

**Statement of Jelani Jefferson Exum**  
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**Before the United States Sentencing Commission**  
**Public Hearing on Drug Offenses**  
**March 12, 2025**

Hon. Chair Reeves, Vice-Chairs, and Commissioners: My name is Jelani Jefferson Exum, and I am the Dean and Rose DiMartino and Karen Sue Smith Professor of Law at St. John's University School of Law. I appear before the Commission in my capacity as a law professor and sentencing scholar. I recently participated in the Commission's Drug Sentencing Roundtable on November 20, 2024, and I appreciated that opportunity to engage with the Commission. I would like to thank the Commission for inviting me to testify regarding the proposed amendments to USSG §2D1.1. My Statement discusses proposed amendment Parts A and B, with most discussion focusing on Part A.

**I. Introduction**

My nearly 20-year career as a sentencing scholar has focused on closing the gap between the ideals of sentencing purposes and the realities of sentencing practices and outcomes, with the goal of ameliorating racial disparities in punishment. That gap between sentencing purposes and sentencing practices is disturbingly wide in the case of federal drug sentencing, and the resulting racial disparities are unconscionable. As I stated in my July 15, 2024 letter to the Commission, there is a pressing need for the Commission to revisit the federal drug guidelines. The research provided by the Commission over several decades has given us valuable data to recognize the historic failures of the 40-year old approach to the War on Drugs, including overincarceration, racial injustice, community destabilization, and a misplaced focus on low-level participants.<sup>1</sup> Data demonstrate that the current approach, focused on using long sentences of incarceration to address drug crimes, has not meaningfully stemmed drug trafficking offenses.<sup>2</sup> However the costs have been dire, and not all communities have borne that weight equally. Data has also shown us that the casualties of this ill-fated war have disproportionately been underserved Black and

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<sup>1</sup> See, e.g., U.S. SENT'G COMM, DRUG SENTENCING ROUNDTABLE PACKET 5, 12 (2024) (the Quick Facts on Individual and Offense Characteristics for §2D1.1 give the following statistics demonstrating these failures: 43.5 were Hispanic, 27.6% were Black, 25.8% were White, and 3.0% were Other races; Further, the Sentences Imposed facts show that prison was imposed in 97.3% of these cases).

<sup>2</sup> PEW, [Federal Drug Sentencing Laws Bring High Costs, Low Return](#), August 27, 2015 (explaining that "the best available data suggest that increased penalties for drug offenders—both at the federal and state levels—have not significantly changed long-term patterns of drug availability or use[.]").

Hispanic communities.<sup>3</sup> Looking at the results of our current model of drug sentencing – based largely on weight and drug type – we can have confidence that punishing our way out of social and economic ills does not work. Though we have learned a great deal, we have not seen the shifts in the approach to punishing drug offenses that take the fullness of those lessons into account.

My research on sentencing history, purposes, and outcomes leads me to advocate for a reconstruction model of federal drug sentencing - one that focuses on function in the offense and the ways in which structural inequities contribute to drug crime.<sup>4</sup> Such an approach draws us closer to the legitimate purposes of sentencing, which include general deterrence; public safety, retribution (punishment that is proportional to culpability), and rehabilitation (a focus on individual opportunities for improvement). This sort of reinvention of the federal drug sentencing guidelines would require moving away from a model in which drug quantities and drug type dictate sentence lengths when research shows those factors do not satisfy legitimate sentencing purposes. Instead, such an approach would move away from lengthy incarceration and focus instead on alternative court programs and partnerships with entities that address substance use disorders as well as those that increase economic opportunities in underserved communities. However, given that those are not the options presented in this amendment cycle, I urge the Commission to adopt the options that result in the most significant move toward meaningfully reconstructing the current approach to federal drug sentencing in a purpose-focused manner.

For Part A, Subpart 1, I ask the Commission to adopt Option 3, setting 30 as the base offense level. For Part A, Subpart 2, I ask the Commission to adopt Option 1, with a 6-level reduction across the board for the low-level functions listed in the amendment, and others sufficiently similar. I also support the Commission's proposal in Part B to eliminate the purposeless distinctions between methamphetamine purity levels.

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<sup>3</sup> Commission data shows that, in fiscal year 2023, more people were sentenced under USSG §2D1.1 than any other guideline. USSC, FY 2023 Sourcebook of Federal Sentencing Statistics tbl. 20 (2023). 74% of individuals sentenced in drug trafficking cases in fiscal year 2023 were Black or Hispanic. *Id.* at tbl. D-2. Further, Commission research also reveals that Black and Hispanic individuals were much less likely to receive a probation-only sentence than white individuals for federal drug trafficking offenses in fiscal years 2017 to 2021. See USSC, Demographic Differences in Federal Sentencing 27-28 & tbl. 6 (2023).

<sup>4</sup> For a full discussion of my concept of Reconstruction Sentencing, see Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 Am. Crim. L. Rev. (Georgetown) 1685 (2021).

## **II. Fulfilling Sentencing Purposes**

Adopting the above amendment options will best allow the Commission to fulfill its statutory goals, specifically when it comes to setting sentences that will meet the purposes set forth in 18 U.S.C. § 3553(a)(2) in a fair manner, and that reflect advancement in knowledge of human behavior.<sup>5</sup> The sentencing purposes set forth in 18 U.S.C. § 3553(a)(2), call for imposed 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

Given that the proposed amendments focus on adjustments to sentence length, rather than type, for the purposes of this Statement I will focus on retribution, deterrence, and public safety. This is because research shows people are best rehabilitated by community-based alternative sentencing rather than incarceration.<sup>6</sup>

### **A. Retribution**

The directive for sentences “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” is most closely reflective of retributivist principles, which necessarily call for a determination of which factors make one offense more serious than another. Retribution also requires consideration of an individual’s moral blameworthiness to arrive at a sentence that reflects “just” punishment. In both regards, the current version of §2D1.1 is not closely aligned with retributivist principles. The drug sentencing guidelines have long been criticized for overreliance on drug type and quantity and under reliance on a person’s true culpability as measured by their actual function in the offense.<sup>7</sup> In first establishing the drug guidelines, the Commission abandoned its empirical, data-driven approach and instead structured drug sentencing guidelines around the weight-based mandatory minimums created in the

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<sup>5</sup> 28 U.S.C. § 991(b)(1)(C).

<sup>6</sup> See generally Vera Institute of Justice, [The Potential of Community Corrections to Improve Safety and Reduce Incarceration](#) (July 2013).

<sup>7</sup> See, e.g., [The Sentencing Project Comment on Proposed Priorities, 2024–2025 Amendment Cycle](#), at 2–3 (July 15, 2024).

Anti-Drug Abuse Act of 1986 (ADAA).<sup>8</sup> Unfortunately, Congress chose the weight quantities in the ADAA without examining whether those quantities would meaningfully sort individuals based on levels of moral blameworthiness or culpability so as to achieve a just punishment.<sup>9</sup> As a result, under the current iteration of §2D1.1, those who perform the lowest level drug trafficking functions are often associated with and punished for higher drug quantities.<sup>10</sup> Adoption of Option 3 for Part A, Subpart 1 working in conjunction with Option 1 for Subpart 2 (with an across the board 6-level reduction) best corrects for the decades-old, ill-fated decision to so tightly tether drug base offense levels to the quantity-based mandatory minimums. Though not a perfect solution, this amendment option is an important step toward fairer, more rational drug sentencing policy. Setting the highest base offense level at 30 and adding a required 6-level function reduction provides the most relief from lengthy prison sentences that are not justified by retributivist principles by: (1) lessening the effect of drug quantity, which bears little relationship to individual blameworthiness in the drug trafficking market; and (2) increasing the significance of function, which more closely aligns with moral desert. This version of the amendment will move in the direction of providing just punishment that also reflects the true seriousness of the offense for a specific individual.

It is important to also highlight the dangers of the retributivist theory of punishment. Scholars and studies have confirmed that assessments of moral blameworthiness can be infected with implicit racial bias at every discretionary stage of the criminal justice process, including sentencing.<sup>11</sup> This is a difficult problem to address, however, as discussed in Part III of this Statement, its human and community toll is significant. The difficulty of protecting individuals from racial bias in sentencing is another argument in favor of reducing reliance on lengthy terms of incarceration when we know that sentencing decisions can suffer from racial bias. Again, a complete restructuring of federal drug sentencing that lessens the impact of racial bias by reducing the reliance on incarceration and focusing instead on alternative punishment and intervention methods is preferable.

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<sup>8</sup> See *Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

<sup>9</sup> See USSC, [Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System](#), 23–24 (2011) (Explaining that “Congress bypassed much of its usual deliberative process. As a result, Congress held no committee hearings and produced no reports related to” the ADAA).

<sup>10</sup> See U.S. SENT’G COMM’N, METHAMPHETAMINE TRAFFICKING OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 39 fig.23 (2024) (this research demonstrates that in Fiscal Year 2022, defendants categorized as a “Courier/Mule” possessed the most drug weight).

<sup>11</sup> See Justin D. Levinson, et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 58 U.C. Davis L. Rev 839 (Dec 2019) (presenting the idea that “race and retribution have become automatically and inextricably intertwined in the minds of Americans.”).

However, the options endorsed in this Statement best allow for a reduction in the harms of racial bias – namely overincarceration – by increasing the opportunity for shorter prison sentences, including alternatives to incarceration, for drug trafficking offenses.

## **B. Deterrence and Public Safety**

The Commission’s goal to set punishment “to afford adequate deterrence to criminal conduct and to protect the public from further crimes of the defendant” invites considering both specific and general deterrence, combined with a focus on protecting the community. General deterrence focuses on reducing overall crime rates, while specific deterrence focuses on using punishment to stop a particular individual from re-offending. When it comes to measuring specific deterrence, drug recidivism studies are of limited utility. The Commission itself has acknowledged that “[e]mpirical research on the relationship between length of incarceration and recidivism is limited and insufficient for developing federal sentencing policy. There are a limited number of studies on the subject and they present mixed results.”<sup>12</sup> Though some data correlate longer sentences with lower recidivism rates for those convicted of drug offenses, other data fail to show that shorter drug sentences lead to higher recidivism rates.<sup>13</sup> A more promising method of promoting public safety and reducing recidivism would be to focus on community-based sanctions for low-level functions rather than relying on incarceration.<sup>14</sup>

Further, rather than depending on recidivism rates to determine appropriate punishment levels, a better focus for setting sentencing policy is general deterrence – that is, developing interventions that reduce overall drug trafficking. Through research compiled over the past 40 years, we have learned that long prison sentences do not meaningfully curb drug trafficking crime.<sup>15</sup> The nature of drug trafficking continues to shift and adjust over time. We know that as low-level participants – namely street-dealers, mules, and

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<sup>12</sup> USSC, *Length of Incarceration and Recidivism*, 3 (2020) (citing to See Daniel S. Nagin et al., Imprisonment and Reoffending, 38 Crime & Just. 115, 121 (2009); Dorothy R. Jaman et al., Parole Outcome as a Function of Time Served, 12 Brit. J. Of Criminology 5 (1972); Elizabeth Deschenes et al., Intensive Community Supervision In Minnesota: A Dual Experiment In Prison Diversion And Enhanced Supervised Release (1995); Thomas A. Loughran et al., Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders, 47 Criminology 699 (2009); Benjamin Meade et al., Estimating a Dose-Response Relationship Between Time Served in Prison and Recidivism, 50 J. Res. Crime & Delinq. 525 (2013)).

<sup>13</sup> *Id.*

<sup>14</sup> See, Vera Institute of Justice, *supra* note 6.

<sup>15</sup> See PEW, *supra* note 2.

couriers – are arrested, new individuals take their place in the marketplace.<sup>16</sup> We also know that the type of drug that is misused or trafficked at any given point changes as those markets evolve and as human behavior changes as well.<sup>17</sup> Therefore, tackling drug trafficking through long prison sentences for low-level individuals, including street-level dealers, mules, and couriers, exacts a human and community cost that is not justified by significant crime control gains.

Judges have also signaled, through their sentencing decisions, that the guideline ranges §2D1.1 yields are “greater than necessary”<sup>18</sup> to carry out the purposes of sentencing. Sentencing data over the past five fiscal years shows that only 29.4% of individuals sentenced under §2D1.1 received within-guidelines sentence, while almost all others received a below-guidelines sentence.<sup>19</sup> Judges are not only sentencing below the ranges in the case of drug offenses. They are sentencing well below the applicable ranges. As noted in the Defender Comment on Drug Offenses:

Specifically, when including cases receiving §5K1.1 and §5K3.1 adjustments, with only one exception, at every BOL from 20 up, courts have been imposing sentences at least 20% lower on average than the guideline minimum.<sup>20</sup>

The Commission’s role is to respond to this empirical feedback. And the best way to do so is to adopt amendments that will most reduce incarceration overall. Of the options offered by the Commission, Option 3 for Part A, Subpart 1 and Option 1 for Subpart 2 (with an across the board 6-level reduction for the functions listed there and those like them) is the combination that best responds to this data on the gap between sentencing purposes and sentencing outcomes.

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<sup>16</sup> See generally, Drug Policy Alliance, *Rethinking the “Drug Dealer,”* (December 2019) (describing how easily drug dealers can be replaced).

<sup>17</sup> See generally Julia Dickson-Gomez et al., *The effects of opioid policy change on transitions from prescription opiates to heroin, fentanyl and injection drug use: a qualitative analysis*, 17 Subst. Abuse Treat., Prev., and Policy 55 (July 21, 2022) (explaining that effect of reduced availability of prescription opiates led to increased use heroin and/or fentanyl).

<sup>18</sup> 18 USC §3553(a)(1) (calling for sentences to be “sufficient, but not greater than necessary, to comply with the purposes set forth” in 18 USC §3553(a)(2))

<sup>19</sup> Only 1.6% of people sentenced pursuant to §2D1.1 received above-guidelines sentences. USSC, FY 2019 to 2023 Individual Datafiles.

<sup>20</sup> Defenders’ Comments on the USSC’s 2025 Proposed Drug Amendments II. A. at 15 (March 3, 2025) (referencing [Public Data Briefing—Drug Offenses](#), at 7)

### III. The Costs of Sentencing Untethered from Purpose

The need to repair the disconnect between sentencing purposes and sentencing outcomes is especially urgent because of the individual, community, and societal costs associated with §2D1.1. It is well understood that drug sentencing plays out in a racially disparate manner. Black and Hispanic individuals constitute 70% of those sentenced under §2D1.1.<sup>21</sup> Overall, the Commission has found that “Black males received sentences 13.4 percent longer, and Hispanic males received sentences 11.2 percent longer, than White males.”<sup>22</sup> This overincarceration has had a devastating effect on many communities of color.<sup>23</sup>

We have long documented the racialized costs of drug sentencing that is untethered from sentencing purposes. For instance, in referring specifically to the lessons from overly-punitive crack cocaine sentencing, in 2002 the Commission reported that low-level crack offenses represented more than sixty percent of federal crack defendants, and the harsh crack cocaine penalties “appl[ied] most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.”<sup>24</sup> Eight years later, in 2010, the Commission was reporting significant racial disparities, with Black people having a 20 percent greater chance of being sentenced to prison for drug offenses than white people involved in drug offenses, and with Black people serving virtually as much time in prison for a drug offense as white individuals were serving

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<sup>21</sup> The Commission’s “Individual Datafiles” are publicly available for download on its [website](#). U.S. Sent’g Comm’n, Commission Datafiles.

<sup>22</sup> USSC, [2023 Demographic Differences In Federal Sentencing](#).

<sup>23</sup> See Defenders’ Comments on the USSC’s 2025 Proposed Drug Amendments I.A. at 7 (March 3, 2025) which also makes this point with the following citations: Becky Pettit & Carmen Gutierrez, [Mass Incarceration and Racial Inequality](#), 77 Am. J. Econ. & Sociol. 1153, 1153–82 (Oct. 29, 2018) (“By removing large numbers of young men from concentrated areas, incarceration reduces neighborhood stability. The cycling of men between correctional facilities and communities may even begin to trigger higher crime rates within a neighborhood, a process [one researcher] describes as ‘coercive mobility.’”); Don Stemen, [The Prison Paradox: More Incarceration Will Not Make Us Safer](#), Vera Inst. of Justice, at 2 (2017) (discussing a neighborhood’s “‘tipping point,’” at which incarceration rates are so high that they “break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system”).

<sup>24</sup> See U.S. SENTENCING COMM’N., REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 99-100 (2002).



for a violent offense.<sup>25</sup> We continue to repeat this history today through the current version §2D1.1. However, there are opportunities to course correct with certain iterations of the proposed amendments.

By reducing the maximum base offense level and increasing opportunities for function to play a role in sentence reductions, the Commission can also lessen the opportunity for sentencing disparities based on race. The Defender Comment on Drug Offenses explains this possibility in great detail by highlighting the amount of racial disparities at various base offense levels.<sup>26</sup> Again, the options endorsed in this Statement are not perfect solutions to this problem, but of the Commission's proposals, the endorsed options give the best opportunity for reducing these harmful disparities.

#### **IV. PART B: Elimination of purity distinctions in the methamphetamine guidelines.**

The current distinctions of methamphetamine mixture, "ice," and methamphetamine actual suffer from the same gap between sentencing purposes and sentencing practice that I have already described. It is understood that there is "no empirical basis" for the Commission's disparity between actual methamphetamine and methamphetamine mixture.<sup>27</sup> Without an indication that the purposes of sentencing, specifically general deterrence and public safety, are fulfilled through this distinction, the disparate treatment is unsound. Thus, I agree with the position of the Defenders and advocate for the elimination of the purity distinctions in the methamphetamine guidelines and for the methamphetamine base offense levels to be set at the meth-mixture levels for the reasons articulated in the Defender Comment on Drug Offense.<sup>28</sup> Likewise, I also urge

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<sup>25</sup> THE SENTENCING PROJECT, [FEDERAL CRACK COCAINE SENTENCING](#) 5 (2010).

<sup>26</sup> Defenders' Comments on the USSC's 2025 Proposed Drug Amendments p. 15: "Racial disparities are present at every offense level, with white individuals never comprising more than 33.7% of individuals sentenced although they make up a majority of the U.S. population. Hispanic people constitute the largest demographic group at every §2D1.1 drug quantity-based BOL above 28, and make up a majority of those with BOLs of 34 and higher. While Hispanic people will still make up a disproportionate number of the people sentenced at a new, 30-capped BOL, they will garner significantly lower guideline ranges. In order to meaningfully reduce sentences for Black individuals, the proposal would need to go further, since Black individuals are disparately represented, and the most frequently sentenced people, at all BOLs below 28." (internal citations omitted).

<sup>27</sup> United States v. Robinson, No. 3:21-CR-14, 2022 WL 17904534, at \*3 (S.D. Miss. Dec. 23, 2022) (Reeves, J.) (citing United States v. Nawanna, 321 F. Supp. 3d 943, 950–51 (N.D. Iowa 2018)).

<sup>28</sup> See Defenders' Comments on the USSC's 2025 Proposed Drug Amendments III (March 3, 2025).



the Commission to eliminate the quantity-based disparity between cocaine powder and cocaine base.

## **V. Conclusion**

Thank you again for the opportunity to engage with the Commission on these critical issues. I remain encouraged by the Commission's efforts to recognize the unjust aspects of USSG §2D1.1 and to seek broad input regarding the proposed amendments. My hope remains that the Commission will continue to be open to being bold, thinking creatively, and entertaining real, large-scale changes to a sentencing system that has for too long operated unevenly against underserved communities of color. This has undermined public confidence in the criminal legal system, with little to no public safety gains in return. A refocus on sentencing purpose while centering racial justice provides a meaningful framework for reconstructing the federal drug sentencing approach. The options endorsed in this Statement are steps toward that just end.