TZEDEK
ASSOCIATION

March 2, 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 Amendments for the 2025 Amendment Cycle Posted January 24, 2025

Dear Judge Reeves and Members of the Commission,

Tzedek Association appreciates the opportunity to comment on aspects of the proposed amendments relating to Supervised Release and Drug Offenses promulgated on January 24, 2025, for the cycle ending May 1, 2025.

I would like to begin by expressing our deepest admiration and appreciation for the extraordinary work of the United States Sentencing Commission since it regained its quorum in August of 2022. Under your leadership, the Commission has achieved unprecedented progress, demonstrating an unparalleled commitment to justice, fairness and evidence-based sentencing policy. In recent years, the Commission has set a new standard for excellence in criminal justice reform. Your accomplishments have not only strengthened the integrity of our sentencing system but have also changed countless lives for the better. We look forward to witnessing, and participating in, your continued tremendous achievements in the months and years ahead.

Tzedek is a non-profit humanitarian organization that focuses on criminal justice reform, religious liberty and humanitarian causes around the globe. Tzedek is committed to championing the civil rights of those mistreated by the criminal justice system and empowering individuals to be productive members of society. Tzedek seeks a society that values and embraces compassion and fairness.

Save A Life, Save A World

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In recent years, Tzedek has championed ground-breaking reforms such as the monumental First Step Act, as well as the provision in the CARES Act that allowed for home-confinement for incarcerated individuals vulnerable to COVID-19 based on CDC criteria, among other criminal justice accomplishments. Tzedek always advocates for reform measures seeking to ensure that the criminal justice system embraces fundamental core values that reflect a belief in the unbounded human capacity for atonement, redemption and rehabilitation.

Tzedek is proud to work alongside numerous advocacy organizations and stakeholders to address the significant need for reform in the American sentencing system. We believe that every human being is placed in this world with a unique purpose and mission. When individuals are warehoused for extended periods, it not only strips them of their humanity but also undermines their very reason for being. We advocate for a sentencing system that is more humane, fair, compassionate and just.

Several weeks ago, Tzedek submitted comments on proposed amendments related to Firearms Offenses and Simplification of the Three Step Process in the Guideline Manual.[1] And, last July, in response to the Commission's call for comments on Proposed 2024-25 Policy Priorities, Tzedek submitted a comprehensive memorandum, urging the Commission to embrace bold reforms to combat excessive harshness and unwarranted disparity in federal sentencing.[2] As more fully delineated below, Tzedek believes that some of the current proposals incrementally address fundamental concerns that have previously been raised with the Commission, not only by Tzedek, but also by many other groups reflecting a broad ideological perspective.

While Tzedek applauds every step that advances the goal of achieving a fairer and more rational sentencing regime, the following suggestions are offered to make the proposed changes as effective as possible and to

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[1] See Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities (January 30, 2025) at www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf.

[2] See Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities (July 15, 2024), *at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=761.

encourage the Commission to build on these steps to undertake more encompassing reforms in upcoming cycles.

Introductory Context

Tzedek's observations with respect to the pending proposed amendments necessarily must be viewed within the context of Tzedek's perspective on larger reforms that are essential to address the unfortunate carceral legacy of the Sentencing Reform Act of 1984 (SRA) and other federal sentencing laws. This disconcerting legacy includes: (1) overreliance upon incarceration, when alternatives to incarceration are adequate to accomplish the statutory purposes of sentencing; (2) overly severe terms of incarceration; and (3) systemic disparities manifested in various phases of the criminal justice system that are exacerbated by flawed components of the current Sentencing Guidelines.

Without fully reiterating the comprehensive proposals Tzedek provided during the Commission's 2024 cycle when it invited comments coinciding with the 40th anniversary of the SRA,[3] a few overarching concerns that are to some extent addressed by the pending proposals, warrant mention. Two of Tzedek's overriding concerns with the current operation application of the Guidelines are the terms and conditions of sentences and core underlying methodologies that vastly overstate individual culpability and disregard the importance of criminal intent.

1) With respect to the first of these concerns, Tzedek believes the Guidelines continue to recommend prison sentences that are far too frequent and far too harsh, failing to maximize the use of alternatives to incarceration and failing to limit terms. By now the Commission is well familiar with the empirical evidence that overly harsh prison sentences produce diminishing returns in terms of public safety and the consequential harms they unintentionally inflict on individuals, families and communities.

[3] Id.

Similarly, there is ample evidence that alternatives to incarceration—including periods of probation, therapeutic approaches, and restorative justice programs—can often be more effective and more likely to decrease recidivism than sentences of imprisonment.[4] Additionally, the imposition of overly harsh conditions upon those who are released can often be counterproductive and, in some cases, lead to unnecessary and costly reincarceration.

2) With respect to what Tzedek characterizes as flawed methodologies, the heart of this concern is the diminishment of *mens rea* ("guilty mind" or criminal intent) as the critical moral anchor of the criminal code, in the charging process and especially sentencing phases. Fundamental to our justice system, individuals should not be subjected to criminal prosecution or conviction unless the underlying conduct evinces a guilty mental state. In the same vein, the severity of the punishment imposed should be tethered to the extent of the individual's criminal intent and all sentencing rules and decision-making should be attentive to this reality.

This problem of criminal intent's degradation in federal law is exacerbated by current federal conspiracy law, which correlates a conspiracy conviction with a violation of the substantive offense and generally subjects co-conspirators to punishment commensurate with the full scope of the criminal conspiracy. As a result, the culpability of an individual co-conspirator may be vastly overstated. While it may be beyond the ken of the Commission to comprehensively reform the problems with federal conspiracy law, it can and should take necessary steps that ameliorate the unduly harsh sentencing consequences that flow from it.

The current Guideline approach to sentencing hinges on a methodology that operates to eviscerate traditional notions of *mens rea* in the imposition of punishment. Most obviously and impacting a

[4] As a case in point, the CARES Act home confinement program proved to result in a significant reduction in recidivism among its participants. See https://www.bop.gov/resources/news/pdfs/20240329-press-release-cares-act.pdf.

> substantial percentage of all federal criminal prosecutions, of the Guidelines give no consideration of *mens rea* in the Drug Quantity Table under U.S.S.G. § 2D1.1, or in the loss table for economic offenses in U.S.S.G. § 2B1.1.
>
> Tzedek continues to hold the strong view that the exaltation of quantification as the key factor driving sentence severity, insofar as quantity without regard for *mens rea* is the essential determinator of the base offense level, constitutes an unreliable and unjust proxy for individual culpability and the factors set forth in 18 U.S.C. § 3553(a), which a court must consider in imposing sentence.[5]
>
> Simply put, sentences that are driven by drug quantity and loss amount completely disregard *mens rea*—which unfairly contributes to excessive sentences and mass incarceration in this country. It is high time that this fundamental injustice is put to an end.

With that background, Tzedek continues to believe far more significant reform is necessary to redress key flaws in the Guidelines. Nevertheless, most of the proposed amendments constitute significant steps to ameliorate some of these flaws and additional concerns.

[5] Tzedek has previously urged the Commission to jettison the quantitative approach that drives sentences in drug and economic loss cases. See Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities (July 15, 2024), *at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=761. For an excellent analysis of the flaws in the application of the loss table in §2B1.1 see Statement of Daniel Dena, Assistant Federal Defender on Behalf of the Federal Public and Community Defenders.

Proposed Amendment: Supervised Release

Tzedek Endorses the Proposed Amendments Related to the Imposition of Supervised Release 1 (A), While Urging the Commission to Add Additional Factors for Courts to Consider

Tzedek enthusiastically endorses the Commission proposal to empower courts to limit the imposition of supervised release where unconstrained by statutory requirements. Tzedek especially lauds the Commission for emphasizing the importance of individualized assessment of each defendant's needs and the transparency that will come with the provision that the court should state the reasons for its determination on the record. Similarly, Tzedek endorses the relaxation of the requirements for certain minimum terms of supervised release (where statutorily permissible) and the provision that courts should conduct an *individualized* assessment to determine what discretionary conditions may be warranted. Finally, Tzedek wholeheartedly supports the new proposed policy statement § 5D1.4, particularly the provision that would encourage a court, soon after a defendant's release from imprisonment, to conduct an individualized assessment to consider modification of the conditions of supervised release and to provide for early termination of supervision in appropriate cases.

Additionally, Tzedek offers the following observations and suggestions with respect to specific issues for comment:

Issue 1

(A) The Commission seeks comment on whether the inclusion of an individualized assessment based on statutory factors is sufficient to provide discretion and useful guidance.

The "individualized assessment" based on the statutory factors are a satisfactory base point, but Tzedek believes that additional factors should be included in the policy statement as well. When the assessment is conducted prior to the imposition of sentence, courts should be encouraged to consider evidence related to the defendant's behavior between the time of arrest and sentence. This period of conduct may be particularly informative when the individual has been at liberty during the pendency of the case. Factors should include evidence of rehabilitation and personal growth, efforts to

repair any harms from the offense (such as some payment of restitution), completion of programs designed to address underlying pathologies that contributed to the criminal conviction or to advance an individual's education or vocational skills and prospects to be a productive member of society, as well as any other evidence of exceptional post-arrest behavior and work performance.

To effectuate this objective when deciding whether and how long a term of supervised release to impose at the time of sentencing, Tzedek recommends adding an Application Note 7 to § 2D1.1 as follows:

> *7) **Post Arrest Behavior** – In considering the history and characteristics of the defendant as required by 18 U.S.C. § 3553(a)(1), the court should consider the defendant's post arrest behavior including but not limited to evidence of rehabilitation and personal growth, efforts to repair any harms from the offense (such as some payment of restitution), completion of programs designed to address underlying pathologies that contributed to the criminal conviction or to advance the defendant's education or vocational skills and prospects to be a productive member of society, as well as any other evidence of exceptional post-arrest behavior and work performance.*

(B) The Commission seeks comment on the bracketed non-exhaustive facts in proposed policy statement § 5D1.4 and whether similar guidance should be included elsewhere.

For the reasons stated above, Tzedek supports the inclusion of the bracketed language, however, suggests that the list of non-exclusive specific factors delineated in the draft of § 5D1.4 should be augmented by including a specific reference to an individual's behavior both during any period of pretrial release and while imprisoned. Indeed, Tzedek notes that factor 6, which addresses the question of whether early termination will jeopardize public safety, directs consideration of the defendant's record while incarcerated. This formulation properly implies that a defendant's record while incarcerated may support the conclusion that early release puts the public at risk. There is no reason why the converse should not be true.

Further, a defendant's exemplary behavior, and achievements while incarcerated may be the strongest indicators that early termination is warranted. One way the Commission might ensure that this factor is fully considered is to modify factor (4) as follows:

(4) the defendant's engagement in appropriate prosocial activities [*subsequent to arrest and during any period of imprisonment, including but not limited to evidence of rehabilitation and personal growth, the completion of programs designed to address underlying pathologies that contributed to the criminal conviction, or to advance the defendant's education or vocational skills and prospects to be a productive member of society, as well as any other evidence of exceptional behavior and work performance while in prison*,] and the existence or lack of a prosocial support to remain lawful beyond the period of supervision.

Issue 3

The Commission seeks comment on whether the non-exhaustive factors for courts to consider when determining whether early termination is warranted are appropriate and adequate.

Tzedek reiterates its comments above that full consideration should be given to an individual's behavior prior to sentence and while in prison in assessing whether early termination of supervised release is appropriate. See the above proposed language adding an Application Note 7 to the revised Commentary under § 5D1.1 and proposed language adding to Factor 4 in the proposed new Policy Statement § 5D1.4 referenced in response to Issues 1 (A) and (B) above.

Additionally, Tzedek urges the Commission to encourage courts to refrain from granting early termination solely because of an outstanding fine, assessment, or restitution. In the absence of a willful failure to make such payments, this is an unfair and irrelevant basis to deny early termination. There are other established means to convert these monetary obligations into a collectible judgment.

Issue 4

The Commission seeks comment on whether and how the proposed changes to supervised release may impact defendants' eligibility to benefit from the First Step Act (FSA) earned time credits, and whether additional changes are necessary to avoid any unintended consequences.

Presumably the Commission has posed this issue out of concern for the potential that if a court did not impose any term of supervised release, an individual might not qualify for early release arising from earned credits due to the provisions of 18 U.S.C. § 3624(g)(3) (Supervised Release), which appears to condition early release upon a term of supervised release after imprisonment. While there are likely to be few cases in which courts impose a significant term of imprisonment without imposing some minimal term of supervised release, one way to deal with this is to add a new subsection to § 5D1.1 as follows:

> (d*) In any case in which a court imposes a sentence including a term of imprisonment, but does not believe that an extended period of supervised release is necessary, the court should consider imposing a minimal period of supervised release to ensure that a defendant may qualify for early release based upon earned credits pursuant to 18 U.S.C. § 3632(d)(4)(A) and 18 U.S.C. § 3624(g)(3).*

Alternatively, or perhaps additionally, the Commission should consider exercising its statutory authority to recommend that Congress amend the appropriate statutes to ensure that the absence of a term of supervised release does not preclude an otherwise qualified individual from benefiting from the early release provisions arising from earned credits.

Issue 7

The Commission seeks comment on procedures to employ in the implementation of the proposed new policy statement § 5D1.4 concerning early termination of supervised release.

Even before considering the nature of the proceeding, whether to provide counsel, and how to ensure victim input in appropriate cases, Tzedek is

concerned with the issue of notice, i.e., ensuring that a defendant who has served a term of imprisonment knows of the right to seek modification or early termination of supervised release. There are others who are better positioned than Tzedek to address whether the Commission has the authority to address that question, as well as the other identified issues, without congressional action and/or modification of the Federal Rules of Criminal Procedure (See F.R.Cr.P. 32.1(c)(2)). Tzedek certainly supports a process, however truncated, that provides meaningful due process and access to counsel, as well as an opportunity for victims to have input.

To address the notice issue, the Commission could recommend that Congress adopt provisions that were previously set forth in legislation introduced in the Safer Supervision Act in the 118th Congress,[6] obligating the Administrative Office of the United States Courts to provide notice to the defendant, defendant's counsel, and any local and Federal Defender Organization or Community Defender when a releasee becomes eligible for early termination of supervision. In this situation, assuming the proposed amendment is adopted, such notice should be required immediately upon release from custody.

Proposed Amendment: Revocation of Supervised Release

Tzedek endorses the Commission's proposals to provide greater discretion to respond to a violation of a condition of supervised release, especially the emphasis on individualized assessment and increased flexibility. Individualized assessment is essential to a system of justice that recognizes the uniqueness of each and every human being, and the circumstances in which a potential violation may occur.

Tzedek also appreciates the Commission's determination to distinguish between the rehabilitative purposes of supervised released as opposed to the punitive aspects of probationary sentences. That said, the same flexibility should be available to courts whenever a statute does not mandate revocation

[6] See Safer Supervision Act of 2023, https://www.congress.gov/bill/118th-congress/house-bill/5005/text.

or incarceration for probation violations. While a probationary sentence is a punitive consequence of criminal conduct, it does not follow that revocation and incarceration should necessarily be imposed in circumstances where such would not be statutorily required and where the policy would not require that outcome in cases of a violation supervised release. Here again, because an individual assessment is the preferred approach to serve all statutory goals, a court should be able to consider the infinite permutations of individual circumstances in assessing whether full revocation is appropriate. Societal interests are not necessarily best served by incarceration when other modifications to the terms of probation may be more effective. For this reason, Tzedek recommends that the Commission consider, in this amendment cycle or future ones, implementing some or all the ameliorating provisions that are proposed under Option I for policy statement§ 7C1.3 (Responses to Violations of Supervised Release) also for § 7B1.3(a) (Revocation of Probation).

Additionally, Tzedek offers the following observations and suggestions with respect to specific issues for comment:

Issues for Comment

1.

(A) The Commission seeks comment on whether the recommendation of an individual assessment when considering a revocation of supervised release based solely on statutory factors is sufficient.

As was the case with the guidance in determining whether to provide early termination of supervised release, Tzedek urges the Commission to include additional non-exclusive factors that expressly urge courts to consider an individual's behavior and achievements while incarcerated. While a purported violation takes place after an individual's release from imprisonment, it does not follow that behavior while incarcerated, which may have encompassed many years of positive adjustment and evidence of rehabilitation, is irrelevant to a revocation determination. While such behavior might not be accorded the same weight in a revocation situation as it is in an early release determination, it still constitutes an important indicator of progress toward rehabilitation.

2. **Should the Commission continue to provide guidance tying whether revocation is required to the grade of the violation, or should the Commission remove this restriction and permit courts to make revocation determinations based on the individualized assessment in all cases?**

For all the reasons stated above concerning the unique characteristics of each individual and each set of circumstances, Tzedek urges the Commission to adopt Option 1 which will provide courts maximum flexibility in fashioning the most just and effective outcome. As suggested above, a range of facts and considerations that can be relevant to supervised release decision-making, and especially to any decision to reincarcerate someone after having completed a prison term, should be considered. Consequently, the Commission should seek to remove any provisions that restrict courts' ability to consider and give effect to all relevant matters.

Greater use of Supervised Release, as well as Terms of Probation, in Lieu of Incarceration

While discussing the importance of individual assessments in supervised release decision-making, albeit beyond the purview of the current proposed amendments, Tzedek takes this opportunity to emphasize the critical importance of the Commission's ability to dynamically and forcefully promote the use of alternatives to incarceration. Alternative approaches have been severely underutilized since the creation of the Guidelines. As noted above, Tzedek agrees that supervised release which is overseen by U.S. Probation should not be considered a punishment when it follows incarceration—but it *should* be considered as an alternative to extended and potentially excessive terms of incarceration when utilized *instead of* extended periods of incarceration, especially in cases in which a defendant lacks a serious *mens rea* and when public safety and community repair may be better served.

As the Commission is well aware, 18 U.S.C. § 3553(a) directs courts to impose a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing and § 3553(a)(3) expressly instructs judges to consider the "kinds of sentences available" so as to ensure judges

directly consider in every case whether alternatives to incarceration may be "sufficient." Yet despite these clear statutory directives, federal judges have relied excessively on prison sentences and often extremely severe terms of imprisonment since the enactment of the SRA. In 1986—the year before the U.S. Sentencing Guidelines took effect—*just over half of all federal sentences included a prison term* and the average time served by those going to prison in this period was less than 20 months.[7] By Fiscal Year 2023, according to Commission data, *the percentage of those sentenced to prison had soared to 92.4%,* and the expected median time served by those now going to prison (even assuming good time credits) is well over 45 months.[8]

Tzedek, along with many others, believes that the modern addiction to incarceration must end. Greater use of supervised release and probation are effective tools that can help achieve important public safety and justice goals without the long-term consequences and burdens associated with imprisonment. Accordingly, Tzedek continues to strongly urge the Commission to prioritize expanding the use of alternatives to incarceration—including the use of supervised release, probation, home detention and other alternatives—which will also likely encourage judges to impose shorter prison terms.

Proposed Amendment: Drug Offenses

As explained in the introductory section above, Tzedek believes that the continued reliance upon quantification without regard for relevant *mens rea* consideration and other more relevant circumstances as the driving force in U.S. sentencing structures is a fundamental flaw. Whether it is loss amount under § 2B1.1 or drug quantity under § 2D1.1 as well as in some mandatory minimum provisions, in many if not most circumstances, especially in multi-defendant conspiracy cases, these factors do not adequately account for

[7] 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.
[8] U.S. Sentencing Comm'n, 2023 Annual Report and Sourcebook of Federal Sentencing Statistics, Figure 6 & Table 15, https://www.ussc.gov/research/sourcebook-2023.

individual *mens rea* and consequently overstate culpability, resulting in unnecessarily harsh sentences.

Tzedek fervently hopes that the Commission's current proposal to ameliorate the severity of drug sentencing does not portend that the Commission is foreclosing more fundamental reforms that are so necessary to restore justice to drug and financial crime sentencing.

With that proviso, Tzedek supports the Commission's proposal to reduce base offense levels and to provide a new mechanism for a reduction for low-level trafficking functions. The base offense level reform is, fundamentally, an important acknowledgement that quantification-driven sentencing results in overly harsh sentences. Similarly, the addition of a new means to provide reductions for the less culpable is a positive step toward addressing inadequate attention to *mens rea* in the structure and operation of the drug guideline.

In contrast, however, the proposal to amend the fentanyl/fentanyl analogue enhancement in § 2D1.1(b)(13) to either lessen or remove the *mens rea* requirement is a wholly regressive step. Tzedek recognizes the harms caused by fentanyl and fentanyl analogues, but that is insufficient justification to impose sanctions in the absence of clearly delineated criminal knowledge and intent. Tzedek urges the Commission to refrain from providing any enhancement without adequate fundamental *mens rea* requirements.

More generally, as with the overreaction to cocaine base decades ago, sentence enhancements engineered to placate intense concern of the moment without being fully attentive to the fundamentals of criminal culpability and other principles of justice inevitably lead to unjust outcomes in individual cases and unnecessary harshness throughout the entire sentencing system.

Additionally, Tzedek offers the following observations and suggestions with respect to specific issues for comment:

Part A – Subpart 1 Amendments to §2D1.1 re: highest base offense level

Issues for Comment

1.

Should the Commission consider setting the highest base offense level at another level [other than 34, 32 or 30]? If so, what is the appropriate highest base offense level for the Drug Quantity Table?

Short of abandoning the quantification approach, among the choices proposed, Tzedek strongly encourages the Commission to adopt the lowest level among the options. Level 30 will provide a base offense level requiring roughly 8 – 10 years imprisonment for the lowest criminal history offender. This is a more than adequate base level to meet the legitimate purposes of sentencing for a non-violent drug offender lacking in other aggravating factors, especially since the guidelines recommend in cases involving death or serious injury or other aggravating factors much greater sentences. Groups with greater expertise in drug sentencing than Tzedek are likely to suggest that a lower level than 30 would be more appropriate, and the Commission should seriously consider such recommendations.

2.

Whether the Commission should consider reducing all base offense levels in the Drug Quantity [rather than just the highest level] and if so to what extent? And should this reduction apply to all drug types and at all offense levels?

The basic rationale behind reducing the base offense level for the highest quantities—the concern that drug quantity assessments alone produce excessive sentencing range—surely justifies implementing a corresponding reduction at all levels. Thus, Tzedek encourages the Commission to select the lowest of the three options (level 30) as the highest base offense level and reduce each succeeding level accordingly. Whether each of the levels is reduced by the same amount as the highest offense level is reduced from 38 (either 8, 6 or 4 levels) or by some lesser amount, it is fair, just and appropriate, to provide some corresponding downward adjustment at the declining quantities. Tzedek does not support limiting any such ameliorative steps to certain categories of drugs.

3.

The Commission seeks comment on how it should address the interaction between the options set forth in Subpart 1 and the

mitigating role cap. Specifically, should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap?

This issue will be impacted by the proposed new § 2D1.1(b)(17) if it is adopted. Apart from that, assuming that § 3B1.2 remains the sole vehicle for a minor or minimal role adjustment, Tzedek proposes that the Commission eliminate any reference to a mitigating role cap.

Part A Subpart 2 – Amending § 2D1.1 to add a reduction for low-level trafficking

Issues for Comment

1.

The Commission has proposed that this specific offense characteristic decrease the offenses levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?

For the reasons previously discussed, Tzedek supports an individualized assessment of culpability and affording courts maximum discretion. Accordingly, Tzedek's inclination is to support the 6-level reduction. That said, with concern that some judges may be disinclined to grant a reduction of that magnitude if that is the only option, the Commission might authorize a reduction of between 2 and 6 levels based upon an individualized assessment of all surrounding facts and circumstances.

Additionally, as will be discussed in greater depth below, if the Commission opts to limit the reduction to anything less than 4 points, Tzedek urges that the Commission make clear that a court should apply either this provision or the Mitigating Role provisions provided in § 3B1.2, whichever results in the greatest reduction.

2.

Are there other factors beyond the specific offense characteristics in the new § 2D1.1b (17) that this provision should capture?

Consistent with the view that every case is unique, and every individual should be assessed with full regard for the attendant circumstances in each situation, under either Option 1 or 2, Tzedek urges the Commission to include an additional phrase to the effect of: "*or under all the attendant circumstances of the case demonstrated a limited role in the trafficking offense.*"

4. and 5. How should the Commission amend § 2D1.1(a)(5) to account for the new low-level trafficking functions?

Tzedek urges the Commission to ensure that eligibility for the role reduction should apply irrespective of how the base offenses levels in the Drug Quantify Table are modified. As far as the reference to § 3B1.1 (Mitigating Role) the Commission should amend the language in § 2D1.1(a)(5) to make clear that the court should apply *whichever analysis results in the greatest reduction*. Language to this effect will be especially crucial if the Commission opts to limit the new role reduction to 2 points.

6.

The Commission seeks comment whether to include a special instruction providing that § 3B1.2 (Mitigating Role) should not apply where the defendant's offense level is determined under § 2D1.1.

As noted above, this special instruction would be wholly inappropriate if the Commission limits the role reduction to anything less than the 4-point reduction for which an individual might qualify under § 3B1.2. Beyond that, should the Commission limit the low-level reduction to 2 points, Tzedek urges the Commission to add an Application Note to the Commentary to the new § 2D1.1(b)(17) making clear that *a court in its discretion may apply both the limited role reduction as well as the Mitigating Role in an appropriate case*.

Part C Misrepresentation of Fentanyl and Fentanyl Analogues

Issue for Comment

1.

The Commission seeks comment on whether any of the three options set forth [to amend § 2D1.1(b)(13)] is appropriate to address concerns. If not, is there an alternative and should the Commission provide a different *mens rea* requirement?

Tzedek opposes sentencing enhancements that hinge upon removing or diminishing *mens rea.* In that regard, as compared to the existing provision, all the options are flawed. Tzedek is unaware of any empirical evidence that casting a broader net to subject individuals who did not know the nature of the substance to greater punishment will in any manner redress the nation's fentanyl problem. The first option is completely unacceptable in that it essentially provides for a significant enhancement, which depending upon other factors could result in additional years of imprisonment, based wholly upon a theory of strict criminal liability. The second option, which has two bracketed alternatives, is similarly flawed. The first alternative alters "knowingly misrepresented or knowingly marketed" to "knowledge or *reason to believe*" [emphasis added]. A "reason to believe standard" is novel and extraordinarily vague and may be viewed as even less rigorous than a civil law negligence standard. The second alternative which speaks to "knowledge or *reckless disregard* as to actual content" [emphasis added] is similarly vague and would inevitably penalize individuals who simply did not know the substance was present, based on an amorphous standard. In the absence of actual knowledge by the defendant, there is no reasonable basis to conclude that either of these standards would deter the unlawful conduct. The third option, which presents a tiered approach, replicates the existing provisions of § 2D1.1(b)(13), but substitutes the dangerously vague dilution of the intent requirements to justify a four-point enhancement and eliminates the *mens rea* requirement for a two-point enhancement.

As Tzedek noted in its comments submitted on January 30, 2025, in response to the proposed amendments related to stolen firearms and firearms with modified serial numbers, if knowledge and intent cannot be proved, an enhancement should not be applied, even if it means that fewer individuals will receive the enhancement.[9] The whole point of the *mens rea* doctrine is

[9] See Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities (January 30, 2025), www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf pp. 1018-1019.

to ensure that only those who are truly culpable because they act with the requisite guilty state of mind should be subjected to prosecution, or in this case subjected to enhanced punishment.

In seeking to persuade the Commission not to go down this road, it cannot be overemphasized that the underlying crime, even without this enhancement, carries substantial penalties. It is neither good policy nor fundamentally just to eliminate or reduce the requisite level of culpability at sentencing, especially in a context in which the burden of proof is less than beyond a reasonable doubt. And to do so, as explained in the Commission's Synopsis of the Proposed Amendment "because courts rarely apply this enhancement" and because "[s]ome commentators suggested that the Commission lower the *mens rea* requirement" appears to be an outcome driven goal of seeking harsher penalties without any rationale or appropriate concern for just punishment.

Finally, in its comments last year, Tzedek urged the Commission to consider numerous steps to mitigate the trial penalty.[10] Eliminating or diluting the *mens rea* requirement for this enhancement will undoubtedly provide another tool in the trial penalty arsenal as role enhancements are routinely deployed to exacerbate the punishment imposed upon those who assert their right to a trial.

Part E Safety Valve

Issue for Comment

The Commission seeks comment on whether the changes set forth in Part E of the proposed amendment are appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider?

Tzedek fully supports the amendment to dispense with the requirement of an in-person meeting with the Government to qualify for the Safety Valve to ensure the safety of defendants who seek the benefit of this provision. Tzedek notes, however, that to accommodate situations or jurisdictions in

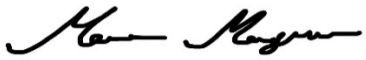
[10] See Supra, note 2, at pages 770 - 778.

which the Government feels that personal interaction is essential, the Commission might also consider providing for a *virtual* meeting as an alternative or an adjunct to a written submission. Such an option would provide for direct interaction between the Government and the defendant but would not implicate the safety concerns of an in-person meeting.

Conclusion

Tzedek greatly appreciates the opportunity to provide input on the proposed amendments in the current amendment cycle. Tzedek looks forward to continuing to work with the Commission in pursuit of a fairer and more humane approach to sentencing.

Sincerely,



Rabbi Moshe Margaretten[11]
President

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