) Promoting evidence based approaches to offense and individual characteristic's.
The fourth category really applies to the before mentioned problem. If you review the case law and amendments , you will see that the marijuana equivalency (CDW) ratio's for these controled substances are illogical. They are not founded on expertise , in fact if you read the footnote in the oppinion by JUDGE Mckee Out of the third circuit court of appeal's ... United States V. Sepling, 944 f.3d 138;2019 U.S App LEXIS 35706 ... you will read that the research the (USSC) relied on for rising the (CDW) ratio for MDMA offenses was entirely flawed. DR.Ricaurte conducted a study on the reduction of serotonin transporters in the brain after one night of MDMA use, but instead of using MDMA he used Meth claiming that the vials were mislabled. DR Ricaurte also had alot of integrety issues when it came to doing his research , he exaggerated the harmfulness of these controlled substances to obtain's federal grants [FOOTNOTE 47]. Sounds very self motivated , so that whole process has to be invalidated and the research resubmitted by a more competent biochemist with nothing to gain by the results. This is where the (USSC)'s 2025 priority list will come into play. Category (4) the commission said they would use "expertise in evidence and best practice"
Lastly, just last year the Food and Drug Administration (FDA) shot down a proposal from a drug research company to make (MDMA) a over the counter prescription drug, helping men and woman with cronic depression, anxiety , PTSD and with children with autism spectrum. The only reason the (FDA) did'nt approve the proposal is because of a sexual relationship between one

of the instructors and a patient tainted the research process, so the (FDA) are making them resubmit the research study. Ever since congress enacted "The Ecstacy Anti-Proliferation Act" In 2000 ,25 years ago we as a society have learned so much about these types of controlled substances , one thing for sure is that cocaine which has a marijuana equivalency (CDW) ratio of 200:1 is substantially more harmful to the community and our childrens than "Ecstacy/MDMA or any type of Synthetic Cathinone whether it be "Alpha-PVP OR "Eutylone" the substance im convicted of distributing. We all know how much harm cocaine has caused over the last 100+ years, we truly need to act on changing these ratios for the above mention substances. This could all be handled when the meth guidelines are amended in 2026 Nov.

Thanks For Your Times, GOD Bless Take Care

Sincerely,

Charles E. Scott

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Karla Sortland, incarcerated son

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

Comments:

I am writing due to my concerns that sentencing for sexual offenders does not differentiate sufficiently between those who molest and abuse children and those who view child porn but do nothing more than that.
Of course, these are all crimes and very concerning, but there is a big difference between those who actively seek out opportunities and children to victimize them, those who create and produce child pornography, those who share and disseminate child porn, and those who have done none of that, but have viewed child pornography. My son is in that latter category. He was molested as a young child, and by not talking about it, he suffered emotional problems which he did not deal with until he was grown. He has taken responsibility for his actions and has sought help and is doing well. He, like many who have similar histories, is unlikely to reoffend. Not all sexual offenders present the same risk to the public as do those who have victimized children directly and/or have sought to profit by sharing what they have done.
Sexual offenders' sentences also are increased if they have used a computer to view images. In today's world, that is how nearly everything is shared, and people should no longer be penalized more for the use of a computer.
I also would like to see the First Step program be available to lower level sexual offenders. Furthermore, to allow those who are determined to be low risk and low risk of escape should be allowed to serve in minimum security camps and facilities. That shouldn't be available only to a select person or persons who have high enough connections to override the rules.
Finally, I encourage consideration in lessening the time on the sexual offender registry and on parole.
126
Karla M. Sortland
Mother of
Philip Carl Sortland [redacted]
Federal Correctional Institution
Texarkana, Texas

From: [redacted]
Subject: [External] ***Request to Staff*** STEINBERG, EVAN, [redacted] ASH-G-A
Date: Sunday, July 19, 2026 1:48:51 PM

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To:
Inmate Work Assignment: ED Tutor

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Replies to this message will not be delivered.

Inmate Message Below

To Whom it May Concern,

I am writing to propose that the Commission consider revising the guidelines for child pornography offenders in its next amendment period. One article, titled "Deconstructing the Myth of Careful Study: A primer on the Flawed Progression of the Child Pornography Guidelines", written in 2009 by an Assistant Federal Public Defender in the Western District of Missouri, uses data form the Federal Justice Statistics Resource Center to illustrate some of the issues with these guidelines. Even though this article is 17 years out of date, the issues that they raise in this article are still present today. More recent statistics for more recent years can be found at the same center.

The guidelines I am referring to are 2G2.2, specifically the specific characteristics section. In Amendment 664 released by the Commission, it is noted that there are several specific offense characteristics that are expected to apply in almost every case: use of a computer, material involving children under 12 years of age, and number of images. The point of these enhancements are to increase the sentencing range beyond the typical individual. If these enhancements apply in almost every case, then the guidelines should be revised to better suit the characteristics present today. In addition, 2G2.2(b)(5) adds a 2 point enhancement for the use of a computer. In todays age of technology, nearly all cases fit this criteria; it is almost impossible to find an individual who does not use a computer in some way to offend. In addition, the internet makes viewing child pornography easier. What I mean by this is that viewing eight three-second video clips of child pornography would trigger 2G2.2(b)(6)(D), a 5 point enhancement for viewing 600 images, as any video is considered 75 images. In one single viewing and receiving session, it is likely that an individual will view more than eight videos, nearly all of which are likely to be longer then three-seconds. Therefore, even when an individual views child pornography only once, they are likely to trigger this enhancement. Furthermore it is common among individuals to share images to get new images, thus triggering 2G2.2(b)(2)(B) in many cases. Even though this "trading" occurs in only one single session, they still trigger this enhancement.

The point of these enhancements are to change the sentencing guidelines beyond a typical defendant and for the worst individuals and the worst crimes. However, the way that the guidelines are written currently apply to almost every individual, thus dramatically increasing the guidelines to the statutory maximum for even the least serious offences. Child pornography is a very serious crime, and does require a sentence. However, the guidelines are failing because they are treating the most sever offenders and the less sever offenders as the same, with the guidelines for both being pushed to the upper statutory range. For these reasons, I propose the Commission amend the Child Pornography Guidelines of 2G2.2.

Thank you for your time,
Evan Steinberg

Comments to the Sentencing Commission

I am writing in response to the Commission's Federal Register notice requesting public comments regarding the Commission's "comprehensive review" of its Rules. I have been involved in the open government area for over 50 years, from the perspective of the Department of Justice Office of Legal Counsel, the Senate Judiciary Committee, and private law practice. I have taught FOIA/Privacy courses and programs, litigated FOIA cases, written articles on open government, and consulted with foreign governments on transparency issues. Most recently I served on the Federal FOIA Advisory Committee and am Founding President of the D.C. Open Government Coalition.

I offer the proposals below relating to open meetings and access to records at the Sentencing Commission.

First, as to meetings, the 1976 Government in the Sunshine Act (Sunshine Act) provides a time-tested framework for determining whether a meeting should be open or closed to the public. Its requirements have been applied by numerous multi-member federal governmental entities – from major agencies like the SEC, NLRB, and FTC to minor regional commissions and advisory committees. The Sunshine Act presumes that meetings will be open, requiring advance notice of meetings, access to the public, and recordkeeping. There are 10 exemptions, however, that permit meetings to be closed subject to an open vote by members made before going into a closed session. (5 U.S.C. § 552b.)

The Sentencing Commission is a hybrid entity with both public members and judges, but other advisory committees that are subject to the Sunshine Act such as the National Archives Freedom of Information Act Advisory Committee have both public and governmental members. Although federal judges serve on the Sentencing Commission, that does not imbue it with status as a Judicial branch entity, and its work clearly impacts the public and is of great public interest and importance.

In short, although the Sunshine Act's enforcement mechanisms would not be applicable to an entity that is not entirely within the Executive branch – just as the ethics enforcement mechanisms applicable to the Executive branch do not apply to the judiciary – we would expect federal judges to follow their own open-meeting rules. Additionally, widespread interest in attending Commission meetings should serve to effectively police compliance.

Second, as to records, without knowledge of the nonpublic records of the Commission, I am unclear as to how the framework of the Freedom of Information Act (FOIA) might be applied to allow the public to access records that had not already been proactively published, although it is likely that the request procedures and substantive exemption could readily be imported to the Commission. (5 U.S.C. § 552.)

Just as with the Sunshine Act's applicability to open meetings, I recognize that FOIA's judicial enforcement provisions are inapposite to the Commission. That has not prevented the Governmental Accountability Office from adopting and implementing rules modeled on the FOIA even though, as an entity within the Legislative branch, GAO is not subject to judicial enforcement and must be relied upon to comply with its own rules.

I urge the Commission to invite additional comments, accompanied by a public hearing, specifically on the transparency proposals made in comments responding to this Request for public comment. This will allow the public an opportunity to learn more about what Commission records and data may not currently be available and for the Commission to learn more about what kinds of information the public is interested in having access to.

Respectfully submitted,
Thomas M. Susman
[redacted]

From: [redacted]
Subject: [External] ***Request to Staff*** SUTTLES, LORENZO, [redacted] YAZ-C-A
Date: Tuesday, July 21, 2026 5:52:55 PM

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To: U.S. Sentencing Commission
Inmate Work Assignment: Unicor

ATTENTION

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Inmate Message Below

Lorenzo L. Suttles
[redacted]

Date: July 21, 2026

U.S. Sentencing Commission
Attn: Public Affairs - Priorities Comment
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

In Re: Priorities Comment

Dear Honorable Sentencing Commission:

Greetings! My name is Lorenzo Suttles, and I am a 46 year old African-American male resident of Chattanooga Tennessee, currently residing in the low security Federal Correctional Institution in Yazoo City Mississippi.

I am writing in regards to the Honorable Sentencing Commission's public comments for it's upcoming 2027 cycle.

In November of 2023, the Commission's guideline for U.S.S.G. section 1B1.13(b)(6) went into effect. After two and a half years of hard fought litigation in both district and appellate courts of appeals, on May 28, 2026, the Supreme Court in Rutherford versus United States, ruled that this Honorable Commission exceeded it's authority in enacting section 1B1.13(b)(6), and thereby invalidated the guideline statute.

The Court's actions in this instance has stranded approximately five to six thousand federal prisoners adversely impacted by a non-retroactive F.S.A. (First Step Act) amendment.

My public comment for the upcoming cycle is for the Commission to submit recommendations to Congress to pass The First Step Implementation Act of 2026. I further recommend for public comment that the Commission enact a subsequent guideline which would afford the opportunity of a reduction of sentence to federal prisoners serving lengthy sentences which are no longer mandated by Congress.

Thank you for your time & consideration of this request!

Respectfully submitted,
Lorenzo L. Suttles

Joni Theobald
[redacted]

July 22, 2026

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Submitted via the public comment portal (comment.ussc.gov)

Re: Proposed Priorities for the Amendment Cycle. Life sentences imposed through the U.S.S.G. §2D1.1(d)(1) murder cross-reference on drug convictions, without any conviction for a killing.

Dear Commissioners:

I write to ask the Commission to prioritize amendment of the §2D1.1(d)(1) murder cross-reference. I hold power of attorney for one of the 168 people described below: a man sentenced to life in FY2005 in the Western District of Texas, whose case appears in the Commission's own public data files and whose facts I set out in Part II. This comment presents original empirical findings from those data files, identifies the individuals behind them by name where the public record permits, and proposes specific amendment text. Everything asserted here can be verified against the Commission's own records or published opinions; nothing rests on my say-so.

I. 168 people are serving life for murders no jury convicted them of committing

Using the Commission's Individual Offender Datafiles for FY2002 through FY2025, I identified every case meeting four criteria: (1) a sentence of life imprisonment (TOTPRISN = 9996); (2) primary sentencing guideline §2A1.1, First Degree Murder (GDLINE1), reached in these cases through the §2D1.1(d)(1) cross-reference; (3) at least one Title 21 drug statute of conviction; and (4) no statute of conviction capable of encompassing a homicide: no 18 U.S.C. §§1111-1113, 1958, 1959, 924(j), 2119(3), 1512(a), 1512(k), 1513(a), or 1201, and no 21 U.S.C. §848(e). The fourth criterion is the load-bearing one: it guarantees that every person counted is serving life on the basis of a killing found by a judge at sentencing, not by any jury on any count.

The result is 168 sentencing events, and at least 167 unique individuals under the most conservative de-duplication. Of the 168: 164 were sentenced at total offense level 43, the §2A1.1 base level, where the guideline range is life regardless of criminal history; 77 percent were convicted at trial. Four districts account for over a third of the total: Puerto Rico (20), Maryland (17), South Carolina (16), and the Western District of Texas (11). A broader 24-year sweep of the same guideline chain identifies 385 people sentenced to 360 months or longer through the cross-reference, 217 of them to life.

The racial composition of this population demands the Commission's attention on its own terms. Ninety percent of the 168, 151 people, are Black or Hispanic: 97 Black, 54 Hispanic, 15 White. By the Commission's own current Quick Facts on drug trafficking, Black individuals account for 31 percent of federal drug trafficking sentencings; they are 58 percent of the people serving life through this cross-reference, nearly double their share of the caseload from which this population is drawn. White individuals account for 24 percent of drug trafficking sentencings and 9 percent of this population. Outside the District of Puerto Rico, two of every three members of this population are Black. I do not ask the Commission to assume an explanation; I ask it to notice that a mechanism operating without a jury, on judge-found facts, at the maximum severity the system can impose, falls this unevenly, and that examining exactly this kind of pattern is written into the Commission's organic statute. 28 U.S.C. §991(b)(1)(B).

The Commission need not take my count on trust. Any staff member with the public datafiles can reproduce it in an afternoon by applying the four criteria above. My row-level audit trail (fiscal year, district, offense level, and full statute set for each of the 168) and a methodology note documenting the replication audit performed on the count, including sensitivity analysis under alternative definitions (the count ranges from 102 under the narrowest definition to 217 under the broadest), are available on request.

II. Who they are: three tiers, and one case the Commission should sit with

The 168 divide into three tiers by how the killing entered the case. In the first, the government charged the homicide and the jury acquitted, and the sentencing court applied the cross-reference anyway. Published opinions confirm this tier by name: in United States v. Correy, 570 F.3d 373 (1st Cir. 2009), and its companion United States v. Casas, 425 F.3d 23 (1st Cir. 2005), defendant Raymond Nicolai-Cabassa was acquitted of murder and sentenced to life through the cross-reference regardless. In the second tier, the jury was asked about the killing through a special verdict and answered no. In the third, the large majority, roughly 98 percent by my review, the killing was never presented to any jury in any form. It arrived at sentencing through a presentence report, proved to a judge by a preponderance.

The candor of one district court, affirmed on appeal, captures the mechanism precisely: "I note that the jury wasn't satisfied that you were guilty beyond a reasonable doubt, but I believe clearly by the preponderance of the evidence you were the shooter in this case." United States v. Shavers, 955 F.3d 685 (8th Cir. 2020). The Commission need not infer what is happening; the record announces it. Indeed, the Commission's own 2024 training primer on offenses against the person instructs practitioners that the cross-reference applies even where the jury acquitted; the practice is not an accident of scattered case law but a rule the system now teaches.

My principal's case shows where this leads. In United States v. Zavala (W.D. Tex.), aff'd sub nom. United States v. Valles, 484 F.3d 745 (5th Cir. 2007), the jury was asked whether he committed the killing and answered no, and the court applied the cross-reference anyway,

resting on witness testimony, and imposed life. Three years later, the United States indicted the leadership of the same criminal organization for a racketeering conspiracy whose charged predicate acts expressly include that same killing, the shooting death of Jose Moreno, and convicted all thirty-four charged defendants, by plea or verdict, before the same district judge. United States v. Navajar, No. 5:08-cr-00047 (W.D. Tex.). At that trial, the government's own witness attributed the killing, under oath, to a different man; a sworn affidavit now attests that this same witness admitted his testimony against my principal was false, given in exchange for the dismissal of charges. The jury's answer, the government's own subsequent indictment and convictions, and the recantation all point one direction. The life sentence stands anyway, because a preponderance finding at sentencing is immune to all of it. No guideline system should be capable of producing that result.

III. A legacy population every reform has passed over

This is largely a population of the early 2000s: 104 of the 168 (62 percent) were sentenced between FY2002 and FY2009, and 53 were sentenced in FY2002 through FY2005, when the Guidelines were mandatory (Booker was decided mid-FY2005). The median member of this group is now 18 years past sentencing; 65 have passed 20 years. Every retroactive reform of the past two decades (the crack amendments, drugs-minus-two, the First Step Act) has passed over them, for the same mechanical reason: at offense level 43, no retroactive reduction of the drug table reaches them. Their sentences were produced by a sentencing regime the law has since repudiated, applied through a fact-finding procedure the Commission has since restricted, and no vehicle exists to revisit them. They are the residue of a superseded system, and only this Commission can build the vehicle.

IV. This population is structurally invisible, which is why the Commission has not seen it

Nothing in the public datafiles flags a §2D1.1(d)(1) cross-reference; I had to reconstruct it from the guideline and statute fields. The appellate record is nearly as silent, for a structural reason: acquittals generate no government appeal, affirmances of within-guideline sentences are routinely unpublished, and defendants who plead have waived most review. In a systematic search of published opinions across the circuits, I found exactly one published decision approving application of a §2A1.1 cross-reference after a jury answered a homicide special question in the negative, and it arose outside the drug guideline. In United States v. Lynch, 437 F.3d 902, 915-16 (9th Cir. 2006) (en banc) (per curiam), the jury determined by special interrogatory that the government had failed to prove the murder beyond a reasonable doubt, and the court affirmed the first degree murder cross-reference under the robbery guideline anyway; the sentence was contained only by the statutory maximum for the offense of conviction. In the drug context, where the identical finding produces life rather than a capped term of years, I found no published decision at all, even though the Commission's data show people serving life in exactly that posture. The practice exists in the data and in unpublished dispositions; it is almost entirely absent from the law reports.

The structure of what juries are asked makes the invisibility concrete. In United States v.

Sanchez-Badillo, 540 F.3d 24 (1st Cir. 2008), a First Circuit drug conspiracy case, the special verdict form asked the jury to fix the drug type and quantity attributable to one defendant, and the jury answered: eighty to one hundred kilograms of marijuana. The presentence report then applied the murder cross-reference for a killing the jury was never asked about, raising the offense level to 43, a guideline life sentence, contained only by the statutory maximum the jury's marijuana findings allowed. The system asked the jury meticulous questions about kilograms and never asked about the killing that determined the sentence. Amendment 826's text reaches only conduct that was criminally charged and acquitted; a jury's negative answer on a special verdict, and a killing never presented to the jury at all, receive no protection from it. A practice that cannot be seen cannot be litigated, studied, or corrected. The Commission's datafiles are the only place this population is visible at all, and the Commission is the only institution positioned to act on what its own data show.

V. Amendment 826 narrowed the pipeline; it did not close it

Amendment 826 addressed acquitted conduct only. Most of the 168 were never acquitted of anything; the killing was never charged, so the amendment's rule does not reach the dominant tier at all. The data confirm the pipeline remains open: FY2024 shows zero qualifying cases, but FY2025 shows one, a jury-trial conviction in the Southern District of Ohio, sentenced at offense level 43 to life through the cross-reference. And where the statutory maximum prevents life, the same mechanism persists at the top of the range: in United States v. Devaney, 109 F.4th 322 (5th Cir. 2024), a defendant convicted at a bench trial where the shooter's identity was unknown received the cross-reference, offense level 43, and the 480-month statutory maximum. The cross-reference also operates as an appellate lock: once offense level 43 attaches, every other guideline dispute becomes harmless error, insulating the entire calculation from review.

VI. The governing doctrine is unsettled at every joint

The circuits have never resolved the basic questions. The intent standard, whether the defendant must have caused the death intentionally or merely foreseeably, was expressly assumed rather than decided in United States v. Anderson, 795 F.3d 613 (6th Cir. 2015). The proof standard divides the case law: the First Circuit reversed a guideline-driven life-equivalent sentence where the murder finding wagged the drug conviction, United States v. Lombard, 72 F.3d 170 (1st Cir. 1995), while the Fifth Circuit distinguished Lombard only because the sentence there fell far below the statutory maximum and the district court had used clear and convincing evidence, United States v. Partida, 385 F.3d 546 (5th Cir. 2004), both distinctions absent in a case like my principal's. Application Note 1 to §2A1.1, which contemplates a downward departure where the death was not caused intentionally or knowingly, is honored almost nowhere in this population: 164 of 168 sat at the undeparted base level, though at least one court applied it, United States v. Patterson, 142 F. App'x 740 (4th Cir. 2005). And the deepest arbitrariness is structural: when a death is an element of the offense, the jury-trial right applies with full force and an appellate court will reverse for insufficient proof, United States v. Wexler, 522 F.3d 194 (2d Cir. 2008); when the identical death enters as relevant conduct, no jury protection applies at all, Shavers, supra. The difference between twenty years and dying in

prison is which procedural channel the same fact travels through.

The Fifth Circuit has since produced both halves of this contradiction in a single opinion. In United States v. Gonzales, 841 F.3d 339 (5th Cir. 2016), the court vacated a defendant's murder conviction because the jury's answers to special interrogatories could not sustain it, holding that a jury's special findings have legal force and that a special finding negating guilt is treated as an acquittal. The same opinion then affirmed the use of the same murder to fix the same defendant's drug sentence at the statutory maximum through §2D1.1(d)(1), stating that the vacatur was "of no consequence to finding him responsible for the murder as a sentencing matter." The panel acknowledged that the result "will no doubt seem arbitrary." Where the drug count carries a life maximum, as it did for the 168 people identified here, that arbitrariness is a life sentence.

Even where a circuit has announced a protective principle, it does not hold. The Fourth Circuit has recognized a non-contradiction principle that prohibits a sentencing court from finding facts by a preponderance of the evidence that contravene a jury's finding beyond a reasonable doubt. Yet in United States v. Hunt, 99 F.4th 161 (4th Cir. 2024), a defendant acquitted of two charged murders was sentenced with those murders counted against him, and the court found no contradiction because the sentencing finding rested on conspirator liability rather than the theory the jury rejected. A protection that dissolves upon restating the theory of liability is not a protection. Only this Commission can supply one that holds.

A development from this term supplies an institutional reason to act now. In Rutherford v. United States, 608 U.S. ___ (2026), decided May 28, 2026, the Supreme Court held that the Commission exceeded its authority under 28 U.S.C. §994(t) when §1B1.13(b)(6) permitted courts to treat nonretroactive changes in law as extraordinary and compelling reasons, and invalidated the provision to that extent. Whatever else Rutherford means, it establishes that Commission provisions are measured against the text of the organic statute, without deference. The murder cross-reference has never been measured against 28 U.S.C. §§994(b) and (c), whose offense categorization factors, the grade of the offense, the circumstances that aggravate or mitigate it, and the harm it caused, each refer to the offense being sentenced, not to a different and graver offense of which the defendant was never convicted. I do not ask the Commission to concede any defect in its provision. I note only that after Rutherford the question of authority can be raised by any litigant in any court without deference to the Commission, and that the orderly place to resolve it is here, through amendment and a retroactivity determination under §1B1.10, on the Commission's own terms, rather than through years of case by case litigation testing the provision against §994 in every circuit.

VII. Requested priorities

1. Amend §2D1.1(d)(1) to condition the murder cross-reference, where it produces offense level 42 or higher, on a conviction encompassing the killing or a jury finding beyond a reasonable doubt. Proposed text is attached.

2. As an interim measure, require clear and convincing evidence and a finding of intentional or knowing causation before the cross-reference applies.

3. Convert Application Note 1 to §2A1.1 from a discretionary departure invitation into a binding offense-level cap where the death was not caused intentionally or knowingly.

4. Undertake a retroactivity study of the population identified here, and pair any retroactive amendment with an instruction under §1B1.10 barring courts from re-finding the killing to deny relief.

5. Add a cross-reference indicator variable to the Individual Offender Datafiles so this population can be monitored without reconstruction.

VIII. Proposed amendment text

Offered as drafting assistance, in the Commission's own idiom:

A. §2D1.1(d)(1), revised:

(d)(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline, PROVIDED that, where application of this subsection would produce an offense level of 42 or greater, it shall apply only if (A) the defendant was convicted of an offense of which the killing was an element, or (B) the trier of fact at trial found beyond a reasonable doubt that the defendant committed or aided and abetted the killing. In all other cases, the court shall not apply this subsection unless it finds by clear and convincing evidence that the defendant caused the death intentionally or knowingly.

B. §2A1.1, Application Note 1, converted to a binding cap:

If the defendant was not convicted of an offense of which the killing was an element and did not cause the death intentionally or knowingly, the offense level under this guideline shall not exceed the level applicable under §2A1.2 (Second Degree Murder), and a downward departure below that level may be warranted.

C. §1B1.10, retroactivity with an anti-relitigation instruction:

Include the foregoing amendment in §1B1.10(d). In determining whether and to what extent a reduction is warranted, the court shall not make new findings respecting the killing that were not made at the original sentencing.

Closing

The people described in this comment are not an abstraction to me. One of them has been my responsibility for more than six years. One hundred sixty-eight people are serving life sentences for murders no jury ever convicted them of committing. In most of these cases, no jury was ever asked. In at least one, the jury was asked and answered no. I ask the Commission to make this population a priority in the coming cycle, and I am available to provide the underlying data, the audit documentation, and the case files supporting every statement in this letter.

Respectfully submitted,

Joni Theobald
[redacted]

Appendix A. Named cases illustrating the mechanism

Each entry is verifiable from the cited public record.

1. Zavala (Valles), 484 F.3d 745 (5th Cir. 2007); Navajar, 5:08-cr-00047 (W.D. Tex.). Special verdict: jury answered no on the killing. The killing was later charged as a predicate act of a RICO conspiracy; all 34 charged defendants were convicted. Sentencing: cross-reference applied on a preponderance; life. The sentence stands.

2. Shavers, 955 F.3d 685 (8th Cir. 2020). Jury acquitted on the firearm count tied to the killing; the court stated the jury "wasn't satisfied beyond a reasonable doubt." Sentencing: judge found him the shooter by a preponderance; affirmed.

3. Nicolai-Cabassa (Casas and Correy), 425 F.3d 23 (1st Cir. 2005); 570 F.3d 373 (1st Cir. 2009). Acquitted of murder at trial. Sentencing: cross-reference; life. Affirmed.

4. Devaney, 109 F.4th 322 (5th Cir. 2024). Bench trial; shooter's identity unknown. Sentencing: cross-reference; offense level 43; 480-month statutory maximum. Affirmed after Amendment 826.

5. FY2025 case (S.D. Ohio), USSC datafile FY2025. Jury trial on drug and §924(c) counts only. Sentencing: cross-reference; offense level 43; life. The pipeline remains open.

6. Anderson, 795 F.3d 613 (6th Cir. 2015). Never charged with the killing. Sentencing: cross-reference to offense level 47; saved from guideline life only by the statutory cap (288 months). Intent standard assumed, not decided.

7. Patterson, 142 F. App'x 740 (4th Cir. 2005). Not convicted of the killing. Sentencing: the rare counterexample; Note 1 departure applied; 360 months.

8. Lombard, 72 F.3d 170 (1st Cir. 1995). State murder acquittal posture; federal drug and gun trial. Sentencing: guideline-driven life reversed; the murder finding cannot wag the conviction.

9. Partida, 385 F.3d 546 (5th Cir. 2004). Not convicted of the killing. Sentencing: cross-reference upheld, expressly because the sentence fell far below the statutory maximum and clear-and-convincing proof was used.

10. Wexler, 522 F.3d 194 (2d Cir. 2008). Death charged as an element; appellate court found the proof insufficient. Result: judgment of acquittal on the death count; the death-driven sentence fell. The contrast case: elements get jury protection; relevant conduct gets none.

11. Lynch, 437 F.3d 902 (9th Cir. 2006) (en banc). Special interrogatory: jury answered that the

government failed to prove the murder beyond a reasonable doubt. Sentencing: first degree murder cross-reference applied under the robbery guideline; contained only by the statutory maximum. The only published approval of this posture anywhere in the federal system, and it is not a drug case.

12. Gonzales, 841 F.3d 339 (5th Cir. 2016). Murder conviction vacated on appeal because the jury's special-interrogatory answers could not sustain it. Sentencing: the same murder fixed the drug sentence at the statutory maximum through §2D1.1(d)(1); the panel called the result one that "will no doubt seem arbitrary."

13. Sanchez-Badillo (Mendez), 540 F.3d 24 (1st Cir. 2008). Special verdict form asked only drug type and quantity; the jury attributed only marijuana. Sentencing: murder cross-reference for a killing the jury was never asked about; offense level 43; contained at the statutory maximum set by the jury's marijuana findings.

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Keaira Tillman, Family members

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

2) Review of the USSC Rules of Practice & Procedure

3) Legislation & Case Law

Comments:

To the United States Sentencing Commission:
Thank you for the opportunity to provide public comment regarding the proposed priorities for the amendment cycle ending May 1, 2027.
I respectfully urge the Commission to prioritize amendments that promote fairness, proportionality, and consistency in federal sentencing, particularly in drug cases.
First, I encourage the Commission to review the application of firearm enhancements under U.S. S.G. §2D1.1(b)(1). In some cases, defendants receive a significant sentencing increase even though they were not convicted of a firearm offense and there is limited evidence connecting the firearm to the offense. Greater guidance would help ensure this enhancement is applied consistently and only when supported by sufficient evidence.
Second, I ask the Commission to review how methamphetamine guidelines distinguish between "actual" methamphetamine and methamphetamine mixtures. These distinctions can produce substantial differences in sentencing, and many families believe the current approach can result in sentences that are greater than necessary to achieve the purposes of sentencing under 18 U.S. C. §3553(a).
Third, I encourage the Commission to give serious consideration to making future sentencing amendments retroactive whenever appropriate. Individuals who are already serving lengthy sentences should have the opportunity to benefit from reforms that the Commission later determines are fair and justified. Retroactivity promotes consistency, public confidence in the justice system, and the efficient use of correctional resources.
Finally, I appreciate the Commission's recognition that reducing incarceration costs and prison overcrowding are important considerations. Sentencing policies should continue to protect public safety while also recognizing rehabilitation, accountability, and the possibility of second chances.
As the spouse of a federal inmate, I have experienced firsthand the impact that lengthy sentences have on families and children. Any effort to improve fairness and consistency in federal

sentencing will have lasting benefits for thousands of families across the country.
Thank you for your consideration of these comments and for your continued work to improve the federal sentencing system.
Respectfully,
Keaira Tillman

Submitted on: July 14, 2026

Public Comment - Proposed 2026-2027 Priorities

Submitter:

Lori Underwood

Topics:

1) Evaluation of the Guidelines & Federal Sentencing Practices

5) Miscellaneous Issues

Comments:

Lori Underwood

July 19, 2026

Submitted Electronically via https://comment.ussc.gov/

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Public Comment on Proposed Policy Priorities for the 2026–2027 Amendment Cycle (Evaluation of the Guidelines and Federal Sentencing Practices & Drug Purity Disparities)

To the Honorable Commissioners:

I am writing as an interested citizen, a voter, and—most importantly—the mother of an individual currently serving a sentence in the federal prison system. I am submitting this comment to strongly support the Commission's proposed priority to conduct a holistic evaluation of the guidelines and federal sentencing practices marking the 40th anniversary of the Guidelines Manual.

From a family perspective, I urge the Commission to focus this evaluation heavily on reducing

excessively long sentences for drug crimes, eliminating outdated drug purity disparities, and dramatically expanding alternatives to incarceration like probation and home confinement. As well as voting for retroactivity.

My hope is that the commission will consider updating current sentencing guidelines related to drug crimes, to reduce excessive sentencing especially for non-violent offenders.

I ask the Commission to fully adopt proposed amendments that eliminate the arbitrary purity distinctions. As the Commission's own research shows, nearly all trafficking offenses now involve high-purity substances regardless of the defendant's role. Treating low-level, first-time, and non-violent offenders as major cartel leaders purely based on chemical laboratory testing creates massive, unwarranted sentencing disparities.

Furthermore, I strongly support efforts to expand Zones B and C of the Sentencing Table. Broadening these zones will allow federal judges the discretion to utilize home confinement, split sentences, and probation more frequently, especially for first-time, non-violent individuals like my son. Allowing individuals to serve their time through community-based supervision preserves vital family bonds, which research consistently shows are the single most critical factor in successful reintegration and preventing recidivism.

I plead to the Commission to use this 2026–2027 evaluation cycle to modernize federal sentencing practices, eliminate the artificial inflation of sentences caused by drug purity rules, and prioritize rehabilitation and family unity over prolonged isolation.

Finally, I strongly implore the Commission to vote to make any future amendments regarding drug purity disparities and Sentencing Table expansions fully retroactive. When the Commission determines that a guideline is broken, outdated, or inflicts disproportionate punishment, it is a matter of basic justice to apply that remedy to those currently serving time under those flawed standards. True modernizing of federal sentencing must include a path forward for those already doing the work of rehabilitation inside.

Thank you for your time, your service, and for considering the voices of the families impacted by these guidelines.

Respectfully submitted,
Lori Underwood

Submitted on: July 19, 2026

Public Comment to the United States Sentencing Commission

Submitted by Omoruyi Uwadiae, [redacted]

July 23, 2026

Dear Members of the Commission:

Thank you for continuing to publish proposed amendments and invite public comment. I particularly appreciate the Commission's recognition of the flexibility required to impose an appropriate sentence in light of increased knowledge of human behavior; the distinct purposes of probation versus incarceration, especially for first-time, nonviolent offenders; and the acknowledgment that probation itself is punitive — a reality courts too often overlook. The comments below combine and update recommendations from my prior submissions and are offered from the perspective of someone directly affected by these issues.

Case Background

I was sentenced to 51 months in federal prison for non-violent conduct. The FBI executed a search and seizure in December 2019, but I was not indicted until April 2024 and was not monitored or supervised in any way during that nearly five-year gap — for most of it, I did not know whether charges would ever be pursued. During that period I remained in regular mental health therapy, was promoted and then moved from P&G to McKinsey & Company, completed a part-time MBA at the Northwestern Kellogg School of Management, and mentored and coached more than a hundred people toward their own career and education goals. I am a first-time offender, and my offense carried no mandatory minimum. Despite all of this, the government pursued imprisonment and the sentencing judge did not depart from the guidelines.

Recommendations

1. Prevent Enhancements from Categorically Blocking Zero-Point Offender and Safety Valve Eligibility"

Enhancements should not be permitted to categorically block first-time, non-violent offenders from the 4C1.1 Zero-Point Offender reduction or the 5C1.1(10)(b) Safety Valve, and any enhancement that materially affects a defendant's sentencing zone or eligibility for a point reduction should require the same level of scrutiny and guidance.

2. Provide Courts With Structured Sentencing Factors

The Commission should provide courts with structured sentencing factors, and my case demonstrates why. Despite extensive evidence of rehabilitation — as detailed above — and the absence of a mandatory minimum, the sentencing judge did not meaningfully engage with the § 3553(a) factors. The same judge, in a separate case involving the same offense, imposed no prison time on a repeat offender who had already served a prior sentence for that same conduct; after remand, that individual ultimately received only six months on a 41–51 month guideline range. That disparity isn't theoretical to me — it's lived. It's also an embarrassment to the justice system that I received more time than Sean “Diddy” Combs and Jeffrey Epstein's first sentence. It makes no logical sense.

Terms like “just punishment” and “adequate deterrence” remain too malleable, and they let judges selectively justify outcomes they've effectively already chosen. To limit that, the Commission should emphasize defendant-specific considerations — post-offense conduct, rehabilitation, and demonstrated capacity for reform — particularly in cases with no mandatory minimum. These factors also should not exclude first-time offenders convicted of non-contact

sex offenses; these individuals overwhelmingly need treatment and supervision, not incarceration, and excluding them only perpetuates over-punishment without any public-safety benefit.

3. Clarify the Vulnerable Victim Enhancement (§3A1.1)

My case highlights an urgent need for clearer guidance on the vulnerable victim enhancement. In my sentencing, the enhancement was applied based on allegations that two individuals were closeted about their sexuality — an application that conflicts with Sixth Circuit precedent limiting the enhancement to victims with unusual mental, emotional, or physical vulnerabilities rendering them unable to protect themselves. If the mere existence of a "secret" qualifies as vulnerability, then virtually any extortion offense becomes enhancement-eligible, whether the secret involves infidelity, financial misconduct, professional impropriety, or other private matters — stretching the enhancement beyond recognition and creating a dangerous precedent.

My attorney failed to cite this established Sixth Circuit precedent, and the resulting enhancement is a significant reason I was found ineligible for the 4C1.1 reduction and 5C1.1(10)(b) Safety Valve, and ultimately why I received a 51-month sentence. The Commission should clarify that the enhancement does not apply absent concrete evidence of extraordinary vulnerability, particularly for first-time, nonviolent offenders.

4. Expand Zones B and C, With Clear BOP Implementation Responsibility

The previously proposed expansion of Zones B and C is appropriate and necessary. The differing eligibility thresholds based on criminal history are reasonable and proportionate — first-time offenders should have broader access to noncustodial options than repeat offenders.

The Commission should clarify who is responsible for effectuating eligibility changes: the courts or the Bureau of Prisons. The BOP especially needs its hand held — despite Director Marshall's efforts, staff remain notorious for failing to follow policy and congressional mandates that would get people out faster, such as properly stacking FSA and SCA credits and applying re-entry time. Without explicit guidance, individuals risk remaining incarcerated longer than intended due to administrative inertia, an issue I have personally experienced.

5. Recognize Pre-Sentence Community and Home Confinement as Time-Served

Community confinement should be the primary consideration for first-time, non-violent (or "serious offense") offenders, especially where significant time — two or more years — passed between notification of investigation and indictment with no additional offense in that period. In my case, the government clearly did not see me as a threat to society for five years, yet still argued for four-plus years of imprisonment after I had proven, without a shadow of a doubt, that I had rehabilitated.

Pre-sentence Home Confinement should also be credited as time-served. If a defendant demonstrably abides by Home Confinement — itself a form of community confinement — that time should count toward any prison term ultimately imposed. For non-violent, first-time offenders in particular, sustained compliance with pre-sentence Home Confinement can itself be evidence that incarceration is unnecessary.

6. Require Accurate BOP Custody Classification and Pre-Sentencing Risk/Needs Assessments

The BOP needs to adhere to a court's rulings rather than make its own assumptions in custody classification and Public Safety Factor (PSF) determinations. In my case, the BOP assigned a PSF – Sex Offender designation even though I was never charged with or convicted of any sex offense. Nowhere in my PSR, judgment, or Statement of Reasons does the court or government call me a sex offender or a current danger to society, and a comprehensive forensic psychological assessment along with letters from my mental health counselors confirm the same. This

unfounded, defamatory designation has blocked me from a Minimum Security classification — despite qualifying points — and with it, camp placement and email access.

Separately, courts should conduct Pattern Risk / Needs Assessments before sentencing. I am currently incarcerated without any identified programming needs, because those needs were already addressed through five years of therapy before sentencing. Yet regular mental health counseling is not readily available in prison: I have been on a waitlist for a trauma class for six months, and prison psychologists have told me they are effectively reserved for the most serious cases, including suicidality. I have now gone six months without therapy after five years of biweekly-to-monthly sessions before I was incarcerated.

7. Create an RDAP-Equivalent Alternative for Defendants Without Substance-Abuse Needs

It is unfair that people who have never struggled with drugs or alcohol miss out on the chance to shave up to a year off their sentence simply because they don't need — and therefore don't qualify for — substance-abuse programming. The Commission and BOP should create an alternative path offering comparable earned-time credit for defendants without a substance-abuse history.

8. Expand FSA Eligibility to All First-Time, Non-Violent Offenders

This is especially important given current prison populations. Anyone convicted of a non-violent offense — including possession, receipt, or distribution — should be FSA-eligible if it is a first offense. Consuming violent media, whether video games or true-crime content, doesn't predict violent conduct; the same logic should extend earned-time credit to first-time, non-violent offenders regardless of offense category.

9. Award SOMP Completion Credit on Par With RDAP

Just as with RDAP, individuals who successfully complete SOMP should be able to earn up to a year off their sentence. Treatment and rehabilitation completion should be incentivized consistently, regardless of which program a defendant's circumstances place them in.

10. Prioritize Rehabilitation Over Warehousing to Reduce Costs and Redirect Resources

Reforming sentencing to rely less on warehousing people and more on actual rehabilitation and alternatives would let the government save substantial taxpayer dollars and close redundant prisons. Those closed properties could be sold or transitioned — with the government holding a financial stake — into uses like data centers for tech and AI companies, generating far more revenue than continued incarceration ever could.

Supporting Evidence: Public Opinion Survey on Sentencing Fairness

To assess public sentiment about my case specifically — a 51-month sentence for non-violent conduct following a five-year pre-indictment delay — I commissioned a survey of over 300 respondents. The results support the recommendations above:

- 56.3% of respondents rated the sentence “harsh”; only 11.3% called it “lenient.”
- 56% supported a noncustodial sentence; among noncustodial options, restorative justice (31.7%) and probation (30.7%) were the most preferred, ahead of any specific prison term.
- Of those who favored incarceration, 74% still preferred a term of less than three years.
- The delay in indictment and post-offense rehabilitation were the most frequently cited reasons the sentence was seen as unfair; 42% said the five-year delay made a prison sentence inherently unfair.
- 41.7% said rehabilitation and positive contributions should have reduced the sentence's severity, and 37.3% said the conduct warranted punishment but not prison.

One nuance worth flagging: the order in which information is presented shapes how forgiving people are. Respondents who learned about my rehabilitation before the underlying offense actually became more punitive after seeing the full picture (86% supported prison) than respondents who saw the offense first (75.5%). That suggests the public's leniency is conditional on framing, not unconditional — which strengthens rather than undermines the case for guidance that keeps sentencing decisions anchored to defendant-specific conduct rather than sequencing or narrative effects.

2026 Proposal	Survey Finding (N=300)	Strategic Insight
§3E1.2 – Post-Offense Rehabilitation Adjustment	41.7% of respondents said rehabilitation should have reduced the sentence's severity.	Public support for the proposed 2–4 level reduction for early remediation and mental-health treatment.
§3D1.1 – Simplification of Multiple Counts	56.3% rated the cumulative 51-month sentence as "harsh."	"Stacking" counts to reach high ranges lacks public legitimacy for non-violent, first-time offenders.
Expansion of Zones B & C	70% supported a sentence under one year; 61% preferred non-prison options overall.	Expanding Zones B/C to allow more probation and split sentences matches the clear majority preference.
Racial Disparity	38.7% believed race influenced this specific sentence.	Supports simplifying guidelines to close the public "trust gap" and reduce unwarranted disparity.

These findings point to a public that is ready for a shift from retribution toward reintegration — which is exactly the direction the Commission's current proposals are already headed.

Conclusion

These recommendations reflect a necessary course correction in federal sentencing. My case illustrates the real consequences of insufficient guidance, unchecked discretion, and enhancements that have drifted from their intended scope. By adopting these amendments, clarifying the enhancements and BOP practices discussed above,

and expanding earned-time credit pathways, the Commission can reduce unwarranted disparities, cut unnecessary incarceration costs, and maintain public safety at the same time.

Thank you for considering these comments.

Respectfully,
Omoruyi Uwadiae
[redacted]

From: ~^! WOOTEN, ~^!BILLY WAYNE
Subject: [External] ***Request to Staff*** WOOTEN, BILLY, [redacted] MON-M-C
Date: Monday, July 13, 2026 6:33:46 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: Guideline Review Memo Input
Inmate Work Assignment: FSD

ATTENTION

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Inmate Message Below

Thank you for asking inmates for our suggestions regarding the upcoming review of the sentencing guidelines. I have three small suggestions:

1. The points we receive for a crime of "sophisticated means" is widely subjective and needs for contextualization for judges. One judge and Assistant US Attorney may believe that sophisticated means involves cyber capability but another could assign these points to someone who knows how to open an Excel spreadsheet or create a pdf, which was my case. What is considered sophisticated needs more definition. These two points could mean the world for someone like me who was one point away from probation vs. 10-12 months incarceration in a federal camp.

2. I also believe that under the acceptance of responsibility guideline, there should be credit given for those who made full financial restitution before an indictment even occurred. A person who accepted full responsibility, cooperated with the investigation of the PI/Forensics accountant, and made full financial restitution before the FBI and DOJ even became involved should receive additional point reductions for leaving the victim institution whole prior to any legal obligation.

3. There should also be more guidance for judges regarding terms of supervised release. For someone who has committed a non-violent white collar offense, has zero criminal history prior to sentencing, accepted full responsibility, and made full financial restitution, and who receives 12 months and a day, a three-year term of supervised release is excessive and most assuredly hinders the job search process upon release, especially if the career field is not viable within the person's supervision radius. I think more thought should be given to this possibility.

From: ~^! YOUNG, ~^!ERNEST M
Subject: [External] ***Request to Staff*** YOUNG, ERNEST, [redacted] SCH-A-B
Date: Monday, July 13, 2026 12:05:00 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: Commissioner
Inmate Work Assignment: 1B Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Thank you for the opportunity to participate in the discourse on Sentencing Reform. I would like to present the following proposed changes for your consideration:

1. Removal of the additional criminal history point(s) that were added for being on supervision when the instant offense was committed. Changes were already made. I am proposing total removal of the item from criminal history scoring.

2. A reduction in the percentage of time that inmates are required to serve on their imposed term of imprisonment.

3. Some sort of reduction in the number of points that can be added to the criminal history score for prior sentences. Although I know that the Supreme Court doesn't agree, I am of the opinion that this is double jeopardy. Inmates are being punished twice for the same crime. I ask for "some" relief because I understand the need to deter further criminal activity.

Thank you in advance.

UNITED STATES SENTENCING COMMISSION
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