

**Federal Public and Community Defenders
Comment on Sentencing Options
(January Proposal 1)**

March 2, 2026

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Defenders enthusiastically support the proposed amendment on Sentencing Options. Part A would add new introductory commentary to Chapter Five of the Guidelines Manual, underscoring the importance of the initial determination of sentence type and the role of non-imprisonment sentences. It would also create a new guideline, §5A1.1. This new provision would, for the first time, explicitly direct courts to decide the appropriate sentence type before deciding on sentence length and conditions, and it would guide them in this decision. Part B would increase the number of people who qualify for a non-prison sentence under the Guidelines by expanding Zones B and C of the Sentencing Table.

Below we recommend ways this proposal could go further to encourage alternatives to prison in appropriate cases. But at a minimum, the Commission should adopt this amendment. The proposed changes (as well as our suggested improvements) are empirically justified. And they better align Chapter Five with the Sentencing Reform Act (SRA), which requires the Commission to provide guidance to courts not only on the appropriate length of a prison sentence, but also on whether to impose a prison sentence in the first place,¹ and contemplates that courts will consider the kinds of sentences available before turning to the question of sentence length or amount.

And both parts of this amendment recognize what Defenders and our clients have long understood: Probation *is* punishment—it involves significant restrictions on liberty and onerous conditions—but it also provides a transformative chance at rehabilitation, which in turn reduces recidivism and makes communities safer. As laid out below, both statute and social science support the proposed amendment, which we hope will result in fewer prison-only sentences, while promoting the important statutory purposes of sentencing.

Our Comment proceeds in three parts. Part I explains how this amendment is consistent with SRA text and legislative history. Part II discusses how developments in social science reinforce the need for this amendment. And Part III affirms Defenders’ support for the proposal and suggests small modifications. Specifically, we offer additional or alternate text to ensure the new §5A1.1 best achieves the Commission’s goals. We also offer support for the proposed expansion of zones in Part B, and we suggest

¹ See Section I, *infra* (discussing 28 U.S.C. § 994(a)(1)(A) & (B); 18 U.S.C. § 3553(a)(3), (4)).

an additional expansion of Zones B and C further for people in Criminal History Categories (CHCs) II and III.

I. The statutory scheme for federal sentencing supports the proposed amendment, which would ameliorate the Guidelines' current default sentence of imprisonment.

As we explain below, the Commission's organic statute is unequivocal: The Guidelines must instruct courts not only on how to select the length of any sentence, but also on how to determine what type of sentence to impose. Despite this, the original Commission made a series of decisions that were at odds with this mandate and created a default outcome of imprisonment, with grave consequences.² The current proposal is an important step toward bringing Chapter Five in line with the SRA and expanding the universe of available punishments under the Guidelines.

A. The SRA supports giving courts guidance on, and promoting the use of, a variety of sentence types.

The SRA's text instructs sentencing courts to consider the § 3553(a) factors "in determining *whether* to impose a term of" probation or imprisonment, distinct from its consideration of those same factors in determining the length of any sentence.³ And it further instructs the Commission to guide courts not just as to the length of sentence, but also on "whether to impose a sentence to probation, a fine, or a term of imprisonment," so that the sentence best achieves the purposes of sentencing in each individual case.⁴

In drafting the SRA, Congress did not provide for a single default sentence type and showed no preference or presumption for one sentence over

² See Section I.B. *infra* (discussing original Commission choice to disregard SRA mandate and subsequent decrease in federal noncustodial sentences).

³ 18 U.S.C. § 3582(a); 18 U.S.C. § 3562(a).

⁴ § 994(a)(1)(A); see also § 994(f) (requiring the Commission, in designing guidelines, to "promote the purposes set forth in section 991(b)(1)," which in turn discusses the § 3553(a) factors, disparity, individualization, and advancement in knowledge of human behavior, among other things).

another.⁵ Legislators explicitly chose not to include a presumption for, or against, sentences of probation.⁶ The SRA framers desired, “in all cases . . . to encourage the intelligent balancing of often competing considerations,” through individualized consideration of the § 3553(a) factors.⁷

Probation, of course, is one of three available punishments under the SRA—not just for misdemeanors but also for most C, D, and E felony offenses.⁸ Outside of a handful of prescriptions, the SRA leaves to the Commission the task of designing guidelines that align with each of the

⁵ When Congress intended a certain type of sentence to prevail in a certain type of case, it said so explicitly. *See, e.g.*, 28 U.S.C. § 994(j) (“The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases” involving a “first offender who has not been convicted of a crime of violence or an otherwise serious offense”); § 994(h) (mandating “that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized” for certain “categories of defendants”). Even when commanding the Commission to create guidelines reflecting that “in many cases, [pre-SRA] sentences do not accurately reflect the seriousness of the offense,” the text does not state that prison is the only appropriately serious sanction. *See* 28 U.S.C. § 994(m). The absence of a presumptive sentence type in the mine-run case is notable considering that at the time of the SRA, most people received some period of probation. *See* Cecelia Klingele, [What’s Missing? The Absence of Probation in Federal Sentencing Reform](#), 34 Fed. Sent. R. 322, 323 (2022) (“In 1986, for example, straight probation accounted for 44.4% of federal sentences, and 62.5% of federal sentences included some period of probation.”).

⁶ [S. Rep. No. 225](#), 98th Cong., 2d Sess. at 91 (Sept. 14, 1983) (“[T]he Committee feels that the best course is to provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission ... and the courts, the full exercise of full discretion in tailoring sentences to the circumstances of individual cases.”).

⁷ *Id.* at 91-92 (discussing 18 U.S.C. § 3562, which directs courts to “consider the factors set forth in section 3553(a)”).

⁸ 18 U.S.C. § 3551(b) (authorizing sentences to a term of probation, a fine, or a term of imprisonment); 18 U.S.C. § 3561(a) (describing the categories of offenses for which probation is not available); *see also* *Esteras v. United States*, 606 U.S. 185, 196 (2025) (“Fines, probation, and imprisonment are a court’s primary tools for ensuring that a criminal defendant receives just deserts.”). While the bulk of this Comment focuses on probation, we note that fine-only sentences are also often permitted under the statutory scheme, which also allows for a wide variety of creative intermediate sanctions via supervision conditions.

purposes of § 3553(a)(2),⁹ which can be achieved by multiple forms of punishment.¹⁰

Moreover, several provisions of that Enabling Statute seem to counsel in favor of far more probationary and alternative sentences than courts impose today. For example, § 994(j) focuses on the appropriate nature of noncustodial sentences for many individuals without criminal history. Section 994(g) requires the Commission to consider correctional resources and minimize the risk of exceeding federal prison capacity. And § 994(k) directs the Commission to avoid recommending imprisonment as a means of rehabilitation.

B. The inaugural Commission’s choice of imprisonment as default punishment failed to give courts important guidance, with grave consequences.

Despite clear statutory text and Congressional intent, the inaugural Commission created a Guidelines structure that did not comply with the SRA and under-promoted non-prison sentences. The original Commission failed to give guidance on sentence type, and instead explicitly and implicitly positioned imprisonment as the default sentencing option.¹¹ Since the dawn

⁹ See 28 U.S.C. § 991(b)(1)(A) (requiring that the Commission “establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18”).

¹⁰ See Hon. Lynn Adelman & Jon Deitrich, [How Federal Judges Contribute to Mass Incarceration and What they Can Do About It](#), 99 *Judicature* 72, 77 (2015) (“Judges also need to overcome the notion that probationary sentences are necessarily lenient The conditions of probation may serve to punish . . . , to incapacitate . . . , and to deter Finally, probation can ensure that a defendant receives needed correctional treatment”); Ellen C. Brotman, [Make Probation a Real Option at Sentencing](#), 23 *Fed. Sent. Rep.* 257, 258 (2011) (“Given how high the statutory eligibility for probation reaches, it is patently unreasonable—and contrary to the statutory structure of federal sentencing as a whole—to focus on a guideline chart that treats probation as only possibly appropriate in the most trivial or extremely mitigated cases.”).

¹¹ See Defenders’ [Priority Letter to USSC](#) at 4 (July, 18, 2025) (discussing failure of Guidelines to effectuate SRA mandate); Tina M. Woehr, [Federal Alternative Sentences: A Critically Endangered Species](#), *Sentencing Matters Substack* (Jan. 5, 2026) (“[T]he Guidelines Manual has, from the start, treated imprisonment as the default outcome, both explicitly and implicitly.”).

of the Guidelines regime, commenters have bemoaned this choice as a misapprehension of the statutory mandate.¹²

Prior to the SRA, straight probation accounted for 44% of federal sentences, and 63% of federal sentences included some period of probation.¹³ Even among those convicted of “violent offenses,” one-third received probationary sentences.¹⁴ By contrast, in fiscal year 2024, only 12% of statutorily eligible U.S. citizens—already a much reduced population after passage of the SRA—receive a straight probation sentence, with another 8% receiving something other than a prison-only sentence.¹⁵ While multiple factors have contributed to the disappearance of non-prison sentences, the Guidelines’ prison-presumptive approach has been a leading factor.¹⁶

¹² See, e.g., Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1955 (1988) (criticizing the original Commission’s failure to address the statutory mandate to reduce probability of prison overcrowding even though “[a] number of obvious options were available” to do so including “propos[ing] alternatives to incarceration as [a] means of reducing the incarceration rate.”); Steven Lindemann, [Opening the Federal Sentencing Guidelines to Alternatives](#), 15 William Mitchell L. R. 555, 600 (1989) (“This article makes a prima facie case that the Commission did not adequately consider nonimprisonment sanctions, the purposes of sentencing, and the impact of the guidelines on prison overcrowding.”); Daniel Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1706 (1992) (“Congress said nothing in the statute about abolishing or even drastically curtailing probation. . . . The Commission, however, drafted guidelines containing a presumptive sentence of imprisonment for every felony. . . .”).

¹³ See [What’s Missing? The Absence of Probation in Federal Sentencing Reform](#) at 323 (discussing data from 1986).

¹⁴ *Id.*

¹⁵ USSC, [Public Data Briefing: Proposed Amendment on Sentencing Options](#) at 6 (Feb. 13, 2026). While the data briefing focused on U.S. citizens, we note that many non-citizens are eligible for, and can be good candidates for, probation, depending on the offense and circumstances.

¹⁶ Melissa Hamilton, [Prison-by-Default: Challenging the Federal Sentencing Policy’s Presumption of Incarceration](#), 51 Houston L. Rev. 1271, 1299-309 (2014) (using sentencing data to establish that “the Commission is largely, perhaps primarily, responsible for a trend toward reliance on incarceration in the vast majority of cases”); see also USSC, [Supplementary Report on the Initial Sentencing Guidelines and Policy Statements](#) at 60 (1987) (“The projections of our basic model indicate that the guidelines will . . . reduce the number of straight probation

The original Commission's choice caused tremendous harm, including contributing to the exploding federal prison population¹⁷ and compounding racial disparities.¹⁸ And despite the Commission's statutory requirement to minimize the likelihood of prison overcrowding, these choices also contributed to the crisis facing the Bureau of Prisons (BOP) system.¹⁹ BOP facilities are unsafe, with insufficient staffing, crumbling facilities, and insufficient medical, psychological, or rehabilitative options available to address the needs of those incarcerated.²⁰ The Commission has acknowledged the

terms. . . . Second, the guidelines will, for a number of crimes, increase somewhat the average length of time served.”).

¹⁷ Hon. Carlton Reeves, [Alternatives to Incarceration and the Sentencing Commission: A Call for Progress Through Partnership](#), 36 Fed. Sent. R. 130, 132 (Feb. 1, 2024) (highlighting that original Commission chose “to write guidelines that made incarceration the default sanction in nearly every case” and “there is no doubt that the policy choice made forty years ago is a major reason why alternatives to incarceration today are all but nonexistent in the federal system”); see also Rachel Barkow, [Sentencing Guidelines at the Crossroads of Politics and Expertise](#), 160 UPALR 1599, 1605 (2012) (“between 1995 and 2004, the federal prison population increased at an annual average rate of 7.8%, compared to an average annual increase of 2.7% in the states.”); Defenders’ 2025 [Priority Letter](#) at 3 n.6 (discussing impact of Guidelines’ structural failure to incorporate probation sentences).

¹⁸ See *Alternatives To Incarceration and the Sentencing Commission: A Call For Progress Through Partnership at 130-132* (discussing racial disparities in criminal legal system over past century); Jelani Jefferson Exum, [Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs](#), 58 Am. Crim. L. Rev. 1685, 1686 (2021) (highlighting importance of Reconstruction period in the “criminal sentencing context where law and policy have been used to perpetuate racialized oppression”).

¹⁹ See Congressman Jamie Raskin et al., [Letter to BOP Director re: Staffing Shortages](#) at 1-2 (Feb. 20, 2026) (“We are concerned that staffing issues have reached a crisis point.”); see also [Defenders’ Comment on the USSC’s 2025 Drug Offense Proposed Amendments](#) at 8-13 (Mar. 3, 2025) (discussing BOP crisis); Max S. Wolson et al., [From Sickness to Cure: Obeying 28 U.S.C. § 994\(g\)’s Mandates as a Remedy to Bureau of Prisons Overcrowding](#), 38 Fed. Sent. Rep. 98 (publication forthcoming May 2026) (same).

²⁰ See, e.g., Keri Blankinger, [We’re Broken: As Federal Prisons Run Low on Food and Toilet Paper, Corrections Officers are Leaving in Doves for ICE](#), ProPublica (Nov. 21, 2025); Sen. Richard J. Durbin, [Priority Letter to USSC re: BOP practices](#) at 5 (July 18, 2025) (urging Commission to consider amendments that account for the limited nature and capacity of facilities and services available within BOP); Nicole B. Godfrey, [Decades of Indifference and Failures in Accountability in the Provision of Medical Care in Federal Prisons](#), 25 Nev. L. J. 755, 755 (Spring 2025) (describing “BOP’s well-known institutional failures in its provision of medical care

difficulty of incentivizing sentences other than straight imprisonment, yet an effective solution has proved elusive, perhaps until now.²¹

II. Advancements in knowledge of human behavior show the proposed amendment would advance public safety.

Moving on from the inaugural Commission’s past oversights, advancements in our knowledge of human behavior since passage of the SRA support the proposed amendment’s recalibration of the Guidelines’ prison-first structure, in terms of promoting the purposes of sentencing.²²

Specifically, research has called into question overreliance on incarceration as a means of promoting public safety. We now know that the value of imprisonment in promoting general deterrence is questionable at best: research shows that certainty of apprehension, as opposed to severity of sanction, carries more deterrent value.²³ Thus, expanding the availability of non-prison sentences will not diminish the general deterrent purpose of sentencing.²⁴

to incarcerated people”); OIG, DOJ, *Top Management and Performance Challenges Facing the DOJ 2025* at 2 (“The Federal Bureau of Prisons (BOP) continues to face persistent challenges, most critically those presented by staffing shortages, deteriorating infrastructure, and the introduction of contraband.”).

²¹ Defenders’ 2025 *Priority Letter* at 10 (discussing past Commission attempts to promote alternative sentences); *see also* USSC, *Alternative Sentencing in the Federal Criminal Justice System* at 1 (2015) (noting “continued decreasing trend in the imposition of alternative sentences” despite previous expansion of zones); USSC, *Alternatives to Imprisonment Project Report* at 4 (1990) (noting a “clear need exists for the U.S. Sentencing Commission to consider alternatives to imprisonment . . .”).

²² The Commission has an ongoing duty to ensure that the Guidelines “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)(C).

²³ Nat’l Inst. of Justice, DOJ, *Five Things About Deterrence* at 5 (May 2016); *see also* Roger Pryzbylski et al., *The Impact of Long Sentences on Public Safety: A Complex Relationship*, 36 Fed. Sent. Rep. 81, 82 (2023) (“The certainty and swiftness of consequences function as a more effective crime deterrent than their severity.”); Daniel Nagin, *Incarceration & Public Safety*, Arnold Ventures (July 2022) (explaining how certainty principle “calls into question the effectiveness of over four decades of U.S. crime-control policy predicated on the premise that lengthy prison sentences . . . are an effective deterrent to crime”).

²⁴ § 3553(a)(2)(B).

With respect to recidivism, noncustodial sentences can be just as, if not more, effective than incarceration.²⁵ Defenders have witnessed the social harms inflicted by removing vast numbers of people from their communities.²⁶ Even short terms of imprisonment can be incredibly disruptive—especially to people who have made steps toward post-offense rehabilitation—by interfering with employment, family stability, and community ties that are themselves protective against future criminal conduct.²⁷ By directing courts to actively engage with the initial sentence type decision, along with broadening the availability of alternative sanctions

²⁵ Kevin Wolff & Michael T. Baglivio, [Priority Letter to USSC](#) at 1 (July 2025) (“A broad literature base demonstrates that incarceration, especially short-term custodial sentences, is less effective at reducing reoffending compared to structured community sanctions.”); Nat’l Rsch. Council, [The Growth of Incarceration in the United States: Exploring Causes and Consequences](#) 156 (2014) (“[T]he body of credible evidence on the effect of the experience of imprisonment on recidivism is small, that evidence consistently points either to no effect or to an increase rather than a decrease in recidivism. Thus, there is no credible evidence of a specific deterrent effect of the experience of incarceration.”); FWD.us, [Priority Letter to USSC](#) at 2 (July 18, 2025) (discussing “meta-analysis of 116 studies that compared people who were sentenced to jail or prison with people who received noncustodial sanctions like probation found that incarceration either has no impact on a person’s likelihood of committing a crime in the future or increases it.”).

²⁶ See, e.g., [Defenders’ 2025 Comment re: Drug Offenses](#) at 7 (Mar. 3, 2025) (noting how mass incarceration has “destabiliz[ed] families and communities—factors that are linked to *increased* crime and *increased* demand for drugs” (emphasis in original); [Defenders’ Letter to the USSC](#) at 26 (July 23, 2012) (encouraging alternatives to incarceration based upon criminogenic nature of imprisonment).

²⁷ See [The Growth of Incarceration in the United States: Exploring Causes and Consequences](#) at 152 (2014); see also Scottish Government, Justice Analytical Servs., [What Works to Reduce Reoffending: An Update of the Evidence on Imprisonment and Community Disposals](#) at 16 (June 2025) (A “review by the Sentencing Council for England and Wales found little evidence for effective or beneficial outcomes in respect of short term prison sentences . . . whilst studies . . . also highlight concerns about short sentences in particular.”) (citations omitted); Melissa Hamilton, [Priority Letter to USSC](#) at 5 (July 2025) (discussing failure of short imprisonment terms to rehabilitate and their exacerbation of reoffending); Youness Nafid et al., [The Role of Criminal Alternatives as a Future in Achieving Security](#), 19 Int’l J. Crim. Just. Sci. 552, 563 (2024) (describing criticisms of short-term incarceration as neglecting “rehabilitative and reintegrative aspects of punishment,” and contending it fails “allow for meaningful correction in [individuals] but tends to perpetuate criminal behavior.”).

under the Guidelines, the proposed amendment can promote recidivism reduction.²⁸

As we explained last month in the context of the proposed post-offense rehabilitation adjustment, since the adoption of the Guidelines, scientific developments have shed light on the dynamic nature of a person’s risk to re-offend.²⁹ In short, people change. Dynamic risk factors fluctuate over time and are receptive to intervention.³⁰ And a growing body of literature recognizes the importance of protective factors, which can decrease the likelihood of reoffending.³¹ A modern-day understanding supports interventions available via probationary sentences as recidivism prevention, such as the Risk-Need-Responsivity model of tailoring sentencing interventions to individual need.³² The proposed amendment provides an important opportunity to incorporate these developments into the Guidelines, as directed by § 991(b)(1)(C).

And despite outdated misconceptions, probation is not simply rehabilitative; it is also highly punitive.³³ The Supreme Court has

²⁸ § 3553(a)(2)(C).

²⁹ [Defenders’ Comment on the USSC’s 2026 Post-Offense Rehabilitation Proposed Amendments](#) at 2-4 (Feb. 10, 2026); *see also* [Hamilton 2025 Priority Letter](#) at 11 (“Incorporating dynamic factors into sentencing promotes proportionality (by aligning the severity of punishment with actual risk), fairness (by recognizing human capacity for change), and public safety (by targeting interventions to address criminogenic needs).”).

³⁰ [Defenders’ 2026 Comment re: Post-Offense Rehabilitation](#) at 2-3.

³¹ *Id.*

³² [Wolff & Baglivio 2025 Priority Letter](#) at 1 (discussing risk-need-responsivity framework); *see also* Devon L. L. Polaschek, *Desistance and Dynamic Risk Factors Belong Together*, 22 *Psychol., Crime & L.* 171, 179 (2016) (discussing the Risk-Need-Responsivity model); James Bonta & Donald A. Andrews, *The Psychology of Criminal Conduct* at 19 (6th ed. 2017) (noting that “Risk-Need-Responsivity (RNR) model of [individual] assessment and rehabilitation . . . has become the premier model to guide applications in corrections and criminal justice.”).

³³ § 3553(a)(2)(B); *see also, e.g.*, Fiona Doherty, [Obey All Laws and Be Good: Probation and the Meaning of Recidivism](#), 104 *Geo. L. J.* 291, 294, 354 (2016) (examining probation systems across the country, which “wield an almost farcical level of control over people’s lives” and concluding that “although probation is often invoked as a solution to the problem of overincarceration, it should instead be analyzed as part of the continuum of excessive penal control.”); Cecelia Klingele,

acknowledged that federal supervised probation is punishment, and that its many conditions “substantially restrict” one’s liberty.³⁴ Especially with taxing conditions such as intensive supervision or electronic monitoring, probation operates as a form of intrusive and punitive control over almost every aspect of an individual’s life.³⁵ And the lived experience of those being supervised confirms that even the forms of supervision not intended to be punitive, such as supervised release and home confinement, can prove to be onerous and a

[*Rethinking the Use of Community Supervision*](#), 103 J. Crim. L. & Criminology 1015, 1065 (2013) (discussing the connection between the rise in probationers and the rise in incarceration and arguing that by “limiting the use, duration, and conditions of probation and post-release supervision, lawmakers can succeed in reducing unnecessary revocation while also ensuring the continued legitimacy of community sanctions.”); *see also* Vera Inst. Just., [*The Perils of Probation: How Supervision Contributes to Jail Populations*](#) at 1 (Oct. 2021) (contending “[p]robation has been considered an alternative to incarceration, but it has become more common and more punitive over time.”).

³⁴ *Gall v. United States*, 552 U.S. 38, 48 (2007) (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)) (People “on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.”). The statute on probation conditions lists nine mandatory conditions and 23 discretionary conditions. 18 U.S.C. § 3563(a), (b).

³⁵ Michelle S. Phelps et al., [*Beyond “Pains” and “Gains”: Untangling the Health Consequences of Probation*](#), 10 *Heath & Just.* 29, 16 (Oct. 2022) (finding “probation provides both pains and gains, connecting people to services and providing a form of coercive motivation, while also burdening precarious adults with significant demands and new legal risks”); U.S. Courts, [*Post-Conviction Supervision*](#) (describing common supervision strategies of federal probation officers of regular monitoring; restrictions such as curfews or abstinence; interventions and required treatments; and contact with family, friends, and employers); Marina Richter et al., [*Punitiveness of electronic monitoring: Perception and experience of an alternative sanction*](#), 13 *European J. of Probation* 262, 275 (2021) (exploring literature and concluding the punitiveness of electronic monitoring may depend on how it is used and noting how electronic monitoring “as a means of controlling people on parole turns it into an additional punishment because it substantially restricts freedom of movement and deprives people of the dynamics of family, work and life in general.”); *see also* Carmen L. Diaz et. al., [*A retrospective study of the role of probation revocation in future criminal justice involvement*](#) 93 *J. Crim. Just.* 102225 (Jul.-Aug. 2024) (“Revocation broadly does not appear to influence future criminal justice contact. Instead, revocation seems to indicate that an individual is already following a trajectory of misconduct. Among low-risk probation clients however, technical violations are particularly harmful.”).

potential trapdoor into prison.³⁶ Further, unlike with supervised release, probation violations are potentially subject to a full resentencing, meaning that probation violations carry the risk of even greater punishment through incarceration.³⁷ In the federal system, probation gives individuals an opportunity at rehabilitation that they would not receive in prison, but that does not take away from the fact that it is also deeply punitive.

III. The Commission should adopt the proposed amendments, with modifications.

Defenders support the Commission’s proposal, which directs courts to contemplate sentence type before sentence length and increases sentencing options for more individuals by expanding Zones B and C. As discussed above, noncustodial and alternative sentences are far too rare despite being statutorily available. And Congress did not mandate this result; the inaugural Commission chose it. The proposed amendment helps this Commission correct course. We urge the adoption of both Parts of this amendment, and below we suggest modest modifications that could help the proposal better promote the statutory purposes of sentencing.

A. Part A

Defenders urge the Commission to adopt, with slight modifications, both Part A’s proposed introductory commentary and the new proposed guideline, §5A1.1.³⁸ For years, stakeholders have asked the Commission to provide more guidance on the threshold question of sentence type.³⁹ For the

³⁶ See [Statement of Rita Gray](#) to USSC on Supervised Release at 1 (March 13, 2025) (discussing supervision restrictions that led to missing child’s graduation, losing professional opportunities, and missing housing opportunities); [Statement of Eric Hicks](#) to USSC on Supervised Release at 4 (March 3, 2025) (discussing loss of travel ability, agency, and privacy rights); [Statement of Daniel Varley](#) to USSC on Supervised Release at 4 (March 3, 2025) (“Being on supervised release added another layer of challenge to an already difficult time.”).

³⁷ See 18 U.S.C. § 3565; see also U.S.S.G. §7B1.3 (advising revocation for Grade A and B violations of probation).

³⁸ See [Issue for Comment 1](#) (Part A).

³⁹ See Section I.B., supra (summarizing early critiques); Defenders’ 2025 [Priority Letter](#) at 3, 8 n.28 (suggesting that the Commission “remodel the first three parts of Chapter Five and incorporate a new guideline that gives judges guidance on the “in/out” decision and on *all* sentencing options available by statute” and collecting

first time in four decades, Part A of this amendment creates such guidance. We appreciate that this Commission has heeded the call to recalibrate the current sentencing process, which overwhelmingly favors incarceration and obscures other available sentencing options. The Commission should adopt both the new introductory commentary and the new guideline.

Below, we further suggest that, in adopting Part A, the Commission should also:

- modify the Chapter Five Introductory Commentary to highlight the importance of the sentence-option choice;
- add language to the Chapter Five, Part A Introductory Commentary to remind courts that imprisonment is not an appropriate means of rehabilitation;
- change language throughout §5A1.1(a) referring to “authoriz[ed]” sentences within certain zones to “recommend[ed]” sentences;
- consider the inclusion of factors in §5A1.1(b) to provide courts with guidance on selecting a sentencing option; and
- keep the bracketed language in §5A1.1(d) reminding courts that they may determine that a sentencing option authorized by statute, but not by the Guidelines, is appropriate.

sources); *see also* [*Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*](#), 51 Hous. L. Rev. at 1324 (“The Commission should jettison its prison-by-default ideology and start anew with the philosophy that giving direction on the full range of types of sentences is at least as important as guidance on the length of imprisonment.”).

1. Chapter Five Introductory Commentary

Defenders support adding the proposed introductory commentary to Chapter Five, and Part A with one suggested change. In keeping with the spirit of this amendment, Defenders believe that the introductory commentary to Chapter Five should read as follows:⁴⁰

Introductory Commentary

Chapter Five sets forth the steps used to determine the applicable sentencing **range options** and sentencing **range options** based upon the guideline calculations made in Chapters Two

This reversal of words accurately reflects the order of operations contemplated in the SRA and the Commission’s organic statute,⁴¹ while also reinforcing the principles in §5A1.1—namely that the court, in the first step of the sentencing process, should consider the *kinds* of sentences available before turning to sentence length.⁴²

2. Chapter Five, Part A Introductory Commentary

Defenders welcome the new introductory commentary to Chapter Five, Part A, titled “Determination of Type of Sentence and Sentencing Range.” This commentary rightfully emphasizes the Commission’s responsibility to provide guidance for courts when making their threshold sentence-type decision by citing the SRA’s legislative history. It also stresses that Congress did not intend to establish a presumption of any sentence, and the need for individualized consideration in each case.

⁴⁰ The text of the introductory commentary, including proposed language, reads: “Chapter Five sets forth the steps used to determine the applicable sentencing **range** and sentencing **options** . . .” [2026 Proposed Amendment: Sentencing Options](#) at 5 (emphasis added). Our changes are in red.

⁴¹ See § 3553(a)(3) and (a)(4); 18 U.S.C. § 3583(a); § 994(a)(1)(A) and § (a)(1)(B).

⁴² Thomas W. Hillier, II, *Linking Judicial Sentences to Congressional Purposes*, 8 Fed. Sent. Rep. 24, 24 (1995) (discussing that judges, lawyers and commentators “have criticized the guidelines since inception for ignoring the Congressional directive that judges fully consider the crime, [individual], possible punishments and purposes of sentencing *before* applying the guidelines.”).

We also support including the bracketed text at the end of the introductory commentary, with modification.⁴³ The language could go further by reminding courts that an individual’s access to programming and resources can vary dramatically,⁴⁴ and no one should be incarcerated simply because programming in the community is unavailable or may prove challenging to implement.⁴⁵ To ensure that lack of access to resources and other structural disadvantages are not used against individuals at sentencing, we propose adding the text in red:

⁴³ The bracketed text reads: “[As the criminal justice system continues to develop more advanced tools to assess and respond to individual defendants’ unique risks and needs, the court should consider the resources available to address the defendant’s needs, and the setting in which those resources can be provided, in determining the appropriate sentencing option.]” [2026 Proposed Amendment: Sentencing Options](#) at 6.

⁴⁴ See [Defenders’ 2026 Comment re: Post-Offense Rehabilitation](#) at 1, 12-13 (requesting modifications to proposed amendment to “ensure that those who lack access to resources or formal programming either in detention facilities or in the community can still qualify for the reduction;”); [CLC Comment on the USSC’s 2026 Post Offense Rehabilitation Amendment](#) at 9 (Feb. 10, 2026) (noting that rehabilitation opportunities “could vary widely depending on . . . what resources might be available in their institutions (for those detained) and in their communities (for those released)”).

⁴⁵ See [Defenders’ 2026 Comment re: Post-Offense Rehabilitation](#) at 17 (describing access barriers); see also § 3582(a) (recognizing that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”).

As the criminal justice system continues to develop more advanced tools to assess and respond to individual defendants' unique risks and needs, the court should consider the resources available to address the defendant's needs, and the setting in which those resources can be provided, in determining the appropriate sentencing option. **However, the court may not choose imprisonment over probation or intermediate forms of punishment because an individual lacks access to such resources. See 18 U.S.C. § 3582(a); *Tapia v. United States*, 564 U.S. 319 (2011) (holding that a sentence of imprisonment is not an appropriate means of promoting rehabilitation, and rehabilitation therefore cannot justify lengthening a sentence).** The Commission intends for §5A1.1 (Determination of Type of Sentence) to support the court's "full exercise of informed discretion in tailoring sentences to the circumstances of individual cases." S. Rep. No. 225, 98th Cong., 1st Sess. 91 (1983).

3. Section 5A1.1

Overall, Defenders support §5A1.1 and its structure, which directs courts to consider available sentence type options and select the appropriate sentence type prior to making the determination of sentence length.⁴⁶ We also appreciate that Part A moves the Sentencing Table from its prominent placement at the beginning of Chapter Five to §5A1.2.⁴⁷ And we appreciate that §5A1.1(a) clearly sets out the descriptions of the zones with cross-references. The zones are currently scattered throughout Chapter Five; recapping them in §5A1.1(a) will make it easier for judges and practitioners to view them together in one place. That said, we have three suggestions to

⁴⁶ See [2026 Proposed Amendment: Sentencing Options](#) at 6-8. See Section I.A., *supra* (discussing statutory scheme); see also Defenders' 2025 [Priority Letter](#) at 5 (discussing the two distinct decisions of sentence type and amount contemplated by statutory scheme).

⁴⁷ [Federal Alternative Sentences: A Critically Endangered Species](#) (recommending that Commission create a new sentencing options guideline that "could come at the start of Chapter Five and prompt sentencers to contemplate sentence type before sentence amount"); Defender's 2025 [Priority Letter](#) at 4, n. 10 ("The choice to begin Chapter Five with the Table as Part A, coming before the Parts discussing terms of probation and imprisonment, also solidifies this default [of imprisonment].").

help the new guideline better accomplish the Commission’s goal of providing courts with effective guidance on this “critical decision.”⁴⁸

First, our global suggestion for §5A1.1 is that the guideline should not use the word “authorize[d]” when discussing what sentence types are included within specific zones.⁴⁹ Given the post-*Booker* advisory guidelines system, only the statutory scheme authorizes sentences. Thus, the Commission should use the word “recommend” throughout instead (such as “Zone A **recommends** a sentence of probation”) to avoid suggesting that the Zones are mandatory.

Second, we appreciate §5A1.1(b), which requires courts to determine the appropriate sentencing option(s) before considering the length of any such sentence.⁵⁰ Defenders would support subsection (b) as written, but we suggest expressly reminding courts of the specific relationship between § 3553(a) and the determination of the appropriate sentence type.⁵¹ As for

⁴⁸ [2026 Proposed Amendment: Sentencing Options](#) at 4. We do have concerns regarding §5A1.1(a)’s reliance on guideline ranges (still measured in months of imprisonment) because of the cognitive anchoring effect of the range, which could inadvertently continue to promote imprisonment as the norm. *See* Defender’s 2025 [Priority Letter](#) at 4. But such concerns are tied to the persistence of the table’s use of months of imprisonment as its unit of measurement and Chapter Five’s continued characterization of guideline ranges as being measured in months of prison as well. In the future, the Commission might explore adding a table providing ranges for alternative sentences. *See* [Federal Alternative Sentences: A Critically Endangered Species](#) (discussing alternatives tables).

⁴⁹ *See* [Defenders’ Comment on the USSC’s 2025 Simplification Amendment](#) at Appx. 11 (Feb. 3, 2025) (“Defenders identified additional language in tension with the post-*Booker* advisory guidelines system—that is, language suggesting certain Commission guidance is mandatory.”).

⁵⁰ As explicit consideration of the punishment type decision is likely new to many courts and practitioners, it makes sense to break this process into distinct steps to ensure courts fully contemplate this decision at the beginning of the sentencing process.

⁵¹ If the Commission adopts the list of factors in Issue for Comment 2, we do not believe it is necessary to explicitly include particular § 3553(a) factors in the list, given that courts must already consider them. *See* § 3582(a) (courts should “consider the factors set forth in § 3553(a) to the extent that they are applicable”). *See also* *Pepper v. United States*, 562 U.S. 476, 488 (2011) (finding that courts can consider the “widest possible breadth of information,” ensuring the court is in

including certain additional factors, as suggested in Issue for Comment 2, these could assist courts in determining the appropriate sentence option.⁵² If the Commission adopts these additional factors, Defenders suggest that the Commission specify that any factors that are drawn from § 994(k) can be taken into consideration only for non-custodial or intermediate sentences.⁵³ Sentencing courts are statutorily prohibited from using these factors to impose or lengthen a term of imprisonment.⁵⁴

Finally, we support the proposed §5A1.1(d), including the proposed bracketed language.⁵⁵ This subsection, including the bracketed language, is outcome-neutral and does not suggest a policy choice by the Commission. It simply reflects the two-step process for sentencing,⁵⁶ along with the law under *Booker* and its progeny that allows a sentencing court to impose any sentence within statutory limits based on appropriate consideration of all the factors listed in § 3553(a). By setting forth the relevant legal framework of §3553(a), the bracketed language in §5A1.1(d) serves to remind sentencing courts of their ability to consider the “widest possible breadth of information”

“possession of the fullest information possible concerning the defendant’s life and characteristics”) (citation omitted)).

⁵² Defenders have asked the Commission for this sort of guidance in the past. See [Joint Statement of Thomas W. Hillier II and Davina Chen on behalf of Defenders to USSC in Stanford, CA on “The Sentencing Reform Act of 1984: 25 Years Later”](#) at 4, 11 (May 27, 2009) (asking the Commission to provide evidence-based guidance for courts making the threshold sentencing options decision); *Linking Judicial Sentences to Congressional Purposes* at 24 (discussing lack of guidance on punishment type).

⁵³ See [Issue for Comment 2](#) (including as a factor for §5A1.1(b): “[w]hether the defendant is in need of educational or vocational training, medical care, or other rehabilitative or correctional treatment, and the setting in which any such treatment would be most effectively provided.”); see *Tapia v. United States*, 564 U.S. 319 (2011) (holding that a sentence of imprisonment is never an appropriate means of rehabilitation, and rehabilitation therefore cannot justify lengthening a sentence).

⁵⁴ See *Tapia*, 564 U.S. at 332.

⁵⁵ The bracketed language reads: “[The court may determine that a sentencing option that is authorized by statute, but not by the guidelines, is appropriate based on the consideration of these sentencing factors.]” [2026 Proposed Amendment: Sentencing Options](#) at 7.

⁵⁶ See USSG §1A1.1 cmt. (citing *Gall*, 552 U.S. at 49-51) (internal quotations omitted); see also USSG §1B1.1, Application Instructions (laying out the two-step sentencing process).

about an individual,⁵⁷ and that courts' sentencing discretion is constrained only by statutory limits.⁵⁸

B. Part B

Defenders support the proposed expansion of Zones B and C. We believe these changes, along with the proposals in Part A, will remind courts of the additional sentencing options available to them and encourage them to utilize those options. We note below that if the Commission wanted to take additional action, it would make sense to broaden the expansions for individuals in CHC I to include individuals in CHCs II and III.

Coupled with the guidance in Part A, the proposed expansion of Zones B and C in Part B is a step toward meaningful change. Defenders have criticized zones in the past as overlooked and confusing. Under the current Manual, the vast majority of individuals fall within Zone D, and even when individuals fall within the lower zones, they frequently receive imprisonment sentences.⁵⁹ But the addition of the new guidance in §5A1.1 addresses some of these concerns by cementing the importance of the sentence-type decision. Defenders support any expansion of Zones B and C, which will promote alternative sentences for our clients.⁶⁰

⁵⁷ See *Pepper*, 562 U.S. at 488.

⁵⁸ See *Concepcion v. United States*, 597 U.S. 481, 494 (2022) (“The only limitations on a court’s discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution.”). Including the bracketed language would also track the Commission’s policy statement on whether to impose a term of supervised release following a term of imprisonment. See USSG §5D1.1. This recently amended policy statement instructs courts to impose terms when required by statute, but “[w]hen a term of supervised release is not required by statute,” it guides courts to “order a term of supervised release to follow imprisonment when warranted by an individualized assessment of the need for supervision.” See *Id.* (including commentary reminding courts of the statutory factors supporting the individualized assessment determination); see also USSC App. C, [Amendment 835](#) (Nov. 1, 2025).

⁵⁹ Defenders’ 2025 [Priority Letter](#) at 13.

⁶⁰ We have supported expansion of Zones B and C in the past. See [Defenders’ Comment on the USSC’s 2017 Proposed Zone Expansion Amendment](#) at 14 (Feb. 20, 2017).

In particular, the proposed expansion of Zones B and C for individuals in CHC I makes sense as it ameliorates the table's prison-default for many individuals with negligible criminal history, which runs afoul of the statutory directive in § 994(j).⁶¹ By including more individuals with the lowest criminal history category into the expanded zones, the Commission is making progress toward effectuating that mandate.⁶²

We note that the proposed amendment (with or without the additional expansion we suggest) is not one of leniency; it simply expands the punitive *options* available under the Guidelines for certain people. As before, imprisonment is still an option in every cell of the table, which continues to carry the unit of measurement of “months of imprisonment.” While Defenders lament that the proposed amendment does not expand Zone A (the only zone that does not recommend some minimum term of confinement), the expansion of Zones B and C will move the Manual in the right direction, and sentencers will retain judicial discretion to tailor the sanction type to the case at hand.

Finally, while Defenders applaud the Commission's expansion of Zones B and C for certain individuals in CHC I, it could go even further. Additional support for the expansion of Part B to include more individuals in CHC II and CHC III comes from racial disparities baked into criminal history scoring,⁶³ particularly with respect to low-level offenses.⁶⁴ Broadening the

⁶¹ § 994(j) (Guidelines should “reflect the general appropriateness of imposing a sentence other than imprisonment in cases” involving a “first offender who has not been convicted of a crime of violence or an otherwise serious offense”).

⁶² This proposal also builds on the Commission's previous work toward effectuating the § 994(j) mandate. See [Statement of Jami Johnson](#) at 18 (comparing breadth of § 994(j)'s mandate to 2023 proposal).

⁶³ See, e.g., Defenders' [Priority Letter to USSC](#) at 12 (May 15, 2024) (urging Commission to “criminal history rules that perpetuate harmful racial disparities”); Defenders' [Priority Letter to USSC](#), at 14 & n.64 (Oct. 17, 2022) (discussing scholarly and legal consensus that Black people are more often the targets of law enforcement stops, searches, arrests, and prosecutions than white people).

⁶⁴ [Statement of Jami Johnson](#) at 11-16 (March 8, 2023) (discussing racial disparities in municipal and juvenile systems); see also R. R. Dunlea & Pauline K. Brennan, [Evidence of Cumulative Disadvantage and the Liberation Hypothesis in Court Cases Involving Resisting Arrest](#), 101 J. Crim. Just. 102513 (2025) (summarizing findings that sociodemographic disparities result from cumulative disadvantage that are observed more often in less serious cases where discretion is

availability of alternative sentencing options could therefore be a step toward alleviating documented racial disparities in who receives alternative sentences.⁶⁵

We recognize that the Commission’s data briefing indicated that rearrest rates are higher for many U.S. citizens who received a term of probation at higher criminal-history scores.⁶⁶ But the data briefing leaves many questions unanswered about those findings,⁶⁷ and rearrest is an especially expansive outcome measure.⁶⁸ And as we have stressed before, the

greater); C. Clare Strange et al., [Rewriting the Record: A Qualitative Analysis of Race, Criminal History, and Sentencing Policy Reform in Pennsylvania](#), 16 *Race & Just.* 191, 193 (2026) (contending that differential policing patterns in minority neighborhoods result in more arrest for low-level crimes).

⁶⁵ See [Alternative Sentencing in the Federal Criminal Justice System](#) at 16 (noting that “Black and Hispanic [individuals] consistently were sentenced to alternatives less often than White [individuals]” and pointing to “differences in criminal history and offense severity,” noting that “Black [individuals] had more serious criminal history scores compared to the other groups.”). And among all U.S. citizens sentenced in fiscal year 2024, Black individuals made up 25% of those within CHC I, but made up 39% of CHC II, and 47% of CHC III. The data for these analyses were extracted from the USSC [“Individual Datafiles”](#) spanning fiscal years 2020 to 2024. The dataset is publicly available for download on its [website](#).

⁶⁶ USSC, [Public Data Briefing on Sentencing Options](#) at 9.

⁶⁷ More granular information would be valuable and was not included. In particular, separating arrests for supervision or probation violations from arrests for new offenses, clarifying whether individuals received terms of straight probation or probation in combination with confinement, distinguishing minor from serious new conduct, identifying supervision status and intensity of supervision at the time of rearrest, providing demographic information with rearrest rates, and reporting reconviction and resentencing outcomes would substantially clarify the practical meaning of the reported rearrest rates. Recidivism statistics for those who ineligible for probation but received a non-prison sentence nonetheless would also be helpful.

⁶⁸ While the briefing did not provide exact parameters, rearrest may include supervision violations, low-level conduct, or even arrests for behavior predating the sentencing event unless specifically excluded. See e.g., USSC, [Older Offenders in the Federal System](#) at 44 (2022) (reporting recidivism counted events such as DUI, probation/supervision violations, and public order offenses); [Urban Institute, “Whys” and “Hows” of Measuring Jail Recidivism](#) 4-5 (2006), (noting recidivism rates can be overstated if counting criminal history events that occurred prior to the commencement of the follow-up period). Further, while higher criminal history categories are often assumed to correspond with incrementally higher recidivism, the Commission’s cell-level table does not exhibit a consistently monotonic pattern; certain higher criminal history cells reflect lower rearrest rates than lower adjacent

Commission should recognize the importance of exploring other, less outdated risk proxies, beyond the static criminal history score.⁶⁹

Finally, to the extent one supports the concept of incremental punishment,⁷⁰ it is consistent with a larger expansion of Zones B and C to incorporate more individuals in CHCs II and III. Data indicate that a substantial portion of people in CHCs II and III have had little, if any, previous extended incarceration, rendering prison-only sentences a potentially dramatic increase in severity.⁷¹ An additional expansion to include more people in CHC II and III would offer sentencers a greater range of recommended sentencing options, which would encourage more individualized sentencing for these individuals.

IV. Conclusion

Defenders welcome the Commission's proposal to mend a glaring gap in the Guidelines, which persists despite clear statutory mandates. We encourage the Commission to adopt both Parts A and B, with the modifications identified above. While more remains to be done to address the Guidelines' overreliance on incarceration, the proposed amendment is an important first step.

categories. These features suggest that the statistics are descriptive and should not be overgeneralized. See USSC, [Public Data Briefing on Sentencing Options](#) at 9.

⁶⁹ See [Defenders' 2026 Comment re: Post-Offense Rehabilitation](#) at I.A. (discussing dynamic risk and protective factors).

⁷⁰ It is unclear if increases based on previous criminal history serve the statutory purposes of punishment. See Rhys Hester et al., [Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences](#), 47 *Crime & Just.* 209, 242 (2018) ("The high cost and adverse effects of prior record sentence enhancements might be tolerable if they served important punishment purposes, but all of the potential justifications for these enhancements are weak."); see also Christopher Lewis, *The Paradox of Recidivism*, 70 *Emory L.J.* 1209, 1271 (2021) ("Rather than responding more severely to repeated wrongdoing than we do to first-time misconduct, they should do the exactly the opposite.").

⁷¹ Many people in CHCs II and III get there without a single, counted, three-point conviction (i.e. solely based on sentences of 13 months or less due either to sentence length or age of conviction). Nearly two thirds (63.2%) of people in CHC II had no three-point offenses, as did nearly half (47.5%) of people in CHC III. [Individual Datafiles](#), FY 2020 to FY 2025.