

Sentencing Options

The Commission has proposed amendments to Chapter Five that emphasize non-incarceration sentencing options. Part A of the proposed amendment posits both an expanded Introductory Commentary to Chapter Five and a new guideline at §5A1.1. For defendants whose guidelines ranges fall within Zones A through C on the Sentencing Table, the new §5A1.1 would encourage courts to determine the sentence type (*e.g.*, imprisonment, probation, intermittent confinement, fine) before determining the length of a sentence. The factors that courts would consider in making this determination closely resemble those that courts typically consider under 18 U.S.C. § 3553(a). Part B of the proposed amendment would expand Zones B and C on the Sentencing Table (now at a new §5A1.2), particularly at Criminal History Category (“CHC”) I. Specifically, at CHC I, the bottom of Zone B would expand from offense level 11 to offense level 23, and Zone C would expand from level 13 to level 29. For other CHCs, Zones B and C would expand by one or two levels.

The Department appreciates the opportunity to offer its views on the Commission’s proposals. We caution, though, that the views presented here are preliminary and may be refined or explained more fully in the comment letter that the Department plans to submit by March 18.

Starting with the Introductory Commentary to Chapter Five: although the Department does not see a pressing need for the new Introductory Commentary that the Commission has proposed, we do not object to changes designed to remind district courts, in an outcome-neutral manner, of the various sentencing options that exist under statutes and the guidelines—similar to the supervised release amendment that the Commission promulgated last cycle.¹ However, we do not support Introductory Commentary that drives judges toward any particular type of sentence, and the latter lines of the current proposal put extra emphasis on non-incarceration. In our view, this commentary is unnecessary and has the potential to create problems, rather than solving them.

District judges are well aware of the sentencing options before them, including non-incarceration options. Presentence Reports identify these options before every sentencing, and parties often argue them in the sentencing phase. With those materials in hand, judges thoughtfully exercise their discretion in making individualized sentencing determinations. Nothing in the sentencing data suggests that judges reflexively refuse non-incarceration options; rather, data showing that most federal defendants receive prison sentences is reflective of factors such as statutory limitations on probation eligibility and a focus of limited federal prosecutorial resources on serious crimes. An enhanced emphasis on non-incarceration options is, in short, unnecessary.

Turning to the proposed §5A1.1, the Department opposes this addition. We are concerned that the proposed §5A1.1 risks confusion and procedurally complicating the two-step post-*Booker* sentencing process, which the Commission cemented into §1B1.1 of the guidelines with last year’s simplification amendment. For defendants in Zones A through C, §§5A1.1(b) and (c) risk injecting a separate procedural step in the sentencing process—in between determining the advisory guidelines range and imposing the sentence under § 3553(a)—that courts must discuss in open court during the sentencing hearing or else commit procedural error. If the Commission’s goal is

¹ U.S.S.G. Ch. 3, Pt. D, intro. comment.

to remind courts of the full range of sentencing options, we think carefully crafted changes to the Introductory Commentary would be a better option than a new guideline.

The Department also opposes the proposed significant expansion of Zones B and C at CHC I. The proposed expansion risks lengthy periods of supervision, which are often counterproductive for defendants and burdensome for probation officers; and it runs counter to appropriately reflecting the seriousness of the offense and providing just punishment.

A. Substantial Changes to Chapter Five Are Unnecessary

It is often said—typically by judges themselves—that sentencing is the most challenging and weighty part of a judge’s job.² Cognizant of this, judges approach with seriousness and thoughtfulness the task of imposing a sentence that is “sufficient but not greater than necessary” to accomplish the goals of sentencing in an individual case—as the existing Introductory Commentary to Chapter Five reminds them to do.³

Our current post-*Booker* system ensures judges know the sentencing options available to them. Section 3553(a) instructs judges to consider the “kinds of sentences available.”⁴ As do the Sentencing Guidelines, including in the current Introductory Commentary to Chapter Five’s sentencing table,⁵ and in the current §§5B1.1 and 5C1.1’s discussion of probation and split sentences. Also, Presentence Reports identify in detail the various types of sentences available in each case, as they are required to by law.⁶ Probation officers, who are themselves well versed in sentencing options, provide guidance as appropriate. And counsel will zealously advocate for non-incarcerative sentences when appropriate and available. Simply put, when a non-prison sentence might be “sufficient but not greater than necessary” in a case, the current system effectively flags it for the court’s consideration.

The fact that most federal defendants receive imprisonment does not show a reflexive judicial tendency toward prison over other options. Rather, it reflects two things: (1) most prosecuted federal crimes warrant a prison sentence due to their nature and seriousness and, relatedly, (2) probation applies in limited circumstances as prescribed by statute. Taking the latter point first, it is worth remembering that probation is not a legally available sentencing option for

² See, e.g., Timothy J. Corrigan, “Who appointed me God? Reflections of a Judge on Criminal Sentencing,” *JUDICATURE*, Vol. 100, No. 3 (2016) (“Sentencing is the most multifaceted, emotional, and challenging task a judge performs.”).

³ U.S.S.G., Ch. 5, intro. comment. (“After applying the provisions of this chapter to determine the sentencing options recommended under the guidelines . . . the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine the length and type of sentence that is sufficient but not greater than necessary.”).

⁴ 18 U.S.C. § 3553(a)(3) (“The court, in determining the particular sentence to be imposed, shall consider—the kinds of sentences available.”)

⁵ U.S.S.G., Ch. 5, intro. comment. (“[T]he provisions in this chapter set forth the sentencing requirements and options under the guidelines related to probation, imprisonment, supervision conditions, fines, and restitution for the particular guideline range. For example, for certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions.”)

⁶ Fed. R. Crim. P. 32(d)(1)(C)-(D).

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a large swath of federal offenders—by our estimate, approximately half of the cases sentenced in Fiscal Year 2024.⁷ Congress has entirely excluded from probation eligibility defendants convicted of serious felonies,⁸ as well as many defendants convicted of frequently prosecuted crimes such as violations of the Controlled Substances Act.⁹

Additionally, the Department directs its limited resources to prosecuting the most serious and consequential crimes, which inherently means crimes warranting incarcerative sentences. Long ago, then-Attorney General Robert H. Jackson described such cases as “those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.”¹⁰ And today, the Principles of Federal Prosecution stated in the Justice Manual require federal prosecutors to consider at the charging stage “[t]he probable sentence or other consequences if the person is convicted,” including “whether such a sentence or other consequence would justify the time and effort of prosecution” and the possible sentence that an offender may face if prosecuted under another jurisdiction’s laws.¹¹ Convictions for offenses that federal prosecutors choose to pursue after considering these criteria will, and should, mostly yield prison sentences. Moreover, given the substantial overlap between state and federal criminal law, those cases where the offense is not the most flagrant—*i.e.*, those that might be more apt to yield probationary or split sentences—are far more often handled at the state level. The federal sentencing data reflects this dynamic and does not indicate a problem that the Commission should implement significant changes to address.

Data about deviations from the guidelines provides further proof that the proportion of non-incarceration sentences is not attributable to rote or reflexive sentencing determinations. In Fiscal Year 2024, for instance, the Commission’s sentencing data show that less than half of all sentences were within the guidelines range. A third of all sentences were variances,¹² a rate that has been

⁷ Compare U.S. Sent. Comm’n, *2024 Sourcebook of Federal Sentencing Statistics*, Table 11 (showing approximately 60,000 sentencings for FY2024), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Sentencing-Section.pdf>, with Sentencing Options Public Data Briefing, Slide 6 ((listing approximately 27,600 probation eligible defendants), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026-Sentencing-Options.pdf>).

⁸ 18 U.S.C. § 3561(a)(1) (excluding individual defendants convicted of Class A and B felonies); U.S.S.G. §5B1.1 (incorporating these limitations).

⁹ 18 U.S.C. § 3561(a)(2) (excluding defendants convicted of “an offense for which probation has been expressly precluded”); see 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B) (barring courts from “plac[ing] on probation or suspend[ing] the sentence of any person sentenced under” certain provisions of Controlled Substances Act).

¹⁰ Attorney General Robert H. Jackson, “The Federal Prosecutor,” address delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>.

¹¹ Justice Manual 9-27.230 (“Initiating and Declining Charges—Substantial Federal Interest”); *id.* at 9-27.240 (“Initiating and Declining Charges—Prosecution in Another Jurisdiction”).

¹² See U.S. Sentencing Commission, “Sentence Imposed Relative to the Guideline Range: Fiscal Year 2024,” available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Tab1e29.pdf>.

relatively stable for the past several years.¹³ Of those, nearly 90% were downward variances.¹⁴ Variances, particularly downward variances, are indicative of judges making individualized determinations as to what sentences they believe are “sufficient but not greater than necessary.” And in a substantial number of cases, judges continue to opt for probation or other split sentences.¹⁵

In sum, viewing the proportion of sentences that are prison only as “too high,” and thus requiring significant changes to Chapter Five, misses the mark. Such a perspective runs counter to the seriousness with which judges approach sentencing, the legal and procedural safeguards that ensure judges are fully informed of all sentencing options, and data showing that judges are not reluctant to exercise their discretion.

B. Part A—Chapter Five Introductory Language and § 5A1.1

The considerations above inform the Department’s view that no changes to the guidelines to further emphasize sentencing options are needed at this time and, correspondingly, that any changes should be modest. For that reason, the Department would not object to changes to the Introductory Commentary of Chapter Five, Part A that are carefully crafted, in an outcome-neutral manner, to remind judges of the various sentencing options that may be available in a given case. We are concerned, however, that the Introductory Commentary as proposed does not meet the key criterion of outcome neutrality and could instead be read as nudging judges toward probation and other non-incarceration sentences.

The most evident example to us is the treatment of deterrence. The Introductory Commentary as drafted makes only a passing mention of deterrence in a parenthetical quoting the legislative history of the Sentencing Reform Act.¹⁶ But Congress cemented deterrence as a central consideration for the sentencing judge under 18 U.S.C. § 3553(a)(2)(B). And the same Senate Report quoted in the proposal makes clear that Congress thought the need for deterrence was a particularly important factor to weigh before deciding to impose a probationary sentence—and one that courts had neglected in “many cases” under the pre-Act system.¹⁷ Commentary highlighting

¹³ See U.S. Sentencing Commission, “Sentence Imposed Relative to the Guideline Range Over Time: Fiscal Years 2015-2024,” available at <https://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Figure09.pdf> (last visited Feb. 17, 2026).

¹⁴ See “Sentence Imposed Relative to the Guideline Range: Fiscal Year 2024,” *supra*.

¹⁵ Sentencing Options Public Data Briefing, Slide 6 (showing that, in FY2024, a total 16% of eligible defendants were sentenced to a fine only, probation only, or probation plus confinement conditions).

¹⁶ Proposed Amendments, at 5-6.

¹⁷ S. Rep. No. 98-225, at 91-92 (1983) (explaining the Senate Judiciary Committee’s view that, in “many cases, particularly in instances of major white collar crime,” courts had granted probation “without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance”); *id.* at 92 (stating that probation “may be grossly inappropriate ... in cases in which the circumstances mandate the sentence’s carrying substantial deterrent or punitive impact”).

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the availability of probation should also reflect Congress’s concerns that it was a poor fit for certain offenders and offenses.¹⁸

Furthermore, the proposed §5A1.1 risks unnecessarily complicating the familiar two-step post-*Booker* sentencing process. Courts are accustomed to (1) correctly calculating the advisory guidelines range and, while remaining cognizant of the advisory range, (2) imposing sentence under the factors set forth in § 3553(a).¹⁹ The proposed § 5A1.1—particularly subsections (b) and (c), when coupled with the reference in the Introductory Commentary about an “initial determination of sentence type”—could be viewed as interjecting another mandatory procedural step between the existing two-step process. Would courts commit reversible error if, after calculating the guidelines range, they proceeded to the familiar § 3553(a) analysis without first articulating their rationale as to the selection of sentence type? Would it be error to consider sentence length contemporaneous with sentence type (notwithstanding such a consideration being typical and natural)?

Adding more confusion, the analysis that proposed §5A1.1 appears to contemplate at this intermediate step is difficult to distinguish from the ordinary § 3553(a) analysis itself. The list of possible factors under Issue for Comment #2, which are replete with citations to § 3553(a), illustrates this point.²⁰ In effect, proposed §5A1.1 could require the judge to evaluate those factors and exercise discretion in determining the sentence type and sentence length *under the guidelines*, before again evaluating those same factors and exercising discretion under § 3553(a) to finally impose sentence. But collapsing the § 3553(a) analysis at step two into the guidelines calculation at step one not only fosters redundancy, it runs counter to the two-step process articulated by the Supreme Court in *Rita* and *Gall*—and enshrined in §1B1.1 of the guidelines themselves via last year’s simplification amendment.

In this way, proposed §5A1.1 could undermine the Commission’s recent efforts at simplifying the guidelines, particularly the removal of most departure provisions. In excising departures, the Commission explicitly acknowledged the “growing shift” among courts post-*Booker* to exercise their discretion in the form of variances under § 3553(a) rather than in the form of departures under the guidelines.²¹ The proposed §5A1.1, however, risks undoing this work and re-injecting these kinds of discretionary determinations back into the guidelines framework.

To sum up our view on Part A of the proposed amendment: the Department does not see a pressing need to remind courts of their sentencing options or suggest an analytical framework for

¹⁸ The Commission’s proposal contains (at 6) bracketed language that refers to the development of risk- and needs-assessment tools and that would advise courts to consider defendant needs and available resources in choosing a sentencing option. The Department is unsure that the bracketed language is warranted but will evaluate the input of others with pertinent knowledge, including probation officers, before providing our view.

¹⁹ *Rita v. United States*, 551 U.S. 338, 351 (2007); *Gall v. United States*, 552 U.S. 38, 49-50 (2007).

²⁰ Proposed Amendments, at 9-10.

²¹ See U.S.S.G. § 1A1.1 (“The Commission envisioned and framed this 2025 amendment to be outcome neutral, intending that judges who would have relied upon facts previously identified as a basis for a departure would continue to have the authority to rely upon such facts to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a).”).

thinking through those options. But if the Commission is going to go that route, carefully and neutrally crafted Introductory Commentary could accomplish that goal within the two-step process that the Commission recently cemented into the guidelines. The proposed §5A1.1, by contrast, risks procedurally complicating the sentencing process or injecting back into the guidelines the very type of substantive advice that the Commission excised just last year when deleting almost all departures from the Guidelines Manual.

* * *

The preliminary views expressed above respond to most of the Issues for Comment for Part A. We elaborate, however, on one specific point under Issue #2. The last bullet-point factor in determining sentence type suggests consideration of “[a]ny *developing* research and knowledge about the effectiveness of available sentencing options in meeting the needs of individual defendants, reducing recidivism, and protecting the public. See 28 U.S.C. § 991(b)(1)(C).”²²

We have two comments on courts considering such a factor in sentencing as a general matter. First, while Congress afforded the Commission the authority to consider the “advancement in knowledge of human behavior as it relates to the criminal justice process” in crafting the guidelines, 28 U.S.C. § 991(b)(1)(C), it is unclear the extent to which Congress authorized sentencing courts to do so under § 3553(a) in a particular case. We do not suggest that research may never be considered by sentencing courts. Rather, we simply point out that the roles of—and the legal authority for—the Commission and sentencing courts are different. Thus, we would be hesitant to endorse any provision suggesting sentencing courts should consider facts and circumstances not closely tethered to § 3553(a).

Second, and more pointedly, the Department would oppose the notion that courts should consider “developing” research in imposing sentences in individual cases. Such a provision could invite parties to cite, and courts to rely on, outlier, non-peer reviewed studies or papers that have limited reliability. But reliability of evidence is a touchstone of sentencing proceedings.²³ Inviting consideration of “developing” research could produce unnecessary side litigation over the reliability of the research being introduced. At worst, if the conclusions in the research turn out wrong, relying on it could result in a miscarriage of justice. Instead, to the extent courts consider research in making sentencing determinations, they should be encouraged to rely only on high-quality studies that bear the usual indicators of reliability, such as peer review, replicability, and other similar studies reaching the same conclusions.

C. Expansion of Zones B and C of the Sentencing Table

The Department opposes the significant expansion of Zones B and C at CHC I for several reasons. First, expanding Zones B and C so extensively at CHC I would not reflect the seriousness of the offense and provide just punishment at the proposed expanded offense levels. This is particularly true when the defendant’s conduct resulted in victim harm. For instance, the notion

²² Proposed Amendments, at 10 (emphasis added).

²³ See U.S.S.G. §6A1.3(a) & cmt.

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that a first-time fraud defendant—say, a corporate executive who embezzled \$3 million in a sophisticated scheme and pleaded guilty (resulting in offense level 22)—would not serve any time in prison runs contrary to common-sense notions of justice. The same could be said of a defendant who committed three Hobbs Act robberies each involving the threat of death and pleaded guilty (resulting in offense level 22), or a defendant who straw purchased 200 or more handguns for a person they knew was prohibited and pleaded guilty (resulting in offense level 23). Each of these examples would fit within the proposed expanded Zone B.

At the expanded Zone C—up to offense level 29 at CHC I—examples of conduct for which split sentences would be authorized are even more egregious. The first-time fraud defendant could steal up to \$150,000,000. The note-job robber could commit many more robberies. The 200+ firearm straw purchaser could supply assault rifles capable of accepting large capacity magazines.

In other words, the extent of expansion of Zones B and C is disproportionate to the extent of societal harm caused by a defendant’s criminal conduct at those expanded offense levels. So much so that it seems difficult to square such outcomes with the commands of 18 U.S.C. § 3553(a)(2)(A).

Second, extensive periods of intensive supervision or community confinement are known to hamper the rehabilitative process and lead to a revolving door of violations.²⁴ Indeed, in our experience, defendants at supervised release violation hearings who are given the choice between a period of incarceration with no supervision to follow or a longer period of supervision with additional constraints will choose the incarceration option. For some defendants, then, serving extended periods of non-incarcerative confinement would not further the goal of promoting reintegration into society.

Third, such a system would impose a significant burden on already overworked probation officers. Probation officers would be responsible for monitoring compliance of defendants who receive these non-incarcerative sentences. Such monitoring is time-intensive for these officers, possibly even more so than supervising defendants on supervised release.

Fourth, as acknowledged in Issue for Comment #3, expanding Zones B and C at CHC I risks offending fundamental notions of fairness where defendants at identical guidelines ranges are treated differently. For instance, under the proposed amendments, the guidelines would authorize only imprisonment (Zone D) for a defendant at offense level 15 and CHC II but would authorize probation (Zone B) for a defendant at offense level 16 and CHC I—notwithstanding that the advisory guidelines range for both defendants is 21-27 months. Accordingly, the proposed expansions to Zones B and C risk creating a further windfall for those with limited criminal history (on top of the recently promulgated zero-point offender reduction in §4C1.1).

Finally, the Commission’s public data briefing indicates that the proposed expansion of

²⁴ See, e.g., Alex Roth, et al., *The Perils of Probation: How Supervision Contributes to Jail Populations* 5 & n.17 (Oct. 2021), at <https://vera-institute.files.svcdn.com/production/downloads/publications/the-perils-of-probation.pdf>.

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Zones B and C would make far more violent offenders eligible for probation.²⁵ For instance, presently at Zone B, 5% of individuals were convicted of a violent offense and 1% of cases involved a weapon. At the proposed expanded Zone B, however, 12% would have been convicted of a violent offense and 8% involved a weapon. Similarly, presently at Zone C, 6% of offenders were convicted of a violent offense, and 4% involved a weapon. At the proposed expanded Zone C, 12% would have been convicted of a violent offense and 12% involved a weapon. Thus, from a public safety perspective, the proposed expansion would significantly increase the number of individuals with greater indicators of dangerousness who are eligible for probation or split sentences under the guidelines.

The Department believes that these significant downsides to the proposed expansion of Zones B and C at CHC I outweigh any potential benefit. As a general matter, the Department believes such extensive expansion is unnecessary for the reasons described above—namely, that judges are cognizant of their obligation to impose a sentence “sufficient but not greater than necessary,” and given that a third of all sentences in FY 2024 were variances, judges are fulfilling that obligation. As we see it, there is no need to encourage judges to consider non-incarcerative sentencing options already familiar to them, and any desire to do so could be met through changes less drastic than the zone expansion that the Commission has proposed.

²⁵ Sentencing Options Public Data Briefing, Slides 16, 23. We acknowledge that the Commission data cited here is not limited to individuals in CHC I. Nevertheless, given that the proposed expansion in CHC I would draw into Zones B or C significantly more individuals than at all other CHCs combined, the data seem directionally relevant to the analysis.