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March 14, 2023

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: Public Comment on Proposed 2023 Amendments

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide comments on the proposed 2023 amendments.¹ Enclosed are our comments on the following proposals, with previously filed witness statements attached:

[Proposal 1: Amendments to §1B1.13](#)

Witness Statement of Kelly Barrett

[Proposal 2: First Step Act—Drug Offenses](#)

Excerpted Witness Statement of Michael Caruso

[Proposal 3: Firearms Offenses](#)

Witness Statement of Michael Carter

[Proposal 4\(A\): Acceptance of Responsibility](#)

Excerpted Witness Statement of Michael Caruso

[Proposal 4\(B\) & 6: Controlled Substance Offenses and Career Offender](#)

*Excerpted Witness Statement of Michael Caruso and Witness Statement
of Juval O. Scott*

[Proposal 5: Crime Legislation](#)

¹ See 88 Fed. Reg. 7180-01, 2023 WL 1438480 (Feb. 2, 2023).

[Proposal 7: Criminal History](#)

Witness Statement of Jami Johnson

[Proposal 8: Acquitted Conduct](#)

Witness Statement of Melody Brannon

[Proposal 9: Sexual Abuse Offenses](#)

Witness Statement of Heather E. Williams

[Proposal 10: Alternatives-to-Incarceration Programs](#)

[Proposal 11: Counterfeit Pills](#)

Excerpted Witness Statement of Michael Caruso

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

Very truly yours,

/s/ Michael Caruso

Michael Caruso

Federal Public Defender

Chair, Federal Defender

Sentencing Guidelines Committee

Sentencing Resource Counsel

Federal Public and Community

Defenders

Enclosures

cc (w/encl.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Jonathan J. Wroblewski, Commissioner *Ex officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

**Federal Public and Community Defenders
Comment on Proposal to Amend USSG §1B1.13
(Proposal 1)**

March 14, 2023

Table of Contents

Introduction	1
I. Congress granted the Sentencing Commission broad policy-making authority to describe what should be considered “extraordinary and compelling.”	2
A. As a matter of plain text, “extraordinary and compelling” is broad, adaptable, and inclusive.	2
B. Legislative history supports this plain-text reading of § 3582(c)(1)(A).	3
C. Decades of inaction by the BOP did not alter the original meaning of “extraordinary and compelling.”	4
D. Prior policy statements also did not alter the original meaning of “extraordinary and compelling.”	7
II. The Commission’s proposed amendments to §1B1.13 are both authorized and lawful.....	10
A. The Commission is authorized to amend §1B1.13 as proposed.....	10
B. The proposed §1B1.13(b)(5) and (b)(6) do not violate any other provision of law.	13
C. Neither subsection (b)(5) nor (b)(6) of §1B1.13 creates tension with USSG §1B1.10.....	18
III. Defenders object to others’ suggestions that would narrow enumerated categories, place burdens on incarcerated individuals that they cannot meet, or categorically exclude some individuals from seeking a sentence reduction.	19
A. Most of the government’s suggestions for the enumerated categories are either problematic or unnecessary.	19
B. NAAUSA’s notion that enumerated categories based on medical circumstances must be accompanied by independent medical evaluations would undermine those categories.	24

C. Law enforcement groups’ position that individuals convicted of certain crimes should be excluded from § 3582(c)(1)(A) relief is untenable.	25
IV. The amendments the Commission has proposed, including subsections (b)(5) and (b)(6), make the right policy call.	27
A. The circuit split regarding legal changes is subject to change and should not dissuade the Commission from making the right policy call on §1B1.13, including by promulgating the proposed (b)(5).....	27
B. Finality and certainty are valid policy interests, but they are of lesser weight in this context and must be balanced against other important interests.	28
C. There is no reason to think that a §1B1.13 that is capable of capturing all extraordinary and compelling cases will overtax the justice system.	30

At the recent hearing on reductions in sentence under 18 U.S.C. § 3582(c)(1)(A), the witness who spoke on behalf of Federal Public and Community Defenders (Kelly Barrett, First Assistant Federal Defender for the District of Connecticut) focused on the amended §1B1.13 as proposed. As Attorney Barrett said both in her written testimony (attached) and at the hearing, Defenders are generally very pleased with the proposed amendments. We have suggested changes to a few provisions, to ensure that they encompass all circumstances that may be extraordinary and compelling, and we've also explained why we think the third option for the proposed subsection (b)(6) is best. But the Commission is on the right track.

This Comment builds on Attorney Barrett's testimony by speaking to three matters that Defenders have not yet addressed. First, the Comment answers the legal questions the Commission posed in its issues for comment on §1B1.13:

- whether the proposed amendment—in particular proposed subsections (b)(5) and (b)(6)—exceeds the Commission's authority under 28 U.S.C. § 994(a) and (t), or any other provision of federal law; and
- whether the proposed amendment—in particular proposed subsections (b)(5) and (b)(6)—is in tension with the Commission's determinations regarding retroactivity of guideline amendments under §1B1.10.

In addressing these questions, we are mindful of arguments raised at the recent hearing regarding, *inter alia*, 28 U.S.C. § 2255, retroactivity doctrine, and separation of powers. After thorough consideration, we have no doubt that the Commission has the legal authority to promulgate §1B1.13 as proposed, including (b)(5) and any of the options for (b)(6).

Second, this Comment addresses a handful of issues related to the proposed enumerated categories (other than (b)(5)) that were raised at the recent hearing, in order to clarify Defenders' positions.

Third, this Comment discusses how the proposed amendments reflect sound policy. Again, we focus on concerns raised around the recent hearing: the circuit conflict over legal changes; finality and certainty in sentencing; and the burden that § 3582(c)(1)(A) motions may place on federal courts.

I. Congress granted the Sentencing Commission broad policy-making authority to describe what should be considered “extraordinary and compelling.”

“Extraordinary and compelling,” by its terms, is a broad, inclusive standard, which this Commission is charged with fleshing out. Some have argued that § 3582(c)(1)(A) has some very significant limitations (beyond the “rehabilitation alone” limitation), but those arguments aren’t grounded in statutory text or legislative history. Instead, they are grounded in decades of federal practice and culture, which developed in the shadow of the Bureau of Prison’s policy decision not to file sentence-reduction motions except in the direst medical cases. But neither the BOP’s inaction in this space nor the Commission’s past quiescence have limited the terms of the governing statutes or the Commission’s authority.

A. As a matter of plain text, “extraordinary and compelling” is broad, adaptable, and inclusive.

The “preeminent canon of statutory interpretation” holds that “the legislature says in a statute what it means and means in a statute what it says there.”¹ Section 3582(c)(1)(A)’s text uses broad, adaptable language for its threshold standard: “extraordinary and compelling reasons.” It also requires that any reduction under the provision be “consistent with applicable policy statements issued by the Sentencing Commission.” And elsewhere, Congress instructed the Commission to

describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.²

Putting these together, the inclusive standard, “extraordinary and compelling,” has no limitations other than that “rehabilitation . . . alone” cannot justify a sentence reduction. The Sentencing Commission is tasked with elaborating on this standard and guiding courts in applying it.

¹ *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (cleaned up).

² 28 U.S.C. § 994(t).

As Attorney Barrett discussed at the recent hearing, this is *not* a “compassionate release” statute.³ By its terms, § 3582(c)(1)(A) is not—and never has been—limited to medical conditions or the like. It isn’t limited to circumstances that are personal to the defendant either. Section 3582(c)(1)(A) is capable of encompassing any circumstance—factual or legal—that an English-speaker would say was *extraordinary* (“beyond what is usual”; “exceptional”) and *compelling* (“tending to compel”; “having a powerful and irresistible effect”) in the sentence-reduction context,⁴ as guided by the Commission’s policy choices.

B. Legislative history supports this plain-text reading of § 3582(c)(1)(A).

The legislative history of § 3582(c)(1)(A), which was enacted as part of the Sentencing Reform Act of 1984 (“SRA”), confirms that Congress’s intent was not to create a narrow mechanism akin to state compassionate-release statutes. Instead, Congress meant to create what it did in fact create: an inclusive judicial sentence-reduction mechanism. And it tasked the Commission with describing what sorts of circumstances could trigger that mechanism.

At this point, the Commission has seen several references to the main Senate Report discussing the SRA, which described § 3582(c)(1)(A) as a “safety valve” that would apply

regardless of the length of sentence, to the unusual case in which the defendant’s circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner.⁵

³ Compare 18 U.S.C. § 3582(c)(1)(A) with, e.g., Conn. Gen. Stat. § 54-131k (“Compassionate parole release”); Kan. Stat. § 22-3728 (“Functional incapacitation release”); Md. Code. Ann., Corr. Servs. § 7-309 (“Medical parole”); N.J. Rev. Stat. § 30:4-123.51e (“Compassionate release”). Similar statutes exist in most states, providing a mechanism for release from prison based on a very serious medical condition or advanced age.

⁴ *The Random House Dictionary of the English Language* 417, 686 (2d ed. unabridged 1987).

⁵ S. Rep. No. 98-225, at 121 (1983), as reprinted in 1984 U.S.C.C.A.N. 3304; available at <https://www.ojp.gov/pdffiles1/Digitization/93948NCJRS.pdf>.

Elsewhere in this Report, the SRA’s drafters said, similarly, that § 3582(c)(1)(A) was intended to apply to “unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances,” including “cases of severe illness” and also “cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence.”⁶

Thus, § 3582(c)(1)(A) was specifically designed to permit sentence reductions not only for medical circumstances, but also for “other” extraordinary and compelling circumstances.⁷

And this safety valve, along with the other safety valves at § 3582(c), may have been essential to the SRA’s enactment. The Senate Report, which was issued the year before passage, notes that there were those “who would retain parole on the ground that it was a valuable ‘safety valve’ designed to shorten lengthy sentences.”⁸ It describes congressional testimony explaining that parole was “really unnecessary in order to deal with that occasional case where, in a determinate sentencing scheme, an offender receives a sentence which turns out to be manifestly unfair or ‘wrong,’ particularly in light of post sentence developments.”⁹ And it explains that § 3582(c)(1)(A) would serve this purpose, as a “safety valve” within the new sentencing scheme.¹⁰

C. Decades of inaction by the BOP did not alter the original meaning of “extraordinary and compelling.”

Nearly 40 years after Congress enacted the SRA, some legal actors are having a hard time accepting that Congress would enact an open-ended judicial sentence-modification provision as part of an act that created a determinate sentencing scheme—even in the face of both plain text and clear legislative history. This is likely because § 3582(c)(1)(A) was essentially dormant for most of those years, due to the BOP’s policy decision to file

⁶ *Id.* at 55–56.

⁷ *See id.*

⁸ *Id.* at 46–47 n.34.

⁹ *Id.* at 53–54 n.74 (citing congressional testimony presented in 1979 by Judge Harold Tyler).

¹⁰ *See id.* at 55–56.

§ 3582(c)(1)(A) motions in only the most dire medical cases.¹¹ We have been living with determinate sentencing all that time, and have come to understand it as a system in which sentences are reduced on the back end for just one reason: good time credit.

This is not a rule from on high. In Wisconsin, for example, the state legislature enacted a determinate sentencing scheme in the late 1990s (known there as “truth in sentencing,” or “TIS”) in which not only parole but also good time credit was abolished.¹² But that state’s common-law system of judicial sentence reduction, which predated TIS, never went away.¹³ Indeed, rather than abolishing the common-law scheme, a year into TIS the state legislature—a legislature committed to truth in sentencing—added a second, statutory mechanism for judicial sentence reduction.¹⁴ So, in Wisconsin, a determinate sentencing system is one in which sentences are reduced on the back end for just one reason: judicial sentence reduction.

This is not to advocate for Wisconsin law. It is to illustrate that it is federal culture and practice that cause some to treat determinate sentencing as incompatible with judicial sentence reduction. And it is federal culture and practice that’s likely the origin of the notion that a plain-language interpretation of § 3582(c)(1)(A) somehow violates the SRA—although § 3582(c)(1)(A) is part of the SRA.

When Congress was drafting § 3582(c)(1)(A) in the early 1980s, in contrast to now, drafters were not operating with a backdrop of 30-plus years

¹¹ See *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020) (describing the history of BOP’s inaction under § 3582(c)(1)(A)).

¹² See Michael B. Brennan et al., *Fully Implementing Truth-in-Sentencing*, 75-Nov. Wis. Law. 10, at 10, 15 (2002).

¹³ See Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 Wm. & Mary L. Rev. 465, 521 (2010) (“[A]lthough [Wisconsin] abolished parole and good time credit in 1999, it never abandoned the practice of sentence modification or imposed any legislative restrictions on its use.”). Under the Wisconsin system, the sentencing court may (as a matter of discretion) modify a sentence if it finds that there is a circumstance that is highly relevant to the sentence that was not known to the court at the time of original sentencing, or if the sentence is “unduly harsh or unconscionable.” *State v. Harbor*, 797 N.W.2d 828, 837–38 & n.8 (Wis. 2011).

¹⁴ See *id.*; see also Wis. Stat. § 973.195 (“Sentence Adjustment”).

of federal practice and culture influenced by BOP inaction on sentence-reduction motions. Instead, Congress was drafting § 3582(c)(1)(A) with the backdrop of a parole system in which the sentencing court had limited control over the sentence an individual would actually serve. In most cases, a person became eligible for parole after serving one-third of the imposed sentence, with the parole decision focused on rehabilitation.¹⁵

Judicial sentence reduction (in just about any form) looks nothing like the parole system that the SRA abolished. Judicial sentence reduction has “deep historical roots.”¹⁶ The Supreme Court approved of it back in 1931, in rejecting a government argument that the practice invaded the executive branch’s commutation power.¹⁷ And prior to passage of the SRA, federal law had two judicial sentence-reduction provisions: the old Fed. R. Crim. P. 35 and 18 U.S.C. § 4205(g). These provisions operated differently, but each gave sentencing courts broad authority to reduce sentences—including based on legal, rather than purely factual, circumstances.¹⁸

Congress, of course, repealed the old Rule 35 and § 4205(g). Section 3582(c)(1)(A) is narrower: there must be “extraordinary and compelling” circumstances; any reduction must be consistent with Commission policy statements; and rehabilitation alone is insufficient. But when Congress enacted the SRA it would have understood that parole and judicial sentence reduction were very different, such that it is entirely sensible that Congress

¹⁵ See S. Rep. No. 98-225, *supra* note 5, at 38–40.

¹⁶ Klingele, *supra* note 13, at 498.

¹⁷ See *United States v. Benz*, 282 U.S. 304, 311 (1931).

¹⁸ See, e.g., *United States v. Diaco*, 457 F. Supp. 371, 376 (D.N.J. 1978) (reducing a sentence under § 4205(g) based on disparities among co-defendants); *United States v. Noriega*, 40 F. Supp. 2d 1378, 1380 (S.D. Fla. 1999) (reducing a sentence under Rule 35 based on the “nature of the confinement” and “the considerable disparity between Defendant’s sentence and the sentences actually served by his co-conspirators”); *United States v. Vaughn*, 598 F.2d 336, 337 (4th Cir. 1979) (referring to the district court’s grant of a Rule 35 motion based on the defendant’s “positive change” post-sentencing); see also *United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir. 1968) (“Rule 35 is intended to give every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim.”).

would eliminate the former but retain the latter.¹⁹ It is only decades later—decades during which the BOP thoroughly neglected § 3582(c)(1)(A)—that the various parts of the SRA now strike some as discordant.

D. Prior policy statements also did not alter the original meaning of “extraordinary and compelling.”

Legal actors and courts may be influenced in their thinking on § 3582(c)(1)(A) not only by the BOP’s decades of inaction, but also by the fact that §1B1.13 has never enumerated any “extraordinary and compelling” circumstances outside of the health, age, and family contexts. But the history of §1B1.13 shows that this, too, goes back to the BOP’s inaction.

For well over 20 years, there was no policy statement regarding § 3582(c)(1)(A). The Commission prioritized the matter in 2006 but ultimately promulgated a policy statement that did no real work:

A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A).²⁰

This was just an “initial step,” with the Commission intending to further describe the criteria for § 3582(c)(1)(A) in the next amendment cycle.²¹

For the next amendment cycle, the American Bar Association submitted a proposed §1B1.13 that had some similarities with the current

¹⁹ Professor Klingele has explained that judicial sentence reduction has significant advantages over parole. First, the process is more transparent: proceedings occur on the record, in the jurisdiction where the crime occurred, with both parties and any victim able to weigh in and the sentencing court required to justify the reduction. *See* Klingele, *supra* note 13, at 515–16. Second, the process promotes accountability: proceedings “invite[] the offender to revisit in a concrete way his offense and the community in which he committed it,” and also enhance judicial accountability. *Id.* at 517. “Moreover, to the degree that the early release decision invites reexamination of the normative question of whether the offender has been sufficiently punished for his offense, courts—not parole boards—have traditionally been arbiters of justice with respect to the outer limits, at least, of the quantum of punishment merited in any given case.” *Id.* at 535.

²⁰ USSG §1B1.13 comment. (n. 1(A)) (2006).

²¹ *Id.* at comment. (“Background”).

proposal, including that it covered certain legal changes.²² The government, in contrast, asked the Commission essentially to cede policymaking to the BOP, which filed § 3582(c)(1)(A) motions only in the rarest medical cases. The government acknowledged in its submission to the Commission that the statute was not limited to medical circumstances.²³ But it said that if the Commission were to issue a policy statement that went beyond the sorts of cases in which the BOP would file motions, “[a]t best,” that policy statement “would be a dead letter.”²⁴ “At worst,” it would incite prisoners to file lawsuits against the BOP.²⁵

The government went on to discuss policy justifications for the BOP’s inaction on § 3582(c)(1)(A). In the government’s view, in order to promote finality and certainty in sentencing, § 3582(c)(1)(A) should be used only in cases of terminal illness with a life expectancy of one year or less or in cases of profound disability (like a vegetative state).²⁶ With terminal illness, the person’s imprisonment would soon end anyway, at his death.²⁷ And with profound disability, upon release, the person would nevertheless

carr[y] his prison in his body and mind, and will not in any event be living in freedom in any ordinary sense if released from a correctional hospital facility to be cared for in some other setting.²⁸

In other words, according to the government, a sentence reduction in these circumstances was acceptable specifically because it would not afford an incarcerated individual any meaningful relief.

²² See Letter from Robert D. Evans on behalf of the ABA to the U.S. Sentencing Comm’n, attach. (July 12, 2006) (detailing proposed §1B1.13 policy statement for sentence-reduction motions under § 3582(c)(1)(A)), *available at* <https://bit.ly/3ZOzOdY>.

²³ See Letter from Michael J. Elston on behalf of the DOJ to the Sentencing Comm’n, at 2 n.1 (July 14, 2006), *available at* <https://bit.ly/3mxN3RW>.

²⁴ *Id.* at 4.

²⁵ *Id.*

²⁶ See *id.* at 3–4.

²⁷ See *id.* at 4.

²⁸ *Id.*

The Commission in 2007 ultimately promulgated a more descriptive §1B1.13, but one that was quite narrow and deferential to the BOP.²⁹ This did not, of course, alter the governing statute.

In 2016, Defenders advocated for amendments to §1B1.13 that might encourage the BOP to file more motions.³⁰ The government continued to urge the Commission to defer to the BOP, suggesting that since the BOP was the gate-keeper, §1B1.13 should simply cross-reference the BOP’s “Reduction In Sentence” program statement.³¹ The Commission ultimately adopted the broader §1B1.13 that currently is in effect—at least, it’s in effect as applied to BOP-filed motions.³² Again, this did not alter § 3582(c)(1)(A).

Between 2016 and now, Congress made a transformational change to § 3582(c)(1)(A): it eliminated the BOP as gatekeeper.³³

At the recent hearing on §1B1.13, some witnesses opposing the Commission’s proposed amendments emphasized that Congress intended the First Step Act’s amendment to § 3582(c)(1)(A) to be procedural (allow defendant’s to file motions), not substantive (alter the standard). But that is precisely the point: Nothing in the First Step Act of 2018 altered the statute’s plain text or the original meaning of “extraordinary and compelling”—just like neither the BOP’s inaction nor the Commission’s quiescence in this space altered the standard. Section 3582(c)(1)(A)’s standard, as discussed, has always been broad and adaptable and inclusive. And now, without the BOP controlling motions under § 3582(c)(1)(A), the Sentencing Commission can finally promulgate a meaningful, effective policy statement for sentence reductions under the statute.

²⁹ See USSG §1B1.13 (2007).

³⁰ See Statement of Marianne Mariano before the Sentencing Comm’n, at 12–15 (Feb. 17, 2016). This statement is appended to and incorporated into Defenders’ Public Comment on Proposed Amendments for 2016 (March 21, 2016), *available at* <https://bit.ly/41XlUIp>.

³¹ See Letter from Michelle Morales on behalf of the DOJ to the Sentencing Comm’n, at 4, 6–8 (Feb. 12, 2016)), *available at* <https://bit.ly/3ZYehjf>.

³² USSG §1B1.13.

³³ See First Step Act of 2018, Pub. L. No. 115-391 § 603(b), 132 Stat. 5194, 5239 (2018) (hereinafter “FSA”).

II. The Commission’s proposed amendments to §1B1.13 are both authorized and lawful.

The Sentencing Commission’s policymaking authority in this space, conferred by 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994(a) and (t), permits it to promulgate the proposed §1B1.13, including subsection (b)(5) and any of the three options for (b)(6). Moreover, no other provision of law prohibits the amendments.

A. The Commission is authorized to amend §1B1.13 as proposed.³⁴

As discussed, § 3582(c)(1)(A)’s “extraordinary and compelling” standard is broad and open-ended, and § 994(t) directs the Sentencing Commission to “describe” what sorts of circumstances “should” meet that standard. With these provisions, Congress created expansive authority for judicial sentence reduction as a safety valve within the new determinate sentencing scheme, and it charged the Commission with fleshing out this authority. The Commission’s proposed amendments fulfill this charge.

Congress did erect one limitation on the Commission’s authority: rehabilitation alone cannot be an extraordinary and compelling reason. And the proposed amended §1B1.13 respects that limitation. There is no basis for reading any other limitation into the statute.³⁵

Beyond §§ 3582(c)(1)(A) and 994(t), another section—§ 994(a)(2)(C)—directs the Commission to promulgate policy statements, including for § 3582(c)(1)(A), “that in the view of the Commission would further the purposes set forth in [18 U.S.C. §] 3553(a)(2).” This only confirms the Commission’s broad authority to provide guidance with respect to what sort of “extraordinary and compelling reasons” for sentence-reduction will further the purposes of sentencing.

³⁴ Defenders have suggested some changes to the Commission’s proposed policy statement. To be clear, the Commission is also authorized to promulgate the amended §1B1.13 as proposed *and expanded upon by Defenders*.

³⁵ *See Concepcion v. United States*, 142 S. Ct. 2389, 2402 (2022) (“Drawing meaning from silence is particularly inappropriate in the sentencing context, for Congress has shown that it knows how to direct sentencing practices in express terms.”) (internal quotation marks and citation omitted).

The proposed policy statement furthers the purposes set forth in § 3553(a)(2) in many ways, including these:

- *3553(a)(2)(A)*: The proposed §1B1.13 permits a sentence-reduction where what the sentencing court understood to be “just punishment” at the time of sentencing no longer holds—because, *e.g.*, the sentence has become overly punitive due to medical risk or prison assault, or changes in law reflect a different societal understanding of what punishment is just.
- *3553(a)(2)(B) & (C)*: The proposed policy statement permits courts to reduce sentences where deterrence and/or public-protection are no longer significant factors, although they may have been paramount at sentencing. This is certainly true for someone who fits within one of the medical or age categories. And the “other reasons” category would cover situations like the example Attorney Barrett raised, regarding understanding of youth brain development, where human knowledge relevant to deterrence and recidivism has advanced since sentencing.³⁶ The policy statement also permits courts to reduce a sentence where release would affirmatively *advance* deterrence and/or public-protection interests, as with a release for family circumstances.³⁷
- *3553(a)(2)(D)*: The enumerated medical categories, along with “other reasons,” permit sentence reductions where it is only in the community that an individual can access essential medical or rehabilitative services. The proposed (b)(4) also advances this sentencing factor, by permitting a sentencing court to remove a victim of sexual or physical abuse from the carceral environment where the abuse occurred, so the victim can heal.

As the government has noted, in the absence of a policy statement, some circuit courts have held that “extraordinary and compelling,” as a

³⁶ See Statement of Kelly Barrett before the Sentencing Comm’n, attached, at 13 n.25 (Feb. 23, 2023) (citing *United States v. Morris*, 2022 WL 3703201, at *8–9 (D. Conn. Aug. 26, 2022, and *United States v. Mendez-Zamora*, 2022 WL 9333452, *2 (D. Kan. Oct. 14, 2022)).

³⁷ See *id.* at 4 n.9 (citing Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 Fam. L. Q. 191, 196 (2006)).

matter of statutory interpretation, cannot encompass legal changes.³⁸ But those courts are wrong. “Extraordinary and compelling” is plainly broad enough to include not just factual but also legal circumstances—not *all* legal circumstances; just those that are “extraordinary” (unusual; exceptional) and “compelling” (having a powerful and irresistible effect). The Commission appreciates this: the proposed subsection (b)(5) encompasses a legal change only if it reveals that the individual’s sentence is “inequitable.”

It borders on absurd to suggest that a person would not use the terms “extraordinary” and “compelling” to describe *any* legal change—even one that reveals that an individual’s sentence is inequitable by, say, eliminating the mandatory life sentence that previously applied to his offense.³⁹

Finally, to the extent that there is a question, Option 3 for subsection (b)(6) complies with § 944(t)’s directive.⁴⁰ Section 1B1.13’s enumerated categories “describe” *specific* circumstances that “should be considered extraordinary and compelling.”⁴¹ Option 3 of (b)(6) “describe[s]” what *additional* circumstances “should be considered extraordinary and compelling”: those that the sentencing court—with its better understanding of the case and context—deems extraordinary and compelling.⁴²

In sum, Defenders have no doubt that the Commission is authorized to promulgate the proposed amended §1B1.13. Indeed, unwarranted restrictions on the “extraordinary and compelling” standard would subvert congressional intent that courts be able to entertain sentence-reduction motions in a variety of circumstances, where those circumstances are extraordinary, compelling, and reflect more than rehabilitation alone.

³⁸ See Letter from Jonathan J. Wroblewski on behalf of the DOJ to the Sentencing Comm’n, at 7 & 7 n.6 (Feb. 15, 2023) (collecting cases).

³⁹ Cf. *Kemp v. United States*, 142 S. Ct. 1856, 1865 (2022) (Sotomayor, J., concurring) (explaining that in the Fed. R. Civ. P. 60(b)(6) context “extraordinary circumstances” include “a change in controlling law.”)

⁴⁰ Attorney Joshua Matz suggested at the hearing that the Commission might add language specifying that the “other circumstances” should be of similar “gravity” to the enumerated circumstances. We have no objection to this language, so long as it is clear that they need not be similar in kind or nature.

⁴¹ See 28 U.S.C. § 994(t).

⁴² See *id.*

B. The proposed §1B1.13(b)(5) and (b)(6) do not violate any other provision of law.

The proposed §1B1.13(b)(5) and at least the open-ended options for (b)(6) have garnered opposition from the Department of Justice, the Victims Advisory Group, and some in law enforcement. To the extent that the debate is over what can fit within the words “extraordinary and compelling,” that is addressed above. To the extent that the debate is about policy concerns, those are addressed below.

This section is focused on dispelling any concerns that (b)(5) and an open-ended (b)(6) are illegal in some other way—that even if those subsections are authorized under 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994, promulgating them would violate some other law. Three provisions have been raised as possibly conflicting with (b)(5) and/or (b)(6): § 2255, nonretroactivity rules related to statutory changes in law, and constitutional separation-of-powers principles.

28 U.S.C. § 2255. A motion for judicial sentence modification is fundamentally different from a habeas corpus petition—or, more precisely for federal prisoners, a motion under § 2255.

As discussed, § 3582(c)(1)(A) is a discretionary “safety valve”: Where “extraordinary and reasons” exist, and a sentence reduction would be consistent with this Commission’s policy choices, the sentencing court has discretion (upon considering § 3553(a) factors) to release the individual from custody, reduce the sentence, or deny the motion outright. In contrast, habeas corpus fundamentally is “a means of contesting the lawfulness of restraint and securing release.”⁴³ The Supreme Court has “often” made the point that habeas corpus is specifically a remedy for ascertaining whether a person “is rightfully in confinement or not.”⁴⁴

⁴³ *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020).

⁴⁴ *Id.* (internal quotation marks omitted). The Supreme Court cited the following for the proposition that it had “often” made this point: *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“It is clear . . . from the common-law history of the writ . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody”); *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (similar); *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (similar).

Section 2255 was enacted in 1948 as a substitute for the traditional habeas remedy with respect to federal prisoners, allowing collateral attacks to be filed in the underlying criminal case rather than a separate civil action, but it covers the same substantive claims for relief, and in the same way.⁴⁵ Section 2255 contains an exclusivity provision prohibiting anyone who can file a motion under that section from filing a civil habeas corpus petition, unless the § 2255 remedy is “inadequate or ineffective to test the legality of his detention.”⁴⁶ But § 2255 has never said anything about § 3582(c) or any other mechanism for sentence reduction—statutes that predated § 3582(c), executive clemency, parole, good time credit.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”), which imposed strict procedural limits on habeas corpus petitions filed by state prisoners (under 28 U.S.C. § 2254) and on § 2255 motions, in order to “curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.”⁴⁷ Nothing in AEDPA’s text or history speaks to any form of sentence reduction—judicial or otherwise. This makes sense: AEDPA puts procedural limits on habeas filings to protect the finality of judgments, especially in capital cases arising from state courts. And § 3582(c) is an express exception to the principle of finality,⁴⁸ with § 3582(c)(1)(A) invoking discretionary powers to modify the length of a sentence rather than mandating relief from illegal judgments.

This is all to say that § 3582(c)(1)(A) and § 2255 (both before and after it was amended by AEDPA) serve fundamentally different purposes. The former is a discretionary act of mercy, reducing what is (at least as a matter

⁴⁵ See *Hill v. United States*, 368 U.S. 424, 427 (1962).

⁴⁶ 28 U.S.C. § 2255(e). The Supreme Court is currently reviewing the contours of this provision and will soon decide under what circumstances the § 2255 remedy is inadequate or ineffective to test the legality of detention, such that a federal prisoner is permitted to file a habeas corpus petition under 28 U.S.C. § 2241. See *Jones v. Hendrix*, No. 21-857 (U.S., argued Nov. 1, 2022). We would not expect the outcome of *Jones* to be relevant to any issue before the Commission.

⁴⁷ H.R. Conf. Rep. 104-518, at 111 (1996), as reprinted in 1996 U.S.C.C.A.N. 944, 944.

⁴⁸ *Concepcion*, 142 S. Ct. at 2399 n.3 (stating of § 3582(c) that “[n]o one doubts the importance of finality. Here, however, the Court interprets a statute whose very purpose is to reopen final judgments.”).

of law) a valid sentence; the latter governs vindication of a right to relief from illegal detention. And thus, expanding §1B1.13's description of "extraordinary and compelling" as permitted by § 3582(c)(1)(A) does not—and cannot—usurp § 2255 any more than a presidential pardon or sentence commutation.⁴⁹

Nonretroactivity. The proposed §1B1.13 says nothing about nonretroactive statutory amendments. But Defenders, like everyone else, read subsection (b)(5) to potentially encompass, for example, the First Step Act's dramatic amendments to sentencing law that reduced minimum penalties for some from life imprisonment or its functional equivalent, to a sentence that a person could expect to survive. Thus, (b)(5) implicates the debate over nonretroactive legal changes that has divided the circuit courts.

As discussed above, to the extent the circuit split is about whether the phrase "extraordinary and compelling" can encompass changed legal circumstances, the circuits answering that question in the negative are plainly wrong. And as discussed below, Defenders are hopeful that when the Commission adopts (b)(5), those circuits will reconsider their caselaw.

The focus here is on whether retroactivity rules, as a matter of law, preclude "extraordinary and compelling" from being interpreted (consistent with plain text) to include a legal change that renders a sentence inequitable if the change isn't retroactively applicable in all cases. And whether we are talking about general background retroactivity principles, or the specific retroactivity/applicability provisions of §§ 401 and 403 of the First Step Act of 2018, the answer to this question is: no.

There are two general background principles of retroactivity at play. The first is the federal saving statute, 1 U.S.C. § 109, which has been interpreted to provide that an ameliorative penalty statute does not abate sentences for offenses committed prior to the statute's enactment, unless the statute indicates otherwise.⁵⁰ The second is the SRA, which provides that the

⁴⁹ This is not to say that a pro se individual might not file what in substance truly is a § 2255 motion or habeas petition, captioned as a § 3582(c)(1)(A) motion. Just the same, an individual might file something captioned under § 3582(c)(1)(A) that in substance is a § 1983 lawsuit, or a motion for bail, or just about anything else. But this sort of mislabeling is common in pro se cases, and courts are capable of addressing it on a case-by-case basis.

⁵⁰ See *Dorsey v. United States*, 567 U.S. 260, 273-75 (2012).

version of the Guidelines Manual that applies in a case is the one in effect at sentencing,⁵¹ supporting that “in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.”⁵²

Several courts of appeal have taken from these background principles that “[w]hat is ‘ordinary’ and routine” in federal sentencing “cannot also be extraordinary and compelling.”⁵³ But general nonretroactivity rules mean only that an ameliorative statute does not, on its own, entitle anyone to resentencing. They do not limit § 3582(c)(1)(A), the SRA’s judicial sentence-reduction mechanism. And Congress’s decision in an ameliorative statute not to require resentencing of everyone sentenced under the prior regime says nothing about whether a court has discretion to find, as part of an “individualized assessment,” that extraordinary sentencing disparities between the current and former regimes present extraordinary and compelling reasons for sentence reduction in a particular case.⁵⁴

Nor do the specific applicability provisions of §§ 401 and 403 of the First Step Act impose any such limitation. Both provisions provide limited retroactivity similar to the SRA rule described above: the new lower statutory penalties apply to pending cases, so long as a sentence for the offense has not been imposed as of the date of enactment.⁵⁵ Certainly, neither provides for full retroactivity. But neither prohibits a court from acknowledging that the impact of this once-in-a-generation legislation on an individual case can be extraordinary and compelling, especially where it exposes that a sentence that is still being served (perhaps with no end in sight) is inequitable. As many courts of appeal have correctly recognized,

there is a significant difference between automatic vacatur and resentencing of an entire class of sentences—with its avalanche of applications and inevitable

⁵¹ See 18 U.S.C. § 3553(a)(4)(A)(ii).

⁵² *Dorsey*, 567 U.S. at 280 (citations omitted).

⁵³ *United States v. McCall*, 56 F.4th 1048, 1055 (6th Cir. 2022) (citation omitted); see also *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (collecting cases and describing the circuit split).

⁵⁴ *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020).

⁵⁵ See FSA, §§ 401(c), 403(b).

resentencings—and allowing for the provision of individual relief in the most grievous cases.⁵⁶

Thus, there is “nothing inconsistent about Congress’s paired First Step Act judgments: that not all defendants convicted under [the prior legal regime] should receive new sentences, but that the courts should be empowered to relieve some defendants of those sentences on a case-by-case basis.”⁵⁷

In the future, Congress could, of course, include with an ameliorative criminal statute a statement that the legislation cannot be considered in § 3582(c)(1)(A) proceedings. But absent such a statement, “extraordinary and compelling” may be interpreted to include inequities exposed by future legislation as well. To conclude otherwise would lead to the counterintuitive result of excluding from the district court’s “extraordinary and compelling” calculus the reality that an individual may be serving decades in prison under a flawed sentencing regime that all agree is bad policy.

Separation of powers. Two circuit opinions have raised the specter of constitutional separation of powers in connection with § 3582(c)(1)(A), but those opinions should not give the Commission pause.⁵⁸

The Seventh Circuit has suggested that permitting a sentencing court to reduce a sentence under § 3582(c)(1)(A) based largely on a concern that it is overly harsh, although the sentence was lawfully imposed under a mandatory-minimum scheme that “Congress enacted, and the President signed, into law,” would “offend[] principles of separation of powers.”⁵⁹ The Seventh Circuit did not cite to any authority here and no other court has picked up this thread. And there is no separation-of-powers problem:

⁵⁶ *McCoy*, 981 F.3d at 286–87 (cleaned up); see also *United States v. Chen*, 48 F.4th 1092, 1099 (9th Cir. 2022); *United States v. Ruvalcaba*, 26 F.4th 14, 27 (1st Cir. 2022); *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021).

⁵⁷ See *McCoy*, 981 F.3d at 287 (cleaned up).

⁵⁸ The Victims Advisory Group also has argued that the proposed (b)(5) violates “separation of powers.” But VAG is using that term as shorthand for the notion that a broad interpretation of § 3582(c)(1)(A) is incompatible with determinate sentencing and/or would work an “end run” around habeas proceedings, neither of which are about constitutional separation of powers. See Written Testimony of Mary Graw Leary on behalf of VAG, at 12–14 (Feb. 2023), available at <https://bit.ly/3LcvJMN>.

⁵⁹ *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021).

Congress enacted § 3582(c)(1)(A) and the President signed it into law. So reducing a lawful sentence—even one that was previously mandatory—as permitted by § 3582(c)(1)(A) cannot violate separation-of-powers principles any more than with Rule 35 or the former § 4205, or any other duly enacted sentence-reduction statute.

The D.C. Circuit has raised “separation of powers” in a different context, stating that “separation-of-powers considerations” counsel against courts using the “general” authority in § 3582(c)(1)(A) to cancel out a more “precise” congressional pronouncement on retroactivity: § 403(b) of the First Step Act.⁶⁰ But this is not about the constitutional doctrine of separation of powers; it’s about a potential conflict between two statutes: § 3582(c)(1)(A) and § 403(b). That potential conflict is addressed above, in the nonretroactivity section.

C. Neither subsection (b)(5) nor (b)(6) of §1B1.13 creates tension with USSG §1B1.10.

The Commission’s proposed amendments to §1B1.13—including (b)(5) and (b)(6)—are not in tension with § 1B1.10. The two provisions serve very different purposes and operate in different ways. Section 1B1.13 guides discretionary sentence reductions where there are extraordinary and compelling circumstances that arise, or at least come to the court’s attention, after sentencing. Section 1B1.10 is a mechanism for applying retroactive guideline amendments in run-of-the-mill cases. Motions under the provisions will be filed in different circumstances, and application of the provisions is distinct. The relationship between the two is not dissimilar to the relationship of §1B1.13 to general statutory retroactivity provisions, which is discussed above.

⁶⁰ *Jenkins*, 50 F.4th at 1198.

III. Defenders object to others’ suggestions that would narrow enumerated categories, place burdens on incarcerated individuals that they cannot meet, or categorically exclude some individuals from seeking a sentence reduction.

Defenders do not attempt to address in this Comment all the suggestions that others have proposed for §1B1.13. It should be clear that we object to all proposals that would eliminate, narrow, or complicate any category that the Commission has proposed. Indeed, we have suggested ways that the Commission should expand several of the enumerated categories, and we have advocated for an open-ended (b)(6) (Option 3).⁶¹

There are a few proposals, though, that require a response: (1) the government’s redlining of §1B1.13, (2) NAAUSA’s notion that incarcerated individuals must have independent medical documentation from at least two medical professionals to fit within certain categories; and (3) all proposals that would preclude individuals convicted of specified crimes from seeking relief under § 3582(c)(1)(A).

A. Most of the government’s suggestions for the enumerated categories are either problematic or unnecessary.

Subsection (b)(1)(D). The government suggests three changes to the proposed (b)(1)(D): (1) adding the word “imminent” before “risk”; (2) adding the words “and extraordinary” before “outbreak”; and (3) using the phrase “due to personal medical risk factors and custodial status” to modify the subsection’s reference to risk of “severe medical complications or death.”⁶²

As Attorney Barrett explained in her witness statement, Defenders urge the Commission to expand (b)(1)(D) so that it covers additional kinds of ongoing emergencies, if they create a risk of severe medical complications or

⁶¹ As noted above, in footnote 40, Attorney Joshua Matz has suggested that with Option 3 for subsection (b)(6), the Commission might want to clarify that “other reasons” should be similar in “gravity” (although not necessarily nature or subject matter) to the enumerated categories. Defenders do not object to such an amendment.

⁶² Letter from Jonathan J. Wroblewski on behalf of the DOJ to the Sentencing Comm’n, at 4 (Feb. 15, 2023) (hereinafter, “Wroblewski letter”), *available at* <https://bit.ly/4221ga1>.

death that cannot reasonably be mitigated.⁶³ We hope the Commission adopts our suggested change. But regardless of whether the Commission accepts our proposal for (b)(1)(D), it should reject the government’s proposals for that subsection.

The government’s first proposal—“imminent”—makes the category less clear: Is it sufficient that an infectious disease is sweeping the nation? Must it already be in the state where the movant is incarcerated? In the specific prison? Must people in that prison already be dead or dying?

There can be no credible concern that courts would apply (b)(1)(D) to risks that are theoretical or distant; the proposal requires that the infectious disease or emergency be “ongoing” and that it has created a risk of death or severe medical complications that cannot be mitigated. Further, discouraging courts to act quickly where there is an ongoing emergency that has already created this sort of risk could be deadly; many incarcerated individuals died during the COVID pandemic while waiting for courts to decide § 3582(c)(1)(A) motions or after courts denied their motions because the risk was thought to be not yet sufficiently imminent.⁶⁴

The government’s second proposal for (b)(1)(D)—“and extraordinary”—is unnecessary and, again, would make the subsection *less* clear. The point of §1B1.13’s enumerated categories is that the Sentencing Commission has determined that these circumstances should be considered extraordinary and compelling, such that a court is authorized to determine, as a matter of discretion, whether it would be appropriate to reduce the sentence.

The government claims that the word “extraordinary” is needed to prevent individuals from filing motions regarding, *e.g.*, seasonal flu. But the

⁶³ Statement of Kelly Barrett before the Sentencing Comm’n, attached, at 8 (Feb. 23, 2023) (hereinafter, “Barrett Statement”).

⁶⁴ See Meg Anderson, *As COVID spread in federal prisons, many at-risk inmates tried and failed to get out*, NPR (Mar. 7, 2022), <https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get->; see also Federal Criminal Defense Clinic, Iowa College of Law, *Compassionate Release*, <https://law.uiowa.edu/compassionate-release> (last accessed Feb. 28, 2023) (explaining that of the 281 deaths the clinic tracked through January 31, 2022, 74 had filed a motion for compassionate release with the federal courts; three of those motions were granted, but the people were not released in time).

proposed subsection covers only risk of “severe medical complications or death,” and the vast majority of people cannot credibly claim that typical, seasonal infectious diseases creates such a risk. At the same time, if there is a severe flu outbreak that places a particular individual at “increased risk of suffering severe medical complications or death,” there is no sound policy reason for precluding a judge from considering evidence that the individual’s circumstances warrants sentence reduction.

Our concern with the third proposal—the addition of “due to personal medical risk factors and custodial status”—is that it assumes that any future health emergency will look like COVID-19. The seriousness of risk from a disease can be personal (think: COVID risk factors) or universal (think: Ebola). If in the future there is an infectious disease or other emergency situation hitting federal prisons that creates a risk of severe medical complications or death that cannot be mitigated in the prison system, whether that risk is personal or more widespread is quite irrelevant to the men and women who would be trapped within that system.

Subsection (b)(3). For the proposed subsection regarding family circumstances, the government proposes: (1) substituting the word “establishes” for “presents”; (2) adding the phrase “when the defendant would be the only available caregiver for the individual in question” to (b)(3)(D); and (3) defining “immediate family member.”⁶⁵

Defenders are pleased that the government largely supports the proposed (b)(3), including the bracketed (b)(3)(D), which is essential to the function of this subsection. We think the government’s first suggested change is simply unnecessary. Any court would interpret “presents” in this context similar to how one would interpret a doctor saying a patient “presents” with a fever and cough. In other words, it does not reference a mere *claim*. If the Commission thinks this requires clarification, though, we suggest different language. All the other subsections refer to facts as determined by the court, rather than as established by the defendant. Thus, for consistency, (b)(3)(D) could simply begin with “There exist”:

There exist circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other

⁶⁵ Wroblewski Letter at 4–5.

immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.

With the family-circumstances category, our strongest objection is to the government’s second suggestion—“only available caregiver”—as it potentially relates to minors. With minors, the goal is not simply to ensure that *some* adult can care for them. Indeed, if no family is available, the State will place a minor in foster care. A federal court must be able to recognize that a minor needs care more particularly from a parent or, as relevant to (b)(3)(D), from another specific person who has played a parental role in the minor’s life—*e.g.*, grandparent, aunt, or unmarried partner of a parent.

We do not object to the government’s third suggestion—its definition of “immediate family member”—so long as the Commission promulgates (b)(3)(D), so that relationships similar to that of an immediate family member can be respected by the courts. If the Commission declines to promulgate (b)(3)(D), then any definition of “immediate family member” would need to be much more expansive.

Subsection (b)(4). The government proposes four changes to the prison-assault category: (1) modify the subsection with “[w]hile in custody for the offense of conviction,”; (2) broaden the subsection to cover any assault or abuse committed “at the direction of” a BOP employee or contractor; (3) also broaden it to cover not only any “correctional officer or other employee or contractor of the Bureau of Prisons”, but also “any other individual who had custody or control over the inmate”; and (4) require that the assault or abuse be “established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case.”⁶⁶

Defenders have urged the Commission to expand the proposed (b)(4) so that it covers sexual or physical abuse of an incarcerated individual by *anyone* where it causes serious bodily injury; and sexual or physical abuse by a prison employee, contractor, or volunteer, without the need for a showing of serious bodily injury.⁶⁷

⁶⁶ *Id.* at 5–6.

⁶⁷ *See* Barrett Statement at 8–11.

The government’s second and third suggestions are good ones. With the second suggestion, we hope the Commission extends (b)(4) to abuse by *anyone* that causes serious bodily injury. But if the Commission were to reject that part of our proposal, certainly, it should at least extend (b)(4) to abuse by any person acting under the direction of a prison authority figure.

As to the third suggestion, Defenders and the government are both proposing to extend (b)(4) to cover prison authorities beyond BOP employees and contractors. We suggested “prison employee, contractor, or volunteer.” But the government’s suggestion—“correctional officer or other employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the inmate”—may be even better.

We object to the government’s other proposals.

As for its first suggestion for (b)(4), the government has not explained why the subsection should begin with “[w]hile in custody for the offense of conviction.” Is the government concerned that claims will be raised regarding abuse inflicted sometime in the past? That could be solved by starting the section with: “After sentencing.”

More likely, the government does not want anyone to come within (b)(4) if they were abused after sentencing while in state custody, before transferring to federal prison. But far from limiting (b)(4) in this way, the Commission should clarify that the subsection *does* cover this sort of abuse. As discussed in Attorney Barrett’s witness statement, § 3582(c)(1)(A) is not a mechanism for punishing bad government actors; it permits a court to reduce a sentence, as a matter of discretion, if new circumstances call that sentence into question.⁶⁸ And prison abuse can be such a circumstance.

The government’s most troubling suggestion for (b)(4) is that it should apply only where abuse is “established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case.” No question, a court considering any motion under (b)(4) would consider the existence, or lack thereof, of a criminal or administrative proceeding regarding the alleged abuse. And an individual who chooses to file a § 3582(c)(1)(A) motion before any such proceeding has concluded runs the

⁶⁸ See *id.* at 8–9.

risk of a quick denial.⁶⁹ But it would be folly to return to the BOP control over whether and when an individual can file a sentence-reduction motion. This would be true regardless of the basis for the motion, and it is doubly so where we are talking about potential BOP misconduct. Further, while we presume that federal prosecutors act in good faith in making charging decisions, there are legitimate reasons other than innocence that a prosecutor might not charge a perpetrator with a crime.

Beyond the fact that the government cannot be permitted to control the adjudication of a § 3582(c)(1)(A) motion that may be based on official conduct, the government's proposal is unworkable for at least two other reasons. First, delay: criminal cases take years to resolve, and administrative proceedings can take even longer.⁷⁰ Second, the inaccessibility of administrative and investigative materials. Defenders have a hard enough time getting medical records from the BOP on behalf of the individuals who are the subject of those records. We cannot imagine how we'd be able to access records of administrative proceedings against individuals who we do not represent, or law enforcement investigative materials.

B. NAAUSA's notion that enumerated categories based on medical circumstances must be accompanied by independent medical evaluations would undermine those categories.

The National Association of Assistant U.S. Attorneys (NAAUSA) has asked the Commission to limit and narrow §1B1.13's enumerated categories in many ways, all of which we disagree with. But NAAUSA's suggestion that §1B1.13(b)(1)(C) and (D) require incarcerated persons to provide the court

⁶⁹ This will not always be true: an individual (perhaps a cooperator) who was hospitalized after being stabbed, or a woman who became pregnant by a correctional officer, might have no trouble at all proving their grounds for sentence reduction.

⁷⁰ See Statement of Heather E. Williams before the Sentencing Comm'n, at 3 (Feb. 24, 2023) ("BOP's Office of Internal Affairs, responsible for investigating staff misconduct, has an 8,000-case backlog, with some reports pending for more than five years. The process for handling reported misconduct under the Prison Rape Elimination Act (PREA) is a failure. The DOJ has, at times, assigned PREA complaint investigations to correctional staff who were themselves sexually assaulting women in their care."), *available at* <https://bit.ly/401npU2>.

with “independent medical documentation from at least two medical professionals”⁷¹ is not just bad policy, it is likely *impossible*.

For an incarcerated person who is acting pro se, it would almost certainly be impossible. But even where someone is represented, it wouldn’t be much better. The BOP does not permit incarcerated persons to bring their own medical professionals into prisons for independent assessments. And even a court order to permit this might not help: prisons are almost always located far from defense counsel and the medical experts they might retain.

In cases involving medical circumstances, where the basis for the motion is not plain from BOP records, Defenders typically do have a doctor review the records to opine about the medical condition. But there is no need for the Commission to require even that. If an individual does not provide the sentencing court with strong support for his or her motion, it will be denied—even in the absence of any restriction in §1B1.13. The NAAUSA’s notion that a movant obtain “independent medical documentation” from not just one but two medical professionals would be laughable, if we weren’t talking about our clients’ lives and health.

C. Law enforcement groups’ position that individuals convicted of certain crimes should be excluded from § 3582(c)(1)(A) relief is untenable.

Some in law enforcement, as well as victim advocates, have asked the Commission to preclude individuals convicted of violent crimes from seeking relief under § 3582(c)(1)(A). It could probably go without saying that this would be a terrible idea, but Defenders cannot leave it unsaid.

As a preliminary matter, the Commission lacks the authority to take this action. Section 994(t) directs the Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction.” Section 3582 obligates courts to “ensure that [any] reduction is consistent with the Commission’s applicable policy statements.” Neither statute empowers the Commission to exclude altogether a category of persons from the sentence-reduction scheme that Congress created.

⁷¹ Written Testimony of Steven Wasserman on behalf of the NAAUSA, at 2 (Feb. 15, 2023), *available at* <http://bit.ly/422X2yZ>.

Moreover, this would be terrible policy. Even determining which offenses might be excluded would be fraught; the definition of what is a “violent” crime is a perennial source of litigation in the federal courts. And however such a category might be defined in this context, it would inevitably impact some number of persons with circumstances that warrant a sentence reduction. Some of the formerly incarcerated individuals who spoke at the hearing on §1B1.13 illustrate as much.

Defenders are not insensitive to victims’ concerns about notice. Most of our cases (*e.g.*, controlled-substance and firearm-possession cases) do not involve victims. But when there is a victim, we expect them to get notice and an opportunity to be heard, and we have no quarrel with that. In many courts, this is already happening with sentence-reduction motions. Indeed, it may already be required by 18 U.S.C. § 3771(a).

We are, however, concerned with the government’s request that §1B1.13 state that “*the court* must provide reasonable notice to any victims” and that it do so “[b]efore *granting* any motion for compassionate release.”⁷² A U.S. Attorney’s Office is the entity that would have a relationship with any victims, and a system for communicating with them. Courts, in contrast, are not set up for this. Also, the notion that notice would be issued only upon a court’s decision to “grant” a sentence reduction seems designed to discourage grants. While Defenders do not speak for crime victims, we cannot imagine they would prefer to get notice of sentence-reduction proceedings only after the court has presumptively decided the matter. Therefore, any notice provision should require the government, not the court, to provide notice, consistent with § 3771(c).

⁷² Wroblewski Letter at 9 (emphasis added).

IV. The amendments the Commission has proposed, including subsections (b)(5) and (b)(6), make the right policy call.

Defenders have suggested some revisions for the proposed §1B1.13 but, again, the Commission is on the right track. At the recent hearing, Attorney Barrett described some of the policy benefits of the proposed amendments, including that, far from exacerbating disparities, the proposed amendments will provide federal courts with a valuable tool for reducing unwarranted disparities that plague our justice system. Attorney Barrett also talked about some of the men and women who have been released under § 3582(c)(1)(A) who are thriving and enriching their communities; they illustrate that the human cost of a restrictive §1B1.13 would be too high. Here, we focus on three policy concerns that others raised at the hearing: the possibility that subsection would perpetuate the circuit split regarding legal changes; finality and certainty; and administrability.

A. The circuit split regarding legal changes is subject to change and should not dissuade the Commission from making the right policy call on §1B1.13, including by promulgating the proposed (b)(5).

The circuit split over whether legal changes can constitute an “extraordinary and compelling” reason for sentence reduction arose in the absence of a policy statement that applies to defendant-filed motions under § 3582(c)(1)(A). If and when the Commission adopts a policy statement that applies to such motions and interprets “extraordinary and compelling” to encompass a situation where “the defendant is serving a sentence that is inequitable in light of changes to the law,” Defenders are confident that circuit courts will revisit their pre-amendment caselaw.

And when they do so, there is good reason to think the Commission’s description of “extraordinary and compelling” will control, such that the circuit courts would resolve the split on their own. First, some courts may find that the amended policy statement does not conflict with their own precedent. The proposed (b)(5) does not cover the mere fact of a legal change; it applies only where legal changes reveal that an individual defendant’s sentence is “inequitable.” Further, to the extent that a circuit court finds that the Commission’s interpretation of “extraordinary and compelling” does

conflict with its own precedent, as Professor Erica Zunkel has explained, the Commission’s interpretation “must prevail.”⁷³

In the worst case scenario, some form of the present circuit split would persist and the issue would go to the Supreme Court for resolution. This possibility should not dissuade the Commission from doing the job Congress gave it to do: determining what is the best policy for § 3582(c)(1)(A). If the question whether § 3582(c)(1)(A)’s phrase “extraordinary and compelling” is capable of encompassing legal changes that renders a sentence inequitable goes to the Supreme Court, under the analyses described earlier in this brief, that Court should answer the question affirmatively.

And in the end, the human beings who would be affected by the Commission’s proposed amendments are worth it. The worst-case scenario for the Commission (a policy statement that is examined by the Supreme Court) is not comparable to the worst-case scenario for the men and women who may be serving sentences—including life sentences—that are fundamentally inequitable.

B. Finality and certainty are valid policy interests, but they are of lesser weight in this context and must be balanced against other important interests.

A number of objections to the Commission’s proposed, expanded §1B1.13 focus on concerns about “finality” and “certainty.” Some of these evocations are in the context of arguing that a broad reading of § 3582(c)(1)(A)—that is, one that is consistent with the section’s plain text—encroach upon, *e.g.*, § 2255 or nonretroactivity rules; those arguments are addressed above (Section II). Some of the evocations are free-standing, though, as if “finality” and “certainty” were *statutes* that the policy statement could *violate*.

But detached from a specific statute that protects finality or certainty in sentencing, these are just policy interests. The BOP for more than three decades elevated those particular interests above all others—even human dignity. Back in 2006, the government emphasized finality and certainty in

⁷³ Statement of Erica Zunkel before the Sentencing Comm’n, at 9 (Feb. 23, 2023) (citing *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982–83 (2005)), available at <http://bit.ly/3T7bAJI>.

justifying the BOP's decision to file sentence-reduction motions only in cases of terminal illness or where a disability was so profound that, if released, the person would still "carr[y] his prison in his body and mind, and will not in any event be living in freedom in any ordinary sense."⁷⁴

Now that the Sentencing Commission is capable of making meaningful policy for § 3582(c)(1)(A), it need not follow the BOP's lead. Indeed, it *should not*. Section 3582(c)(1)(A)'s sentence reduction for "extraordinary and compelling reasons" is an express exception to the SRA's general principle of finality for criminal sentences.⁷⁵ It was designed as a safety valve that could protect other, competing interests. The legislative history suggests two potential competing interests: compassion and fairness.⁷⁶ But ultimately it gave the task of making policy decisions in this space to this Commission.

As for certainty, the SRA codified a determinate sentencing scheme that would advance certainty and truth in sentencing *in a particular way*, which included judicial sentence reduction under § 3582(c)(1)(A). The nationwide move from parole to determinate sentencing that started in the 1980s was grounded in part on "structural deficits" in the parole system.⁷⁷ The SRA abolished parole. But it retained good-time credit and it also created a sentence-reduction mechanism at § 3582(c)(1)(A) that would "keep[] the sentencing power in the judiciary where it belongs" and be subject to this Commission's policy choices.⁷⁸

Thus, the Sentencing Commission need not, and should not, elevate policy interests in finality and certainty over the interests that animated the creation of the very statute at issue here.

⁷⁴ Letter from Michael J. Elston, *supra* note 23, at 4.

⁷⁵ § 3582(c); *see also Concepcion*, 142 S. Ct. at 2399 n.3 ("No one doubts the importance of finality. Here, however, the Court interprets a statute whose very purpose is to reopen final judgments.").

⁷⁶ *See* S. Rep. No. 98-225, *supra* note 5, at 55–56 (referring to cases involving "severe illness" and also cases involving "unusually long sentences").

⁷⁷ Klingele, *supra* note 13, at 495; *see also id.* at 474–76 (describing these deficits in more detail).

⁷⁸ S. Rep. No. 98-225, *supra* note 5, at 121.

C. There is no reason to think that a §1B1.13 that is capable of capturing all extraordinary and compelling cases will overtax the justice system.

Some have raised concerns that the proposed amendments to §1B1.13 would create problems related to administrability. But these concerns are colored by our experiences during the recent COVID-19 pandemic.⁷⁹ There is every reason to think that post-pandemic, sentence-reduction proceedings will be entirely manageable—regardless of what policy statement the Commission promulgates.

There is no question: at the height of the COVID-19 pandemic, the volume of § 3582(c)(1)(A) motions was hard to manage—not just for courts and prosecutors, but for Defenders too. To be clear, Defenders feel honored and privileged that we were able to help many of our vulnerable clients get out of unsafe conditions in our nation’s federal prisons. We wish we could have done more; we are heartbroken for the many men and women who died during this period in BOP custody, far from family or comfort.

But the volume and the urgency of § 3582(c)(1)(A) motions during the pandemic at times felt overwhelming. It did not help that, at the time, the courts were still sorting out how the newly amended § 3582(c)(1)(A) would operate; there was no applicable policy statement in most circuits; and we were also facing other unprecedented challenges in the courts and in all of our own family lives. However, as could have been anticipated, post-pandemic, § 3582(c)(1)(A) filings have plummeted.⁸⁰

If there had not been a pandemic, there likely still would have been some sort of surge in § 3582(c)(1)(A) filings after § 603 of the First Step Act for the first time permitted defendants to file their own motions for relief.⁸¹

⁷⁹ See, e.g., Oral Testimony of Hon. Randolph D. Moss at the Commission’s Public Hearing on Compassionate Release (Feb. 23, 2023) (explaining in his opening statement that sentence-release proceedings have consumed tremendous judicial resources, with reference to experiences during the pandemic).

⁸⁰ See *USSC Compassionate Release Data Report*, tbl. 1 (Dec. 2022), <https://bit.ly/3JAexzj>.

⁸¹ Professor Klingele predicted that this sort of surge would follow new legislation in her article on judicial sentence mechanisms that was published in 2014. Klingele, *supra* note 13, at 528.

And when the Commission issues its first-ever policy statement addressed to defendant-filed § 3582(c)(1)(A) motions, there may well be another surge. But in the absence of a pandemic, any surge should be manageable and will level off. Jurisdictions with robust mechanisms for judicial sentence reduction “appear to do so efficiently and without detriment to the court’s ability to manage other demands on its time.”⁸² Federal courts are well-equipped to adjudicate § 3582(c)(1)(A) motions, and Defenders are eager to continue to help courts in this endeavor.

What’s more, there is no evidence that the “extraordinary and compelling” legal standard has a significant impact on filing. The Second and Seventh Circuits, for example, are similar in terms of the number of criminal cases filed in their district courts.⁸³ Yet in the Seventh Circuit, where the circuit court has read § 3582(c)(1)(A) far more restrictively than in the Second Circuit, district courts have seen more, not fewer, § 3582(c)(1)(A) motions.⁸⁴ The Eleventh Circuit has the nation’s most restrictive “extraordinary and compelling” standard, but the number of filings in district courts within that circuit is greater than in the Ninth Circuit, where there is both a generous standard and more criminal cases.⁸⁵

Now that Congress has permitted individuals to file their own motions under § 3582(c)(1)(A), there is no policy statement that could reduce the volume of sentence-reduction motions to pre-2018 levels. But in the post-pandemic future, even with a significantly broadened §1B1.13, there is no reason to think this will be unmanageable. And ultimately, the fact that the number of sentence-reduction motions going forward will be substantially higher than it was pre-First Step Act is a solution, not a problem: § 3582(c)(1)(A) is finally capable of functioning as the safety valve it was always meant to be.

⁸² *Id.*

⁸³ See USSC, *2021 Sourcebook of Federal Sentencing Statistics* tbl. 1 (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table01.pdf>.

⁸⁴ *USSC Compassionate Release Data Report*, *supra* note 80, at tbl. 3.

⁸⁵ *Id.* Incidentally, this data report also shows that there is considerable variation in the grant/denial rates in the Eleventh Circuit, evidencing that a narrow “extraordinary and compelling” standard does not result in uniformity. *Id.*

**Before the United States Sentencing Commission
Public Hearing on Compassionate Release**

Statement of Kelly Barrett, First Assistant Federal Public
Defender for the District of Connecticut, on Behalf
of the Federal Public and Community Defenders

February 23, 2023

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Hon. Chair Reeves, Vice-Chairs, and Commissioners: Thank you for holding a hearing on this important topic and for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders.

My name is Kelly Barrett and I am the First Assistant to the Federal Public Defender for the District of Connecticut. Since the First Step Act of 2018 enabled individuals to seek sentence reductions under 18 U.S.C. § 3582(c)(1)(A) on their own behalf, I have spearheaded my office's efforts under that statute. I have filed numerous § 3582(c)(1)(A) motions for my own clients and also helped facilitate the work of other attorneys for their clients.¹ Many of those motions were granted, some with the government's agreement, and many others were denied. With my clients who have prevailed, we are richer for having them back home—working, caring for their families, and sharing their talents with their communities.

Indeed, my former § 3582(c)(1)(A) clients aren't just doing well; they are *thriving*. More than a dozen of those clients have successfully graduated from the District of Connecticut's rigorous reentry court, and three of those graduates now mentor others in reentry court. The day before the Commission holds this hearing, another of my clients will be graduating.

This statement goes through the Commission's proposed amendments to §1B1.13, with an eye toward Issues for Comment 2, 3, and 4. Defenders will address the legal questions about the Commission's authority and whether there is any potential tension between §1B1.13 and other laws (Issues for Comment 1 and 5) in our written comments, which are due March 14. Of course, at the hearing, I will endeavor to answer any questions that Commissioners may have regarding any of the proposed amendments.

¹ Commissioners may note that I refer to motions for sentence reduction under § 3582(c)(1)(A), rather than "compassionate release." As the Second Circuit has explained: "It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020).

I. Introduction

My circuit—the Second Circuit Court of Appeals—was one of the first to hold that the current USSG §1B1.13 does not apply to defendant-filed motions, and courts have broad discretion to determine whether the individualized circumstances presented in a particular case constitute “extraordinary and compelling reasons” for a sentence reduction.² Judges in the District of Connecticut have exercised that discretion carefully and reduced sentences in many cases where “circumstances [were] so changed” that it “would be inequitable” to maintain the sentence as originally imposed.³ These are the kinds of cases to which Congress intended § 3582(c)(1)(A) to apply; that section was meant to function as a “safety valve”—one controlled by judges, not a parole board—in the newly determinate federal sentencing scheme.⁴

Defenders commend the Commission for proposing amendments to §1B1.13 that provide guidance while also granting courts discretion to consider the entire constellation of circumstances that might warrant a sentence reduction in a particular case. With these changes, § 3582(c)(1)(A) would be able to serve as a meaningful safety valve.

The past few years have served as a laboratory for the Commission, as district judges have had great discretion in determining which circumstances present extraordinary and compelling reasons for sentence reduction. The proposed amendments show that the Commission is listening to judges: the Commission is proposing to add new enumerated categories to §1B1.13 based on circumstances that judges have found to be extraordinary and compelling—*e.g.*, serious medical needs that are not being met, prison assault, and legal changes.⁵

² See *Brooker*, 976 F.3d at 236–37.

³ S. Rep. No. 98-225, at 121 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3304. This is a quote from the Senate Report on the Sentencing Reform Act of 1984 that Defenders discussed in a recent letter to the Commission. See Defender Comment on the Commission’s Proposed Policy Priorities, at 3 n.11 (Oct. 17, 2022).

⁴ See S. Rep. No. 98-225, at 121 (1983).

⁵ This is how the Commission is meant to work: “The statutes and the Guidelines . . . foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.” *Rita v. United States*, 551 U.S. 338, 350 (2007).

Also, the Commission has proposed options for an open-ended catchall category, which reflects something we all learned from the recent pandemic: we cannot know what the future holds. It is essential that courts have discretion to recognize extraordinary and compelling circumstances that we cannot even imagine today, or that may arise only in a single case. As Defenders have said before, Congress’s legal standard for § 3582(c)(1)(A)—“extraordinary and compelling reasons”—is not reduceable to a finite list.

II. The proposed amendments to §1B1.13 give clear guidance to federal courts while retaining flexibility.

Since Congress empowered individuals to file § 3582(c)(1)(A) motions on their own behalf, all the circuits that have decided the issue except one have held that the current §1B1.13 is not applicable to defense-filed motions.⁶ Thus, in most of the country, there has been no Commission guidance on how to apply § 3582(c)(1)(A), which makes it unsurprising that different courts have applied the section differently. The proposed amendments to §1B1.13 will go far to reduce unwarranted disparities.⁷

The proposed §1B1.13’s enumerated circumstances (sub. (b)(1)–(5)) address the Commission’s obligation to provide “criteria” and also “examples” of extraordinary and compelling reasons.⁸ They appropriately capture the kinds

⁶ See *United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). But see *United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021).

⁷ In the past, the DOJ has raised concerns about disparities in this context. See DOJ Public Comment on the Proposed Priorities, at 5 (Sept. 12, 2022). It is impossible to ascertain from motion grant/denial rates whether disparities are unwarranted or are based on distinctions between individualized circumstances. It is the Defenders’ experience that it is a combination of these. And the Commission should endeavor to reduce only *unwarranted* disparities. See *Gall v. United States*, 552 U.S. 38, 55 (2007) (approving of the effort to reduce not just unwarranted disparities but also “unwarranted similarities” among defendants who are not similarly situated).

⁸ 28 U.S.C. § 994(t).

of circumstances that courts have found, in individual cases, may warrant a sentence reduction:

- *The proposed sub. (b)(1) appropriately expands the health-related circumstances that may warrant sentence reduction to include medical conditions that pose treatment challenges in prison and also infectious disease.* The former provides a path to complex medical care—while our clients can still benefit from it—that is removed from litigation about who is to blame for health-care failures. The latter reflects what we’ve all learned the hard way: infectious diseases can be difficult or impossible to manage in the prison setting.
- *Subsection (b)(3) recognizes that someone who is not an individual’s minor child may require their care.* This does not only benefit our clients and their families. It benefits the public by easing communities’ caretaking responsibilities and also by reducing recidivism risk.⁹ It is essential that the amendment include the bracketed sub. (b)(3)(D) to capture circumstances that may be extraordinary and compelling in unusual cases. Family and kinship relationships are not one-size-fits-all. This is true generally and can also relate to varying cultural norms, which are entitled to respect.
- *The bracketed sub. (b)(4) acknowledges that sometimes imprisonment is more punitive and traumatic than the sentencing court intended or society can bear.* Prison rape and assault are real. And no judge would have intended such a violation. By acknowledging that some individuals are victimized while in custody and that this can impact the appropriateness of the sentence originally imposed, this proposed amendment promotes healing and rehabilitation.
- *The bracketed sub. (b)(5) appreciates that a sentence imposed under a legal scheme that is now understood to be overly harsh can epitomize “extraordinary” and “compelling.”* It would harm the

⁹ See Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 Fam. L. Q. 191, 196 (2006) (“The single best predictor of successful release from prison is whether the former inmate has a family relationship to which he can return. Studies have shown that prisoners who maintain family ties during imprisonment are less likely to violate parole or commit future crimes after their release than prisoners without such ties.”).

credibility of our justice system to prohibit judges from recognizing this reality. By expressly endorsing the consideration of legal changes in the extraordinary-and-compelling analysis, regardless of whether a change would have retroactive application as a general matter, sub. (b)(5) will encourage circuit courts that have prohibited this practice to revisit pre-amendment caselaw, reducing disparities and protecting the credibility of the federal criminal justice system.

III. A few simple changes to the proposed enumerated circumstances would improve §1B1.13.

As discussed below, an open-ended catchall category is essential to the functioning of §1B1.13: it captures circumstances that we cannot foresee, or that would be too rare or idiosyncratic for an enumerated category. But even with a catchall, care must be taken with the enumerated circumstances. A court analyzing a circumstance that is close to, but does not quite fit within, an enumerated category may think that the Commission intended to delineate the boundaries of that category and feel compelled to deny the motion. We urge the Commission to clarify or broaden language proposed in three of the enumerated categories.

A. Subsection (b)(1)(C) should refer to medical care that is not being provided in a timely or “effective,” rather than merely “adequate,” manner.

Again, we commend the Commission for proposing the new sub. (b)(1)(C). Most Defenders have had clients who suffered from medical conditions that could have been managed far better, or even cured, in the community, but unfortunately they got much worse in prison.

One of my own cases, *United States v. Cruz*, 3:15-cr-96-VLB, doc. 402 (D. Conn. Dec. 19, 2022), provides an example. The motion containing the medical information in that case was filed under seal, but Ms. Cruz has given me permission to provide it to the Commission upon request. To summarize, after sentencing, Ms. Cruz was diagnosed with multiple sclerosis. Her condition was managed effectively while she served a state sentence but, once she was transferred from state to federal prison, all treatment stopped (apparently due to the need for multiple layers of BOP approval) and her health deteriorated. Thankfully, the government did not oppose our motion for

sentence reduction and the court granted it. Now Ms. Cruz is home with her family, getting treatment, and doing well. Other courts around the country have granted § 3582(c)(1)(A) motions in numerous similar cases, so that other individuals could get needed treatment.¹⁰

¹⁰ See, e.g., *United States v. English*, 2022 WL 17853361, at *7 (E.D. Mich. Dec. 22, 2022) (where Mr. English had several significant health concerns, including multiple tumors, but the BOP had no treatment plan, “BOP’s gross mismanagement of English’s serious health conditions, even if they are not yet life-threatening, presents an extraordinary and compelling reason for release”); Order, *United States v. Halliday*, No. 3:17-cr-267-JAM, doc. 176, at 1–2 (D. Conn. Aug. 11, 2022) (“I conclude that Halliday has shown that he suffers from a gravely serious eye disease—keratoconus—that has advanced to a great degree and imminently threatens permanent blindness unless promptly subject to sophisticated medical treatment. . . . Halliday’s best hope for retaining his eyesight is to seek treatment by an eye specialist in the outside community as soon as possible.”); *United States v. Verasawmi*, 2022 WL 2763518, at *10 (D.N.J. July 15, 2022) (“In these atypical circumstances, where Verasawmi suffers from a complex array of serious conditions, some of which the BOP has failed to treat diligently, the Court cannot simply wait until [life-threatening] outcomes materialize.”); Order, *United States v. Green*, No. 3:16-cr-63-SLF, doc. 198, at 10–11 (D. Alaska Mar. 29, 2022) (granting § 3582(c)(1)(A) relief based on aggressive prostate cancer that appeared to have metastasized to other parts of Mr. Green’s body while he waited for testing and treatment, and the BOP still did not have a treatment plan in place); *United States v. Russell*, 2022 WL 18542444, at *4 (D.N.J. Mar. 9, 2022) (“The surest and perhaps only path towards the proper treatment [Mr. Russell] urgently needs is his release from prison.”) (quoting the motion); *United States v. McPeck*, 2022 WL 429249, at *9 (N.D. Iowa Feb. 11, 2022) (collecting cases where courts found that “BOP delays in treatment of serious disorders can constitute or contribute to finding extraordinary and compelling circumstances”); *United States v. Bandrow*, 473 F. Supp. 3d 778, 787 (E.D. Mich. 2020) (“Elkton’s inability to provide care for Bandrow’s hematuria further weighs in favor of compassionate release. Despite knowing about Bandrow’s hematuria since January 2020, and being alerted that his condition was a ‘serious illness/critical illness’ on June 4, 2020, FCI Elkton has been unable to provide Bandrow with the CT urogram and urology consultation he needs to address this issue.”); *United States v. Almontes*, 2020 WL 1812713, at *1, *6–7 (D. Conn. Apr 9, 2020) (granting relief to an individual in need of urgent spinal surgery related to a previously broken neck, where the BOP had delayed treatment for years and his health was deteriorating); *Bruno v. United States*, 472 F. Supp. 3d 279, 284 (E.D. Va. 2020) (“In addition to Petitioner’s status as HIV-positive, the Court is also concerned that his mental health needs are being neglected during his term of incarceration. . . . This outcome is plainly unacceptable, as Petitioner was sentenced based in large part on his need for mental health treatment for his Bipolar Disorder.”).

Defenders presume that the BOP is rarely deliberately indifferent—the Eighth Amendment standard.¹¹ The beauty of sub. (b)(1)(C) is that it does not attempt to assign blame or remedy harm. Instead, it permits the court to reduce a sentence *before* there is harm—or at least further harm—so that a person who urgently needs complex or specialized medical care can access it.

Our concern is with the word “adequate,” as it appears in the phrase “that is not being provided in a timely or *adequate* manner.” That word may discourage courts from granting § 3582(c)(1)(A) relief so that an individual can get medical care in the community (where other factors militate in favor of release) in all but the most extreme circumstances. And where circumstances are extreme, §1B1.13 may not even be needed; that’s what the deliberate-indifference standard addresses. Section 3582(c)(1)(A) and §1B1.13(b)(1)(C) serve a different purpose.

In *Green*, a case in footnote 10 involving aggressive prostate cancer, the government opposed the motion on the ground that the BOP was providing “adequate” care.¹² But the court explained that nothing in § 3582 or §1B1.13 “require[d] the defendant to show that the BOP is not providing *adequate* medical care in order to be granted compassionate release.”¹³ Thus, the court did not have to assign a grade to the BOP’s care of Mr. Green. It was enough that Mr. Green needed far more aggressive and urgent care than he was getting in BOP custody, and the § 3553(a) factors supported release.¹⁴

To ensure that courts have the discretion to consider sentence reductions in cases like Mr. Green’s, where an individual needs access to urgent medical care in the community, Defenders recommend a stronger word than “adequate.” We suggest “effective.” As in: “The defendant is suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or *effective* manner.” This is a small change that could make a big difference in some cases.

¹¹ See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹² Order, *United States v. Green*, No. 3:16-cr-63-SLF, doc. 198 (D. Alaska Mar. 29, 2022) (quoting the government’s motion).

¹³ *Id.* at 4 (emphasis added).

¹⁴ See *id.*

B. Subsection (b)(1)(D) should encompass *any* emergency situation that threatens the lives or health of individuals in prison that cannot be mitigated.

As currently drafted, sub. (b)(1)(D) applies only to an “infectious disease” or a “public health emergency.” This is too narrow, given the reality of other emergency situations that may pose a health threat to the prison population. For example, it is easy to imagine a catastrophic weather event that prevents the BOP from protecting inmates’ health and safety. And if such an event happened over a large enough area, and the aftermath extended for a long enough period, individuals could face significant health threats that the BOP would not be able to mitigate.

But if the proposed sub. (b)(1)(D) were expanded solely to include extreme weather events, that would be overly narrow, too, given other events that could occur: *e.g.*, war, geological disaster, economic collapse. Defenders hope that we never see any of these circumstances in our lifetimes, and it would not make sense for the Commission to write a doomsday provision into the §1B1.13 policy statement. But the Commission should broaden sub. (b)(1)(D) to cover *any* emergency situation that poses a health threat to imprisoned individuals that cannot be appropriately mitigated.

C. The Commission should expand sub. (b)(4) in two ways in order to reach all prison abuse that may warrant a sentence reduction.

The bracketed sub. (b)(4), regarding people who have been the victim of physical or sexual abuse in prison, would be a positive change, but it covers only abuse that was perpetrated by a BOP employee or contractor and only if it resulted in “serious bodily injury.” The new subsection is well-meaning but these two limitations mean that it would not apply to circumstances that many—or even most—judges would find extraordinary and compelling.

First, there is no reasoned justification for limiting sub. (b)(4) to circumstances where the perpetrator is a BOP employee or contractor. With both sexual and physical abuse, the harm is real regardless of the identity of the perpetrator. Many Defenders have seen our clients return from prison with visible scars from injuries inflicted by other inmates and emotional scars

from violent rape. For victims of violent attacks while in prison, the fact that a BOP employee or contractor was not the perpetrator is utterly irrelevant.

Limiting sub. (b)(4) to situations where the perpetrator was a BOP employee or contractor makes the provision seem less like an illustrative example of an “extraordinary and compelling reason[]” for sentence reduction and more like compensation for harm inflicted by the government. In reality, the government can bear responsibility for inmate-on-inmate assault. But more importantly, the point of § 3582(c)(1)(A) is not to assign responsibility for harm, and it’s not to reduce a sentence in order to punish the government.

The point is that a particular individual’s circumstances might so change during their term of imprisonment that it would be inequitable to maintain the sentence as originally imposed. And sexual and physical abuse are life-changing no matter who the assaulter is: a federal employee or contractor,¹⁵ a state or local correctional officer (which might arise where the individual is serving both state and federal sentences or where he is in transit to a federal facility),¹⁶ or a fellow inmate.¹⁷

¹⁵ See, e.g., *United States v. Brice*, 2022 WL 17721031, at *4 (E.D. Pa. Dec. 15, 2022) (holding that prison guards’ sexual assault of the individual was an extraordinary and compelling reason for sentence reduction).

¹⁶ Cf. *United States v. Brocoli*, 543 F. Supp. 3d 563, 568–69 (S.D. Ohio 2021) (“[A]lthough Mr. Brocoli was investigated, charged, and sentenced in the federal system, he has nevertheless been detained in state-level institutions for a significant portion of his incarceration. During his incarceration in these state institutions, he reports having been severely abused and victimized. . . . For these reasons, the Court finds that Mr. Brocoli has demonstrated extraordinary and compelling reasons that could justify his release.”).

¹⁷ See, e.g., Mot. for Compassionate Release Due to Serious Medical Condition at 3–4, *United States v. Smith*, No. 3:11-cr-194-14, doc. 2260 (M.D. Tenn. March 31, 2022) (granted by Order dated Dec. 15, 2022, doc. 2285) (explaining that the individual was (mistakenly) believed to have cooperated with the government, which resulted in him being beaten so severely that he went into a coma and likely would require permanent nursing care); *United States v. Wise*, 2020 WL 4251007, *2–3 (N.D. Ohio June 25, 2020) (granting § 3582(c)(1)(A) motion based in part on medical conditions for an individual who had been brutally attacked in prison in 2007, causing spinal fractures, a broken jaw, a broken nose, and lingering neurological problems); cf. *United States v. Pinson*, 835 F. App’x 390, 392 (10th Cir. 2020) (affirming a district court judgment where the court had apparently accepted that it could be extraordinary and compelling that the individual had been subjected to “serious violence by other inmates, including rape,” but had denied the motion based on §

Second, Defenders are also concerned about the proposed sub. (b)(4)'s "serious bodily injury" requirement. The Guidelines define "serious bodily injury" as

injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.¹⁸

This limitation may make sense as applied to abuse by fellow inmates. Unfortunately, low-level violence in prison is not extraordinary; it is all too common. This is among the reasons that ending mass incarceration is a moral imperative for our nation. But it means that courts are likely to think that inmate-inflicted abuse in prison is extraordinary only when it causes significant injury or involves non-consensual sexual assault.

However, the situation is different where a prison employee, contractor, or volunteer (*e.g.*, clergy member, teacher) is the perpetrator. In that situation, it is the gross imbalance of power that makes a sexual act "abusive." *See* 18 U.S.C. § 2243 (sexual abuse of a minor or ward). And it is this same imbalance of power that makes physical abuse of an imprisoned individual by a person with authority more than simple assault—it's a civil rights violation.

In this situation, there should be no need for an individual to make a showing of harm—and certainly not "serious bodily injury"—before a court can recognize that it is extraordinary and compelling.

3553(a) factors). I have also reviewed a redacted version of a § 3582(c)(1)(A) motion that was filed under seal on behalf of a transgender woman who was housed in male prisons, where she was repeatedly attacked and raped. That motion was withdrawn before the court ruled on it, after the individual's BOP sentence expired. Motion to Withdraw Document, *United States v. Gerald P.*, No. 4:04-cr-29-TRM-SKL-1, doc. 326 (E.D. Tenn. Jan. 27, 2023). As with the other sealed document discussed in this statement, if it would be helpful, the client has granted permission for me to provide the Commission with a copy of the § 3582(c)(1)(A) motion upon request.

¹⁸ USSG §1B1.1, comment. (n. 1(M)).

Perhaps “serious bodily injury” was chosen for the proposed sub. (b)(4) because it applies anytime there has been sexual abuse as defined at 18 U.S.C. §§ 2241 or 2242, whereas the generally lower standard, “bodily injury,” does not.¹⁹ But in many sexual assault cases in which a BOP employee or contractor was the perpetrator, the offense comes within 18 U.S.C. § 2243 (sexual abuse of a minor or ward), but not necessarily §§ 2241 or 2242.²⁰ Thus, the limitation of sub. (b)(4) to circumstances that involve a “serious bodily injury” threatens to undermine even the core purpose of this proposed enumerated circumstance.

In order to address both of our concerns, Defenders recommend that the Commission alter sub. (b)(4) so that it reads:

VICTIM OF ABUSE.—The defendant was a victim of sexual or physical abuse in prison, where such abuse resulted in serious bodily injury or where it was perpetrated by a prison employee, contractor, or volunteer.

IV. An open-ended catchall category is essential to §1B1.13’s ability to capture unforeseeable and unique circumstances that are extraordinary and compelling.

Since the Sentencing Commission created a policy statement at §1B1.13, it has always had an open-ended catchall category. In the past, that category has turned on the BOP’s discretionary judgment; that was out of necessity, since the BOP effectively controlled § 3582(c)(1)(A) motions until passage of the First Step Act of 2018.²¹ Now that the BOP no longer controls these motions, the Commission need not reverse course; it should just update the entity that exercises discretion.

¹⁹ Compare USSG §1B1.1, comment. (n. 1(B)) with §1B1.1 comment. (n. 1(M)).

²⁰ In the context of the coercive relationship between a prison authority and an imprisoned person, consent is a thorny issue. That’s why sexual abuse of a minor or ward is a serious felony regardless of force, threat, or consent, which are the elements that define §§ 2241 and 2242.

²¹ When the BOP controlled sentence reductions under § 3582(c)(1)(A), as the Commission is aware, the BOP effectively abdicated its responsibility to seek sentence reductions. See *Brooker*, 976 F.3d at 231–32 (recounting this history).

The presence of an open-ended catchall category (like Option 3 for the proposed sub. (b)(6)) further defines the “criteria to be applied”²² in these proceedings and is essential to the functioning of §1B1.13, and we appreciate that the Commission has proposed it as an option. Before 2020, the Commission did not think to include risks related to infectious disease in §1B1.13; now we know. But we do not know all that we still do not know.

And beyond our inability to predict the future, it would not make sense for the Commission to include every conceivable occurrence that might, in an individual case, warrant a sentence reduction. Consider a few situations that have been recognized as among the extraordinary and compelling reasons for sentence reduction in my own district in recent years:

- *BOP services halted.* Our client was at the point of his sentence where ordinarily he would be receiving transitional services and transferring to a halfway house but, because of circumstances outside of his control (the pandemic), he was receiving no transitional or supportive services.²³
- *BOP rules increased sentence.* The parties and the sentencing court understood that the sentence would be fully concurrent to a state sentence, but the BOP deemed the federal sentence to be consecutive and thus our client was slated to serve a sentence far longer than the sentencing court had intended.²⁴
- *Youth at the time of sentencing.* In the more than 20 years since our client was sentenced to life in prison for serious offenses committed

²² 28 U.S.C. § 994(t). The Commission acts well within its policy-making authority in this space when it decides, as a matter of policy, that the sentencing court should have broad discretion to recognize unusual extraordinary and compelling reasons when they arise.

²³ See Order, *United States v. Coleman*, 3:17-cr-216-AWT, doc. 92 (D. Conn. May 20, 2020); see also Unopposed Mot. 4–5, *United States v. Coleman*, 3:17-cr-216-AWT, doc. 91 (D. Conn. May 18, 2020). Similar situations have arisen elsewhere. See, e.g., *United States v. Fraga*, 2020 WL 5732329, at *3 (D. Mass. Sept. 24, 2020) (granting release to home confinement where, if not for the pandemic, Mr. Fraga already would have been transferred to a halfway house or residential facility).

²⁴ See *United States v. Castillo*, 2021 WL 1781475, at *3 (D. Conn. Feb. 22, 2021). Again, similar situations have arisen elsewhere. See, e.g., *United States v. Comer*, 2022 WL 1719404, *5 (W.D. Va. May 27, 2022).

when he was 18 years old, society's and the courts' understanding of brain development had evolved considerably, calling into question the appropriateness of the sentence.²⁵

- *Sentence lengthened by civic duty.* Our client's time in the RDAP program²⁶ was cut short when the government transported him to testify before a grand jury. If he'd been able to complete RDAP he would have been released already, but because the government pulled him out of prison for a civic duty he was still in prison.²⁷
- *Family emergency.* Our client had just 20 days left to serve on his sentence under home confinement in New Jersey, and he was doing well. His mother was in hospice care in Georgia and would die any day. Given the short time left on our client's sentence, the court found that our client's need to be with his mother was extraordinary and compelling and granted his § 3582(c)(1)(A) motion.²⁸

"Extraordinary and compelling" findings arising from idiosyncratic circumstances in other districts include: saving the life of another person while in prison²⁹; risk of death at a halfway house related to cooperation with the

²⁵ See *United States v. Morris*, 2022 WL 3703201, at *8–9 (D. Conn. Aug. 26, 2022). Again, similar situations have arisen elsewhere. See, e.g., *United States v. Mendez-Zamora*, 2022 WL 9333452, *2 (D. Kan. Oct. 14, 2022).

²⁶ The BOP's Residential Drug Abuse Program (RDAP) is an intensive treatment program, where completion of the program results in a sentence reduction. See Federal Bureau of Prisons, *Substance Abuse Treatment*, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp; Families Against Mandatory Minimums, *Frequently Asked Questions about the Residential Drug Abuse Program (RDAP)* at 1 (May 2012), <https://famm.org/wp-content/uploads/FAQ-Residential-Drug-Abuse-Program-5.3.pdf>.

²⁷ See *United States v. Wooten*, 2020 WL 6119321, at *8 (D. Conn. April 27, 2021).

²⁸ See Unopposed Emergency Mot., *United States v. Oreckinto*, No. 3:16-CR-026 (JAM), doc. 137 (D. Conn. Feb. 13, 2021) (granted by Order, doc. 138 (Feb. 13, 2021)).

²⁹ See *United States v. Pimental-Quiroz*, 2021 WL 915141, at *4 (W.D. Wash. Mar. 10, 2021) (finding that Mr. Pimental-Quiroz "put himself at risk when he assisted a female corrections officer who was being assaulted by a mentally ill inmate"); see also *United States v. Meeks*, 2021 WL 9928774, at *3 (N.D. Ill. Dec. 15, 2021) (recognizing as extraordinary and compelling that the individual saved the life of a fellow inmate who was attempting suicide).

government³⁰; unwarranted disparities among co-defendants that emerged after sentencing³¹; childbirth and inability to bond with a newborn while incarcerated³²; unwarranted reincarceration after release to CARES Act home confinement³³; and psychological problems manifesting in a child upon separation from her incarcerated parent.³⁴

These sorts of circumstances do not relate to any enumerated category that the Commission has proposed. But also, it would not make sense to create an additional category for, say, saving someone's life or being pulled out of RDAP for grand jury service. These are too idiosyncratic. However, an open-ended §1B1.13(b)(6) ensures that sentencing courts are able to identify

³⁰ In the case in which this arose, all documents were filed under seal and cannot be shared. But it is no secret that halfway houses can expose vulnerable individuals to new violence. *See, e.g., 1 wounded in shooting near halfway house in New Orleans*, 4WWL (Feb. 10, 2022), <https://www.wwltv.com/article/news/crime/1-wounded-in-shooting-near-halfway-house/289-e975d60a-c908-48d1-b712-06974e995000>.

³¹ *See United States v. Edwards*, 2021 WL 1575276, at *1–2 (D. Md. Apr. 22, 2021); *see also United States v. Conley*, 2021 WL 825669, at *4 (N.D. Ill. Mar. 4, 2021) (granting relief under § 3582(c)(1)(A) in a stash-house case in which Mr. “Conley was the next to least culpable, yet received the longest prison sentence by double based on outrageous and disreputable law enforcement tactics”). Pre-Sentencing Reform Act, at least one court in a published case reduced a sentence under a predecessor statute—18 U.S.C. § 4205, which permitted the BOP to seek a sentence reduction below an otherwise mandatory-minimum—based on disparities among co-defendants. *See United States v. Diaco*, 457 F. Supp. 371, 376 (D.N.J. 1978).

³² *See United States v. Garcia-Zuniga*, 2020 WL 3403070, at *2–3 (S.D. Cal. June 19, 2020).

³³ *See* Mot. for Emergency Status Hearing, *United States v. Levi*, No. 8:04-cr-235-DKC, doc. 2086 (D. Md. July 2, 2021) (granted by Order, doc. 2086 (July 6, 2021)). It is my understanding that Gwen Levi will testify before the Commission, so the Commission is likely familiar with her case. But for a narrative of what occurred, *see* Kristine Phillips, *Woman who was arrested after missing officials’ phone call while in computer class is headed home*, USA Today (July 7, 2021), <https://www.usatoday.com/story/news/politics/2021/07/06/gwen-levi-headed-home-after-judge-approves-compassionate-release/7877359002/>.

³⁴ *See* Order, *United States v. Ochoa*, No. 18-cr-03945-BAS-1, doc. 70 at 8 (S.D. Cal. Feb. 19, 2021) (“In light of the pandemic, the closed schools, and the serious difficulties L. has been experiencing—namely, his reported deterioration in mental health and suicidal ideation—the Court finds this showing constitutes ‘extraordinary and compelling circumstances’ to support reducing Ms. Ochoa’s sentence to allow her to better care for her minor child.”).

circumstances like these as extraordinary and compelling when they encounter them—in appropriate cases, on an individualized basis.

Of the three options the Commission has presented for the new §1B1.13(b)(6), the third option is the best. The proposed third option gives sentencing courts nothing more than the same meaningful discretion that the Commission has long afforded the BOP.³⁵ It does not preclude relief in circumstances that courts may reasonably find—indeed, have reasonably found—to be extraordinary and compelling reasons for sentence reduction, and its meaning is clear.

Option 1 is overly restrictive. Option 1 is limited to circumstances that are “similar in nature and consequence” to §1B1.13’s enumerated circumstances. Thus, it wrongly suggests that those enumerated categories have entirely covered the kinds of circumstances that may present an extraordinary and compelling basis for sentencing relief. But none of us—including the Commission—is omniscient, nor can we see the future.

The circumstances that supported relief in the idiosyncratic cases bulleted above are not similar in nature to any of the enumerated circumstances in sub. (b)(1) through (b)(5). What’s more, none of them make sense as a new enumerated category, given that they are so unusual and fact-specific.

Beyond what has arisen in actual § 3582(c)(1)(A) cases, it is not hard to imagine hypothetical fact-bound circumstances that, in a particular case, might be an extraordinary and compelling reason for sentence reduction:

- An individual co-owns a grocery store; while he is incarcerated, the other co-owner becomes incapacitated and the store is in danger of shutting down, which would negatively impact not just the defendant and his family but also the neighborhood’s access to fresh, affordable food.
- An individual’s spouse and children are killed in a tragic accident and no one else is able to plan memorials or ensure that the family home is not foreclosed upon, and also the sentencing court wants to encourage the individual to start rebuilding his life post-tragedy.

³⁵ See USSG §1B1.13, comment. (n. 1(D)).

- An individual who suffers from Tourette’s Syndrome has been repeatedly threatened in prison for involuntarily saying offensive things, leading to near-permanent solitary confinement.³⁶
- The BOP erroneously releases an individual from prison who successfully serves his term of supervised release and then lives as a law-abiding citizen in the community for years, before the error is discovered and he is sent back to prison.

Perhaps some of these circumstances will never arise; but it is inevitable that there will be circumstances that are similarly extraordinary, compelling, and utterly distinct from any enumerated category. None of these circumstances would guarantee a sentence reduction, of course, but a court facing such a circumstance should be able to decide whether a reduction is warranted. Option 1 of the proposed options for sub. (b)(6) could be read to categorically bar relief in all these circumstances, regardless of other factors.

Option 2 of sub. (b)(6) could create uncertainty. Option 2 is not necessarily problematic. It is preferable to Option 1: it acknowledges that circumstances that are unrelated to §1B1.13’s enumerated categories could warrant § 3582(c)(1)(A) relief. Also, it evokes § 3582(c)(1)(A)’s legislative history, in which a Senate Report referred to the provision as a “safety valve” that would apply whenever an individual’s circumstances were “so changed” that it would be “inequitable” to maintain the original sentence.³⁷

The Defenders’ concern is that the phrases “changes in the defendant’s circumstances” and “intervening events” do not have established meanings in this context, and so present uncharted litigation territory. Different courts could interpret the phrases differently. And given that the Commission has previously adopted the language of Option 3, there is no need to promulgate a new, untested standard.

If Option 2 is ultimately chosen, we would urge the Commission to adopt the language both outside and inside the brackets, so that courts would understand that sub. (b)(6) covers not only circumstances that are personal to

³⁶ This hypothetical is based on a real situation, where a § 3582(c)(1)(A) motion may be filed in the future.

³⁷ See S. Rep. No. 98-225, at 121 (1983), *see also supra* note 3.

the individual, but also circumstances related to outside events that may impact the propriety of a particular sentence.³⁸ Or, even better, the Commission could simplify Option 2:

The circumstances as understood at sentencing have so changed that it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of his or her sentence.

Also, if the Commission chooses Option 2, it should retain—either within sub. (b)(6) or elsewhere—the clarification that “the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.”³⁹ Indeed, it would be sensible for the Commission to retain this language regardless of sub. (b)(6). Defenders just note that it would be particularly important to retain the language if the Commission chooses Option 2 for sub. (b)(6), given uncertainties with the language. The Commission appears to have deleted this commentary as an accident of restructuring §1B1.13 so that it is no longer dependent on BOP action, not as a substantive policy choice, but some judges may assume otherwise.

Option 3 is the best, and simplest, option. Option 3 respects the courts' ability to exercise discretion under Congress's substantive standard no less than the Commission has always respected the BOP. This is consistent with one of the purposes of the Sentencing Reform Act: to keep sentencing decisions in the judiciary. And Option 3 is not overly restrictive; it is clear; and it will allow courts to transparently grant relief in cases that cry out for relief.

³⁸ The drafters of the Model Penal Code's new sentence modification provision that is modeled, in part, on § 3582(c)(1)(A) have explained that while application of such provision “will usually focus on circumstances having to do with the prisoner, or the prisoner's behavior,” it is meant to be “flexible enough to reach compelling changes of circumstances outside the institution.” *Model Penal Code: Sentencing* § 305.7 (Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmary, Exigent Family Circumstances, or Other Compelling Reasons), comment b. (Am. L. Inst., Proposed Official Draft 2017).

³⁹ USSG §1B1.13 comment. (n. 2).

V. Conclusion

Almost 20 years ago, Justice Kennedy gave a speech in which he criticized the legal profession for “losing all interest” after someone is judged guilty and the appeal ends.⁴⁰ “We have a greater responsibility,” he said; “As a profession, and as a people, we should know what happens after the prisoner is taken away.”⁴¹

To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.⁴²

This really speaks to § 3582(c)(1)(A). When Congress in 1984 abolished parole, it decided that under the new determinate sentencing system, there needed to be a way for courts to address changed circumstances—to find out what happened after someone was taken away to prison—where those circumstances may render the sentence inequitable as imposed. There needed to be an adaptable safety valve: § 3582(c)(1)(A).

In fulfilling its obligation to set policy for sentence reductions under § 3582(c)(1)(A), the Commission has recognized our incarcerated clients’ humanity, and that they are not frozen in time at sentencing—they, their families, and larger forces change during their incarceration. The Commission has proposed a policy statement that would allow § 3582(c)(1)(A) to serve as a meaningful safety valve that can respond to these changes, as Congress intended, when they render the sentence in a particular case inequitable.

Defenders appreciate that you have given us the opportunity to suggest changes and comment on options that would improve and strengthen the Commission’s proposals. At the hearing, I look forward to addressing any questions or concerns Commissioners may have.

⁴⁰ Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.

⁴¹ *Id.*

⁴² *Id.*

**Federal Public and Community Defenders
Comment on First Step Act—Drug Offenses
(Proposal 2)**

March 14, 2023

The attached excerpt of the Statement of Michael Caruso contains Defenders’ comments on Part A (Safety Valve) and Part B (Recidivist Penalties) of Proposed Amendment 2. We supplement those comments to address a question that was raised at the March 7, 2023 hearing about Part B.

Both the primary federal drug statutes, 21 U.S.C. §§ 841 and 960, contain a mechanism that enhances statutory penalties based on proof of certain prior convictions. To establish the existence of these prior convictions, a prosecutor must file and sustain an information pursuant to 21 U.S.C. § 851.

Generally, the drug guidelines do not separately account for convictions that are statutorily enhanced by sustained § 851 informations—the base offense level is determined by the type and quantity of the drug involved, and, if the calculated guideline range is less than an applicable mandatory minimum, the person’s guideline range becomes that mandatory minimum.¹ However, there is one exception: if a person has a triggering prior conviction *and* if the offense resulted in death or bodily injury, the guidelines direct that either §2D1.1(a)(1) or (a)(3) apply, enhancing the base offense level.

Since the First Step Act changed the types of prior convictions that can trigger enhanced statutory penalties, the Commission has proposed to update §2D1.1(a)(1) and (a)(3). The cleanest way to account for these new definitions would be to delete §2D1.1(a)(1) and (a)(3) entirely. This would mirror the way the drug guidelines have always handled cases that have a triggering prior conviction but without death or serious bodily injury. It would ensure that the Commission does not need to continuously update §2D1.1 every time Congress revises the criteria for the triggering priors. And it would prevent the Commission from incorporating a drafting oddity from the First Step Act that produces disproportionate sentences.²

If the Commission chooses to retain these enhanced base offense levels, it must ensure that they are triggered only in cases where a person is subject to enhanced statutory penalties. That is, in cases where a person is convicted

¹ See USSG §§ 2D1.1(a)(5); 5G1.1(b).

² See Statement of Michael Caruso on First Step Act—Drug Offenses and Counterfeit Pills 11–14 (March 7, 2023).

of an offense causing death or serious bodily injury and where an § 851 information establishing a prior conviction has been sustained. Otherwise, even though DOJ has determined as a matter of policy *not* to seek a mandatory sentence of life imprisonment under §§ 841(b)(1)(C) or 960(b)(3) based on a prior felony drug offense conviction, the applicable enhanced base offense level would nevertheless be life imprisonment.³

At the March 7, 2023 hearing, Vice Chair Mate asked what language the Commission could use to better clarify that §2D1.1's enhanced base offense levels should only apply if a person is subject to enhanced statutory penalties. In addition to confirming in the commentary that “offense of conviction” means “the offense conduct charged in the count of the indictment or information of which the defendant was convicted,”⁴ Defenders suggest:⁵

43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and (a) the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, and (b) the defendant is subject to an enhanced statutory penalty on the basis of a prior conviction; that the defendant committed the offense after one or more prior convictions for a similar offense;

³ See *id.* at 13–14 & n.53.

⁴ USSG §1B1.2(a).

⁵ The same suggested language would apply to §2D1.1(a)(3).

The following is excerpted from the March 7, 2023 Statement of Michael Caruso.

* * * * *

I. First Step Act—Drug Offenses

In the First Step Act of 2018 (FSA),¹ Congress began an overdue retreat from the punitive and mandatory sentencing schemes that fueled mass incarceration, entrenched racial disparity, and crippled communities across the country. By expanding safety valve eligibility, reducing mandatory minimum penalties for certain drug offenses, and narrowing some categories of prior convictions that trigger heightened mandatory penalties, Congress took a meaningful step towards a “fairer and smarter” sentencing policy.² Defenders appreciate the Commission’s efforts to incorporate the FSA’s ameliorative policies into the sentencing guidelines.

A. Safety Valve Implementation

In the FSA, Congress expanded the list of statutory offenses for which safety valve relief is available to include 46 U.S.C. §§ 70503 and 70506.³ Congress also expanded the class of persons eligible for relief from an otherwise applicable mandatory minimum penalty by revising § 3553(f)(1)’s criminal history criteria. Before the FSA, only persons with one criminal

¹ See Pub. L. No. 115-391 §§ 401–02, 132 Stat. 5194 (2018).

² 164 Cong. Rec. S7828 (daily ed. Dec. 19, 2018) (statement of Sen. Schumer); see 164 Cong. Rec. S7644 (daily ed. Dec. 17, 2018).

³ See FSA § 402 (codified at 18 U.S.C. §3553(f) (2018)).

history point or less were eligible for safety valve relief.⁴ Now, relief is available for persons who do not have the following:

- (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
- (B) a prior 3-point offense, as determined under the sentencing guidelines; **and**
- (C) a prior 2-point violent offense, as determined under the sentencing guidelines[.]⁵

Since the FSA’s enactment, a circuit conflict has emerged about the proper interpretation of the statute’s criminal history criteria. Specifically, the circuit courts disagree as to whether “and”—as used in § 3553(f)(1)(B)—means “and.” Does “and” work, as it ordinarily does, to create a conjunctive list that requires a person to meet all three criminal history criteria to be ineligible for safety valve relief?⁶ Or does “and” do the work of “or”—creating a disjunctive list that requires a person to meet only one of the three criteria to be ineligible?⁷

Because this disagreement raises a clear conflict among multiple circuit courts on the same important matter,⁸ Defenders and the Department of Justice (DOJ) have asked the Supreme Court to resolve the issue—a

⁴ See 18 U.S.C. § 3553(f)(1) (effective through Dec. 20, 2018).

⁵ 18 U.S.C. § 3553(f)(1)(A)–(C) (emphasis added).

⁶ See *United States v. Jones*, --- F. 4th ---, 2023 WL 2125134, at *1 (4th Cir. Feb. 21, 2023); *United States v. Garcon*, 54 F.4th 1274, 1276 (11th Cir. 2022) (en banc); *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021), *reh’g denied*, 58 F.4th 1108 (9th Cir. 2023) ; see also *United States v. Haynes*, 55 F.4th 1075, 1080 (6th Cir. 2022) (Griffin, C.J., dissenting); *United States v. Palomares*, 52 F.4th 640, 652 (5th Cir. 2022) (Willett, C.J., dissenting); *United States v. Pace*, 48 F.4th 741, 760 (7th Cir. 2022) (Wood, C.J., dissenting in part).

⁷ See *Haynes*, 55 F.4th at 1079; *Palomares*, 52 F.4th at 643; *Pace*, 48 F.4th at 754; *United States v. Pulsifer*, 39 F.4th 1018, 1021–22 (8th Cir. 2022).

⁸ See Sup. Ct. R. 10(a).

request the Supreme Court has just granted.⁹ The Commission's most prudent course of action is to update the guidelines to be consistent with § 3553(f)'s amended requirements and revisit the need to promulgate further amendments after the Supreme Court provides guidance on the proper interpretation of § 3553(f)'s criminal history criteria.

1. The Commission should update §5C1.2 to be consistent with § 3553(f)'s statutory requirements.

Defenders agree with the Commission's proposal to amend §5C1.2(a) and the commentary to reflect the language of § 3553(f) as amended by the FSA.¹⁰

Because Congress expanded safety valve relief to persons outside of Criminal History Category I, Defenders also agree that §5C1.2(b) should be revised.¹¹ At the time Congress created § 3553(f), it directed the Commission to promulgate guidelines to “call for a guideline range in which the lowest possible term of imprisonment is at least 24 months” for individuals otherwise subject to a mandatory minimum term of five years.¹² Section 5C1.2(b) currently specifies that a person with a mandatory minimum sentence of at least five years who meets the safety valve criteria cannot receive an offense level less than 17—which, combined with Criminal History Category I, yields a guideline range of 24 to 30 months' imprisonment. Because persons in higher criminal history categories are now eligible for safety valve relief and offense level 17 produces a guideline range above 24 to 30 months for persons outside criminal history category I, §5C1.2(b) should

⁹ See *Pulsifer v. United States*, --- S.Ct.---, 2023 WL 2227657 (Feb. 27, 2023) (granting certiorari); see also Brief for the United States, at 7, *Pulsifer v. United States*, No. 22-340 (Jan. 13, 2023) (agreeing with petitioner that certiorari to resolve this circuit conflict is “warranted”); *Lopez*, 58 F.4th at 1108 (Nelson, C.J., statement regarding denial of reh'g banc) (“[T]his issue warrants Supreme Court review.”); Per Curiam Order, *United States v. Holroyd*, No. 20-3083 (D.C. Cir. Jan. 23, 2023) (granting the government's unopposed motion to hold appeal in abeyance pending the Supreme Court's disposition *Pulsifer v. United States*, No. 22-340).

¹⁰ Proposed Amendments, 88 Fed. Reg. 7180, 7188 (proposed Feb. 2, 2023) (“2023 Proposed Amendment”).

¹¹ *Id.*

¹² See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 80001(b), 108 Stat. 1796 (codified at 28 U.S.C. § 994 note).

be amended to make clear that the low-end guideline term may be as low as 24 months.

No additional revisions to §5C1.2 are needed to implement the FSA's extension of safety valve relief.

2. The Commission should wait before providing further guidance on the guidelines' safety valve rules.

The Commission seeks comment on whether it should: (1) amend §2D1.1(b)(18) and §2D1.11(b)(6) to ensure that those provisions apply only if a person meets a disjunctive reading of the safety valve criteria; and (2) provide guidance on what constitutes a “1-point,” “2-point,” or “3-point” offense “as determined under the guidelines” for the purposes of §5C1.2.¹³

The Commission should do neither.

a. The Commission should adopt Option 1 and refrain from making substantive changes to §2D1.1(b)(18) or §2D1.11(b)(6).

The Commission should adopt Option 1 of the proposed amendment and keep the triggering criteria for §2D1.1(b)(18) and §2D1.11(b)(6) the same as the criteria for statutory safety valve relief. Option 2—which would result in some circuits having the disjunctive rule for the guidelines but not for statutory safety valve relief—is problematic for several reasons.

First, Option 2 would exacerbate disparity and confusion. Adopting a disjunctive rule for the guidelines would force courts in my district and at least 32 other federal districts to have to juggle two rules instead of one.¹⁴ In our districts, there would be a group of people, who, despite being deemed by Congress to be safety valve eligible, would be denied offense level reductions under the guidelines. Because most base offense levels under §2D1.1 and §2D1.11 are extrapolated from the statutory mandatory minimum

¹³ 2023 Proposed Amendment, at 7188–89.

¹⁴ See *Circuit Map*, U.S. Courts, <https://tinyurl.com/2p8b6hnw> (last visited Feb. 27, 2023) (identifying 33 federal districts in the Fourth, Ninth, and Eleventh Circuits). This number would not include the district courts that adopt a conjunctive reading and are in one of the several circuits that have not yet weighed in on this issue.

penalties—meaning that anyone subject to a mandatory minimum would likely have a guideline range at or above that mandatory minimum—without these offense level reductions, some courts may be disinclined to impose a sentence under the mandatory minimum for some safety valve eligible individuals even though Congress explicitly permitted it.¹⁵

Second, a more restrictive approach is inconsistent with Congress’s original instructions to the Commission when it first enacted the statutory safety valve. At that time, Congress instructed the Commission to promulgate amendments that would “carry out the purposes” and “assist in the application” of the then-newly created § 3553(f).¹⁶ The Commission should not attempt to carry out the purpose of the new criminal history requirement until it is sure what that requirement is. It should be particularly reluctant to promulgate an amendment that deviates from § 3553(f)’s text. Imposing a separate and more stringent rule for safety valve relief under the guidelines now, right as the Supreme Court is taking up a deep and entrenched circuit split, would only frustrate § 3553(f)’s purpose. And forcing some courts to have two rules instead of one would make the application of the safety valve—under both the statute and the guidelines—more difficult.

Third, adopting a rule for guidelines’ safety valve relief that is more restrictive than what Congress intended would be inconsistent with the spirit of the FSA. Congress intended the FSA’s sentencing reforms to be a “first step” to reckoning with our nation’s overharsh sentencing policies. Congress sought reforms that would maintain public safety and “allow judges to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime.”¹⁷

¹⁵ See USSG, App. C, Amend. 782, Reason for Amendment (Nov. 1, 2014); see also *United States v. Molina-Martinez*, 578 U.S. 189 199–200 (2016) (“In the usual case, the systemic function of the selected Guidelines range will affect a defendant’s sentence.”).

¹⁶ Violent Crime Control and Law Enforcement Act of 1994 § 80001(b)(1)(i), (ii).

¹⁷ 164 Cong. Rec. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Nelson).

By maintaining § 3553(f)’s other offense-based restrictions, Congress’s expansion of the criminal history criteria reflects this balanced intent. As Senator Grassley, one of the primary sponsors of the FSA explained:

if you have committed a nonviolent drug offense without the use of a weapon, and you are willing to cooperate with the government, with the prosecution, you will be eligible to be considered for a lower minimum sentence. . . . No mandate on the judge. It’s still up to their discretion [whether to grant relief].¹⁸

Congress would want the Commission to be faithful to this intent, not frustrate the purposes of the FSA.

Finally—while the Defenders’ position is that the Commission should permit litigation over the statutory meaning of § 3553(f) to conclude without weighing in on that litigation by adopting Option 2—if the Commission disagrees with this perspective, it should nonetheless adopt Option 1 because it is the superior reading of § 3553(f). “And” means “and.” This interpretation “harmonizes most canons of statutory interpretation and gives effect to the language Congress used.”¹⁹

Congress “says in a statute what it means and means in a statute what it says there.”²⁰ As the Eleventh Circuit, sitting en banc, recognized: the ordinary meaning of “and” is conjunctive.²¹ When, like in § 3553(f)(1)(B), “and” connects a series of conditions, “and” means that all those conditions

¹⁸ Transcript, *Sens. Grassley, Durbin on ‘smarter’ criminal law, bipartisanship*, PBS News Hour (Dec. 12, 2018), <https://tinyurl.com/ymyu6srp>; see also Senator Mike Lee, *The Truth About the First Step Act*, Nat’l Rev. (Nov. 27, 2018), [shorturl.at/eGUZ7](https://www.nationalreview.com/shorturl.at/eGUZ7) (recognizing that while the FSA would expand safety valve to “allow[] trial judges to avoid harsh mandatory minimums in appropriate cases,” FSA “maintains important limits” on safety valve relief, including requiring a proffer with law enforcement and barring relief for individuals convicted of offenses involving the possession of a firearm or dangerous weapon and offenses resulting in serious bodily injury or death).

¹⁹ *Haynes*, 55 F.4th at 1081.

²⁰ *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992).

²¹ See *Garcon*, 54 F.4th at 1278.

must be met.²² This is true even if the list of conditions is preceded by a negative.²³

While the inquiry ends “[w]hen the words of the statute are clear,” the conjunctive meaning of “and” is bolstered by the canon of consistent usage.²⁴ The word “and” is used conjunctively elsewhere in the same section of the statute. At § 3553(f)(4), Congress used the word “and” to connect each of the five main eligibility criteria for safety valve—requiring all conditions to be met before qualifying for relief.²⁵ So too in § 3553(f)(1). If Congress intended a disjunctive reading, it knew how to achieve that.²⁶

While several circuit courts have interpreted the statute disjunctively, they did so only by ignoring the ordinary meaning of “and” and adopting “a novel reading . . . that appears to have been crafted by the government specifically for this statute to achieve its preferred outcome.”²⁷ The Commission should refrain from following suit.

²² See *id.* (citing *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620–21 (2021)).

²³ See *id.*

²⁴ See *Jones*, 2023 WL 2125134, at *3.

²⁵ See *id.*; see also *Garcon*, 54 F.4th at 1279.

²⁶ See *Garcon*, 54 F.4th at 1279 (holding that because Congress used “or” in § 3553(f)(2) and (f)(4) to ensure that any one of the listed conditions would disqualify a person from safety valve eligibility “we [must] presume [that when Congress chose to use “and” in § 3553(f)(1)(B) it intended] a variation in meaning”). Indeed, the Commission’s decision to propose Option 2—which would replace Congress’s “and” with an “or,” ensuring that the guidelines’ criteria would operate disjunctively—further supports the conclusion that if Congress wanted the statute to be read disjunctively, it would have written it differently. See 2023 Proposed Amendments, at 7189.

²⁷ *Jones*, 2023 WL 2125134, at *5 (quoting *Garcon*, 54 F.4th at 1280). Several of the circuit courts that have interpreted § 3553(f)(1) disjunctively have claimed not to be adopting a disjunctive interpretation of “and” but rather a “conjunctive distributive” reading. See, e.g., *Garcon*, 54 F.4th at 1280 (collecting cases). But whether it is called “disjunctive” or “conjunctive distributive,” the result is the same: these courts are “manufactur[ing] ambiguity” to read “or” for “and.” *Palomares*, 52 F.4th at 652 (Willett, C.J., dissenting); see also *Haynes*, 55 F.4th at 1080 (Griffin, C.J., dissenting) (“The majority’s conclusion, though couched in other terms, is that ‘and’ means ‘or’ in this context.”); *Pace*, 48 F.4th at 761 (Wood, C.J., dissenting in

“In the end, reasonable people can disagree with how Congress balanced the various social costs and benefits in this area.”²⁸ But—particularly in this instance, where courts are free to reject safety valve relief, vary, or depart to arrive at an appropriate sentence—“interchanging ‘and’ and ‘or’ [would be] a mistake.”²⁹ The Commission should take no action at this time and allow the Supreme Court to resolve the statutory interpretation issue—which will then inform what further guidance, if any, the Commission needs to provide.

b. No additional guidance on the criminal history criteria is necessary at this time.

The Commission seeks comment on whether it should provide further guidance on §5C1.2’s criminal history criteria “as determined under the guidelines.”³⁰ The Commission should wait before issuing further guidance on §5C1.2’s criminal history criteria for the same reasons it should wait before amending the criminal history criteria used in §2D1.1(b)(18) and §2D1.11(b)(6). The Commission has not yet seen how courts will treat the amended §5C1.2, and it does not have the benefit of Supreme Court guidance on the correct reading of Congress’s language.

Further, Defenders are unsure of what additional guidance the Commission could offer. The guidelines themselves already set forth the rules for determining whether a prior sentence is assessed criminal history points and how many points a prior sentence will receive.³¹ And Congress already provided the definition of “violent offense,” which the proposed amendments incorporate. Even if additional guidance were needed to apply §5C1.2, this guidance would not extend to § 3553(f). The “Commission’s interpretations of its guidelines do not bind courts interpreting statutes,” even where the

part) (describing the majority’s “distributive reading” as a “disjunctive list in which the final connector must be read as an ‘or’ even though it says ‘and.’”).

²⁸ *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).

²⁹ *Palomares*, 52 F.4th at 651 (Willett, C.J., dissenting). Because courts retain the ultimate authority of whether to sentence even safety valve eligible individuals below the mandatory minimum, it makes little difference that more individuals would be eligible under a conjunctive interpretation than a disjunctive interpretation. See 2023 Proposed Amendments, at 7189.

³⁰ 2023 Proposed Amendments, at 7189.

³¹ See USSG §§4A1.1–4A1.2 and accompanying commentary.

language is similar or identical.³² The circuit conflicts over the definitions of “1-point,” “2-point,” and “3-point” concern the meaning of those terms in § 3553(f) and are inseparable from the statutory interpretation question about whether § 3553(f) should be read conjunctively or disjunctively. The Commission should not weigh in on this statutory interpretation matter, especially given its current posture before the Supreme Court.

B. Recidivist Penalties for Drug Offenses

For most drug convictions pursuant to 21 U.S.C. §§ 841 and 960, the statutory penalties are determined by the quantity and type of drug involved in the offense.³³ But Congress provided enhanced mandatory penalties in three discrete cases: (1) if the drug offense resulted in death or serious bodily injury; (2) if the person committed the instant drug conviction after having sustained one or more certain prior convictions; and (3) if death or serious bodily injury resulted and the offense was committed after certain prior convictions. To trigger an enhanced penalty based on a person’s prior conviction, the government must file an information pursuant to 21 U.S.C. § 851 that establishes the qualifying prior.

In the FSA, Congress both narrowed and expanded the types of prior convictions that could trigger these enhanced statutory penalties for the top two quantity-based offenses—§§ 841(b)(1)(A) and (b)(1)(B), and 960(b)(1) and (b)(2). It narrowed the types of prior drug convictions that could trigger an enhanced penalty by replacing “felony drug offense” with the more tailored “serious drug felony.”³⁴ And it added a new class of triggering prior convictions: “serious violent felon[ies].”³⁵ It did not, however, amend the types of prior convictions that trigger enhanced penalties under the least serious provisions of the statutes (such as §§ 841(b)(1)(C) and 960(b)(3))—for those, a “felony drug offense” is still enough.

³² *United States v. Lane*, 252 F.3d 905, 907 (7th Cir. 2001) (citing *Neal v. United States*, 516 U.S. 284, 294 (1996)).

³³ *See, e.g., Chapman v. United States*, 500 U.S. 453, 465 (1991) (describing the current statutory penalty scheme as “assign[ing] more severe penalties to the distribution of larger quantities of drugs”); *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) (describing the “weight-driven” scheme).

³⁴ FSA § 404(a)–(b).

³⁵ *Id.* § 401(a)(1).

Section 2D1.1(a)'s base offense levels generally mimic Congress's statutory penalty scheme. Sentencing courts determine most base offense levels from the type and quantity of drug involved in the offense.³⁶ However, §2D1.1 currently provides for enhanced base offense levels in two instances: (1) if "the offense of conviction establishes that death or serious bodily injury resulted;"³⁷ and (2) if "the offense of conviction establishes that death or serious bodily injury resulted;" *and* the individual "committed the offense after one or more prior convictions for a similar offense."³⁸

Notably, there is no heightened base offense level for offenses that receive enhanced statutory penalties only for prior convictions. These cases are assigned a base offense level based on the quantity and type of drug involved, and, if, after the normal operation of the guidelines, the advisory range is less than any applicable mandatory minimum, the guideline range is elevated to meet the mandatory minimum.³⁹

1. The Commission should delete §2D1.1(a)(1) and (a)(3) and treat all cases with proven § 851 informations the same.

The Commission does not need to promulgate the proposed amendment to account for the new FSA definitions. Instead, the Commission should simply remove the enhanced base offense levels that refer to prior convictions altogether and allow all cases where a triggering prior conviction was statutorily proven to be treated the same:

³⁶ See USSG §2D1.1(a)(5).

³⁷ *Id.* §2D1.1(a)(2), (a)(4).

³⁸ *Id.* §2D1.1(a)(1), (a)(3).

³⁹ See *id.* §5G1.1(b).

(a) Base Offense Level (Apply the greatest):

- ~~(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or~~
- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- ~~(3) 30, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or~~
- (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

Cases are not assigned to §2D1.1(a)(1) and (a)(3) often—only 107 cases in the last five years.⁴⁰ But even for the relatively small number of cases that do exist, maintaining §2D1.1(a)(1) and (a)(3) is unnecessary. In cases where the offense of conviction established that death or serious bodily injury resulted, an enhanced base offense level at §2D1.1(a)(2) or (a)(4) would apply. If, in those cases, the government also established a triggering prior conviction through an § 851 information, then the drug statutes would direct the penalty. For convictions under §§ 841(b)(1)(A)–(C) and 960(b)(1)–(3), that penalty would be mandatory life, making any enhanced base offense level superfluous. For the less common convictions under §§ 841(b)(1)(E) and 960(b)(5), the statute would enhance the maximum penalty to 30 years. If the prior conviction established by the § 851 information does not sufficiently

⁴⁰ See USSC *Individual Datafiles* FY 2017 – 2021; USSC, *Enhanced Penalties for Federal Drug Trafficking Offenders Datafiles* FY 2017–2021.

increase the guideline range by raising a person’s criminal history, a court could depart pursuant to §4A1.3 or vary.

Deleting §2D1.1(a)(1) and (a)(3) would also ensure a more uniform application of the guidelines in cases involving § 851 informations. The Commission deliberately chose the §2D1.1 enhanced base offense levels to be triggered by the “*offense of conviction*,”⁴¹ which the guidelines define as “the offense conduct charged in the count of the indictment or information of which the defendant was convicted.”⁴² The Commission could have tethered §2D1.1’s enhanced base offense levels to “the *offense*”—which includes both “the offense of conviction and all relevant conduct under §1B1.3”⁴³—but it did not do so. This choice was deliberate: In 1989, the Commission explained that it chose to use “offense of conviction” so that the enhanced base offense levels “apply only in the case of a conviction under circumstances specified in the statutes cited.”⁴⁴

But while §2D1.1 explicitly requires the offense of conviction to justify its enhanced base offense levels, some courts have been assigning §2D1.1(a)(1) and (a)(3)’s enhanced base offense levels even when 21 U.S.C. § 851 informations have not established a prior conviction triggering an enhanced statutory penalty.⁴⁵ In fact, of the 107 individuals who were assigned enhanced base offense levels under §2D1.1(a)(1) or (a)(3) in the last five years, only 30 were subject to § 851 informations that the government did not withdraw prior to sentencing—meaning in only 30 cases did the

⁴¹ USSG §2D1.1(a)(1)–(4).

⁴² *Id.* §1B1.2(a).

⁴³ USSG §1B1.1 cmt. n.1(I).

⁴⁴ USSC App. C, Amend. 123, Reason for Amendment (Nov. 1, 1989) (replacing “an offense that results” in §2D1.1(a)(1) and (a)(2) base offense levels with “offense of conviction establishes”); *see* USSC App. C, Amend. 727, Reason for Amendment (Nov. 1, 2009) (adding §2D1.1(a)(3) and (a)(4) base offense levels “that are comparable to the alternative base offense levels at subsections (a)(1) and (a)(2)”); *see also United States v. Lawler*, 818 F.3d 281, 284 (7th Cir. 2016) (explaining that “offense of conviction” does not include “relevant conduct” and collecting cases confirming same).

⁴⁵ *See, e.g., United States v. Sica*, 676 F. App’x 81, 86 (2d Cir. 2017) (collecting cases that indicate a split as to whether a person must be subject to an enhanced statutory penalty to be assigned an enhanced base offense level under §2D1.1(a)).

“offense of conviction” establish that the enhanced base offense level was warranted.⁴⁶

Deleting §2D1.1(a)(1) and (a)(3) also avoids incorporating into the guidelines an FSA drafting oddity that produces disproportionate sentences. In the FSA, Congress sought to “restrict” easily triggered mandatory minimum sentences by replacing the all-inclusive “felony drug offense”⁴⁷ with “serious drug felony” and “serious violent felony.”⁴⁸ “Serious drug felony” is much narrower than “felony drug offense.” To constitute a “serious drug felony,” an offense must have a maximum term of imprisonment of at least 10 years.⁴⁹ A person must also have served more than 12 months on the offense and must have been released from imprisonment for the prior conviction within 15 years of commencing the instant offense.⁵⁰ Additionally, to qualify as a “serious drug felony,” simple possession is not enough—a prior state offense must “involve[] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.”⁵¹

While Congress swapped out “felony drug offense” from the mandatory minimum penalties in 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B), 960(b)(1), and 960(b)(2) (the subsections applicable to the most serious trafficking offenses), it failed to do the same in the remainder of these statutes, including in §§ 841(b)(1)(C) and 960(b)(3).⁵² There is no rational explanation for this omission, and its consequences are severe: it requires a lesser showing to

⁴⁶ See USSC Individual Datafiles, *supra* note 40.

⁴⁷ “Felony drug offense” includes any prior drug offense—including simple possession—so long as the offense is punishable by a term of imprisonment exceeding one year and “prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.” 21 U.S.C. § 802(44).

⁴⁸ FSA § 401(a)–(b) (section entitled “Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies”).

⁴⁹ See 21 U.S.C. § 802(57) (“serious drug felony” incorporates definition of serious drug offense “described in [18 U.S.C. § 924(e)(2)]; 18 U.S.C. § 924(e)(2) (offense only qualifies as a “serious drug offense” if it has a maximum term of imprisonment of ten years or more).

⁵⁰ See 21 U.S.C. § 802(57).

⁵¹ 18 U.S.C. § 924(e)(2)(A)(ii).

⁵² Compare 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), and *id.* § 960(b)(1), (b)(2), with *id.* § 841(b)(1)(C), and *id.* § 960(b)(3).

trigger mandatory life under §§ 841(b)(1)(C) and 960(b)(3) than it does to trigger mandatory life under the more serious §§ 841(b)(1)(A) and (b)(1)(B) and 960(b)(1) and (2). This anomaly means that a person with a less serious criminal history, who traffics in a lower quantity of drugs, would be subject to a mandatory life penalty, but if that same person was convicted of selling more drugs, the mandatory life penalty would not be triggered.

This irrational scheme invites prosecutors to charge a less serious offense to obtain a steeper penalty. While DOJ has rightfully agreed not to do so,⁵³ this concession means little if §2D1.1(a)(1)—as currently proposed—prescribes the same enhanced base offense level for persons violating § 841(b)(1)(C) after sustaining a less restrictive “felony drug offense” as it does for persons violating § 841(b)(1)(A) or (b)(1)(B) after sustaining a “serious drug felony.”

2. At minimum, the Commission must ensure §2D1.1(a)’s base offense levels are only triggered by the statutory offense.

Removing subsections (a)(1) and (a)(3) from §2D1.1 is the simplest approach to account for the FSA and still ensure uniform and proportionate application of the guideline. If the Commission is unwilling to remove §2D1.1(a)(1) and (a)(3), however, it must ensure that the base offense levels may only be applied if the “offense of conviction” establishes the aggravating facts. Swapping out “similar offense” for the statutory terms—as is currently proposed—is not enough. Instead, the Commission should amend the guideline to make clear that qualifying prior convictions must have been statutorily proven through an § 851 information (and death or serious bodily injury must have been charged and proven beyond a reasonable doubt).

⁵³ See U.S. Dep’t of Justice, *First Step Act Annual Report* 50 (Apr. 2022), <https://tinyurl.com/22b4hm6a> (“[T]o promote consistency in sentencing under Sections 841(b)(1) and 960(b), the Department has determined as a matter of policy not to seek a mandatory sentence of life imprisonment under Section 841(b)(1)(C) or 960(b)(3) unless a defendant’s prior conviction meets the statutory definition of a ‘serious drug felony’ or ‘serious violent felony.’”).

**Federal Public and Community Defenders
Comment on Firearms Offenses (Proposal 3)**

March 14, 2023

Table of Contents

Introduction.....	1
I. PART A: Implementing the Bipartisan Safer Communities Act (“BSCA”)	2
A. Answers to the Commission’s questions at the recent hearing establish that it should not promulgate a reactive, across-the-board increase to the severity of the firearm guidelines.	2
1. What should the Commission study before implementing the Congressional directive?	2
2. What does prior Commission research tell us about people who are sentenced under §2K2.1?	3
3. Does BSCA require the Commission to raise penalties across §2K2.1?	5
B. The Commission should expand the reduction for mitigating factors.	8
1. The proposed reduction should be increased.	10
2. Any mitigating-factors reduction should adopt BSCA’s plain-language requirement to consider “any . . . other mitigating factors.”	11
3. The proposed limiting criteria should be broadened.	12
C. The criminal-affiliation enhancement should be narrow.	15
1. Gang affiliation is often based on inaccurate information and is not a reliable proxy for culpability.	15
2. The proposed criminal-affiliation enhancement improperly sweeps beyond the specifically enumerated statutes in the BSCA directive.	18
3. The Commission should require the government to prove criminal affiliation by clear and convincing evidence and bar reliance on gang databases alone to prove criminal affiliation.	19

II. PART B: Mens Rea and Privately Manufactured Firearms	20
A. The Commission should add a mens rea requirement to §2K2.1(b)(4).	20
1. The Importance of Mens Rea.	21
2. The §2K2.1(b)(4) strict-liability enhancements disparately impact Black people.	23
3. The strict-liability standard for (b)(4) does not serve a legitimate purpose of sentencing.	24
4. The Commission has never provided a policy reason or rationale to justify the lack of scienter in §2K2.1(b)(4).	25
B. The Commission should not unreasonably elevate sentences in cases involving privately made firearms.	27
1. An enhancement for PMFs would not serve a legitimate purpose of sentencing.	28
a. PMFs are not illegal under federal law.	29
b. PMFs are not inherently more dangerous than serialized firearms.	30
c. The difficulty in tracing PMFs does not implicate a legitimate purpose of sentencing.	31
2. The Commission should gather data before expanding §2K2.1(b)(4) penalties.	33
III. PART C: Other Changes to §2K2.1	34

This comment explains Defenders' position on firearms issues not addressed in prior written testimony (attached), responds to specific questions raised by the Commission at the hearing on March 7, 2023, and addresses proposals advanced by the Department of Justice (DOJ) and other stakeholders in their submissions and testimony.

As explained in our written testimony, at the hearing, and in this comment, Defenders take the following positions on each Part of the proposed Firearms Offenses amendment¹:

- **Part A**: Defenders oppose changes proposed in Options 1 & 2 and urge the Commission to study firearms offenses carefully before increasing penalties in USSG §2K2.1. If the Commission nonetheless proceeds, Defenders favor the narrower changes proposed in Option 1. Defenders encourage the Commission to account for mitigating factors by following the language Congress provided in the BSCA directive. And, in light of racial disparities and inaccuracies in gang databases, we urge the Commission to implement the crime-affiliation enhancement cautiously.
- **Part B**: Defenders encourage the Commission to add a mens rea requirement to §2K2.1(b)(4) and oppose adding privately made firearms (PMFs) to the enhancement. In addition, the Commission should reject DOJ's request for a rebuttable presumption of mens rea in §2K2.1(b)(4).
- **Part C**: Defenders oppose any unstudied expansions to §2K2.1 and urge the Commission to carefully review each of the five issues it identifies in this part before increasing the punitiveness of the gun guideline.

¹ The proposed Firearms Offenses amendment is a three-part proposal. Part A proffers two potential responses to the Bipartisan Safer Communities Act ("BSCA"): Option 1 would add references to new sections 932 and 933 of Title 18 and revise the firearms trafficking enhancement at §2K2.1(b)(5); Option 2 would restructure base offense level provisions across §2K2.1 for a wide range of firearms offenses. Part B seeks comment on whether a mens rea standard should be added to the strict-liability §2K2.1(b)(4) enhancement and whether privately manufactured firearms ("ghost guns") should be added to the list of characteristics that trigger the enhancement. Finally, Part C provides five additional issues for Comment. *See* 2023 Proposed Amendments, 88 Fed. Reg. 7180, 7190–98, 2023 WL 1438480 (Feb. 2, 2023) ("2023 Proposed Amendments").

I. PART A: Implementing the Bipartisan Safer Communities Act (“BSCA”)

A. Answers to the Commission’s questions at the recent hearing establish that it should not promulgate a reactive, across-the-board increase to the severity of the firearm guidelines.

At the March 2023 hearing on Firearms Offenses, the Commissioners identified several areas of particular interest. This section briefly addresses those questions.

1. What should the Commission study before implementing the Congressional directive?

At the hearing, there was significant discussion of the need for additional study and data relating to firearms offenses. Defenders appreciate the Commission’s interest in what potential research could inform its implementation of the BSCA directive² and strongly recommend it undertake a careful review. That review should examine at least the following issues:

- the Commission should collect data about how the new BSCA statutes, §§ 932 and 933, are utilized. Many districts have yet to see new prosecutions under these statutes, and there is no public sentencing data yet available;
- the Commission should review relevant Commission and other data and research to understand the significant race, gender, and ethnic disparities in arrest, prosecution, and sentencing of federal firearm offenses. A special coding project could help better differentiate disparities that arise prior to and during sentencing;
- the Commission should undertake special study of straw purchasers without significant criminal histories, in order to identify the most common mitigating factors in such cases; and

² The Bipartisan Safer Communities Act, Pub. L. 117-159 § 12004(1)(a)(5) (2022).

- the Commission should assess how it can mitigate the well-documented problems with inaccuracies and racial profiling in gang identification tools, like databases.

Defenders understand that the Commission is obligated to respond to the directive in BSCA. But that directive does not include a timeline, affording the Commission the opportunity to tread cautiously. The Commission could use the information it obtains from its review to tailor changes to §2K2.1 to recommend sentences sufficient, but not greater than necessary to serve the statutory purposes of sentencing. Taking care to do this could avoid further entrenching the pernicious racial disparities already embedded in the firearms guideline. If such tailoring is not possible, and implementation of the directive would be inconsistent with the Commission’s obligation to “carry out an effective, humane, and rational sentencing policy,”³ the Commission could advise Congress about the need for changes to the statute.⁴

2. What does prior Commission research tell us about people who are sentenced under §2K2.1?

The Commission’s past research does not provide insight into the issues listed above. Nor does it tell us about the impact of sentence length on recidivism. To date, the Commission’s firearms recidivism research has been inconclusive as to the impact of sentence length on recidivism. The Commission’s 2021 firearms recidivism report found that “the data did not show a clear relationship between sentence length and recidivism.”⁵

³ 28 U.S.C. § 995(a)(20).

⁴ *See id.*

⁵ USSC, *Recidivism of Federal Firearms Offenders Released in 2010* 30 (2021), <https://bit.ly/3ZZpGiQ>. Note that “firearms offenses” includes a broader class of offenses beyond §2K2.1. While Defenders have hesitations about the methodology used in many Commission recidivism reports, *see* Tina Woehr & Allison Bruning, *Limitations of the Commission’s ‘Length of Incarceration and Recidivism’ Report* 35 Fed. Sent’g Reporter 43–46 (Oct. 2022), <https://bit.ly/3ZEB02y>, the 2021 Firearms Recidivism report found that specifically for §2K2.1 cases, the group with the *shortest* imprisonment lengths (<24 months) actually had a *lower* rearrest rate than groups with sentences between 24 to 59 months, 60 to 119 months, and 120 months or more. *Id.* at 42. This held true for both the prohibited class and prohibited weapon groups.

Similarly, in 2019, the Commission concluded that the association between sentence length and rate of recidivism among both firearms and non-firearms offenders was not clear.⁶

During the hearing, several Commissioners asked whether longer sentences would at least protect the community by taking dangerous people off the street. The answer is no. Low-level gun possessors, traffickers and straw purchasers are fungible.⁷ And incapacitation has been shown to have negative public-safety consequences and criminogenic effects. Scholar and former USSC Commissioner Rachel Barkow has explained that “any incapacitation benefit that we get while someone is incarcerated has to be weighed against the likelihood that the person might be a greater danger to society when he or she comes back out because the longer that person spends in prison, the more likely it is that his or her reentry will be a bumpy one.”⁸ As Congress acknowledged when it passed the First Step Act, “the vast majority of federal prisoners will one day be released from BOP custody,” and

⁶ USSC, *Recidivism Among Federal Firearms Offenders* 21 (2019), <https://bit.ly/426q5Sr>. For firearms offenses, this report found that the rearrest rate was actually lower (64%) for people sentenced to the shortest terms of imprisonment (<24 months) compared to a rearrest rate of 74% for those who were sentenced to before 24–59 months and a rearrest rate of 72% for those sentenced to between 60–119 months. For those receiving a sentence of ≥120 months, the rearrest rate did drop to 56%, but the report noted that “[l]onger sentences result in older ages at release, which may be one factor contributing to the lower recidivism rate for this group.” *Id.* at 21. And as was true in 2021, the Commission found that specifically for §2K2.1 cases, for both the prohibited-class and prohibited-weapons groups, the rearrest rates appear to be the lowest for those receiving the lowest sentences (up to 24 months), and rise with sentence length, with the highest rearrest rates appearing in the group receiving the highest sentences (120 months or more). *Id.* at 32.

⁷ See Brady United Against Gun Violence, *Comments on Consideration of Possible Amendments to § 2K2.1* 3 (Oct. 17, 2022) (“Those individuals lower down in the supply chain are often fungible, whereas the larger players (organized distribution rings, dealers, etc.) are not.”) (“Brady Comment”); see also Carrie Johnson, *Lawmakers Rip Gun-Tracking Effort In Mexico*, NPR (June 24, 2011), <https://n.pr/3LfVPYu> (quoting former prosecutor’s assessment that “when you’re talking about straw buyers, or straw purchasers, you’re talking about people who are very fungible You can arrest and charge and convict a hundred straw buyers and you’re not going to have an impact on the organization, you’re not going to help public safety.”).

⁸ Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* 46 (2019).

it is in “the fiscal interest of the government to reduce recidivism [and] in the public safety interest as well[.]”⁹ Avoiding unnecessary incarceration is a critical part of meeting this goal.

3. Does BSCA require the Commission to raise penalties across §2K2.1?

No. DOJ has advanced two arguments in favor of a global increase in penalties across §2K2.1. Neither is persuasive.

Proportionality. DOJ argues that principles of proportionality require across-the-board increases in §2K2.1. Not so.¹⁰

First, DOJ argues that, without a global increase, prohibited gun possessors will get lower sentences than straw purchasers.¹¹ This outcome is unlikely. The vast majority of prohibited-person offenses are predicated on a prior felony conviction, with over half of individuals sentenced under §2K2.1 having a criminal history category IV, V, or VI.¹² This reality, in addition to the multiple ways that the gun guideline counts criminal history, makes it unlikely that gun-possessors would be punished less harshly than straw purchasers under Option 1.

DOJ also urges the Commission to treat straw purchasers and prohibited persons alike, as it did before BSCA’s enactment. But BSCA specifically rejects such an approach. Gun-safety advocates who were involved with Congress’s enactment of BSCA have testified that Congress

⁹ H.R. Rep. No. 115-699, at 22 (2018).

¹⁰ See Statement of Michael Carter on Proposed Firearms Amendments 24–26, <https://bit.ly/42kouIO> (“Statement of Michael Carter-Firearms”).

¹¹ See Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sentencing Comm’n 3 (Feb. 27, 2023) (“DOJ Written Testimony for March 2023 Hearings”) (“[U]nder Option 1, a felon who asks a confederate to purchase a gun on his behalf would face a lower Guidelines range than the confederate who purchased the gun.”).

¹² USSC, *What Do Federal Firearms Offenses Really Look Like?* 19 (2022), <https://tinyurl.com/6jsusejv> (“2022 Firearms Report”). During fiscal year 2021, most people sentenced under §2K2.1 who were prohibited from possessing a firearm were prohibited because of a prior felony conviction (79.0%). *Id.* at 24.

“deliberately sought to shift federal enforcement further upstream in the illegal trafficking pipeline.”¹³

For this reason, the Commission should reject DOJ’s suggestion that §2K2.1(b)(5), as revised in Option 1, be further amended to apply to any prohibited person who receives weapons through a straw-purchasing or trafficking arrangement.¹⁴ As courts have recognized and we discuss below, the nature of prohibited-possession offenses requires, in general, that the accused has participated in the illicit-firearms market.¹⁵ DOJ’s proposed amendment would contravene Congressional intent by causing §2K2.1(b)(5) to potentially apply in nearly all prohibited-person offenses.

Similarly, DOJ’s argument that the Commission should increase existing base offense levels (BOLs) for 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A)—the statutory provisions used to prosecute straw purchasers before BSCA—is not persuasive. Those statutes have historically been used to prosecute low-level individuals, not the upstream firearms traffickers Congress targeted in BSCA.¹⁶ Indeed, Congress specifically created new sections 932 and 933 to target those traffickers because it was dissatisfied with the limitations of the straw-purchasing offenses on the books.¹⁷ BSCA does not require an increase in the BOLs applicable to §§ 922(a)(6) and 924(a)(1)(A).

¹³ Statement of Rob Wilcox, Legal Director, Everytown for Gun Safety, on behalf of the Zimroth Center/NYU Law Working Group before the U.S. Sentencing Comm’n for March 2023 Firearms Offenses Hearing 1 (Mar. 7, 2023), <https://bityl.co/HazK> (“Zimroth Statement”).

¹⁴ See DOJ Written Testimony for March 2023 Hearings, *supra* note 11, at 3–4.

¹⁵ See *infra* at Part II(A)(3).

¹⁶ See Hearing at 2:38:08–2:29:27 (Testimony of Rob Wilcox, Legal Director, Everytown for Gun Safety) (testifying that the elements of these statutes necessarily focus on individual acts, rather than organizations and upstream distributors); see also Comment from The Peter L. Zimroth Ctr. on the Admin. of Crim. L., *Re: Proposed Priorities for the 2022-23 Amendment Cycle* 14-15 (Oct. 17, 2022) (“Zimroth Comment”), <https://tinyurl.com/yw95dthx>; Federal Defenders, *Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2014* 41-42 (Jul. 15, 2013).

¹⁷ See Hearing at 2:28:08–2:29:27 (Testimony of Rob Wilcox).

Directive. In its submission, DOJ leans heavily on the “sufficient to deter” language in the BSCA directive to argue in favor of global increases to §2K2.1’s BOLs, including a 4-level increase to straw-purchasing penalties.

But this approach would read the “sufficient to deter” language out of context. Indeed, Senators Booker and Murphy wrote to the Commission in December to explicitly caution against interpreting the “sufficient to deter” language “more broadly than intended.” They explained:

We are aware that the Department of Justice has relied on the ‘sufficient to deter’ language to recommend that the Commission adopt a four-level increased base offense level for a variety of offenses. We urge the Commission to reject that approach here. Such a recommendation would be contrary to the intent of the BSCA which *seeks to hold accountable those most culpable in the firearm trafficking chain*, and it would ignore the Commission’s role and process—to review data and devise evidence-based sentencing policies that ‘reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.’¹⁸

Nevertheless, in its February 27, 2023, submission and in its testimony to the Commission, DOJ doubles down on its October recommendation, again relying heavily on an out-of-context reading of the “sufficient to deter” language to urge a four-level BOL increase for straw purchasing.¹⁹ Such an increase, they explain, would take non-custodial sentences off the table and ensure imprisonment for all straw purchasers.

But the “sufficient to deter” language does not appear in isolation. It is included in the first clause of a sentence that also instructs the Commission to consider

¹⁸ Letter from Sens. Cory Booker & Christopher Murphy to Hon. Carlton W. Reeves, Chair, United States Sentencing Comm’n 1 (Dec. 5, 2022), <https://tinyurl.com/n9s52veb> (“Booker & Murphy Letter”) (citations omitted) (emphasis added).

¹⁹ DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 5.

an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities *and* reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.²⁰

Congress has thus directed the Commission to balance deterrence and mitigation in amending the firearms guideline. According to Congress’s directive, the Commission’s amendments should reflect both the need for deterrence and the general reality that many straw purchasers have significantly mitigating backgrounds. DOJ’s myopic focus on the “sufficient to deter” clause would disrupt the careful balance Congress wants reflected in the BOL for straw purchasing itself, preventing the guidelines from distinguishing between the most culpable straw purchasers and the lowest-level individuals with the most fungible roles.

B. The Commission should expand the reduction for mitigating factors.

Defenders urge the Commission to refrain from amending §2K2.1 until it has completed a careful review and study. Other commentators and two lead architects of BSCA agree.²¹ However, if the Commission chooses to move forward, it should broaden its proposed mitigating-factors amendment to better track the plain language of the BSCA directive.

As a general principle, and to counter the “one-way upward ratchet” of the guidelines, the Commission should prioritize giving courts the tools to decrease sentences when doing so is just.²² Congress recognized the need to consider mitigating factors carefully in many straw purchasing cases, and included in the BSCA a directive to “reflect the intent of Congress that straw

²⁰ BSCA § 12004(1)(a)(5) (emphasis added).

²¹ See Booker & Murphy Letter, *supra* note 18 at 1; Testimony of Marlo P. Cadeddu, Fifth Circuit Representative, Practitioners’ Advisory Group 3 (Mar. 7, 2023), <https://bit.ly.co/Hazr> (“PAG Testimony”).

²² Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319 (2005).

purchasers without significant criminal histories receive sentences that . . . reflect the defendant’s role and culpability, and *any* coercion, domestic violence survivor history, or *other mitigating factors*.”²³

In their December letter, Senators Booker and Murphy urged the Commission to “interpret[] the instruction to consider ‘other mitigating factors’ broadly.”²⁴ They warned that failure to do so could result in excessive sentences and “disproportionately impact low-income people and people of color.”²⁵ A coalition of gun-safety researchers, policymakers, lawyers, and advocates have also urged the Commission to apply this aspect of the directive broadly, in order to address “past racial disparities in sentences and to ensure that these disparities do not persist going forward.”²⁶

Notwithstanding these powerful statements in support of a robust mitigating-role reduction, the Commission proposes to implement this directive narrowly, by adding a new subsection to §2K2.1 that would authorize a small one- to two-level reduction under limited circumstances. This crabbed approach would undermine Congressional intent and fail to implement the plain language of the directive.

Most problematically, the proposal omits the directive’s catch-all instruction to consider “any . . . other mitigating factors” and introduces limitations that do not align with the broad categories identified in the BSCA. These harms are compounded by the Commission’s proposal to make

²³ BSCA § 12004(a)(1) (emphases added).

²⁴ Booker & Murphy Letter, *supra* note 18 at 2; *see also* Letter from Sen. Christopher Murphy to Hon. Merrick Garland, Att’y Gen., Regarding DOJ’s Implementation of BSCA 3 (Sept. 12, 2022), <https://bit.ly/3SSmnaD> (“As the Department implements these new criminal provisions, it is incumbent on Department leadership to ensure that these new tools and power do not come at the expense of historically over-policed and over-prosecuted communities. The drafters of the BSCA included an explicit directive to the United States Sentencing Commission to consider mitigating factors when developing sentencing guidelines to ensure that there are less severe criminal consequences for individuals who have been coerced to participate in a gun trafficking scheme, are themselves victims of domestic abuse, or have a limited role or culpability.”).

²⁵ Booker & Murphy Letter, *supra* note 18 at 2.

²⁶ Zimroth Statement, *supra* note 13 at 10.

the criteria conjunctive, to delete the lone departure provision in §2K2.1, and to limit the scope of the reduction to no more than two levels.

This approach is wrong-headed. The Commission should not omit the catch-all language from the BSCA. Nor should it hem in the mitigating-factors directive with limitations found nowhere in the statutory text. Further, the Commission should not compound the harms of its upward-ratchet response to the BSCA by deleting §2K2.1's sole departure provision.²⁷ Instead, it should expand that departure to ensure that it reflects Congressional intent to "broadly" incorporate consideration of mitigating factors at straw-purchaser sentencings.²⁸

1. The proposed reduction should be increased.

The BSCA does not quantify the extent of reduction that a person presenting mitigating circumstances should receive, yet both proposals to amend §2K2.1 would create a specific offense characteristic for just a 1- or 2-level reduction. This proposal is much smaller than the substantial increases the Commission proposes to address aggravating factors (between two and four levels for people with certain criminal affiliations).

Defenders agree that a new specific offense characteristic is the appropriate mechanism to fulfill this directive but urge the Commission to adopt a greater reduction.²⁹ A 1- to 2- level reduction would be inadequate to perform the crucial function of "avoiding unnecessarily long sentences for people with less culpability or without significant criminal histories" as Congress intended.³⁰ And, as gun-safety advocates have explained, "the Commission should make mitigation broadly available, both to address past racial disparities in sentences and to ensure that these disparities do not persist going forward."³¹

²⁷ See USSG, *List of Departure Provisions* (indicating that §2K2.1 cmt. n.15 is the sole downward departure in §2K2.1).

²⁸ Booker & Murphy Letter, *supra* note 18 at 2.

²⁹ Cf. PAG Testimony, *supra* note 21 at 4.

³⁰ Booker & Murphy Letter, *supra* note 18 at 2.

³¹ Zimroth Statement, *supra* note 13 at 10.

2. Any mitigating-factors reduction should adopt BSCA’s plain-language requirement to consider “any . . . other mitigating factors.”

Consistent with Senators Booker and Murphy’s explanation that Congress intended to equip courts with significant discretion to craft sentences that reflect a range of mitigating factors, BSCA requires the consideration of “any . . . other mitigating factors.”³² Yet the Commission’s proposed reduction fails to reflect this language entirely. The Commission should remedy this omission by adding this language to its proposed reduction.

Additionally, we encourage the Commission to retain, but amend, Application Note 15, §2K2.1’s sole departure provision.³³ Application Note 15 should be retained because it includes two offenses that do not completely overlap with those designated by the Commission as “straw purchasing” offenses—§§ 922(a)(6) and 924(a)(1)(A). These criminal provisions can encompass people who deserve consideration for a downward departure. Take, for example, a person who is threatened, and purchases a firearm for protection, but lists an outdated address on the ATF Form 4473. They could qualify for the departure in Application Note 15 as currently written. But because this individual did not commit a straw purchase or trafficking offense, they would not be eligible for the proposed reductions provided in Option 1 at subsection (b)(9) and in Option 2 at (b)(10).

Application Note 15 is also an additional vehicle for ensuring that §2K2.1 fully reflects Congressional intent to provide appropriate sentences for people who present compelling mitigation, which could complement Defenders’ preferred approach of a mitigating-factors reduction. To accomplish this, the Commission should amend Application Note 15 to direct courts to consider a downward departure to a non-custodial sentence in cases where warranted by “other . . . mitigating factors.” This would keep with Congressional intent to equip courts with significant discretion to respond to mitigating factors in this context.

³² BSCA § 12004(a)(1).

³³ See USSG, *List of Departure Provisions*.

3. The proposed limiting criteria should be broadened.

The language of BSCA instructs the Commission to consider a broad range of mitigating circumstances. Instead of tracking this language, however, the Commission proposes general motive-, compensation-, and culpability-based limitations on the availability of this reduction, which appear nowhere in BSCA's text. It also proposes to proscribe the reduction's applicability by making the criteria conjunctive. The Commission has asked if these limiting criteria should be changed or framed differently and if the criteria should be disjunctive. The answer to both questions is yes.

a. The Commission should adopt the language of the directive instead of unduly restricting the availability of the mitigating-factors reduction.

The Commission proposes three limiting criteria for the proposed reduction, each substantially narrower than the language in the directive to which they appear to correspond.

Motive. The BSCA directive instructs the Commission to account for straw purchasers who have endured “*any . . . coercion*” or experienced “*any domestic violence survivor history. . .*”³⁴ The Commission's proposal, however, limits the availability of its reduction to people “motivated by an intimate or familial relationship or by threats or fear to commit the offense.” This proposal ignores “domestic violence survivor history” entirely. And it reduces coercion to “threats or fear,” when—particularly in the domestic-violence context—coercion extends more broadly to encompass other forms of structural control and manipulation. Instead of placing a restrictive gloss on BSCA's mitigating-factors directive, the Commission should revert to the statutory language.

Compensation. BSCA says nothing about limiting consideration of mitigating factors to people who receive “little or no compensation from the offense.” Nonetheless, the Commission proposes to include this restriction in the new reduction. This proposal ignores the complex pathways of domestic violence and the ways in which compensation can be part and parcel of a cycle of abuse, which commonly involves the abuser “alternat[ing] between

³⁴ BSCA § 12004(a)(1) (emphases added).

violent, abusive and apologetic behavior.”³⁵ Again, the Commission should simply track the BSCA’s statutory directive.

“*Role and Culpability.*” Congress directed the Commission to also consider the “defendant’s role and culpability.”³⁶ The Commission proposes implementing this directive by limiting the reduction to those who “had minimal knowledge of the scope and structure of the enterprise” or minimal knowledge “that the firearm would be used or possessed in connection with further criminal activity.” These restrictions do not adequately capture the factors a court must examine to conduct the holistic examination of a person’s “role and culpability” required by BSCA.

In addition, the proposal to limit eligibility to people with “minimal knowledge” that the firearm would be “used or possessed in connection with further criminal activity” could lead to absurd results. Many straw purchasing offenses (and some of the Commission’s proposals) require proof that the defendant engaged in straw purchasing while “knowing or having reasonable cause to believe” that the firearm would be possessed in connection with further criminal activity.³⁷ If the Commission limits the mitigating-factors reduction to exclude people with “minimal knowledge . . . that the firearm would be used or possessed in connection with further criminal activity,” then virtually every single person convicted of a straw-purchasing offense based on knowledge (likely the vast majority) would be excluded from the reduction—by virtue of the conviction itself. And even for those few people convicted based only on “reasonable cause to believe,” the “minimal knowledge” element would overwhelmingly exclude them from the reduction. There is scant logical—and even less practical—room to say that

³⁵ Zlatka Rakovec-Felser, *Domestic violence and abuse in intimate relationship from public health perspective*, 2 Health Psych. Rsch. 1821, 1821 (2014), <https://bit.ly/co/HTdH>.

³⁶ BSCA § 12004(a)(1).

³⁷ See, e.g., 18 U.S.C. § 932(b) (to be guilty of straw purchasing, a person must know or have reasonable cause to believe that firearm would be possessed by a prohibited person, used in connection with a wide range of different potential offenses, or transferred to a prohibited person or someone intending to engage in criminal conduct); see also 18 U.S.C. §§ 933(a) (trafficking in firearms can be established through proof of reasonable cause to believe), 922(d)(10) (can be proved through reasonable cause to believe), 924(h) (same). Option 1’s proposed §2K2.1(b)(5)(B)(i)(II) and (C)(i)(III) present this same issue.

someone can have “reasonable cause to believe” a firearm will be used in connection with criminal activity but lack “minimal knowledge” of that same fact.

More fundamentally, this proposal will lead to arbitrary and unjustifiable policy outcomes. A battered domestic partner who purchases a firearm for their abuser out of fear is at the core of whom Congress intended to receive the new reduction—yet the minimal-knowledge proposal would exclude that person if they knew the firearm would be used in connection with further criminal activity. The minimal knowledge proposal is simply not the right demarcation point to capture and reflect Congress’s intent.

Instead of inventing hyper-technical gradations between mental states and otherwise diluting consideration of mitigating factors, the Commission should simply track BSCA’s statutory text in implementing the reduction; it should not introduce new limitations.

b. A conjunctive approach would contravene Congressional intent.

The Commission seeks comment on whether the limiting factors it has proposed should be promulgated conjunctively (such that a person needs to satisfy each of them to be eligible for the mitigating-factors reduction) or disjunctively (such that as long as a person satisfies at least one factor, they would be eligible for the reduction). The factors should be promulgated disjunctively. Requiring a straw purchaser to meet each limiting criteria would be inconsistent with the language of BSCA. We agree with gun-safety advocates that “[n]othing in this directive suggests that a straw purchaser must meet all these factors before they can qualify for a reduction. In fact, bundling these exceptions together undermines Congress’s clear directive.”³⁸

DOJ urges a conjunctive approach, arguing that the alternative would lead to absurd results because a “defendant would be eligible for a reduction, for example, if he provided a gun to a criminal gang, with full knowledge of the scope of the criminal enterprise or that the weapon would be used in connection with criminal activity, and even if he transferred the gun to obtain status in an organization, so long as he received only minimal financial

³⁸ Zimroth Statement, *supra* note 13 at 9.

compensation.”³⁹ But this hypothetical does not illustrate the folly of a disjunctive approach. Instead, it shows why relying on specific criteria—like monetary compensation alone—to approximate “role and culpability” is a flawed approach. By equipping courts with the discretion to conduct the holistic, fact-based review that Congress mandated, DOJ’s “absurd result” would be avoided.

C. The criminal-affiliation enhancement should be narrow.

In BSCA, Congress instructed the Commission to “review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18 . . . who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.”⁴⁰

Because of pernicious and well-known problems associated with gang designations, the Commission should carefully study social-science research, empirical evidence, and sentencing data before adding a criminal-affiliation enhancement to §2K2.1. And, when it moves forward, the Commission should interpret Congress’s directive as narrowly as possible. It should require the government to prove any such affiliation by clear and convincing evidence and also limit the potential increase to one level.

1. Gang affiliation is often based on inaccurate information and is not a reliable proxy for culpability.

The problems with law enforcement methods for documenting criminal affiliation have been widely recognized, and counsel in favor of great caution in implementing the BSCA criminal-affiliation directive.

First, these methods are unreliable. Law enforcement uses broad criteria for identifying a person as a gang member.⁴¹ Often, these criteria amount to little more than mere “suspicion or association,” as opposed to firm

³⁹ DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 6.

⁴⁰ BSCA § 12004(a)(1).

⁴¹ See Youth Just. Coal., *Tracked and Trapped: Youth of Color, Gang Databases, and Gang Injunctions* 5–6, 8 (2012), <https://bit.ly.co/Hb0z>.

evidence of active gang membership.⁴² These criteria are poor indicators of current gang involvement.⁴³ The essentially unbridled discretion law enforcement has to identify individuals as gang members has caused gang databases and other designation lists to be riddled with mistakes.⁴⁴ In addition, some gang databases are poorly maintained or monitored, meaning people are added based on irrelevant evidence⁴⁵ or remain in the database past the federally regulated time for data validation.⁴⁶

Gun-safety experts agree that records reflecting “gang membership and affiliation with a gang often rest on unreliable data,”⁴⁷ and “law enforcement’s identification of gang affiliation is often significantly overinclusive.”⁴⁸ There is “no universal definition of who gets counted as a

⁴² Emmanuel Felton, *Gang Databases are a Life Sentence for Black and Latino Communities*, Pac. Standard (Mar. 15, 2018), <https://bityl.co/Hb10>.

⁴³ James A. Densley & David C. Pyrooz, *The Matrix in Context: Taking Stock of Police Gang Databases in London and Beyond*, 20 Youth Just. 11, 17 (2020) (“[T]he fact that ‘police and partner agencies’ are listed as examples of intelligence sources for the Matrix, however, gives rise to suspicion that it is built on subjective opinion and circular logic alone—not exactly the types of procedures that inspire confidence in its validity.”).

⁴⁴ See, e.g., Felton, *supra* note 42 (giving an example where the same person was documented by separate police officers as a member of two rival gangs based solely on the geographic location where each officer happened to have stopped him); Maxine Bernstein, *Portland police to halt, purge all gang designations*, The Oregonian (Sept. 8, 2017), <https://bit.ly/3En8Grg> (noting that “gang designations” “serve[] as lifelong barriers for those who have,” in actuality, “shunned the gang lifestyle”).

⁴⁵ Cal. State Auditor, Rep. No. 2015-130, *The CalGang criminal intelligence system 2* (2016), <https://bityl.co/Hb1A> (“[A] person in CalGang [was included] for allegedly admitting during his booking into county jail that he was a gang member and for being ‘arrested for an offense consistent with gang activity.’ However, the supporting files revealed that this person stated during his booking interview that he was *not* a member of a gang and that he preferred to be housed in the general jail population. Further, his arrest was for resisting arrest, an offense that has no apparent connection to gang activity.”).

⁴⁶ Tex. State Auditor, Rep. No. 22-039, *An Audit Report on The Department of Public Safety’s Texas Gang Intelligence Database 5* (2022), <https://bityl.co/Hb1B>.

⁴⁷ Zimroth Comment, *supra* note 16 at 10.

⁴⁸ Brady Comment, *supra* note 7 at 4.

‘gang member’ versus someone who is ‘associated with’ but not in a gang,”⁴⁹ and gang-designation practices can vary wildly across districts.⁵⁰ As a result, most gang databases are deeply flawed.

Second, gang databases are riddled with egregious racial bias and disparities.⁵¹ The numbers are consistently shocking. In Boston, 90% of so-called documented gang members are Black or Latino.⁵² In Los Angeles, that number recently stood at 86%.⁵³ In Portland, Oregon, 81% of those in the gang database “were part of a racial or ethnic minority.”⁵⁴ Even when historically white gangs are reported, many of its members are people of color,⁵⁵ and typically white supremacist groups are not included in such databases.⁵⁶

⁴⁹ Zimroth Comment, *supra* note 16 at 10. (Noting that Immigrations and Customs Enforcement (“ICE”) designates a person as a gang member if they “meet at least two criteria from a list that includes ‘having gang tattoos,’ ‘frequenting an area notorious for gangs,’ and ‘wearing gang apparel.’”).

⁵⁰ *Id.*

⁵¹ Only 1.1% of NYPD’s gang database is white. Nick Pinto, *NYPD added nearly 2,500 new people to its gang database in the last year*, The Intercept (June 28, 2019), <https://bitly.co/Hb1O>. California’s gang database is nearly 20% Black people and 66% Latino. See Youth Just. Coal., *supra* note 41 at 8.

⁵² Philip Marcelo, *Gang database made up mostly of young black, Latino men*, AP News (Jul. 30, 2019), <https://bitly.co/Hb1K>.

⁵³ Youth Just. Coal., *supra* note 41 at 8.

⁵⁴ Bernstein, *supra* note 44.

⁵⁵ UIC Policing in Chi. Rsch. Grp., *Expansive and Focused Surveillance: New Findings on Chicago’s Gang Database 1* (June 2018), <https://bitly.co/Hb1b> (“Although between 11% and 27% of self-identified gang members are estimated to be White, and White gang members report levels of criminal offending equal to those of their non-White counterparts, a powerful racial stereotype associates gang membership with Latinx and especially Black boys and young men.”); Marie Pryor, *et al.*, *Risky Situations: Sources of Racial Disparity in Police Behavior*, 16 Ann. Rev. L. & Soc. Sci. 343, 347 (2020).

⁵⁶ UIC Policing in Chi. Rsch. Grp., *supra* note 54 at 5 (“[O]nly 23 people [in Chicago’s gang database] are listed as members of white supremacist organizations.”); Pinto, *supra* note 51 (the Proud Boys were not included in the NYPD gang database); see Zimroth Comment, *supra* note 16 at 11.

Finally, gang participation alone is “not a reliable identifier of culpability.”⁵⁷ Brady United has explained that “[a]dolescents who grow up in areas with heavy gang activity often have little choice in whether they interact with gangs on a daily basis.”⁵⁸ “Despite popular myths that paint every gang member with the same violent brush and assert that there is no escaping a gang, membership is remarkably porous, and most social scientists describe varied levels of involvement with gangs, with a majority of gang members quitting soon after joining a gang and others aging out of gangs.”⁵⁹ In particular, researchers distinguish between “core members” and “fringe members.”⁶⁰ It is not mere participation that predicts criminality—it is the *degree* of the person’s participation that matters. The Commission should examine this research, hear from experts on gang involvement, and ideally report to Congress on its findings before promulgating this enhancement. If the Commission decides to move ahead with an enhancement now, at a minimum, it should very narrowly construe “affiliation” with a gang, so that it reaches only those individuals with deep ties to a gang—the sort of person who Congress would have been picturing when it enacted the BSCA.

2. The proposed criminal-affiliation enhancement improperly sweeps beyond the specifically enumerated statutes in the BSCA directive.

The BSCA directive specifies that the criminal-affiliation enhancement should apply in cases involving a “conviction under section 932 or 933 of title 18.”⁶¹ Despite this plain language, each option the Commission proposes would go significantly beyond the directive by deeming people with other convictions or specific offense characteristics eligible for the enhancement.⁶²

⁵⁷ Brady Comment, *supra* note 7 at 5.

⁵⁸ *Id.* (citation omitted).

⁵⁹ K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 St. Thomas L. Rev. 620, 644 (2011) (citations omitted).

⁶⁰ *Id.* at 647.

⁶¹ BSCA § 12004(a)(1).

⁶² Option 1 would tie eligibility for criminal-affiliation enhancement to either (1) receiving an enhancement under §2K2.1(b)(5); or (2) being convicted under 18 U.S.C. §§ 922(d), 932, or 933; or (3) being convicted under 18 U.S.C. §§ 922(a)(6) or

When Congress intended other aspects of the BSCA’s directive to apply more broadly, it said so. For example, the first sentence, which instructs the Commission to increase certain penalties, refers to “persons convicted of an offense under section 932 or 933 of title 18 . . . *and other offenses applicable to the straw purchases and trafficking of firearms.*”⁶³ The next sentence, which governs the Commission’s consideration of mitigating factors, refers broadly to “straw purchasers.” But the final sentence, which includes the criminal-affiliation enhancement, refers *only* to sections 932 or 933. The different language used in each part of the directive shows that Congress did not intend for this enhancement to be applied as expansively as the Commission now proposes. Therefore, the Commission should revise Subpart A to refer to only sections 932 and 933.

3. The Commission should require the government to prove criminal affiliation by clear and convincing evidence and bar reliance on gang databases alone to prove criminal affiliation.

If the Commission proceeds with the criminal-affiliation enhancement, it should include guidance that: (1) requires the government to meet a clear-and-convincing standard to establish criminal affiliation at sentencing, and (2) instructs that presence on a gang database alone is not sufficient to establish criminal affiliation.

First, the Due Process Clause of the Fifth Amendment accords the right to be sentenced on the basis of accurate information.⁶⁴ A sentencing

924(a)(1)(A) and having committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to another person. Option 2 would tie eligibility to cases where proposed subsection (b)(9) does not apply and the person is convicted under 18 U.S.C. §§ 922(d), 924(h), 924(k), 932, or 933.

⁶³ BSCA § 12004(a)(1) (emphasis added).

⁶⁴ *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (person has a right under the Due Process Clause to be sentenced on the basis of accurate information about his criminal history); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (person has a right under the Due Process Clause not to be sentenced based on “misinformation” or facts that are “materially untrue”) (citation omitted); *see also United States v. Juwa*, 508 F.3d 694, 700–701 (2d Cir. 2007) (recognizing “distinct limits” to a judge’s discretion at sentencing, including “a defendant’s due process right to be sentenced based on accurate information”); *United States v. Safirstein*, 827 F.2d 1380, 1385

court violates a person's right to due process when it makes "unfounded assumptions or groundless inferences" in imposing sentence.⁶⁵ Given the severe racial bias and inaccuracies that plague gang databases and law enforcement efforts to ascertain affiliation, the Commission should require a heightened standard of proof to ensure that individuals are sentenced using reliable and accurate information.

Second, the Commission should also recognize the widespread problems with allegations of criminal affiliation, particularly with respect to gang databases, by instructing courts that "information derived from gang databases do not have sufficient indicia of reliability to alone support imposition of the criminal-affiliation enhancement."

II. PART B: Mens Rea and Privately Manufactured Firearms

A. The Commission should add a mens rea requirement to §2K2.1(b)(4).

Section 2K1.1(b)(4) provides that if a firearm has an altered or obliterated serial number, a four-level increase applies; and if it is stolen, a two-level increase applies. Since 1993, the Guidelines have instructed judges that these are strict liability enhancements: they "appl[y] regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."⁶⁶

The Commission seeks comment on whether it should add a mens rea to the enhancements in §2K2.1(b)(4). Defenders strongly urge the Commission to make this change. There are four reasons why a scienter requirement should be added to §2K2.1(b)(4). First, adding mens rea to §2K2.1(b)(4) would conform this provision to the "fundamental legal tradition that blameworthiness hinges upon a culpable state of mind" and further the Commission's duty to establish policies that ensure fair and certain

(9th Cir. 1987) ("[T]he Fifth Amendment guarantee of due process protects the defendant from consideration of improper or inaccurate information" at sentencing.); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (It is procedural error for a court "to choose a sentence based on clearly erroneous facts[.]").

⁶⁵ See *Safirstein*, 827 F.2d at 1385.

⁶⁶ See USSG §2K2.1 cmt. n.8(B).

sentencing.⁶⁷ It would also assure punishment proportionate to the individual’s culpability.⁶⁸ Second, it would restrict the application of an enhancement that has resulted in significant racial disparities.⁶⁹ Third, the strict-liability enhancement serves no legitimate purpose of punishment. And fourth, the Commission has never articulated an empirical or policy rationale to support the current (b)(4) enhancement.

1. The Importance of Mens Rea.

Last year, the Supreme Court reiterated that, as a general matter, “wrongdoing must be conscious to be criminal.”⁷⁰ It is “universal and persistent in mature systems of criminal law” that a person must possess a culpable mens rea, or “scienter,” to be held criminally responsible for her acts.⁷¹ Mens rea requirements advance this principle by helping to “separate those who understand the wrongful nature of their act from those who do not.”⁷²

The Court has recently—since the Commission last had a quorum—clarified that the “longstanding presumption” of mens rea applies to firearms offenses, even where Congress has failed to specify any scienter requirement. In *Rehaif v. United States* (2019), the Court overturned every single Court of Appeals to conclude that the felon-in-possession statute, 18 U.S.C. § 922(g), requires the government to prove knowledge of each essential element (aside from jurisdiction).⁷³ In doing so, the Court explained that the presumption of mens rea applies in the vast majority of cases and should be excused only where statutory provisions are part of a “regulatory” or “public welfare”

⁶⁷ *United States v. Handy*, 570 F. Supp. 2d 437, 440 (E.D.N.Y. 2008), disapproved of on other grounds by *United States v. Thomas*, 628 F.3d 64 (2d Cir. 2010).

⁶⁸ 18 U.S.C. § 3553(a)(2)(A).

⁶⁹ See *infra* at Part II(A)(2).

⁷⁰ *Ruan v. United States*, --- U.S. ---, 142 S. Ct. 2370, 2376 (2022) (quoting *Elonis v. United States*, 575 U.S. 723, 734 (2015)).

⁷¹ *Id.* at 2376–77 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

⁷² *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (quoting *United States v. X-Citement Video*, 513 U.S. 64, 72–73 n.3 (1994)).

⁷³ See *id.* at 2201 (Alito, J., dissenting) (noting that Court’s decision overturned “every single Court of Appeals”).

program, and “carry only minor penalties.”⁷⁴ This exception does not apply here. The four- and two-level enhancements included in § 2K2.1(b)(4) are not part of a regulatory or public welfare program.⁷⁵ Nor are they minor. To the contrary, they ratchet up the already high applicable penalties at stake in firearms prosecution.

DOJ has said that it “understands the reasoning behind the proposal to add a *mens rea* requirement to the enhancement,”⁷⁶ but it inexplicably asks the Commission to shift the burden of proof to the defense. That burden, DOJ proposes, should require the convicted individual to prove that “he or she did not know, *and had no reason to believe*, that the firearm was stolen, missing a serial number, or had an altered or obliterated serial number.”⁷⁷

The Commission should reject this request. The problem with strict liability enhancements is not that they don’t give defendants a theoretical possibility to rebut the enhancement’s application; the problem, as the Supreme Court has repeatedly emphasized, is that they relieve the government of its burden to establish culpability—of which scienter is a crucial element. DOJ’s proposal is inconsistent with the basic principle that the government bears the burden to support an enhanced punishment. Moreover, as Commissioner Gleeson highlighted in his questioning during the March 2023 hearing, placing the burden of proof on the defense could pressure individuals to waive their Fifth Amendment right to remain silent. And, if a person in this position were to testify, and their testimony were deemed incredible, it could trigger higher sentences through denial of acceptance-of-responsibility points and application of the obstruction enhancement.

For similar reasons, the Commission should also reject DOJ’s suggestion to dilute the *mens rea* requirement by marrying its proposed rebuttable presumption with a “reason to believe” standard. As DOJ argues later in its same submission, the “reason to believe” standard is unwieldy,

⁷⁴ *Id.* at 2197 (citing *Staples v. United States*, 511 U.S. 600, 606 (1994)).

⁷⁵ *See id.* (explaining that criminal firearms statutes “are not part of a regulatory or public welfare program”).

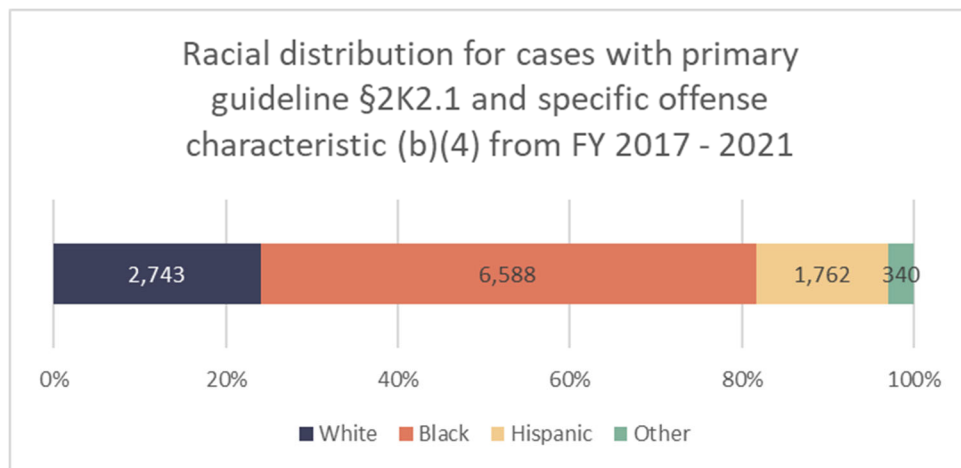
⁷⁶ DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 7 (emphasis added).

⁷⁷ *Id.*

and can result in inconsistent interpretations.⁷⁸ That standard would become even more unwieldy in the context of a rebuttable presumption. Together, the rebuttable presumption and reason-to-believe standard would become an exception to swallow the rule, erasing any potential benefit that might be gained by adding a scienter requirement to §2K2.1(b)(4).

2. The §2K2.1(b)(4) strict-liability enhancements disparately impact Black people.

In our written testimony, Defenders explained that Black people are disproportionately overrepresented in firearms prosecution and sentencing.⁷⁹ This is also true specifically with respect to the (b)(4) enhancement. And further, the data show that Black people who receive the (b)(4) enhancement are subjected to longer sentences than their white counterparts.



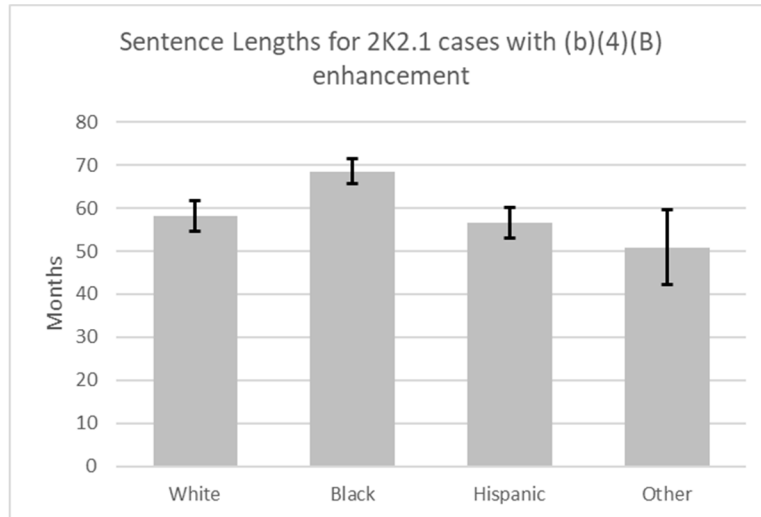
From fiscal years 2017 through 2021, the (b)(4) enhancement applied in roughly 32% of all §2K2.1 cases.⁸⁰ Over half of individuals who received a (b)(4) enhancement (58%) were Black, and roughly 50% of individuals who received a (b)(4)(B) enhancement for AOSNs were Black. The mean sentence length for Black individuals who received the (b)(4) enhancement was 69

⁷⁸ See DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 51.

⁷⁹ Statement of Michael Carter-Firearms, *supra* note 10 at 6–12.

⁸⁰ The data used for these analyses were extracted from the Commission’s “Individual Offender Datafiles” spanning fiscal years 2017 to 2021, which are available at <https://bitly.co/HBGG>.

months imprisonment, compared to 58 months imprisonment for white individuals who received the enhancement.⁸¹



Adding a mens rea requirement would be one step towards narrowing this enhancement's general application and reducing disparities.

3. The strict-liability standard for (b)(4) does not serve a legitimate purpose of sentencing.

As it stands, §2K2.1(b)(4) cannot serve any sentencing purpose.⁸² Starting first with stolen firearms: “Because this enhancement does not require the defendant to know or have reasonable cause to believe that the firearm he possessed was stolen, it does not provide deterrence since a person cannot be deterred from doing what he or she does not know is being done.”⁸³ And because this enhancement “lacks a requirement of scienter,” it cannot provide just punishment either.⁸⁴

This same logic applies to firearms with an obliterated or altered serial number. The government asserts that the “fact that a gun has a missing,

⁸¹ *Id.*

⁸² The government concedes that it “may not be . . . readily apparent that a gun is stolen.” DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 7.

⁸³ *Handy*, 570 F. Supp. 2d at 480.

⁸⁴ *Id.*

altered, or obliterated serial number is generally readily apparent.”⁸⁵ Not so. In fact, it is often difficult to tell that a serial number has been removed or obliterated.⁸⁶

Not only does the §2K2.1(b)(4) strict-liability enhancement serve no purpose of punishment, it often constitutes double punishment for the same conduct—that is, the illegal possession of a gun. In *United States v. Faison*, Judge Hazel explained that for individuals convicted of being a felon in possession of a firearm, “there is no legal avenue by which that person could have purchased a firearm,” and therefore “every felon in possession of a firearm has engaged in the illegal marketplace to acquire a gun. That is true whether the gun reached him through a straw purchase, an illegal transfer from a lawful owner, or by the acquisition of a stolen gun.”⁸⁷

Punishment roulette serves no purpose of sentencing. Adding a mens rea requirement would go far to meaningfully distinguish the culpability of prohibited persons who possess firearms.

4. The Commission has never provided a policy reason or rationale to justify the lack of scienter in §2K2.1(b)(4).

The Commission has never provided a well-grounded, empirical reason for dispensing with the presumption of mens rea for §2K2.1(b)(4),⁸⁸ and the history of this enhancement shows that it has lacked an empirical basis from

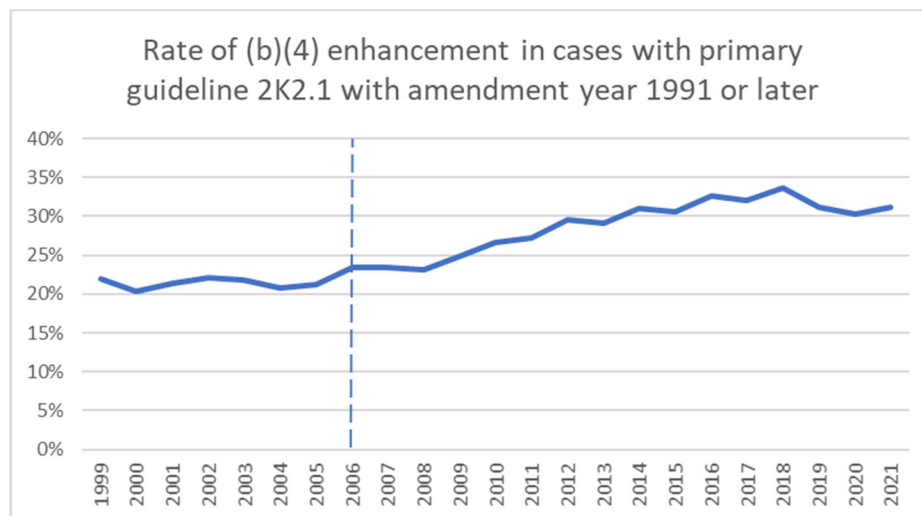
⁸⁵ DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 7.

⁸⁶ *See, e.g., United States v. Frett*, 492 F. Supp. 3d 446, 448 (D.V.I. 2020) (granting a motion for a judgment of acquittal in a 922(k) case where the government failed to prove that the accused knew the firearm was obliterated); *United States v. Johnson*, 381 F. 3d 506, 510 (5th Cir. 2004) (evidence insufficient to show knowledge of obliterated serial number where accused did not own the gun, physically possessed it for only brief intervals, and physical evidence of obliteration was limited to “silvery scratches” on the gun’s action slide); *United States v. Haile*, 685 F.3d 1211, 1221 (11th Cir. 2012) (evidence insufficient to show knowledge of obliteration where government proved only constructive possession, and put forth no evidence that accused possessed the gun for any significant length of time).

⁸⁷ *United States v. Faison*, 2020 WL 815699, at *7 (D. Md. Feb. 18, 2020).

⁸⁸ *See, e.g., USSG App. C, Amend. 478* (Nov. 1, 1993) (“[T]his amendment clarifies that the enhancement in §2K2.1(b)(4) applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an altered or obliterated serial number.”).

the start. In fact, in 1987, §2K2.1 commentary noted the lack of data sufficient to determine the effect of a stolen firearm on sentences.⁸⁹ Yet over time the enhancement continued to ratchet upward. In 1989, it increased from 1 level to 2 levels across the board.⁹⁰ In 2006, at DOJ's prompting, it doubled from 2 levels to 4 levels in any case involving a firearm with an altered or obliterated serial number.⁹¹ While DOJ requested the serial-number increase to "provide stronger deterrence and better reflect the harm of these offenses,"⁹² since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value.



⁸⁹ See USSG § 2K2.1, cmt. background (1989) ("Available data are not sufficient to determine the effect a stolen firearm has on the average sentence."). In 1987, the Commission appeared to believe that a stolen-firearm enhancement might serve as a proxy for firearms that are used "in the commission of crimes." *Id.* Whatever the merits of this speculation in 1987, there is no longer any need for a stolen-firearm proxy for firearms possessed in connection with the commission of another crime; §2K2.1 now directly provides an enhancement for this circumstance. See USSG §2K2.1(b)(6)(B).

⁹⁰ See USSG App C., Amend. 189, Reason for Amendment (Nov. 1, 1989) (stating the reasoning is "to better reflect the seriousness of this conduct").

⁹¹ See USSG App. C., Amend. 691 (Nov. 1, 2006); DOJ's Comments on U.S. Sentencing Comm'n Proposed Priorities 3 (Aug. 15, 2005), <https://bit.ly/3l3AUns> ("DOJ's 2005 Comments"), <https://bit.ly/3l3AUns>.

⁹² DOJ's 2005 Comments at 3.

DOJ also argued in 2006 that “the intentional obliteration or alteration of a serial number” is a “clear indicator of firearms trafficking or an intent to otherwise use the firearm unlawfully.”⁹³ Yet Commission data does not seem to support this proposition either. From Fiscal Years 2017 through 2021, less than 2% of §2K2.1 cases involved the application of both the enhancements in (b)(4)(B) and (b)(6)(B), which covers use or possession “in connection with another felony offense.”⁹⁴ And during the same period, less than 2% of §2K2.1 cases involved the application of both the enhancements in (b)(4) and (b)(5), which covers trafficking in firearms.⁹⁵

Finally, sentences in cases involving application of the (b)(4) enhancement do not reflect the need for an additional increase, with the vast majority of such cases sentenced in the past five fiscal years falling either within or below the advisory guideline range.⁹⁶ Thus, the past ratcheting upward of the enhancement did not serve to deter this conduct and does not track the views of today’s sentencing judges.

B. The Commission should not unreasonably elevate sentences in cases involving privately made firearms.

The Commission proposes to address cases involving privately made firearms (PMFs)⁹⁷ by amending § 2K2.1(b)(4)(B) to instruct that cases

⁹³ DOJ Letter to the U.S. Sentencing Comm’n Regarding 2006 Proposed Guidelines Amendments 8 (March 28, 2006), <https://bit.ly.co/Hdxx>.

⁹⁴ From FY 2017–2021 and amendment year 2006 or later, 653 cases had enhancements for both (b)(4)(B) and (b)(6)(B), after excluding 3 cases that were coded as having (b)(4)(B) and (b)(6)(B) enhancement values of zero or negative levels. This is out of a total of 36,173 §2K2.1 cases.

⁹⁵ From FY 2017–2021 and amendment year 2006 or later, 582 cases had enhancements for both (b)(4) and (b)(5). This is out of a total of 36,173 §2K2.1 cases.

⁹⁶ USSC, Individual Offender Datafiles, *supra* note 80. 41.4% of §2K2.1 cases receiving the (b)(4)(A) enhancement were sentenced below guideline range, while 52.6% of §2K2.1 cases receiving the (b)(4)(B) enhancement were sentenced below guideline range during fiscal years 2017–2021. The Commission also reported that in fiscal year 2021, 46% of cases of prohibited persons sentenced under §2K2.1 involving the conduct at issue in (b)(4) received sentences below their advisory guideline range. *See* 2022 Firearms Report, *supra* note 12 at 27 fig. 20.

⁹⁷ The term “ghost guns” is vague, thus we use the ATF-preferred term PMF. ATF, *What is a privately made firearm (PMF)?* (July 22, 2022), <https://bit.ly.co/Hb2s>.

involving firearms that are “not otherwise marked with a serial number” warrant the 4-level enhancement.

We object to this proposed amendment and—consistent with our opposition to other increases to §2K2.1—instead recommend that the Commission gather data on these offenses before reflexively expanding the reach of (b)(4). If the Commission still chooses to act, we recommend that it add no additional enhancement to subsection (b)(4); or, at a minimum, provide for a lesser, more tailored enhancement requiring that the PMFs were manufactured “in connection with” the offense. In either event, as discussed above, a mens rea requirement should be added to (b)(4) in order to assure punishment proportionate to the individual’s culpability.⁹⁸

1. An enhancement for PMFs would not serve a legitimate purpose of sentencing.

The proposed PMF enhancement serves no legitimate sentencing purpose. Specific offense characteristics are intended to single out some aspect of a criminal offense that makes the crime more or less dangerous or the individual more or less culpable. Flawed as it is, §2K2.1(b)(4) at least tries to follow this basic precept: it singles out for extra punishment the extra layer of illegality associated with possessing a stolen firearm or a firearm with an altered or obliterated serial number.

By contrast, adding PMFs to §2K2.1(b)(4)(B) will further unmoor the enhancement from basic principles of punishment. Unlike the other forms of conduct described in §2K2.1(b)(4), there is no illegality associated with PMFs—they are federally *legal*. Nor is a PMF inherently more dangerous than other legally available firearms. It follows, therefore, that the guidelines should not treat possession of a PMF similar to the otherwise illegal conduct at issue in (b)(4), particularly without requiring a culpable mental state or nexus to the offense.

Importantly, §2K2.1 already provides for a menu of special-offense-characteristic enhancements that fully encompass any risk that a PMF might pose in a discrete case. For uniquely destructive PMFs, there are enhancements at §2K2.1(b)(1) and (b)(3). For PMFs used in connection with

⁹⁸ 18 U.S.C. § 3553(a)(2)(A).

otherwise illegal conduct, there is (b)(4), (b)(5), (b)(6), and (b)(7). The only characteristic that all PMFs share in common is that they make it difficult for the government to trace serial numbers. But the guidelines should not be in the business of inflicting retribution for conduct—legal in itself—that creates a bureaucratic difficulty.

a. PMFs are not illegal under federal law.

The proposed enhancement errs by treating possession of a PMF and possession of a firearm with an altered or obliterated serial number as equivalent conduct. The current enhancements in (b)(4) encompass conduct that (if done knowingly) could be a separate felony offense, regardless of whether the possessor is a prohibited person.⁹⁹ But PMFs are not subject to the same federal legal prohibitions. Non-prohibited, unlicensed persons can make or possess PMFs for their personal use under federal law.¹⁰⁰

Indeed, PMF manufacturing by hobbyists and private citizens dates back to the founding of this country.¹⁰¹ Serial numbers, on the other hand, do not. “[S]erial numbers arose only with the advent of the mass production of firearms,” and the prohibition on possession of firearms with altered or obliterated serial numbers is even more recent.¹⁰² A prohibited possessor with a PMF—who has committed one federal offense—is not similar to a prohibited person whose possession of a firearm constitutes at least two

⁹⁹ 18 U.S.C. § 922(i), (k), (j); *id.* § 5861(g), (h), (i).

¹⁰⁰ Neither the new ATF final rule nor the Gun Control Act imposes a marking or recordkeeping requirement on unlicensed persons making PMFs who are not engaged in a business or activity requiring a license. *See* Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652, 24715 (Apr. 26, 2022) (“Of course, private makers must abide by the Undetectable Firearms Act, 18 U.S.C. 922(p); NFA requirements; and any applicable State and local laws that govern privately made firearms.”).

¹⁰¹ *Stop Gun Violence—Ghost Guns: Hearing Before the S. Subcomm. on the Const. of the S. Comm. on the Judiciary* (May 11, 2021) (statement of Ashley Hlebinsky at 5), <https://bit.ly/424czyC> (“In the American colonies alone, it is estimated that around 2,500 to 3,000 gunmakers were making guns. While these gunmakers were able to make firearms from scratch (carving wood, forging barrels, engraving metal, etc.), many ordered parts to assemble the guns even back then.”) (“Hlebinsky Testimony”).

¹⁰² *United States v. Price*, ---F. Supp. 3d---, 2022 WL 6968457, at *5 (S.D.W. Va. Oct. 12, 2022) (finding § 922(k) unconstitutional) (citations omitted); *see also id.* at 6.

potential federal offenses.¹⁰³ The proposed PMF enhancement thus fails to pick out uniquely culpable conduct for a proportionately harsher sanction.

b. PMFs are not inherently more dangerous than serialized firearms.

The vast majority of cases sentenced under §2K2.1 involve a prohibited person in possession of a firearm convicted under 18 U.S.C. § 922(g), which is a status offense.¹⁰⁴ The act of possessing the firearm by the prohibited person is the offense, full stop. The fact that the firearm lacks a serial number alone does not increase the dangerous nature of the firearm. Nor is there evidence that PMFs are inherently more destructive than commercially manufactured firearms. In fact, as the Government itself recently admitted, the commercial requirement that a serial number be placed on a firearm does not impact the use or functioning of a weapon in any way.¹⁰⁵ DOJ now claims that there is a “proliferation of crimes” involving PMFs. But §2K2.1 already has a separate specific offense characteristic for precisely that scenario, covering usage “in connection with another felony offense.”¹⁰⁶ Likewise, the guideline has a specific offense characteristic to encompass trafficking. The fact that a firearm was privately made does not, on its own, make the firearm more dangerous.

¹⁰³ 28 U.S.C. § 991(b).

¹⁰⁴ 2022 Firearms Report, *supra* note 12 at 4 (“The vast majority of the offenders sentenced under §2K2.1 were convicted under 18 U.S.C. § 922(g).”).

¹⁰⁵ *Price*, 2022 WL 6968457, at *6 (“In fact, as the Government points out, the *commercial* requirement that a serial number be placed on a firearm ‘does not impair the use or functioning of a weapon in any way.’”). Other courts considering Second Amendment challenges to § 922(k)’s prohibition on possession of a firearm with an obliterated serial number have noted that serialization does not change the core function of the firearm. *See United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010) (noting “the presence of a serial number does not impair the use or functioning of a weapon in any way. . . . [A] person is just as capable of defending himself with a marked firearm as with an unmarked firearm.”); *United States v. Holton*, ---F. Supp. 3d ---, 2022 WL 16701935, at *4 (N.D. Tex. Nov. 3, 2022) (“[F]irearms of similar make and model are essentially fungible”).

¹⁰⁶ USSG §2K2.1(b)(6)(B).

c. The difficulty in tracing PMFs does not implicate a legitimate purpose of sentencing.

DOJ bases its request to increase sentences for PMFs on the assertion that these firearms are “extremely difficult to trace.”¹⁰⁷ The difficulty that the lack of serialization can create for government investigations is not a legitimate purpose of sentencing under § 3553(a)(2).

As the Practitioners’ Advisory Group noted as far back as 2006, the difficulty in tracing guns without serial numbers “does not have any relationship with the federal crime of being a felon-in-possession, or federal gun-possession crimes generally, since knowing the serial number does not in any way make proving the offense more difficult or allow an offender to escape detection.”¹⁰⁸ This is particularly true for the vast majority of §2K2.1 offenses; a prohibited person cannot possess any firearm—serialized or not.

What’s more, firearms experts disagree on the value of firearms tracing.¹⁰⁹ As the ATF itself explains, “[f]irearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired

¹⁰⁷ DOJ Letter to the U.S. Sentencing Comm’n Regarding 2023 Proposed Priorities 6 (Sept. 12, 2022), <https://bit.ly/co/Hb3H>.

¹⁰⁸ Practitioner’s Advisory Group Comment on Omnibus Proposals for 2006 Amendment Cycle 9 (Mar. 15, 2006). As Defenders argued in 2006, DOJ now concedes that “ATF firearm examiners can sometimes still detect altered or obliterated serial numbers using chemicals and microscopic analysis.” DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 6; *see also* Federal Defenders Comment on Proposed Amendments to the Firearms Guideline 16 (Mar. 9, 2006) (noting that serial numbers can frequently be “restored by a simple laboratory procedure”).

¹⁰⁹ *See* Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 U.C.L.A. L. Rev. 1233, 1271 (2009) (“Experts have repeatedly concluded that the guns traced by ATF are not a representative sample of crime guns, and cannot provide a reliable picture of the modes of acquisition most frequently used by criminals or the paths of distribution that crime guns most often follow.”); Hlebinsky Testimony, *supra* note 101 at 8 (“It is certainly easier to purchase an already made firearm that will definitely function, and file the serial number off to use in criminal activity rather than assembling a purchased parts kit Therefore, the idea that a serial number and markings are the be all to end all in tracing crime is simply not accurate and many other factors are utilized when trying to track down a criminal.”).

for use in crime.”¹¹⁰ Moreover, a recent ATF report sheds light on the many reasons that firearms cannot be traced, and PMFs do not even appear in this table. Failure to provide complete information tops the list, and a sizeable number of “crime guns” are actually traced back to a “government entity, law enforcement agency, or military.”¹¹¹

Table OFT-05: Reasons Crime Guns are Not Traced to a Purchaser, 2017 – 2021

Trace Completion Status	Number	Percent
Incomplete / Invalid Firearm Information Provided	137,765	7.2%
FFL Acquisition and Disposition Record Missing	95,395	5.0%
Pre-1968 Firearm Manufacture / Too Old to Trace	65,945	3.4%
Obliterated Serial Number	48,601	2.5%
Traced to Government Entity, Law Enforcement Agency, or Military	25,904	1.3%
Other	66,106	3.4%
Total	439,716	

As ATF notes, PMFs present an “emerging issue.”¹¹² And a recent Commission report found that 44% of individuals sentenced under §2K2.1 in fiscal year 2021 were arrested following a targeted investigation conducted by law enforcement after receiving allegations of a crime, with another 28% arrested as part of a routine police patrol.¹¹³ Neither scenario is likely to involve a firearm trace that led to the arrest.

The Commission also states that it has “heard from commenters that the very purpose of PMFs is to avoid the tracking and tracing systems associated with a firearm’s serial number.”¹¹⁴ This is simply untrue. The manufacture of PMFs by private citizens has been legal since the founding of

¹¹⁰ ATF, *Firearms Trace Data: Arizona—2021* (Sept. 15, 2022), <https://bit.ly.co/Hb3Z>.

¹¹¹ Percentages are out of total gun traces; ATF was able to determine the purchaser in 77% of requested crime gun traces. 2(3) ATF, *National Firearms Commerce and Trafficking Assessment: Crime Guns Recovered and Traced within the United States and its Territories* 5 (Feb. 2, 2023), <https://bit.ly.co/Hb3a> (“Law enforcement agencies recovered and submitted 37,980 suspected privately made firearms (PMFs) to ATF for tracing between 2017 and 2021. . . . In September 2020, ATF issued guidance to all eTrace users explaining how to identify and trace PMFs.”).

¹¹² *Id.*

¹¹³ 2022 Firearms Report, *supra* note 12 at 32–33.

¹¹⁴ 2023 Proposed Amendments, 88 Fed. Reg. 7180 at 7197.

this country and predates the invention of serialization.¹¹⁵ Federal law allows individuals to make PMFs for personal use and in fact prohibits a national registry of most modern firearms.¹¹⁶

2. The Commission should gather data before expanding §2K2.1(b)(4) penalties.

The Commission should not repeat mistakes of the past by ratcheting up penalties in response to headlines without carefully gathering and considering relevant data.¹¹⁷ And while DOJ's comments and media coverage on PMFs invoke the specter of homemade firearms being used for crimes,¹¹⁸ such a serious 4-level enhancement should not be added to the guideline without an empirical basis.¹¹⁹ While the Commission notes that it has heard from commenters that PMFs "increasingly are associated with violent crime," there is no public Commission data on offenses involving PMFs. And the ATF final rule regarding PMFs, which took effect in August 2022, will result in a steep drop in sales of unserialized 80% complete firearms kits.¹²⁰ Before it

¹¹⁵ Hlebinsky Testimony, *supra* note 101 at 5–8.

¹¹⁶ 18 U.S.C. § 926(a).

¹¹⁷ Bowman, *supra* note 22 at 1319 ("To an ever-increasing degree, the power to make and influence sentencing rules has migrated away from the judiciary, from the U.S. Sentencing Commission, and even from local federal prosecutors, toward political actors in Congress and the central administration of the Department of Justice.").

¹¹⁸ Despite the flurry of media attention to unserialized firearms, mass shootings most often involve legally obtained weapons. See Glen Thrush, *What Do Most Mass Shooters Have in Common? They Bought Their Guns Legally*, N.Y. Times (May 16, 2022) (77% of mass shooters from 1966 to 2019 purchased weapons used legally).

¹¹⁹ Where Guidelines are not based on empirical evidence or on the Commission's research and expertise, the Guideline ranges for those crimes are a less reliable appraisal of a fair sentence. See *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

¹²⁰ The ATF recently adopted a new final rule updating the definition of "frame and receiver," which sweeps so called 80% complete weapons kits into the definition and aims to ensure serialization and recordkeeping of firearms manufactured, imported, acquired, and disposed by federal firearms licensees. See 87 Fed. Reg. at 24652.

acts, the Commission should use its power to “systematically . . . collect . . . the data” on federal offenses involving PMFs.¹²¹

Finally, DOJ argues that ATF’s recent “frame and receiver” rule amendment means that PMF “kits are now considered firearms under federal law” and the definition of “firearm” should be updated so that they trigger additional enhancements. Defenders disagree. First, for the reasons stated above, these firearms are not more inherently dangerous due to lack of serialization. Second, the ATF’s regulatory decision will result in a steep drop in sales of PMF kits and also seed litigation—the Commission should not act before the impact and lawfulness of the ATF’s new regulation has been adequately tested.¹²² Third, we have no data on the prevalence of such kits in federal offenses. Given the new ATF regulations, the Commission should pause and gather data before making any changes to the guideline.

III. PART C: Other Changes to §2K2.1

What we’ve emphasized elsewhere applies equally to Part C: Defenders strenuously oppose any and all unstudied increase in the sentencing ranges called for by §2K2.1.

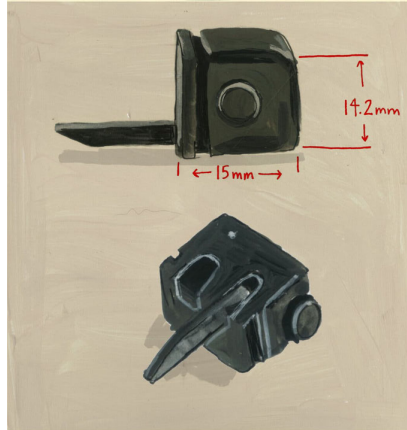
We elaborate further on only one aspect of Part C: Issue for Comment No. 4. During the March 2023 hearing, Commissioner Wong asked whether an expansion in the definition of “firearms” might mean that a firearm with certain aftermarket parts affixed to it could constitute two firearms instead of one.

This question raises just one of many problems with amending the definition of “firearms” in Application Note 1 of §2K2.1 to include devices which are “firearms” under § 5845(a) but not § 921. First, as Commissioner Wong’s question reflects, this amendment would cause §2K2.1 to apply in bizarre and counterintuitive ways, diminishing its influence. Second, DOJ’s

¹²¹ 28 U.S.C. § 995(a)(13).

¹²² It is not settled that such kits are considered “firearms” under federal law, given ongoing litigation and at least one partially granted preliminary injunction. *See* Order Granting Prelim. Inj., *VanDerStok v. Garland*, 4:22-cv-00691, ECF No. 89 (N.D. Tex. Oct. 1, 2022); *see also* *Cargill v. Garland*, 57 F. 4th 447, 450–51 (5th Cir. 2023) (en banc) (finding ATF lacked authority to amend regulations to include bump stocks in the definition of machinegun).

requested expansion of the “firearms” definition also lacks a sufficient empirical underpinning. Third, it would create unwarranted disparity. DOJ points to “Glock switches” which are aftermarket parts, most commonly a small block-shaped object about the length of a Lego brick:



These switches do nothing unless inserted into an actual firearm. Treating possession of an aftermarket part such as a machinegun part or silencer the same as possession of an actual “firearm” within the meaning of 18 U.S.C. § 921(a)(3) would create unwarranted disparity, and as Commissioner Wong’s question at the hearing highlighted, could result in the double counting of a part and the actual firearm itself.¹²³ In addition, it could compound preexisting racial disparity in machinegun prosecutions; 65% of individuals sentenced from Fiscal Years 2017 to 2021 in cases with at least one count of conviction under § 922(o) were Hispanic.¹²⁴

Instead of finding ways to add complexity to the guideline to account for outlier conduct, the Commission should focus on empirically based changes to §2K2.1 that better calibrate the guideline to § 3553(a)’s mandate.

¹²³ “The term ‘firearm’ means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.” 18 U.S.C. § 921(a)(3).

¹²⁴ USSC, Individual Offender Datafiles, *supra* note 80.

**Before the United States Sentencing Commission
Public Hearing on Firearms Offenses**

Statement of Michael Carter,
Federal Public Defender for the Eastern District of Michigan
on Behalf of the Federal Public and Community Defenders

March 7, 2023

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Hon. Chair Reeves, Vice-Chairs, and Commissioners: My name is Michael Carter, and I am the Federal Public Defender for the Eastern District of Michigan. I am also a member of the Federal Defender Sentencing Guideline Committee. I would like to thank the Commission for inviting me to testify on the proposed amendments to USSG §2K2.1.¹

I. Introduction

As a federal public defender, and a lifelong resident of Michigan who was born in Detroit, I fear that the Commission’s proposed changes to §2K2.1 would not make us safer,² and would exacerbate the unwarranted racial disparities that have long dominated federal gun-enforcement policies and sentencing.³ In my city and in my profession, I have witnessed the devastation caused both by gun violence and by law-enforcement practices that target Black people and our communities.

Today, I urge the Commission to give any changes to §2K2.1 the careful study and deliberation they deserve. Chairman Reeves, I was grateful for your pledge, at the Commission’s October 28, 2022 meeting, to “operate in a deliberative, empirically based, and inclusive manner,”⁴ and to “leave an even more improved federal sentencing guideline system for the next set of Commissioners.”⁵ Consistent with that pledge, and the Commission’s role as an independent, expert body, it should collect, study, and publish more data

¹ See 2023 Proposed Amendments, 88 Fed. Reg. 7180, 7190-7198, 2023 WL 1438480 (Feb. 2, 2023) (“2023 Proposed Amendments”).

² See *infra* at 12-16.

³ See *infra* at 6-12.

⁴ Remarks of Judge Carlton W. Reeves, Chair of the U.S. Sentencing Comm’n 4 (Oct. 28, 2022), <https://tinyurl.com/567hfjsm>.

⁵ *Id.*

and other information about the sufficiency of current penalties for firearms offenses, before acting.⁶

Defenders understand that the Commission is obligated to respond to the directive in the Bipartisan Safer Communities Act of 2022 (“BSCA”) to review and amend the guidelines.⁷ But that directive does not include a timeline, and there is ample reason to tread cautiously.⁸ In December 2022, two of the BSCA’s principal leaders, Senators Chris Murphy and Cory Booker, wrote to the Commission to warn that: “[W]e believe that [the BSCA] can and will save lives. But to achieve that outcome, it is essential that the implementation of the law avoids the mistakes of the past.”⁹ They implored the Commission to “approach amending §2K2.1 with full awareness of the inequities that may result from any misguided sentencing policy” and “to give special consideration to the primary purposes of the BSCA and to the consequences which the Commission’s guidelines may have for communities of color.”¹⁰ Failure to heed the Senators’ warning would, as a coalition of gun violence researchers, policymakers, and lawyers have warned, risk misapplying the BSCA in a manner that would “increase the racial disparities that already exist in federal sentences for firearms offenses, and fail to measurably impact gun violence.”¹¹

Today, I will explain why the Commission should study the need for, and potential ramifications of, increased penalties in §2K2.1 before

⁶ See Defender Comment on the Commission’s Proposed Policy Priorities 4-9 (Oct. 17, 2022) (“Defender October Comment”).

⁷ See Pub. L. No. 117-159 § 12004(1)(a)(5) (2022) (“BSCA”).

⁸ See Defender October Comment, *supra* note 6 at 6.

⁹ Letter from Sens. Cory Booker & Christopher Murphy to Hon. Carlton W. Reeves, Chair, United States Sentencing Comm’n at 1 (Dec. 5, 2022), <https://tinyurl.com/n9s52veb> (“Booker & Murphy Letter”); see also Letter from Sen. Christopher Murphy to Att’y Gen. Merrick Garland, Sept. 12, 2022, at 3, <https://tinyurl.com/4xzu29et> (“As the Department implements these new criminal provisions, it is incumbent on Department leadership to ensure that these new tools and power do not come at the expense of historically over-policed and over-prosecuted communities.”).

¹⁰ Booker & Murphy Letter, *supra* note 9 at 1–2.

¹¹ See Comment from The Peter L. Zimroth Ctr. on the Admin. of Crim. L., *Re: Proposed Priorities for the 2022-23 Amendment Cycle* at 1 (Oct. 17, 2022) (“Zimroth Comment”), <https://tinyurl.com/yw95dthx>.

implementing the BSCA's directive.¹² Alternatively, if the Commission chooses to implement the directive this amendment cycle, it should do so as narrowly as possible. There are two reasons why. First, past practice and national experience demonstrate that enhancements to the firearms guidelines would disparately impact Black people and their communities. Second, the history of §2K2.1 reflects numerous upward ratchets lacking empirical study or basis, which the Commission should not repeat now.

II. The BSCA and the proposed amendments to §2K2.1

Less than one year ago, in the wake of a spate of mass shootings, Congress enacted the BSCA.¹³ The BSCA's purpose, according to Senators Booker and Murphy, was to “end the flow of illegal guns into communities and reduce gun violence.”¹⁴ Among other things, the BSCA created new statutory provisions covering straw purchasers and gun traffickers, at 18 U.S.C. §§ 932 and 933. It increased the statutory maximum penalties for four statutes—18 U.S.C §§ 922(d), 922(g), 924(h), and 924(k)—from 10 to 15 years (which is also the statutory maximum for newly created sections 932 and 933).¹⁵

¹² See BSCA at 136 Stat. 1328.

¹³ *Id.*; see also Kyana Givens, Michael Carter & Laura Abelson, *Federal Time*, Inquest (Aug. 11, 2022), <https://tinyurl.com/33ddcbyu> (“*Federal Time*”) (discussing the BSCA's enactment).

¹⁴ Booker & Murphy letter, *supra* note 9; see also Zimroth Comment, *supra* note 11 at 2-4. There's good reason to question whether the BSCA's increased penalties for illegal firearms acquisition and possession will effectively reduce gun violence. Indeed, the vast majority of U.S. mass shootings involve legally purchased firearms. See Glenn Thrush, *What Do Most Mass Shooters Have in Common? They Bought Their Guns Legally*, NY Times (May 16, 2022), <https://tinyurl.com/3a7jtdhp>; Michael Sisak, *22 mass shootings. 374 dead. Here's where the guns came from*, AP (May 27, 2022), <https://tinyurl.com/4ry3yvwr> (Uvalde, Buffalo, and El Paso shooters legally purchased firearms); Lee Hedgepeth, *After Alabama church shooting, prosecutor names suspected gunman*, AL News (June 17, 2022), <https://tinyurl.com/cw97rnev> (shooter was federally licensed firearms dealer); Minyvonne Burke, et. al., *Tulsa gunman bought AR-15-style rifle hours before using it to kill his former doctor, 3 others*, NBC News (June 2, 2022), <https://tinyurl.com/mwrts3ff> (shooter legally purchased firearm).

¹⁵ See BSCA §§ 12001, 12002, 12004, 12005.

The BSCA also directed the Commission to “review and amend” the firearms guidelines and policy statements to: (1) ensure that people convicted of offenses under the “new sections 932 and 933 of title 18 and other offenses applicable to straw purchases and trafficking of firearms, are subject to increased penalties in comparison to those currently provided”; (2) reflect the intent of Congress that a person convicted of a §§ 932 or 933 offense who is “affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual”; and (3) reflect the intent of Congress that “straw purchasers without significant criminal histories receive sentences that are sufficient to deter . . . and reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history or other mitigating factors.”¹⁶ In contrast to past directives to the Commission, the BSCA did not contain a timeline for implementation,¹⁷ and also required the Commission to *review* any amendment.¹⁸

Eight short months after the BSCA was enacted, the Commission has proposed sweeping changes to the firearms guideline. The proposed amendments are organized into three parts: Part A presents two options that would amend §2K2.1 to respond to each part of the BSCA directive. Part B proposes changes to address concerns about firearms that are not marked with serial numbers. And Part C provides issues for comment on possible further revisions to §2K2.1. Today, I will focus my testimony on the proposed Part A changes to §2K2.1 that would either increase penalties for straw purchasing and firearms trafficking (Option 1) *or* increase penalties more broadly across the guideline (Option 2). Defenders will address the proposed criminal affiliations and mitigating circumstances adjustments in Part A, as

¹⁶ *Id.*

¹⁷ *See, e.g.,* Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. No. 112-269 § 3(d) (2013) (requiring the Commission to complete its “consideration and review” “not later than 180 days after” the Act’s enactment); Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 § 401(m) (2003) (requiring implementation of directive within 180 days of enactment of the Act).

¹⁸ *See* BSCA § 12004(a)(5) (emphasis added).

well as Parts B and C of the proposed amendment, in our written comments submitted on a later date.¹⁹

Option 1 adds references to the new statutes created by the BSCA into §2K2.1 and amends the 4-level firearms trafficking enhancement at §2K2.1(b)(5) to make it a tiered enhancement that applies to straw purchasing and trafficking. It provides for either a 1- or 2-level increase at subsections (b)(5)(A) and (B), and a 5- or 6-level increase at subsection (b)(5)(C). Option 2—which would apply a 1- or 2-level base offense level (BOL) increase for offenses under the two new statutes and for offenses under §§ 922(d), 922(g), 924(h), and 924(k)—appears to respond to a comment submitted by the Deputy Attorney General (DAG) on October 17, 2022. The DAG asked the Commission to “undertake a broader review of Section 2K2.1 at the same time it reviews the guideline to implement the BSCA,” and proposed general increases to guideline ranges across §2K2.1.²⁰ Although Option 2 does not reflect all of the DAG’s requested changes, it would implement changes that are more expansive and punitive than those required by the BSCA’s directive, raising many §2K2.1 BOLs.

III. Past practice and national experience demonstrate that sweeping firearm guideline enhancements would disproportionately impact communities of color, with little to no improvement to public safety.

Sweeping and empirically unsupported increases to §2K2.1’s penalties would not make our communities safer.²¹ Instead, these changes would

¹⁹ As we will explain in those comments, with respect to the remainder of Part A, Defenders have concerns about the proposed criminal affiliations enhancement and we will suggest removing some of the limiting criteria from the proposed mitigated role reduction. With respect to Part B, Defenders strongly support the addition of a *mens rea* requirement to §2K2.1(b)(4) and oppose the proposed enhancement for privately made firearms in §2K2.1(b)(4)(B). With respect to Part C, we urge the Commission to reject any additional proposed amendments that would further ratchet up punishment under §2K2.1.

²⁰ Comment from the Office of the Deputy Att’y Gen. at 3 & App. A (Oct. 17, 2022).

²¹ See *Federal Time*, *supra* note 13 (discussing severe race disparities in federal firearms prosecutions and convictions); Benjamin Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173, 2176 (2016) (applying the drug war’s critical rubric to gun possession highlights similar pathologies and speaks to broader flaws in the

exacerbate the unwarranted racial disparities that have long dominated federal gun enforcement policies and sentencing.²² Against the backdrop of these historical trends, the Commission must tread cautiously in implementing the BSCA's directive, and, consistent with its obligation to establish fair sentencing policies and practices that meet the purposes of 18 U.S.C. § 3553(a)(2),²³ it must use every tool available to redress these harms.

A. Racial Disparities

The changes Option 2 proposes to §2K2.1, much like the felon-in-possession statute, are facially race-neutral. Yet they would be certain to disproportionately impact and harm Black people.²⁴ There are two primary reasons why: *first*, Black people are arrested, prosecuted, and convicted of higher rates of felony offenses in comparison to white people,²⁵ and *second*,

structure of the criminal legal system); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1346 (2005) ("Increasing penalties is almost always perceived as conferring political benefit. Thus, there is no governor on the gradual upward ratchet of harsher penalties made attractive by politics . . .").

²² See, e.g., David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L. J. 1011, 1021-25 (2020) (examining racial disparities in federal gun possession prosecutions arising from law enforcement practices that target communities of color). And as the DOJ itself recently argued, American disarmament laws historically targeted enslaved Black individuals as a group perceived to be "dangerous." Supp. Br. for the Appellee United States at 22-23, *U.S. v. Rahimi*, 21-11001 (5th Cir. Aug. 9, 2022) ("Several colonies (or states) also passed statutes disarming classes of people deemed to be threats, including those unwilling to take an oath of allegiance (to the crown and later the states), slaves, and native Americans.").

²³ 28 U.S.C. § 994(g).

²⁴ See Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Century-Old Methods to Disarm Black Communities*, 21 CUNY L. Rev. 143, 164 (2018) ("[S]ince the first colonists set foot on the New World, firearm and weapon control laws were enacted to suppress the enslaved and free Black populations.") (citing Michael Waldman, *The Second Amendment: A Biography* 8 (2014)); see also Cornel West, Foreword to Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* X (2010) ("In fact, the very discourse of colorblindness . . . has left America blind to the New Jim Crow.").

²⁵ See Shreefter, *supra* note 24 at 157; see also ACLU & The Sent'g Project, *Racial Disparities in Sentencing in the United States* 1 (July 14, 2022),

federal firearms enforcement initiatives like “Project Safe Neighborhoods” have exacerbated the generally disparate enforcement of criminal laws by disproportionately targeting and harming people of color and their communities.²⁶ There is ample reason to fear that the BSCA’s broad expansion of firearms crimes and penalties will be used to similar effect. Although the BSCA’s supporters intended it to focus on straw purchases and gun trafficking,²⁷ the DAG’s request that the Commission ratchet up offense levels across §2K2.1 shows that it will seize the opportunity to expand prosecutions and punishment for all types of gun offenses, including simple possession by a prohibited person.²⁸

Overincarceration. At the threshold, the racial disparities in federal firearms enforcement and convictions reflect centuries of unequal and racially disproportionate crime control.²⁹ “From arrest to sentencing, racial and ethnic disparities are a defining characteristic of our country’s criminal legal system.”³⁰ “Since 1850, when the first prison statistics were published,

<https://tinyurl.com/362tn8au> (Black individuals in America are incarcerated at a rate five times higher than white individuals).

²⁶ See Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 315-17 (2007) (recognizing that federal gun enforcement initiatives like “Project Safe Neighborhoods” have historically focused efforts in predominantly Black, urban communities and collecting statistics provided in litigation showing that the vast majority of persons prosecuted in select districts under Project Safe Neighborhoods were Black); Patton, *supra* note 22 at 1021-25 (examining racial disparities); Humera Lodhi, *There’s A Large Racial Disparity in Federal Gun Prosecutions in Missouri, Data Shows*, The Kansas City Star (updated July 1, 2022), <https://www.kansascity.com/news/state/missouri/gun-violence-missouri/article258304878.html> (reporting racial disparities in both federal gun convictions and sentence lengths and recognizing that “[l]aws focused on felons are ‘racially coded language’ . . . because people of color are more likely to come in contact with police, more likely to be arrested, and more likely to be labeled a felon than white people”).

²⁷ See Zimroth Comment, *supra* note 11 at 2-4; Brady United Against Gun Violence, *Re: Comments on Consideration of Possible Amendments to § 2K2.1* at 1 (Oct. 17, 2022) (urging holistic view).

²⁸ DAG Comment, *supra* note 20 at 3 & App. A.

²⁹ See Shreefter, *supra* note 24 at 158-59.

³⁰ Mike Wessler, *Updated charts provide insights on racial disparities, correctional control, jail suicides, and more*, Prison Policy (May 19, 2022), <https://tinyurl.com/2p943b9z>; see also Alexander, *supra* note 24 (arguing that mass

it has been evident that Blacks are overrepresented in state and federal prisons.”³¹ This inequitable enforcement regime has shaped the American criminal justice system: In 2020, the Bureau of Justice Statistics found that Black Americans are imprisoned in state and federal prisons at a rate that is over five times the rate of white Americans.³²

This imbalance is replicated in federal firearms sentencings, the vast majority of which involve a prohibited person in possession of a firearm conviction under 18 U.S.C. § 922(g).³³ The Commission’s 2022 report on firearms offenses found that over half of the individuals convicted of offenses sentenced under §2K2.1 in fiscal year 2021 were Black.³⁴ And Commission data shows that for felon-in-possession offenses, in particular, 56% of the individuals sentenced that fiscal year were Black.³⁵

incarceration is a perpetuation of American’s dark legacy of slavery and segregation); Elizabeth Hinton, et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Inst. of Just. at 1 (May 2018), <https://tinyurl.com/3zev58dd> (“Black men comprise about 13 percent of the male population, but about 35 percent of those incarcerated.”).

³¹ Shreefter, *supra* note 24 at 158; *see also* Kevin R. Reitz, *Don’t Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 Tex. L. Rev. 1787, 1791–92 (2006) (“Shortly following emancipation, by 1880, the black-white disparity ratio in per capita imprisonment was nearly three to one” and in the “120 years following 1880, black-white disproportionalities in prison rates have grown steadily worse.”).

³²E. Ann Carson, U.S. Dep’t of Just., Off. of Just. Programs, Bureau of Just. Stats., *Prisoners in 2019* 10 (2020), <https://tinyurl.com/4sswe6xd>.

³³ USSC, *What Do Federal Firearms Offenses Really Look Like?* 4 (July 2022), <https://tinyurl.com/6jsusejv> (“The vast majority of the offenders sentenced under §2K2.1 were convicted under 18 U.S.C. § 922(g).”) (Firearms Report).

³⁴ *Id.* at 10 tbl.1 (reporting that in fiscal year 2021, a majority of individuals sentenced under §2K2.1 (after “excluding offenders sentenced under the career offender guideline, Armed Career Criminal Act, and offenders convicted solely of an offense under 18 U.S.C. § 924(c) and certain other cases”) were Black (54.5%) and U.S. citizens (96.1%)).

³⁵ USSC, *Quick Facts: Felon in Possession of a Firearm Fiscal Year 2021* (2022), <https://tinyurl.com/5ykh2z5u>. Studies have also found similar racial disparities in state firearms convictions. For example, a 2021 study found that over two-thirds of convictions involving a firearm in Illinois were for mere possession offenses, and that Black men, particularly in Cook County, were disproportionately convicted. David E. Olson, *et al.*, Loyola Univ. Chi., Ctr. for Crim. Just. Rsch, Pol’y, and Prac.,

Enforcement. “F[el]on-in-possession laws are embedded in a broader range of decisions about criminal law and its enforcement.”³⁶ In particular, the failed “War on Drugs” is “deeply intertwined” with the criminal regulation of gun possession.³⁷ For example, “drug convictions often serve as predicates for a range of felon-in-possession gun crimes, and policing of guns and drugs are often closely tied.”³⁸ As I have written elsewhere, the racialized policing practices that became popular during the 1980s and continue today—including stop-and-frisks and traffic stops—mean that “too often, whether you are deemed a ‘prohibited person’ depends on your skin color and zip code, not the threat you pose to the community.”³⁹ Indeed, in its recent Firearms Report, the Commission studied a sample of firearms convictions and found that a significant number of the sample—27.5%—originated from “traffic stop[s] or routine patrol[s].”⁴⁰ Within that group, the Commission found astonishing racial disparities: “Black firearms offenders represented a higher share of arrests following law enforcement conducting a routine street

Sentences Imposed on Those Convicted of Felony Illegal Possession of a Firearm in Illinois at 1-2 (July 2021), <https://tinyurl.com/5n7cfhkk>.

³⁶ Levin, *supra* note 21 at 2197.

³⁷ *Id.* at 2177; see Schreefter, *supra* note 24 at 174 (“[T]he ‘War on Drugs’ shaped today’s reality of the disparate enforcement of federal firearm offenses by significantly increasing the number of Black people with felony convictions.”).

³⁸ Levin, *supra* note 21 at 2177 (summarizing study findings that “for weapons offenses, the arrest rates for African Americans is five times higher than the rate for whites and three times higher than the rate for Hispanics” in New York City).

³⁹ *Federal Time*, *supra* note 13; see also B. Keith Payne & Julian M. Rucker, *Explaining the Spatial Patterning of Racial Disparities in Traffic Stops Requires a Structural Perspective: Further Reflections on Stelter et al. (2022) and Ekstrom et al.* 33(4) Psych. Sci. 666–68 (2022), <https://tinyurl.com/uphmvder> (“Recent studies have made clear that Black drivers in the United States are more likely to be stopped by police than White drivers and that the size of the disparity varies widely from one place to another.”); Daniel Webster, *et al.*, *Reducing Violence and Building Trust: Data to Guide Enforcement of Gun Laws in Baltimore*, Johns Hopkins Ctr. for Gun Pol’y and Rsch. at 16 (Jun. 4, 2020), <https://tinyurl.com/4k8xaxfx> (“BPD’s gun law enforcement strategy has historically prioritized stop-and-search practices with insufficient training and oversight to prevent racial profiling.”).

⁴⁰ See *What Do Federal Firearms Offenses Really Look Like?*, *supra* note 33 at 32.

patrol (73.0%) and traffic stops (66.9%) compared to the overall percentage of Black firearms offenders in the sample.”⁴¹

Federal firearms enforcement patterns have exacerbated these disparities. Over the last two decades, federal firearms prosecutions have proliferated under charging policies and taskforces implemented by the Department of Justice (DOJ). Most prominently, Project Safe Neighborhoods, launched by President George W. Bush in 2001, increased firearm prosecutions nationwide. The federal government hired hundreds of new prosecutors and law enforcement agents to bring federal prosecutions for gun crimes—largely simple possession—that would have otherwise proceeded in state courts for the express purpose of imposing more severe prison sentences.⁴²

Critics have concluded that Project Safe Neighborhoods “specifically targets communities of color for punishment above and beyond what would already be significant punishment in state court.”⁴³ More than half of all Black individuals in the United States live in just 30 cities, all of which have been targeted as part of Project Safe Neighborhoods.⁴⁴ In those cities, the people who are prosecuted for firearms offenses are overwhelmingly Black. In 2007, Professor Bonita Gardner reported that in my district, the Eastern District of Michigan, “almost ninety percent of those prosecuted under Project Safe Neighborhoods [were] African American.”⁴⁵ Many of these federal cases

⁴¹ *Id.* at 33.

⁴² Gardner, *supra* note 26 at 312 (Throughout Project Safe Neighborhoods’ existence, the overwhelming majority of its gun prosecutions have focused on felon-in-possession charges.). Federal prosecutors have focused on simple possession charges despite the existence of “twenty major federal gun crimes—including gun trafficking, corrupt gun dealers, stolen guns, selling to minors, obliterating serial numbers, and lying on the background check form.” Patton, *supra* note 22 at 1022.

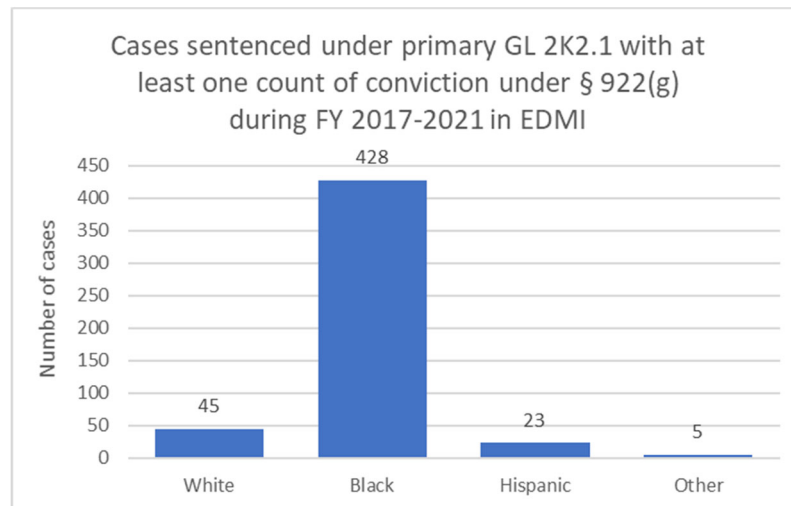
⁴³ Patton, *supra* note 22 at 1023.

⁴⁴ Gardner, *Separate and Unequal*, *supra* note 26 at 316.

⁴⁵ *Id.* at 313-17 (citing *Hubbard v. United States*, No. Crim. 04-80321, 2006 WL 1374047, at *2 (E.D. Mich. May 17, 2006)) (Of the 61 defendants prosecuted under the program represented by the local FPD, “54 were African-American, 2 were Native American, 3 were Hispanic or Latino, and 2 were Caucasian.”). Likewise, in the Southern District of New York, “testimony show[ed] that more than eighty percent of defendants prosecuted under [Project Exile] were African American.” And

are picked up from ongoing state prosecutions. When prosecutors choose to bring federal charges, with their longer and determinate sentences and mandatory minimums, they can coerce guilty pleas. Even the threat of federal prosecution can deter an individual in state court from exercising her constitutional right to proceed to trial.⁴⁶

In the Eastern District of Michigan, the pattern has held steady since Dr. Gardner published her report: during the fiscal years of 2017 to 2021, 85% of people sentenced under primary guideline §2K2.1 with at least one count of conviction under § 922(g) were Black.⁴⁷ Compared to all other races, in my district, Black individuals are 5.9 times more likely to be sentenced with at least one § 922(g) conviction and under §2K2.1 than non-Black individuals.⁴⁸



in the Southern District of Ohio, “more than ninety percent” of known cases of individuals prosecuted under the program were Black. *Id.* at 317.

⁴⁶ See Patton, *supra* note 22 at 1025 (“Although the vast majority of criminal cases, and therefore the vast source of mass incarceration, come from state systems, the federal prosecutions impact those systems tremendously by providing state prosecutors greater power to negotiate tougher pleas.”).

⁴⁷ The data for these analyses were extracted from the Commission’s “Individual Offender Datafiles” spanning fiscal years 2017 to 2021. The Commission’s “Individual Offender Datafiles” are publicly available for download on its website. USSC, *Commission Datafiles*, <https://tinyurl.com/4j32hwha>. By comparison, nationwide, from fiscal year 2017 to 2021, 56% of individuals sentenced under primary guideline §2K2.1 with at least one § 922(g) charge were Black. *Id.*

⁴⁸ This calculation represents relative risk.

B. Public Safety

In October, a coalition of gun violence prevention researchers, policymakers, lawyers, and advocates explained to the Commission that firearm violence in the United States is a racial justice crisis.⁴⁹ I am grateful to these groups for emphasizing this too-often ignored reality. As the coalition explained: “Gun violence does not impact Americans equally: Black people are twice as likely as White people to die from gun violence and 14 times more likely to be wounded, while Black children and teens are 14 times more likely to die from gun violence than their White counterparts.”⁵⁰ These disparities “do not arise from cultural deficiencies, a greater propensity toward violence, or moral decay.”⁵¹ Rather, they reflect a preference for incarceration over intervention and for abandonment rather than aid.⁵² Our approach to gun violence in Black communities—racially-targeted police enforcement—has exacerbated problems at enormous social and monetary costs.

“The impact of gun violence on the lives of [people of color] is devastating, but so too is the over-reliance on a heavily-punitive criminal legal system to address violence.”⁵³ These strategies are predicated on the assumption that the prospect of harsh, determinate sentences will deter

⁴⁹ Zimroth Comment, *supra* note 11 at 12.

⁵⁰ *Id.* (gathering sources).

⁵¹ *Id.*

⁵² See Brady United, *Gun Violence is a Racial Justice Issue*, <https://tinyurl.com/yccvm7ee> (last accessed Feb. 26, 2023) (“Black people are not inherently more violent. . . . White men, for instance, commit the majority of mass shootings. . . . public policy has made it so that Black people are more likely to face conditions that facilitate gun violence.”).

⁵³ Educational Fund to Stop Gun Violence, DC Justice Lab, Cities United, March for Our lives, Community Justice Action Fund, Consortium for Risk-Based Firearm Policy, and Johns Hopkins Center for Gun Violence Prevention and Policy, *Racial Equity Framework for Gun Violence Prevention* at 4 (2022), <https://tinyurl.com/4j2f44fs>; see also Robert Weiss, *Rethinking Prison for Non-Violent Gun Possession*, 112 J. Crim. L. & Criminology 665, 668 (2022) (citing James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* 35 (2017)) (noting “[L]ow-income and Black Americans experience both criminal justice over-enforcement (mass incarceration, disparate arrest rates, police abuses) and under-enforcement (unabated gun violence, low homicide closure rates, etc.”)).

conduct.⁵⁴ But years after deploying strategies based on that unproven assumption, it remains just that: an assumption. And it is an assumption that ignores the relative consensus in empirical research that enhanced penalties for simple gun-possession offenses do not effectively reduce violence.⁵⁵

What could explain this? For one thing, it is consistent with the reality that the general deterrence benefit of “severe prison terms, specifically, is quite limited.”⁵⁶ As the DOJ’s National Institute of Justice has explained, “increasing the severity of punishment does little to deter crime”—“[t]he certainty of being caught is a vastly more powerful deterrent.”⁵⁷ A recent Johns Hopkins University study that examined gun violence in Baltimore, Maryland, concluded that “increasing the certainty that violators experience consequences for committing gun crime is more important and cost-effective in reducing crime than increasing the length of sentences.”⁵⁸

⁵⁴ See Patton, *supra* note 22 at 1018 (“The U.S. Attorney for the Eastern District of Virginia, Helen Fahey, explained the advantages of federal prosecutions: lower likelihood of bail, harsher sentences, and a federal prison system that meant serving time in a distant location (hence the name ‘Exile’).”).

⁵⁵ See e.g., Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. Pa. L. Rev. 637, 694 (Feb. 2022) (“The research is clear that imposing increasingly harsh sentences is not an effective way to reduce gun crime.”) (gathering sources); see also Matthew Makarios & Travis C. Pratt, *The Effectiveness of Policies and Programs that Attempt to Reduce Firearm Violence: A Meta-Analysis*, 58 Crime & Delinquency 222, at 236 (2012) (finding a “weak” relationship between enhanced prison terms and gun violence); see also Weiss, *supra* note 53 at 686 (arguing for importance of using public health tools and discussing “substantial literature that considers gun violence a public health problem”).

⁵⁶ Melissa Hamilton, *Some Facts About Life: The Law, Theory, and Practice of Life Sentences*, 20 Lewis & Clark L. Rev. 803, 821 (2016) (“The lost deterrence function in lengthening sentences is also likely due, to a significant degree, to the recognition from behavioral law and economics studies that offenders often are not rational thinkers who carefully measure the benefits of their actions against potential distant or long-term legal consequences.”).

⁵⁷ U.S. Dep’t of Just., Nat’l Inst. of Just., *Five Things About Deterrence* at 1 (May 2016), <https://tinyurl.com/54tshyyj>.

⁵⁸ Webster, *supra* note 39 at 4; see also Weiss, *supra* note 53 at 675 (“Evidence of a connection between putting people in prison for gun possession and increased public safety is weak.”).

And to the extent that any minimal deterrent effect might exist, it comes at significant human and fiscal costs.⁵⁹ Incarceration is not only expensive, it often “does not prevent reoffending and has a criminogenic effect on those who are imprisoned.”⁶⁰ That is because imprisonment severs ties to family and community, disrupts housing stability, and diminishes employment options on release.⁶¹ As the Vera Institute has explained, “incarceration is an expensive way to achieve little public safety.”⁶²

Another reason that prosecutions for felon-in-possession offenses alone cannot effectively make communities safer is that a prior felony conviction is a poor proxy for dangerousness.⁶³ Law enforcement officers often claim that Project Safe Neighborhoods and other firearm taskforce prosecutions focus on “violent” people,⁶⁴ but there is little apparent pattern to who is prosecuted

⁵⁹ Webster, *supra* note 39 at 24 (gathering sources).

⁶⁰ *Id.*

⁶¹ See generally Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis. L. Rev. 1049, 1054-72 (cataloging eighteen criminogenic effects of incarceration); Lynne M. Vieraitis, Tomislav V. Kovandzic, & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol’y 589, 614-16 (2007); see also USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996) (recognizing imprisonment has criminogenic effects including: contact with more serious “offenders”, disruption of legal employment, and weakening of family ties).

⁶² Don Stemen, *For the Record: The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Evidence Brief at 2 (Jul. 2017), <https://tinyurl.com/ycyzkurs>.

⁶³ See Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 721 (2007) (noting that “many felonies are not violent in the least, raising no particular suspicion that the convict is a threat to public safety. Perjury, securities law violations, embezzlement, obstruction of justice, and a host of other felonies do not indicate a propensity for dangerousness. . . . Yet, despite this overinclusiveness, felon possession bans are consistently, and without exception, deemed reasonable measures of promoting public safety”); see also *Kanter v. Barr*, 919 F.3d 437, 466 (7th Cir. 2019) (Barrett, J., dissenting) (explaining § 922(g)(1) “also encompasses those who have committed any nonviolent felony or qualifying state-law misdemeanor—and that is an immense and diverse category. It includes everything from Kanter’s offense, mail fraud, to selling pigs without a license in Massachusetts, redeeming large quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses.”), *abrogated by New York State Rifle & Pistol Association, Inc v. Bruen*, 142 S. Ct. 2111 (2022).

⁶⁴ See Daniel Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369, 375, 391 (2001) (summarizing promises

federally for firearm possession, beyond racial disparities. In my experience, felony convictions (defined as “a crime[s] punishable by imprisonment for a term exceeding one year”) can include minor, local offenses such as possession of drugs in small quantities, certain driving offenses, and petty theft, which may include stealing food from a grocery store. Option 2’s changes to §2K2.1 would allow prosecutors to cast an even wider net and risk amplifying these existing disparities.

IV. The history of §2K2.1 reflects numerous, unstudied upward ratchets that should not be repeated for “proportionality” reasons.

In addition to Option 2’s likely disproportionate and harmful impact on communities of color, the history and evolution of the firearms guideline counsels against this sweeping response to the BSCA’s directive. Section 2K2.1’s history reflects many hastily promulgated upward adjustments that were not preceded by careful study and review. In fact, numerous commentators have suggested that the firearms guidelines should be *decreased, not heightened*.⁶⁵

by Project Safe Neighborhoods initiatives to “target the most prolific violent offenders,” and “crack down on violent gun criminals”).

⁶⁵ See, e.g., Statement of Barry J. Portman Before the U.S. Sentencing Comm’n, Washington, D.C., at 25 (Mar. 5, 1991) (“Portman 1991 Statement”) (“The data indicate that, under the November 1, 1989 version of §2K2.1, courts are sentencing below or at the bottom of the guideline range in 49% of the cases (below = 6.8%; bottom = 42.4%), and above or at the top of the range in 28.8% of the cases (above = 5.1%; top = 23.7%) – suggesting that the offense levels under the guideline are too high.”); Statement of Paul D. Borman Before the U.S. Sentencing Comm’n, Washington, D.C., at 13 (Mar. 5, 1991) (Borman 1991 Statement) (“The report accompanying this guideline suggests that [the] majority of courts are sentencing toward the bottom of the guideline, so it is unclear why the Commission is proposing a complex revision of the guideline that would lead to higher offense levels. . . .”); Defenders’ Annual Letter to the U.S. Sentencing Comm’n, at 3 (Mar. 9, 2006) (arguing that the Commission should eliminate the enhanced base offense levels for semiautomatic firearms capable of accepting large capacity magazines after the repeal of the assault weapons and large capacity magazine bans that prompted these heightened offense levels); Testimony of Richard A. Hertling Before the U.S. Sentencing Comm’n, Washington, D.C., at 11 (Mar. 15, 2006) (“The Department favors the upward-departure approach over the offense-level approach in light of the fact that possession of such firearms is no longer illegal *per se*.”); Testimony of Kyle Welch Before the U.S. Sentencing Comm’n, Washington, D.C., at 3 (Mar. 17, 2011)

While the BSCA does not require the Commission to increase penalties for offenses other than straw purchasing and drug trafficking, the Commission seeks comment on “whether having higher penalties for straw purchasers than prohibited persons”—as Option 1 would provide—“raises proportionality concerns.”⁶⁶ Linking the prohibited persons sentencing range to that of an arbitrarily inflated straw purchasing enhancement is not good sentencing policy. The Commission’s greater concern should be the proportionality of punishment to the conduct being punished. Option 2’s punishment enhancements are greater than necessary.

A. History of §2K2.1

The history of amendments to 2K2.1 is a story of repeat, non-evidence-based, one-way ratchets. This historic failure to adopt a deliberative process that “begins with, and builds upon, empirical data,”⁶⁷ would be greatly exacerbated by any further across-the-board upward expansions just eight short months after the BSCA was enacted.

Soon after promulgating its original guidelines, the “Commission undertook several major revisions [which] resulted in significant severity increases over historic levels.”⁶⁸ Over the course of those revisions, the firearms guidelines have been amended to increase penalties in a variety of ways no less than ten times.⁶⁹ Most of these increases have been in response

(“Welch 2011 Testimony”) (stating that the straw purchaser enhancements being considered in 2011 were not supported by the Commission’s own empirical data and arguing that “[t]hese data suggest the guideline ranges for these offenses are too high, not too low”).

⁶⁶ 2023 Proposed Amendments, at 7196.

⁶⁷ See USSG ch. 1, pt. A, at 5.

⁶⁸ USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 66 (2004) (“*Fifteen Years of Guideline Sentencing*”).

⁶⁹ See USSG, App. C, Amends. 189 (Nov. 1, 1989), 333 (Nov. 1, 1990), 374 (Nov. 1, 1991), 478 (Nov. 1, 1993), 522 (Nov. 1, 1995), 531 (Nov. 1, 1995), 578 (Nov. 1, 1998), 631 (Nov. 1, 2001), 691 (Nov. 1, 2006), 753 (Nov. 1, 2011).

to DOJ and federal law enforcement requests,⁷⁰ congressional directives,⁷¹ statutory minimum and maximum penalty increases,⁷² or some combination

⁷⁰ See, e.g., Letter of Stephen A. Saltzburg, Deputy Attorney General, on Behalf of the Dept. of Justice to Judge William Wilkins, Chair, U.S. Sentencing Comm’n, at 35, Washington, D.C. (Apr. 14, 1989) (requesting increased base offense levels across firearms guidelines “to at least 16 for any firearms offense subject to a 10-year maximum penalty”); USSG App. C., Amend. 631, Reason for Amendment (Nov. 1, 2001) (explaining that the increases in punishment for an offense involving three or more firearms “responds to a recommendation from the Bureau of Alcohol, Tobacco and Firearms (ATF) to increase the penalties in §2K2.1”); DOJ Comments on the Sentencing Commission’s Proposed Priorities (Aug. 15, 2005) (recommending new SOC for firearms trafficking and an increase in the SOC for altered or obliterated serial numbers); Letter from Jonathon Wroblewski, DOJ Office of Policy and Legislation, to Chief Judge William K. Sessions, III, Chair, U.S. Sent’g Comm’n, at 9 (June 28, 2010) (requesting additional enhancements).

⁷¹ The 1995 Amendments were in response to a provision in the Violent Crime Control Law Enforcement Act of 1994, Pub. L. No. 103-322 § 110501, 108 Stat. 1796 (Sept. 13, 1994), which directed the Commission to “amend its sentencing guidelines to provide an appropriate enhancement of the punishment for a crime of violence . . . or a drug trafficking crime . . . if a semiautomatic firearm is involved.” In addition to adding an upward departure, the Commission increased the base offense levels for firearms capable of accepting a large capacity magazine to make them commensurate with the levels for possession of machine guns, silencers, destructive devices, and other National Firearms Act weapons. Notably, *the enhancement applied even when the firearm was not connected to a crime of violence or drug trafficking offense*. Thus, the amendment was broader than the congressional directive. See USSG App. C., Amends. 522, 531 (Nov. 1, 1995). The 1998 Amendment 578 was enacted in response to “a *proposed directive* contained in juvenile justice legislation approved by the Senate Judiciary Committee early in 1997.” 63 Fed. Reg. 602, 1998 WL 1699 (Jan. 6, 1998) (1998 Notice of Proposed Amendments) (emphasis added); see also *United States v. Bennett*, No. 8:07CR235, 2008 WL 2276940, at *4 (D. Neb. May 30, 2008) (explaining that the “guidelines that establish the base offense levels for weapons crimes were . . . promulgated in large part pursuant to Congressional directive”).

⁷² For example, in 1989 the Commission raised the BOL for most conduct covered by the original 2K2.1, including 18 U.S.C. § 922(g) offenses, from 9 to 12 in response to the Anti-Drug Abuse Act of 1988, which raised the statutory maximum for conduct covered by the guideline from five to ten years. See USSG, App. C., Amend. 189, Reason for Amendment (Nov. 1, 1989). In 1991, the Commission implemented graduated base offense level increases across 2K2.1 based on the existence of certain qualifying prior convictions. Compare USSG §2K2.1 (1991) with *id.* §§2K2.1, 2K2.2, 2K2.3 (1990). These enhancements were in response to a study of the firearms guidelines by the Commission’s 1990 Firearms and Explosive Materials Working Group. See USSC, *Firearms and Explosive Materials Working Group*

of these factors. Most did not involve extensive empirical studies and review.⁷³ The Commission offered little or no explanation for some of its decisions.⁷⁴ Commentators such as the Federal Defenders,⁷⁵ the National

Report (1990) (“*Working Group Report*”). However, the working group’s recommendations were largely based not on national data and experience, but on Congress’s increasing of statutory maximum and mandatory minimum penalties for prohibited persons with certain types of prior convictions under 18 U.S.C. § 924(e) (Armed Career Criminal Act). *See id.* at 18-21.

⁷³ The one exception may be the 1991 amendments which were prompted by the working group study mentioned above. *See Working Group Report, id.* But, as explained *infra*, at 21-22, the working group’s recommendations for reformation of the guidelines were not supported by its findings.

⁷⁴ For instance, the Commission’s only explanation for the 1989 increases to offense levels (from 9 to 12 for many offenses, 8 to 12 for certain categories of straw purchasers, and 12 to 16 for certain categories of weapons) and specific offense characteristics (for trafficking in multiple firearms, and for stolen weapons or obliterated serial numbers) was “to better reflect the seriousness of this conduct” and to account for statutory increases. USSG App. C., Amend. 189, Reason for Amendment (Nov. 1, 1989). In 1990, the Commission increased the base offense levels for possession, receipt, and transport of National Firearms Act weapons from 16 to 18. *See* USSG, App. C., Amend. 333 (Nov. 1, 1990). The only reason provided was “to better reflect the seriousness of the conduct covered.” *Id.*, Reason for Amendment. In 1993, the Commission amended the commentary to §2K2.1 to provide for strict liability “under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number.” 57 Fed. Reg. 62832, 62838, 1992 WL 386965 (Dec. 31, 1992) (“Notice of 1993 Proposed Amendments”). The Commission’s notice of proposed amendment was completely devoid of reasoning. And the Commission’s “Reason for Amendment” was equally opaque, simply referring to the amendment as “clarif[ying].” USSG, App. C., Amend. 478, Reason for Amendment, (Nov. 1, 1993); *cf. United States v. Handy*, 570 F. Supp. 2d 437, 453 (E.D.N.Y. 2008) (“None of [the firearm guideline amendments] have altered the two-level enhancement for a stolen firearm, nor have they provided any indication of why the Commission believes that the enhancement is appropriate despite the lack of knowledge that the firearm involved was stolen.”).

⁷⁵ *See e.g.* Comments of the Federal Defenders on the 1989 Proposed Guidelines Amendments and Other Aspects of Guideline Sentencing 30, Washington, D.C. (Apr. 7, 1989); Portman 1991 Statement, *supra* note 65 at 4-5, 21-25; Letter from Jon M. Sands on Behalf of the Federal Public and Community Defenders to the U.S. Sent’g Comm’n 3, Washington, D.C., at 3 (Mar. 9, 2006) (“Sands 2006 Letter”); Testimony of Jon Sands on Behalf of the Federal Public and Community Defenders Before the U.S. Sentencing Comm’n, Washington, D.C., at 1-2 (Mar. 18, 2009) (“Sands 2009 Testimony”); Welch 2011 Testimony, *supra* note 65 at 2-3.

Association of Criminal Defense Lawyers,⁷⁶ the American Bar Association,⁷⁷ and the Practitioner's Advisory Group⁷⁸ have criticized the Commission for proposing and implementing penalty increases without sufficient empirical review of the need for the enhancements, and offering perfunctory, generalized reasons for the enhancements.

The original 1987 firearms guidelines, which were based on the Commission's study of past practices, set lower BOLs and far fewer specific offense characteristic (SOC) enhancements than today.⁷⁹ Unlike the current version, BOLs were not increased based on certain prior convictions.⁸⁰ Nor did the Commission set out alternative BOLs based on a firearm's features, as it does today.⁸¹ Indeed, the Commission stressed the difficulty of distinguishing levels of culpability based on a firearm's features.⁸²

But in 1991, the Commission restructured the firearms guidelines completely, consolidating three different sections into one new §2K2.1.⁸³ The revised BOLs "[were] linked to the statute of conviction," were enhanced

⁷⁶ Statement of Benson Weintraub, National Association of Criminal Defense Lawyers, Before the U.S. Sentencing Comm'n, Washington, D.C., at 2-3 (Mar. 15, 1990).

⁷⁷ Statement of Samuel J. Buffone, Chairperson, U.S. Sentencing Commission Committee Criminal Justice Section, Before the U.S. Sentencing Comm'n, Washington, D.C., at 3-6 (Mar. 15, 1990).

⁷⁸ Letter from Fred W. Bennett on Behalf of the Practitioners' Advisory Group (PAG) to U.S. Sentencing Comm'n, Washington, D.C., at 17 (Mar. 9, 1998); Letter from Greg Smith on Behalf of the PAG to U.S. Sentencing Comm'n, Washington, D.C., at 9-15 (March 15, 2006).

⁷⁹ Compare USSG §2K2.1, §2K2.2, §2K2.3 (1987) with §2K2.1 (2021) (In 1987, the conduct now contained solely in §2K2.1 was included in §2K2.1, §2K2.2, and §2K2.3). In 1987, the §2K2.1 BOL was 9. While there was a one-level enhancement if the firearm was stolen or had an altered or obliterated serial number in 1987, *see id.* §2K2.1(b)(1) (1987), the commentary noted the lack of data sufficient to determine the effect of a stolen firearm on pre-guidelines sentences. *See* USSG §2K2.1, comment. background (1987).

⁸⁰ *See* USSG §2K2.1, §2K2.2, §2K2.3 (1987).

⁸¹ *See id.*

⁸² *See id.* §2K2.1, comment. background (1987) ("Some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm.").

⁸³ *See* USSG §2K2.1 (1991).

significantly based on the existence of qualifying prior convictions, and were not based on data and national experience.⁸⁴ These changes were prompted by a report issued by the Commission's Firearms and Explosive Materials Working Group ("the Working Group"), a staff project that looked at data, case files, appellate decisions, and comments from law enforcement, including from the Bureau of Alcohol, Tobacco, and Firearms ("ATF").⁸⁵ The Working Group recommended enhancing BOLs across §2K2.1 based on the existence of qualifying priors.⁸⁶

The Working Group studied prior firearms sentencing decisions and determined that the offense characteristics impacting sentencing length "includ[ed] actual or intended unlawful or criminal use of the firearm, possession of the firearm for personal protection, sporting or collection purposes, drug-related conduct, [and possession of] N.F.A. firearms [and] destructive devices."⁸⁷ Indeed, most upward departures occurred where the individual had recently used the weapon, or intended to use the weapon, to commit another crime.⁸⁸ Significantly, *the existence of prior convictions was not in the Working Group's list of reasons for upward departures*. In fact, the Working Group determined that sentence length "does not seem strongly correlated with the existence of prior firearms or drug-related offenses or convictions for crimes of violence."⁸⁹ Of the cases studied, convicted persons who had committed prior offenses related to firearms, drugs, or crimes of violence "were sentenced to an average of 14 (fourteen) months, slightly lower than the fifteen-month average for all cases combined."⁹⁰ And while possession of a firearm for personal protection was cited by judges as a reason

⁸⁴ See *Fifteen Years of Guideline Sentencing*, *supra* note 68 at 66.

⁸⁵ See *Working Group Report*, *supra* note 72.

⁸⁶ See *id.* at 18-22.

⁸⁷ *Id.* at 10; see also *id.* App. D: Memorandum from Vince Ventimiglia to Commissioner Carnes, Rich Murphy, Firearms Working Group Re: Review of Case File Summaries for Firearms Guideline §2K2.1 (1989) 8-14 (Nov. 9, 1990) ("App. D").

⁸⁸ See *id.* at 11.

⁸⁹ *Id.* at 10.

⁹⁰ *Id.* at 10.

for imposing reduced sentences, the Working Group proposed no such adjustment.⁹¹

The Working Group's recommendation to enhance and restructure penalties across §2K2.1 was tied to legislative increases of statutory maximum and mandatory minimum penalties for prohibited persons and persons with certain types of prior convictions.⁹² For example, the Working Group noted that the Armed Career Criminal Act (ACCA) provided for a fifteen-year mandatory minimum for unlawful firearm possession where the individual had three specified prior convictions;⁹³ it therefore recommended an increased sentence for an individual with two qualifying felonies to increase "proportionality."⁹⁴ But the fifteen-year mandatory sentence was not based on Commission expertise: Commission data reflected no need for proportionality with this draconian mandatory minimum, and the drug felonies the Commission chose to trigger the enhancements were broader than those that triggered the ACCA.⁹⁵

Unsurprisingly, the 1991 amendments led to significant increases in prison sentences. In cases sentenced under primary guideline §2K2.1 with at least one count of conviction under § 922(g), the mean length of imprisonment leapt from 48.4 months in 1991 to 70.2 months in 1992.⁹⁶

In 1995, the Commission again made drastic changes to §2K2.1 via Amendment 522. A year earlier, Congress had enacted the Violent Crime

⁹¹ *See id.* at 10.

⁹² *See id.* at 19-21, 29-32. The Working Group's recommendations were predicated upon other factors unrelated to empirical research and the statutory purposes of sentencing as well. For instance, it noted the purported reluctance of federal prosecutors to expend resources on firearms offenses "in light of the relatively low penalties under the guidelines." *Id.* at 32.

⁹³ *See* 18 U.S.C. § 924(e).

⁹⁴ *See Working Group Report* at 18-23, App. D, *supra* note 87 at 10.

⁹⁵ *Compare* USSG §4B1.2(b) *with* 18 U.S.C. § 924(e)(2)(A).

⁹⁶ Data calculated from the annual datasets for fiscal years 1991 and 1992 available in the series created by the United States Sentencing Commission titled Monitoring of Federal Criminal Sentences, 1987-1998 (ICPSR 9317), and hosted by the Inter-university Consortium for Political and Social Research, <https://tinyurl.com/53wztrdf>

Control Law Enforcement Act of 1994,⁹⁷ which created several new firearms offenses (banning assault weapons and large capacity magazines).⁹⁸ The new law directed the Commission to “amend its sentencing guidelines to provide an appropriate enhancement of punishment for [a crime of violence or a drug trafficking crime] if a semiautomatic firearm is involved.”⁹⁹ Aside from this directive, which applied only to crimes of violence and drug trafficking, Congress required no action relating to this new offense.

But the Commission responded more broadly than required by the directive. It increased the offense levels for possession of certain semiautomatic firearms capable of accepting large capacity magazines to make them commensurate with the offense levels for possession of machine guns and other National Firearms Act weapons (18 U.S.C. § 5845) in §2K2.1(a)(1) [level 26], (a)(3) [level 22], (a)(4) [level 20], and (a)(5) [level 18],¹⁰⁰ and applied the enhancements even when the firearm was not connected to a crime of violence or drug trafficking offense.¹⁰¹ The Commission offered no explanation for this amendment or its decision to enhance penalties beyond the narrower dictates of the directive.¹⁰² The assault weapon and large capacity magazine bans expired in 2004 (and have never been reinstated by Congress) but the Commission has not taken action to remove these enhancements.¹⁰³ A 1997 Urban Institute study mandated by Congress concluded that the bans had little impact on murder rates.¹⁰⁴ Yet even in the face of the 2004 sunset, Urban Institute report, and 2006 public comment—from both Defenders and the DOJ—urging the Commission to

⁹⁷ Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994).

⁹⁸ *Id.*, Tit. XI, Subtitle A; see also *Fifteen Years of Guidelines Sentencing*, *supra* note 68 at 66.

⁹⁹ Pub. L. No. 103-322 § 110501.

¹⁰⁰ See USSG §2K2.1 (1995).

¹⁰¹ See USSG, App. C., Amend. 522 (Nov. 1, 1995).

¹⁰² See *id.*

¹⁰³ See Pub. L. No. 103-322 § 110501(2) (indicating the amendments made by this subtitle are repealed effective ten years after the date of their enactment).

¹⁰⁴ Roth Kroper, et al., Urban Institute, *Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994*, at 2 (Mar. 13, 1997), <https://tinyurl.com/jnmes9h4>; see also Pub. L. No. 103-22, § 110104 (mandating this study).

remove the large capacity magazine BOL enhancements,¹⁰⁵ these enhancements remain in place (and were broadened) at §2K2.1(a)(1), (a)(3), and (a)(4).¹⁰⁶

In 2011, DOJ requested, and the Commission implemented, enhancements to §2K2.1 for straw purchasers and for offenses involving firearms and ammunition transported or intended to be transported out of the United States.¹⁰⁷ Much like today, the 2011 proposed amendments to §2K2.1 were in reaction to highly publicized, high-profile instances of gun violence sparking political debate.¹⁰⁸ DOJ's testimony during that amendment cycle highlighted high-profile examples of drug cartel violence in Mexico and U.S. cities bordering Mexico.¹⁰⁹ Defenders pointed to the border district data, showing that the sentences for straw purchasers ("overwhelmingly first time, non-violent offenders for whom prison should be 'generally' inappropriate" under § 994(j)) should not be increased.¹¹⁰ We feared that the Commission's proposals were "not narrowly tailored to carry out the purposes of sentencing and [brought] with them significant risk of

¹⁰⁵ See Hertling 2006 Testimony, *supra* note 65 at 3; Sands 2006 Letter, *supra* note 75 at 3-10.

¹⁰⁶ See USSG §2K2.1 (Nov. 1, 2021). When the bans were repealed, the Commission replaced the statutory references to the repealed laws with the phrase "semiautomatic firearm capable of accepting a large capacity magazine." USSG App. C., Amend 691, Reason for Amendment (Nov. 1, 2006). This had the effect of broadening the reach of these enhanced BOLs beyond the magazines covered by the large capacity magazine ban when it was in effect. The Commission gave no reason for retaining and broadening the enhanced BOLs other than to point out that district courts were *increasingly not applying them* after the repeal of § 921(a)(30) (which would normally counsel toward jettisoning—not keeping—them). See Sands 2006 Letter, *supra* note 75 at 6-8.

¹⁰⁷ See USSG App. C. Amend. 753 (Nov. 1, 2011); *see also* Defenders' Annual Letter to the Sentencing Commission, at 43 (July 15, 2013); Letter from Jonathon Wroblewski, DOJ Office of Policy and Legislation, to Chief Judge William K. Sessions, III, Chair, U.S. Sentencing Comm'n, at 9 (June 28, 2010); Statement of Laura E. Duffy, United States Attorney for the Southern District of California, Before the U.S. Sentencing Comm'n, Washington, D.C. (Mar. 17, 2011) ("Duffy 2011 Statement").

¹⁰⁸ See Welch 2011 Testimony, *supra* note 65.

¹⁰⁹ See Duffy 2011 Statement, *supra* note 107 at 2-15.

¹¹⁰ Defenders' Annual Letter to the Sentencing Commission, at 8 (Aug. 18, 2010); *see also* Welch 2011 Testimony, *supra* note 65 at 3.

incarcerating low-level, first-time offenders for a length of time that is not only greater than necessary, but detrimental to public safety.”¹¹¹
Nonetheless, the Commission complied with DOJ’s request once again.¹¹²

These examples demonstrate §2K2.1’s history of unstudied one-way ratchets. They also show that §2K2.1 does not need further increases. While both options of Part A of the Commission’s proposed amendment represent a problematic continuation of this trend, Option 2 is far worse because it implements more expansive and punitive reforms than required by the BSCA directive, raising many of the BOLs that have already been dramatically increased in previous years with little or no empirical support. Rather than implementing sweeping changes to §2K2.1 less than one year after the directive, the Commission should embrace its characteristic institutional role and unique expertise by treading cautiously until an exhaustive study can be completed.

B. Proportionality

Calls for “proportionality” between straw purchasers and prohibited persons do not justify increasing the base offense levels across §2K2.1 as Option 2 proposes. We have a simple response to the Commission’s question of “whether having higher penalties for straw purchasers than prohibited persons raises proportionality concerns”¹¹³: *you don’t fix something that’s broken by breaking it more*. Option 2 would compound the many problems of an already flawed guideline by implementing changes that sweep beyond the BSCA directive. Calls to anchor the prohibited person calculations to a straw purchasing enhancement motivated, not by careful study and the purposes of sentencing, but by Congress, ring hollow when the anchor itself is irrational and arbitrarily inflated.

Linking sentencing guideline ranges to statutory maximum punishments is not reasoned sentencing policy. The Commission was created to independently assess the need for the sentencing ranges it establishes to meet the purposes of sentencing and avoid unwarranted disparities and

¹¹¹ Welch 2011 Testimony, *supra* note 65 at 2.

¹¹² USSG §2K2.1(a)(6)(C) (Nov. 1, 2011). *Compare id.* with §2K2.1(a)(6) (Nov. 1, 2006).

¹¹³ 2023 Proposed Amendments at 7196.

unwarranted similarities.¹¹⁴ It was not created to mirror acts of Congress. Indeed, over 30 years ago the Supreme Court upheld the constitutionality of the Sentencing Commission in the face of a separation-of-powers challenge on the principle that judicial representation on the Commission would “ensure[] that judicial experience and expertise [would] inform the promulgation of rules for the exercise of the Judicial Branch’s own business—that of passing sentence on every criminal defendant.”¹¹⁵ But an upward ratchet linked to statutory amendment does not reflect judicial experience and expertise—oftentimes, it reflects just the opposite. Thus, “[i]nstead of reflexively keying sentences to arbitrary statutory norms, the Commission should use its data and other expert research at its disposal to create guidelines that further the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).”¹¹⁶

As Defenders underscored in 1991, the statutory maximum sets the most severe punishment “for the most aggravated form of the offense.”¹¹⁷ An increased maximum reflects a Congressional decision to treat the most aggravated form of the offense more severely, “but does not necessarily mean that Congress believes that the heartland form of the offense should be treated more severely.”¹¹⁸ This holds true today. And the Commission need not divine what Congress may have been signaling by raising the statutory maximums for straw purchasing and prohibited persons offenses to 15 years. In its directive to the Commission, Congress explicitly stated that it intended for straw purchasers and gun traffickers to be subject to higher penalties. If it wanted the same for prohibited persons, it would have said so.

Furthermore, pre-BSCA sentencing data show that judges do not see the need for higher penalties in most of these cases. The Commission’s firearms report shows that, for cases sentenced under §2K2.1 in fiscal year 2021, sentencing judges gave within-range sentences in 50% of cases, and varied downward in 36% of cases, compared to fiscal year 2007, when 71% of such cases were sentenced within-range, and only 11% received downward

¹¹⁴ 28 U.S.C. § 991.

¹¹⁵ *Mistretta v. United States*, 488 U.S. 361, 408 (1989).

¹¹⁶ Sands 2009 Testimony, *supra* note 75 at 2.

¹¹⁷ Portman 1991 Statement, *supra* note 65 at 4.

¹¹⁸ *Id.*

variances.¹¹⁹ Given the information currently available to it, the Commission should conclude that §2K2.1's current BOLs are more than adequate. For these reasons, if the Commission amends §2K2.1 in response to the BSCA now, it should implement Option 1, and should do so in the narrowest possible way to mitigate the harm of such an increase to communities of color. It should implement a 1-level enhancement in the proposed subsections (b)(5)(A) and (B), and a 5-level enhancement in the proposed subsection (b)(5)(C). These increases are less drastic than their alternative counterparts.

When the Commission increased guideline ranges for homicide and assault in 2004, Judge Sessions noted: “[T]he Commission looks to individual enhancements that might require an increase.”¹²⁰ But “nobody seems to consider the big picture, or the cumulative effect of all the little decisions that the Commission makes.”¹²¹ “[A]s a result, the penalties seem to continually grow based on apparently legitimate reasons. If one looks to the overall system, which is not known to be particularly lenient, it is continuously becoming more severe.”¹²² Recognizing that penalties get ratcheted up through the continual interaction of new legislation and the Commission’s concern with proportionality, Judge Sessions emphasized the Commission’s duty to “make independent judgments, and that it reflect upon its ultimate goal.”¹²³ The Commission has made numerous “little [and big] decisions” about the firearms guidelines over the years that have had an immense “big picture” impact on sentencing ranges. As we asked over ten years ago, we request that the Commission “resist [further] actions that seem mathematically rationale in their incremental application but have the overall impact of increasing (yet again) the overall sentencing range.”¹²⁴

¹¹⁹ *What do Federal Firearms Offenses Really Look Like?*, *supra* note 33 at 16 fig. 8.

¹²⁰ Sands 2009 Testimony, *supra* note 75 at 2 (quoting USSC, *Minutes of the March 19, 2004 Public Meeting*, at 5).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

V. Conclusion

The history, experiences, and data I have compiled here today counsel against any further increase to §2K2.1 during this amendment cycle, especially the across-the-board increases in Option 2. The Commission should not abandon its characteristic institutional role and expertise, and should collect, study, and publish data and other information about the sufficiency of current penalties for firearms offenses.

As Defenders have previously warned: “[e]xperience teaches us [that] high profile tragedies may lead to hastily made but long-lasting policy decisions that can have detrimental effects.”¹²⁵ Today is no different. This amendment cycle could be a turning point and opportunity for change. Or it could be a repeat of past injustices that have led many to lament that the war on guns is the new war on drugs. The stakes could not be higher, and I urge the Commission to proceed deliberatively and with caution.

¹²⁵ Welch 2011 Testimony, *supra* note 65 at 1 (noting that 18 U.S.C. § 924(c) was enacted after the shooting death of Martin Luther King, Jr. and amended after the assassination of Robert F. Kennedy, and the punitive crack penalties set forth in the Anti-Drug Abuse Act of 1986 followed the overdose death of famous basketball player, Len Bias).

**Federal Public and Community Defenders
Comment on Acceptance of Responsibility
(Proposal 4A)**

March 14, 2023

The following excerpt from the March 2023 Statement of Michael Caruso contains Defenders’ comments on Part A of Proposed Amendment 4.

* * * * *

I. Acceptance of Responsibility

To better ensure that §3E1.1(b) operates as Congress and the Commission intended—that is, to reward a person who timely notifies the government of his intent to plead guilty thereby permitting the government to avoid preparing for trial and allowing the government and the court to allocate resources efficiently—the Commission should clarify two aspects of the guideline.

First, Defenders agree that the Commission should clarify the term “preparing for trial.” Because the progression of a case is impacted by a host of unique factors including the pace of each district’s docket, “preparing for trial” should focus on the nature and purpose of the government’s work, as opposed to when that work is performed. Second, the Commission should revise the existing commentary in Application Note 6 to clarify that the government should not withhold a motion for interests not identified in §3E1.1(b).

For better or worse, our criminal legal system is “a system of pleas, not a system of trials.”¹ Last year, 98.3 percent of all persons sentenced in federal

¹ *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)) (recognizing that plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system”).

court pled guilty.² In my district, that number was even higher—99.3 percent.³

The decision to plead guilty is one of the few decisions that belongs solely to our clients.⁴ It is not an easy one. When a person pleads guilty, he “forgoes not only a fair trial, but also other accompanying constitutional guarantees,” like the privilege against self-incrimination, the right to a jury trial, and the right to confront his accusers.⁵ If he pleads pursuant to a plea agreement, the government often demands that he waive numerous other rights including the right to ask for a sentence below the calculated guideline range, the right to appeal, the right to collaterally attack his sentence, and even the right to file an extraordinary-and compelling motion under § 3582(c)(1)(A).⁶

In exchange for a plea of guilty, a person may generally expect a lower sentence than if he had chosen to proceed to trial.⁷ Indeed, the guidelines embrace this expectation. When reporting on the original sentencing guidelines, the Commission recognized that “merely pleading guilty has been recognized as a factor that legitimately may result in a sentence reduction.”⁸ The Commission created §3E1.1—which originally provided for a two-level

² See USSC, *Sourcebook of Federal Sentencing Statistics* 56–58 tbl. 11 (2021), <https://bitly.co/HN2k>.

³ See *id.* at 58, tbl. 11.

⁴ See Model Rules of Pro. Conduct r. 1.2, (Am. Bar Ass’n 2020). (“[A] lawyer shall abide by the client’s decision. . . as to a plea to be entered. . .”).

⁵ *Class v. United States*, 138 S. Ct. 798, 805 (2018) (quoting *United States v. Ruiz*, 536 U.S. 622, 628 (2002)).

⁶ In March 2022, the Department of Justice directed prosecutors to not “as a general matter” require individuals to waive “the general right” to file or appeal a compassionate release motion and to decline to enforce such waivers. However, the Department still permits “a narrower form of waiver” in select instances, and Defenders do not know the status of DOJ’s implementation of its new policy. See Memorandum from the Deputy Attorney General on Department Policy on Compassionate Release Waivers in Plea Agreements 1–2 (Mar. 11, 2022), <https://bitly.co/HN3X>.

⁷ See, e.g., Nat’l Ass’n of Crim. Def. Laws., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 20–21 fig. 1 (2018), <https://bitly.co/HN4K> (“NACDL Trial Penalty”).

⁸ USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 50 (1987) (citations omitted), <https://tinyurl.com/45t4fres>.

reduction for acceptance of responsibility—as “the only adjustment that the guidelines recognize for pleas.”⁹

Today, §3E1.1 provides up to three offense levels off for acceptance of responsibility. Pursuant to §3E1.1(a), a two-level reduction is awarded to people who clearly accept responsibility for the offense. For people who get the two-level reduction and who have an offense level of 16 or greater, §3E1.1(b) provides for an additional third-level reduction “upon motion of the government.” As recently recognized by Justices Sotomayor and Gorsuch, the impact of §3E1.1(b)’s one-level reduction “can be substantial”—and can “even make the difference between a fixed-term and life sentence.”¹⁰

The stated purpose of §3E1.1(b)’s reduction is to reward a person who “timely notif[ies] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.”¹¹ Despite this clear purpose, some courts continue to permit prosecutors to withhold this third level for reasons other than preparing for trial, like litigating a suppression motion or when a person who has pled guilty raises challenges at sentencing.¹² In order to “ensure that §3E1.1(b) is applied fairly and uniformly,”¹³ the Commission should clarify that the proper interpretation of §3E1.1 does not permit these practices.

⁹ *Id.*

¹⁰ *United States v. Longoria*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., Gorsuch, J., statement respecting denial of cert.).

¹¹ USSG §3B1.3(b).

¹² See Proposed Amendments, 88 Fed. Reg. 7180, 7199 (proposed Feb. 2, 2023) (“2023 Proposed Amendment”) (summarizing the two circuit conflicts).

¹³ *Longoria*, 141 S. Ct. at 979.

A. The Commission should clarify that §3E1.1(b) already limits the government’s discretion to withhold a §3E1.1(b) motion to instances where the lack of a timely plea requires the government to perform work and expend resources for the specific purpose of preparing for trial.

1. The history of §3E1.1.

Section 3E1.1, as originally promulgated, awarded a two-level downward adjustment if the district court determined that a person “clearly demonstrate[d] a recognition and affirmative acceptance of personal responsibility.”¹⁴ In 1992, after receiving a recommendation from the Judicial Conference to provide a greater acceptance of responsibility adjustment “to encourage entries of pleas,”¹⁵ the Commission amended §3E1.1, to instruct that courts should “decrease the offense level 1 additional level” if certain conditions were met:¹⁶

(b)	If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
(1)	timely providing complete information to the government concerning his own involvement in the offense; or
(2)	timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,
decrease the offense level by 1 additional level.	

¹⁴ See USSG §3E1.1 (Nov. 1987).; see also USSG App. C, Amend. 46 (Jan. 1988) (expanding scope of conduct for which person must accept responsibility from “offense of conviction” to “criminal conduct”).

¹⁵ See USSC, *Acceptance of Responsibility Working Group Report* app. A (1991), <https://bitly.co/HN5n> (noting that “[t]he two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels”).

¹⁶ USSG App. C., Amend. 459 (Nov. 1, 1992).

The Commission also added Application Note 6 to §3E1.1's commentary to explain that "[s]ubsection (b) provides an additional 1-level decrease in offense level" for someone who "tak[es] one or both of the steps set forth in subsection (b)."¹⁷ Section 3E1.1 maintained this structure for over a decade.

In 2003, Congress passed the PROTECT Act, which contained direct amendments to §3E1.1.¹⁸ These amendments make clear that Congress intended §3E1.1(b)'s third-level reduction to be awarded to people whose timely plea allowed the government and the court to avoid a costly trial.

Congress amended §3E1.1(b) in three ways. First, it required a government motion before the court could grant the additional third-level reduction.¹⁹ Second, it struck §3E1.1(b)(1), which previously permitted a person to receive the third-level reduction for timely providing complete information to the government, instead tying this level exclusively to a timely guilty plea.²⁰ And third, it modified former §3E1.1(b)(2) to account for both government and court resources saved from avoiding trial:²¹

¹⁷ *Id.*; *see also* USSG § 3E1.1 background cmt. (emphasizing that if a person meets §3E1.1(b)'s criteria, the additional one-level reduction is "appropriately merit[ed]").

¹⁸ *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 650 (Apr. 30, 2003) ("PROTECT Act").

¹⁹ *Id.* § 401(g)(1)(A).

²⁰ *Id.* § 401 (g)(1)(B).

²¹ *Id.*

- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by ~~taking one or more of the following steps:~~
- (1) ~~timely providing complete information to the government concerning his own involvement in the offense; or~~
 - (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate ~~its~~ their resources efficiently,
- decrease the offense level by 1 additional level.

Further confirming that it intended the §3E1.1(b) motion to be contingent upon a plea that avoids time-consuming trial preparation, Congress added the following language to Application Note 6 of §3E1.1's commentary:²²

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21.

While recognizing that the government is in the best position to determine whether the line prosecutor has avoided preparing for trial, nothing in the PROTECT Act amendments indicated that Congress was permitting the government to withhold its motion for any other reason. In fact, aside from a small conforming change,²³ Congress retained the rest of

²² *Id.* § 401(g)(2)(B).

²³ Because Congress removed one of the steps by which a person could receive a 1-level reduction from §3E1.1(b), it also removed the reference in Application Note 6 to “one or both of the steps” and the background commentary to “one or more of the steps specified in subsection (b).” Now, both Application Note 6 and the background

Application Note 6, including the instruction that “[s]ubsection (b) provides an additional 1-level decrease in offense level” for a person who “take[s] the steps set forth in subsection (b)” and the background commentary explaining that a person who meets the conditions of §3E1.1(b) has “accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner [and] thereby appropriately merit[s] an additional reduction.”²⁴ The PROTECT Act directed that the congressional amendments to §3E1.1 cannot be “alter[ed] or repeal[ed]” by the Commission.²⁵

Although Congress plainly intended the government to move for the third-level reduction for acceptance of responsibility if §3E1.1(b)’s conditions were met, that has not always happened. After the implementation of the PROTECT Act, a circuit conflict emerged as to whether the government could withhold a §3E1.1(b) motion for reasons other than preparing for trial. While some circuits had permitted the government to withhold the §3E1.1(b) motion if a person refused to sign an appellate waiver,²⁶ the Fourth Circuit confirmed that the purpose of the third-level reduction is to permit “the efficient allocation of *trial* resources, not *appellate* resources.”²⁷ The Second Circuit similarly determined that §3E1.1(b) does not permit the government to withhold a motion for the third-level if a person requests an evidentiary hearing on sentencing issues because the plain language of §3E1.1(b) and its commentary confirm that the government is to “determine simply whether the [person] has entered a plea of guilty and thus furthered the guideline’s purpose in that matter,” not whether the person “has declined to perform some other act.”²⁸

commentary refer only to “the steps specified in subsection (b).” *See* PROTECT Act, § 401(g)(2)(A), (3).

²⁴ USSG §3E1.1, cmt. n. 6 & background cmt (2003).

²⁵ PROTECT Act, §401(j)(4).

²⁶ *See United States v. Johnson*, 581 F.3d 994, 1002 (9th Cir. 2009); *United States v. Deberry*, 576 F.3d 708, 711 (7th Cir. 2009); *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008).

²⁷ *United States v. Divens*, 650 F.3d 343, 348 (4th Cir. 2011) (emphasis in original).

²⁸ *United States v. Lee*, 653 F.3d 170, 175 (2d. Cir. 2011) (quoting *Divens*, 650 F.3d at 348) (internal marks omitted).

In 2013, the Commission promulgated Amendment 775 which amended §3E1.1's commentary to address the circuit conflict on the proper interpretation of §3E1.1(b).²⁹ Mindful of both Congress' direct amendments to §3E1.1 and its directive that those amendments not be altered or repealed, the Commission "studied the operation of §3E1.1 before the PROTECT Act, the congressional action to amend §3E1.1, and the legislative history of that congressional action."³⁰ Concluding that it "could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1,"³¹ the Commission endorsed the Fourth and Second Circuit decisions, and added the following to Application Note 6: "The government should not withhold [the §3E1.1(b) motion] based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."³²

Congress did not disapprove of this amendment, and it went into effect on November 1, 2013.³³

Despite the plain language of §3E1.1(b) and Amendment 775's clarifying efforts, the circuits still disagree about whether the government may withhold a third-level reduction motion for reasons unrelated to §3E1.1(b), including because a person moves to suppress evidence³⁴ or raises sentencing challenges.³⁵

²⁹ See USSC App. C., Amend. 775 (Nov. 1, 2013).

³⁰ *Id.* at Reason for Amendment.

³¹ *Id.*

³² *Id.*

³³ See USSG §3E1.1 (2013); see also 28 U.S.C. § 994(p) (permitting Congress 180 days to modify or disapprove of a promulgated guideline before the guideline goes into effect).

³⁴ Compare, *United States v. Vargas*, 961 F.3d 566, 582 (2d Cir. 2020), *United States v. Price*, 409 F.3d 436, 444–45 (D.C. Cir. 2005), *United States v. Marquez*, 337 F.3d 1203, 1212–13 (10th Cir. 2003), *United States v. Marroquin*, 136 F.3d 220, 224–25 (1st Cir. 1998), *United States v. Kimple*, 27 F.3d 1409, 1414–15 (9th Cir. 1994), with *United States v. Longoria*, 958 F.3d 372, 378–79 (5th Cir. 2020), *cert denied* 141 S. Ct. 978 (2021), *United States v. Collins*, 683 F.3d 967, 707 (6th Cir. 2012), and *United States v. Drennon*, 516 F.3d 160 162–63 (3d Cir. 2008).

³⁵ Compare, *United States v. Castillo*, 779 F.3d 318, 323 (5th Cir. 2015), and *United States v. Lee*, 653 F.3d at 173, with *United States v. Adair*, 38 F.4th 341, 355

2. Section 3E1.1's plain language has always identified when the §3E1.1(b) adjustment is warranted.

The circuits continue to disagree on the bases the government may use to withhold a §3E1.1(b) motion. But §3E1.1(b) and its accompanying commentary have always identified when the reduction is warranted.

Prior to the PROTECT Act, the decision to award the third-level reduction belonged only to the court.³⁶ During that time, all courts of appeals that had considered the question agreed that the §3E1.1(b)'s instruction to “decrease the offense level by an additional level” was required so long as §3E1.1(b)'s conditions were met.³⁷

In the PROTECT Act, Congress conferred discretion to the government to determine in the first instance whether the line prosecutor had prepared for trial “because the government is in the best position” to assess its own preparation. But by changing “*who* initiates [§3E1.1(b)'s] adjustment and giving that decision deference,”³⁸ Congress did not give the government “a roving license to ignore” the limits of the guideline, nor did it revise the expectation that if §3E1.1(b)'s conditions were met, the third-level reduction would be awarded.³⁹ In fact, Congress' preservation of the rest of §3E1.1's commentary—including that a person “appropriately merit[s]” the third-level reduction if §3E1.1(b)'s conditions have been satisfied—indicates Congress intended that the government would exercise its discretion within the limits of §3E1.1(b).⁴⁰

(3d Cir. 2022), *United States v. Jordan*, 877 F.3d 391, 395–96 (8th Cir. 2017), *United States v. Sainz-Preciado*, 566 F.3d 708, 715–16 (7th Cir. 2009), and *United States v. Beatty*, 538 F.3d 8, 16–17 (1st Cir. 2008).

³⁶ See USSC §3E1.1 cmt. n.5 (2002).

³⁷ See Statement of Lisa Hay Before the U.S. Sentencing Comm'n, Washington, D.C., at 8 – 10 (Mar. 13, 2013), <https://bitly.co/HN8w> (collecting cases) (“Statement of Lisa Hay”).

³⁸ *United States v. Johnson*, 581 F.3d 994, 1010 (9th Cir. 2009) (M. Smith, C.J., dissenting in part), *superseded by* Amendment 775.

³⁹ *Divens*, 650 F.3d at 347 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)); USSG §3E1.1(b) & cmt. n.6; see also *United States v. Davis*, 714 F.3d 474, 477 (7th Cir. 2013) (Rovner, C.J., concurring).

⁴⁰ See *Divens*, 650 F.3d at 346 n.1 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 992–93 (2005)).

Further, nothing in Congress' revisions indicate an intent to extend the government's discretion to deny a §3E1.1(b) motion because it expends resources not specifically related to trial.⁴¹ "The text of §3E1.1(b) does not require a defendant to plead without engaging in pretrial motion practice,"⁴² or raising sentencing challenges,⁴³ or providing "the type of assistance that might reduce the expense and uncertainty" of an appeal.⁴⁴ It only requires "that the plea be sufficiently in advance of trial to avoid extensive trial preparation."⁴⁵ Indeed, a contrary reading would "produce absurd results; it could allow the government to cite any defendant-caused government resource expenditure whatsoever, no matter how unrelated to the guilty plea" to justify withholding the §3E1.1(b) motion.⁴⁶

To be sure, there may be cases where actions other than a person's timely plea of guilty may cause the government to expend resources in a way that impacts a person's acceptance of responsibility.⁴⁷ But those actions are properly considered by the court when assessing whether a person receives a two-level reduction pursuant to §3E1.1(a). Nothing in the text of §3E1.1(b) gives the government unfettered discretion to withhold the third level from

⁴¹ See, e.g., *Johnson*, 581 F.3d at 1009 (M. Smith, C.J., dissenting in part) (recognizing that interpreting §3E1.1(b) to render a person ineligible for the adjustment where "he *either* goes to trial *or* causes the government to expend resources. . . . misreads the guideline's plain language").

⁴² *Vargas*, 961 F.3d at 582.

⁴³ See *Lee*, 653 F.3d at 174 (confirming the plain language of §3E1.1(b) and its commentary "do not refer to resources saved by avoiding preparation for a [sentencing] hearing or any other proceeding"); *Castillo*, 779 F.3d at 323 ("[A]lthough the current version of the guideline refers to efficient allocation of governmental resources, it does so only in the context of preparing for trial. . . ."); *Davis*, 714 F.3d at 479 (Rovner, J., concurring) ("[T]he guideline and commentary focus explicitly and exclusively on avoiding the need to prepare for trial (and clearing the district court's trial calendar). No proceeding or event that might occur later is mentioned or even hinted at.").

⁴⁴ *Divens*, 650 F.3d at 348 (internal marks omitted).

⁴⁵ *Vargas*, 961 F.3d at 566 (citation omitted).

⁴⁶ *Johnson*, 581 F.3d at 1009 (M. Smith, C.J., dissenting in part).

⁴⁷ See, e.g., USSG §3E1.1 cmt. n. 4 ("Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct."); cf. *id.* at cmt. n. 1(A)–(H) (listing conduct that should be considered when "determining whether a defendant qualifies under subsection (a)").

someone who has already accepted responsibility and timely notified the prosecutor of his intention to plead guilty for reasons other than preparing for trial.⁴⁸ “The only ‘resources’ that may be considered in gauging the defendant's satisfaction of the guideline are those resources devoted to trial preparation.”⁴⁹

3. Despite §3E1.1’s plain language, prosecutors’ misuse of the §3E1.1(b) motion persists.

In 2013, Defenders commented that, despite the plain language of §3E1.1(b) and its accompanying commentary, some prosecutors use the government motion requirement to “obtain concessions well beyond timely guilty pleas and to impose a cost for the exercise of constitutional rights.”⁵⁰ Ten years later, not much has changed. In my district and across the country, some prosecutors continue to leverage §3E1.1(b) and chill good-faith litigation. This misguided practice is inconsistent with the guideline’s text and purpose.

For example, in my district, many of our clients are charged with maritime offenses pursuant to Title 46. Because the government is not permitted to proscribe drug trafficking conduct in the territorial waters of other nations, in many of these cases, we file motions to dismiss for lack of jurisdiction.⁵¹ Recently, a prosecutor informed an attorney in my office that for any Title 46 case she is handling, she will withhold conditional pleas and the third level of acceptance of responsibility if we seek evidentiary hearings in support of these pretrial motions.

My district is not alone. A recent survey conducted of Federal Public and Community Defenders reveals that in many districts, prosecutors still

⁴⁸ See *Johnson*, 581 F.3d at 1009 (M. Smith, C.J., dissenting in part) (“Moreover, such a reading could produce absurd results; it could allow the government to cite any defendant-caused government resource expenditure whatsoever, no matter how unrelated to the guilty plea.”).

⁴⁹ *Id.* at 1011 (citing *United States v. Vance*, 62 F.3d 1152, 1157 (9th Cir. 1995)).

⁵⁰ Statement of Lisa Hay at 5.

⁵¹ See *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1258 (11th Cir. 2012) (Pryor, C.J.) (holding that the Maritime Drug Law Enforcement Act was unconstitutional as applied where the drug trafficking conduct occurred in the territorial waters of Panama).

see §3E1.1(b) as their own one-level “slush-fund,”⁵² to withhold or threaten to withhold for a host of good-faith litigation unrelated to timely guilty pleas or government trial preparations. Defenders have observed prosecutors withhold or threaten to withhold the third level for a variety of conduct unrelated to §3E1.1(b), including:

- filing of pretrial motions, including motions to suppress, or motions to dismiss for improper jurisdiction or lack of venue;
- requesting additional discovery;
- not pleading guilty or continuing the trial date before the government’s deadline for expert disclosures, even though discovery had not yet been received;
- pleading to an indictment as opposed to a plea agreement;
- obtaining a conditional plea to appeal a suppression issue;
- post-plea conduct, such as testing positive for marijuana or possessing marijuana in pretrial custody;
- raising sentencing challenges including objections to the guideline calculations in the presentence investigation report (PSR) or disputing the accuracy of the factual narratives contained in the PSR;
- failing to pay enough restitution; and
- the government’s dissatisfaction with the state of the interior of a client’s vehicle that was forfeited post-plea.

These practices affect the length of time our clients spend in prison. For some, losing the §3E1.1(b) reduction could “shift the Guidelines range by years.”⁵³ For others, months.⁵⁴ And this leveraging cannot be viewed in

⁵² Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 144 (Mar. 13, 2013) (Lisa Hay) (“2013 AOR Hearing”), <https://bit.ly.co/HNA1>.

⁵³ *Longoria*, 141 S. Ct. at 979.

⁵⁴ See generally *United States v. Fasion*, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020) (“[I]t is crucial that judges give careful consideration to every minute that is

isolation. Rather, it is another tool in the government’s “arsenal” to suppress litigation and obtain hasty dispositions.⁵⁵

The weaponizing of the third level has impacts far beyond an increased sentence for a single client. This practice results in unwarranted disparities and has a chilling effect on the client, the attorney, and the federal criminal legal system.

Unwarranted Disparity. As we recognized in 2013, not all prosecutors exercise their §3E1.1(b) motion authority in ways inconsistent with §3E1.1(b).⁵⁶ But precisely because “government practice varies across and within districts, even among similar cases in the same district,” unwarranted disparities result.⁵⁷ Further, when the §3E1.1(b) motion is used as a bargaining chip to dissuade litigation unrelated to trial, sentencing disparities will result between the cases where the defense succumbs to the prosecutor’s threat to withhold the third level (better ensuring the point is ultimately awarded) and where the defense does not.

Chilling Effect. Our adversarial system “is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.”⁵⁸ Using the third level of acceptance of responsibility to suppress meaningful investigation, litigation, and advocacy frustrates this adversarial process and obstructs counsel from providing “vigorous representation.”⁵⁹

Pressure to not pursue good-faith litigation harms our clients. For example, one colleague from Iowa was recently informed by a prosecutor that

added to a defendant’s sentence. Liberty is the norm; every moment of incarceration should be justified.”).

⁵⁵ NACDL Trial Penalty at 16 (discussing the “arsenal of tools” prosecutors have to achieve speedy convictions); *see also* David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 Yale L.J. 2578, 2590–94 (2013) (describing pretrial detention, time-sensitive offers to cooperate, safety valve eligibility, 21 U.S.C. §851 informations, and §3E1.1 as all pressures that “have turned the system starkly away from a healthy adversarial process”).

⁵⁶ Testimony of Lisa Hay, at 7.

⁵⁷ *Id.*

⁵⁸ *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal marks omitted).

⁵⁹ *Id.*

the prosecutor could withhold the §3E1.1(b) motion preemptively. After a plea of guilty without an agreement, but prior to my colleague submitting his sentencing statement, the government stated in its sentencing submission that while the client's acceptance was timely, acceptance could or could not be appropriate depending on the client's objections to the presentence report and his agreement to the applicable guideline enhancements. A blanket warning like this moves well beyond the discretion Congress conferred to the government in §3E1.1(b) and fuels the dangerous presumption that a person must choose between asserting good-faith challenges and receiving a lower sentence.

The misuse of §3E1.1(b) also harms the public. Another prosecutor recently threatened to withhold a §3E1.1(b) motion if a colleague filed a motion to suppress. My colleague, in consultation with his client, decided to file the motion despite the prosecutor's threat. After a suppression hearing, the court declined to credit the testimony of a police officer and granted the motion, prompting the dismissal of all charges. While the correct result was reached in that case, there may be countless other instances of police misconduct that would not be discovered because counsel or the client were more risk adverse.

4. The Commission can—and should—clarify the proper interpretation of §3E1.1(b).

Because the circuits still disagree as to the proper interpretation of §3E1.1(b), and because some prosecutors continue to withhold the third-level motion for reasons inconsistent with the guideline, the Commission “should take steps” to clarify its proper interpretation.⁶⁰

In 2013, Defenders, DOJ, and the Commission all recognized that the Commission had the authority to clarify the proper interpretation of §3E1.1, even though the guideline was directly amended by Congress.⁶¹ Because a clarifying amendment, by definition, does not change a guideline's meaning

⁶⁰ *Longoria*, 141 S. Ct. at 979.

⁶¹ See Testimony of Lisa Hay, at 5; DOJ Comments on the Sentencing Commission's Proposed Amendments 27 (Mar. 8, 2013); USSC, App. C., Amend. 775, Reason for Amendment (Nov. 1, 2013).

but rather confirms what it has always meant,⁶² such an amendment is consistent with Congress' directive not to repeal or change the PROTECT Act amendments.

And clarification from the Commission is needed. All circuits to have addressed §3E1.1(b) since Amendment 775 agree that the scope of the government's discretion is dictated by the language of §3E1.1. But they disagree on what that language requires. Some courts correctly recognize that §3E1.1(b) permits the government to withhold its motion only for the reasons identified in that provision—that is, if an individual fails to timely notify the government of its intention to plead guilty, thereby requiring the government to prepare and expend resources for trial.⁶³ Others interpret Amendment 775's added commentary to permit the government to withhold a §3E1.1(b) motion as long as any interest in §3E1.1—subsections (a) or (b)—is

⁶² See, e.g., *United States v. Goines*, 357 F.3d 469, 474 (4th Cir. 2004).

⁶³ See, e.g., *Vargas*, 961 F.3d at 582–84 (2d Cir. 2020) (“The text of § 3E1.1(b) does not require a defendant to plead without engaging in pretrial motion practice; it requires that the plea be sufficiently in advance of trial to avoid extensive trial preparation.”); *United States v. Knight*, 710 F. App'x 733, 736 (9th Cir. Oct. 5, 2017) (“[T]he Government does not have unbounded discretion to refuse the third point; it can only refuse to do so for the reasons articulated in section 3E1.1(b).”); *United States v. Rivers*, 572 F. App'x 206, 207 (4th Cir. May 22, 2014) (explaining that the government “may not refuse to make a §3E1.1(b) motion for reasons other than a defendant's failure to fulfill the prerequisites listed therein”); see also generally *United States v. Johnson*, 980 F.3d 1364, 1384–1385 (11th Cir. 2020) (declining address issue but recognized the split of authority and that withholding a §3E1.1(b) motion on the basis of obstruction of justice “takes us far afield from the focus on §3E1.1(b), which looks to the timeliness of a [person]'s notification to the Government that he will be pleading guilty. . . [which] allows the Government to cease the unnecessary expenditure of its resources”); *United States v. Rivera-Morales*, 961 F.3d 1, 16–17 (1st Cir. 2020) (recognizing split while confirming that “[q]uintessentially, section 3E1.1(b) is meant to reward [people] who spare the government the expense of trial”).

identified.⁶⁴ And a single court recently determined that Amendment 775's added commentary is not authoritative at all.⁶⁵

By amending §3E1.1(b)'s text, as the Commission proposes, to define “preparing for trial,” and by clarifying that the scope of the government’s discretion to withhold the §3E1.1(b) motion is cabined by the guideline that Congress wrote, the Commission will better ensure the uniform application of the third-level adjustment.

a. The definition of “preparing for trial” should focus on the purpose of government preparations rather than the timing of the preparations.

Defenders applaud the Commission for proposing to clarify what should already be clear: that not all the work performed to prosecute a case constitutes preparing for trial.

We appreciate and agree largely with the definition the Commission proposes. We agree that “preparing for trial” may be appropriately defined as the “substantive preparations taken to present the government’s case against the defendant to a jury (or judge, in the case of a bench trial) at trial,”⁶⁶ We think the definition would be more accurate if it defined “preparing for trial” as: “substantive preparations taken *with the specific purpose* to present the government’s case against the defendant to a jury (or judge, in the case of a bench trial) at trial.”⁶⁷

⁶⁴ See, e.g., *Castillo*, 779 F.3d at 323 (interpreting Amendment 775’s commentary to allow the government to “withhold a §3E1.1(b) motion based on an interest identified in either subsection (a) or (b) of §3E1.1.”); *Jordan*, 877 F.3d at 396 (holding that the government may withhold a §3E1.1(b) motion for preparing for a sentencing hearing, in part, because “[i]f the Commission intended to exclude contested sentencing hearings from interests identified in §3E1.1, it could have done so. It did not.”); see generally *Johnson*, 980 F.3d at 1385 (“In short, in the case of a timely notification of a decision to plead guilty, it is clear the government can no longer base its refusal to move for a third level reduction on the defendant’s refusal to waive appellate rights. Beyond that, nothing else is clear[.]”).

⁶⁵ See *Adair*, 38 F. 4th at 358–361 (3d Cir. 2022).

⁶⁶ 2023 Proposed Amendments, at 7200.

⁶⁷ See *Marquez*, 337 F.3d at 1212 (recognizing that “even where there is substantial overlap between the issues that will be raised at the suppression hearing

We also agree with the Commission’s proposal to specify actions that *do not* constitute “preparing for trial.” For example, we wholeheartedly endorse the Commission’s proposed language that “Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered ‘preparing for trial.’”⁶⁸

We encourage the Commission to similarly confirm that preparation for pretrial proceedings conducted for purposes other than trial are not considered “preparing for trial.” We fear that the Commission’s proposed description of pretrial proceedings is unnecessarily limited and may inadvertently deprive deserving individuals of the third level of acceptance of responsibility. The Commission proposes that:

Preparation for *early* pretrial proceedings (such as litigation related to a charging document, *early* discovery motions, and *early* suppression motions) ordinarily are not considered ‘preparing for trial’ under this subsection.⁶⁹

Better guidance would be: ***“Preparation for pretrial proceedings, such as litigation related to a charging document, discovery motions, and suppression motions are not considered ‘preparing for trial’ under this subsection.”*** This guidance is more straightforward than what is proposed, and it is more accurate. Preparation for the purpose of a pretrial proceeding that is unrelated to trial cannot reasonably constitute preparation for trial.

We at least urge the Commission to omit “early” from the proposed guidance. The focus of the “preparing for trial” inquiry should be the *purpose* of the preparation, not the timing. By including this temporal qualifier to describe pretrial work that ordinarily does not constitute “preparing for trial,” the Commission may unintentionally imply to courts that the government’s engagement in other pretrial work—even work totally

and those that will be raised at trial,” preparation for a motion to suppress would not require” the same preparation as trial).

⁶⁸ 2019 Proposed Amendments, at 7200.

⁶⁹ *id.* (emphasis added).

unrelated to trial or to a person's timely plea—does constitute “preparing for trial” if that work did not occur sufficiently “early” in the case.

Whether government preparation for pretrial proceedings properly constitutes “preparing for trial” should not hinge on timing for several reasons. First, if the preparation is not taken in order to present the government's case against a person at trial, then it should not matter when the preparation happened. The timing of the government's work is not a proxy for the purpose of that work. Indeed, the timing of cases in my district shows why. In *United States v. Miles*, our client was arraigned in October of 2019, we filed a motion to suppress in December, and his trial occurred in February 2020.⁷⁰ The pace and timing of Mr. Miles's case is not unusual.⁷¹ But other cases take longer to litigate. In *United States v. Kachkar*, we were appointed on September 1, 2017. We filed a motion to suppress in July 2018, the judge conducted a two-day evidentiary hearing in October 2019, and Mr. Kachkar's four-week trial commenced in January 2020.⁷² Because “[a]ny experienced criminal lawyer knows that preparing for a jury trial involves more work than preparing for a suppression hearing,”⁷³ preparing for a suppression hearing—no matter when that hearing occurs—should not constitute “preparing for trial.”

Second, by excluding only “early” pretrial preparations from “preparing for trial,” the proposed language fails to account for the cause of the timing. The purpose of §3E1.1(b) is to reward someone who does not plead on the eve of trial after the government has already prepared. But permitting the government to withhold the §3E1.1(b) motion because of delay unrelated to a

⁷⁰ See *United States v. Miles*, No. 19-cr-20687 (S.D. Fla.).

⁷¹ See also, e.g., *United States v. Knight*, No. 18-cr-20033 (S.D. Fla.) (indicted on January 19, 2018, motion to suppress filed on February 20, 2018, suppression hearing held March 5, 2018, and trial started on March 7); *United States v. Nelson*, No. 22-cr-20294 (S.D. Fla.) (arraignment in August 2022, motion to dismiss filed in October 2022, and bench trial held in November 2022); *United States v. Brown*, No. 19-cr-20360 (S.D. Fla.) (arraigned in June 2019, motion to dismiss filed in August 2019, change of plea hearing held in November 2019).

⁷² See *United States v. Kachkar*, No. 16-cr-20595 (S.D. Fla.).

⁷³ *Vargas*, 961 F.3d at 585 (citing *Marquez*, 337 F.3d at 1211–12); see also *Divens*, 650 F.3d at 349 (“[Section] 3E1.1(b) requires the Government to consider the specific factors articulated in the guideline itself, not some other criterion that it believes to be ‘closely related’ to the textual requirement.”) (citation omitted).

person's own conduct, like the government's late production of discovery, would nullify the benefit of the person's timely plea. If a person does everything in her power to satisfy §3E1.1(b)'s conditions, she should not be penalized for events not of her own making.

Third, a focus on the timing of the government's pretrial preparations would cause unwarranted disparities. What constitutes "early" in one district may be considered late in another because the length of a typical case varies from place to place. For example, last fiscal year in my district the median time from filing to disposition in a criminal felony case was 9 months. But in the Eastern District of New York, the median time was over triple that—almost 30 months.⁷⁴ Variations between case lengths exist even between federal districts in the same state: the median length of a criminal felony case in the Southern District of California is 7.6 months; in the Eastern District of California it is 29.1 months.⁷⁵ And what constitutes "early" in one type of case may not be early in another type of case.

If, despite these problems, the Commission retains its proposed language, we encourage the Commission to make clear in §3E1.1(b) or its commentary that the government should not withhold the motion from an otherwise eligible individual if belated government preparations were not caused by actions taken by the individual for purposes of delay.

b. The Commission should also clarify that the government may not refuse to file the §3E1.1(b) motion for interests not identified in §3E1.1(b).

The Commission does not need to "specify[] a . . . standard" to "address the breadth of the government's discretion to withhold a §3E1.1(b) motion,"⁷⁶ because the breadth of the government's discretion is already identified by the guideline and accompanying commentary.

However, we encourage the Commission to clarify that "the straightforward terms of both the guideline and the accompanying

⁷⁴ See U.S. Courts, *U.S. District Court – Judicial Caseload Profile*, <https://tinyurl.com/4whu9cas> (last visited Feb. 27, 2023).

⁷⁵ *Id.*

⁷⁶ 2023 Proposed Amendments, at 7200.

commentary specify the criteria that control the government's assessment” of when to make the §3E1.1(b) motion.⁷⁷ The Commission proposes to delete the commentary it added in Amendment 775 that “The government should not withhold [a §3E1.1(b)] motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.”⁷⁸ Instead of deleting this commentary we urge the Commission to revise it to state that:

The government should not withhold such a motion based on interests not identified in §3E1.1(b), such as whether the defendant agrees to waive his or her right to appeal, whether the defendant moves to suppress evidence, or whether the defendant raises sentencing challenges.

This slight revision would complement the Commission’s proposed clarification in §3E1.1(b)’s text to better ensure that the government does not withhold a §3E1.1(b) motion if the conditions Congress identified in §3E1.1(b) are not met and to better ensure that courts do not deny the third-level reduction for reasons not identified in §3E1.1(b), like general docket management.⁷⁹

Contrary to the conclusion of one Third Circuit panel, clarifying the proper interpretation of this guideline would not be adding a limitation to “when the government can withhold a motion,”⁸⁰ but rather recognizing one that has always existed. Indeed, amending the guideline to expand the government’s discretion beyond what Congress provided for in its direct amendments, *would* violate the PROTECT Act. For this reason, the

⁷⁷ *Davis*, 714 F.3d at 477 (“Although the PROTECT Act made the government the arbiter of whether a defendant ought to receive the extra reduction for acceptance of responsibility, . . . the straightforward terms of both the guideline and the accompanying commentary specify the criteria that control the government's assessment.”) (Rovner, J., concurring).

⁷⁸ 2023 Proposed Amendments, at 7200.

⁷⁹ See, e.g., Order Setting Jury Trial at 1, *United States v. Babary*, No. 22-cr-60222 (S.D. Fla. Nov. 1, 2022), Doc. No. 8; Order Setting Jury Trial at 1, *United States v. Davis*, No. 22-cr-80181 (S.D. Fla. Nov. 29, 2022), Doc. No. 9.

⁸⁰ *Adair*, 38 F.4th at 359 (holding Amendment 775 invalid because it constitutes an alteration of Congress’ PROTECT Act amendments).

Commission should not incorporate the discretion standard articulated in *Wade v. United States* that is used for §5K1.1 substantial assistance motions.⁸¹

Section 3E1.1(b) “involves far less expansive governmental discretion than under §5K1.1.”⁸² To be sure, both provisions require a “motion of the government,” stating that an individual assisted authorities in a particular way.⁸³ But unlike §5K1.1, §3E1.1(b) and its accompanying commentary are “explicit about what conduct warrants the favorable exercise of the government’s discretion,”⁸⁴ For example, §3E1.1(b) contains a description of the precise assistance necessary to warrant relief. Section 5K1.1 does not.⁸⁵ Section 3E1.1’s commentary articulates the reason for the government’s discretion. Section 5K1.1 does not.⁸⁶ Section 3E1.1’s commentary identifies the precise “steps” a person must take to “appropriately merit[]” the reduction. Section 5K1.1 contains no such prescription.⁸⁷

The Commission wisely rejected the opportunity to incorporate the *Wade* framework into §3E1.1 in 2013.⁸⁸ It should do so again by clarifying

⁸¹ See 2023 Proposed Amendments, at 7200 (citing *Wade v. United States*, 504 U.S. 181, 185–86 (1992)).

⁸² *Divens*, 650 F.3d at 345–46 (quoting USSC §3E1.1, cmt. n.6 & background commentary).

⁸³ Compare USSG §§3E1.1(b), with 5K1.1.

⁸⁴ *Davis*, 714 F.3d at 477 (Rovner, J., concurring).

⁸⁵ Compare USSG §§5K1.1, with 3E1.1(b) (“[U]pon motion of the government stating that the defendant has assisted authorities. . . by *timely notifying authorities of his intention to enter a plea of guilty*, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently[.]” (emphasis added)).

⁸⁶ Compare USSG §§5K1.1, with 3E1.1 cmt. n.6 (“*Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial*, an adjustment under subsection (b) may only be granted upon a formal motion by the Government.” (emphasis added)).

⁸⁷ Compare USSG §§5K1.1, with 3E1.1 background cmt. (confirming that a person who “tak[es] the steps specified in subsection (b). . . has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction”).

⁸⁸ Compare DOJ Comments on the Sentencing Commission’s Proposed Amendments 27 - 28 (Mar. 8, 2013) (requesting the Commission incorporate a *Wade*-like standard into §3E1.1 that would allow the government to withhold the

Statement of Michael Caruso

March 7, 2023

Page 22

that the government may not refuse to file the §3E1.1(b) motion for interests not already identified in §3E1.1(b).

**Federal Public and Community Defenders
Comment on Circuit Conflict re: Controlled
Substance Offense (Proposal 4B) and Proposals to
Amend Career Offender Guideline (Proposal 6)**

March 14, 2023

Table of Contents

I. Introduction	1
II. The Commission’s proposals for the career offender guideline would have a substantial negative impact and should not be adopted without further study and review.....	2
A. By expanding the reach of the career offender guideline, every one of the Commission’s proposals would increase unwarranted disparities without relieving complexity.....	2
B. Before making significant changes to the career offender guideline—changes that in our view would make a problematic guideline much worse—the Commission should undertake a robust review of relevant data and likely impact.....	4
III. The categorical approach is a <i>solution</i> to a host of potential problems, not a problem in need of solving.....	11
A. It is for good reason that Defenders and DOJ agree that the Commission should not compare prior offenses against listed guidelines.....	11
B. The elements-based categorical approach remains the best methodology for assessing prior convictions.....	15
1. A methodology that relies on old court documents—or even worse, non-court documents—to discern “conduct” ignores the realities of state court practice and would be fundamentally unfair	16
2. A methodology that goes beyond documents, providing for true mini-trials, would come with its own problems	19
3. Anomalous cases can be addressed through variances	20
IV. Arguments in favor of expanding the definitions of “controlled substance offense” and “crime of violence” in other ways are not persuasive	21

A.	There is no justification for expanding the reach of the definition of “controlled substance offense” (Proposals 4B, 6C, 6D)	21
1.	The Commission should limit the definition of “controlled substance offense” to the federal felonies enumerated in 28 U.S.C. § 994(h)(2)(B)	22
a.	This proposal is the most parsimonious and is consistent with the language of § 994(h).....	22
b.	This proposal would resolve most of the concerns raised this cycle with respect to the definition of “controlled substance offense”	26
2.	At minimum, the Commission should clarify that “controlled substance” has its federal definition, and it should not otherwise expand the reach of “controlled substance offense”	26
a.	The Commission should clarify that “controlled substance” is federally defined (Proposal 4B).....	26
b.	The Commission should exclude inchoate offenses, including “offers to sell” (Proposals 6B, 6D)	30
B.	There is also no justification for expanding the reach of the definition of “crime of violence” (Proposals 6B, 6C, 6A-recklessness, force against property)	31
V.	Conclusion	34

I. Introduction

This Comment addresses both Proposal 4B (the circuit conflict regarding “controlled substance offense”) and Proposal 6 (the career offender proposals). This is because both proposals would affect the reach of the career offender guideline and other recidivist enhancements that cross-reference USSG §4B1.2.

In their written statements (attached) Federal Public Defenders Michael Caruso and Juval Scott addressed each of the Commission’s proposals. We encourage the Commission to carefully review their written submissions, and we refer back to them where appropriate.

This Comment responds to arguments raised at the hearings:

- It explains why the primary justifications offered for proposals that would expand the reach of the guideline—disparity and complexity—are not persuasive: expanding the career offender guideline would *increase* both disparity and complexity. (§ II.A.).
- It discusses data the Commission could collect to inform its work on the career offender guideline. (§ II.B.).
- It explains why the categorical approach is superior to any of the proposals discussed at the hearing. (§ III).
- It explains that our proposal to limit the definition of “controlled substance offense” to the federal felonies enumerated in the career offender directive is in full compliance with the directive. (§ IV.A.1).
- It responds to the Department of Justice (“DOJ” or “the Department”) and the Probation Officers Advisory Group’s (“POAG”) arguments in favor of expanding the definitions of “controlled substance offense” and “crime of violence.” (§ IV).

Ultimately, Defenders encourage the Commission to follow the data. The career offender guideline is overly punitive, it has no empirical or other principled basis, and it exacerbates racial disparity in federal sentencing. Thus, the Commission should take no action that would expand its reach.

II. The Commission’s proposals for the career offender guideline would have a substantial negative impact and should not be adopted without further study and review.

A. By expanding the reach of the career offender guideline, every one of the Commission’s proposals would increase unwarranted disparities without relieving complexity.

The Department’s written testimony starts by acknowledging that the career offender guideline is deeply problematic. It recognizes “legitimate concerns about severity levels” associated with Guidelines recidivist provisions; that the career offender guideline in particular has been “the subject of considerable criticism for producing overly long sentences”; and that “[d]ecades of research show that the career offender guideline produces a clear racial disparity in application.”¹ The Department acknowledges that district judges impose below-range sentences in increasing numbers of cases—often at the government’s request—and that the Commission has urged Congress to narrow the career offender directive.²

POAG has also recognized that data suggests the guideline calls for sentences that are too high in most of the cases it reaches.³

But although both DOJ and POAG *know* the career offender guideline is deeply problematic, they nevertheless recommend that the Commission adopt amendments from Proposals 4B and 6 that would vastly *expand* that guideline’s reach. That is, they recommend that the Commission adopt amendments that would ensure even *more* individuals would be subject to this guideline. Their reasoning boils down to two justifications: reducing disparity and increasing simplicity.

These justifications cannot support the recommendations. Individuals subject to the career offender guideline will always be subject to an unwarranted disparity when compared to those not subject to the guideline

¹ Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent’g Comm. at 27 & n.42, 35. (Feb. 27, 2023) (“DOJ Written Testimony for March 2023 Hearings”).

² See *id.* at 27 & nn.43, 44.

³ See POAG Circuit Conflicts Testimony 4 (Feb. 27, 2023) (“POAG Written Testimony on Circuit Conflicts”); POAG Comments on Proposed Priorities 3–4 (July 31, 2017), <https://tinyurl.com/y43vvanh>.

because there is no empirical or other principled justification for imposing a near-maximum sentence on any category of individuals absent case-specific aggravating facts.⁴ And Black individuals will disparately be subjected to this unjustified sentence because of racial inequality in the criminal legal system over space and time.

The fact that some individuals will be captured by an unwarranted recidivist provision cannot justify subjecting other individuals to that provision based on principles of fairness. The career offender guideline is fundamentally unfair; it is an unwarranted-disparity-creating machine. And whether by broadening the definition of “controlled substance offense” or “crime of violence,” or by altering the methodology for identifying whether convictions fall into these categories, any expansion of the reach of the guideline will *increase* unwarranted disparity. Contraction will *reduce* unwarranted disparity.

The DOJ and POAG also emphasize simplicity. But, as Federal Defenders Michael Caruso and Juval Scott have explained, the Commission’s proposals are unlikely to simplify anything; introducing new definitions and methodologies would simply multiply the approaches courts will have to master. For example:

- Controlled substances are limited to federally controlled substances for purposes of the Armed Career Criminal Act, 21 U.S.C. § 802(57), and 8 U.S.C. § 1326(d) motions; under the Guidelines, controlled substances would include any substance “otherwise controlled under applicable law.”
- Hobbs Act robbery and reckless offenses are not predicates under 18 U.S.C. § 924(e) (ACCA) or 21 U.S.C. § 802(58); the opposite would be true under the Guidelines.
- The categorical approach is used for statutory-recidivism-enhancement and immigration cases; under the Guidelines there would be a new accusation-based, “listed guideline” approach. And this new approach would be performed in *many* more cases: as

⁴ The career offender guideline exists solely because a statute mandates that it exist. But the existence of a congressional mandate is not an empirical justification for the guideline, and it’s certainly not a justification for expanding that guideline.

discussed below, nearly half of cases fall within one of the listed guidelines.

But even if the proposed amendments would simplify the application of recidivist enhancements, simpler is not unfailingly better. After all, the simplest method would be to make *all* offenses subject to the career offender guideline. No one thinks that is appropriate. But expanding the reach of the career offender guideline moves in that direction, one step at a time.

B. Before making significant changes to the career offender guideline—changes that in our view would make a problematic guideline much worse—the Commission should undertake a robust review of relevant data and likely impact.

At the hearing, there was significant discussion of the need for additional data. Vice Chair Mate suggested that the Commission might update its *2016 Career Offender Report*, and several Commissioners asked what sort of research and data collection the Commission could engage in to inform decisions about the career offender guideline. Defenders agree that the Commission should not expand the reach of the career offender guideline without undertaking a robust review of relevant data and the likely impact of any changes. That review should incorporate at least the following components:

- the Commission should collect data to determine the characteristics of those who its proposed, amended guideline would reach, and the impact the amendments will have on those individuals;
- the Commission should articulate the justification for the career offender guideline consistent with the statutory purposes of sentencing; and
- the Commission should review relevant Commission and other data and research to determine which categories of individuals require a near-maximum sentence, to achieve the articulated goal of the enhancement.

Characteristics of impacted individuals. In light of what we already know—that judges impose below-range sentences in nearly 80% of career-offender cases; that the guideline is a poor predictor of recidivism; and that the guideline is a driver of racial disparity in federal sentencing—the Commission should not promulgate any amendment that would expand the reach of the career offender guideline without understanding who it would reach.

For example, there is reason to be very, very concerned about the “listed guideline” alternative to the categorical approach. Commission data reflect that, in the last five fiscal years, 44.4% of Guidelines sentences involved at least one of the “listed guidelines”; this is an astoundingly high percentage for a guideline that is meant to capture the worst of the worst. The Department has proposed to add *additional* guidelines to the Commission’s list, which would cause this percentage to rise to a full 50%.⁵

For any proposal the Commission considers, it should collect data on how many individuals the proposal will identify as career offenders, whether they share characteristics with those for whom judges are already imposing below-range sentences, and whether the expansion will further increase racial disparity in sentencing.

Justifications for the guideline. Perhaps most fundamentally, the Commission should interrogate the penological basis for the career offender guideline, which calls for a sentence at or near the maximum for certain categories of defendants. Although Congress mandated the existence of such a guideline, through the use of definitions, the Commission has exercised significant control over who the guideline captures. Before setting out to capture more individuals, and to guide determination of which individuals the guideline *should* capture, the Commission should articulate the

⁵ As with the data cited at Statement of Juval O. Scott Before the U.S. Sentencing Comm’n, at 24 n.107 (Mar. 8, 2023) (“Statement of Juval O. Scott”), this figure was derived from USSC, Individual Datafiles FY 2017–2021. Of the 334,688 sentenced cases for which the Commission had relevant documentation, in 167,278 of the cases, one of the guidelines listed in the proposed amendment or proposed by the Department was identified as either (1) one of the statutory guidelines calculated in the case, or (2) the primary guideline where one of the statutory guidelines was §§2X1.1 or 2X2.1. Due to data limitations, these were not filtered for the additional requirements the Department proposes.

justification for basing a near-maximum sentence solely on criminal history and category of offense.

“The most common justifications for enhancements” based on criminal history “are elevated risk (crime prevention goals) and elevated culpability (retributive rationales).”⁶ Although the Commission has never expressly articulated a justification for the career offender guideline, the Commission’s discussion of the guideline, including in the *2016 Career Offender Report*, has focused on the former rationale: crime prevention.⁷ Under a crime-prevention rationale, imposing longer sentences protects the public through specific deterrence, general deterrence, and/or incapacitation.⁸

If any or all of these are, in fact, the best justifications for the career offender guideline, then the Commission should explain that, so that data and research can focus on whether, and how, the guideline can be designed to meet these goals.

Crafting the guideline in light of its justifications. Once the Commission articulates the penological justifications for the career offender guideline, it can measure the guideline’s definitions against the justifications. The Commission’s overarching obligation is to promulgate guidelines that recommend a sentence for each defendant that is sufficient but not greater than necessary to serve the statutory purposes of sentencing.⁹ If the Commission believes the career offender guideline is justified by a crime-prevention rationale, the Commission should conduct research that would inform the question: For which category of individuals, if any, would a near-

⁶ Richard S. Frase & Julian V. Roberts, *Paying for the Past: The Case Against Prior Record Sentence Enhancements* 207 (2019).

⁷ See, e.g., USSC, *Report to the Congress: Career Offender Enhancements* 43 (2016) (“*2016 Career Offender Report*”), <https://tinyurl.com/3ubzdabx>. As mentioned in Attorney Juval Scott’s statement, even retributivist theories would not justify the sentences currently recommended by the career offender guideline. See Statement of Juval O. Scott at 7–8 & n.36.

⁸ See Frase & Roberts, *supra* note 6 at 73.

⁹ See *Rita v. United States*, 551 U.S. 338, 347–49 (2007) (explaining that Commission’s enabling statute tells the Commission to write guidelines that will lead to sentences that comply with § 3553(a)).

maximum sentence be the least punishment necessary to achieve the guideline's crime prevention goals?

Some of this research could be performed by the Commission's Office of Research and Data. The Commission's individual data files, special coding projects, and recidivism data would be invaluable both to Commission staff and others in performing research that would inform this question. In addition to collecting its own data and conducting research, the Commission is also charged with "collect[ing] systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process."¹⁰ So the Commission should also look outside the Commission for work that would inform this question. The Robina Institute of Criminal Law and Criminal Justice, an academic think tank devoted to sentencing guidelines systems, for example, publishes a Criminal History Enhancement Sourcebook, which examines questions regarding the justification for criminal history enhancements at sentencing, the relationship between criminal history and recidivism risk, and criminal history enhancements as a cause of minority over-representation in prisons.¹¹

The data the Commission has reported reflect that more examination is needed. For example, although Defenders do not have access to the Commission's recidivism datafiles, the data the Commission has published reflect that the career offender guideline does not properly identify those at the greatest risk of recidivism even for those the Commission identify as "violent." Before digging into that data, we want to note a critical data point that is missing: The Commission's *2016 Career Offender Report* compared those assigned career offender status based on controlled substance offenses with those assigned based on crimes of violence. But, when determining whether the career offender guideline is appropriate for any category of individuals, it is essential to compare the recidivism rates of those who are assigned career offender status with those who are not.

With the data that do exist, it appears that those the Commission describes as violent offenders, like others assigned career-offender status, *also* have a recidivism rate that does not approach the Criminal History

¹⁰ 28 U.S.C. § 995(a)(13).

¹¹ See Richard S. Frase, et al., Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancements Sourcebook* (2015).

Category VI they are automatically assigned by the career offender guideline. That is, this is not just a problem for controlled-substance-pathway cases. To be specific, the *2016 Career Offender Report* reported a 69.4% recidivism rate for “mixed career offenders,” and a 69.0% recidivism rate for “violent only career offenders.”¹² The Commission’s *2016 Recidivism Among Federal Offenders: A Comprehensive Overview* reports recidivism rates of 74.7%, 77.8% and 80.1% for those placed in CHC IV, V, and VI, respectively.¹³ So, Commission data reflects that for the group of individuals the Commission identifies as “violent” who were placed in CHC VI on the basis of career offender status, their recidivism rate falls below other defendants in CHC IV.

This was not a singular occurrence. As early as 2004, in its very first recidivism report, the Commission reported that counting career offenders as CHC VI made the CHC a worse predictor of recidivism.¹⁴ And in its most recent reports, the Commission again reported that for “violent offenders” released in 2010, those placed in CHC VI as career offenders or armed career criminals, as a group, had a recidivism rate of 65.0%.¹⁵ By comparison, “violent offenders” with CHC III, IV, V, and VI, had recidivism rates of 66.3%, 73.5%, 79.0% and 83.9%, respectively.¹⁶ That is, for this most recent cohort, “violent offenders” placed in CHC VI based on career offender or armed career criminal status had a recidivism rate lower than other “violent offenders” in CHC III. Simply put, Commission data *already* reflects the career offender guideline cannot be justified on the basis of recidivism risk.

Further, if (as suggested above) the Commission considers crime prevention the primary goal of the career offender guideline, among the

¹² See *2016 Career Offender Report* at 42 fig.21 (2005 Recidivism Release Cohort Datafile). It should be noted that the *2016 Career Offender Report* identified three “pathways” that approximate, but do not match the three categories of those assigned career offender status. See *id.* at 27, 38–39.

¹³ See USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19 fig.7A (2016), <https://tinyurl.com/h5s62tym> (2005 Recidivism Release Cohort Datafile).

¹⁴ See USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9, 37 (2004), <https://tinyurl.com/2mpd5nbc>.

¹⁵ See USSC, *Recidivism of Federal Violent Offenders Released in 2010* 29 fig. 14 (2022), <https://tinyurl.com/2mwju7xt> (2010 Recidivism Release Cohort File).

¹⁶ See *id.*

questions the Commission must consider are whether longer sentences prevent crime. There is a broad academic consensus that longer sentences do not serve as either a specific or a general deterrent.¹⁷

Ex-officio Member Wroblewski suggested at the recent hearing that incapacitation of gun offenders with prior crimes of violence should be an area of agreement. But the career offender guideline is rarely applied to firearm offenses.¹⁸ Moreover, the recidivist enhancements in USSG §2K2.1 are *not* data driven, and data does *not* show that they are a good predictor of recidivism.¹⁹ And, most importantly, the Commission should not assume, but rather should study, how incapacitation interacts with crime-prevention goals. Almost all incarcerated individuals will someday reenter our communities and, as Attorney Leslie Scott explained in her testimony on the firearms panel, there is evidence indicating incapacitation is actually criminogenic.²⁰

¹⁷ See, e.g., Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 154 (Jeremy Travis, et al., eds. 2014) (any deterrent effect of lengthy sentences is modest at best and diminishes, rather than increases, as sentence length increases); Daniel S. Nagin, et al., *Imprisonment and Reoffending*, 38 Crime & Just. 115, 178 (2009) ("a key finding of our review is that the great majority of studies point to a null or criminogenic effect of the prison experience on subsequent offending"); U.S. Dep't of Just., Nat'l Inst. of Just., *Five Things About Deterrence* 1 (May 2016), <https://tinyurl.com/54tshyyj> ("increasing the severity of punishment does little to deter crime"—"[t]he certainty of being caught is a vastly more powerful deterrent").

¹⁸ See *2016 Career Offender Report* at 19 (in 2014, 5.4% of those sentenced as career offenders would have been sentenced under the firearms guideline).

¹⁹ See Statement of Michael Carter Before the U.S. Sentencing Comm'n on Firearms Offenses 19–21 (Mar. 7, 2023) (tracing history of recidivism enhancements in §2K2.1). The Commission has observed that base-offense levels assigned based on the number and type of prior convictions under §2K2.1 correlate with higher recidivism rates but has explained "[t]hese higher recidivism rates are likely due to the greater criminal history accrued by offenders in the higher BOLs." USSC, *Recidivism of Federal Firearms Offenders Released in 2010* 41 (2021), <https://tinyurl.com/8erahmz7>.

²⁰ See also Daniel Webster, et al., Johns Hopkins Ctr. for Gun Pol'y and Rsch., *Reducing Violence and Building Trust: Data to Guide Enforcement of Gun Laws in Baltimore* 24 (2020), <https://tinyurl.com/4k8xaxfx> (incarceration "does not prevent reoffending and often has a criminogenic effect on those who are imprisoned"); Don Stemen, Vera Institute for Justice, *The Prison Paradox: More Incarceration Will Not*

Ultimately, § 994(h) will always be a blunt instrument. Given the overarching obligation that the Guidelines recommend a sentence that is sufficient but not greater than necessary to serve the statutory purposes of sentencing, the Commission should not cast the §4B1.1 net wide with the goal of ensuring that it catches the anomalous cases that warrant more punishment than the non-career offender guideline recommends. After all, judges impose sentences above the recommended guideline range in less than 3% of cases, and below the recommended guideline range in nearly 50% of cases, annually.²¹ As for within-guideline sentences, 41.7% of them fall at the guideline minimum.²²

Instead, the Commission should build on the important work it has done in the past to determine the particular subset of individuals that is appropriate for the longest sentences that the Guidelines call for. Defenders are well aware that the Commission has to work within the confines of § 994(h). But again, the Commission has considerable discretion in defining the categories of individuals that Congress specified in § 994(h). And the Commission ultimately may find that it is compelled to ask Congress to amend § 994(h), as it did in 2016, or even to repeal that provision. This is consistent with 28 U.S.C. § 995(a)(20), which authorizes the Commission to make recommendations to Congress concerning statutory modifications “the Commission finds to be necessary to carry out an effective, humane and rational sentencing policy.”

Make Us Safer (2017), <https://tinyurl.com/ycyzkurs> (“[i]ncarceration is an expensive way to achieve little public safety”); Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis. L. Rev. 1049, 1054–72 (cataloging eighteen criminogenic effects of incarceration); Lynne M. Vieraitis, et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol’y 589, 614–16 (2007); USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996), <https://tinyurl.com/3f6bbzy9> (recognizing imprisonment has criminogenic effects including: “contact with more serious offenders, disruption of legal employment, and weakening of family ties”).

²¹ See USSC, *Interactive Data Analyzer*, Sentence Imposed Relative to Guideline Range, FY2015-2021 (above guideline range computed by adding upward departure percentage to upward variance percentage; below range computed by adding §5K1.1, §5K3.1, Downward Departure Govt Motion, Non-Govt Downward Departure, Downward Variance Govt Motion, and Non-Govt Downward Variance)

²² See *id.*, Position of Within Guideline Range Sentences, FY2015-2021.

III. The categorical approach is a *solution* to a host of potential problems, not a problem in need of solving.

At this point, multiple alternatives have been discussed for altering the categorical approach as it is employed in the §4B1.2 context. This section first addresses the aspect of the Commission’s “listed guideline” approach that is about the definitions of the predicates: replacing definitions in §4B1.2 with a list of Chapter 2 guidelines. Then it addresses methodology: how courts determine whether a particular conviction fits within the definition.

The bottom line is that the categorical approach is not a problem that needs fixing, as was suggested at the recent hearing. No doubt, some judges do not like it, although not all of them.²³ But the categorical approach is like democracy in the famous Churchill quote—the worst form of government, except for all the others. The Supreme Court had good reasons for developing the categorical approach. And the Commission cannot abolish it; it is here to stay in the ACCA context, and in the context of other statutory recidivist provisions and immigration cases.

What the Commission can do is make sure the categorical approach is workable by retaining the categories that are already the subject of considerable caselaw and by providing training and guidance so that judges and practitioners can apply the approach faithfully and efficiently. And the Commission can clarify that a variance may be appropriate in individual cases where the categorical approach results in an anomalous outcome.

A. It is for good reason that Defenders and DOJ agree that the Commission should not compare prior offenses against listed guidelines.

The Department agrees with Defenders that the proposal to substitute the tailored definitions of “crime of violence” and “controlled substance offense” with a list of Chapter 2 guidelines is overly complicated.²⁴

²³ At the hearing, Attorney Juval Scott mentioned Judge Lohier’s concurrence in *United States v. Morris*, defending the categorical approach. See __ F.4th __, 2023 WL 2375951, at *6–7 (2d Cir. Mar. 7, 2023) (Lohier, J., concurring).

²⁴ The Department does not agree, however, that the list (which already includes more than half the Chapter 2 guidelines) is overly expansive. Indeed, it recommends

POAG and the Trial Issues Advisory Group (“TIAG”), by contrast, support the listed guideline approach and suggest that it will simplify application. For the reasons Attorney Juval Scott and the Department have articulated, we disagree. And, as stated, we do not believe that simplification warrants expanding the reach of the career offender guideline. But we would like to engage with the comments that have been made.

Although POAG ultimately favors the new approach, it expresses some ambivalence, noting that the new approach could either “function as designed,” or if not “it could overwhelm the system for a period of time with application issues and ensuing litigation for the foreseeable future.”²⁵ So POAG recommends that the Commission clarify that “one must refer to the specific federal guideline to determine if the offense meets the definition in the guidelines.”²⁶ Defenders do not understand what this means; most guidelines do not have a “definition” for comparison purposes. Rather USSG §1B1.2(a) directs courts to refer to the statutory index.

POAG’s testimony last week regarding which listed guidelines they may want the Commission to “consider refining/removing,” as they noted in their written testimony, was revealing.²⁷ When Vice Chair Mate asked the POAG witness, Joshua Luria, which specific guidelines gave cause for concern, Mr. Luria suggested that there was no consensus but some POAG members were concerned that some of the listed guidelines could sweep in non-violent conduct; he gave as an example that someone was concerned that the guidelines for “threatening or harassing communications, hoaxes,

that, if the Commission adopts the listed-guideline approach, it *add eight additional* Chapter 2 guidelines to the list. Among the additions the Department proposes is § 2B2.2 (burglary). *See* DOJ Written Testimony for March 2023 Hearings at 32. Under the listed-guideline approach, §2B2.2 would likely reach all burglaries (state and federal) as well as any felony trespassing or other “similar” offenses. *See, e.g.,* Colo. Rev. Stat. Ann. § 18-4-503(1)(a), (2)(a) (trespassing on fenced agricultural land with intent to commit felony). This, even though the Commission previously limited the enumerated offenses to “burglary of a dwelling,” and in 2016 decided, based on its data and expertise, to remove even that limited offense. The Department’s comments appear to have just one benchmark: expansion.

²⁵ POAG Career Offender Testimony 3 (Feb. 27, 2023) (“POAG Written Testimony on Career Offender”).

²⁶ *Id.* at 2.

²⁷ POAG Written Testimony on Career Offender at 2.

stalking, and domestic violence,”²⁸ would apply to a particular harassment offense that could be either a felony or a misdemeanor. Presumably, a POAG member has experience with this particular offense and how the state applies it, and thus has reason to be concerned that that particular listed guideline is overbroad.

Defenders practice in every district, in every state. And we all know state offenses (many of which are misdemeanor/felony wobblers) that would never count as a career-offender predicate under current law, and *should not count* given how states apply them, but might count under the listed guideline approach. This is untenable: at best, it will lead to excessive litigation; at worst, it will result in additional years, even decades, of lives behind bars.

TIAG, for its part, is not concerned that the listed-guideline approach would be overly complicated based on its likening the approach to §2X5.1, which directs courts to select the “most analogous guideline” for offenses for which no guideline expressly has been promulgated.²⁹ TIAG states that this approach works well.³⁰ Doubtless, TIAG’s members have significant expertise applying §2X5.1 in Major Crimes Act and Assimilated Crimes Act cases. But this is an entirely different context. We wouldn’t be dealing only with offenses that are serious enough for the federal government to prosecute them in federal court. We would be dealing with thousands (or hundreds of thousands) of distinct state offenses, some of which aren’t even always felonies. According to Commission data, in FY2017-2021, §2X5.1 was applied in 0.1% of sentenced cases annually.³¹ Employing this type of analysis in the tens of thousands of cases that will require it yearly for §4B1.2 purposes, on both the instant offense and multiple prior convictions in each case, would overwhelm the system.

At the recent hearing, TIAG’s witness Hon. Ralph Erickson explained that individuals who are charged in federal court with what would be state

²⁸ United States Courts, *Public Hearing – March 8 – Day 2*, YouTube, at 2:09:09 – 2:09:55, <https://tinyurl.com/bdrysj8u>.

²⁹ See TIAG Written Testimony on Career Offender 1–2 (Feb. 27, 2023).

³⁰ See *id.*

³¹ See USSC, *Sourcebook of Federal Sentencing Statistics*, Table 20, FY2017–2021.

offenses often complain that they would have been treated differently in state court. And he noted that in other regions, the opposite is true. This just underscores the difference in context: with the listed guideline approach, we are not talking about a state crime that was charged in federal court; we are talking about unknown, varied state crimes charged by state prosecutors in our nation's 3,000-plus counties (and county equivalents—*e.g.*, parishes) that all operate quite differently. There is no reason for optimism that this would be workable.

While the Department opposes the listed-guideline approach, it recommends that, if the Commission adopts that approach, the Commission should explain that, like §2X5.1, the approach will not require a “perfect match of elements” but “only an assessment of whether the guideline in question ‘covers the type of criminal behavior’ of which the defendant was convicted.”³² To be clear, §2X5.1 requires an elements-to-elements comparison between the elements of the instant offense and the elements of the offenses covered by the guideline, just not a perfect match.³³

The first case the Department cites, *United States v. Jackson*, amply illustrates that the listed guideline approach will generate significant litigation, cause confusion, and generate disparities. The opinion is 51 pages long, including a lengthy dissent, on whether a district court erred in determining that there was no sufficiently analogous guideline for the assimilated crime of New Jersey child welfare endangerment.³⁴ The majority sets forth three potential tests that could be used, before adopting an “elements-based approach.”³⁵ Ultimately, after engaging in an extensive analysis that included discussion of courts (and U.S. Attorney's Offices) reaching different conclusions with similar crimes, the Third Circuit concluded that the elements of New Jersey child welfare endangerment,

³² DOJ Written Testimony for March 2023 at 30 (quoting *United States v. Jackson*, 862 F.3d 365, 376 (3d Cir. 2017), and *United States v. Calbat*, 266 F.3d 358, 363 (5th Cir. 2001)).

³³ See, *e.g.*, *United States v. Clark*, 981 F.3d 1154, 1162 (10th Cir. 2020); *Jackson*, 862 F.3d at 372–73; *Calbat*, 266 F.3d at 363.

³⁴ See *Jackson*, 862 F.3d at 371–389, 403–415.

³⁵ *Id.* at 372 (internal quotation marks and citation omitted).

USSG §2A2.2, and the federal offense of simple assault were “within the same proverbial ‘ballpark.’”³⁶ That is, the district court had erred.³⁷

The second case the Department cites, *United States v. Calbat*, although much shorter, does not recommend this approach, either. In *Calbat*, the Fifth Circuit affirmed a determination that the Texas offense of assault by intoxication was “most analogous” to §2A2.2 (Aggravated Assault) —where the Texas offense involved “accident or mistake,” causing serious bodily injury, while intoxicated.³⁸ Under this analysis, and if the Commission were to accept the Department’s recommendation not to exclude reckless and negligent offenses, even an offense committed by *accident or mistake* would be a career offender predicate. Notably, §2A1.4 (Involuntary Manslaughter), a guideline that the Commission has *not* listed as a career offender predicate, specifically mentions driving while intoxicated; but the Fifth Circuit rejected the argument §2A1.4 was the most analogous offense, because manslaughter requires a death.³⁹ That is to say, under the listed-guideline approach and the Fifth Circuit’s analysis, driving while intoxicated would not be a career offender predicate if it causes death, but it would be a career offender predicate if it causes only serious bodily injury.

B. The elements-based categorical approach remains the best methodology for assessing prior convictions.

We strongly oppose the notion of using a list of guidelines as the comparator for determining whether a prior offense is a career-offender predicate. But regardless of whether the Commission decides to compare prior offenses to listed guidelines or to categories like those presently at §4B1.2, it must retain the elements-based categorical approach as the methodology for conducting that comparison. The Supreme Court developed the categorical approach for good reasons—not only (as the government has suggested) to avoid *Apprendi* problems.

The categorical approach is grounded in how criminal cases function in the real world: a person is not convicted of conduct, he or she is convicted of

³⁶ See *id.* at 371–389.

³⁷ See *id.*

³⁸ See *Calbat*, 266 F.3d at 363.

³⁹ See *id.*

crimes, according to their *elements*. And if an accused person tells their attorney that they did not commit some conduct that doesn't go to an element of the offense charged, the defense attorney will advise them that they should not, or even cannot, raise that in court. So, when a case resolves, all we can know is what crime, with what elements, the person was convicted of.

Also, we cannot separate the question of methodology from real-life consequences. As Justice Kagan explained in *Borden*, the categorical approach is “under-inclusive by design.”⁴⁰ The elements-based categorical approach avoids expanding the reach of the deeply problematic career-offender guideline. If the Commission chooses a methodology that sweeps in more convictions—and thus more individuals—the effect will be to subject more individuals to a guideline that everyone agrees is broken.

1. A methodology that relies on old court documents—or even worse, non-court documents—to discern “conduct” ignores the realities of state court practice and would be fundamentally unfair.

The Commission has proposed substituting the Supreme Court's narrow elements-based approach with one that relies on court documents' descriptions of conduct. The basic idea is that a court could use what are known as *Shepard* documents, but without any of the restrictions that *Shepard* and its progeny placed on such use.⁴¹ Attorney Juval Scott, in her written testimony, referred to this as an “accusation-based approach.”⁴²

The Department goes even further, suggesting that courts should be able to look at non-elemental facts—that is, accusations—that show up not only in court documents but also in other documents, like police reports.⁴³

⁴⁰ *Borden v. United States*, 141 S. Ct. 1817, 1832 (2021).

⁴¹ *See Mathis v. United States*, 579 U.S. 500, 505–06, 510 (2016) (discussing *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

⁴² Statement of Juval O. Scott at 13–14, 18–24.

⁴³ At the hearing, the POAG witness suggested that courts should also be able to rely upon non-public documents about third parties—specifically mentioning a victim's medical record. We assume that the Commission would not allow this. Defense counsel would never be able to access a non-public record related to a third party like this. If the government sought to use such a record, we presume they

Defenders are pleased that the Commission has not proposed to adopt the Department's approach, although the Department has recommended it repeatedly. Even if legal, it would be terrible policy. The Department suggests that permitting judges to determine the actual conduct on which a prior conviction is based, without any real restrictions on what could be used, is akin to sentencing determinations judges currently make about current offense conduct and personal history, consistent with the rules of relevant conduct and subject to §6A1.3.⁴⁴ This is not correct.

Information about prior convictions—sometimes decades old—will be documented in a uniquely partial way that has no comparison with information about the instant offense or an individual's personal history. As Attorney Juval Scott has discussed, this is true even of court documents, which generally memorialize only accusations—most of which the defendant has no incentive, and possibly no opportunity or ability, to contest.⁴⁵ This is of particular concern for the vast majority of criminal cases where the defendant is indigent. As both Attorney Juval Scott (a former state prosecutor) and the Practitioners Advisory Group ("PAG") witness Attorney Susan Lin explained at the recent hearing, state court practice is fast-paced. And as Hon. Chair Reeves noted, state indigent defense systems are overstretched and, in some cases, unfortunately, deficient.

The situation is even worse with police reports, which are produced (in this context) to explain an arrest, with an eye toward criminal charges. As Attorney Juval Scott explained at the hearing, police reports are not always truthful. But even if we accept that a particular report is truthful, that does not mean it would contain mitigating information.

If the Commission permits courts to impose career-offender sentences based on findings made from reviewing years-old police reports, the

would be required to share a copy with the defense, but of course they would not seek to use a third-party record that supports the defense position, rather than the government's position. So practically speaking, this kind of record could never help the defense; it could only help the government, exacerbating unfairness.

⁴⁴ See DOJ Written Testimony for March 2023 Hearings at 31.

⁴⁵ If our client had an actual defense—one related to an element of the charged offense—that would be memorialized. But the fact of conviction would reveal that any defense against the elements was unsuccessful. Factual disputes unrelated to the elements of the offense generally are not documented anywhere.

Commission's very legitimacy would be endangered. As then-Commissioner Rachel E. Barkow stated during the last amendment cycle, adopting a conduct-based approach would take the bad rule of relevant conduct and make it worse.⁴⁶ The Federal Guidelines stand alone in permitting courts to consider uncharged "real offense" conduct.⁴⁷ The fairness problems posed by the relevant-conduct rule would be exponentially exacerbated if the Commission were to require judges to look at "real offense" conduct for offenses commit long ago in different jurisdictions.⁴⁸

The fact is that none of the sources discussed, including but not limited to judicial records, is "reliable" in the sense that the Department asserts. These documents might not be tampered with and may accurately reflect complaints, reports, and accusations; but they do not reliably prove conduct. That is why, under the Federal Rules of Evidence, a judgment of conviction is admissible to establish, at most, facts "essential to the judgment," and the remaining documents would be wholly inadmissible under both the Rules of Evidence and the Sixth Amendment's Confrontation Clause.⁴⁹ Indeed, Rule 803(8)(ii) specially excludes from the public-records exception to the hearsay bar matters observed by law-enforcement personnel in criminal cases.

What's more, in the unlikely event that an alternative version of events is documented—what then? Let's say a defendant at a plea hearing in

⁴⁶ See Transcript of Public Meeting Before the U.S. Sentencing Comm'n, Washington, D.C., at 13 (Aug. 23, 2018) (Commissioner Rachel E. Barkow).

⁴⁷ See Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1628 (2012) (sentencing guidelines adopted after the federal guidelines); Phyllis J. Newton, Staff Director, U.S. Sent'g Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent'g Rep. 68, 69, 1995 WL 843512 (Sept/Oct. 1995) (sentencing guidelines adopted before and after the federal guidelines).

⁴⁸ TIAG suggests that "because a district court has the most complete understanding of a given defendant's criminal history, the sentencing judge can best ensure that prior eligible offenses 'match up' with the Guidelines set forth in the proposal." TIAG Written Testimony on Career Offender at 2. But the only understanding a district court has about an individual's criminal history that happened long ago and in other jurisdictions is from the Presentence Report, which itself is prepared based on police reports, probation reports, and court records. As stated, these documents contain the accusation, not the defense, and are not reliable as to non-elemental facts.

⁴⁹ See Fed. R. Evid. 802, 803(22); *Crawford v. Washington*, 541 U.S. 36 (2004).

an old case—where we are lucky enough to have a transcript—specifically says, “I am pleading to resisting/obstructing an officer but based only on the fact that I gave the officer a false name; I did not push the officer, like he claimed.” And then the prosecutor says, “Noted, but that doesn’t go to the elements of the offense.” How does the federal sentencing court resolve this? And if the court resolves it against the individual, will the court hold it against him that he raised the objection?

Finally, the Department does not explain how non-elemental facts could ever satisfy §4B1.1’s requirement that “the defendant has at least two prior *convictions* of either a crime of violence or a controlled substance offense.” The same goes for USSG §2K2.1, which also cross-references the definitions at §4B1.2—it refers to convictions, not conduct. Relatedly, the Department proposes that the definition of “crime of violence” should retain an elements clause. The elements clause defines “crime of violence” as an offense that “has as an *element* the use, attempted use, or threatened use of physical force against the person of another.”⁵⁰ This definition plainly requires an elements-based approach, and the government has never explained how it could be otherwise.⁵¹

2. A methodology that goes beyond documents, providing for true mini-trials, would come with its own problems.

The Department’s written testimony indicates that the primary difference between its methodology and the proposed amendment is that the Department’s methodology would not be limited by the idea of “*Shepard* documents,” indicating that it would like courts to be able to rely on non-court documents. But at the hearing, the Department’s witness suggested that they would not be opposed to more robust fact-finding proceedings to determine conduct related to a prior offense—that is, mini-trials.

This still runs up against the fact that §4B1.1 and §2K2.1 refer to prior “convictions,” not conduct. But also, mini-trials would just create new

⁵⁰ USSG §4B1.2(a).

⁵¹ See, e.g., *United States v. Taylor*, 142 S. Ct. 2015, 2024 (2022) (elements clause by its terms “asks whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force”).

problems. Most obviously, it creates a problem of administration. A major impetus for seeking an alternative to the categorical approach is a desire to simplify federal sentencing; it would not make sense to replace that approach with one that is more complicated, and more resource-intensive.

The other problem is that the individuals being sentenced and their attorneys—Defenders included—will be hesitant to raise objections related to prior-offense conduct out of fear that it will result in a higher sentence. Perhaps this could resolve some administrability problems, but it would come at a high cost to both accuracy and justice. As noted above, even pointing out that old court records call the government’s version of conduct into question, if the matter is resolved in the government’s favor, could militate toward a longer sentence. Asking for a hearing at which the parties would present witnesses would come with much greater risk.

Day in and day out, Defenders have to explain to our clients the potential benefits and risks of objecting to factual allegations at sentencing. In circuits where objections can result in losing the acceptance-of-responsibility reduction, one risk is concrete; the Commission is considering guidance on this, which we would appreciate. But in every district, this is risky; ceding time at sentencing that could be spent on mitigation, to instead engage in a factual dispute with the prosecution about an old crime, could well result in a higher sentence. If the draconian career offender guideline is on the line, more of our clients likely would take that risk. But this Commission should not require them to make that choice.

3. Anomalous cases can be addressed through variances.

It turns out that there is no perfect solution to the problems inherent in basing sentence enhancements on whether an offense fits within a specified category. As we have explained, the categorical approach is the best solution out there; it’s not perfect, and it’s certainly not popular, but it avoids the profound unfairness of a court finding non-elemental facts based on court records that would not memorialize the defense’s version of events that don’t impact the elements, or of requiring individuals to choose between mini-trials or mitigation at sentencing. And, as even the Department’s witness at the March 8, 2023, career offender hearing acknowledged, for the many issues that have already been resolved in categorical-analysis caselaw, there is ease of application.

The trade-off, of course, is that the categorical approach produces odd results in some cases. But courts can address that through individualized variances. The Department recognizes this, in suggesting that the Commission provide guidance regarding variances related to career-offender findings.⁵² Defenders would not object to guidance encouraging variances.

The Commission should not expand the reach of the career offender guideline and then rely on courts to vary downward. The penalties of such an approach will fall most heavily on individuals with the least experienced counsel. The guideline range that is determined to apply to an individual is the “anchor[]”; the “benchmark”; the “framework” for sentencing.⁵³ The Commission should avoid raising this benchmark into the stratosphere for many more individuals; courts can simply vary upward where appropriate.

IV. Arguments in favor of expanding the definitions of “controlled substance offense” and “crime of violence” in other ways are not persuasive.

A. There is no justification for expanding the reach of the definition of “controlled substance offense” (Proposals 4B, 6C, 6D).

Three of the Commission’s proposals would expand the reach of the career offender guideline to more individuals convicted of drug offenses:

- Proposal 4B, Option 2, would sweep in any prior felony for any substance a state chooses to regulate in any manner—and the Department proposes that even a state decriminalizing a substance should not matter for this analysis.
- Proposal 6C would sweep in attempts and conspiracies, plus an unknown number of unidentified and undefined inchoate offenses and accomplice theories.
- Proposal 6D would sweep in offers to sell, which need not involve any controlled substance at all.

⁵² See DOJ Written Testimony for March 2023 Hearings at 34.

⁵³ *Peugh v. United States*, 569 U.S. 530, 541–42 (2013).

Adopting Defenders' proposal to mirror 28 U.S.C. § 994(h) would moot all of these proposals, reduce unwarranted disparity, and greatly simplify application. It would also go a great distance toward removing drug-trafficking convictions from the reach of the problematic career offender guideline, which the Commission has previously advocated for.

1. The Commission should limit the definition of “controlled substance offense” to the federal felonies enumerated in 28 U.S.C. § 994(h)(2)(B).

a. This proposal is the most parsimonious and is consistent with the language of § 994(h).

As Attorney Caruso explained in his statement, the Commission should dial back the definition of “controlled substance offense” to those offenses listed in the career offender directive.⁵⁴ Mirroring § 994(h) in the definition of “controlled substance offense” would ensure that only federal felonies under the enumerated statutes would constitute a career offender predicate.

At the March 7, 2023 hearing, *ex officio* Member Wroblewski suggested that § 994(h)(2)(B)'s use of the phrase “described in” (“an offense described in section 401 of the Controlled Substances Act” etc.) requires the career offender guideline to reach state offenses. This suggestion is unfounded. To be sure, some courts have held that the Commission has the authority under either § 994(h) or its general promulgating authority to “include[e] prior state convictions as an additional basis for career offender status.”⁵⁵ But in the relevant cases, the courts were considering whether §4B1.2 as promulgated was permitted by the language of § 994(h), not whether it was *required* by that language.⁵⁶

⁵⁴ See Statement of Michael Caruso Before the U.S. Sentencing Comm’n on Acceptance of Responsibility and Controlled Substance Offenses 25–28 (March 7, 2023) (“Statement of Michael Caruso-CSO”).

⁵⁵ *United States v. Stewart*, 761 F.3d 993, 998–99 (9th Cir. 2014) (collecting cases).

⁵⁶ See, e.g., *United States v. Beasley*, 12 F.3d 280, 283–53 (1st Cir. 1993) (“the statutory provision authorizes the Commission to define ‘career offender’ as it has done, that is, to include those with prior state law convictions for offenses of the sort

Section 994(h)(2)(B) lists only federal offenses. And, reading § 994(h)(2)(B) in the context of § 994, the Sentencing Reform Act of 1984 (“SRA”) as a whole, and the entire Comprehensive Crime Control Act of 1984, reflects that, when Congress intended a recidivist provision to encompass non-federal convictions, it said so expressly.

Starting with § 994(h) itself, § 994(h)(2)(B) (the enumerated offenses for prior convictions) is worded identically to § 994(h)(1)(B) (the enumerated offenses for instant convictions). It is a certainty that § 994(h)(1)(B) identifies only federal offenses, as it identifies the instant offense of conviction, which could only be a federal offense. Under the canon of consistent usage, it is generally presumed that Congress meant the same thing when it used the identical phrase twice in a single subsection of a statute.⁵⁷

Strong evidence that Congress would have expressly listed non-federal convictions if it meant for them to be included can be found in 28 U.S.C. § 994(i), the very next subsection in the same statute. Subsection 994(i) directs the Commission to assure that the Guidelines specify a “substantial term of imprisonment”—but not “at or near the maximum”—for a person who “has a history of two or more prior Federal, state, or local felony convictions for offenses committed on separate occasions.”⁵⁸ Subsection 994(i) expressly includes prior “Federal, State, or local felony convictions,” while § 994(h)(1)(B) and (2)(B) do not.⁵⁹ “When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally

defined in the listed federal statutes”); *United States v. Whyte*, 892 F.2d 1170, 1174 (3d Cir. 1989) (“We believe the entire guideline is authorized, if not required, by section 994(h)”); *United States v. Brown*, 23 F.3d 839, 841 (4th Cir. 1994) (rejecting argument that § 994(h) permits the career offender guideline only to take account of federal controlled substance convictions); *United States v. Consuegra*, 22 F.3d 788, 789–90 (8th Cir. 1994) (holding Commission’s interpretation of § 994(h) was “sufficiently reasonable”); *United States v. Rivera*, 996 F.2d 993, 995 (9th Cir. 1993) (“Section 994(h) of the statute is ambiguous”); *United States v. Gonsalves*, 121 F.3d 1416, 1417–10 (11th Cir. 1997) (agreeing with other circuits that Commission did not exceed its authority in § 994(h) in including state convictions).

⁵⁷ See *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85 (2017).

⁵⁸ Compare 28 U.S.C. § 994(i)(1) with 28 U.S.C. § 994(h).

⁵⁹ In construing § 4B1.2(b), the Eighth and Tenth Circuits mistakenly turned to 28 U.S.C. § 994(i) as the career offender directive. See *United States v. Henderson*, 11 F.4th 713, 717 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288, 1296 (10th Cir. 2021).

understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*).”⁶⁰ To interpret § 994(h)(2)(B) to mean something different from the exact same words in § 994(h)(1)(B), and something similar to entirely different words in § 994(i) would “def[y] this traditional rule of statutory construction.”⁶¹

Other parts of the SRA confirm that Congress expressly included non-federal convictions when that was its intention. For example, 18 U.S.C. § 3607(a), which provides for special probation for drug possessors, applies to those found guilty of “an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844),” so long as they have not, among other requirements “been convicted of violating a Federal or State law relating to controlled substance.”⁶² That is, in another section of the SRA, Congress used the “described in” language to identify federal offenses only, and then used “Federal or State law” to identify a broader category of prior controlled substance offenses.⁶³ “Conspicuously, the one place in the [SRA] where the government needs [non-federal] language to appear is the one place it does not.”⁶⁴ So, “the government’s [] theory faces not just a single *expressio unius* challenge but two.”⁶⁵

Really, it faces three. For in the same legislation that enacted the SRA, Congress also expanded the federal drug statute’s recidivist maximum

⁶⁰ *Bittner v. United States*, 143 S. Ct. 713, 720 (2023); see also *Department of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”) (citation omitted).

⁶¹ *Bittner*, 143 S. Ct. at 720.

⁶² Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 2003 (1984) (Chapter II of Comprehensive Crime Control Act of 1984).

⁶³ Where Congress has used the phrase offense “described in” to reach non-federal offenses, it has said so expressly. See, e.g., 18 U.S.C. § 3559(c)(2)(F)(i) (“a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111)”; 8 U.S.C. § 1101(a)(43) (“The term applies to an offense described in this paragraph whether in violation of Federal or State law[.]”). As the Supreme Court made clear in *Torres v. Lynch*, 578 U.S. 452, 460–66 (2016), it is the coupling of “described in” with a reference to state offenses that expands a statute’s reach to non-federal offenses.

⁶⁴ *Bittner*, 143 S. Ct. at 721.

⁶⁵ *Id.*

penalties to reach those who had been convicted of non-federal offenses. Prior to 1984, the federal drug statute's recidivist penalties were triggered only upon previous conviction for federal drug felonies.⁶⁶ But in Chapter V of the Comprehensive Crime Control Act of 1984 (the SRA is Chapter II), Congress amended 21 U.S.C. § 841 to provide for recidivist penalties for previous felony convictions under certain federal statutes or "other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances."⁶⁷ Surely, being in the process of amending another statute expressly to include non-federal prior convictions to increase statutory maximums, Congress would have so specified if it intended § 994(h) to direct near-maximum sentences for those same non-federal prior convictions. We cannot infer the opposite.

It makes sense that Congress would direct the Guidelines to assure near-maximum sentences only for those with federal convictions, where Congress could be certain that they reflected federal legislative and executive priorities and that federal judicial and prosecutorial standards were met. Convictions under local and state laws would vary state-to-state, and legislative, prosecutorial, and judicial policies would also vary state-to-state. Although Congress included non-federal convictions in the recidivist enhancements for § 841, at the time, those enhancements increased only the *maximum* penalties. There were no mandatory minimums. But including non-federal convictions in § 994(h) would have directed mandatory guideline ranges at or near the increased statutory maximum for these local and state convictions. If Congress had intended that, it would have said so.

⁶⁶ See *United States v. Gates*, 807 F.2d 1075, 1081–82 (D.C. Cir. 1986) ("after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or Subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances") (citation omitted) (emphasis omitted).

⁶⁷ See Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, § 502, 98 Stat. 1837, 2068 (1984) (Chapter V of Comprehensive Crime Control Act of 1984).

b. This proposal would resolve most of the concerns raised this cycle with respect to the definition of “controlled substance offense.”

Mirroring § 994(h) would resolve not only the circuit split raised in Proposal 4B (by limiting the definition to federal offenses, which involve only federally controlled substances), but also the circuit conflict raised in Proposal 6C (by excluding most inchoate offenses). It would also moot both parts of Proposal 6D (by rejecting “offer to sell” and adding title 46 chapter 705 offenses).

It would also resolve any concerns with respect to disparate treatment between conduct in different states posed by both Options 1 and 2 of Proposal 4B. All individuals would be treated similarly: no state convictions would be considered controlled substance offenses; only convictions for enumerated federal offenses would qualify.⁶⁸ And whereas Options 1 and 2 both admittedly involve some complexity in application, our proposal does not.

2. At minimum, the Commission should clarify that “controlled substance” has its federal definition, and it should not otherwise expand the reach of “controlled substance offense.”

a. The Commission should clarify that “controlled substance” is federally defined (Proposal 4B).

DOJ and POAG have suggested that expanding “controlled substance” to include any substance controlled under applicable state law (Option 2) is faithful to the current language of §4B1.2(b). It is not.⁶⁹ But even if it were, this is irrelevant. It makes no difference what the current §4B1.2(b) covers, now that the Commission is proposing to amend it.

The statutory directive, § 994(h), clearly does not require inclusion of offenses involving substances that are not controlled federally. So, the

⁶⁸ This treats those with state and federal priors differently, but it is a reasonable difference. As discussed, Congress could well have wished to reserve near-maximum sentences for those who had been twice previously convicted of federal drug offenses in federal court, consistent with federal legislative and executive priorities, and federal prosecutorial and judicial standards.

⁶⁹ See Statement of Michael Caruso-CSO at 32–34.

Commission is faced with a policy choice. Given the problems with the career offender guideline, magnified in the context of drug-trafficking offenses, the Commission should choose the narrowest definition possible. It certainly should not expand the reach of this federal sentencing enhancement to offenses not involving federally controlled substances.

DOJ and a majority of POAG also suggest that Option 2 should be selected because Option 1 would lead to some state offenses being excluded.⁷⁰ Commissioners queried Attorney Caruso about this problem. But like the categorical analysis, this is not a problem to be solved. States are permitted to choose what substances to regulate, how to define those substances, and what jurors must find to convict. Indeed, our federalist system requires that states have these choices, which permit them to make it easier for state law enforcement and prosecutors to obtain convictions. But this means that some state convictions do not trigger career offender sentences. This is already true in the context of the INA, the ACCA, and 21 U.S.C. § 841.⁷¹

The Department claims that Option 1 would lead to unnecessary complexities at sentencing. To this, Defenders have three responses. First, regardless of this guideline definition, the complexities the Department references will continue in the context of ACCA, § 841, and challenges to prior deportations under 8 U.S.C. § 1326(d). One of the cases Assistant United States Attorney Carmen Mitchell referred to at the March 7, 2023 hearing—the case about Iowa coca convictions, *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022)—involved the ACCA. So, nothing the Commission does with respect to the Guidelines would alter its outcome. But if Option 1 is promulgated, answers courts provide in those contexts will apply equally here, which simplifies things.

Second, as set forth in Attorney Caruso’s statement, Option 2 will lead to *more* complexities and litigation.⁷² The only way to avoid that would be for

⁷⁰ See DOJ Written Testimony for March 23 Hearings at 21; POAG Written Testimony on Circuit Conflicts at 5.

⁷¹ See, e.g., *Mellouli v. Lynch*, 575 U.S. 798 (2015) (INA); *United States v. Cantu*, 964 F.3d 924 (10th Cir. 2020) (ACCA); *United States v. Oliver*, 987 F.3d 794 (8th Cir. 2021) (21 U.S.C. § 841). Defenders are unaware of the government ever seeking cert or even rehearing en banc to challenge these results.

⁷² See Statement of Michael Caruso-CSO at 34–38.

courts to conclude that literally every felony for any offense involving any random substance a state chooses to regulate in any way could be a career offender predicate. And neither Defenders nor our clients would accept that conclusion without pitched battle.

Third, simplifying application is no excuse for expanding the reach of the career offender guideline.

The Department also recommends that the Commission “clarify” that the substance at issue must have been controlled when the defendant committed the predicate offense.⁷³ Really, the Department’s position is that the substance need *only* have been controlled at that time—that is, where a state or the federal government later decides that the substance is not appropriate for control, a conviction based on that substance is still a predicate.⁷⁴ This would not be a clarification but a substantive change, and it is not one the Commission should adopt.

The Department suggests that “[b]ecause the ‘controlled substance offense’ definition applies to prior convictions, a federal sentencing court should look to the applicable drug schedules in effect at the time of the prior crime to determine whether the defendant engaged in conduct involving a ‘controlled substance.’”⁷⁵ But the Sentencing Reform Act explicitly provides that the Guidelines that apply are those that are in effect at the time of sentencing, not at the time of the prior conviction.⁷⁶ And this remains true when the guideline cross-references an external statutory definition. For example, although Congress has steadily expanded the definition of “aggravated felony,” courts applying §2L1.2 have looked to the definition of

⁷³ See DOJ Written Testimony for March 2023 Hearings at 22

⁷⁴ See *id.*

⁷⁵ *Id.* Although the Third and Sixth Circuits relied on *McNeill v. United States*, 563 U.S. 816, 820 (2011), to justify looking to the definition from the time of the prior state conviction to determine the scope of “controlled substance,” see *United States v. Lewis*, 58 F.4th 764, 772 (3d Cir. 2023); *United States v. Clark*, 46 F.4th 404, 409 (6th Cir. 2022), the Department does *not* cite *McNeill*, likely because it recognizes it is wholly inapposite. See, e.g., *United States v. Gibson*, 55 F.4th 153, 161–62 (2d Cir. 2022); *United States v. Abdulaziz*, 998 F.3d 519, 525–27 (1st Cir. 2021); *United States v. Batista*, 989 F.3d 698, 703–04 (9th Cir. 2021).

⁷⁶ See 18 U.S.C. § 3553(a)(4)(A)(ii).

aggravated felony on the date of the federal immigration offense, not the date of the prior conviction.⁷⁷

The Department provides no reason why drug offenses should be treated differently. The SRA charged the Commission with developing guidelines that not only provide certainty and fairness and avoid unwarranted sentencing disparities, but also “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”⁷⁸ What should matter—and what has always mattered—for recidivist enhancements is the current assessment of the prior conviction, not an assessment under an old standard that has since been rejected.⁷⁹ To accept the Department’s timing argument would be to permit low-THC marijuana offenses to trigger enhancements indefinitely, although our society’s assessment of that substance has evolved. In its testimony, the Practitioner’s Advisory Group provided several examples of the injustices that would result from this frozen-in-time sentencing analysis.⁸⁰

For its part, POAG recognizes that Option 2 will cause disparity because conduct that is legal in one state could be a career offender predicate in another. But a majority concluded that this is not important because “the defendant’s choice to violate these rules is the central issue that should be focused on.”⁸¹ This conflates using criminal convictions to increase criminal history category, which would be unaffected by defining “controlled substance” consistent with federal law, with using these convictions to trigger

⁷⁷ See, e.g., *United States v. Avila-Ramirez*, 170 F.3d 277, 278 (2d Cir. 1990) (per curiam) (holding that characterization of prior conviction as “aggravated felony,” for ex post facto purposes, depended on date of immigration offense); *United States v. Saenz-Forero*, 27 F.3d 1016, 1018–21 (5th Cir. 1994) (same); *United States v. Aldape-Mendoza*, 21 F. App’x 340, 341–42 (6th Cir. 2001) (same); *United States v. Estrada-Quijas*, 183 F.3d 758, 760–61 (8th Cir. 1999) (same); *United States v. Arzate-Nunez*, 18 F.3d 730, 733–35 (9th Cir. 1994) (same).

⁷⁸ 28 U.S.C. § 991(b)(1).

⁷⁹ See *Gibson*, 55 F.4th at 162; *Abdulaziz*, 998 F.3d at 528; *Bautista*, 989 F.3d at 703.

⁸⁰ See Testimony of Marlo P. Cadeddu on Behalf of PAG 9 (Mar. 7, 2023) (“PAG Written Testimony for March 7, 2023 Hearings”).

⁸¹ POAG Written Testimony on Circuit Conflicts at 5.

the draconian career offender penalty. It is the latter that the definition of “controlled substance” impacts.⁸²

Finally, although POAG understands that Option 2 would result in more defendants qualifying as career offenders based on “controlled substance offense” predicates, a majority concluded that “this may be the cost of creating a higher continuity of application.”⁸³ Defenders submit that the cost in human liberty is too high.

b. The Commission should exclude inchoate offenses, including “offers to sell” (Proposals 6B, 6D).

Both DOJ and POAG recommend expanding the definition of controlled substance offense (and crime of violence) to include any inchoate offense and any theory of accomplice liability a state decides to criminalize, as well as the specific inchoate offense of “offers to sell.” Again, neither reconciles this position with the recognition that the career offender guideline is overly punitive, has no empirical basis, and exacerbates racial disparity.

Both DOJ and POAG suggest that expanding career offender predicates to include unidentified, undefined, and unknown theories of inchoate and accomplice liability is consistent with the Commission’s long-held position stated in note 1 of the commentary. First, it is not: As Attorney Juval Scott’s testimony explains, the current commentary is far more limited.⁸⁴ Second, even the offenses currently included—generic attempts and conspiracies—are too much. One way the Commission could rein the career offender guideline in is by excluding less serious inchoate offenses and less culpable forms of accessorial liability.⁸⁵

If the Commission elects to continue to include attempts and conspiracies, it should make clear that these terms have content, such that a conviction is not for an attempt or conspiracy unless it matches the generic federal definition. Otherwise, for example, conspiracy convictions might count

⁸² See, e.g., *Abdulaziz*, 998 F.3d at 528.

⁸³ POAG Written Testimony on Circuit Conflicts at 4.

⁸⁴ See Statement of Juval O. Scott at 29–30.

⁸⁵ See *id.* at 28–30; Defender Comments on 2019 Proposed Amendments at 30–34 (Feb. 19, 2019), <https://tinyurl.com/4nm3zecy>.

without any agreement, and attempt convictions might count without any intent to commit the crime.⁸⁶

POAG notes that it would be “simpler” for *all* inchoate and accessorial offenses to qualify.⁸⁷ But, as discussed, simpler is not always better, especially when the cost is years in human liberty.

B. There is also no justification for expanding the reach of the definition of “crime of violence” (Proposals 6B, 6C, 6A- recklessness, force against property).

The proposals to expand the definition of “crime of violence” pose the same problems. Two of the Commission’s proposals would expand the definition of “crime of violence”: Proposal 6B would extend the definition to reach offenses that require neither immediate threats nor threats to the person; Proposal 6C, discussed above, would sweep in attempts and conspiracies, as well as unidentified, undefined, and unknown inchoate offenses and accomplice theories.

Both DOJ and POAG support these proposals to expand the definition.⁸⁸ The Commission has proposed one amendment that would preserve a constraint the Supreme Court has placed on the definition of violent felonies—to exclude offenses based upon a finding of recklessness or negligence—and DOJ objects to that one.⁸⁹ Finally, DOJ recommends the Commission reverse decades of policy and expand the elements clause to include offenses that have as an element the use of force “against property.”⁹⁰

⁸⁶ See, e.g., Wash. Rev. Code §9A.28.040(2)(f) (“It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired. . .[i]s a law enforcement officer or other government agent who did not intend that a crime be committed.”); *Richeson v. State*, 704 N.E.2d 1008, 1010 (Ind. 1998) (holding Indiana attempts statute does not require intent).

⁸⁷ POAG Written Testimony on Career Offender at 4.

⁸⁸ See DOJ Written Testimony for March 2023 Hearings at 36; POAG Written Testimony on Career Offender at 4–5.

⁸⁹ See DOJ Written Testimony for March 2023 Hearings at 32–33.

⁹⁰ See *id.* at 31 n. 50.

DOJ and POAG suggest there's "confusion" over whether Hobbs Act robbery qualifies as a crime of violence.⁹¹ There is no confusion. Every circuit to address the issue has held that it does not qualify because it does not require an immediate threat of force and it does not require any force directed at a person.⁹² This distinguishes Hobbs Act robbery from most definitions of robbery (under state and federal law), which require "a type of force that creates 'an immediate danger to the person.'"⁹³ And, although Assistant United States Attorney Robert Zauzmer suggested at the recent hearing that Hobbs Act robbery was one of the two triggers of the original ACCA, that is not correct. The type of robbery conviction that triggered the original ACCA was a conviction for "any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will *imminently* be subjected to *bodily injury*."⁹⁴ The Commission, having expended significant resources to scale down the "crime of violence" definition, should not now step-by-step expand it.

Nor should the Commission provide that crimes with a mens rea of negligence or recklessness may constitute crimes of violence. The Supreme Court recently held, in *Borden v. United States*, that the use of physical force requires more than negligent or reckless conduct.⁹⁵ The Department complains that adhering to this exclusion would exclude more than a third of the states' aggravated assault statutes and a handful of robbery statutes.⁹⁶

⁹¹ POAG Written Testimony on Career Offender at 3–4; *see also* DOJ Written Testimony for March 2023 Hearings at 35–36.

⁹² *See United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 190 (3d Cir. 2021); *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020).

⁹³ *United States v. Rabb*, 942 F.3d 1, 5–6 (1st Cir. 2019) (quoting government).

⁹⁴ Pub. L. No. 98-473, 98 Stat. 2185 (18 U.S.C. app. § 1202(c)(8) (Supp. II 1984)) (emphasis added).

⁹⁵ *See* 141 S. Ct. at 1821–22 (plurality opinion).

⁹⁶ *See* DOJ Written Testimony for March 2023 Hearings at 32–33.

That is as it should be: those statutes are currently excluded,⁹⁷ and there is no sound reason to expand the definition.

The Department complains that court documents will not always reflect which portion of a statute a conviction was based on and recommends that, should the Commission adopt an exclusion for offenses committed recklessly, it place the burden on the defendant to show that the conviction was based on reckless conduct.⁹⁸ In view of the Department's desire that courts be permitted to rely on charging documents to find non-elemental facts for the purpose of imposing draconian sentencing enhancements, it is discordant for the Department also to complain that charging documents do not reliably describe actual conduct. In any event, in a criminal case, where the government bears the burden of proof, evidentiary gaps work against the government.⁹⁹

Finally, the Commission should not reintroduce “or property” into the elements clause. The original career offender guideline included force against property. In 1989, the Commission amended the definition, “in response to research that concluded that the definition in § 924(e) is more specific than the definition of a ‘crime of violence’ in 18 U.S.C. § 16, and more narrowly drawn and that linking the definitions of predicate crimes to those already approved, defined, and joined together by Congress for the heavy sanction of § 924(e) would facilitate both the acceptance of the guideline and its proper application.”¹⁰⁰ Congress's most recent relevant enactment, the First Step Act of 2018, likewise adopts a force clause that is limited to “physical force against the person.”¹⁰¹ The Department's suggestion that the Commission reverse this decision made over three decades ago defies explanation.

⁹⁷ See, e.g., *United States v. Schneider*, 905 F.3d 1088, 1095 (8th Cir. 2018) (excluding aggravated assault with element of ordinary recklessness); *United States v. Tagatac*, 36 F.4th 1000, 1004–05 (9th Cir. 2022) (including Hawaii robbery because conviction was for divisible portion of statute that required intent).

⁹⁸ See DOJ Written Testimony for March 2023 Hearings at 33.

⁹⁹ See *Pereida v. Wilkinson*, 141 S. Ct. 754, 766–67 (2021).

¹⁰⁰ 2016 *Career Offender Report* at app. A-9–A-10 (cleaned up).

¹⁰¹ 18 U.S.C. § 3559(c)(2)(F)(ii), as incorporated in 21 U.S.C. § 802(58).

V. Conclusion

In sum, Defenders suggest the Commission:

- Amend §4B1.2(b)(2) to define “controlled substance offense” as felony violations of the offenses listed in 28 U.S.C. § 994(h)(2)(B); and
- Delete from Application Note 1 to §4B1.2 the commentary that provides that “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

We urge the Commission to forgo further amendments impacting the career offender guideline until it has had an opportunity to review and study relevant data. Defenders are heartened by the Commission’s and the Department’s recognition that the career offender and other recidivist guideline enhancements call for sentences that are not necessary or appropriate, and we welcome the continued opportunity to work toward meaningful reform.

The following is excerpted from the March 2023 Statement of Michael Caruso.

* * * * *

I. Controlled Substance Offense

The Commission has proposed two options to resolve a circuit split regarding the definition of “controlled substance.” Option 1 would adopt the federal definition from 21 U.S.C. § 802(6) and provide that “controlled substance” means “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*).”⁸⁹ Option 2 would include those federally controlled substances and also substances “otherwise controlled under applicable state law.”⁹⁰

Long-documented problems with the career offender guideline are set forth in detail in the Statement of Juval Scott on the Commission’s proposed amendments to the career offender guideline, and although she will be testifying after me, I hope you will consider my comments in the context of her written testimony.⁹¹ These problems are magnified when the career offender guideline’s application is triggered by convictions for “controlled substance offenses.”⁹² The Commission should take this opportunity to define controlled substance offense to reach no further than what is required by the statutory directive, 28 U.S.C. § 994(h).⁹³ The simplest and most parsimonious

⁸⁹ 2023 Proposed Amendments, at 7201.

⁹⁰ *Id.*

⁹¹ See Statement of Juval O. Scott on Proposed Amendments to the Career Offender Guideline at 3-12.

⁹² See USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 3 (2016), <https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements> (“2016 Career Offender Report”) (“Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive.”).

⁹³ Section 994(h) reads:

way to achieve this is to define “controlled substance offense” to mirror the federal offenses enumerated in § 994(h)(1)(B), (2)(B):

The term “controlled substance offense” means an offense, punishable by imprisonment for a term exceeding one year, described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

If the Commission decides not to limit “controlled substance offense” to the mandate, then, at a minimum, it should limit the definition of “controlled substance” to the finite and known category of federally controlled substances, consistent with Option 1.

Option 2 would create unwarranted disparity, spawn new litigation, and vastly expand the number and variety of offenses that would trigger the career offender guideline and Chapter Two and Four recidivist enhancements. Judges already impose a below-guideline sentence in nearly 80% of cases identified by the career offender guideline; expanding its reach would further diminish its influence, when it is already at an all-time low.⁹⁴

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

⁹⁴ See USSC, Quick Facts: Career Offenders (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf (“2022 Career Offenders Quick Facts”); USSC, The Influence of the Guidelines on Federal Sentencing: Federal Sentencing Outcomes,

A. The Commission should contract, not expand, the reach of the career offender guideline.

The career offender guideline calls for such high sentences because Congress, at 18 U.S.C. § 994(h), directed the Commission to assure that the Guidelines specify a sentence at or near the maximum term for categories of defendants convicted of a felony crime of violence (undefined in the statute) or one of a list of certain enumerated felony drug-trafficking offenses, and who had previously been convicted of two or more felony crimes of violence or those same enumerated trafficking offenses. The Commission promulgated the career offender guideline, USSG §§4B1.1, 4B1.2, to implement this directive.⁹⁵

But, as set forth in more detail in Ms. Scott's testimony, the directive and the guideline implementing it are highly flawed. The guideline calls for sentences that are too high for most of the individuals it captures. As a result, judges impose a sentence below the range called for by the career offender guideline in an increasing percentage of cases to which it applies.⁹⁶ And the gap between the average guideline minimum and the average sentence judges impose continues to widen.⁹⁷

The reason for the career offender guideline's ever-waning influence is that it has no empirical basis. Commission research over decades reflects that recidivism rates are most closely correlated with total criminal history points, not career offender status, and the Commission has never stated any *other* empirical rationale for imposing near-maximum sentence on this category of individuals.⁹⁸

2005-2017 55–56 (2020), <https://www.ussc.gov/research/research-reports/influence-guidelines-federal-sentencing> (“*Influence Report*”).

⁹⁵ See *2016 Career Offender Report* at 14–15.

⁹⁶ See *id.* at 22.

⁹⁷ See *Influence Report* at 55–56.

⁹⁸ See *2016 Career Offender Report* at 43 (noting that Commission's research over decades reflects that recidivism rates are “most closely correlated with total criminal history points”); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 18-19 (2016), <https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview>; USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing*

The guideline also exacerbates racial disparity in guideline sentencing, with Black individuals nearly six times as likely to be identified as career offenders as white individuals.⁹⁹ In light of these problems, the Commission should contract, not expand, the reach of this guideline, especially as applied to drug offenses.

In its *2016 Career Offender Report*, the Commission itself recommended to Congress that it amend the career offender directive to remove from its coverage those who qualify based solely on drug-trafficking offenses, and it also expressed concern about including those for whom drug-trafficking offenses played any role in their career offender status.¹⁰⁰ As it now stands, the career offender guideline is already the least influential guideline: In FY2021, judges imposed sentences below the recommended guideline range in nearly 80% of career offender cases.¹⁰¹ For the Commission to now expand the guideline by defining “controlled substance offense” to reach still more drug offenses would give judges even more reasons not to follow it. Instead, the Commission should follow the evidence and limit the definition to what is required by § 994(h).

B. The Commission should limit §4B1.2(b) to the offenses enumerated in § 994(h).

The specific directive that resulted in §4B1.1 identifies a short, discrete list of federal drug felonies for which Congress has mandated near-maximum guidelines ranges.¹⁰² The Commission should mirror this list in the guideline definition of a “controlled substance offense.” This limitation is consistent with the Commission’s 2016 recommendation to Congress that it remove those identified as career offenders solely on the basis of drug-trafficking

Guidelines 9, 37 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

⁹⁹ This figure was derived from USSC, *Individual Datafiles FY 2017-2021*, which reflect that 6.9% of Black individuals sentenced under the Guidelines were identified as career offenders, whereas 1.2% of non-Black individuals were identified as career offenders).

¹⁰⁰ See *2016 Career Offender Report* at 43, 44.

¹⁰¹ See *2022 Career Offenders Quick Facts*.

¹⁰² See 28 U.S.C. § 994(h)(1)(B), (2)(B).

convictions from the reach of the career offender directive.¹⁰³ It would also respond to the Probation Officer Advisory Group’s suggestion that “limiting the number of controlled substance offenses that are included as predicate offenses will help create simplicity in guideline application and address sentencing disparities throughout the country.”¹⁰⁴ Only convictions for the enumerated offenses would qualify.

Limiting the definition to federal drug felonies enumerated in § 994(h) would also resolve several circuit splits and anomalies in the current guideline. It would resolve the circuit conflict addressed in Proposed Amendment 6C in favor of removing inchoate offenses not included in § 994(h), and it would moot the proposal in Proposed Amendment 6D to expand the definition of “controlled substance offense.” It would also resolve the anomaly that the guideline definition includes offenses like 21 U.S.C. § 952(b), which Congress deliberately excluded from § 994(h).¹⁰⁵

Further, it would remedy another anomaly, which appears to permit state offenses that would be misdemeanors if charged under 21 U.S.C. § 841 (the offense enumerated in § 994(h)) to constitute career offender predicates simply because a state chooses to classify those offenses as felonies.¹⁰⁶ For example, distributing a schedule V controlled substance and distributing a small amount of marijuana for no remuneration are misdemeanors under § 841, and thus not felonies described in any of the offenses enumerated in

¹⁰³ See *2016 Career Offender Report* at 3.

¹⁰⁴ Probation Officers Advisory Group’s Comments on the United States Sentencing Commission’s Proposed Priorities 9 (Oct. 17, 2022).

¹⁰⁵ See *United States v. Knox*, 573 F.3d 441, 448 (7th Cir. 2009) (discussing Congress’s deliberate choice to direct that the career offender guideline “include[] 21 U.S.C. § 952(a), which prohibits the importation of schedule I and II controlled substances and narcotic drugs in schedule III, IV, or V, but [to] carefully exclude[] 21 U.S.C. § 952(b), which prohibits the importation of nonnarcotic schedule III, IV, and V substances”). Likewise, Congress did not include export offenses described in 21 U.S.C. § 953, but § 4B1.2 includes exporting a controlled substance in its definition of a “controlled substance offense.”

¹⁰⁶ Cf. *Lopez v. Gonzales*, 549 U.S. 47, 53, 60 (2006) (holding, for Immigration-and-Nationality-Act purposes, that when a state offense proscribes conduct that would only qualify as a misdemeanor under federal drug-trafficking law then that offense does not count as a “felony punishable under the Controlled Substance Act” even if the state classifies it as a felony).

§ 994(h).¹⁰⁷ But distributing many of those same schedule V substances is a felony in some states, and until recently distributing a small amount of marijuana for no remuneration remained a felony in most states.¹⁰⁸ Mirroring § 994(h) in the definition of “controlled substance offense” would ensure that only felonies under the enumerated statutes would constitute career offender predicates.

Finally, limiting the definition of “controlled substance offense” to the enumerated offenses is consistent with § 994(h)’s directive that the career offender enhancement should apply to individuals with felony drug convictions “described in” the enumerated list of exclusively federal statutes. As the Supreme Court has made clear, it is the coupling of “described in” with a reference to state offenses that expands a statute’s reach to non-federal offenses.¹⁰⁹ We recognize that this proposal, if adopted, would significantly narrow the reach of the career offender guideline. But, as the Commission acknowledged in its *2016 Career Offender Report*, the evidence plainly supports this restriction, especially when the career offender guideline is triggered by drug-trafficking convictions.¹¹⁰ Thus, now is the time to revise §4B1.2 to reflect, to the extent practicable, advancement in knowledge of

¹⁰⁷ See 21 U.S.C. § 841(b)(3), (4).

¹⁰⁸ See, e.g., Ala. Code §§ 13A-5-6, 13A-12-215 (distribution of any controlled substance in Alabama schedules I through V punishable as Class B felony with statutory range of 2 to 20 years); 720 Ill. Comp. Stat. Ann. 570/401(h) , 730 Ill. Comp. Stat. Ann 5/5-4.5-40(a) (punishing distribution of Illinois schedule V substance as Class 3 felony, punishable by determinate sentence 2 to 5 years); Ind. Code. Ann. §§ 35-48-4-4(e), 35-50-2-6(a) (punishing distribution of between 10 and 28 grams of Indiana schedule V substance as Level 5 felony, punishable by fixed term of 1 to 6 years); *Moncrieffe v. Holder*, 469 U.S. 184, 204 (2013) (noting that about half the states criminalized marijuana distribution through statutes that did not require remuneration or any minimum quantity of marijuana).

¹⁰⁹ See *Torres v. Lynch*, 578 U.S. 452, 460–66 (2016). Where Congress has used the phrase “described in” to reach non-federal offenses, it has said so expressly. See, e.g., 18 U.S.C. § 3559(c)(2) (“[T]he term ‘serious violent felony’ means . . . a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111). . . .”); 8 U.S.C. § 1101(a)(43) (“The term aggravated felony means . . . an offense described in . . . [§ 844(i)] . . . whether in violation of Federal or State law. . . .”).

¹¹⁰ See *2016 Career Offender Report* at 43, 44.

human behavior as it relates to the criminal legal process.¹¹¹ To do any less would be to continue to maintain the unsupportable status quo.

**C. At a minimum, the Commission should clarify that
“controlled substance” in §4B1.2 means *federally*
controlled substance.**

If the Commission insists on retaining state drug offenses as predicates, it should at minimum limit its definition of a “controlled substance offense” to state and federal offenses that can reasonably be said to be “described in” § 994(h)—*i.e.*, offenses that prohibit manufacturing, importing, or distributing, or possessing with the intent to manufacture, import, or distribute, *federally* controlled substances. As set forth above, § 994(h) enumerates only federal drug offenses, which by definition prohibit conduct involving only federally controlled substances. If the Commission declines to mirror § 994(h), it should elect Option 1, defining “controlled substance” consistent with federal law.

**1. Fairness and consistency support limiting the
definition of “controlled substance” to federally
controlled substances.**

Until recently, it was uncontroversial that “controlled substance” under the Federal Sentencing Guidelines referred to substances on the five federal drug schedules.¹¹² But this changed after the Supreme Court’s 2015 decision in *Mellouli v. Lynch*, which drew widespread attention to the fact that some states control substances that the federal government does not control.¹¹³ In *Mellouli*, the Supreme Court held that an immigrant’s

¹¹¹ See 28 U.S.C. § 991(b) (Commission to establish sentencing policies and practices “to assure the meeting of the purposes of sentencing as set forth in [18 U.S.C. § 3553(a)(2)]” and to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”); *id.* § 994(o) (Commission to periodically review and revise the guidelines).

¹¹² See, e.g., *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661–62 (8th Cir. 2011); *United States v. Leiva-Deras*, 359 F.3d 183, 189 (2d Cir. 2004); *United States v. Kelly*, 991 F.2d 1308, 1316 (7th Cir. 1993).

¹¹³ 575 U.S. 798 (2015).

conviction of a Kansas drug paraphernalia offense did not trigger removal under the Immigration and Nationality Act because Kansas controlled at least nine substances, including salvia and jimson weed, that were not included on the five federal drug schedules.¹¹⁴ Following *Mellouli*'s lead, defendants argued that convictions under these overbroad state statutes should not trigger enhanced penalties under the Armed Career Criminal Act, 18 U.S.C. § 924(e), or under the career offender guideline.

Every court to consider the question has recognized this to be correct with respect to the ACCA, which like the INA expressly incorporates the federal definition for “controlled substance” set forth at 21 U.S.C. § 802(6).¹¹⁵ But the courts of appeal are now split with respect to the career offender guideline, with the Second and Ninth Circuits reasserting that the federal definition controls, and the Third, Fourth, Seventh, Eighth, and Tenth Circuits defining “controlled substance” in a variety of other ways.¹¹⁶

To be clear, this new circuit conflict about the meaning of the phrase “controlled substance” in §4B1.2 is not about the correct interpretation of § 994(h). The words “controlled substance” appear in § 994(h) only as part of the titles of the Controlled Substances Act and the Controlled Substances Import and Export Act, both of which, of course, incorporate the federal

¹¹⁴ *Id.* at 808, 813.

¹¹⁵ See *United States v. Brown*, 47 F.4th 147, 149 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487, 498–99 (4th Cir. 2022); *United States v. Fox*, 2021 WL 3747190, at *4 (6th Cir. Aug. 25, 2021); *United States v. Perez*, 46 F.4th 691, 698–99 (8th Cir. 2022); *United States v. Cantu*, 964 F.3d 924, 927, 934 (10th Cir. 2020); *United States v. Latson*, 2022 WL 3356390, at *2–3 (11th Cir. Aug. 15, 2022).

¹¹⁶ Compare *United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018) (federal definition controls for guidelines purposes), and *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021) (same), with *United States v. Lewis*, 58 F.4th 764, 771 (3d Cir. 2023) (“a drug regulated by either state or federal law”), *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020) (“[W]e look to *either* the federal or state law of conviction. . . .”), *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (“any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law” (quoting *Controlled substance*, The Random House Dictionary of the English Language (2d ed. 1987))), *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021) (“no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law”), and *United States v. Jones*, 15 F.4th 1288, 1295 (10th Cir. 2021) (“substances not found in the CSA”).

definition of controlled substance.¹¹⁷ Indeed, courts that have interpreted “controlled substance” in §4B1.2 to include non-federally controlled substances understand their interpretation to result from what they perceive to be the Commission’s choice to include offenses beyond what is required by § 994(h).¹¹⁸

The Commission should resolve the circuit conflict by expressly clarifying that “controlled substance” refers only to substances prohibited by the federal Controlled Substances Act. *First*, defining “controlled substance” consistent with federal law is all that § 994(h) requires. Indeed, as explained above, it is *more* than § 994(h) requires, since Option 1 of the proposed amended guideline would encompass not just federal but also state offenses involving the trafficking of substances listed on the federal drug schedules. If the Commission elects to expand the highly problematic career offender guideline beyond what is required, it should do so in the most limited manner possible.

Second, restricting “controlled substance” to federally controlled substances conforms guideline recidivist enhancements to statutory recidivist enhancements and other federal consequences, ensuring that federal consequences are triggered by uniform definitions independent of the labels employed by the various states. For example, a conviction that could have been for salvia does not trigger deportation.¹¹⁹ It also does not serve as a predicate for the ACCA or for 21 U.S.C. § 841(b)’s recidivism enhancements.¹²⁰ But, because the Tenth Circuit holds that “controlled

¹¹⁷ See 21 U.S.C. § 802(6) (“The term ‘controlled substance’ [for purpose of both Controlled Substances Act and Controlled Substances Import and Export Act] means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.”).

¹¹⁸ See *Lewis*, 58 F.4th at 769; *Jones*, 15 F.4th at 1294–95; *Henderson*, 11 F.4th at 718–19; *Ward*, 972 F.3d at 371–72; *Ruth*, 966 F.3d at 652.

¹¹⁹ See *Mellouli*, 575 U.S. at 808, 813.

¹²⁰ See *Cantu*, 964 F.3d at 934 (ACCA); see also *United States v. Oliver*, 987 F.3d 794, 807 (8th Cir. 2021) (same analysis applies under § 841(b)); 21 U.S.C. § 802(57) (defining “serious drug felony”—which triggers § 841(b) enhancements—in relevant part as “an offense described in [the ACCA]”).

substance” under the Guidelines is not limited to federally controlled substances, it *does* trigger guideline enhancements.¹²¹

This anomaly is especially perverse for guidelines like USSG §2K2.1. The increased base offense levels in §2K2.1 triggered by prior convictions for controlled substance offenses were promulgated to provide “proportionality” with ACCA sentences.¹²² But the ACCA would never be triggered by a conviction for an offense involving a non-federally controlled substance. There is no good reason why the same should not be true for USSG §2K2.1.

Third, limiting the definition to federally scheduled substances places control over federal sentencing enhancements applied by federal judges in federal prosecutions for federal offenses where it belongs: in the hands of the federal government.

Finally, as explored in more detail below, any definition of “controlled substance” that goes beyond federally controlled substances will open the door to wildly divergent applications of these severe federal enhancements.¹²³ Conduct that is perfectly lawful in one state would constitute a career offender predicate in another. For example, distribution of Salvinorin A is legal in the District of Columbia. In Maryland, possession is legal for adults, but a citable offense for those under 21, and distributing to a person under 21 is a misdemeanor subject to a fine.¹²⁴ In Virginia, Salvinorin A is a schedule I controlled substance, and distribution is punishable by 5 to 40 years’ imprisonment.¹²⁵ Conduct that is perfectly legal in D.C. and subject only to a fine in Maryland, would make someone a career offender if done in Virginia. Likewise, because jimson weed is a schedule I controlled substance in

¹²¹ See *Jones*, 15 F.4th at 1290.

¹²² See USSC, *Firearms and Explosive Materials Working Group Report* 18–23 (Dec. 1990), <https://www.ojp.gov/pdffiles1/Digitization/145575NCJRS.pdf>.

¹²³ 28 U.S.C. § 994(f) (guidelines should reduce unwarranted sentencing disparities).

¹²⁴ See Md. Code Ann., Criminal Law § 10-130, *et seq.*

¹²⁵ See Va. Code Ann. §§ 54.1-3446, 18.2-248(C).

Kansas, but legal in Missouri, conduct legal in Kansas City, Kansas, would constitute a career offender predicate in Kansas City, Missouri.¹²⁶

2. The Commission should use a clarifying amendment to define “controlled substances” as federally controlled substances.

If the Commission amends §4B1.2 to define “controlled substance” consistent with the federal definition, it should identify this as a clarifying amendment. Over the years, the Commission has amended §4B1.2’s definition of “controlled substance offense” many times, but it has never expanded it to include non-federally controlled substances.¹²⁷ In the first Guidelines, the Commission enumerated several federal offenses “and similar offenses.”¹²⁸ There was no indication that the Commission believed “similar offenses” would include offenses that were not in fact similar because they involved substances not prosecutable as an enumerated federal offense. The Commission quickly amended the guideline or commentary twice, each time describing the changes as non-substantive.¹²⁹

In 1989, the Commission adopted a new definition of “controlled substance offense,” which is close to its current definition.¹³⁰ The Commission

¹²⁶ Compare Kan. Stat. Ann. §§ 65-4105(a), (d)(31), with Mo. Rev. Stat. § 195.017.

¹²⁷ See *2016 Career Offender Report* at app. A (describing history of career offender guideline).

¹²⁸ See Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18046, 18095 (May 13, 1987). In Commentary, the Commission explained that “‘controlled substance offense’ was defined to include the offenses described in 28 U.S.C. § 994(h), as these offenses have been modified by amendments to the Controlled Substances Act made by the Anti-Drug Abuse Act of 1986, Pub. L. 99-570.” *Id.*

¹²⁹ See Sentencing Guidelines for United States Courts, 52 Fed. Reg. 44674 (Nov. 20, 1987); Sentencing Guidelines for United States Courts, 53 Fed. Reg. 1286 (Jan. 15, 1988). Although it’s debatable whether the changes were non-substantive, they did not expand the definition to include non-federally controlled substances.

¹³⁰ This new definition defined “controlled substance offense” to mean an offense “under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute.” USSG App. C, amend. 268 (Nov. 1, 1989). The current guideline adds “dispensing” to the list of conduct. USSG § 4B1.2(b).

described this as a clarifying amendment, and it did not expand the reach of the guideline to non-federally controlled substances.¹³¹ In explaining its amendment, the Commission said that it “sought a definition that was well-established in legislative history and that had the prospect of cohesive case law development.”¹³² “The Commission concluded that the definition from 18 U.S.C. § 924(e) [the ACCA] would be preferable to the previous definition because the previous definition ‘introduces a new offense description into the drug law, one which will have no legislative history and less interpretive case law than would a term already adopted by Congress.’”¹³³ The new definition did not quite mirror § 924(e).¹³⁴ But, in seeking a well-established federal definition, which was itself limited to federally controlled substances, the Commission did not purport to expand the definition to include offenses that could not be prosecuted federally.

By amending §4B1.2 expressly to reach only federally controlled substances, the Commission would be clarifying what it has always meant.¹³⁵

¹³¹ See USSG App. C, Amend. 268 (Nov. 1, 1989) (“The purpose of this amendment is to clarify the definitions of crimes of violence and controlled substance offense used in this guideline.”).

¹³² 2016 *Career Offender Report* at app. A-9 (citing Memorandum from Gary J. Peters presenting the report of the career offender working group at 22–24 (March 25, 1988) (“*Peters Memorandum*”)).

¹³³ *Id.* (citing Peters Memorandum at 22).

¹³⁴ 18 U.S.C. § 924(e)(2)(A) defines “serious drug offense” as:

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law[.]

¹³⁵ See, e.g., *United States v. Jerchow*, 631 F.3d 1181, 1184 (11th Cir. 2011) (recognizing that a clarifying amendment “provide[s] persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline” (quoting *United States v. Descent*, 292 F.3d 703, 707–08 (11th Cir. 2002))).

To expressly say that the amendment is clarifying would help to ensure consistent treatment by courts.¹³⁶

D. Option 2 unnecessarily expands the definition of “controlled substance offense” and with no limiting principle.

Once again, the Commission should not expand the definition of “controlled substance offense” beyond what is required by § 994(h). But Option 2 goes much further. It wouldn’t just expand that definition; it would do so recklessly, by creating a category with no limiting principle, which neither Congress nor the Commission would control, and with unknown parameters.

Option 2 would define “controlled substance” as “a drug or other substance, or immediate precursor, either included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) or otherwise controlled under applicable state law.” The Commission has not released any data on how many more individuals would be subject to career offender or other recidivist enhancements under Option 2, nor do Defenders think it would be possible for it to estimate. But the numbers are likely to be enormous. Adopting Option 2 would mean that any offense prohibiting conduct involving any drug or substance (or an immediate precursor) that a State has chosen to regulate might qualify as a “controlled substance offense”—because those substances all would be, by definition, “controlled under applicable state law.” The Commission should not cede to the states the power to decide what triggers a severe federal sentencing penalty.

Option 2 broadens the definition of “controlled substance” as used to trigger federal guideline enhancements to include substances that the federal government has elected not to schedule—substances like hemp (an agricultural fiber),¹³⁷ mature stalks of cannabis,¹³⁸ salvia (a Oaxacan

¹³⁶ *Id.* at 1185 (in determining whether an amendment is clarifying, court looks to the Commission’s own description of it).

¹³⁷ *See Bautista*, 989 F.3d at 705.

¹³⁸ *See Said v. U.S. Att’y Gen.*, 28 F.4th 1328, 1333 (11th Cir. 2022).

ceremonial herb),¹³⁹ jimson weed (a traditional medicinal herb),¹⁴⁰ thenylfentanyl (an inert substance with no abuse potential),¹⁴¹ human chorionic gonadotropin (the pregnancy hormone),¹⁴² and morpholine (a food additive used as wax coating for fruit).¹⁴³

Indeed, Option 2 proposes to reach substances Congress affirmatively *descheduled* (like hemp),¹⁴⁴ substances the temporary scheduling of which the Drug Enforcement Administration deliberately permitted to expire (like thenylfentanyl),¹⁴⁵ and even substances the Food and Drug Administration has affirmatively approved under its regulatory authority (morpholine).¹⁴⁶

And these are just some of the substances we know about. We are unaware of any compilation of the many substances controlled by various states that are not federally scheduled. And of course, such a compilation (if it existed) would be subject to change whenever any state legislature or agency (depending on state law) chose to control some additional substance. Thus, Option 2 would have the consequence of expanding the reach of severe federal sentencing enhancements to an unknown—and unknowable—list of substances.

It is worth keeping in mind that “control” means “[t]o regulate or govern.”¹⁴⁷ States regulate and govern all manner of drugs, substances, and precursors under diverse statutory and regulatory schemes. Most states employ a broad definition of “drug,” like the one from Pennsylvania, which includes, among other things, “substances (other than food) intended to affect

¹³⁹ See *Mellouli*, 575 U.S. at 808.

¹⁴⁰ See *id.*

¹⁴¹ See *Hnatyuk v. Whitaker*, 757 F. App’x 10, 11 (2d Cir. 2018).

¹⁴² See *Townsend*, 897 F.3d at 74.

¹⁴³ See *Johnson v. Barr*, 967 F.3d 1103, 1106–07 (10th Cir. 2020).

¹⁴⁴ See Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4908, 5018 (2018).

¹⁴⁵ See Schedules of Controlled Substances, 50 Fed. Reg. 43698-02, 43701 (Oct. 29, 1985); see also *Ragasa v. Holder*, 752 F.3d 1173, 1176 n.3 (9th Cir. 2014) (noting that temporary scheduling of thenylfentanyl in 1985 was allowed to expire after one year).

¹⁴⁶ See 21 C.F.R. § 172.235.

¹⁴⁷ *Control*, Black’s Law Dictionary 416 (11th ed. 2019) (second definition).

the structure or any function of the human body or other animal body.”¹⁴⁸ In Pennsylvania, selling any misbranded “drug,” where the drug has been misbranded with intent to defraud, is a crime punishable by up to three years’ imprisonment.¹⁴⁹ In Delaware, delivering or possessing with intent to deliver a *non-controlled* prescription drug is a crime punishable by up to two years’ imprisonment.¹⁵⁰ Option 2 is likely to spawn litigation over whether these are offenses that prohibit delivering a “drug . . . controlled under applicable state law.” And if they are, courts are likely to reject the application of the career offender guideline in even more cases, rendering the guideline even less influential than it currently is.

Nor would adding a qualifier like “dangerous” help narrow this definition’s reach. Whereas Montana defines “dangerous drug” to mean a drug, substance, or immediate precursor in Montana’s dangerous drug schedules,¹⁵¹ Texas defines “dangerous drug” to mean “a device or drug that is unsafe for self-medication and that is *not* included in schedules I through V or Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act).”¹⁵² Delivering or offering to deliver a dangerous drug is a Texas jail felony, punishable by up to two years.¹⁵³ Parties will no doubt litigate whether a drug that is not scheduled, but is deemed by Texas to be unsafe for self-medication, is “controlled,” making delivery a career offender predicate.

Even requiring a substance to be considered a “controlled substance” under applicable law would not result in uniformity and would still likely spawn litigation:

¹⁴⁸ 35 Pa. Cons. Stat. Ann. § 780-102.

¹⁴⁹ See 35 Pa. Cons. Stat. § 780-113(a)(7), (8), (b).

¹⁵⁰ See Del. Code Ann. tit. 16, § 4761(a), (c) ; *id.* tit. 11, § 4205(b)(7).

¹⁵¹ Mont. Code Ann. § 50-32-101(6).

¹⁵² Tex. Health & Safety Code Ann. § 483.001(2) (emphasis added).

¹⁵³ See Tex. Health & Safety Code Ann. § 483.042(d) ; Tex. Penal Code Ann. § 12.35(a).

- Maine’s Health and Welfare Code has a definition of “controlled substance” that mirrors the federal definition,¹⁵⁴ but its Criminal Code does not include the term “controlled substance” at all.¹⁵⁵
- Vermont defines “controlled substance” as federally controlled substances in some specific statutes,¹⁵⁶ but describes the substances *it* regulates as “regulated drugs.”¹⁵⁷
- Tennessee defines “controlled substance” as a substance in one of its schedules, of which it has not five, but seven.¹⁵⁸
- Virginia has six schedules¹⁵⁹; South Dakota four.¹⁶⁰
- Long before Illinois legalized cannabis, that state regulated cannabis separately from its controlled substance schedules.¹⁶¹
- By contrast, in New Jersey, “controlled dangerous substance” means a drug, substance, or precursor in its schedule I through V, *or* marijuana, *or* hashish, *or* any substance the distribution of which is specifically prohibited by five separate statutes, *and* any drug or substance that, when ingested, is metabolized or otherwise becomes a controlled dangerous substance in the human body.¹⁶² The term further includes any substance that is an immediate precursor of a controlled dangerous substance (regardless of whether that

¹⁵⁴ See Me. Rev. Stat. Ann. tit. 22, § 7246(1).

¹⁵⁵ Cf. Me. Rev. Stat. Ann. tit 17-A, § 1102).

¹⁵⁶ See, e.g., Vt. Stat. Ann. tit. 18, § 4201(26).

¹⁵⁷ See *id.* § 4201(29).

¹⁵⁸ See Tenn. Code Ann. § 39-17-402(4). Distributing a schedule VII substance is a felony. See *id.* § 39-17-417(h).

¹⁵⁹ See Va. Code Ann. § 18.2-247(A).

¹⁶⁰ See S.D. Codified Laws § 34-20B-3. South Dakota places most federal schedule V substances in schedule IV, the distribution of which is a felony. See *id.* §§ 34-20B-25, 22-42-4.

¹⁶¹ Compare Cannabis Control Act, 720 Ill. Comp. Stat. 550/1 *et seq.* with Illinois Controlled Substances Act, 720 Ill Comp. Stat. 570/100 *et seq.*

¹⁶² See N.J. Stat. Ann. § 2C:35-2.

precursor is scheduled) *and* any controlled substance analogue (regardless of whether intended for human consumption).¹⁶³

Simply put, the proposed definition of any drug, substance, or precursor “controlled under applicable state law” (Option 2) is too broad, and there is no viable way to limit it to capture the same types of offenses across jurisdictions. Prior state felony convictions involving any random substance might constitute career offender predicates simply because, by definition, they will be convictions for an offense involving a substance controlled under the applicable state law—an expansive proposition that will surely invite fierce litigation. And should the courts decide this proposition is correct, below-range sentences will continue to increase.

The best way to define “controlled substance offense” and “controlled substance” is to follow § 994(h) and limit the offenses to the enumerated federal felonies. Or at minimum, to limit the substances to federally controlled substances.

¹⁶³ *See id.*

**Before the United States Sentencing Commission
Public Hearing on Proposed Amendments to the
Career Offender Guideline**

Statement of Juval O. Scott, Federal Public Defender
for the Western District of Virginia, on Behalf
of the Federal Public and Community Defenders

March 8, 2023

**Statement of Juval O. Scott, Federal Public
Defender for the Western District of Virginia,
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission Public Hearing on
Proposed Amendments to the Career Offender Guideline**

March 8, 2023

Hon. Chair Reeves, Vice-Chairs, and Commissioners: Thank you for holding a hearing on this important topic and for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders.

I. Introduction

My name is Juval O. Scott, and I am the Federal Public Defender for the Western District of Virginia. I have been a Federal Defender for more than seventeen years, in three different jurisdictions (Virginia-Western, Indiana-Southern, and Wisconsin-Eastern), as well as an attorney advisor in the Training Division of the Office of Defender Services. I have represented hundreds of clients and have seen the devastating impact of career offender and other recidivist guideline enhancements on their sentences, their lives, their families, and their communities.

The Commission has proposed a four-part amendment to the career offender guideline, every part of which would expand its reach.¹ This is the same guideline that has long been recognized—including by the Commission—to be overly punitive, to have no empirical basis, and to exacerbate racial disparities in guideline sentencing. Even though individuals sentenced as career offenders represent only about 3% of those sentenced in federal court, they comprise over 11% of the federal prison population.² Even the Department of Justice, in its comments on the Commission’s proposed priorities for 2023, recognized that guideline recidivist penalties are “not optimally set.”³ As the Commission recently reported, the career offender guideline is already the least influential guideline, with judges imposing below-guideline

¹ See 88 Fed. Reg. 7180, 7209- 7218 (2023) (“2023 Proposed Amendments”).

² See USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 2 (2016), <https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements> (“2016 Career Offender Report”).

³ See DOJ Comments on the Sentencing Commission’s Proposed Priorities 15 (Sept. 12, 2022).

sentences in nearly 80% of cases.⁴ Extending its reach would give judges still more reasons to disregard it.

The Commission should take no action that will expand this problematic guideline. It definitely should not take the actions proposed here.

The Supreme Court's categorical approach is the best way to maintain consistency with the language of §4B1.1 and § 994(h), to ensure a reliable basis for severe sentencing enhancements, and to cabin the reach of the career offender guideline. The Commission's proposal to abandon the categorical approach would vastly and unreliably expand the reach of the guideline, without alleviating complexity. And it would give rise to new forms of unwarranted disparity and absurdity. If the Commission wishes to simplify the application of the categorical approach, it could greatly advance that goal by limiting the definition of "controlled substance offense" to those offenses enumerated in § 994(h),⁵ and excluding inchoate offenses entirely.⁶ But even if the Commission were to reject these particular suggestions, the problems that eliminating the categorical approach would create are too great to bear.

The Commission also should not retreat in other ways from its stated goal⁷ of narrowing career offender and related enhancements by:

- expanding the definition of "robbery" to include offenses that require neither immediate threats, nor threats to the person (Part B);
- expanding the definitions of both "crime of violence" and "controlled substance offense" to include unidentified, undefined, and unknown breeds of inchoate offenses and accomplice liabilities (Part C); or

⁴ See USSC, *The Influence of the Guidelines on Federal Sentencing* 55-56 (2020), <https://www.ussc.gov/research/research-reports/influence-guidelines-federal-sentencing> ("*Influence Report*"); USSC, *Quick Facts: Career Offenders* (2022), <https://www.ussc.gov/research/quick-facts/career-offenders> ("*2022 Career Offenders Quick Facts*").

⁵ See Statement of Michael Caruso on Acceptance of Responsibility and Controlled Substance Offense § II.B (March 7, 2023).

⁶ See, *infra*, § III.C.

⁷ See *2016 Career Offender Report* at 55.

- expanding the definition of “controlled substance offense” to include “offers to sell,” which need not involve any controlled substance at all (Part D).

Consistent with § 994(h), however, the Commission must include offenses described in Chapter 705 of title 46.

II. Given problems with the career offender guideline, the Commission should not further expand its reach.

In its *2016 Career Offender Report*, the Commission acknowledged “longstanding policy concerns” with the career offender guideline, explained steps it had taken toward its goal of targeting only the most dangerous individuals, and recommended that Congress enact legislation that would permit the Commission to further narrow the guideline’s reach.⁸ Judges recognize the broad overreach of this guideline and have responded by imposing below-range sentences in an ever-increasing percentage of cases, reaching nearly 80% in FY2021.⁹ The Commission should heed this judicial feedback and cabin, not expand, the reach of the guideline.¹⁰

This is especially true given the lack of any rationale, tied to statutory sentencing purposes, for the guideline’s severity. Commission data has consistently reflected that the career offender guideline does a poor job of

⁸ See *2016 Career Offender Report* at 43-45, 52-56. In the Report, the Commission recommended to Congress only that it remove from the career offender directive those assigned career offender status based solely on drug-trafficking convictions. *Id.* at 44-45. But the Report acknowledges that the Commission’s data reflect that individuals in what the Commission calls the “mixed pathway” (those who may have a prior conviction or arrest for a violent crime) resemble in many respects, including in the rate and extent of below-guideline sentences, what the Commission calls the “drug trafficking only pathway” (those with no prior conviction or arrest for a violent crime). *Id.* at 43. And, although those in the “mixed pathway” and “violent only pathway” have a higher recidivism rate than those in the “drug trafficking only pathway,” as noted in detail, *infra*, at 5-7 & nn. 22-33, the recidivism rate for these groups also correlates most closely with total criminal history points, not career offender status.

⁹ See *Influence Report* at 55-56; *2022 Career Offenders Quick Facts*.

¹⁰ See *Rita v. United States*, 551 U.S. 338, 350 (2007).

identifying defendants at the greatest risk of recidivism.¹¹ And the Commission has never provided any other sound reason for relying solely on criminal history to set a sentence at or near the statutory maximum. At the same time, the Commission has long recognized the guideline as a source of significant and unwarranted racial disparities.¹²

Because the guideline is overly punitive, has no empirical basis, and exacerbates racial disparity, the Commission should not further expand its reach.

Overly Punitive. The Sentencing Reform Act (SRA) directed the Commission to assure that the Guidelines specify a sentence at or near the maximum term for categories of defendants convicted of a felony crime of violence (undefined in the statute) or one of a list of certain enumerated federal drug-trafficking offenses, and who had previously been convicted of two or more felony crimes of violence or those same enumerated trafficking offenses.¹³ With the SRA's abolition of parole,¹⁴ and the increase in maximum terms for drug-trafficking offenses under the Anti-Drug Abuse Acts of 1986,¹⁵ a sentence at or near the statutory maximum is an exceptionally long sentence.

The Commission implemented this directive by creating the career offender guideline, §4B1.1. And then it went about defining who would be subject to this guideline, §4B1.2. That is to say, while Congress directed that a discrete category of individuals must be subject to a near-maximum career

¹¹ See, e.g., USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004), https://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/15_Year_Study/index.cfm (“*Fifteen-Year Assessment*”); *2016 Career Offender Report* at 2-3, 38-41, 44.

¹² See *Fifteen-Year Assessment* at 132, 134.

¹³ 28 U.S.C. § 994(h).

¹⁴ Just before the SRA's passage, the average federal prisoner was released after serving less than half the sentence imposed. See U.S. Department of Justice, Bureau of Justice Statistics, *Historical Corrections Statistics in the United States, 1850-1984*, Table 6-17.

¹⁵ Compare 21 U.S.C. § 841(b)(1)(B) (1982) (setting five year maximum for schedule II non-narcotic controlled substance) with 21 U.S.C. § 841(b)(1)(C) (1986) (setting 20-year maximum for schedule II controlled substance)

offender sentence, the Commission has exercised significant control over which individuals would come within that category.¹⁶

Judges recognize that the guideline calls for sentences that are too high in most of the cases it captures. The Commission reported in its *2016 Career Offender Report* that, since *Booker*, the proportion of those identified as career offenders who are sentenced within the applicable guideline range decreased from 43.35% in FY2005 to 27.5% in FY 2014.¹⁷ In FY2021, judges imposed within-range sentences in just 19.7% of those deemed career offenders.¹⁸

It is no wonder that, in its 2020 report on *The Influence of the Guidelines on Federal Sentencing*, the Commission identified the career offender guideline as one of the least influential guidelines.¹⁹ Not only do judges impose a within-guideline sentence in a small and shrinking percentage of cases, but the difference between the average guideline minimum in these cases and the average sentence imposed has steadily widened.²⁰ Thus, unlike other guidelines, whose influence has stabilized over time, judges have diverged from the career offender guideline in more cases and to a greater extent over time.²¹

No empirical basis. The judges' instincts are not wrong. The Commission has repeatedly observed that the career offender guideline does a poor job of identifying defendants at the greatest risk of recidivism—starting from its very first recidivism report.²² In its *Fifteen-Year Assessment*, the Commission explained that the “recidivism rates for career offenders more

¹⁶ See *2016 Career Offender Report* at 12-15.

¹⁷ See *id.* at 22.

¹⁸ See *2022 Career Offenders Quick Facts*.

¹⁹ See *Influence Report* at 55-56.

²⁰ The difference between the average guideline minimum and the average sentence imposed in career offender cases widened from a difference of 45.6 months in 2005, just after *Booker*, to a difference of 66.9 months in 2017, the last year of the study period. See *id.* By FY2021, the difference had grown to 73 months. See *2022 Career Offenders Quick Facts*.

²¹ See *Influence Report* at 56.

²² See USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9, 37 (2004).

closely resembles the rates for individuals in the lower criminal history categories in which they would be placed under the normal criminal history scoring rules.”²³ And the Commission repeated this observation in its *2016 Career Offender Report*: “recidivism rates are most closely correlated with total criminal history points.”²⁴

Commission data has consistently reflected that, as a group, those placed in Criminal History Category (CHC) VI by operation of the career offender and armed career criminal guidelines have a recidivism rate closer to those placed in CHC III based on points.²⁵ Even limiting the analysis to “violent offenders” placed in CHC VI by the career offender guideline, Commission data still reflects that, as a group, they have a recidivism rate²⁶ closer to those in CHC III²⁷ and lower than other “violent offenders” placed in CHC III based on points.²⁸ Likewise, the *2016 Career Offender Report* also reports a recidivism rate for those placed in CHC VI through its “violent only career offender” pathway as having a recidivism rate²⁹ closer to CHC III.³⁰

²³ *Fifteen-Year Assessment* at 134.

²⁴ *2016 Career Offender Report* at 43.

²⁵ See, e.g., USSC, *Recidivism of Federal Violent Offenders Released in 2010* 29, fig.14 (2022), <https://www.ussc.gov/research/research-reports/recidivism-federal-violent-offenders-released-2010> (“*2022 Recidivism Report-Violent*”); USSC, *Recidivism of Federal Drug Offenders Released in 2010* 31 fig.14 (2022), <https://www.ussc.gov/research/research-reports/recidivism-federal-drug-trafficking-offenders-released-2010> (“*2022 Recidivism Report-Drugs*”); USSC, *Recidivism of Federal Offenders Released in 2010* 26, fig.13 & 29, fig.16 (2021), <https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010> (“*2021 Recidivism Report*”); *2016 Career Offender Report* at 38-41, 44; USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19, figs.7A & 7B (2016), <https://www.ussc.gov/research-and-publications/research-publications/2016/recidivism-among-federal-offenders-comprehensive-overview> (“*2016 Recidivism Report*”); *Fifteen Year Assessment* at 134.

²⁶ See *2022 Recidivism Report-Violent* at 29 fig.14 (65% for ACCA/CO “violent offenders”).

²⁷ See *2021 Recidivism Report* at 26 fig.13 (61.9% for CHC III).

²⁸ See *2022 Recidivism Report-Violent* at 29 fig.14 (65% for ACCA/CO “violent offenders,” 66.3% for CHC III “violent offenders”).

²⁹ See *2016 Career Offender Report* at 42 fig.21 (69% for “violent only career offenders”).

³⁰ See *2016 Recidivism Report* at 19 fig.7A (63.3% for CHC III).

The mismatch between the career offender guideline and recidivism is even worse for the approximately 75% of people classified as career offenders based on instant drug-trafficking offenses.³¹ The Commission's most recent data for those placed in CHC VI by operation of the career offender and armed career criminal guidelines based on instant controlled substance offenses show that, as a group, they have a recidivism rate³² below those in CHC III.³³

Further, beyond the CHC, those deemed career offenders based on an instant drug-trafficking offense also suffer some of the steepest offense level increases. The career offender offense level is tied to the statutory maximum for the offense, and the statutory maximum terms for federal drug offenses rise quickly from 20 years for some of the least serious offenses to life.³⁴ As a result, individuals deemed career offenders on the basis of a conviction under 21 U.S.C. § 841 receive a starting offense level no lower than 32, and are frequently placed in offense level 37, to staggering effect.³⁵ An individual convicted of distributing 28 grams of crack cocaine with one § 851 enhancement faces a statutory mandatory minimum of 10 years and could have a §2D1.1 guideline range significantly lower than that. If he is deemed a career offender, his starting guideline range soars to 360 months to life.

There is no empirical basis for this severe increase. Again, risk of recidivism provides no basis for any increase in either CHC or offense level. Nor has the Commission articulated any *other* principled rationale for sentencing any particular set of individuals at or near the statutory maximum term. And it would be hard to find one. Indeed, even retributivist theories—those that justify criminal history enhancements on the theory of greater offender

³¹ The percentage of those deemed career offenders based on a current drug-trafficking offense hovers above 75%. *See, e.g.*, USSC, *Quick Facts: Career Offenders* (2022) (969 out of 1246); USSC, *Quick Facts: Career Offenders* (2021) (948/1216); USSC, *Quick Facts: Career Offenders* (2020) (1305 out of 1737).

³² *See 2022 Recidivism Report-Drugs* at 31 fig.14 (58.9% for ACCA/CO).

³³ *See 2021 Recidivism Report* at 26 fig.13 (61.9% for CHC III).

³⁴ *See* 21 U.S.C. § 841(b)(1)(C), (b)(1)(A).

³⁵ *See* USSG §4B1.1.

culpability—agree that the added penalty for the criminal history should not exceed the penalty for the offense itself.³⁶

The Commission itself appears to have abandoned any effort to identify a rationale for the career offender guideline tied to sentencing purposes. In its *2016 Career Offender Report*, the Commission stated: “Despite the continued reliability of the guideline’s criminal history score in predicting recidivism, and the impact an offenders’ criminal history score has on increasing the offenders’ range of punishment under the guidelines, the Commission continues to believe that certain recidivist offenders should be punished more severely based on the nature of their priors.”³⁷ But the Commission’s “belief” is not a rationale. The Commission notably did not purport to justify a sentence near the statutory maximum for *any* set of individuals without any case-specific aggravating offense facts. Instead, what followed in the *Report* was the Commission’s plea to Congress, based on empirical evidence and national experience, to remove individuals whose career offender status was based solely on drug trafficking convictions from the reach of the directive. This recognition of one of the most obvious of the guideline’s problems, while welcome, does not justify the other ways in which the guideline overreaches.

It’s no surprise that neither the Commission nor anyone else has offered a principled rationale for the career offender guideline. The career offender guideline is not a product of the Commission acting within its “characteristic institutional role”³⁸; it is simply the product of a congressional directive. The Commission cannot change or eliminate the directive (although it should continue to implore Congress to do so). But given the lack of any principled rationale for the career offender guideline, other than the directive, the Commission should ensure that the guideline reaches no further than the directive, § 994(h), requires.

³⁶ See Richard S. Frase & Julian V. Roberts, *Retributivist Perspectives, in Paying for the Past: The Case Against Prior Record Sentence Enhancements*, 23, 35-36, 38 (2019). In practical terms, this means “offenders with the longest records should not receive penalties more than twice as severe as first offenders who commit the same offense.” *Id.* at 36. And this is roughly what the normal operation of the CHC achieves, with the ranges provided in CHC VI roughly double the ranges provided in CHC I for the same offense level. See USSG Chapter 5, Part A (Sentencing Table).

³⁷ *2016 Career Offender Report* at 43.

³⁸ *Kimbrough v. United States*, 552 U.S. 85, 89 (2007).

Racially disparate. Finally, this singularly problematic guideline—problematic in both its severity and its lack of empirical basis—is disproportionately visited on Black individuals. As early as 2004, the Commission identified the career offender guideline—along with the since-reduced 100-to-1 quantity ratio between powder and crack cocaine—as a source of significant and unwarranted adverse impact on Black defendants.³⁹ In the last five years, Black individuals comprised 20.8% of those sentenced under the Guidelines, but 60.7% of those identified as career offenders.⁴⁰ Viewed from the other side, the rate at which Black individuals are assigned career offender status is almost six times the rate for non-Black individuals.⁴¹

Thus, the severe and empirically unjustified career offender enhancement feeds not only over-incarceration but also racial inequality in the criminal legal system. The racially disproportionate impacts of sentencing enhancements based on prior convictions, like this one, have led the Robina Institute’s Sentencing Guidelines Resource Center to call on sentencing commissions to examine the racial impact of their use of prior convictions: “[I]f a particular component is found to have a strong disparate impact on nonwhite offenders, the commission should carefully evaluate the rationales for including the component to ensure that the degree of added enhancements is narrowly tailored to meet the chosen goals without unnecessary severity and disparate impact.”⁴²

In the case of the career offender guideline, the total absence of a real rationale ensures that its enhancement is *not* narrowly tailored to meet any chosen goal. As the Commission recognized in 2004, a “rule that serves no clear purpose would be questionable in any event, but rules that adversely affect a particular group deserve extra scrutiny.”⁴³ For these reasons alone, the

³⁹ See *Fifteen-Year Assessment* at 131-34.

⁴⁰ See USSC, Individual Datafiles FY 2017-2021.

⁴¹ *Id.* (6.9% of Black individuals sentenced under the Guidelines were identified as career offenders, whereas 1.2% of non-Black individuals were identified as career offenders).

⁴² Richard Frase & Rhys Hester, *Criminal History Enhancements as a Cause of Minority Over-Representation*, in *Criminal History Enhancements Sourcebook* 105, 116 (Robina Institute of Criminal Law and Criminal Justice, 2022).

⁴³ *Fifteen-Year Assessment* at 131

Commission should take care to cabin the reach of the career offender guideline.

But there is more. A disturbing source of this disparity—especially with respect to drug prosecutions, the primary source of career offender placement—is racially disparate law enforcement practices.⁴⁴ It has long been acknowledged that law enforcement practices spawned by the War on Drugs increased arrests for low-level drug trafficking offenses, and that Black Americans were and are disparately affected.⁴⁵ Recent individualized data analyses suggest that the greater likelihood of arrest for Black individuals, in comparison with white individuals, cannot be explained by differences in either drug or non-drug offending or by differences in community context, such as greater likelihood of selling drugs to strangers, in public places, or in areas with heavy police presence.⁴⁶ After controlling for these differences, Professors Mitchell and Caudy report that the disparity in arrests for drug distribution between Black and white individuals remained “statistically significant and substantively large.”⁴⁷ They conclude that these results are most consistent with racial bias.⁴⁸

Research from across the country confirms that Black drivers and pedestrians are stopped, frisked, searched, and arrested far in excess of their portion of the population or their share of criminality. Drugs, weapons, and other contraband are found at significantly lower rates in frisks and searches of Black than of white individuals, and the bar for searching Black drivers is lower than that for searching white drivers.

For example, the Stanford Open Policing Project analyzed data from 21 state patrol agencies and 29 municipal police departments, comprising nearly

⁴⁴ See Nat’l Research Council, *The Growth in Incarceration in the United States: Exploring Causes and Consequences* 97 (Jeremy Travis *et al.*, eds. 2014).

⁴⁵ See, e.g., Michael Tonry, *Malign Neglect, Race, Crime, and Punishment in America* (1995).

⁴⁶ See Mitchell, O. and Caudy, M., *Race Differences in Drug Offending and Drug Distribution Arrests*, 63(2) *Crime & Delinquency* 91, 108 (2017).

⁴⁷ *Id.*

⁴⁸ See *id.*

100 million traffic stops.⁴⁹ It found significant racial disparities in policing and, in some cases, evidence that bias plays a role. Specifically, the Project found that Black drivers were less likely to be stopped after sunset, when their race would not be apparent.⁵⁰ It also found that the bar for searching Black and Hispanic drivers once stopped was lower than that for searching white drivers.⁵¹ Similar results have been found in studies of specific cities⁵² as well as whole states.⁵³ Because police can find contraband only where they look for it, Black individuals are arrested and convicted in disproportionate numbers relative to similarly situated white individuals.⁵⁴

We could go on. But the point is this: sentencing enhancements based on prior convictions replicate this racial inequality in the criminal legal system over time and space. Put differently, even if all of today's investigation, prosecution, and sentencing within the federal system were somehow to shed all racial inequality (an obvious impossibility), increasing federal sentencing ranges based on prior convictions would continue to "bake in" the inequalities of the past.⁵⁵

⁴⁹ See Findings, Stanford Open Policing Project, <https://openpolicing.stanford.edu/findings/> (last visited Feb. 8, 2023).

⁵⁰ See Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 *Nature Human Behavior* 736, 742-43 (2020).

⁵¹ See *id.* at 743.

⁵² See, e.g., Office of the San Francisco Dist. Att'y, *Report of the Blue Ribbon Panel on Transparency, Accountability, & Fairness in Law Enforcement* (2016), http://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf; *Floyd v. City of New York*, 959 F. Supp.2d 540, 559-60 (S.D.N.Y. 2013) (summarizing reports of Jeffrey Fagan, Ph.D.); Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 5-6 (2008), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profilng-Report-ACLU.pdf>.

⁵³ See, e.g., Frank R. Baumgartner et al., *Targeting Young Men of Color for Search and Arrest during Traffic Stops: Evidence from North Carolina, 2002-2013*, Politics, Groups, & Identities (2016); Matthew B. Ross et al., Inst. for Mun. & Reg'l Policy, Cent. Conn. State Univ., *State of Connecticut: Traffic Stop Data Analysis and Findings* (2016).

⁵⁴ See David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 *Minn. L. Rev.* 265, 297, 301-02 (1999).

⁵⁵ Rhys Hester, *Prior Record and Recidivism Risk*, 44 *American Journal of Criminal Justice* 353, 354 (2019); see also, generally, Richard Frase & Rhys Hester,

We were pleased that the Commission took steps in 2016 to address these concerns. Recognizing that § 994(h)’s mandate is out of sync with the statutory purposes of sentencing and the Commission’s data, the Commission recommended to Congress that it remove from § 994(h) those who qualify as career offenders based solely on controlled substance offenses.⁵⁶ That same year, the Commission amended the “crime of violence” definition consistent with its goal of focusing on the most dangerous individuals,⁵⁷ and recommended that Congress adopt the resulting definition as a uniform definition for “crime of violence.”⁵⁸

Yet, every part of the Commission’s proposed career offender amendment moves in the opposite direction. Each would have the effect of expanding—in the case of Parts A and C, drastically—the reach of this draconian guideline, identifying many more individuals as subject to near-maximum sentences, and visiting these overly severe sentences disparately on Black individuals. We oppose each part.

Criminal History Enhancements as a Cause of Minority Over-Representation, in Criminal History Enhancements Sourcebook (Robina Institute of Criminal Law and Criminal Justice, 2022); Rhys Hester et al., *Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences*, 47 *Crime & Justice* 209, 238 (2018).

Similar concerns are at play in USSG §2K2.1, which contains enhanced base offense levels that were promulgated not based on data or national experience, but a desire to achieve “proportionality” with statutory mandatory minimum sentences. See Statement of Michael Carter on Firearms Offenses at 21 (March 7, 2023). Like the career offender guideline, these severe enhancements disparately impact Black individuals. For example, according to data obtained from the USSC FY2017-2021, Individual Datafiles, Black individuals comprised 20.8% of all individuals sentenced under the Guidelines, 53.3% of those for whom §2K2.1 was the primary guideline, and 72.5% of those who were assigned base offense level §2K2.1(a)(2), based on two qualifying prior convictions.

⁵⁶ See *2016 Career Offender Report* at 43-45.

⁵⁷ See USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016).

⁵⁸ See *2016 Career Offender Report* at 48-55.

III. Every part of the four-part proposal would expand the reach of the career offender guideline.

A. The Commission should not replace the Supreme Court’s narrow elements-based categorical approach with a broad, unworkable accusation-based approach.

Although imperfect, the Supreme Court’s categorical approach is “under-inclusive by design.”⁵⁹ By contrast, the proposal in Part A to substitute the elements-based categorical approach with an accusation-based examination of court documents, coupled with new definitions of “crime of violence” and “controlled substance offense” requiring identification of the most appropriate federal guideline even for state offenses, appears to be *over*-inclusive by design. It would not solve the problems it targets—complexity, unwarranted disparity, perceived arbitrariness. It would only swap them out for new problems of the same ilk. This is not a trade the Commission should make.

The Commission’s proposal to abandon the Supreme Court’s categorical approach consists of two components. First, the Commission proposes to replace the uniform definitions for “controlled substance offense” and “crime of violence” with a long list of federal guidelines: federal offenses for which these guidelines are the applicable guideline, and state offenses for which these guidelines would be the “most appropriate” guideline if the state offense had been sentenced under the Guidelines in federal court, would constitute career offender predicates. Second, the Commission proposes to replace the Supreme Court’s elements-based categorical approach with what functions as an accusation-based approach: federal judges examine court documents to determine what conduct the conviction was based on.⁶⁰

While the Commission has not released data on the impact of this proposal, there can be no doubt it would vastly increase the number of people subject to the career offender guideline and other recidivist enhancements, further increase the federal prison population, and exacerbate racial disparity. The proposal would also worsen, not alleviate, complexity, and thus

⁵⁹ *Borden v. United States*, 141 S. Ct. 1817, 1832 (2021).

⁶⁰ See 2023 Proposed Amendments at 7209-14.

significantly increase litigation and decrease judicial efficiency. And it would give rise to new disparities and arbitrary results.

1. The listed-guideline approach is overly expansive and complicated.

In its *2016 Career Offender Report*, the Commission described its “overall goal of focusing the career offender and related enhancements on the most dangerous offenders.”⁶¹ Contrary to this goal, the Commission’s current proposal replaces the tailored definitions of “crime of violence” and “controlled substance offense” with a list of more than half of the Chapter 2 guidelines in the book.⁶² And it provides that prior state convictions will constitute career offender predicates if one of the listed guidelines would be “the most appropriate guideline . . . had the defendant been sentenced” for the state offense “under the guidelines in federal court.”⁶³

No doubt, most of the listed guidelines cover *some* offenses that involve the purposeful use of violent force.⁶⁴ But most—perhaps all—also include some offenses that do not. Adopting this approach would sweep in many offenses that fit no one’s understanding of a “crime of violence” or “controlled substance offense.”

For example, the proposal lists §§2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations), and 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise), as crimes of violence. But these are the applicable guidelines for the offenses of participating in hundreds of types of racketeering and specified unlawful activities, including gambling, sports bribery, counterfeiting, theft from interstate shipments, trafficking in counterfeit labels for computer programs, and contraband cigarettes.⁶⁵ Under the Commission’s proposal, participating in the affairs of an enterprise that engages in, or conspiring to travel in

⁶¹ *2016 Career Offender Report* at 55.

⁶² See 2023 Proposed Amendments at 7210-11.

⁶³ *Id.* at 7211.

⁶⁴ See *Borden*, 141 S. Ct. at 1828 (holding use means purposeful or knowing use); *Johnson v. United States*, 559 U.S. 133, 140 (2010) (holding physical force means violent force).

⁶⁵ See USSG §§2E1.1, 2E1.2; 18 U.S.C. §§ 1952(b); 1961.

furtherance of, any of these activities would be crimes of violence. And, if a court thought that §§2E1.1 or 2E1.2 would be “the most appropriate guideline” for state racketeering offenses, then racketeering in forgery, counterfeiting, gambling, and lottery enterprises;⁶⁶ or participating in grand larceny, failure to pay withheld child support, or unlawful sublease of motor vehicles corrupt organizations⁶⁷ would be crimes of violence also.

So, too, would offenses like obstructing an officer. This is because the Commission included §2A2.4 (Obstructing or Impeding Officers) in its list of crimes of violence. Many of the federal offenses indexed to §2A2.4 could never be career offender predicates because they are misdemeanors.⁶⁸ But some are felonies: for example, a person in charge of a vessel of the United States commits the federal felony of failing to heave to, if he fails to obey an order by an authorized Federal law enforcement officer to adjust the vessel’s course to facilitate law enforcement boarding.⁶⁹ And in many states, simple obstruction offenses are punishable by imprisonment for a term exceeding one year.⁷⁰ If a court were to determine §2A2.4 was the “most appropriate guideline” for these state obstruction felonies, they could all be career offender predicates.

Indeed, even determining which guideline to consult would be no easy task. Consider for just three paragraphs how maddeningly complicated it would be to determine the applicable guideline for one common category of offenses: assault. Sections 2A2.2 (Aggravated Assault) and 2A2.4 (Obstructing and Impeding an Officer) are listed guidelines for “crime of violence,” but §2A2.3 (Assault) is not. Even federal offenses do not fit neatly into these guidelines, much less do state offenses. Take 18 U.S.C. § 111, which prohibits assaulting, resisting, or impeding certain federal officers or employees. It

⁶⁶ See Miss. Code Ann. § 97-43-1, *et seq.*

⁶⁷ See Va. Code Ann. § 18.2-512, *et seq.*

⁶⁸ See, e.g., 18 U.S.C. §§ 111(a), 1501, 1502, 3056(d).

⁶⁹ See 18 U.S.C. § 2337(a)(1).

⁷⁰ See Md. Code Ann., Crim. Law § 9-408 (interfering with an individual who the person has reason to know is a police officer who is making or attempting to make a lawful arrest or detention of another person); Mass. Gen. Laws Ann. Ch. 268, § 32A (willfully interfering with a firefighter in the lawful performance of his duty); 30 Pa. Stat. and Cons. Stat. Ann. § 904; 18 Pa. Stat. and Cons. Stat. Ann. § 5104.3 (resisting inspection by a waterways conservation officer); Wis. Stat. Ann. §§ 946.41, 939.62 (obstructing an officer as a “repeater”).

covers misdemeanor assaults and resisting, which are elevated to felonies if the acts involve physical contact with the victim or the intent to commit any other felony.⁷¹ The Guidelines' Statutory Index (Appendix A) specifies §§2A2.2 and §2A2.3 as the applicable guidelines for § 111. Because both are among the listed guidelines for crimes of violence, one might conclude that all violations of § 111, and all state offenses that are “most similar” to § 111, are “crimes of violence.”

But it's not nearly so simple. After all, § 111(a) includes assaults that are *misdemeanors* under federal law and thus can never be career offender predicates. And, although Appendix A does not index § 111 to §2A2.3 (Assault), a federal sentencing judge could well conclude that the “most appropriate” guideline for a state offense that resembled the misdemeanor violation or other non-aggravated versions of § 111, is §2A2.3. And, as noted above, §2A2.3 is not listed as a “crime of violence.”

If the court were persuaded to ignore Appendix A, it might be tempted to draw a distinction between aggravated assault and simple assault and conclude that the former are career offender predicates, whereas the latter are not. After all, the *background* to §2A2.3 (Assault) explains that “[t]his section applies to misdemeanor assault and battery and to any felonious assault not covered by §2A2.2 (Aggravated Assault).” And the *commentary* to §2A2.2 purports to define “aggravated assault” as “a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony.”⁷² But it is unclear why the commentary defines “aggravated assault,” since the guideline text does not use the phrase “aggravated assault.” Moreover, that definition could not define the contours of which assaults constitute “crimes of violence” because the definition specifies no *mens rea* requirement. The Commission's proposal excludes from the “crime of violence” definition convictions under federal or state law based upon a finding of recklessness or negligence, and some “aggravated assaults” can be committed with a reckless

⁷¹ See 18 U.S.C. § 111.

⁷² USSG §2A2.2, comment. (n. 1).

state of mind.⁷³ In short, under the Commission’s listed guideline approach, determining whether assault—under federal or state law—is a crime of violence would be complicated.

Indeed, every guideline the Commission has identified as a “crime of violence” raises complexities. Even §2A1.1 (First Degree Murder) would not be entirely straightforward. Section 2A1.1 is the applicable guideline for federal felony murder.⁷⁴ The guideline itself notes that there may be cases where the defendant did not cause the death intentionally or even knowingly and that a downward departure might in those cases be warranted.⁷⁵ Does this acknowledge that not every federal felony murder should be a career offender predicate? And, what about state felony murder convictions? Would §2A1.1 always be the “most appropriate guideline . . . had the defendant been sentenced [for the state felony murder] under the guidelines in federal court”?

Consider Missouri, where James Colenburg was convicted of felony murder after he killed a child who suddenly ran into the middle of the street in front of the car Mr. Colenburg was driving, which he knew had been stolen seven months earlier.⁷⁶ Or Illinois, where Allison Jenkins was convicted of felony murder after an officer chased him, erroneously suspecting he had drugs. When Mr. Jenkins elbowed the officer to shake free, the officer’s gun went off, killing his partner.⁷⁷ Federal felony murder encompasses neither a death caused in the course of driving a car without permission, nor a killing committed by a police officer in attempting to effect an arrest. Is the guideline that covers the type of conduct “most similar” to these offenses the listed guideline §2A1.1 (First Degree Murder) or the unlisted guideline § 2A1.4 (Involuntary Manslaughter)?

⁷³ See, e.g., 18 U.S.C. § 113(a)(6); Ariz. Rev. Stat Ann. §§ 13–1203, 1204; Me. Rev. Stat. tit. 17-A, § 208; Tenn. Code Ann. § 39-13-102(a)(1)(B); Tex. Penal Code Ann. § 22.02.

⁷⁴ See USSG §2A1.1; 18 U.S.C. § 1111(a).

⁷⁵ See USSG §2A1.1, comment. (n. 2(B))

⁷⁶ See *State v. Colenburg*, 773 S.W.2d 184, 185, 187-89 (Mo. Ct. App. 1989).

⁷⁷ See *People v. Jenkins*, 545 N.E.2d 986, 990-91 (Ill. App. Ct. 1989).

2. The non-elemental approach is unreliable, overly inclusive, and impossibly complicated.

The second component of the Commission’s proposal to eliminate the categorical approach—to require courts, for each prior conviction, to determine from court records what *conduct* the conviction was based on—may be even more problematic. The categorical approach, for better or worse, at least has a clear basis: A prior conviction is not for a specified offense unless the conviction establishes the elements of the specified offense because otherwise the individual has not been convicted of the specified offense.⁷⁸

The Commission’s proposal eschews this elements-based approach and proposes to substitute in its place an approach with nothing clear about it:

- It would direct federal courts to determine what the “most appropriate guideline” for the state offense would have been if the defendant had been sentenced for the state offense in federal court, by determining which guideline “covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted.”⁷⁹
- It would direct that “[t]he court shall make this determination based on: (1) the elements, and means of committing such an element, that formed the basis of the defendant’s conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any element or means.”⁸⁰
- It would identify, in commentary, a variety of documents, including “the charging document” and “any comparable judicial record,” that the court may consult in making this determination.⁸¹

⁷⁸ See *Taylor v. United States*, 495 U.S. 575, 602 (1990). Defenders set forth a detailed rationale for the categorical approach at pages 6-18 of our Comments on the Sentencing Commission’s 2019 Proposals (Feb. 19, 2019).

⁷⁹ 2023 Proposed Amendments at 7211-12.

⁸⁰ *Id.* at 7212.

⁸¹ *Id.*

- Finally, it would instruct, also in commentary, that the “[f]act that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the [listed guidelines] is not determinative.”⁸²

Every step of these directions decreases the reliability of the court’s assessment, expands the pool of eligible convictions, and exacerbates the complexity of the proposed approach.

Start with reliability. The reason the Supreme Court forbids application of a recidivist sentencing enhancement without first determining the *elements* of the prior offense of conviction is that the only “conduct” a prior conviction proves is the conduct that was necessary to sustain the conviction—that is, the elements of the offense.⁸³ As the Supreme Court explained in *Descamps*, any other fact a court purports to divine from records “may be downright wrong.”⁸⁴ A defendant “has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to.”⁸⁵ At trial, the court may well prohibit extraneous facts and arguments that may confuse the question of guilt for the jury.⁸⁶

The Court reiterated this in *Mathis*: “Statements of ‘non-elemental fact’ in the records of prior convictions are prone to error precisely because their proof is unnecessary.”⁸⁷ When a defendant does not contest (or even is precluded from contesting) what does not matter under the law, “a prosecutor’s or judge’s mistake as to means, reflected in the records, is likely to go uncorrected.”⁸⁸ By directing courts to discern non-elemental facts from court documents, the Commission’s proposal requires courts to engage in unreliable factfinding.

And to be clear, the non-elemental facts upon which the proposal directs federal sentencing courts to rely are *the prosecution’s accusations*. The

⁸² *Id.*

⁸³ *See Descamps v. United States*, 570 U.S. 254, 269-70 (2013).

⁸⁴ *Id.* at 270.

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *Mathis v. United States*, 579 U.S. 500, 512 (2016)

⁸⁸ *Id.*

first two items on the Commission’s list of permissible sources of information are the judgment of conviction and the charging document. It is the charging document that will usually contain the most information about conduct, but that’s nothing more than allegations—sometimes prepared by the prosecution, sometimes by a police officer, sometimes even by a civilian complainant.⁸⁹ Even a grand jury indictment is not proof; it’s a finding of sufficient evidence to charge.⁹⁰ And just as a jury is required to be unanimous only about the elements of an offense, so when a defendant pleads guilty, he is required to admit only the elements.⁹¹ Indeed, most states permit a plea without admitting *any* of the facts in the charging document.⁹² Directing courts to find facts from charging documents would replace the Supreme Court’s narrow elements-based approach with a broad accusation-based approach.⁹³

⁸⁹ See, e.g., *State ex rel. Kalal v. Circuit County for Dane County*, 681 N.W.2d 110, 117 (Wis. 2004) (discussing private criminal complaints under Wisc. Stat. Ann. § 968.02(3)); *State v. Smith*, 505 A.2d 511 (Md. 1986) (describing statement of charges of civilian complaint sworn before judicial officer under Md. R. 4-211(b)(1)).

⁹⁰ See, e.g., *Wright v. Commonwealth*, 667 S.E.2d 787, 701 (Va. Ct. App. 2008).

⁹¹ See, e.g., *Schad v. Arizona*, 501 U.S. 624, 637 (1991), *abrogation on other grounds recognized by Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (trial); *State v. Derango*, 613 N.W. 2d 833, 838-841 (Wis. 2000) (trial); *Davison v. Commonwealth*, 819 S.E.2d 440, 445-446 (Va. 2018) (trial); *Descamps*, 570 U.S. at 269-70 (plea); *State v. Thomas*, 605 N.W.2d 836, 843-45 (Wis. 2000) (plea); *Stott v. State*, 486 N.E.2d 995, 997 (Ind. 1985) (plea).

⁹² See, e.g., *North Carolina v. Alford*, 400 U.S. 25 (1970); *In re Barr*, 684 P.2d 712, 715 (Wash. 1984); *People v. Martin*, 374 N.E.2d 1012, 1015 (Ill. App. Ct. 1978); *People v. Clairborne*, 39 A.D.2d 587, 588, (N.Y. App. Div. 1972); *People v. Johnson*, 181 N.W.2d 425, 429 (Mich. Ct. App. 1970), *abrogated on other grounds by People v. Smith-Anthony*, 837 N.W.2d 415 (Mich. 2013).

⁹³ Moving to a pure conduct-based approach, as the Department of Justice has suggested in the past, would not resolve these concerns. In addition to inviting a mini-trial at every single sentencing involving recidivism enhancements under the Guidelines, the defendant would be placed at an insurmountable disadvantage. For the same reasons that “[s]tatements of ‘non-elemental fact’ in the records of prior convictions are prone to error precisely because their proof is unnecessary,” *Mathis*, 579 U.S. at 512, court and especially law-enforcement records will rarely record exculpatory facts that would not constitute a defense to the crime. That evidence is not likely to be preserved anywhere. As a result, a so-called conduct-based approach could easily devolve into a routine reading of police reports as if they were an objective representation of the facts in the case. Recent events have laid bare that there can be no presumption of reliability for such reports simply because they were

By permitting courts to identify convictions as eligible based on prosecutorial accusations, the Commission’s proposal would vastly increase the pool of newly-eligible convictions—and of newly-minted career offenders.

What’s more, the proposal would not simplify federal sentencing. To be clear, Defenders do not think that it is justifiable to wrongly identify whole new groups of individuals as subject to harsher penalties for the purpose of simplifying Article III judges’ jobs. But, even if it were, the Commission’s proposal will create more, not less, work.

First, a federal judge cannot escape the categorical approach. Regardless of the Guidelines, the categorical approach will continue to apply to standards under the Bail Reform Act,⁹⁴ firearm prosecutions under §§ 922(g)(9) and 924(c),⁹⁵ and challenges to prior deportations under 8 U.S.C. § 1326(d),⁹⁶ as well as all statutory sentencing enhancements.⁹⁷ In firearm and drug-trafficking prosecutions with statutory enhancements, the court would have to first perform an elements-based categorical analysis to determine whether prior convictions triggered an enhanced statutory range, and then perform a second accusation-based analysis—sometimes for the same conviction—to determine whether the recidivist guideline enhancement applied.

Second, at least in the early years, a threshold question in every case would be whether the proposed amendments to the guideline setting forth *definitions* for terms used in the career offender guideline, §4B1.2, conflicts with the *substantive* guideline, §4B1.1, and the career offender directive, § 994(h), itself. The directive and the substantive guideline both require “convictions” as the basis for the enhancement. And the Supreme Court has

prepared by law enforcement officers. Jaglois, et al., *Initial Police Report on Tyre Nichols Arrest is Contradicted by Videos*, N.Y. Times, January 30, 2023, <https://www.nytimes.com/2023/01/30/us/tyre-nichols-arrest-videos.html>.

⁹⁴ See *United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999).

⁹⁵ See *United States v. Castleman*, 572 U.S. 157, 169 (2014) (§ 922(g)); *United States v. Taylor*, 142 S. Ct. 2014, 2020 (2022) (§ 924(c)).

⁹⁶ See *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017).

⁹⁷ See *Borden*, 141 S. Ct. at 1822 (2021) (ACCA); *United States v. Thompson*, 961 F.3d 545, 549 (2d Cir. 2020) (§ 851 enhancement); *United States v. Schopp*, 938 F.3d 1053, 1059 (9th Cir. 2019) (§ 2251(e)); *United States v. Leaverton*, 895 F.3d 1251, 1253 (10th Cir. 2018) (§ 3559(c)).

consistently held that the term “conviction” requires an elements-based analysis because being “convicted” of a certain type of offenses is not the same thing as “committing” a certain type of conduct.⁹⁸ In each case implicating the Commission’s new approach, courts would first need to address whether the Commission can, through §4B1.2, convert the elements-based approach required by §4B1.1 and § 994(h) into an accusation, or even conduct-based one. Is this even within the Commission’s statutory authority?⁹⁹ How will courts reconcile §4B1.1 with §4B1.2?

The executive branch’s attempt to change what it means to be “convicted of . . . a crime involving moral turpitude,” as summarized in *Matter of Silva-Trevino III*, offers a cautionary tale.¹⁰⁰ Immigrants convicted of a “crime involving moral turpitude” are ineligible for discretionary relief from deportation.¹⁰¹ In 2008, the Attorney General attempted to eliminate the use of the categorical approach for this determination in the exercise of his authority to issue controlling determinations with respect to questions of law in immigration courts.¹⁰² He issued an opinion establishing a three-step framework: the first step resembled a categorical inquiry; the second permitted resort to the modified categorical approach in every case in which there was not a categorical match; and the third permitted the adjudicator to look beyond the record of conviction.¹⁰³

What followed was six years of litigation, leading to a circuit conflict over the propriety of the Attorney General’s opinion, with five circuits rejecting the Attorney General’s interpretation as contrary to the statute’s use of

⁹⁸ See, e.g., *Taylor* 495 U.S. at 600 (interpreting “conviction” and applying the categorical approach to enumerated offense clause of 18 U.S.C. § 924(e)); *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013) (holding that “convicted of” requires categorical approach to 8 U.S.C. § 1227(a)(2)(A)(iii)); *Castleman*, 572 U.S. at 168 (applying categorical approach to determine whether defendant had been “convicted” of a misdemeanor crime of domestic violence as required under 18 U.S.C. § 922(g)(9)); *Johnson v. United States*, 576 U.S. 591, 604-05 (2015) (residual clause of 18 U.S.C. § 924(e)).

⁹⁹ See *United States v. LaBonte*, 520 U.S. 751, 762 (1997).

¹⁰⁰ See *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 826, Interim Decision 3875 (BIA 2016) (“*Matter of Silva Trevino III*”).

¹⁰¹ See 8 U.S.C. § 1182(a)(2).

¹⁰² See *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 688, Interim Decision 3631 (U.S. Atty Gen. 2008) (“*Matter of Silva-Trevino I*”) (invoking 8 U.S.C. § 1103(a)(1)).

¹⁰³ See *id.* at 689-90.

the term “convicted,” and two according deference to the construction.¹⁰⁴ In 2015, the Attorney General decided this was untenable and vacated the 2008 opinion in its entirety and directed the Board of Immigration Appeals to develop a uniform national framework.¹⁰⁵ In 2016, the Board of Immigration Appeals adopted the categorical and modified categorical approaches as defined by recent Supreme Court precedent, including the threshold divisibility analysis.¹⁰⁶

Should the Commission pursue its proposed course of attempting to define what it means to be “convicted” of or to have “convictions for” triggering offenses by directing an examination of non-elemental facts in prior court records, it would invite similar litigation with respect to the propriety of that attempt.

Third, even if the amendment survived a frontal challenge, every word and phrase will require interpretation. For example:

- Must the court choose the guideline for conduct *most similar* to the offense, even if there is no guideline that is actually similar?
- Does it suffice for the guideline to cover the type of conduct most similar to the *offense charged* in the count on which the defendant was convicted, irrespective of what the conviction was based on?
- Must the court make its determination based on the elements *and* means *and* conduct, or is one of these bases sufficient?
- May a court use the *charging document* as a source of information in all cases, irrespective of the reliability of the information in the charging document?

Fourth, to the extent the proposal seeks to promote judicial efficiency, it is far more time-consuming than the categorical approach. Under the categorical approach, once it is determined that an offense categorically is, or is not, a triggering offense, the inquiry is over for that offense; the same answer

¹⁰⁴ See *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 552 & nn.1, 2, Interim Decision 3833 (U.S. Atty Gen. 2015) (“*Matter of Silva-Trevino II*”).

¹⁰⁵ *Id.* at 552-54.

¹⁰⁶ See *Matter of Silva-Trevino III* at 831-33 & n. 8.

would adhere in every case involving that offense. Under the Commission’s proposal, if a statute is overbroad, the court would need to review documents in every case to determine non-elemental facts. And there will be no answering the question once and for all, because every conviction will have different non-elemental facts.

This more time-consuming analysis would also need to occur in more cases. In FY2017-2021, 44.4% of cases sentenced under the Guidelines involved at least one of the guidelines listed in the Commission’s proposal.¹⁰⁷ In every one of these cases—nearly half of all sentenced cases—if the individual also had two prior felony convictions of any sort, the Probation Office would need to obtain court records to determine whether the conduct that establishes any element or means of the offense was most similar to the conduct covered by one of the listed guidelines. The added workload would be enormous.

3. The Commission’s proposal would result in unwarranted disparities and arbitrary results.

Finally, the Commission’s proposal would result in additional unwarranted disparities and new types of arbitrary results. As set forth above, recidivist penalties already visit overly severe sentences on Black individuals in a disparate manner. Expanding their reach would exacerbate that disparity.

The proposal would also exacerbate unwarranted disparities based on the differing recordkeeping and responsiveness to record requests of different states, counties, and courthouses. Courts would need to look at the

¹⁰⁷ This figure was derived from USSC, Individual Datafiles FY 2017-2021. Of the 334,688 sentenced cases for which the Commission had relevant documentation, in 148,471 of the cases one of the guidelines listed in proposed §§4B1.2(a)(2) or (b)(2) was identified as either (1) one of the statutory guidelines calculated in the case, or (2) the primary guideline where one of the statutory guidelines was §§2X1.1 or 2X2.1. Section 2A6.1 was not limited to offenses involving a threat to injure a person or property because a court would need to make this determination in each instance. Section 2K2.1 was not limited to offenses involving possession of a firearm described in 26 U.S.C. § 5845(a) for the same reason. In addition, the proposed amendments would also impact all cases for which §2K2.1 was one of the statutory guidelines or the primary guideline because the proposed conforming amendment would also impact the definitions of “crime of violence” and “controlled substance offense” in §2K2.1.

documents in many more cases, but as the Probation Officers Advisory Group explains in its comments, “the documentation necessary to apply the modified categorical approach is often lacking the required detail or not available.”¹⁰⁸ And as Defenders explained in our 2019 comments, the availability of documents differs even within a single jurisdiction.¹⁰⁹ Convictions for the same offense would be treated differently based on document availability.

Even the same exact conviction would be treated differently by different judges. Surely, some judges would recognize that a three-time participant in contraband cigarette or unlawful vehicle sublease rackets has not been convicted of three crimes of violence; but others, literally following the language of the proposal, might disagree. Likewise, some judges would be reluctant to conclude that an individual is a career offender because of two prior felony disorderly conduct convictions, where the facts in the complaint could also make out obstructing an officer. But others might disagree.

It is true, as the Commission notes, that some judges have “criticized the categorical approach as a ‘legal fiction’ in which an offense that a defendant commits violently is deemed non-violent because other defendants at other times could have been convicted of violating the same statute without violence, often leading to ‘odd’ and ‘arbitrary’ results.”¹¹⁰ But the proposal casts the net so wide that it would deem violent far more offenses that did not involve violence—arbitrarily subjecting more individuals to extremely harsh penalties.

Again, the categorical approach the Commission seeks to eliminate is “under-inclusive by design.”¹¹¹ By disallowing the use of convictions unless the least serious conduct they cover satisfies the requirements of a uniform definition, the Supreme Court’s categorical approach “*expects* that some violent acts, because charged under a law applying to non-violent conduct, will not trigger enhanced sentences.”¹¹² The Commission’s proposal, by contrast,

¹⁰⁸ POAG’s Comments on the Sentencing Commission’s Proposed Priorities 8 (Oct. 17, 2022).

¹⁰⁹ See Defender Comments on the Sentencing Commission’s Proposed Amendments 20 (Feb. 19, 2019) (“Defender Comments on 2019 Proposed Amendments”).

¹¹⁰ 2023 Proposed Amendments at 7210.

¹¹¹ *Borden*, 144 S. Ct. at 1832.

¹¹² See *id.*

appears over-inclusive by design. Erring on the side of sweeping in more offenses—and thus more individuals—is no way to go about fixing any problem.

B. The Commission should not expand the definition of robbery.

Part B of the Commission’s proposal is to amend USSG §4B1.2 to add a definition of “robbery” that mirrors the Hobbs Act robbery definition at 18 U.S.C. § 1951(b)(1):

“Robbery” is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.¹¹³

As explained in our 2019 Comments on a similar proposal, the Commission has provided no justification for expanding the already over-inclusive career offender guideline to reach offenses involving *future* threats of force against *property*.¹¹⁴

In its *2016 Career Offender Report*, the Commission described the considerable resources it had devoted to formulating a “crime of violence” definition that advanced the goals of judicial efficiency, just punishment, and targeting recidivism risk, and it recommended that Congress adopt the same framework for other recidivist enhancements.¹¹⁵ It should not now, at the request of the Department of Justice, start expanding that definition again.

The Commission proposes the new robbery amendment to address the “concern” that Hobbs Act robbery is not a crime of violence under its 2016

¹¹³ 2023 Proposed Amendments at 7214-15.

¹¹⁴ See Defender Comments on 2019 Proposed Amendments at 27-30; Defender Reply Comment on Sentencing Commission’s Proposed Amendments 6-7 (Mar. 15, 2019)

¹¹⁵ See *2016 Career Offender Report* at 53.

definition.¹¹⁶ But this is not concerning. Unlike other modern robbery offenses—including other federal robbery offenses—Hobbs Act robbery may be committed without an immediate threat of force, and without a threat of force against the person.¹¹⁷ For this reason, federal law often distinguishes between generic robbery and Hobbs Act robbery.

Notably, the term “serious violent felony”—for the federal three-strikes law and, as incorporated in the First Step Act of 2018, for an enhancement to federal drug offenses—includes “robbery (as described in sections 2111, 2113, or 2118),” but not Hobbs Act robbery.¹¹⁸ Indeed, the original Armed Career Criminal Act, which was triggered only by prior convictions for burglaries and robberies, defined robbery as “any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will *imminently* be subjected to *bodily injury*.”¹¹⁹ Given longstanding federal distinctions between Hobbs Act robbery and generic robbery, the Commission should not mirror Hobbs Act robbery in its “crime of violence” definition.

In addition, defining robbery to mirror Hobbs Act robbery will import additional complexity into the analysis. The Commission has taken care to exclude non-violent threats from its extortion definition,¹²⁰ but Hobbs Act robbery, too, can be committed by non-violent threats. Juries are routinely instructed that, for Hobbs Act robbery, the use or threat of force or violence might be aimed at causing *economic* rather than physical injury,¹²¹ and that fear of injury “exists if a victim experiences anxiety, concern, or worry over expected *personal harm or business loss, or over financial or job security*.”¹²²

¹¹⁶ 2023 Proposed Amendments at 7214.

¹¹⁷ Compare 18 U.S.C. § 1591 with 18 U.S.C. §§ 2111, 2113, 2118.

¹¹⁸ See 18 U.S.C. § 3559(c)(1)(F)(i); 21 U.S.C. § 802(58).

¹¹⁹ See 18 U.S.C. App. 1202(c)(8) (Supp. II 1984).

¹²⁰ See USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016).

¹²¹ 3 Leonard B. Sand, *Modern Federal Jury Instructions-Criminal* ¶ 50.01, Instruction 50-5 (emphasis added).

¹²² *Id.*, Instruction 50-6 (emphasis added); see also Tenth Circuit Pattern Criminal Jury Instructions. 2.70 (“‘Fear’ means an apprehension, concern, or anxiety about physical violence or harm or *economic loss* or harm that is reasonable under the circumstances”) (updated January 2023) (emphasis added); Eleventh Circuit Pattern Jury Instructions, Criminal Cases (last revised March 2022) (“‘Fear’ means

The Commission's use of § 1951's definition would communicate that *all* Hobbs Act robberies are crimes of violence, regardless of this broad reach, and it would reopen the possibility that non-violent state extortion convictions could be considered crimes of violence under this new definition.

C. The Commission should exclude inchoate offenses.

Part C of the Commission's proposal involves two options, both of which would expand the definitions of both "crime of violence" and "controlled substance" to include:

the offense of aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or "controlled substance offense."¹²³

Option One would further instruct judges not to use the generic definitions of the relevant inchoate offense or offense arising from accomplice liability:

To determine whether any offense described above qualifies as a "crime of violence" or "controlled substance offense," the court shall only determine whether the underlying substantive offense is a "crime of violence" or a "controlled substance offense," and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.¹²⁴

In its Issues for Comment, the Commission asks whether it should instead exclude these offenses altogether as predicate offenses.

As explained in our Comments on a similar 2019 Proposal, the Commission should exclude these offenses altogether.¹²⁵ Inchoate offenses are not

a state of anxious concern, alarm, or anticipation of harm. It includes the *fear of financial loss* as well as fear of physical violence").

¹²³ 2023 Proposed Amendments at 7217.

¹²⁴ *Id.*

¹²⁵ Defender Comments on 2019 Proposed Amendments at 30-34.

equivalent in seriousness to completed offenses.¹²⁶ Excluding them would be a significant step toward the Commission’s goal of focusing the career offender and related enhancements on the most dangerous individuals.¹²⁷ It would also be consistent with § 994(h), which does not broadly include inchoate offenses.¹²⁸ And it would be consistent with force-clause jurisprudence: The Supreme Court recently held that the inclusion of “attempted use of force” in the force clause of the crime of violence definition does not include every attempted crime of violence, but only those offenses that actually require the attempted use of force.¹²⁹

As for accomplice liability, “aiding and abetting” is already included so there is no need for the Commission to specify “aiding and abetting” for it to be included. Every jurisdiction has expressly abrogated the distinction between principals and aiders and abettors.¹³⁰ The Commission should also not add any other forms of accomplice liability, as they are far less serious than principal liability. Accessory after the fact, for example, is punishable under federal law by half the term of the principal¹³¹; misprision by no more than three years.¹³² (Notably, the Commission has not proposed to add accessory after the fact or misprision of a felony under its listed-guideline proposal.)

Much less should the Commission add “any other inchoate offense or offense arising from accomplice liability.” This would expand the career offender predicates beyond even the current commentary at Application Note 1 to any unidentified, undefined, and unknown inchoate offense or offense arising from any sort of accomplice liability. It would do so in at least three ways:

- It would add “any other inchoate offense or offense arising from accomplice liability,” which would extend, without limit, the reach of

¹²⁶ *Id.* at 31-32.

¹²⁷ *2016 Career Offender Report* at 55.

¹²⁸ *See* 28 U.S.C. § 994(h) (omitting conspiracy and attempt, except for 46 U.S.C. § 70506(b)).

¹²⁹ *Taylor*, 142 S. Ct. at 2021-22.

¹³⁰ *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189-90 (2007).

¹³¹ *See* 18 U.S.C. § 3.

¹³² *See* 18 U.S.C. § 4.

these federal enhancements to any theories that any state has now or may devise in the future.

- It would move from a requirement that the offense be an attempt or conspiracy to commit the substantive offense to one that covers any inchoate offense or offense arising from accomplice liability “involving” the substantive offenses, which could be interpreted to broadly reach offenses that “relate to or connect with” the substantive offenses.¹³³
- It would eliminate the requirement of a match between the elements of the inchoate offenses and the offenses arising out of accomplice liability, which would treat even the furthest outlier theories of liability as equivalent to the completed substantive offenses.¹³⁴

As with the Commission’s proposal to define “controlled substance” to include any substance “controlled under applicable state law,” this open-ended proposal would cede entirely to the states the ability to invent new forms of liability that trigger severe federal sentencing penalties.

If the Commission insists on including inchoate offenses and offenses arising out of accomplice liability, it should do no more than move the definition from the commentary into the text as written: “Crime of violence’ and ‘controlled substance offense’ include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.”¹³⁵ And it should define these terms in the generic sense.¹³⁶ But, given that the career offender guideline already reaches too far, even this expansion is not warranted.

¹³³ See, e.g., *United States v. Fields*, 53 F.4th 1027, 1045 (6th Cir. 2022) (discussing varying interpretations of the term “involving”).

¹³⁴ See, e.g., *Richeson v. State*, 704 N.E.2d 1008, 1010 (Ind. 1998) (holding that Indiana attempt law does not require state to prove defendant had intent to commit substantive crime).

¹³⁵ USSG §4B1.2, comment. (n. 1).

¹³⁶ For example, most state conspiracies require an overt act. 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b) n.52 (3d ed. Oct. 2022 update).

D. The Commission should not expand the controlled substance offense definition to include offers to sell.

Part D of the Commission's proposal is to add "offers to sell" and title 46 offenses to the definition of "controlled substance offense."¹³⁷ The Commission should not expand the definition to include "offers to sell." Section 2L1.2's inclusion of "offers to sell" a controlled substance is an anomaly. It was added by the Commission in 2008 only to §2L1.2, and no reason was given for its addition.¹³⁸ Offer to sell is not included in § 994(h), there is no such federal offense, and the states that criminalize it permit convictions without any possession of, or intent or ability to sell, a controlled substance.¹³⁹ A conviction can be sustained for selling baking soda, coffee, and sugar.¹⁴⁰ If anything, §2L1.2 should be amended to *delete* offers to sell. Expanding the definition of "controlled substance offense" would unjustifiably extend the reach of a guideline that undisputedly reaches too far already.

The Commission must, however, consistent with § 994(h), include offenses described in chapter 705 of title 46. As Defenders recommend in our Statement regarding the "controlled substance offense" circuit conflict, the Commission should limit the definition of "controlled substance offense" to the offenses enumerated in § 994(h), while continuing to press Congress to eliminate the career offender status of those convicted solely of controlled substance offenses.¹⁴¹

IV. Conclusion

Both the courts and the Commission have long recognized that the career offender guideline calls for sentences that are too high in most of the cases it captures. This leads to both over-incarceration and racial inequality in sentencing. Although the Commission cannot ignore or eliminate the career offender directive on its own, it can take steps to ensure that its guideline applies to no one to whom the directive itself does not apply.

¹³⁷ 2023 Proposed Amendments at 7217-18.

¹³⁸ USSG App. C, Amend. 723, Reason for Amendment (Nov 1, 2008).

¹³⁹ Defender Comments on 2019 Proposed Amendments at 35 & nn.168, 169.

¹⁴⁰ *Id.* at 35 n.169.

¹⁴¹ See Statement of Michael Caruso on Acceptance of Responsibility and Controlled Substance Offense § II.B (March 7, 2023).

Statement of Juval O. Scott

March 8, 2023

Page 32

The Defenders urge the Commission to reject all parts of the proposed amendment.

**Federal Public and Community Defenders
Comment on Crime Legislation (Proposal 5)**

March 14, 2023

The Commission seeks comment on its proposed eleven-part crime legislation amendment, which recommends a wide range of amendments to the Guidelines to respond to recently enacted legislation. Defenders encourage the Commission to index all new criminal statutes to USSG §2X5.1 in the first instance. If the Commission elects to index these statutes to specific subject-matter guidelines, Defenders urge the Commission not to make any further amendments to those guidelines at this time.

I. The Commission should index all new criminal statutes to USSG §2X5.1.

At the outset, the Commission should allow district courts to determine the most analogous guideline in the first instance by indexing all new crimes to USSG §2X5.1. By design, the Guidelines are an “evolutionary” system.¹ “[T]he Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time.”² This principle applies not just to revising the Guidelines, but also to extending particular guidelines to cover new offenses. “[I]n creating categories and determining sentence lengths, the Commission, by and large, follow[s] typical past practice.”³

For this system to work as intended, the Commission needs to give sentencing courts time and space to exercise their sentencing discretion in cases involving new criminal statutes, thereby generating the feedback needed to properly develop guidelines that adequately reflect the statutory purposes of sentencing. The Commission should not immediately index new criminal statutes to existing substantive guidelines because the anchoring function of those substantive guidelines will—in effect—corrupt the data the Commission needs to do its job in an empirically informed way.⁴ Once enough new offenses have been prosecuted and sentenced, the Commission will have the data it needs to evaluate which substantive guidelines the new crime

¹ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988).

² *Id.*

³ *Id.* at 7.

⁴ See generally Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489 (2014).

legislation should be indexed to and whether any adjustments to those guidelines need to be made.

II. The Commission should not use the proposed crime legislation amendment to make substantive amendments to any guidelines.

In the event the Commission decides to index the new crimes to substantive guidelines, Defenders urge the Commission not to also substantively amend those guidelines, as proposed in the crime legislation amendment⁵ and by the Department of Justice.⁶ The substantive proposals implicate a range of hard questions that warrant careful study. Yet none of these relatively new statutes has received focused review by the courts or stakeholders. An omnibus crime legislation amendment—which seeks to update the Guidelines to cover the extensive legislative activity that occurred while the Commission lacked a quorum—is not the right vehicle for substantive amendments to particular guidelines.

III. Conclusion

The Commission should index all new criminal statutes to §2X5.1 to permit the evolutionary process of Guidelines development to unfold properly. If the Commission elects to index the new criminal statutes to discrete substantive guidelines, it should take no further action with respect to these statutes. Particularly given this highly expedited amendment cycle and the lack of a public hearing on the crime legislation proposals, no substantive amendments to any specific guidelines should be promulgated through this omnibus crime legislation amendment.

⁵ Specifically, the Commission proposes expanding §2G1.1(b)(1) and adding a new specific offense characteristic at §2G1.3(b)(4)(B). There is no empirical or other stated basis for these four-level proposed increases, and Defenders oppose them.

⁶ See Letter from Jonathan J. Wroblewski on behalf of the DOJ to the Sentencing Comm’n at 23–26 (Feb. 27, 2023).

**Federal Public and Community Defenders
Comment on Criminal History (Proposal 7)**

March 14, 2023

I. Parts A and B: Status Points and Criminal History Zero.

Defenders are pleased to support the Commission's proposed amendments to eliminate status points and to provide increased sentencing options for persons with zero criminal history points. We urge the Commission to adopt Option 3 of Part A of the proposed amendment (eliminating status points) and adopt Option 2 of Part B of the proposed amendment (defining "first offender" as a person with no countable criminal history points). We encourage the Commission to amend §5C1.1 Application Note 4 to adopt the proposed downward departure for persons in Zones A and B. And the Commission should extend the same invited departure to persons in Zones C and D.

The attached March 8, 2023 Statement of Jami Johnson contains our comments on Parts A and B of Proposed Amendment 7.

II. Part C: Impact of Simple Possession of Marijuana.

Defenders join the Department of Justice (DOJ) and the Practitioners Advisory Group (PAG) in commending the Commission for its proposed amendment to address the impact of convictions for the simple possession of marijuana. As the legal landscape of marijuana changes, so too should the guidelines to reflect the advancement in knowledge and changing perception of marijuana possession.

Defenders encourage the Commission to amend §4A1.2(c)(2) to exclude any sentence for the simple possession of marijuana from the criminal history score. Excluding prior convictions for the simple possession of marijuana would further the Commission's duties for three reasons. *First*, the criminalization of the simple possession of marijuana has been categorically unjust since its inception. It has resulted in high arrest and conviction rates as well as longer sentences for Black and Latino individuals that are inconsistent with the Commission's goal of avoiding unwarranted disparities. *Second*, excluding prior convictions for the simple possession of marijuana would be empirically based and would reflect the shift in the legal status of marijuana possession in many jurisdictions nationwide. *Third*, the simple possession of marijuana is similar to other excludable offenses enumerated in §4A1.2(c)(2). Adding simple marijuana possession offenses to §4A1.2(c)(2) would promote certainty, uniformity, and fairness by ensuring that all simple possession of marijuana offenses are treated similarly.

A. Categorically excluding prior offenses for the simple possession of marijuana from the criminal history score would reduce unwarranted racial disparities.

Excluding simple possession of marijuana from the criminal history calculation is a crucial step toward reducing racial disparities in federal sentencing. As the ACLU recently recognized, “marijuana enforcement remains as racialized as ever.”¹ In 2018, marijuana offenses still accounted for approximately 43% of all drug arrests.² Of those, approximately 90% of marijuana-related offenses were for the simple possession of marijuana.³ Notably, the vast majority of those arrested for the simple possession of marijuana were Black. “On average, a Black person is 3.64 times more likely to be arrested for marijuana possession than a white person, even though Black and white people use marijuana at similar rates.”⁴ The Commission’s own data highlights how these racial disparities are perpetuated in federal sentencing. White people account for only “about one-fifth” of federally sentenced individuals with marijuana-possession priors.⁵ By contrast, “[a]lmost half of those with a marijuana prior were Black (47.0%) and nearly one-third were Hispanic (31.1%).”⁶ And the numbers are even more alarming when analyzing the impact on criminal history categories: over 80% of persons “whose criminal history category was impacted by a prior marijuana possession sentence” were either Black or Hispanic.⁷

Excluding these offenses under §4A1.2(c)(2) would go a long way towards preventing this deep-seated injustice from continuing to lengthen federal sentences.

¹ ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* 37 (2020), <https://bit.ly.co/HSuO>.

² See *id.* at 5. In 2010, marijuana arrests made up “just over 50 percent of drug arrests.” *Id.* at 7.

³ See *id.*

⁴ See *id.* at 5.

⁵ See USSC, *Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System* 16 (2023) (hereinafter “2023 Simple Possession Report”).

⁶ *Id.*

⁷ See *id.* at 3.

B. Public perception of marijuana use supports a categorical exclusion of marijuana-possession offenses.

The guidelines should reflect the general consensus of the American public on marijuana, including state and federal lawmakers. As of last year, 44 states permitted some use of marijuana, a notable increase from the 28 states that permitted some use of marijuana in 2011.⁸ These legal changes are largely the byproduct of “popularly-approved state initiatives and propositions . . . ,” suggesting society’s judgment that Americans are no longer willing to disenfranchise, stigmatize, and punish those who simply possess marijuana.⁹

The federal government is starting to follow suit. In October 2022, President Biden declared that “no one should be in jail just for using or possessing marijuana,”¹⁰ and issued pardons for people with federal convictions for simple possession.¹¹ Last year, the House of Representatives passed the MORE Act, which would have removed marijuana from the list of scheduled substances under the Controlled Substances Act and eliminated criminal penalties for manufacturing, distributing and possessing marijuana.¹² In 2021, United States Senator Cory Booker introduced legislation to not only legalize marijuana federally, but to reinvest in the communities most harmed by the War on Drugs through job-readiness trainings, equitable marijuana industry policies, and expungement of criminal records.¹³ And DOJ has pledged not to prioritize simple possession of

⁸ See USSC, *Public Data Briefing Presentation for Proposed Criminal History Amendment* Slide 61 (2023).

⁹ Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. Crim. L. & Criminology 379, 401 (2020).

¹⁰ The White House, *Statement from President Biden on Marijuana Reform*, (October 6, 2022) (pardoning citizens and lawful permanent residents who had been previously convicted of the federal offense of simple possession of marijuana) (hereinafter “Biden Marijuana Reform Statement”); see also 2023 Simple Possession Report, *supra* note 5 at 28 (“Over the last several decades, the legal status of marijuana has been changing in many states and territories.”).

¹¹ Biden Marijuana Reform Statement, *supra* note 10.

¹² See H.R. Rep. No. 3617, 117th Cong. (2022).

¹³ See S. 4591, 117th Cong. §§ 101, 306 (2022).

marijuana prosecutions.¹⁴ Currently, no one remains in federal custody for simple possession alone.¹⁵

Despite this ideological shift, in Fiscal Year 2021, 4,405 individuals received criminal history points for prior marijuana possession sentences.¹⁶ And for over 40% of these individuals, their prior marijuana possession sentences resulted in a higher criminal history category.¹⁷ This should not be.¹⁸ Using marijuana does not predict recidivism.¹⁹ And penalizing simple possession of marijuana does not promote public safety.²⁰ Indeed, enhancing punishment for such widely decriminalized and destigmatized activity promotes “not respect, but derision, of the law. . . .”²¹

¹⁴ See Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sentencing Comm’n at 45 (Feb. 27, 2023).

¹⁵ See 2023 Simple Possession Report, *supra* note 5, at 2.

¹⁶ See *id.* at 3.

¹⁷ See *id.*

¹⁸ Particularly because individuals charged with marijuana possession offenses may not be afforded counsel if the charges do not carry terms of imprisonment. See Jordan Cummings, *Nonserious Marijuana Offenses and Noncitizens*, 62 UCLA L. Rev. 510 (2015); see also *United States v. Boots*, 314 F.Supp.2d 141 (2004); *United States v. Jenkins*, 989 F.2d 979 (1993); *United States v. Falesbork*, 5 F.3d 715 (1993).

¹⁹ See, e.g., Ojmarrh Mitchell, *Drug Use Disorders before, during, and after Imprisonment*, 51 Crime & Just. 307, 324 (2022) (“[U]se of marijuana . . . by [itself] d[oes] not predict recidivism. . . .”).

²⁰ See, e.g., Mary K. Stohr, et al., *Effects of Marijuana Legalization on Law Enforcement and Crime: Final Report 7* (2020), <https://bit.ly.co/HT01> (“[L]egalization [of marijuana use] appears to have coincided with an increase in crime clearance rates in several areas of offending and an overall null effect on rates of serious crime.”).

²¹ *Gall v. United States*, 552 U.S. 38, 54 (2007). This is particularly true when publicly traded U.S. corporations have made billions of dollars selling marijuana. See Wayne Duggan, *9 Best Cannabis Stocks of 2023*, Forbes (Mar. 2, 2023), <https://www.forbes.com/advisor/investing/best-cannabis-stocks/> (legal U.S. cannabis sales “increased 35% in 2021, to a total of \$24.6 billion”).

C. Adding simple possession of marijuana to the excluded offenses in §4A1.2(c)(2) would promote certainty, uniformity, and fairness.

Excluding simple possession of marijuana priors from the criminal history computation would promote certainty, uniformity, and fairness. In many states, simple possession of marijuana is treated with more leniency than the offenses currently excluded from the criminal history calculation. Consider public intoxication. In California, public intoxication is a misdemeanor with a maximum penalty of 6 months and a maximum fine of \$1,000.²² Possession of more than 28.5 grams of marijuana for personal use in California can result in up to 6 months in jail (like public intoxication), \$500 in fines, or both.²³ In Virginia, there is no penalty for possessing less than one ounce of marijuana.²⁴ Possession of 1 to 4 ounces of marijuana in public is punishable as a civil violation with a maximum fine of \$25.²⁵ Public intoxication, on the other hand, is a class 4 misdemeanor, and is punishable with a maximum fine of \$250.²⁶

Further, excluding simple possession of marijuana ensures marijuana possession priors are not used to enhance the guideline range and that similarly situated individuals are treated similarly regardless of state and local practices. A discretionary downward departure—an alternative the Commission proposes, and DOJ supports—would not provide the same level of certainty, uniformity, and fairness since judges would be free to ignore the departure provision. An invited downward departure would leave individuals with marijuana possession priors in an uncertain position at sentencing. And Defenders are concerned that some judges would be hesitant to depart below the guidelines where the departure request is not sponsored by the government.²⁷ A departure-based approach to prior marijuana possession

²² See Cal. Penal Code §§ 19, 647(f).

²³ See Cal. Health & Safety Code § 11357(b)(2).

²⁴ See Va. Code Ann. § 4.1-1100.

²⁵ See *id.*

²⁶ See Va. Code Ann. §§ 18.2-11, 18.2-388.

²⁷ See USSC, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics* 84 (2021), <https://bit.ly/co/HT0Q> (noting that non-government-sponsored downward departures were granted in only 2.6% of all federal sentencings in FY 2021).

offenses does not fully promote the policy rationale underlying this proposal, which is properly focused on this entire, problematic class of convictions—not an undefined, random subset.²⁸

Full exclusion of these prior convictions would promote fairness and uniformity in other ways as well. DOJ’s proposal to permit courts to consider extraneous, non-elemental, and accusatory facts, including “the nature of the original charges, the facts surrounding the offense. . . , whether the defendant’s conviction was the result of a plea agreement that involved the dismissal of drug trafficking charges, and whether the offense was subsequently pardoned,” when deciding whether or to what extent to depart, would complicate the analysis and lead to unjust results.²⁹ As we know from the categorical approach, “[s]tatements of ‘non-elemental fact’ in the records of prior convictions are prone to error precisely because their proof is unnecessary.”³⁰ “At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law”³¹ Indeed, a person “‘may have good reason not to’—or even be precluded from doing so by the court.”³² In such instances, a factual error “reflected in the record, is likely to go uncorrected.”³³ This is particularly true for uncounseled individuals.³⁴ Uncorrected and inaccurate facts not reflected in a person’s

²⁸ 28 U.S.C. § 994(f) and 28 U.S.C. § 991(b)(B) direct the Commission to avoid unwarranted sentencing disparities. Specifically, § 991(b)(B) directs the Commission “to provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences. . . .” Excluding prior convictions for simple possession of marijuana from increasing a person’s guideline range fulfills the Commission’s duties under § 991(b)(B).

²⁹ See Letter from Jonathan Wroblewski, *supra* note 14, at 45.

³⁰ *Mathis v. United States*, 579 U.S. 500, 512 (2016) (quoting *Decamps v. United States*, 570, U.S. 254, 270 (2013)) (noting that factual “inaccuracies should not come back to haunt the defendant many years down the road....”).

³¹ *Id.*

³² *Id.* (quoting *Decamps*, 570 U.S. at 270).

³³ *Id.*

³⁴ See *Cummings*, *supra* note 18.

conviction for the simple possession of marijuana “should not come back to haunt” them “down the road.”³⁵

For all these reasons, we urge the Commission to add simple possession of marijuana to the list of excluded offenses in §4A1.2(c)(2).

³⁵ *Mathis*, 579 U.S. at 512.

**Before the United States Sentencing Commission
Public Hearing on Criminal History**

Statement of Jami Johnson, Appellate Attorney
Federal Defenders of San Diego, Inc.
on Behalf of the Federal Public and Community Defenders

March 8, 2023

**Statement of Jami Johnson
Appellate Attorney for the
Federal Defenders of San Diego, Inc.
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
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My name is Jami Johnson, and I am an appellate attorney at the Federal Defenders of San Diego, Inc., the Federal Community Defender Organization for the Southern District of California. Thank you for inviting me to testify on behalf of the Federal Public and Community Defenders in support of the Commission’s proposed amendments on criminal history.

Aside from offense level, an individual’s criminal history score is the single most powerful factor in determining their guideline range. Congress did not mandate this structure; the Commission selected it.¹ There are good reasons why criminal history should not play such a prominent role in the sentencing process. The criminal history rules are numerous and complex. They often lead to unjust, unnecessarily long sentences that exacerbate racial disparities. And research confirms that increasing sentences based on prior criminal convictions is often not justified by any commonly recognized goal of sentencing.² Defenders hope to continue to work alongside the Commission to consider ways to reduce the outsized effect criminal history has on guidelines calculations.

We appreciate the Commission’s efforts to make Chapter 4 fairer and to better encourage alternatives to incarceration. In my decade as a criminal

¹ See 28 U.S.C. § 994(d)(10) (directing the Commission to consider, to the extent relevant, criminal history when establishing the guidelines and policy statements); *id.* § 994(h) (directing the Commission to assure the guidelines recommend a sentence “at or near” the statutory maximum for individuals convicted of certain felonies who sustained at least two prior convictions for certain felonies); *id.* § 994(j) (directing the Commission to assure the guidelines “reflect the general appropriateness” of a sentence other than imprisonment for a “first offender” who has not been convicted of a “crime of violence or otherwise serious offense”).

² 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 sentencing 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, 1270 (2021).

defense attorney, I have seen firsthand the outsized impact criminal history plays in federal sentencing. Moreover, while the guidelines consider numerous aspects of a person's criminal history to *increase* the guideline range, there are few rules that recommend a decrease in sentence based on the nature or extent of a person's criminal history. While this year's proposed criminal history amendments retain the guidelines' undue emphasis on a defendant's criminal history score, we recognize that each proposal would go a long way towards implementing the Commission's statutory duties under 28 U.S.C. §§ 991(b)(1), 994(g), and 994(j).³ For these reasons, Defenders are pleased to support them.

I address Part B (persons with zero criminal history points) and Part A (status points) of the proposed criminal history amendments below. Defenders will address Part C (impact of simple possession of marijuana offenses) in our comment letter submitted on a later date.

I. Persons with Zero Criminal History Points

Defenders commend the Commission's efforts to change to the way the guidelines treat persons with zero criminal history points. Amendments that encourage more frequent use of non-prison sentences are consistent with the Commission's duties under 28 U.S.C. §§ 994(j) and (g), further the purposes of sentencing, and are reinforced by the Commission's research.

When Congress enacted the Sentencing Reform Act in 1984, it believed there was "too much reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty that results from imprisonment."⁴ Through the

³ See 28 U.S.C. §§ 991(b)(1)(C) (requiring the Commission to establish sentencing policies that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process"); 994(g) (requiring the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons"); 994(j) (requiring the Commission to ensure that "first offenders" who commit non-serious offenses generally receive non-custodial sentences).

⁴ S. Rep. No. 98-225, at 59 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3242. See also *id.* at 50 (finding that the law "is not particularly flexible in providing the sentencing judge with a range of options," such that "a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available" or "a longer term than would ordinarily be appropriate simply because

SRA, Congress sought to “assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case,”⁵ including probation with meaningful conditions, and alternatives to all or part of a prison term such as fines, community service, and intermittent confinement.⁶

As Defenders, however, we have seen first-hand the under-utilization of alternatives to incarceration, particularly for clients whose offenses fall within Zone C or Zone D of the guidelines.⁷ District court judges take seriously, as they should, the guidance of the Commission in fashioning sentences. We have observed that judges are often reluctant to award the kind of variances that would be necessary to impose a non-custodial sentence in cases that fall within these zones, even when other relevant sentencing factors suggest that a sentence other than imprisonment would be appropriate.

I’ve had many clients over the years that would benefit from the Commission’s proposals regarding first-time offenders, but three in particular come to mind.

I represented Julio when I was an Assistant Federal Public Defender in the District of Arizona.⁸ Julio was a 19-year-old U.S. citizen who was born in Yuma, Arizona to Mexican citizen parents. His parents returned to Mexico shortly after his birth, and apart from spending a few months in Arizona at the age of 10, he grew up entirely outside of the United States. When he began school in Mexico, he was diagnosed with an intellectual disability and enrolled in a program for students with special needs. Despite seven years of full-time education, Julio never learned to read or write very well. He had difficulty learning and retaining new material, repeated multiple grades, and

there were no available alternatives that served the purposes he sought to achieve with a long sentence.”).

⁵ *Id.* at 39.

⁶ *See id.* at 50, 59.

⁷ *Cf.* USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5, 8 (2015), <https://tinyurl.com/yck3j8rp> (recognizing statutory and citizenship limits on some types of alternative sentences).

⁸ I am referring to “Julio” by an alias to respect his privacy with regard to certain medical and mental health information.

failed to make significant academic progress despite receiving services both at school and at home.

As is unfortunately common for individuals with intellectual disabilities, Julio experienced bullying at school and had difficulties finding friends among his same-age peers. He spent his social time playing with his younger siblings and with the much-younger grade school children in his neighborhood. Even as a teenager, his mother reported that he was “childlike” and had few, if any, friends his own age.

When Julio was 10, his parents separated, and his father died by suicide shortly thereafter. His father’s suicide was traumatic for Julio and further limited both his academic and social progress. He ultimately left school at the age of 13 because he found even the modified curriculum too challenging, and he was unable to keep up.

When he was 15 or 16, Julio began crossing the border into the United States to pick lettuce and watermelon on the farms in Southern Arizona. Because he did not know how to read a map, ask for or follow directions, or find his way to unfamiliar places without assistance, Julio never crossed the border by himself. Other workers looked out for him and made sure he made it home safe every night.

Finally, when he was 19 years old, Julio was approached in Mexico by someone who lived on his block and asked if he would like to make some extra money by carrying drugs into the United States. Julio initially said he would be interested, but after he had time to think about it, he decided he did not want to do it after all. Having changed his mind, Julio had no intention of carrying drugs into the United States, but one morning, a person he had never seen before showed up at his house and told him that he was going to carry drugs that day. Julio didn’t know what to do, so he got into the man’s car, and the man drove him to a place near the border, where other unknown individuals taped methamphetamine to him. He was then led to the San Luis port of entry by the unknown man.

At the port of entry, Julio was quickly referred to secondary inspection. When asked if he had anything attached to his body, Julio immediately volunteered that he had “ice” strapped to his thighs. He made this admission before agents patted him down or called a narcotics dog. He was arrested and

charged with attempted importation of methamphetamine and possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 960(b)(3) and 841(b)(1)(C).

During his post-arrest interview, Julio told the agents everything he knew. Julio's intellectual disabilities were apparent throughout the interview. He declined the written *Miranda* advisory, explaining he could not read. He was unable to supply the agents with basic biographical information about himself, such as his height or weight, or to provide reasonable guesses of the same. He didn't know his own phone number, or the phone numbers of any family members. When asked, he was unable to tell the agents that he was attempting to enter the state of Arizona, but rather knew only that he was entering the "United States."

Julio had no criminal history whatsoever. But knowing no one in the United States and having nowhere to live, he remained in pretrial detention during the pendency of his case. A neuropsychological exam performed while he was in custody confirmed that Julio was "severely impaired" in the areas of learning, recognition, and working memory and in executive function, which measures individuals' ability to plan, strategize, and make decisions. The examiner opined that these characteristics made him unusually susceptible to exploitation and likely contributed to his becoming involved in the offense.

The same characteristics that made Julio vulnerable to exploitation by unscrupulous elements within his community also made him vulnerable in jail. While in pretrial detention, Julio was repeatedly exposed to negative influences. Having never been in a fight in his life, he was told by other prisoners that if one of them got into a fight, he had to "help," or he would be beaten up.

Julio ultimately pleaded guilty to one count of possessing methamphetamine with the intent to distribute. At sentencing, he faced guidelines of 33 to 41 months. Notwithstanding these guidelines, I asked the court to sentence Julio to time served. What Julio needed most desperately was access to services, in particular services for adults with special needs. He also needed to stay as far away as possible from influences of the sort he was virtually certain to be exposed to in jail. The probation office and the

government both agreed that a variance was appropriate, though they disagreed about the amount, and recommended a sentence of 24 months.

The Court ultimately sentenced Julio to 21 months in prison. In imposing sentence, the district judge agreed that Julio's age and his developmental issues were factors that warranted a variance. Nevertheless, the district court cited "the judgement of Congress and the Sentencing Commission" that such offenses should be dealt with "harshly" in explaining why it declined to vary further.

If the guidelines contained a departure which invited a sentence other than imprisonment, Julio might not have been sentenced to prison at all. Julio's track record on supervision demonstrated his amenability and ability to perform well while supervised outside a custodial setting. He began a three-year term of supervised release in November 2017 and completed it in November 2020 without violation.

Another client who illustrates the need for special consideration for "first offenders" is Vania Alvarado. When I met Ms. Alvarado in 2018, she was a 27-year-old United States citizen with no criminal history and no prior contacts with law enforcement. She was born in the United States and grew up in both the United States and Mexico, moving back and forth between the two countries with her permanent resident parents and three U.S.-citizen siblings.

When Ms. Alvarado was in high school, she met and entered into a relationship with a man who was several years her senior. She became pregnant, and they married. The marriage was not happy. Her husband was physically abusive, controlling, and addicted to drugs. He introduced her to drugs and used drugs to control her.

Ms. Alvarado, very young, addicted to meth, and with a small child, lacked the strength to leave the relationship until 2013, when her second child was born. Her child tested positive for methamphetamine upon its birth, and as a result, the state of Arizona took custody of both of her children and placed them with relatives of her husband.

The intervention of the state motivated Ms. Alvarado to change her life and regain custody of her children. Ms. Alvarado tried to get herself into drug treatment but was unable to secure a residential treatment placement

because of backlogs caused by lack of state funding. With an open family court case and the threat of losing her children over her head, Ms. Alvarado nevertheless persisted in her determination to stop using drugs and, against the odds, managed to get sober all on her own. She also divorced her husband when his own attempts at sobriety proved less successful than hers.

Sadly, in 2016, despite three years of sobriety and three years of diligent compliance with the family court requirements, the family court terminated Ms. Alvarado's parental rights. The termination of Ms. Alvarado's parental rights sent Ms. Alvarado into a self-destructive downward spiral. She relapsed on drugs, using much more than she ever had before. She also began intentionally to engage in reckless and self-destructive behaviors.

In the midst of this binge of self-destructive behavior, Ms. Alvarado impulsively agreed to drive a load of drugs across the border. She was arrested at the San Luis port of entry with drugs in her car and charged with attempted importation and possession with intent to distribute methamphetamine. She was granted pretrial release on condition that she reside at a residential drug rehabilitation center. This was the first organized drug treatment program she'd ever been offered. She spent four months living at Crossroads for Women in Phoenix, a residential drug treatment facility, where she thrived.

Particularly helpful to Ms. Alvarado was the mother's group at Crossroads. Many of the women in the group were older than Ms. Alvarado. Some even had grown children. One day, one of the women pointed out to Ms. Alvarado that while she couldn't control what had happened in the past, she could control what her children would find if and when they ever came looking for her. They could either find a drug-addicted woman who made them grateful that their adoptive parents had taken them away, or they could find a sober, healthy woman with whom they wanted to build a relationship. She realized that because she had no control over when or if that day might ever arrive, she had to stay sober every day for the rest of her life.

Ms. Alvarado ultimately pleaded guilty to possession with intent to distribute 50 grams or more of methamphetamine. She faced guidelines of 41 to 51 months. I argued for a significant downward variance because of her lack of criminal history and post-offense rehabilitation. At sentencing, the

judge commended Ms. Alvarado for her efforts on pretrial release. He expressed sympathy for her losses and expressed confidence that in light of the changes she had made that he would not see her in his courtroom again. Nevertheless, in imposing sentence, the judge deferred to the guidelines and imposed a 41-month sentence—the bottom of the recommended range.

This sentence shows the seriousness with which judges take the guidelines and their recommendations. The district judge expressed confidence that Ms. Alvarado was on the right path and would not recidivate. But despite his confidence, he ultimately imposed the sentence recommended by the guidelines.

Like Julio, Ms. Alvarado's performance on supervised release continues to demonstrate that she was a good candidate for supervision and services instead of incarceration. She was released from custody in April 2021 and has remained out of custody on supervision without incident for the last two years.

A third client who exemplifies why “first offenders” should be treated differently is Mario Chavez. Mr. Chavez is a United States citizen who was born in Chandler, Arizona. His parents divorced when he was very young, and his mother moved to Mexico to be near her family and took Mr. Chavez with her. His father remained in Chandler.

Mr. Chavez had a good childhood. Both his parents were active in his upbringing and worked hard to provide him with the basic necessities. He was able to travel frequently to Chandler to spend time with his U.S.-based family. Because he lived in Mexico he was not, however, eligible to attend school in the United States and thus never learned English. Even with supportive parents, at 15 he started making poor choices. He started going to parties and clubs in Mexico, where he drank alcohol and occasionally experimented with cocaine.

Mr. Chavez was not yet 18 when he met a man in one of these clubs who offered him money to transport drugs into the United States. He was arrested transporting these drugs in November 2019—less than 3 months after his 18th birthday.

Mr. Chavez was released to the custody of his father. He pleaded guilty quickly to one count of possession with intent to distribute

methamphetamine in February 2020, a few weeks before the then-emerging COVID-19 pandemic brought courts to a standstill. The district court sua sponte reset his sentencing four times through April 2021. By the time his sentencing date arrived, Mr. Chavez had been on pretrial release for almost 16 months.

During his 16 months of pretrial release, Mr. Chavez grew up. His father found him a job at the construction company where he worked. He received a promotion and a raise, and received glowing reviews from his supervisor, who told the probation office that he was welcome to return to work at the company at any time.

The structure of living with his father and going to work every day also helped Mr. Chavez make better choices about how to spend his free time. He didn't drink or use drugs while on pretrial release. He saved his money and paid cash to buy his first car. He got his driver's license. He also learned English. At the time of his arrest, Mr. Chavez spoke almost no English, knowing only what he had picked up through casual interactions with his U.S.-based family. By sentencing, Mr. Chavez's English improved to a point that he required only minimal assistance from an interpreter.

In light of Mr. Chavez's age and his exceptional performance on pretrial release that demonstrated his amenability to community supervision, I requested that he not receive any additional time in custody, even though his guidelines were 41 to 51 months. The district judge was also impressed with Mr. Chavez's turnaround—so impressed that he gave Mr. Chavez what he reported was the lowest sentence he believed he'd ever imposed in a drug courier case: 6 months.

The district judge clearly viewed the variance he gave Mr. Chavez as exceptional. It was the largest one he'd ever given in a case of this sort. But notwithstanding the exceptional nature of this case, the district judge nevertheless felt obligated to impose a custodial sentence. Had the guidelines made clear that the district judge was authorized or encouraged to consider alternatives to incarceration, Mr. Chavez might have received a different sentence.

These cases demonstrate the importance of reform, in particular for "first offenders." In enacting the SRA, Congress tasked judges and the

Commission with assuring that the full range of sentencing options, not merely incarceration, were available. Judges were instructed to consider “the kinds of sentences available” prior to imposing a sentence sufficient but not greater than necessary to serve the purposes of sentencing.⁹ And the Commission was instructed to ensure “that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”¹⁰

Unfortunately, the use of probation and other alternatives to prison dramatically decreased after the SRA. When the SRA was enacted “almost 50 [percent] of federal sentences were sentenced to straight probation.”¹¹ Under the initial guidelines, approximately 15 percent of sentences were to straight probation.¹² Last year, straight probation was imposed in only 6.2 percent of cases.¹³ And no matter the sentencing zone, alternative sentences other than probation are exceedingly rare.¹⁴

We recognize the modest steps the Commission has taken so far to increase sentencing options and encourage alternatives to incarceration.¹⁵

⁹ 18 U.S.C. § 3553(a)(3).

¹⁰ 28 U.S.C. § 994(j).

¹¹ Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers* 56 Stan. L. Rev. 1211, 1222 (2004).

¹² See *id.* at 1222.

¹³ See USSC, *2021 Sourcebook of Federal Sentencing Statistics* fig. 6 & tbl. 14 (2022), <https://bit.ly/3TL44UL> (“FY 2021 Sourcebook”) (excluding non-U.S. citizens, probation only sentences were imposed 8.1 percent of the time); see also Cecelia Kingele, *What’s Missing? The Absence of Probation in Federal Sentencing Reform* 34 Fed. Sent’g Rep. 322, 324 (2022) (recognizing that while for some offenses, probation is prohibited by statute, judges are still imposing imprisonment in many cases where probation is available).

¹⁴ See FY 2021 Sourcebook, at tbl. 14; see also USSC, *Public Data Presentation for Proposed Criminal History Amendment*, slide 58 (2023), <https://tinyurl.com/2p9989vf> (“CH Data Briefing”) (reporting that people sentenced last year who would have been eligible for the proposed §5C1.1 application note 4 departure received prison-only sentences 79.3 percent of the time).

¹⁵ See, e.g., USSG App. C, Amend. 811 (Nov. 1, 2018) (adding cmt. n.4 to §5C1.1 defining “first offender” and recommending “the court should consider imposing a sentence other than a sentence of imprisonment”); *id.*, Amend. 738 (Nov. 1, 2010) (expanding Zone B and Zone C of the Sentencing Table by one level each); *id.*,

But, as the Commission’s data and research reflect, more can be done.¹⁶ To better capture the purpose and spirit of § 994(j) and better encourage sentences that are no greater than necessary to serve the purposes of 18 U.S.C. § 3553(a), the Commission should adopt Option 2 of the proposed amendment with the narrowest set of exclusions. The Commission should also make clear that a sentence other than imprisonment is generally appropriate for persons who qualify as “zero-point offenders” under Option 2 of the proposed amendment, regardless of their zone on the sentencing table.

A. The Commission should adopt Option 2 of the proposed amendment, which defines “first offender” as a person with zero criminal history points.

The Commission has proposed two alternative definitions of a “first offender.” Option 1 would define a “first offender” as a person with “no prior convictions or other comparable judicial dispositions of any kind,” including juvenile adjudications or diversionary or deferred dispositions.¹⁷ Option 2 would define a “first offender” as someone with zero countable criminal history points.¹⁸ Option 2 is the superior policy choice for several reasons.

Fairness. Option 2 is the fairer option. Excluding persons with non-countable convictions from the “first offender” status—no matter the nature or type of the disposition—would raise significant fairness concerns and perpetuate unwarranted disparities.

Option 1 would exclude far too many people with prior contacts with law enforcement, the outcomes of which are not worthy of confidence. It would exclude, for example, many residents of Ferguson, Missouri, where a 2015 report by the Department of Justice Civil Rights Division found that the municipal court system, which “handle[d] most charges brought by [the

Amend. 462 (Nov. 1, 1992) (expanding the number of cells of the Sentencing Table in which straight probation is permissible).

¹⁶ See USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5 (2015), <https://tinyurl.com/yck3j8rp> (“Alternative Sentencing”) (finding that the “low rate” of alternative sentences “primarily is due to the predominance of offenders whose sentencing ranges were in Zone D of the Sentencing Table”).

¹⁷ Proposed Amendments, 88 Fed. Reg. 7180, 7221 (proposed Feb. 2, 2023) (“2023 Proposed Amendment”).

¹⁸ See *id.*

Ferguson Police Department]” did so “not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue.”¹⁹ The DOJ report found that the municipal court system imposed harsh financial penalties for minor code violations and harsher penalties if a defendant was unable to pay.²⁰ The DOJ ultimately concluded “[t]he impact that revenue concerns have on court operations undermines the court’s role as a fair and impartial judicial body” and that these unlawful practices had a disproportionate effect on the African-American residents of Ferguson.²¹

Problems with municipal court systems are not isolated to Ferguson. Arizona, for example, operates a city court system not unlike the one used in Ferguson, Missouri. A 2017 report by the Goldwater Institute, a conservative and libertarian think tank, laid bare the problems with the Arizona courts.²² As in Ferguson, city court judges in Arizona are appointed by the city council and the mayor and are not elected by the people.²³ They are therefore beholden not to the electorate but to the city officials who are responsible for raising revenue. Municipal judges are not required by Arizona law to be lawyers.²⁴ As in Ferguson, municipal courts in Arizona often boast of the revenue they raise for the city.²⁵

City courts in Arizona have jurisdiction over violations of city code, which are frequently classified as criminal misdemeanors. Charges can include such violations as “having excessively tall weeds in your yard, littering, failing to return a library book, and violating city smoking ordinances, all of which are considered criminal infractions in some

¹⁹ U.S. Dep’t of Just. Civ. Rts. Div., *Investigation of the Ferguson Police Department* 42 (2015), <https://tinyurl.com/5av262ja>.

²⁰ *See id.*

²¹ *Id.* at 42 & 4–5.

²² *See* Goldwater Inst., *City Court: Money, Pressure and Politics Make It Tough to Beat the Rap* 2–4 (2017), <https://tinyurl.com/mrxddfvn> (“Goldwater Inst. Rep.”) (summarizing the financial pressures on courts).

²³ *Id.* at 4.

²⁴ *Id.* at 6.

²⁵ *Id.* at 7–8.

municipal codes across Arizona.”²⁶ Municipal judges can impose sentences of up to six months in jail and \$2,500 in fines for criminal misdemeanors, though as a practical matter, few of these offenses result in jail time.²⁷ Instead, individuals who find themselves in city court are often offered diversion and fees in order to avoid a conviction. Many accept simply to avoid the costs or hassle of litigating a minor charge, or the risk of ending up with a criminal record.

Also as in Ferguson, municipal courts in Arizona disproportionately affect communities of color. In 2013, the Arizona District Court found that Maricopa County Sheriff Joe Arpaio was engaging in discriminatory practices under Title VI of the Civil Rights Act of 1964 by targeting Latino residents of Phoenix and the surrounding area for selective enforcement.²⁸ Notwithstanding a permanent injunction, the unlawful racial profiling continued, and in October 2016, the DOJ filed criminal contempt charges against Arpaio for continued violation of the injunction.²⁹ Arpaio was ultimately found guilty of criminal contempt for repeated disregard of the order to stop discriminating.³⁰

Municipal courts play an outsized role in the state system. More than half of all cases in Arizona are heard in a city court.³¹ As a defender in Arizona, I saw first-hand the way that municipal courts handling minor charges operated to disadvantage poor people and people of color. During my time in Arizona, I routinely saw clients with no countable criminal history who had received one or more convictions or diversionary sentences for minor charges in municipal court.

The Commission does not have the power to end the injustices and racial inequities frequently present in municipal court systems. It can and should, however, prevent those injustices from being perpetuated within the federal system. Under the current guidelines, many of the kinds of cases

²⁶ *Id.* at 6.

²⁷ Goldwater Inst. Rep., *supra* note 22, at 6.

²⁸ *Ortega-Melendres v. Arpaio*, 989 F. Supp. 2d 822, 910–11 (D. Ariz. 2013).

²⁹ *United States v. Arpaio*, No. 2:16-cr-01012-SRB, doc. 1 (D. Ariz.) (order concerning criminal contempt).

³⁰ *See id.* doc. 210 at 14 (order finding Arpaio willfully violated court order).

³¹ *See* Goldwater Inst. Rep., *supra* note 22, at 5.

routinely handled in municipal courts are appropriately excluded from consideration under §4A1.2(c). Permitting them to be used to deny “first offender” status in federal court would only exacerbate racial disparities and disadvantage poorer communities.³²

Option 1’s definition would also appear to exclude people with tribal convictions from “first offender” relief.³³ Tribal courts play an important role in our federal system. But many convictions in tribal courts do not include the same procedural safeguards as those in federal or state courts. Tribal courts are chronically under-resourced. They also frequently employ methods of dispute resolution that are culturally dissimilar from those used in state and federal court and consider factors federal courts would not deem relevant in a criminal case. Many people who are convicted in tribal courts lack effective counsel. Many tribal courts, for example, permit “lay advocates” to represent the accused—meaning counsel may not have graduated from law school, or even from high school. Some courts lack counsel entirely.³⁴

Option 1 would also include all offenses committed before age 18 and all juvenile adjudications. Research continuously shows that juveniles are less culpable than adults. Juveniles are more impulsive and more vulnerable to peer pressure because “adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.”³⁵ Similar to tribal

³² See Statement of Miriam Conrad Before the U.S. Sentencing Comm’n, Washington, D.C., at 3 (Mar. 14, 2018); Defenders’ Comments to the Commission’s Proposed 2017 Amendments 8 (Feb. 20, 2017) (“Defenders’ 2017 Comments”) (collecting authorities).

³³ See USSG §4A1.2(i). Excludable expunged, military, foreign, and juvenile diversionary dispositions also would appear to potentially qualify as “convictions” under Option 1. See *id.* §4A1.2(f), (g), (h), (j).

³⁴ See, e.g., Brief of Amici Curiae of the National Association of Criminal Defense Lawyers and Experienced Tribal Court Criminal Litigators in Support of Respondent, at 16, *United States v. Bryant*, 579 U.S. 140 (2016) (No. 15-420), 2016 WL 1055618, at *16 (describing difficulties in accessing effective counsel in tribal courts); see also Samuel Macomber, *Disparate Defense in Tribal Courts: The Unequal Right to Counsel as a Barrier to the Expansion of Tribal Court Jurisdiction*, 106 Cornell L. Rev. 275, 279 (2020) (same).

³⁵ *Miller v. Alabama*, 567 U.S. 460, 472 & n. 5 (2012) (quoting Brief for American Psychological Association et al. as Amici Curiae); see also Amber Venturelli, *Young Adults and Criminal Culpability* 23 U. Pa. J. Const. L. 1142,

courts, juvenile adjudication practices vary widely among jurisdictions—including on issues of counsel, age limits, competency, diversion, and release.³⁶ And because it is well-recognized that young persons of color are overrepresented at every stage of the juvenile justice system, adopting a rule that would prevent people with juvenile adjudications from qualifying for “first offender” relief would adversely impact minorities.³⁷ Further, permitting any juvenile adjudication to disqualify a person from “first offender” status, no matter how old that person would be at sentencing, is inconsistent with the Commission’s research that a person’s recidivism risk drops as they age.³⁸

Admittedly, Option 2 does not prevent these problems. It would still include offenses committed before age 18 and juvenile adjudications if those prior convictions were assessed criminal history points.³⁹ For the reasons just

1161–69 (2021) (collecting research); *Miller*, 567 U.S. at 472 (recognizing blameworthiness is “not as strong with a minor as with an adult”) (citation omitted).

³⁶ See, e.g., Juvenile Justice: Geography, Policy, Practice & Statistics (JJGPS), <http://www.jjgps.org/> (last visited Feb. 26, 2023) (identifying various standards for age boundaries, waivers to adult court, competency, waiver and timing of counsel, diversion, and release decisions).

³⁷ See, e.g., Richard A. Mendel, The Sentencing Project, *Diversion: A Hidden Key to Combating Racial and Ethnic Disparities in Juvenile Justice* 1–2 (2022), <https://tinyurl.com/2p8fhn35> (reporting that youths of color are more likely to be arrested and less likely to be diverted than white peers); U.S. Dep’t of Justice, *OJJDP Statistical Briefing Book* (rev. June 2022), <https://bit.ly/3cYqO35> (reporting Black juveniles were arrested more than twice as often as white peers in 2020); Lindsey E. Smith et al., Juvenile Law Center, *Reimagining Restitution: New Approaches to Support Youth and Communities* 16–7 (2022), <https://bit.ly/3x3t0gC> (discussing racial disparities at various stages in juvenile justice system); Eli Hager, *Racial Inequality in US Youth Detention Wider Than Ever, Experts Say*, The Guardian (Mar. 8, 2021), <https://bit.ly/3Rpak39> (discussing racial gap in detention in and release rates from juvenile detention facilities).

³⁸ See, e.g., USSC, *Recidivism of Federal Offenders Released in 2010* 6 (2021), <https://tinyurl.com/2p922sns> (“2021 Recidivism Report”) (finding lower rearrest rates for older individuals); USSC, *The Effects of Aging on Recidivism Among Federal Offenders* 3 (2017), <https://tinyurl.com/2zvcaptk> (finding “[o]lder offenders were substantially less likely than younger offenders to recidivate”); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 23, fig. 11 (2016) <https://tinyurl.com/3aeybdsp> (“2016 Recidivism Report”) (showing lower rearrest rates for recidivism for older individuals).

³⁹ See 2023 Proposed Amendments, at 7219.

stated, we strongly encourage the Commission to exclude all juvenile adjudications from the “first offender” analysis. Short of that, Option 2, which would exclude juvenile adjudications that are not assessed criminal history points, is preferable.

Simplicity. Option 2 is the simplest option. As the Commission alludes to in its issues for comment, Option 1 would pose numerous practical challenges.⁴⁰ Option 1 would inject further complexity into Chapter 4 because it would require courts to use one set of rules to calculate a person’s criminal history category under Chapter 4A, and then use another set of rules to assess whether a person qualifies as a “first offender” under the proposed §4C1.1. Option 1 would also increase complexity and litigation at sentencing. Indeed, it is challenging enough to obtain documentation to prove or refute prior convictions that are counted under Chapter 4A.⁴¹ But Option 1 would require parties to dig up case documents from potentially decades ago and from a variety of different tribunals. Records of convictions—particularly if they are too old or minor to count for criminal history points—may be lost, incomplete, or unavailable. Indeed, the “incomplete nature of disposition data” is a reason cited by the Commission for using rearrest as the measurement for its own recidivism studies.⁴² Because our clients have the right to be sentenced on accurate sentencing information,⁴³ Defenders would

⁴⁰ See 2023 Proposed Amendments, at 7223.

⁴¹ See *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (“The Guidelines are complex”).

⁴² 2021 Recidivism Report, *supra* note 38, at 6; see also USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders 2* (2017), <https://tinyurl.com/5n8hn77f> (“Past Predicts the Future”) (“While states have improved the completeness of criminal history records, a recent federal study found significant gaps in reporting of dispositions following an arrest.”).

⁴³ See USSG §6A1.3 (“When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor . . . provided that the information has sufficient indicia of reliability to support its probable accuracy.”); see also *Molina-Martinez*, 578 U.S. at 198 (holding that when a person is sentenced under an incorrect guidelines range, that error will often be “sufficient to show a reasonable probability of a different outcome absent the error”); *United States v. Juwa*, 508 F.3d 694, 700–01 (2d Cir. 2007) (recognizing a due process right to be sentenced on accurate information).

seek to refute incomplete or inaccurate disposition records at sentencing if those records were being used to exclude a client from §4C1.1 relief.⁴⁴

Evidence-Based. Option 2 is supported by research. The Commission has repeatedly recognized that its criminal history rules—including the rules that exclude certain prior convictions from the point-calculation—do a strong job of predicting future rearrests.⁴⁵ It has also recognized that persons with zero criminal history points have a significantly lower rate of rearrest than other groups, meaning Option 2 would pose little risk to public safety.⁴⁶

Research from outside the Commission supports Option 2 as well. For example, one study assessing whether more severe types of sanctions decreased recidivism rates for “first-time felons” found that probation is more effective than prison in reducing reoffending.⁴⁷ Other reports similarly conclude that prison alternatives are often the superior sentencing option.⁴⁸

⁴⁴ See, e.g., *United States v. Pless*, 982 F.2d 1118, 1127–28 (7th Cir. 1996) (“Due process entitles defendants to fair sentencing procedures, especially a right to be sentenced on the basis of accurate information. If a defendant raises the possibility of reliance on misinformation in the PSI, the court must provide an opportunity to rebut the report. That may take a number of forms: by allowing defendant and defense counsel to comment on the report or to submit affidavits, or other documents or by holding an evidentiary hearing.”) (internal citations omitted).

⁴⁵ See, e.g., Past Predicts Future, *supra*, note 42, at 6 (“Criminal history score and Criminal History Category (CHC) are strong predictors of recidivism.”).

⁴⁶ See, e.g., 2021 Recidivism Report, *supra* note 38, at 24; Past Predicts Future, *supra* note 42, at 7, fig. 1; 2016 Recidivism Report, *supra* note 38, at 18, fig. 6; see also CH Data Briefing, *supra* note 14, at slide 36 (reporting that the vast majority of eligible persons under Option 2 who had a prior conviction committed non-violent prior convictions and that the most common prior conviction by far was public order offenses).

⁴⁷ See Daniel Mears & Joshua Cochran, *Progressively Tougher Sanctioning and Recidivism: Assessing the Effects of Different Types of Sanctions*, 55 J. Res. Crime & Delinq. 194, 207–217 (2018).

⁴⁸ See, e.g., Damon M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 Crime & Just. 353, 357 (2021) (“[C]ustodial sanctions have a null or criminogenic effect on reoffending when compared with noncustodial sanctions such as probation.”); see also Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 28–29 (Apr. 18, 2017) (Faye Taxman, Ph.D.); Rebecca Umbach et al., *Cognitive Decline as a Result of Incarceration and the Effects of a CBT/MT Intervention*, 45 Crim. Just. & Behav. 31 (2018) (finding that incarceration worsens cognitive functioning—“a known risk factor for crime”).

In implementing Option 2, the Commission should provide at least a two-level decrease for persons who qualify under the proposed §4C1.1. As the Commission's recent research confirms,⁴⁹ a two-level decrease would move the average guideline minimum closer to the sentences that courts "actually impose" in these types of cases.⁵⁰ Providing at least a two-level decrease would best reflect the Commission's "ongoing" and "continuous evolution helped by the sentencing courts."⁵¹

B. §4C1.1's remaining exclusionary criteria should be narrow.

Defenders recognize that § 994(j) provides a presumption of non-imprisonment for persons who have not been convicted of a "crime of violence" or an "otherwise serious offense." However, we fear that some of the Commission's proposed exclusions in §4C1.1(a) sweep too broadly and may prevent persons with no criminal history points who were convicted of sufficiently non-serious offenses from getting relief. We encourage the Commission to adopt a narrow ineligibility criteria and permit courts to ascertain whether to depart or vary from the §4C1.1 adjustment in outlier cases.

For example, the Commission proposes to exclude anyone who "possess[ed] a firearm or other dangerous weapon (or induce[d] another participant to do so) in connection with the offense[.]"⁵² While we appreciate this exclusion is narrowed to "the defendant's own conduct,"⁵³ it is still substantially broader than § 994(j) requires. The SRA directs that a "first offender who has not been convicted of a crime of violence or an otherwise

⁴⁹ See CH Data Briefing, *supra* note 14, at slide 43.

⁵⁰ See 28 U.S.C. § 995(a)(15).

⁵¹ *Rita v. United States*, 551 U.S. 338, 350 (2007); see also 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.").

⁵² 2023 Proposed Amendments, at 7222.

⁵³ *Id.* ("Consistent with §1B1.3 (Relevant Conduct), the term 'defendant' limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.").

serious offense,” should receive a sentence other than imprisonment.⁵⁴ But it only singled out “a person convicted of a crime of violence that results in serious bodily injury” for a prison sentence.⁵⁵ Therefore, nothing in the statute precludes the Commission from encouraging non-incarceration sentences for “first offenders” not “convicted of a crime of violence that results in serious bodily injury.”

Defenders recognize that the proposed §4C1.1(a)(2) exclusion is identical to 18 U.S.C. § 3553(f)(2).⁵⁶ But adopting the (f)(2) exclusion here could pose serious problems. First, this rule could exacerbate racial disparities because Black individuals are disproportionately targeted and sentenced for firearms possession offenses.⁵⁷ This rule could also prompt unwarranted disparities, preventing deserving individuals from obtaining §4C1.1 relief. As Defenders explained in 2018, adopting (f)(2)’s exclusion in this context would compound a circuit split on whether constructive possession is sufficient to constitute “possess[ing] a firearm or other dangerous weapon . . . in connection with the offense.”⁵⁸ There is also a split of authority on whether a person possesses a weapon in connection with the offense if they receive an enhancement under §2D1.1(b)(1).⁵⁹ Further, this

⁵⁴ 28 U.S.C. § 994(j).

⁵⁵ *Id.*

⁵⁶ Compare 18 U.S.C. § 3553(f)(2), with 2023 Proposed Amendments, at 7222.

⁵⁷ See David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L. J. 1011, 1021–25 (2020) (examining racial disparities in federal gun possession prosecutions arising from law enforcement practices that target communities of color); see also Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 315–17 (2007); Statement of Michael Carter before the U.S. Sentencing Comm’n, Washington, D.C., (Mar. 7, 2023).

⁵⁸ 2023 Proposed Amendment at 7222. See Defenders’ 2017 Comments, *supra* note 32, at 10 (attached to Statement of Miriam Conrad, *supra*, note 32). See also *United States v. Carillo-Ayala*, 713 F.3d 82, 97 n. 13 (11th Cir. 2013) (summarizing circuit conflict).

⁵⁹ Compare, e.g., *Carillo-Ayala*, 713 F.3d at 89-91 (holding that not all defendants who receive the enhancement under §2D1.1(b)(1) are precluded from safety valve relief), with *United States v. Ruiz*, 621 F.3d 390, 397 (5th Cir. 2010) (actual and constructive possession of a weapon under §2D1.1(b)(1) excludes safety valve relief).

exclusion is inconsistent with the Commission’s guidance in §4B1.2 which excludes most firearms possession offenses from the “crime of violence” definition.⁶⁰

We encourage the Commission to replace the exclusion proposed at §4C1.1(a)(2) with the “crime of violence” definition articulated in 18 U.S.C. § 16. This definition was recently recognized by Congress in the amended safety valve statute as an appropriate definition for a “violent offense”⁶¹ and, along with the additional exclusions in §4C1.1, would fully comply with §994(j)’s mandate.

The Commission should also revise proposed §4C1.1(a)(3) (“the offense did not result in death or serious bodily injury”) so that it is limited to the conduct of the individual being sentenced. Because “the offense” includes “the offense of conviction and all relevant conduct under §1B1.3”⁶²—including the conduct of others—Defenders are concerned that persons deserving of §4C1.1 relief who played a minor and non-violent role in an offense may be excluded because of co-conspirator conduct. This can be easily remedied by revising §4C1.1(a)(3) to state: “the defendant did not cause death or serious bodily injury.” At a minimum, the exclusion should be limited to “the offense of conviction.”⁶³

Defenders similarly urge the Commission to adopt the narrowest eligibility alternatives proposed in §4C1.1(a)(4) and (6).⁶⁴

C. An invited downward departure should be added to Option 2.

The Commission proposes to include an invited upward departure in Option 2 for cases in which a §4C1.1 adjustment “substantially

⁶⁰ See USSG §4B1.2(a)(2).

⁶¹ 18 U.S.C. §3553(f)(1)(C) & (g).

⁶² USSG §1B1.1 cmt. n.1(I).

⁶³ See USSG §1B1.2(a) (defining “offense of conviction” as “the offense conduct charged in the count of the indictment or information of which the defendant was convicted”).

⁶⁴ 2023 Proposed Amendments, at 7222 (excluding persons whose acts or omissions resulted in substantial financial hardship to 25 or more victims and persons who were subject to §4B1.5).

underrepresents the seriousness of the defendant’s criminal history.”⁶⁵ It proposes that an upward departure may be warranted if an individual “has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.”⁶⁶ We encourage the Commission to include a downward departure as well. The representation of a person’s criminal history swings both ways⁶⁷—and a downward departure may be particularly warranted in circumstances where someone does not qualify as a “first offender” under Option 2 solely because of a juvenile adjudication or other minor offense.

D. Section 5C1.1’s downward departure for Zones C and D should match the downward departure proposed for Zones A and B.

We are pleased the Commission has proposed to replace Application Note 4 in §5C1.1 and provide an invited downward departure for all persons who would qualify as “first offenders” under §4C1.1.⁶⁸ However, we urge the Commission to provide the same invited departure for persons in Zones C and D as it proposes for Zones A and B.

The Commission proposes that for persons who qualify as “first offenders” in Zones A and B, “a sentence other than a sentence of imprisonment. . . is generally appropriate.”⁶⁹ But for persons who qualify as “first offenders” in Zones C and D, the Commission proposes that “a sentence of imprisonment [may be appropriate] [is generally appropriate]” only if the “instant offense of conviction is not an otherwise serious offense.”⁷⁰ The Commission should provide the same presumption of non-imprisonment that it proposes for persons in Zones A and B to all persons who receive the §4C1.1 adjustment for several reasons.

First, asking courts to assess whether “the defendant’s instant offense of conviction is not an otherwise serious offense” is unnecessary and

⁶⁵ *Id.*

⁶⁶ 2023 Proposed Amendments, at 7222.

⁶⁷ *See* USSG §4A1.3.

⁶⁸ 2023 Proposed Amendments, at 7222–23.

⁶⁹ *Id.* at 7222.

⁷⁰ *Id.* at 7222–23.

duplicative of the §4C1.1 analysis. By the time a court would assess whether a §5C1.1 downward departure is warranted, the court would have already determined not only that the person being sentenced has zero criminal history points but also that the instant offense did not meet any of §4C1.1's exclusionary criteria. Since everyone eligible for §4C1.1 would be in Criminal History Category I, and "[t]here is no correlation between recidivism and guidelines' offense level,"⁷¹ adding an extra layer of analysis is unwarranted. Similarly, because anyone eligible for the §5C1.1 downward departure would have been convicted of an offense that did not meet §4C1.1's exclusionary criteria, additional guidance on what constitutes "an otherwise serious offense"⁷² is not necessary.⁷³

Second, there are strong reasons to not punish persons who qualify as "first offenders" simply because of their sentencing zone. Because all "first offenders" would necessarily be in Criminal History Category I, their zone would be driven exclusively by offense level. But as Defenders have often noted, a person's offense level often provides little indication of the seriousness of the offense. Offense levels are frequently driven by things like drug quantity, drug type, and loss amount—factors bearing little relationship to culpability.⁷⁴ Leaving the departure for Zones C and D as proposed may make judges less inclined to consider a sentence other than imprisonment for people like Julio, Vania Alvarado, and Mario Chavez.

⁷¹ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 15 (2004), <https://tinyurl.com/2p9xrrf9> ("Measuring Recidivism") ("Whether an offender has a low or high guideline offense level, recidivism rates are similar.").

⁷² 2023 Proposed Amendments, at 7223.

⁷³ Because §4C1.1 would provide an analysis to determine whether an instant offense is "otherwise non-serious," so as to warrant "first offender" relief, the Commission should delete the confusing and arguably conflicting portion of Policy Statement 4(d) in Chapter 1, Part A. USSG Ch. 1, Pt. A, cmt. 4(d) ("Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'"). *See also* 2023 Proposed Amendments, at 7223 (seeking comment on conforming changes).

⁷⁴ *See, e.g.*, Defenders' Annual Letter to the U.S. Sentencing Comm'n 13–17 & n. 88 (Sept. 14, 2022).

II. Status Points

Defenders are excited to see the Commission’s proposed changes to the status points rule, USSG §4A1.1(d). Under the current §4A1.1(d), two points are added to a person’s criminal history score if they committed the instant offense while under a criminal justice sentence, including parole, probation, supervised release, imprisonment, work release, or escape status. A “criminal justice sentence” is any “sentence countable under §4A1.2” which has “a custodial or supervisory component, although active supervision is not required.”⁷⁵ Because status points lack an empirical basis, do not serve the purposes of sentencing, and fail to further the Commission’s purpose, Defenders strongly believe the Commission should implement Option 3 and eliminate status points from the criminal history calculation.

A. The Commission should adopt Option 3 of the proposed amendment and eliminate status points from the criminal history calculation.

The Commission has proposed three options for amending §4A1.1(d).⁷⁶ Each option would de-emphasize, in different ways and to varying degrees, the importance of person’s “status” (i.e., being “under a criminal justice sentence”) in determining their sentence.

Option One. Option 1 would add a downward departure to Application Note 4 of the Commentary to §4A1.1 for cases where status points are applied. It would read: “There may be cases in which adding points under §4A1.1(d) results in a Criminal History Category that substantially overrepresents the seriousness of the defendant’s criminal history. In such a case, a departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History).”

Option Two. Option 2 would decrease the number of points added under §4A1.1 from two to one. It would also add a departure provision to the Commentary of §4A1.1 to provide for an upward or downward departure, depending on the circumstances. It would read: “There may be cases in which adding a point under §4A1.1(d) results in a Criminal History Category that

⁷⁵ USSG §4A1.1, cmt. n.4.

⁷⁶ 2023 Proposed Amendments, at 7221.

substantially overrepresents or underrepresents the seriousness of the defendant’s criminal history. In such a case, a departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History Category).”

Option Three. Option 3 would eliminate the status points altogether. It would also amend the Commentary to §4A1.3 to provide an example of an instance in which an upward departure may be warranted. It would read: “An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances: *** (v) The defendant committed the instant offense (i.e., any relevant conduct to the instant offense under §1B1.3 (Relevant Conduct)) while under any criminal justice sentence having a custodial or supervisory component (including probation, parole, supervised release, imprisonment, work release, or escape status).”

The Commission should adopt Option 3.

1. The History of Status Points.

Status points and the other Chapter 4 criminal history rules were designed to reflect both culpability (*i.e.*, just punishment) and risk of recidivism (*i.e.*, the likelihood of rearrest).⁷⁷ The factors used to measure culpability and recidivism were meant to be “consistent with the extant empirical research,” and to incorporate “additional data insofar as they become available in the future.”⁷⁸ However, because of time and resource constraints, the original Commission did not use its own empirical data and research to develop the criminal history rules.⁷⁹ Instead, it reviewed four prediction measures being used in the mid-1980s and ultimately incorporated aspects of two: the Parole Commission’s Salient Factor Score (SFS) and the Proposed INSLAW scale.⁸⁰ Status points emanated from the SFS Item E, which used criminal justice sentence status as a predictor of greater

⁷⁷ See Measuring Recidivism, *supra* note 71, at 1–2.

⁷⁸ USSG Ch. 4, Pt. A, introductory cmt.

⁷⁹ See Measuring Recidivism, *supra* note 71, at 1.

⁸⁰ See USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score 3–4* (2005), <https://tinyurl.com/5fw3ezpw>, (“Salient Factor Score”).

recidivism risk.⁸¹ But, as discussed below, more recent Commission data reveal that “status” is a poor predictor of recidivism risk.

Status points were justified on similar grounds as the related (former) “recency points” rule and should be eliminated for the same reasons that recency points were eliminated from the criminal history computation in 2010. Under the original guidelines, one or two points were added to a person’s criminal history score if the convicted person committed the instant offense less than two years after release from prior imprisonment.⁸² Both status and recency points were considered measures of the “recency” of prior criminal conduct and were predicated on the now disproven assumption that more recent criminal activity was a reliable predictor of future criminal conduct.⁸³ However, the Commission eliminated recency points from the criminal history calculation in 2010, stating that “[r]ecent research isolating the effect of §4A1.1(e) on the predictive ability of the criminal history score indicated that consideration of recency only minimally improves the predictive ability.”⁸⁴ Additionally, it received public testimony that “recency does not necessarily reflect culpability.”⁸⁵ As further explained below, the same is true for status points. Indeed, when Defenders urged the Commission to eliminate recency points in 2010, we also urged it to eliminate status points because neither measure accurately predicts recidivism nor effectively distinguishes individuals who are more culpable than others.⁸⁶

⁸¹ *See id.* at 7.

⁸² *See* USSG §4A1.1(e) (Nov. 1, 1987).

⁸³ *See* Salient Factor Score at 7 (stating that status points “capture[] the higher recidivism likelihood when the instant offense is committed while the offender is still meeting a sentence obligation for an earlier offense” and recency points “[identified] as more likely to recidivate an offender” who committed the instant offense “less than *two* years after release from an imposed imprisonment sentence of 60 days or longer.”).

⁸⁴ USSG App. C., Amend. 742, Reason for Amendment (Nov. 1, 2010).

⁸⁵ *Id.*

⁸⁶ *See* Statement of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm’n, Washington, D.C., at 90 (Mar. 17, 2010) (“Meyers and Mariano 2010 Statement”).

2. Impact, Recidivism Prediction, and Culpability.

Status points increase the time our clients spend in prison and lead to higher federal incarceration rates but have low recidivism prediction value and are a poor measure of culpability. In the last five years §4A1.1(d) applied in 37.5 percent of cases and increased a person's criminal history in 61.5 percent of cases in which it was applied.⁸⁷ Status points are also connected with higher sentences. "The average prison sentence imposed for [a person assessed status points] was 66 months, which is 21 months longer than the average for [people who were not assessed status points] (45 months)."⁸⁸ By increasing the length of sentences imposed, the status points rule contributes to prison overcrowding. The Bureau of Prisons ended Fiscal Year 2021 with 264 more inmates than the prior year and BOP continues to "experience substantial crowding in high, and medium security facilities."⁸⁹

While §4A1.1(d) exacerbates imprisonment lengths and rates, the Commission's own data shows that the rule lacks an empirical basis. As far back as 2005, Commission research established that recency and status points *combined* did not significantly increase the criminal history score's ability to predict recidivism risk.⁹⁰ "The [2005] study found that the full criminal history score, with all components included, successfully predicted rearrest 69.9 percent of the time."⁹¹ Yet, when "both status points and recency points were removed, the score still would successfully predict rearrest 69.8 percent of the time."⁹² Thus, "status points and recency points together improved prediction of rearrest by only 0.1 percent."⁹³

⁸⁷ See USSC, *Revisiting Status Points 2* (2022), <https://bit.ly/3RXl3lf> ("Revisiting Status Points").

⁸⁸ See *id.* at 12, fig. 5.

⁸⁹ Federal Bureau of Prisons, Program Fact Sheet (Dec. 31, 2021) (noting the "first increase in inmate population after 6 years of decreases"); Federal Bureau of Prisons, Program Fact Sheet (Feb. 2, 2023).

⁹⁰ See Meyers and Mariano 2010 Statement at 92 (citing Salient Factor Score, at 13 & Ex. 5).

⁹¹ Revisiting Status Points, *supra* note 87, at 5.

⁹² *Id.*

⁹³ *Id.*

Last summer, the Commission updated its research with respect to status points by examining people who were released from prison or began a term of probation in 2010.⁹⁴ The Commission determined that “[people] who received status points were rearrested at similar rates to those without status points who had the same criminal history score.”⁹⁵ Similarly, it found that “the inclusion of status points in the criminal history score improved successful prediction of rearrest by less than 0.2 percent.”⁹⁶ These figures are comparable to those found by the 2005 study.⁹⁷ Therefore, “[d]espite the sentencing impacts resulting from the application of status points, the status points provision only minimally improves the overall recidivism predictivity of the criminal history score.”⁹⁸

While the Commission admits that status points lack an empirical basis, it notes that these points “may address culpability and other statutory purposes of sentencing.”⁹⁹ The Commission therefore asks for comment on whether the §4A1.1(d) rule should still apply in specific instances, such as if a person was under a criminal justice sentence for “certain categories of prior offenses” or if a person was “recently placed under a criminal justice sentence involving a custodial or supervisory component.”¹⁰⁰ Because §4A1.1(d) is not needed to further any purpose of sentencing, the rule should be eliminated in all circumstances, and an upward departure should not be adopted.

The guidelines and relevant statutes already account for the scenarios such as those that the Commission identifies and increase penalties accordingly. For example, if a person was “under a criminal justice sentence resulting from a violent offense,”¹⁰¹ he would likely be subject to a violation of his supervision, probation, or parole in addition to facing the new criminal

⁹⁴ *See id.* at 14.

⁹⁵ *Id.* at 3.

⁹⁶ *See* Revisiting Status Points, *supra* note 87, at 17. To phrase it differently, “status points improve the criminal history score’s successful prediction of rearrest for only 15 out of 10,000 offenders.” *Id.* at 18.

⁹⁷ *See id.*

⁹⁸ *Id.* at 18.

⁹⁹ *Id.*

¹⁰⁰ 2023 Proposed Amendments, at 7221.

¹⁰¹ *Id.*

charge. If found guilty of the violation, his sentence on that violation may be imposed consecutive to his sentence for the instance offense.¹⁰² The prior violent offense would also count towards his criminal history score.¹⁰³ And, if the offense was sufficiently violent to constitute a “crime of violence” or to trigger application of a recidivism statute, the prior violent offense may further increase his guideline range or subject him to enhanced mandatory penalties.¹⁰⁴

Guidelines and statutes also already account for committing a crime while under a criminal justice sentence with a custodial component.¹⁰⁵ If a person commits a federal crime while in custody, his prior offense would count towards his criminal history score.¹⁰⁶ The guidelines further provide numerous offense level increases, adjustments, and departures to account for offenses occurring in custody and, if applicable, the status of the victim.¹⁰⁷ And the guidelines direct that for any offense committed while a person “was serving a term of imprisonment (including work release, furlough, or escape status). . . the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.”¹⁰⁸ Compounding these existing penalties with criminal history points that lack an empirical basis is unwarranted.

¹⁰² See USSG §7B1.3(f) (“Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation.”).

¹⁰³ See USSG §§4A1.1, 4A1.2. Unless the offense otherwise constituted relevant conduct, in which case the prior violent offense would increase the individual’s offense level for the instant offense. See USSG §4A1.2 cmt. n. 1.

¹⁰⁴ See, e.g., USSG §§4B1.1, 4B1.2, 2K2.1(a), 2L1.2(b); 18 U.S.C. § 924(e); 21 U.S.C. § 841(b)(1)(A) & (b)(1)(B).

¹⁰⁵ See 2023 Proposed Amendments, at 7221.

¹⁰⁶ See USSG §4A1.2(e).

¹⁰⁷ See, e.g., USSG §§2A3.1(b)(3); 2D1.1(b)(4); 2D2.1(b)(1); 2P1.1; 2P1.2; 2P1.3; 3A1.2(c)(2); see also generally *id.* §§4A1.3(a); 5K2.7.

¹⁰⁸ USSG §5G1.3(a).

3. Unwarranted Disparities and Adverse Impact.

Far from furthering other purposes of sentencing, status points create disparities and have an adverse impact.

Section 4A1.1(d) perpetuates unwarranted disparities in two ways—both by treating dissimilar circumstances alike, and by treating similar circumstances differently.¹⁰⁹ Because §4A1.1(d) applies to any “criminal justice sentence”—whether actively supervised, or not; custodial or non-custodial—§4A1.1(d) treats dissimilar types of criminal justice sentences the same. And because community-based supervision practices vary from state to state, §4A1.1 treats similar circumstances differently.

I have seen unjustified disparities caused by status points firsthand. From 1998 to 2016, the state of Arizona operated a program colloquially known as “half-term to deport,” under which non-citizens convicted of certain crimes who were subject to an order of removal could be released to the custody of ICE after serving half of the state sentence imposed.¹¹⁰ If, however, the person ever returned to the United States without permission, the Arizona Department of Corrections would revoke the person’s release and require them to serve the remaining half of the sentence.¹¹¹

Individuals granted early release were not under any form of supervision or subject to any conditions other than the condition that they not return to the United States, but they were considered to be “under a criminal justice sentence” under §4A1.1(d). Individuals who returned to the country and faced federal charges, often for illegal reentry, were therefore assessed “status points.” And because service of the remaining half of the DOC sentence “refreshed” the age of the state conviction under §4A1.2(e), it was not uncommon to see defendants who were assessed five criminal history

¹⁰⁹ See 18 U.S.C. § 3553(a)(6); *Gall v. United States*, 552 U.S. 38, 55–56 (2007) (recognizing that avoiding “unwarranted similarities among [individuals] not similarly situated” is relevant to the disparity analysis); USSC, *Fifteen Years of Guideline Sentencing* 113 (2004), <https://bit.ly/2BZj3XB> (“Fifteen Year Report”) (recognizing disparities occur from both unwarranted different and unwarranted similar treatment).

¹¹⁰ Ariz. Rev. Stat. § 41-1604.14 (repealed Aug. 6, 2016).

¹¹¹ Ariz. Rev. Stat. § 41-1604.14(B).

points for state convictions that were quite dated, placing them immediately in criminal history category III.

Arizona is far from the only state where such idiosyncrasies exist. My office represents a man who is receiving status points for an offense so old that it no longer scores for purposes of his criminal history. In 2006, Mr. Morales pleaded no contest to a misdemeanor offense for which he received 3 years of probation in Yolo County Superior Court in Woodland, California. A bench warrant issued in 2007 following a failure to appear, but Yolo County has failed to either execute or quash the warrant despite multiple opportunities to do so. The presence of the warrant means Mr. Morales remains “under a criminal justice sentence” and continues to receive status points even though the underlying offense has not counted for purposes of his criminal history since 2016.

Section 4A1.1(d) also has a disparate impact on Black people. Data from the Commission’s report confirms that Black people are 1.4 times more likely to get status points than other groups combined.¹¹² This disparate impact is unsurprising. Research shows that Black people are far more likely than whites to be targeted by law enforcement for stops, searches, arrests, and criminal prosecutions,¹¹³ even in the face of evidence that Black and

¹¹² See *id.* at 6-7 (comparing 47.5 percent of Blacks given status points with the 37.5 percent given status points across all individuals. The 47.5 percent is calculated from Table 1 where 32.7 percent of the 76,337 individuals with status points were Black and 21.7 percent of the 127,162 individuals without status points were Black).

¹¹³ See, e.g., Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases*, 65 Clev. State L. Rev. 491, 500–01 (2017) (reviewing statistics on crime and arrest rates by race and concluding that the overrepresentation of people of color in the criminal justice system results from “racial disparity in law enforcement practices” rather than “a problem of crime within the black community alone”); Jessica Eaglin & Danyelle Solomon, Brennan Center for Justice, *Reducing Racial Disparities in Jails: Recommendations for Local Practice* 17 (2015) (“Evidence demonstrates that once stopped by a police officer, African Americans are arrested at a higher rate than other racial groups. A recent study of 3,528 police departments found that blacks are more likely to be arrested in almost every city for almost every type of crime. . . . African Americans are almost four times more likely to be arrested for selling drugs and more than twice as likely to be arrested for possessing drugs, even though whites are more likely to sell drugs and equally likely to consume them. African Americans constitute 30% of arrests for drug violation offenses even though they make up only 13% of the total population.”); Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a*

white people commit certain offenses at similar rates.¹¹⁴ Black people are more likely to be on supervision and to be subject to longer terms of supervision than whites,¹¹⁵ which underscores the uneven impact of the status point rule on minority groups.

While retaining status points would frustrate the Commission's mission to provide guidelines that promote sentences not greater than necessary, eliminating them would help the Commission fulfill its obligations. The Commission would act in its characteristic institutional role to "base its determinations on empirical data and national experience."¹¹⁶ By adopting Option 3, the Commission would improve the accuracy and reliability of the guidelines. It would make the guidelines more certain and fairer in fulfilling the goals of sentencing. It would reduce unwarranted

Response to Racial Injustice, 20 Stan. L. & Pol'y Rev. 463, 477 (2009) ("The war on drugs, and particularly the special intensity with which it has been waged against open-air drug dealing and crack cocaine, has fueled a massive and demographically disproportionate increase in the number of black males held in the nation's prisons."); William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1893 (2000) (describing "anti-vice crusades that target racial or ethnic minorities who live in urban poverty"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 957 (1999) ("Recent studies support what advocates and scholars have been saying for years: The police target people of color, particularly African Americans, for stops and frisks."); cf. *Jamison v. McClendon*, 476 F. Supp. 3d 386, 414–15 (S.D. Miss. 2020) (Order Granting Qualified Immunity) ("Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike. United States Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as 'the world's greatest deliberative body.' The 'vast majority' of the stops were the result of 'nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial.'" (citations omitted)).

¹¹⁴ See Eaglin & Solomon, *supra* note 113, at 17.

¹¹⁵ See Kendra Bradner & Vincent Schiraldi, *Racial Inequities in New York Parole Supervision* 3, Columbia University Justice Lab (2020), <https://bit.ly/3Dkiyp1> (collecting research on national racial inequities in parole and reporting that "Black people are 4.15 times more likely to be under parole supervision than white people," that Black people "remain on probation and parole longer than similarly situated white people," and that research suggests that disparities exist in parole violation charges and outcomes); see also Alex Roth et al., *The Perils of Probation: How Supervision Contributes to Jail Populations* 8, Vera Institute of Justice (2021), <https://bit.ly/3QxNrZX>.

¹¹⁶ *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

disparities and better reflect the advancement of human knowledge.¹¹⁷ And it would further the Commission’s statutory obligation to “take into account the nature and capacity of the penal, correctional, and other facilities and services available” and to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons[.]”¹¹⁸ For all these reasons, we urge the Commission to adopt Option 3 of the proposed amendment.

¹¹⁷ 28 U.S.C. § 991(b)(1)(A)–(C).

¹¹⁸ 28 U.S.C. § 994(g).

**Federal Public and Community Defenders
Comment on Acquitted Conduct Sentencing
(Proposal 8)**

March 14, 2023

The attached Statement of Melody Brannon contains Defenders' comments on Proposed Amendment 8.¹ We supplement those comments below to further respond to some of the issues raised at the February 2023 public hearing and by the Department of Justice (DOJ) in its written statement.²

At the public hearing, the Commission asked two hypothetical questions related to how the Defender's proposal to remove the limitation language at proposed USSG §1B1.3(c)(1) would impact "overlapping conduct" between acquitted and convicted counts.³ First, Vice Chair Murray asked if, under the Defenders' proposal, the officers who assaulted Rodney King could have been prosecuted and sentenced in federal court for violating Mr. King's civil rights, even though they were acquitted in state court for assault and use of excessive force.⁴ The answer to that question is yes. The Double Jeopardy Clause does not prevent the states and federal government from prosecuting the same course of conduct because the states are separate sovereigns from the federal government and each state's power to prosecute is derived from its inherent sovereignty.⁵ Defenders' rule would not prevent these types of state-federal prosecutions, nor would it prevent the federal government from waiting for the state to prosecute conduct first and, based on what happens in state court, determining whether to prosecute federally.

The federal case prosecuting Rodney King's assaulters did not involve the use of acquitted conduct at sentencing. In *United States v. Koon*, the Court sentenced Officers Stacey Koon and Laurence Powell for violating Rodney King's *federal constitutional rights*, under 18 U.S.C. § 242, after they

¹ See Statement of Melody Brannon on Proposed Acquitted Conduct Amendment (Feb. 24, 2023) ("Statement of Melody Brannon-Acquitted Conduct").

² See Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent'g Comm. (Feb. 15, 2023) ("DOJ Written Testimony for February 2023 Hearings").

³ See 88 Fed. Reg. 7180, 7225, 2023 WL 1438480 (2023) ("2023 Proposed Amendments").

⁴ See USSC, *Public Hearing on Proposed Amendment on Acquitted Conduct*, U.S. Sent'g Comm'n (Feb. 24, 2023, 2:32:45–2:37:06), <https://tinyurl.com/mneaea37> ("Feb. 2023 Public Hearing") (hypothetical question posed by Vice Chair Murray and Ms. Brannon's response); see also *United States v. Koon*, 833 F. Supp. 769, 774–76 (C.D. Cal. 1993) (discussing the details of the arrest and assault on Rodney King by four police officers, the subsequent federal trial for deprivation of rights, and the jury's verdict), *vacated in part by Koon v. United States*, 518 U.S. 81 (1996).

⁵ See *Heath v. Alabama*, 474 U.S. 82, 87–89 (1985).

were convicted by a jury.⁶ Even though the federal convictions resulted from facts similar to those underlying the state acquittals, the officers were not sentenced for assault and excessive force—the state charges for which they were acquitted. To the extent the facts underlying a federal conviction “overlap” with those underlying a state court acquittal, it should be clear to federal courts that they can and must sentence the individual for violating federal law—not the state law that was the subject of a separate prosecution—if the elements of the federal violation are proven beyond a reasonable doubt.⁷

Next, *ex officio* Commissioner Wroblewski asked whether, under the Defenders’ proposal, the guideline range would be “zero” for someone convicted of arson but acquitted of conspiracy to commit an arson hate crime, because the jury concluded the arson was not motivated by racial animus.⁸ A general prohibition on the use of acquitted conduct at sentencing does not complicate this fact pattern or result in a guideline range of zero. Federal arson, 18 U.S.C. § 844(i), is sentenced under USSG §2K1.4 and provides varying base offense levels, specific offense characteristics, and a cross-reference that may apply depending on the facts of the case, but none are triggered by hate motivation.⁹ However, there is a victim-related adjustment at USSG §3A1.1 that provides for a three-level increase if the crime was

⁶ See *Koon*, 833 F. Supp. at 774.

⁷ Defenders would object, however, if the federal court used conduct underlying a state court acquittal that was not *separately proven at the federal trial* to enhance the individual’s sentence on the federal conviction under the federal guidelines. This was not at issue in *Koon*, but occurred recently in *United States v. Bullock*, 35 F.4th 666 (8th Cir. 2022). DeShaun Bullock pled guilty in federal court to possession of a firearm by an unlawful drug user. *Id.* at 669. At sentencing, the district court granted the government’s motion for an upward departure under USSG §4A1.3 for underrepresented criminal history relying on a state charge for reckless use of a firearm resulting in serious injury for which Mr. Bullock had been acquitted in state court several years prior. *See id.* at 669–70. The court calculated a guideline range of 46–57 months, but sentenced Mr. Bullock to 63 months after applying the upward departure. *Id.* at 670. The Eighth Circuit affirmed, relying on the differing burdens of proof at trial and at sentencing. *See id.* at 671. Mr. Bullock’s certiorari petition on this issue is currently pending before the Supreme Court. *See* Petition for Writ of Certiorari, *Bullock v. United States*, ___ U.S. ___ (No. 22-5828).

⁸ See *Feb. 2023 Public Hearing*, *supra* note 4, at 2:45:04–2:45:54.

⁹ The hate crime version of the offense is penalized under different statutes, 18 U.S.C. § 249 and 42 U.S.C. § 3631, and is sentenced under USSG §2H1.1.

motivated by hate. This enhancement must be proven to the finder of fact at trial (or in the case of a guilty or no contest plea, to the court at sentencing) beyond a reasonable doubt.¹⁰ Thus, under this fact pattern, the court would apply the rules at §2K1.4 to derive a guideline range for the offense of conviction (arson, count two), but would be precluded from applying the three-level increase at §3A1.1 because the accused was acquitted of the hate crime (count one). The court would not be sentencing based on an overlapping acquittal because the jury did not acquit the individual of the arson, but rather, concluded that the arson was motivated by something other than racial animus. Thus, the sentence is for the arson (conviction) but not for the hate crime (acquittal).

Commissioner Wroblewski also asked Ms. Brannon what she meant in her witness statement by: “In most cases, the preclusive effect of the jury’s verdict will be clear.”¹¹ This means that in most cases, a jury’s split verdict will be both rational and consistent. Given the length and detail of jury instructions, the jury’s ability to ask questions during deliberations, and the availability of special verdict forms where appropriate, irrational and inconsistent verdicts involving overlapping conduct are unlikely to occur frequently. Courts will generally be able to determine from the jury’s verdict how to sentence in the face of a general prohibition on acquitted conduct sentencing. For instance, “if the defendant is convicted on one count of selling five grams of crack and acquitted on two other counts, the weight of the drugs

¹⁰ See USSG §3A1.1(a) & comment. (n. 1).

¹¹ See *Feb. 2023 Public Hearing, supra* note 4, at 2:44:05—2:44:15; see also Statement of Melody Brannon-Acquitted Conduct, *supra* note 1, at 14. In a 1996 law review article, scholar Barry L. Johnson argued in favor of abolishing the use of acquitted conduct at sentencing but acknowledged that doing so might lead to some limited “litigation over the preclusive scope of acquittals.” Barry L. Johnson, *If at First You Don’t Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 201 (1996). But uncertainties and litigation about the scope of the jury’s verdict—for instance in the case of inconsistencies and overlapping conduct—are an “insufficiently weighty” objection to ending acquitted conduct sentencing to carry the day. *Id.* Mr. Johnson noted there would be few cases in which acquitted conduct would be at issue and in most of those cases, “the preclusive effect of the jury’s result will be clear.” *Id.* Further, there are several mechanisms by which both the Commission and the courts could further reduce the likelihood of inconsistent verdicts including, for example, “the use of supplemental special verdict forms in cases where such confusion may arise.” *Id.* at 202.

alleged to have been sold in the two acquittal counts is not considered for relevant conduct purposes. This is straightforward.”¹²

Take, as another example, the *McClinton* case, discussed at the hearing. Dayonta McClinton was tried on charges of robbery, brandishing a firearm, and murdering a co-defendant.¹³ The jury acquitted Mr. McClinton of murder, but convicted him of robbery and brandishing.¹⁴ Despite this acquittal, the sentencing court applied the homicide cross-reference to enhance Mr. McClinton’s offense level from 23 to 43, and his sentencing range from 57–71 months to 324 months–life, before varying downward and sentencing Mr. McClinton to 228 months.¹⁵ If acquitted conduct sentencing was prohibited, use of the murder cross-reference, with its 20-level base offense increase, would have been precluded by the jury’s “not guilty” verdict on the murder charge.¹⁶

It is difficult, if not impossible, to craft rational sentencing policy around the unlikely specter of irrational jury verdicts. Courts will encounter and deal with anomalies on a limited, case-by-case basis. And in these circumstances, courts will undoubtedly understand the need to sentence individuals for their crimes of conviction. To the extent there’s ambiguity about the applicability of a certain enhancement or cross-reference, the parties will argue their positions based on the evidence presented at trial and the most logical explanation for the verdict. Courts, after sitting through the

¹² Johnson, *supra* note 11, at 201.

¹³ See Petition for Writ of Certiorari at 6, *McClinton v. United States*, ___ U.S. ___ (No. 21-1557).

¹⁴ See *id.* at 7.

¹⁵ See *id.* at 8–9.

¹⁶ At the hearing, Commissioner Wroblewski also asked if Defenders were “okay” with a judge considering acquitted conduct “just in an unguided way under 3553(a).” See *Feb. 2023 Public Hearing*, *supra* note 4, at 2:44:15–2:44:47. Defenders do not believe that a judge should consider acquitted conduct at sentencing when applying the guidelines or when applying 18 U.S.C. § 3553(a). However, the Commission’s authority to control sentencing outcomes is limited to application of the guidelines. Section 3553(a) vests significant discretion in sentencing courts to vary below and above the guidelines based on a variety of factors. While varying above the guidelines under § 3553(a) to account for acquitted conduct raises significant constitutional concerns, those concerns are for the Supreme Court to resolve.

trial and hearing the parties' arguments, will be in the best position to confront these issues as they arise, in an individualized way. For these reasons, a simple approach is the best approach. Defenders urge a bright-line prohibition on the use of acquitted conduct to apply the guidelines, and removal of the proposed limitation language at §1B1.3(c)(1).¹⁷ This approach would be the clearest for courts to apply in most cases and—as all guidelines do—permit the courts to deal with ambiguities resulting from inconsistent verdicts on a case-by-case basis.

DOJ's proposed alternative elements-based definition of acquitted conduct does not offer better workability, nor would it better address inconsistent verdicts.¹⁸ And we fear it may lead to unintended consequences. For instance, it is unclear how the DOJ's approach would apply to affirmative defense acquittals—acquittals which are generally not based on the government's failure to prove an element of the offense.

Defenders respectfully urge the Commission to: (1) prohibit the use of acquitted conduct to calculate the guideline range and remove the proposed limitation language; (2) prohibit horizontal and vertical departures and within-guideline sentences based on acquitted conduct; and (3) reject DOJ's narrow definition of acquitted conduct, including its proposed exception for acquittals unrelated to the individual's conduct and maintain the definition at proposed USSG §1B1.3(c)(2).

¹⁷ In the alternative, if the Commission believes more guidance to courts is necessary to account for anomalies such as overlapping conduct and inconsistent verdicts, we suggest that the Commission: (1) move the limitation language to an application note so as not to unnecessarily complicate and muddle the general prohibition; and (2) clarify the meaning of and purpose for the limitation, perhaps by providing examples, so as to avoid unintended consequences that undermine the ameliorative function of the new rule.

¹⁸ See DOJ Written Testimony for February 2023 Hearings, *supra* note 2, at 16. Indeed, at the public hearing on the acquitted conduct amendment, Probation Officer Jill Bushaw testified that when she first read DOJ's proposed narrow definition of acquitted conduct she was thinking, "I don't know if we have all the information to determine the type of acquitted conduct they were recommending." She expressed concerns that DOJ's proposal was not clearly defined and would lead to a "very complicated sentencing process." See *Feb. 2023 Public Hearing*, *supra* note 4, at 3:16:52–3:17:22.

**Before the United States Sentencing Commission
Public Hearing on Acquitted Conduct**

Statement of Melody Brannon,
Federal Public Defender for the District of Kansas
on Behalf of the Federal Public and Community Defenders

February 24, 2023

**Statement of Melody Brannon
Federal Public Defender for the District of Kansas
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
Public Hearing on Acquitted Conduct
February 24, 2023**

Hon. Chair Reeves, Vice-Chairs, and Commissioners: My name is Melody Brannon, and I am the Federal Public Defender for the District of Kansas. I am also a member of the Federal Defender Sentencing Guidelines Committee. I would like to thank the Commission for holding this important hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders on the use of acquitted conduct to enhance sentences (“acquitted conduct sentencing”).

Defenders wholeheartedly support eliminating the use of acquitted conduct—whether the acquittal is by a jury or a judge—to enhance sentences. As shown by Jessie Ailsworth’s experience, which I discuss below, punishing a person based on allegations rejected by the jury undermines the role of the jury and has a powerful and chilling impact on the decision to go to trial. Mr. Ailsworth’s 30-year prison sentence was driven by the court’s wholesale reliance on acquitted conduct. But the reach of this pernicious practice extends well beyond the people in Jessie Ailsworth’s position. The reverberations of that injustice affected district-wide practices in Kansas for years to follow.

While Defenders are excited by this proposal, we have concerns about the proposed limitations in §1B1.3(c)(1) that are apparently designed to account for so-called “overlapping conduct” or other anomalous scenarios. A simple, bright-line rule that prohibits the use of acquitted conduct when applying the guidelines will best safeguard sacred jury trial and due process rights and will further the purposes of sentencing. The limitations outlined in proposed §1B1.3(c)(1) are unclear, unnecessary, and undermine the policy reasons for prohibiting acquitted conduct sentencing in the first place.

Similarly, because acquitted conduct sentencing frustrates the Commission’s obligations to advance the purposes of sentencing, promote certainty and fairness in punishment, and avoid unwarranted disparities, we oppose the suggested revisions to §6A1.3 that invite courts to consider

acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guideline range is warranted.¹

Finally, the limitation on the use of acquitted conduct at sentencing should not be narrowed to exclude acquittals “unrelated to the substantive evidence” if it is to have the effect of truly protecting acquittals. Such a rule would be too complicated and invites unwarranted disparity. Also, it would invade the province of the jury to parse the basis for the acquittal to search for the jury’s reasoning. For example, the defense may present more than one theory of defense, even if those defenses are inconsistent.² And a jury may acquit on a completely different basis, without the need to explain or justify its verdict. We explain below.

I. Using acquitted conduct to enhance sentences is unsound sentencing policy.

Acquitted conduct sentencing is bad sentencing policy. The Supreme Court has described the jury as “the central foundation of our justice system and our democracy,” “a necessary check on governmental power,” “a fundamental safeguard of individual liberty,” and “a tangible implementation of the principle that the law comes from the people.”³ The jury system “over

¹ While I focus my statement on the acquitted conduct proposal, we also continue to urge the Commission to eliminate from the application of the guidelines the use of uncharged and dismissed conduct, or significantly limit its reach. *See generally* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 208-20 (1991) (identifying “serious due process issues” with the relevant conduct guideline).

² *See Mathews v. United States*, 485 U.S. 58, 63 (1988).

³ *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017); *see also United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (describing the “impressive [historical] pedigree” of the jury trial right, which was “designed ‘to guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.’” (quoting 2 J. Story, *Commentaries on the Laws of England* 343, 540-41 (1769))); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”); *cf. United States v. Brown*, 892 F.3d 385, 409 (D.C. Cir. 2018) (Millett, J., concurring) (“The genius of the Constitution’s protections for criminal defendants was to prevent tyranny [by] ensuring that an individual’s liberty could only be stripped away by a jury of his peers upon proof of a crime

the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases.”⁴

A prison sentence predicated on the very allegations that a unanimous jury of 12 rejected subverts that jury’s esteemed and deep-rooted institutional role.⁵ Acquitted conduct sentencing relegates the jury’s “not guilty” verdict—which cannot be appealed by the government and carries the constitutional protection against double jeopardy—to advisory opinion status, rather than a fundamental safeguard against oppression and ultimate declaration of a person’s guilt or innocence.⁶

Numerous judges and commentators have condemned acquitted conduct sentencing as constitutionally dubious, unsound sentencing policy, or both.⁷

beyond a reasonable doubt.”); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 241-42 (2009) (“Juries provide several benefits: they serve as a check on the government, the judiciary, and the law, and they reinforce democratic norms. The diversity, group dynamics, and neutrality of juries offer benefits in fact-finding over that of a single judge.”).

⁴ *Pena-Rodriguez*, 580 U.S. at 210.

⁵ See Ngov, *supra* note 3, at 242 (“Consideration of acquitted conduct by a judge after a jury has already deliberated sends a message that the work of the jury was unnecessary and, in turn, threatens to undermine the role the jury serves and advantages it provides over judicial fact-finding.”); *United States v. Ibanga*, 454 F. Supp. 2d 532, 541 (E.D. Va. 2006) (Kelley, J.) (“A sentence that repudiates the jury’s verdict undermines the juror’s role as both a pupil and participant in civic affairs. The juror learns that the law does not value the results of his or her participation in the judicial process and may reject it at will.”).

⁶ See Brief of Professor Douglas Berman as Amicus Curiae Supporting Petitioner at 7, *McClinton v. United States*, No. 21-1557, 2022 WL 2704759 (U.S. July 8, 2022) (“Acquittals, in these cases, are mere formal matters; acquittals in name only with no meaningful consequence or limit on the state’s effort to punish based on the very allegation the jury unanimously rejected.”).

⁷ See, e.g., See *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millet, J., concurring in the denial of rehearing en banc) (acquitted conduct sentencing reduces the “liberty-protecting bulwark” of the jury system to “little more than a speed bump at sentencing”); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) (“Permitting a judge to impose a sentence that reflects conduct the jury expressly disavowed . . . trivializes [the jury’s] principal fact-finding function. But no less significant, this judicial fact-finding deprives a defendant of adequate notice as to his or her possible sentence. This state of affairs is unfair, unjust and I believe plain unconstitutional.”); *United States v. White*, 551 F.3d 381,

Indeed, over three decades ago, the Ninth Circuit recognized that enhancing a sentence on a convicted count for allegations rejected by the jury effectively punishes for the acquitted conduct.⁸ It lamented that such punishment “pervert[s] our system of justice” and “circumvent[s] . . . statutory directive” prescribing proportional sentencing.⁹ Yet, 32 years later, this perverse affront to proportionality persists. D.C. Circuit Judge Patricia Millett recently observed, “Allowing the government to lock people up for a discrete and identifiable term of imprisonment for criminal charges rejected by a jury is a dagger pointed at the heart of the jury system and limited government.”¹⁰ Other judges have implored the Sentencing Commission to outlaw this pernicious practice.¹¹

(6th Cir. 2008) (Merritt, J., dissenting) (“[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense.”); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (“I strongly believe [that] sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”); *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) (“Although it makes no difference in this case, we believe that a defendant’s Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him. Moreover, we believe the Guidelines’ apparent requirement that courts sentence for acquitted conduct utterly lacks the appearance of justice.”); see also Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 25-27 (2016); Lucius T. Outlaw III, *Giving An Acquittal Its Due: Why a Quartet of Sixth Amendment Cases Means the End of United States v. Watts and Acquitted Conduct Sentencing*, 5 U. Denv. Crim. L. Rev. 173, 188-91 (2015); Ngov, *supra* note 3, at 263-308; Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523, 551 (1993); Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rep. 355, 356 (1992).

⁸ See *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991), *abrogated by United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

⁹ *Id.* at 851.

¹⁰ *Brown*, 892 F.3d at 408 (Millett, J., concurring).

¹¹ See, e.g., Transcript of Public Hearing Before the U.S. Sentencing Comm’n, New York, N.Y., at 42-43 (July 9, 2009) (Judge Kavanaugh); cf. *United States v. Watts*, 519 U.S. at 158 (Breyer, J. concurring) (“I join the Court’s per curiam opinion

Some district judges already reject the use of acquitted conduct to enhance sentences on policy grounds.¹² Several state high courts have held acquitted conduct sentencing runs afoul of state or federal constitutional provisions, or both.¹³ And the American Law Institute’s Model Penal Code (MPC) expressly rejects the use of acquitted conduct to formulate sentencing guidelines.¹⁴ While the MPC drafters noted their concern about the lack of constitutional safeguards at sentencing,¹⁵ they recognized that even without constitutional infirmity, acquitted conduct sentencing is “an anomaly with grave impacts upon fairness and process regularity” that is especially malevolent “when the penalty consequences attending a finding of ‘guilt’ at sentencing are identical to those that would have resulted from a formal conviction at trial.”¹⁶

Congress enacted the Sentencing Reform Act (SRA) in 1984 with an eye toward assuring “that sentences are fair both to the [individual being sentenced] and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all federal cases.”¹⁷ It created the Sentencing Commission and set forth one of its primary purposes: to establish sentencing policies and practices that “provide certainty and fairness in meeting the purposes of sentencing” and “avoid[] unwarranted

while noting that it poses no obstacle to the Sentencing Commission itself deciding whether or not to enhance a sentence on the basis of conduct that a sentencing judge concludes did take place, but in respect to which a jury acquitted the defendant.”).

¹² See, e.g., *United States v. Safavian*, 461 F. Supp. 2d 76, 83 (D.D.C. 2006) (Friedman, J.); *United States v. Coleman*, 370 F. Supp. 2d 661, 671, 673 (S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152-53, 155 (D. Mass. 2005) (Gertner, J.).

¹³ See *State v. Melvin*, 258 A.3d 1075 (N.J. 2021); *People v. Beck*, 939 N.W.2d 213, 216 (Mich. 2019); *Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997); *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987).

¹⁴ See Model Penal Code: Sentencing § 9.05(2)(b) (Am. Law. Inst., Approved 2017).

¹⁵ See Model Penal Code: Sentencing § 6B.06 (Comment) (Am. Law. Inst., Proposed Official Draft 2017).

¹⁶ *Id.*

¹⁷ S. Rep. 98-225, 98th Con., 2d Sess. at 39 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 3182, 3222.

sentencing disparities.”¹⁸ As Defenders explained to the Commission in our September 2022 Annual Letter, acquitted conduct sentencing frustrates this purpose.¹⁹

Sentencing hearings lack the evidentiary, procedural, and constitutional protections of trials. The rules of evidence (especially the rule against hearsay), the right to confront witnesses, the exclusionary rule, unanimous multiple factfinders, and the proof “beyond a reasonable doubt” standard—none of these protections apply at federal sentencing hearings, which often devolve into brief, informal proceedings by proffer and pronouncement.²⁰ The use of acquitted conduct to enhance sentences in these circumstances is antithetical to basic notions of certainty and fairness to the sentenced individual and undermines public respect for the sentencing process and the federal judicial system.²¹ It also leads to unwarranted disparities because

¹⁸ 28 U.S.C. § 991(b)(1)(B). The guidelines the Commission promulgates must similarly give “particular attention” to these requirements. *See* 28 U.S.C. § 994(f).

¹⁹ *See* Defenders’ Annual Letter to the Sentencing Commission 6-8 (Sept. 14, 2022).

²⁰ *See* Outlaw, *supra* note 7, at 179-80; Ngov, *supra* note 3, at 239; Reitz, *supra* note 7, at 548-49.

²¹ *See United States v. Mateo-Medina*, 845 F.3d 546, 554 (3d Cir. 2017) (“[C]alculating a person’s sentence based on crimes for which he or she was not convicted undoubtedly undermines the fairness, integrity, and public reputation of judicial proceedings.”); *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996) (“[A]s a matter of public perception and acceptance, [acquitted conduct sentencing] can often invite disrespect for the sentencing process.”); *Coleman*, 370 F. Supp. 2d at 671 n. 14 (“[C]onsideration of acquitted conduct has a deleterious effect on the public’s view of the criminal justice system. A layperson would undoubtedly be revolted by the idea that, for example, a ‘person’s sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct for which he has been acquitted.’” (quoting *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring))); *cf. Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“Community participation in the administration of the criminal law [is] not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.”); Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth*, 39 Ga. L. Rev. 895, 945 (2005) (“Because juries are generally perceived to be neutral and because social science research shows that even losing disputants will accept the outcome if they believe the process was fair, juries help guarantee acceptability for the parties, as well as for the community.”).

some judges accept, and others reject, acquitted conduct sentencing.²² For those who accept it, unwarranted disparities manifest in treating individuals convicted of the same offense dissimilarly, and unwarranted similarities manifest in treating individuals acquitted of an offense similarly to those convicted of the same offense.²³

In addition to providing certain and fair sentencing policies and guarding against unwarranted disparities, the Commission is statutorily required to “independently develop a sentencing range that is consistent with the purposes of sentencing” outlined in 18 U.S.C. § 3553(a).²⁴ Yet, acquitted conduct sentencing conflicts with this obligation, too.²⁵ It “risks creating a society that does not respect the law,” is an ineffective deterrent because most people are unaware that sentences can be increased for acquitted conduct, and is unlikely to significantly enhance public safety.²⁶ And while the policy may be facially neutral, in practice it disproportionately impacts racial and ethnic minorities.²⁷ “[M]ore [B]lack and ethnic minority defendants have acquitted conduct used against them under the broad relevant conduct provisions of the Guidelines than white defendants; as a result, the acquitted conduct may be used as an unintended proxy for racial disparagement.”²⁸ This undermines the Commission’s obligation to ensure that the sentencing guidelines and policy statements are racially neutral.²⁹

Acquitted conduct sentencing also dangerously elevates prosecutorial power. The specter of acquitted conduct sentencing encourages prosecutors to overcharge, knowing if they can get a conviction on one count, they will be granted a “second-bite at the apple of punishment” at sentencing “under

²² See Defenders’ Letter *supra* note 19, at 8; see also Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John’s L. Rev. 1415, 1462 (2011); Outlaw, *supra* note 7, at 180.

²³ See Defenders’ Letter, *supra* note 19, at 7-8.

²⁴ See 28 U.S.C. § 994(m).

²⁵ See Ngov, *supra* note 3, at 295-308; Orhun Hakan Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: “Kafka-esque,” “Repugnant,” “Uniquely Malevolent” and “Pernicious”?* 54 Santa Clara L. Rev. 675, 706-09 (2014).

²⁶ See Ngov, *supra* note 3, at 296-304.

²⁷ See Yalincak, *supra* note 25, at 709-10.

²⁸ *Id.*

²⁹ See 28 U.S.C. § 994(d).

circumstances that substantially disfavor the defendant.”³⁰ Thus, it tips the scales of an already imbalanced legal system even further in favor of the prosecution. It is impossible to quantify the coercive effect of acquitted conduct sentencing on an individual’s decision whether to exercise their constitutionally protected right to a jury trial.³¹ My personal experience, practicing for 25 years in the district of Kansas after Jessie Ailsworth was sentenced, confirms this reality.

The chorus of criticism against this policy and the Commission’s three previous proposals to eliminate acquitted conduct sentencing make clear that this amendment is long overdue.³² As the lambasting has grown louder over the years, the Commission is obligated under the SRA to set new sentencing policy that reflects this “advancement in knowledge . . . relate[d] to the criminal justice process.”³³ Prohibiting acquitted conduct sentencing would carry out that statutory duty, while bringing greater legitimacy,

³⁰ Outlaw, *supra* note 7, at 179; *see also* Reitz, *supra* note 7, at 521 (“[T]he relitigation of acquittal counts at sentencing adds a substantial burden on defendants convicted of some charges and acquitted of others. Acquittal charges must be defended twice, and the defense must be more vigorous the second time around because the available procedures are more spare.”).

³¹ *See Bell*, 808 F.3d at 929 (Millet, J., concurring in the denial of rehearing en banc) (“[F]actoring acquitted conduct into sentencing decisions imposes almost insurmountable pressure on defendants to forgo their constitutional right to a trial by jury. Defendants will face all the risks of conviction, with no practical upside to acquittal unless they run the board and are absolved of *all* charges.”); *see also* Brief for the National Ass’n of Federal Defenders & Families Against Mandatory Minimums as Amici Curiae Supporting Petitioner at 9, *McClinton v. United States*, No. 21-1557, 2022 WL 2704759 (U.S. July 8, 2022) (“A defendant’s typical incentive for rejecting a plea offer is the prospect that she will obtain a more favorable result if she prevails at trial. But punishing acquitted conduct means defendants often cannot reap the benefits of acquittal. In fact, as a practical matter, it threatens *harsher* outcomes for defendants who secure partial acquittals: They are sentenced as if they admitted guilt on every count, but with none of the sentencing breaks that attend a guilty plea.” (citation omitted)).

³² *See* 62 Fed. Reg. 15201 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992).

³³ 28 U.S.C. § 991(b)(1)(C); *see also* 28 U.S.C. § 994(o) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”).

transparency, respect, and fairness to the federal system. Below, we highlight three stories of persons impacted by acquitted conduct sentencing.

II. Using acquitted conduct to enhance sentences leads to unjust results.

The cases of Erick Osby and Christian Nieves highlight the unwarranted and unfair disparities caused by acquitted conduct sentencing. On May 31, 2019, a jury acquitted Erick Osby, a Black man in his mid-twenties, of five of seven drug and weapon counts.³⁴ At sentencing on the two counts of conviction, the court disregarded the jury's acquittals and used that alleged conduct to calculate the guideline range.³⁵ The sentencing court felt compelled to "follow the law. . . and allow acquitted conduct to be at least considered."³⁶ This "consideration" increased Erick's guideline range from 24 to 30 months, based solely on the counts of conviction, to 87 to 108 months based on the whole of the government's allegations at trial.³⁷ Erick was sentenced to 87 months in prison. Erick has now exhausted the appellate process. His petition for a *writ of certiorari* was denied in October 2021.³⁸ Erick is 28 years old and remains confined at FCI Beckley.³⁹ Had the court honored the jury's verdict, Erick would likely be a free man today.

³⁴ Counts one through four of the indictment stemmed from a police search of a hotel room on September 18, 2018, that allegedly uncovered drugs, money, and a firearm. Counts five through seven stemmed from a traffic stop and car search, on September 27, 2018, that allegedly uncovered another gun, more money, and more drugs. *See United States v. Osby*, No. 4:19-cr-9, ECF No. 1. Erick was acquitted of both gun charges (possession of a firearm in furtherance of drug trafficking) and acquitted of the possession with intent to distribute charges related to the hotel search. *See id.*, ECF No. 58 (verdict form). He was convicted only of possession with intent to distribute the drugs found in the car on September 27, 2018. *See id.*

³⁵ *See United States v. Osby*, No. 4:19-cr-9, ECF No. 84 (transcript of sentencing hearing).

³⁶ *Id.*, ECF No. 84, at 17.

³⁷ *See id.*, ECF No. 84, at 59.

³⁸ *See id.*, ECF No. 96 (text entry).

³⁹ *See* BOP Inmate Locator Service, available at <https://www.bop.gov/inmateloc/> (search by Register No. 93119-083) (last checked February 9, 2023); *see also United States v. Basher*, 629 F.3d 1161, 1165 n.2 (9th Cir. 2011) (taking judicial notice of publicly available BOP Inmate Locator data).

Christian Nieves, in contrast, benefited from a sentencing judge who recognized that acquitted conduct sentencing is bad policy.⁴⁰ On April 23, 2021, a jury found Christian, a Latino man, not guilty of conspiracy to commit witness tampering (count four), but guilty of witness retaliation (count one).⁴¹ At sentencing, the government asked the court to increase Christian's guideline range based on the witness tampering allegation rejected by the jury at trial.⁴² Refusing to substitute its judgement for the jury's, the court denied the government's request, sentencing Christian to 36 months in prison.⁴³

Erick and Christian's cases not only exemplify the unwarranted sentencing disparities that result from permitting acquitted conduct sentencing when applying the guidelines,⁴⁴ they display the direct and harmful impact of acquitted conduct sentencing on Erick Osby and others who exercise their constitutional right to a jury trial.

Acquitted conduct sentencing also has an indirect, chilling effect on the exercise of the sacred right to be tried by a jury that extends far beyond any one case. Take, for instance, what happened in my district after Jessie Ailsworth was sentenced to 30 years in prison for an expansive crack cocaine conspiracy despite the jury's determination that he played a very minor role.

In 1994, Jessie Ailsworth was charged with a far-ranging conspiracy to distribute crack cocaine spanning 13 months and involving six other people, in violation of 21 U.S.C. § 846. He was also charged with dozens of other drug- and gun-related crimes.⁴⁵ Jessie chose to have a jury trial.⁴⁶ His jury was thoughtful and deliberate in their verdict. Jury deliberations lasted

⁴⁰ We reviewed a copy of the sentencing transcript where the judge rejected, as a policy matter, the use of acquitted conduct to enhance Mr. Nieves's guideline range.

⁴¹ See *United States v. Nieves*, No. 1:19-cr-354, ECF No. 107 (verdict form).

⁴² See *id.*, ECF No. 134, at 3-6 (transcript of sentencing).

⁴³ See *id.* at 36. Christian's conviction was recently overturned on appeal for errors during the *voir dire* process. See *United States v. Nieves*, 58 F.4th 623 (2d Cir. 2023).

⁴⁴ Cf. 28 U.S.C. §§ 991(b)(1)(B); 994(f).

⁴⁵ See *United States v. Ailsworth*, No. 5:94-cr-40017, ECF No. 287 (second superseding indictment).

⁴⁶ See *id.*, ECF No. 719 (minute sheet of jury trial).

several days during which the jury submitted numerous questions to the court. Finally, the jury returned a partial verdict that exonerated Jessie of 28 of the 37 counts.⁴⁷ And although the jury ultimately convicted on the top conspiracy count,⁴⁸ they wrote a note on the bottom of the verdict form limiting Jessie's involvement to the sale of 33.81 grams of crack cocaine in exchange for food stamps.⁴⁹

At sentencing on December 12, 1996, the presentence investigation report (PSR) calculated a guideline range that included the acquitted conduct and the government advocated for a life sentence, which was within the enhanced range.⁵⁰ In other words, without presenting additional testimony or evidence, the government asked the sentencing court to substitute its fact-finding judgement for that of Jessie's impartial and unanimous jury acquittal.⁵¹ The sentencing court overruled Jessie's objections to the acquitted conduct drug weight and sentenced Jessie to 30 years in prison, assessing a guideline range of 360 months to life in prison based on facts rejected by the jury.⁵² This was 25 years longer than any of his co-defendants, who opted to plead guilty, cooperate with the government against Jessie, or both.⁵³

⁴⁷ See *id.*, ECF No. 797 (sentencing transcript on file with author).

⁴⁸ Jessie was found guilty of conspiracy to distribute crack cocaine in count 1. That count specifically alleged 1,947.58 grams of crack cocaine. At sentencing, all parties understood that the jury's finding limited the scope of Jessie's participation in the conspiracy to the date November 19, 1993 (the conduct alleged in counts 26 through 28) because the jury wrote on the verdict form, "as related to counts # 26, 27, and 28 on 11/19/93 only." The jury hung on counts three and twelve. The jury convicted him of one other drug count (count 6) and two food stamp counts (counts 7 and 9). At sentencing all parties referred to the conduct alleged in the remaining counts that would have made up the remainder of the 1947.58 grams as acquitted conduct. The verdict form was, in some respects, treated like a special verdict form. The fact that the jury returned a verdict of guilty to count one, limiting the scope of Jessie's participation to approximately 33.81 grams, was not in dispute at the time of sentencing.

⁴⁹ See *id.*, ECF No. 985, at 3 (motion to reduce sentence).

⁵⁰ I reviewed the PSR and sentencing transcript when preparing these comments.

⁵¹ See *Ailsworth*, *supra* note 45, at ECF No. 797

⁵² See *id.*; USSG §2D1.1(c)(6) (1994).

⁵³ See *Ailsworth*, *supra* note 45, at ECF No. 797.

Jessie's case is not simply a tale of injustice for one man.⁵⁴ His case is an example of the daunting effect of acquitted conduct sentencing on those who wish to exercise their constitutional right to trial. I knew Jessie's story long before I became the Federal Defender and before our office represented him in First Step Act litigation in 2019. For years, Jessie's success at trial and concomitant loss at sentencing was the lesson that federal court was no place for a jury trial. Jessie's case was the example drilled into my head as a new Assistant Federal Public Defender that trial in federal court was an all-or-nothing game. It was the example we repeatedly, and to my great shame and regret today, used to convince clients to plead guilty rather than risk a trial, regardless of the strength of their defense.⁵⁵ I can only conclude that his 30-year sentence, after the jury gutted the prosecution's case, emboldened prosecutors to aggressively and indiscriminately overcharge, knowing they only needed to secure a conviction on one count to request a sentence based on every allegation.

While we are able to talk about the identifiable harm or threat of harm acquitted conduct sentencing posed in these three cases, it is impossible to capture or calculate the damage done to so many clients who should have and could have gone to trial—in our system that was conceived and based on jury

⁵⁴ Although, indeed, Jessie's case involved multiple layers of personal injustice. In addition to being sentenced for acquitted conduct, Jessie was punished for crack cocaine distribution during the era of the now universally repudiated 100:1 crack to powder cocaine quantity ratio. Beginning in 1995, the Commission urged Congress to abandon the sentencing structure that treated the two forms of cocaine differently and resulted in disproportionately severe sentences for people of color for over two decades. In 1995, the Commission issued a special report to Congress stating it "firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress." USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy, Executive Summary* xii-xv & 192 (1995). The ratio has since been reduced to 18:1. Today, a drug offense involving approximately 34 grams of crack would receive a base offense level (BOL) of 24. In 1996, when Jessie was sentenced, a drug offense involving 34 grams of crack would have received a BOL of 28. See USSG §2D1.1 (Nov. 1, 1995). However, because the court used acquitted conduct, Jessie's BOL was 38.

⁵⁵ Obviously, this does not apply in single-count indictments. But in federal court, as least in our district, those are mostly felon-in-possession or immigration cases. Our bread-and-butter drug-weapon-conspiracy cases are almost always multiple count indictments. Most white-collar and child pornography cases are also multi-count indictments that carry the same risk of acquitted conduct sentencing.

trials—but did not, because of the risks writ large, exemplified by Jessie Ailsworth’s experience, and the experiences of people like him in other districts.

Jessie served 25 years before he was released under the First Step Act.⁵⁶ In June 2022, the district court granted Jessie’s unopposed motion for early termination of his supervised release term.⁵⁷ Today, Jessie has been out of custody for 4 years, and is still adjusting to life since his release. He has his commercial driver’s license and drives a truck for a living. He lost his only brother while he was in prison. He missed watching his nephews and other family members grow up. More importantly, during those 25 years when I was building my career as a Federal Defender and raising my own two children, Jessie lost the chance to have children of his own. There is not enough room or time to talk about everything that Jessie lost during those 25 years he served in prison for the very crimes he didn’t commit, according to the unanimous jury of 12 who heard and rejected the government’s accusation.

III. The Commission should eliminate, rather than limit, the use of acquitted conduct to determine the guideline range.

The Commission should eliminate, rather than limit, the use of acquitted conduct to calculate the sentencing guideline range. Section 1B1.3(c)(1) of the proposal potentially allows acquitted conduct to be used to determine the guideline range under two unusual circumstances. Namely, “acquitted conduct” must not be used to calculate the sentencing range “unless such conduct (A) was admitted by the defendant during a guilty plea colloquy; or (B) was found by the trier of fact beyond a reasonable doubt”⁵⁸ These two limitations are unnecessary, opaque, and may lead to unintended consequences. A clearer rule would state: “Acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range.” This language and the definition of acquitted conduct at

⁵⁶ See *Ailsworth*, *supra* note 45, at ECF Nos. 985 and 986.

⁵⁷ See *id.* at 994.

⁵⁸ See 88 Fed. Reg. 7180, 7225 (2023) (“2023 Proposed Amendments”).

proposed §1B1.3(c)(2) provide sufficient guidance to courts to apply the guideline.

The Commission raises concerns about the scope of a jury's acquittal where there is "overlapping conduct" among the counts of conviction and acquittal. These scenarios are likely to be so rare as to be anomalous. And policy should not be built on anomalies. For instance, courts and parties attempt to guard against inconsistent verdicts through arguments and instructions to the jury. In most cases, the preclusive effect of the jury's verdict will be clear. If anomalies occur, courts are in the best position to decipher the parameters of the jury's "guilty" and "not guilty" verdict, after hearing arguments from both sides, and to sentence accordingly under § 3553(a). Creating special rules in anticipation of anomalies dilutes and muddles the guideline in the face of strong policy reasons for a general prohibition. Moreover, the Commission can revisit the rule, if necessary, once it has been in place for some time and after receiving feedback from courts and commentators about its workability. This is how the guideline amendment process was intended to work.⁵⁹

IV. The policy reasons to eliminate acquitted conduct from the guideline calculation apply equally to within-guideline and vertical and horizontal departure sentences.

In addition to the changes proposed at USSG §1B1.3 that define and limit acquitted conduct sentencing, the Commission proposes to amend the policy statement at §6A1.3 (Resolution of Disputed Factors). The proposal reads:

Acquitted conduct, however, generally should not be considered relevant conduct for purposes of determining the guideline range. *See* subsection (c) of §1B1.3 (Relevant Conduct). *Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a

⁵⁹ *See Rita v. United States*, 551 U.S. 338, 350 (2007) ("The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.").

Point Within the Guideline Range or Departing from the Guidelines)).⁶⁰

The Commission should prohibit the consideration of acquitted conduct when calculating the guidelines—both when determining the initial range, and when determining whether any departures apply. The many policy reasons against using acquitted conduct to increase the offense level apply to *all* sentencing determinations, including *all* applications of the guidelines. There is no reason for the Commission to invite courts to depart upward or sentence at the top of the range to account for acquitted conduct that is excluded from calculating the offense level. The proposed italicized language creates an unnecessary exception to the Commission’s laudable new rule and charts a potential end-run around the salutary effect of the relevant conduct amendment.

United States v. Brady, 928 F.2d 844 (9th Cir. 1991) is a prime example of the injustice of using acquitted conduct to vertically depart (along the offense level axis) from the guideline range. Leon Brady was charged with first degree murder and assault with intent to commit murder.⁶¹ At trial, he was acquitted of the greater offenses and convicted of voluntary manslaughter and assault with a dangerous weapon.⁶² The sentencing judge departed above the 51 to 63-month guideline range and sentenced Mr. Brady to 180 months, in part because the court believed Mr. Brady was guilty of the greater offenses.⁶³ The Ninth Circuit reversed. It held, in relevant part, that the *upward departure* to account for acquitted conduct was improper because it effectively overruled the jury’s verdict, bringing it outside the bounds of the relevant conduct guideline.⁶⁴

⁶⁰ See 2023 Proposed Amendments, at 7225.

⁶¹ See *Brady*, 928 F.2d at 845.

⁶² See *id.* at 845-46.

⁶³ See *id.* at 846.

⁶⁴ See *id.* at 851-52; see also *United States v. Brown*, 892 F.3d at 409 (Millet, J., concurring) (“[U]sing [acquitted] conduct to single a defendant out for distinctively severe punishment—an *above-Guidelines sentence*—renders the jury a sideshow. Without so much as a nod to the niceties of constitutional process, the government plows ahead incarcerating its citizens for lengthy terms of imprisonment without the inconvenience of having to convince jurors of facts beyond a reasonable doubt.” (emphasis added)); *Bell*, 808 F.3d at 931 (Millet, J., concurring in the denial of

United States v. Fonner, 920 F.2d 1330 (7th Cir. 1991), provides a compelling example of the injustice of using acquitted conduct to horizontally depart (along the criminal history axis) from the guideline range. Barron Fonner was acquitted of murder in 1972 when the jury concluded unanimously that he acted in self-defense.⁶⁵ More than 15 years later, Mr. Fonner was convicted in federal court of mailing threats, under 18 U.S.C. § 876.⁶⁶ Although his federal sentencing range for the threats conviction was only 30 to 37 months, the district judge departed to the statutory maximum of 10 years, in part because he believed Mr. Fonner’s criminal history score underrepresented his record, under USSG §4A1.3, because the 1972 *acquittal* was not scored as criminal history.⁶⁷ The Seventh Circuit remanded for resentencing because the district court did not adequately justify the extent of the departure.⁶⁸ But it endorsed the district court’s use of Mr. Fonner’s jury acquittal to depart above his range based on the different burdens of proof at trial and sentencing, and existing circuit precedent.⁶⁹

18 U.S.C. § 3661 does not compel the Commission to carve departures out of an acquitted conduct prohibition. Section § 3661 provides: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”⁷⁰ But the “no limitation” language should not be read

rehearing en banc) (explaining that recent Supreme Court decisions “cast substantial doubt on the continuing vitality” of imposing “dramatic *departures* from the Sentencing Guidelines range based on acquitted conduct” (emphasis added)).

⁶⁵ *See Fonner*, 920 F.2d at 1331.

⁶⁶ *See id.*

⁶⁷ *See id.* Courts may depart upward “[i]f reliable information indicates that the defendant’s criminal history category substantially underrepresents the likelihood that the defendant will commit other crimes.” USSG §4A1.3(a). “Prior similar adult criminal conduct not resulting in a criminal conviction” is given as an example of the information that may form the basis of the departure. *Id.* §4A1.3(2)(E).

⁶⁸ *See id.* at 1332.

⁶⁹ *See id.* at 1333.

⁷⁰ 18 U.S.C. § 3661.

expansively. Otherwise, it “negates the entire Guidelines enterprise”⁷¹ and conflicts with other portions of the SRA.⁷²

A primary purpose of the SRA was to “cabin the discretion of all [sentencing] judges” to remedy what Congress viewed as “an unjustifiably wide range of sentences.”⁷³ In line with this purpose, the guidelines and SRA limit information judges consider at sentencing related to the convicted person’s “background, character, and conduct” in numerous ways.⁷⁴ For instance, §5K1.1 and the SRA require a government motion before a court can depart based on substantial assistance to authorities.⁷⁵ The guidelines list various “specific offender characteristics”—such as educational/vocational skills, drug/alcohol/gambling addiction, family responsibilities, and lack of guidance as a youth—that courts must generally disregard in deciding whether to *depart*.⁷⁶ Prior convictions deemed minor or too remote in time are excluded from the criminal history calculation.⁷⁷ Likewise, a prior arrest record, alone, is not grounds for upward departure based on inadequate Criminal History Category.⁷⁸ More generally, the guidelines limit the weight courts accord specific factors through its mathematical system of adding and subtracting points and levels. Read literally, § 3661 would even seem to invalidate the well-recognized “preponderance of the evidence” evidentiary burden at sentencing—a limitation on the court’s ability to base sentencing

⁷¹ Johnson, *supra* note 7, at 37.

⁷² Courts have argued that instead of *effectuating* statutory goals and requirements, acquitted conduct sentencing *frustrates* them. *See White*, 551 F.3d at 395 (Merritt, J., dissenting) (the plain language of the Sentencing Reform Act requires a defendant to be “convicted” of the conduct that forms the basis for the sentence); *Ibanga*, 454 F. Supp. 2d at 539 (punishing for acquitted conduct contravenes 18 U.S.C. § 3553(a)(2)(A)’s requirement that the sentence promote respect for the law and results in just punishment for the offense of conviction).

⁷³ *United States v. Watts*, 519 U.S. at 161 (Stevens, J., dissenting) (quoting S. Rep. No. 98-225, p. 38 (1983)).

⁷⁴ 18 U.S.C. § 3661.

⁷⁵ *See* USSG §5K1.1; 18 U.S.C. § 3553(e).

⁷⁶ *See* USSG ch. 5, pt. H. We note that while the guidelines discourage or prohibit consideration of these factors as grounds to *depart*, courts can (and often do) consider these factors as reasons to *vary* below the guidelines. *See* 18 U.S.C. § 3553(a).

⁷⁷ *See* USSG §4A1.2.

⁷⁸ *See* USSG §4A1.3(a)(3).

decisions on unreliable evidence. Thus, § 3661 “pose[s] no threat to the Commission’s authority to determine the content of the Guidelines, including whether sentencing courts [can] use acquitted conduct.” ⁷⁹

Finally, an uneven rule that treats guideline calculations and departures/within-guideline determinations differently does not fully rectify the unwarranted disparities problem.⁸⁰ While the proposed §1B1.3 amendment mitigates this risk, some judges may still be inclined to consider acquitted conduct when applying the guidelines, even if it is not part of the offense level calculation, either by imposing a sentence at the high end of the range or by way of upward departure.

Although the Supreme Court has yet to invalidate acquitted conduct sentencing altogether, and courts may still consider acquitted conduct when imposing a final sentence under § 3553(a), the Commission should not encourage this practice. Thus, we urge the Commission to delete the proposed statement that “*Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted.*” We further urge the Commission to amend §§1B1.4, 4A1.3 (which the district court applied to Mr. Fonner’s case), and 5K2.0 (which the district court applied to Mr. Brady’s case) to make clear that acquitted conduct may not be considered at any point when applying the guidelines.

⁷⁹ Johnson, *supra* note 7, at 41. The House Report on the predecessor version of § 3661 cites the Supreme Court’s decision in *Williams v. New York*, 337 U.S. 241 (1949) to explain its enactment. *See United States v. Grayson*, 438 U.S. 41, 50 n. 10 (1978) (citing H.R. Rep. No. 91-1549, at 63 (1970)). Thus, § 3661 can be understood to codify the holding in *Williams* that due process does not mandate application of the rules of evidence and confrontation clause at sentencing. *See Williams*, 337 U.S. at 250-51; *see also Watts*, 519 U.S. at 160 (Stevens, J., dissenting) (“In 1970, during the era of individualized sentencing, Congress enacted the statute now codified as 18 U.S.C. § 3661 to make it clear that otherwise inadmissible evidence could be considered by judges in the exercise of their sentencing discretion.” (Emphasis added)).

⁸⁰ *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f) (describing one mission of the Commission as establishing policies that avoid unwarranted disparities in sentencing similarly situated individuals).

V. The limitation on the use of acquitted conduct at sentencing should not be narrowed based on the nature of the acquittal.

Finally, the Commission seeks comment on whether the limitation on the use of acquitted conduct is too narrow or too broad. As an example, the Commission asks whether it should “account for acquittals for reasons such as jurisdiction, venue, or statute of limitations, that are otherwise unrelated to the substantive evidence?”⁸¹

Again, the Commission should not narrow the rule to account for outlier scenarios. “A jury’s verdict of acquittal represents the community’s collective judgment regarding all the evidence and arguments presented to it.”⁸² It is “a legal certification [that] an accused person is not guilty of the charged offense.”⁸³ In our justice system, an acquittal is both “final, the last word on a criminal charge”⁸⁴ and “unassailable.”⁸⁵ Creating entire categories of acquittals exempt from the amendment diminishes the force and finality of the verdict, erodes the safeguards of the Fifth and Sixth Amendments, and undermines the ameliorative function of the proposed rule by sanctioning punishment for an acquitted offense in certain circumstances.

Any attempt to define exempt categories of acquittals “otherwise unrelated to the substantive evidence” risks over-complicating the guideline calculation. Courts would need to attempt to ascertain the basis for the jury’s

⁸¹ See 2023 Proposed Amendments, at 7225.

⁸² *Yeager v. United States*, 557 U.S. 110, 122 (2009).

⁸³ Black’s Law Dictionary 30 (11th ed. 2019).

⁸⁴ *Bravo-Fernandez v. United States*, 580 U.S. 5, 9 (2016) (citation and quotation marks omitted).

⁸⁵ *Yeager*, 557 U.S. at 123.

verdict⁸⁶ and whether it implicates “substantive evidence”.⁸⁷ It potentially opens the door to consideration of acquittals based on affirmative defenses, such as duress or entrapment. It would be further complicated if multiple or even inconsistent defenses were presented. Disagreement among judges on these questions, or whether the carve-out was a proper policy choice to begin with,⁸⁸ can lead to disparities in sentencing similarly situated individuals. A simple, clear, inclusive prohibition best promotes the policies for the rule, promotes more uniformity, and is easiest to apply.

VI. Conclusion

Defenders commend the Commission for its salient work on this amendment. We encourage the Commission to: (1) eliminate, rather than just limit, the use of acquitted conduct to calculate the guideline range; and (2) prohibit horizontal and vertical departures and within-guideline sentences based on acquitted conduct. We also urge against any narrowing of the limitation on the use of acquitted conduct to account for acquittals “unrelated to the substantive evidence.” If the Commission is going to end acquitted conduct-based sentencing, it should do so fully and unequivocally. The pursuit of both the reality and appearance of justice demands no less.

⁸⁶ This task is not always easy. Jury deliberations have been described as a “black box” where “the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review.” *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008). With limited exceptions, see Fed. R. Evid. 606(b)(2); *Pena-Rodriguez*, 580 U.S. at 225-26, the Rules of Evidence forbid courts from inquiring into juror decision-making once a verdict is rendered. See Fed. R. Evid. 606(b)(1).

⁸⁷ The “substantive” nature of the acquittal may also be the subject of dispute among judges. Cf., *United States v. Johnson*, 323 U.S. 273, 276 (1944) (“Questions of venue in criminal cases . . . are not merely matters of formal legal procedure.”); *United States v. Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J. concurring in part) (observing that the constitutional venue provisions “were adopted to achieve important substantive ends”), *rev’d on other grounds*, *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

⁸⁸ Judges can vary below the guidelines based on policy disagreements with the Commission. See *Spears v. United States*, 555 U.S. 261, 264 (2009); *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

**Federal Public and Community Defenders
Comment on Sexual Abuse Offenses Amendments
(Proposal 9)**

March 14, 2023

Federal Public and Community Defenders, along with our CJA colleagues, represent 80 to 90 percent of all individuals prosecuted in federal court. We are deeply concerned about the safety and wellbeing of our clients (and others) in federal custody. And we appreciate that the Commission seeks to address the epidemic of sexual misconduct in BOP and other custodial settings. Our testimony laid out the reasons that the Commission should stay its hand instead of drastically increasing the §2A3.3 BOL.¹ In this comment, we address matters that were raised at the February 2023 hearing on this topic.

We note that this is not the first time DOJ's mismanagement of its staff has prompted it to seek an increase in punishment. Despite previous upward ratchets to the §2A3.3 guideline and § 2243(b) statutory penalties over the years, the well-documented sex abuse problem in BOP has persisted for decades. The DOJ OIG issued a report in 2005 on the sex abuse problem within BOP.² In 2007, DOJ requested an additional increase to §2A3.3's BOL; the Commission then raised §2A3.3's BOL from 12 to 14.³ Sixteen years later,

¹ We incorporate by reference the written testimony of Heather E. Williams, submitted for the recent hearing. ("Williams Test.") It is attached to this Comment.

² See U.S. Dep't of Just., Off. of the Inspector Gen., *Deterring Staff Sexual Abuse of Federal Inmates* 3 (2005), <https://bityl.co/H97T> ("The OIG has investigated hundreds of allegations of sexual abuse of inmates by BOP staff."). This report followed the 1999 GAO report that also documented sexual misconduct in BOP. See Gov't Accountability Office, *Women in Prison: Sexual Misconduct by Correctional Staff* 2 (1999), ("1999 GAO Report"), <https://bityl.co/HAFo>.

³ Section 401 of the PROTECT Act directed, among other things, that the "Commission shall amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses under sections 2243(b)." Pub. L. No. 108-21, § 401(g), 117 Stat. 650 (Apr. 30, 2003). In 2004, DOJ urged a two-level increase in the §2A3.3 BOL, arguing, without an empirical basis, that "the 2A3 guidelines should be increased to maintain proportionality with the increases in the 2G guidelines," and recommended raising the BOL from 9 to 12. Deborah Rhodes, DOJ Comments Regarding 2004 Proposed Amendments at 13 (Mar. 1, 2004), <https://bit.ly/3ZYDVEh>. The Commission accordingly raised the §2A3.3 BOL from 9 to 12 in 2004, citing to the PROTECT Act. See USSG App. C, Amend 664 (Nov. 1, 2004), <https://bit.ly/3mCyZXk>. In 2007, DOJ requested that the Commission raise the BOL to 20. See Benton Campbell, DOJ Comments Regarding 2007 at 6 (March 30, 2007), <https://bit.ly/3l7UOxM>. Instead, the Commission raised the BOL to 14, noting that "section 207 of the Adam Walsh Act increased the statutory maximum term of imprisonment under 18 U.S.C. § 2243(b) from 5 years to 15 years for the sexual abuse of a person in official detention or under custodial authority." USSG app. C, Amend. 701 (Nov. 1, 2007), <https://bit.ly/3YG641W>.

DOJ and BOP have still not meaningfully addressed the ongoing misconduct within their own facilities,⁴ yet DOJ asks again for an increase in severity of punishment, without adequately explaining why this time it will be different.

The Commission asked genuinely good questions at the hearing. And certain misstatements by DOJ's witness at the hearing underscore the importance of pausing to gather data and accurate information.

I. DOJ and BOP have the power to prevent this conduct.

Despite the significant body of literature to the contrary, at the February 24, 2023 hearing, the DOJ witness speculated that the well-accepted research on deterrence might not apply in the specific context of §2A3.3 cases because prison employees are a discrete community to whom DOJ could broadcast a guideline increase through “supervisory channels.”⁵

Although this argument is contradicted by the well-established body of general deterrence literature,⁶ DOJ's emphasis on the “special context” of employee-driven sexual assaults does contain one kernel of insight: it highlights that DOJ and BOP are in a unique position to prevent this conduct from occurring in the first place.

DOJ cannot implement surveillance and management policies in every public space in the nation to prevent unknown future crimes such as robbery. By contrast, it could utilize the “supervisory channels” in its own facilities to curb the epidemic of abuse and culture of impunity that pervade them.

⁴ This problem requires BOP to make sweeping systemic policy and culture changes—changes they claim to be working to implement. *See Williams Test. supra* note 1 at 3; *see also* Staff Rep. S. Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs., *Sexual Abuse of Female Inmates in Federal Prisons*, at 1 (2022), <https://bit.ly/H9sF> (“Senate Sexual Abuse Report”); U.S. Dep't of Just., *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* at 6 (2022), <https://bit.ly/GxJW> (“DOJ Sexual Abuse Report”).

⁵ *See* Oral Testimony of Principal Associate Deputy Attorney General Marshall Miller (Feb. 24, 2023), <https://bit.ly/3Jz23bt> (“Miller Test.”).

⁶ *See* Daniel S. Nagin, Deterrence, *Reforming Criminal Justice Vol 4: Punishment, Incarceration, and Release*, Vol. 4 20 (2017), <https://bit.ly/3LhOxdj>.

Yet even though BOP already has the ability to closely monitor its employees, thoroughly surveil the premises, and implement systems to prevent this epidemic of abuse, it has failed to do so for decades.⁷ Both Congress and the DOJ Working Group have recently emphasized that BOP still has far to go to effectively implement those systems.⁸ DOJ should focus on implementing these systemic controls using their supervisory channels to keep victims safe, not on pursuing enhancements to the sentencing guidelines which have yet to deter misconduct.⁹ DOJ's unsupported deterrence argument serves only to illustrate the troubling institutional focus on punishment instead of front-end prevention to keep our clients safe in custody.¹⁰

⁷ See 1999 GAO Report at 2 (recommending that BOP “develop systems and procedures for monitoring, analyzing, and reporting allegations of staff-on-inmate sexual misconduct in federal prisons.”).

⁸ See Williams Test., *supra* note 1 at 8–10 (summarizing recommended institutional reforms in BOP). See also Michael Balsamo & Michael R. Sisak, *AP investigation: Women's prison fostered culture of abuse*, AP (Feb. 6, 2022), <https://bitly.co/GxJ2>.

⁹ See *id.* DOJ's witness also relayed an anecdote about the former FCI Dublin chaplain prosecuted in *United States v. Highhouse*, who told his victim that he would face only a “slap on the wrist.” According to DOJ's witness, this comment showed “awareness in the population that there are light penalties applicable here.” But DOJ's own sentencing memorandum in *Highhouse* does not support this argument; that memorandum shows that the chaplain was referring to employment consequences, not criminal penalties. Gov't Sent. Memo., *United States v. Highhouse*, 4:22-cr-00016 ECF 23 at 5 (N.D. Cal. Aug. 24, 2022); See also Miller Test., *supra* note 5. Indeed, the *Highhouse* sentencing memo underscores our basic point: employees at FCI Dublin were immersed in a culture of impunity because—in an institution where the PREA compliance officer was himself a sexual abuser—there was no *certainty* or *speed* in detection and consequences. Impunity at Dublin, and elsewhere in federal corrections, flows from culture, not any defect in §2A3.3.

¹⁰ It also wholly ignores the nearly one-third of §2A3.3 cases sentenced in the past 10 years that did not happen in BOP prisons. This analysis was performed in part using data extracted from the Commission's “Individual Offender Datafiles” spanning fiscal years 2012 to 2021, combined with publicly available information in charging documents obtained via PACER. The Commission's “Individual Offender Datafiles” are publicly available for download on its website. See USSC, Commission Datafiles, <https://bitly.co/HBGG>. Of the 65 cases sentenced nationwide under primary guideline §2A3.3 between fiscal years 2012 and 2021, charging documents indicate that roughly one-third involved conduct that occurred in a non-BOP facility

The DOJ's highest priority should be a commitment to protecting our clients, and of course all of BOP's charges, from sexually abusive corrections employees and law enforcement officers, but its statements to the Commission during the February 24, 2023 hearing, belie that commitment. The Commission could, for example, ensure that victims of sexual misconduct are able to get speedy sentence reductions via § 3582(c)(1)(A). But the DOJ remains focused on criminal prosecution, instead of quickly removing our clients out of harm's way.¹¹ As addressed in our testimony, a reactive punishment increase should not be the first response.

Prior to making any changes to §2A3.3's BOL, we urge the Commission to pause and let DOJ and BOP implement the changes they have promised. DOJ has also pledged to prioritize prosecutions, which could increase the certainty of apprehension and result in more data. In the meantime, the Commission can take other actions outside of drastically raising the BOL.¹²

II. There is a need for additional, accurate data collection.

We have asked the Commission to engage in additional data collection and analysis instead of imposing a dramatic, unstudied increase to §2A3.3's

such as DOJ or DHS-contracted private jails, immigration detention facilities, tribal jails, or military facilities. *See* USSC, Commission Datafiles, <https://bitly.co/HBGG>.

¹¹ DOJ's request comes despite significant problems in how BOP handles complaints of sexual abuse. At the hearing, the DOJ witness and chair of the Working Group tasked with addressing this type of misconduct within BOP, could not answer Vice Chair Murray's question regarding the timeline for administrative complaints. *See* Miller Test., *supra* note 5. But, the recent Senate Report found that the BOP Office of Internal affairs, which investigates staff misconduct, found has an 8,000-case backlog, with some reports pending for more than five years. *See* Senate Sexual Abuse Report, *supra* note at 3.

¹² *See* Williams Test., *supra* note 1 at 6 ("the only effective way to protect individuals from future abuse and neglect in prison is to responsibly reduce our federal prison population—moving everyone we possibly can out of harm's way") (citing Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, 35(1) Fed. Sent'g Rep. 12 (2022), <https://bitly.co/GzMJ>).

base offense level.¹³ And certain incorrect statements by DOJ's witness at the hearing showed why accurate data collection is critical.

First, at the February 24, 2023 hearing, the DOJ witness stated twice, incorrectly, that “upward departures have been occurring at an unusually high rate with respect to this guideline, over the last 5 years” and that “over the last five years 25% of [2A3.3] cases have involved upward departures.”¹⁴ This claim—like the broader impression the DOJ tried to convey that most judges generally find §2A3.3 too lenient—is not factually supported:

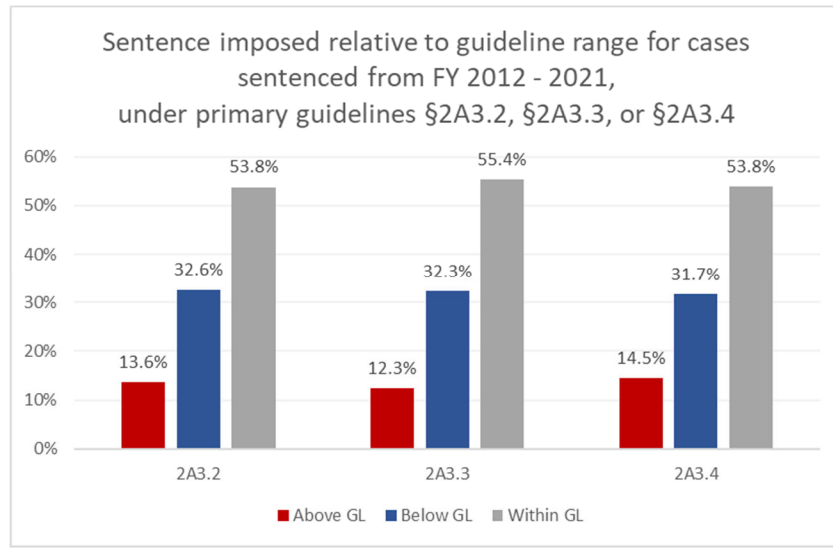
- Of the 22 cases sentenced under primary guideline §2A3.3 in the past five fiscal years, 18% involved upward departures, not 25%.¹⁵
- Although DOJ pointed to the elevated upward departure rate compared to the pool of all federal offenses, over the past ten fiscal years, the distribution of sentences in §2A3.3 cases are not outliers compared to similar sex abuse guidelines, as the following figure illustrates:¹⁶

¹³ For an individual in Criminal History Category I, increasing §2A3.3's base offense level from 14 to 22 would result in a jump of advisory guideline range from 15–21 months to 41–51 months; in other words, it would increase the low end by 173% and the high end by 143%.

¹⁴ Miller Test., *supra* note 5.

¹⁵ It is possible there was confusion between cases with a count of conviction under § 2243(b), as opposed to cases sentenced under primary guideline §2A3.3. This analysis was performed using data extracted from the Commission's “Individual Offender Datafiles” spanning fiscal years 2017 to 2021. The Commission's “Individual Offender Datafiles” are publicly available for download on its website. USSC, Commission Datafiles, <https://bitly.co/HBGG>. And a slightly greater percentage of §2A3.3-as-primary-guideline cases received a within-guidelines sentence (55%) than the percentage of within guidelines sentence (49%) across all cases sentenced nationwide from FY2017 to FY2021. *Id.*

¹⁶ See USSC, Commission Datafiles. This figure shows the distribution of sentence placement relative over the past 10 fiscal years, compared to its neighbors in the Manual, §2A3.2. (Sexual Abuse of a Minor) and §2A3.4. (Abusive Sexual Contact).



The Defenders also agree with the Practitioners Advisory Group (“PAG”), whose Chair noted that the §2A3.3 guideline encompasses a broad range of conduct and statutes of conviction. In fact, out of the 65 cases sentenced under primary guideline §2A3.3 cases over the past ten fiscal years, eight cases involved a sole substantive count of conviction under 18 U.S.C. § 1001, without a recorded conviction under § 2243(b).¹⁷ The cases also encompassed a wide range of statutes beyond § 2243(b).¹⁸

Likewise, the DOJ witness was confused as to where these offenses originate, stating that “almost all of these cases” involved BOP employees. But a review of the facts alleged in those 65 cases reveals that although nearly two-thirds of the cases arose out of BOP facilities, the rest originated in other facilities, including private contract jails and immigration detention centers.¹⁹ And the new subsection, § 2243(c), will encompass a broad range of potential offense conduct, settings, and actors.

¹⁷ See USSC, Commission Datafiles.

¹⁸ The 65 cases also included convictions under 18 USC § 1001 (falsification or false statement), 18 USC § 1153 (Major Crimes Act offenses), 18 USC § 1791 (contraband in prison), 18 USC § 2244(a)(4) (knowingly engaging in sexual contact without permission in certain prisons or custodial facilities if doing so would violate § 2243(b)), 18 USC § 2244(b) (knowingly engaging in sexual contact without permission in certain prisons or custodial facilities). And, as PAG points out, §2A3.3 is also indexed to 18 USC § 113(a)(2) in Appendix A of the Manual.

¹⁹ See *supra* note 10.

Second, the Commission should also gather more information on the interplay between the current guideline and the other proposed amendments. At the hearing, questions were also raised regarding proportionality between this guideline and its neighbor, §2A3.2 (Sex abuse of a minor). While it is a complex issue, we agree with the PAG: §2A3.3 covers a wide variety of conduct, much of which is simply different in kind from sexual abuse of a minor. This is reflected in the wide range of sentences under §2A3.3, and more study is needed to determine the proper calibration for the range of offense conduct that falls within §2A3.3.

Third, we know nothing about the offenses sentenced under § 2243(c), the new subsection indexed to §2A3.3.²⁰ The Commission should wait for the forthcoming GAO report. It should also undertake a careful analysis of sentencing for these new offenses. In addition, the DOJ witness promised to “come back with data across the board” which could also assist the Commission in its study.

In sum, Defenders urge the Commission to gather and closely evaluate the data on these offenses, as well as how §2A3.3 interacts with other relevant guidelines. Defenders urge an approach that pauses the reactive ratchet, focuses on empirical evidence, and acknowledges the importance of prevention over after-the-fact punishment.

²⁰ The subsection is so new that not only does the Commission public dataset have no information, but also an attempt to perform a PACER reports search by citation of any criminal cases brought under the new § 2243(c) subsection in 12 of the busiest districts in the country (S.D. Tex.; W.D. Tex.; D. Ariz.; S.D. Cal.; D.N.M.; C.D. Cal.; S.D.N.Y.; E.D.N.Y.; D.D.C.; S.D.Fl.; and D.P.R.) on March 4, 2023, could not be completed because there was no search by citation drop-down menu option for § 2243(c) offenses, unlike the older § 2243(a) and (b) subsections.

**Before the United States Sentencing Commission
Public Hearing on the Sexual Abuse Offenses
Amendments**

Statement of Heather E. Williams,
Federal Public Defender for the Eastern District of California,
on Behalf of the Federal Public and Community Defenders

February 24, 2023

Table of Contents

I.	Introduction	1
II.	The DOJ has abdicated its duty to protect the safety and health of those in its custody and care.....	2
III.	The Sexual Abuse Offenses amendments	6
	A. Addressing the sexual violence epidemic within DOJ institutions requires systemic institutional reform.....	8
	B. The proposed 8-level increase to §2A3.3's base offense level will not deter sexual assault.....	11
	C. The proposed increase fails to discharge the Commission's obligation to devise a rational sentencing system through a deliberative, evidence-based approach.....	12
III.	Conclusion.....	14

**Statement of Heather E. Williams
Federal Public Defender for the Eastern District of California
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
Public Hearing on the Sexual Abuse Offenses Amendments
February 24, 2023**

Honorable Chair Reeves, Vice Chairs and Distinguished Commissioners:

I. Introduction

In January, I got an email from one of my District's CJA Panel lawyers. He had a female client facing sentencing and, given she's from Sacramento, he meant to ask the sentencing judge for a recommended prison designation of FCI Dublin, the nearest federal Bureau of Prisons (BOP) women's facility. The email, entitled "*Dublin Prison also called 'Rape Club'.*" originated from his out-of-custody client who was highly concerned for her own safety if sentenced to prison. The email included several links to articles describing reported abuses by prison employees and one link to a Department of Justice (DOJ) press release describing the December 2022 guilty verdicts against a former FCI Dublin prison warden for sexual abuse of women held in custody.¹

Defenders are in a unique position in responding to this horrific issue. It easily could have been one of my clients asking the heartbreaking question: will I be safe in prison? Defenders frequently represent people who have been—or will be—victimized by prison guards, jail staff, or law enforcement, and we bear firsthand witness to the devastation and trauma wrought by these experiences. No person sentenced to federal prison should be punished

¹ See Chandra Bozelko, *When a prison is known as the 'rape club,' our justice system has a credibility problem*, USA Today (Dec. 17, 2022), <https://bitly.co/H5GO>; Bob Egelko, *Advocates, employees say abuses at Dublin prison will continue without 'real changes'*, S.F. Chron. (Dec. 12, 2022), <https://bitly.co/H5GT>; Lisa Fernandez, *Dozens of women detail rape and retaliation at Dublin prison, real reform is questioned*, KTVU FOX 2 (updated Sept. 25, 2022), <https://bitly.co/H5GY>; Press Release, U.S. Dep't of Just., *Jury Convicts Former Federal Prison Warden for Sexual Abuse of Three Female Inmates* (Dec. 8, 2022), <https://bitly.co/H5Ge>; Ray J. Garcia, *Former warden at female prison known as 'rape club' guilty of sexually abusing women behind bars*, L.A. Times (Dec. 8, 2022), <https://bitly.co/H5Gm>.

with a regime of terror and abuse. People should never emerge from prison more broken than when they entered.

But what we know from representing both victims and those accused of crimes is that the best way to protect people—like the woman whose email landed in my inbox—from being preyed on while in prison is to change the institutional culture of the federal correctional system. Ratcheting up penalties does not advance that goal.

II. The DOJ has abdicated its duty to protect the safety and health of those in its custody and care.

There is an epidemic of federal correctional officers sexually abusing and sexually terrorizing people in their custody. This represents the DOJ's moral failure to protect those in its care.² Over the past three years, the scope and severity of this misconduct has emerged in horrifying detail. These reports eventually prompted government oversight action, including the

² My remarks focus primarily on the well-documented abuse and neglect within the BOP. But the culture of carceral cruelty and abuse in government-run and contracted facilities extends well beyond the BOP. *See, e.g.,* Seth Freed Wessler, *The Justice Department Will End All Federal Private Prisons, Following a 'Nation' Investigation*, *The Nation* (Aug. 18, 2016), <https://bit.ly.co/GzLQ> (describing investigation documenting “more than two dozen questionable deaths and widespread medical negligence” in private federally contracted prisons); Southern Poverty Law Center, et al., *Shadow Prisons: Immigrant Detention in the South* at 4 (2016), <https://bit.ly.co/GzKt> (describing how the “immigrant detention system is . . . rife with civil rights violations and poor conditions. . . .”); Eillen Martinez, et al., *‘They Treat Us Like Dogs’: ICE’s Medical Negligence & Abuse*, *MedPage Today* (Feb. 27, 2022), <https://bit.ly.co/GzL3> (documenting pervasive abuse in immigration detention); American Civil Liberties Union, *Sexual Abuse in Immigration Detention*, <https://bit.ly.co/GzL8> (interactive map of sexual abuse complaints unearthed through ACLU’s FOIA requests); University of Washington, Ctr. for Hum. Rts., *Conditions at the NWDC: Background, Methodology, and Human Rights Standards*, <https://bit.ly.co/H9r0> (documenting “key areas where conditions . . . at [Northwest Detention Center] diverge from . . . international human rights standards”); U.S. Dep’t of Just., Off. of the Inspector Gen., *Audit of the U.S. Department of Justice’s Oversight of Non-Federal Detention Facility Inspections* at 4, 6 (2013), <https://bit.ly.co/H1ma> (finding U.S. Marshal Service (USMS) failed to provide adequate oversight to “ensure a safe, secure, and humane environment for federal detainees housed in non-federal facilities”); Seth Freed Wessler, *Inside the US Marshals’ Secretive, Deadly Detention Empire*, *Mother Jones* (Nov.-Dec. 2019), <https://bit.ly.co/H1vm> (noting former DOJ official’s report that the USMS operates with “an attitude of indifference,” leaving local “jails to do what they will”).

United States Senate Permanent Subcommittee on Investigations' December 2022 report, which found that "BOP employees sexually abused female prisoners in at least *two-thirds* . . . of federal prisons that have held women over the past decade."³ The accounts from FCI Dublin reveal the ingrained culture of sexual exploitation and abuse of people in federal custody.

Federal corrections is septic with a problem that has been known and documented for decades.⁴ The problem is fundamentally cultural; late last year, a Deputy Attorney General working group, convened to investigate sexual misconduct within the federal correctional system, concluded that the federal correctional system is plagued by a "culture of permissiveness toward staff misconduct and retaliation against victims who report abuse."⁵

Disturbing institutional facts bear this out. BOP's Office of Internal Affairs, responsible for investigating staff misconduct, has an 8,000-case backlog, with some reports pending for more than five years.⁶ The process for handling reported misconduct under the Prison Rape Elimination Act (PREA) is a failure. The DOJ has, at times, assigned PREA complaint investigations to correctional staff who were themselves sexually assaulting women in their care.⁷

Victims brave enough to speak out do so at a cost. At FCI Dublin, officials retaliated against women who reported sexual assault by placing

³ See Staff Rep. S. Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs., *Sexual Abuse of Female Inmates in Federal Prisons* at 1 & Ex. 1 (2022) (emphasis added), <https://bit.ly.co/H9sF> (hereinafter *Senate Sexual Abuse Report*).

⁴ See U.S. Dep't of Just., Off. of the Inspector Gen., *Deterring Staff Sexual Abuse of Federal Inmates* at 3 (2005), <https://bit.ly.co/H97T> ("The OIG has investigated hundreds of allegations of sexual abuse of inmates by BOP staff.").

⁵ U.S. Dep't of Just., *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* at 6 (2022), <https://bit.ly.co/GxJW> (hereinafter *DOJ Sexual Abuse Report*). Congress agrees. See Senate Sexual Abuse Report at 3; see also Press Release, Sen. Dick Durbin, Statement on Resignation of Director Carvajal from Federal Bureau of Prisons (Jan. 5, 2022), <https://bit.ly.co/GxPO> ("For years, the Bureau of Prisons has been plagued by corruption, chronic understaffing, and mismanagement.").

⁶ Senate Sexual Abuse Report at 3.

⁷ Michael Balsamo & Michael R. Sisak, *AP investigation: Women's prison fostered culture of abuse*, Associated Press (Feb. 6, 2022), <https://bit.ly.co/GxJ2>.

them in solitary confinement.⁸ At FMC Carswell, women who reported sexual abuse were placed in solitary confinement or received “diesel therapy”—where they were placed on transports and relocated from Carswell to a another facility, potentially hundreds of miles away from their families.⁹ Time and again, the media has unearthed evidence of federal correctional employees pressuring incarcerated people not to report sexual abuse.¹⁰ These problems stem from failures of investigation, procedure, and integrity, not a failure of the sentencing guidelines to adequately punish.

Discovery of this sexual abuse epidemic has occurred amidst other significant institutional failures. A series of reports issued by the DOJ’s Office of Inspector General (OIG) paint a damning picture of neglect and mismanagement in federal corrections:

- Numerous OIG reports describe how the federal prison system catastrophically failed to protect individuals in its care from the ravages of Covid-19;¹¹

⁸ *Id.* (describing how woman reporting her prison sexual assault was “punished with three months in solitary confinement and a transfer to a federal prison in Alabama”).

⁹ Kaley Johnson, *Exclusive: Fort Worth Carswell women’s prison plagued by sexual abuse, cover-ups*, Fort Worth Star-Telegram (Sept. 2, 2022), <https://bit.ly.co/GxNf>.

¹⁰ Balsamo & Sisak, *supra* note 7.

¹¹ See, e.g., U.S. Dep’t of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Complex Butner* at ii (2021), <https://bit.ly.co/H25Z> (describing numerous violations of BOP and Centers for Disease Control and Prevention (CDC) guidance concerning social distancing, quarantining, personal protective equipment (PPE) use, and use of home confinement authority); U.S. Dep’t of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Institution Milan* at ii (2021), <https://bit.ly.co/H25j> (describing failures of social distancing and appropriate PPE use); U.S. Dep’t of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Complex Coleman* at ii-iii (2021), <https://bit.ly.co/H25p> (describing numerous deficiencies including failures to provide basic sanitation products to incarcerated individuals and refusing to allow staff to wear face coverings until three months into the pandemic); U.S. Dep’t of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Institution Terminal Island* (2021), <https://bit.ly.co/H25z> (documenting numerous failures to follow CDC and BOP guidance, resulting in catastrophic Covid-19 outbreak within FCI Terminal Island);

- A 2018 OIG report documents systemic failure to provide appropriate therapeutic care to women with histories of trauma;¹² and
- A 2017 OIG report reflects systematic abuse and neglect of people held in custody who struggle with mental illness. According to this report, these individuals are often warehoused in restrictive housing units for months—or even years. Only “3 percent of the BOP’s sentenced inmate population” receive regular mental health treatment, despite the fact that “45 percent of federal inmates ha[ve] symptoms or a recent history of mental illness.”¹³

Nor does the federal correctional system respond to outside auditors or oversight. In 2019, the OIG placed BOP under an “ongoing policy development review” because of what it termed “*significant delays* in the

U.S. Dep’t of Justice, Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Complexes Oakdale and Pollock* at ii (2020), <https://bityl.co/H26D> (identifying “numerous failures in Oakdale officials’ response to the COVID-19 outbreak”); *see generally* Meg Anderson & Huo Jingnan, *As COVID spread in federal prisons, many at-risk inmates tried and failed to get out*, NPR (Mar. 7, 2022), <https://bityl.co/H26H> (documenting BOP’s deficient Covid-19 response and the resulting pain, suffering, and death).

¹² As the OIG again found, even though “[r]esearch . . . recommends that female inmates undergo trauma treatment early during incarceration,” the federal correctional system elected to “assign[] only one staff member at each institution to offer” trauma treatment, meaning it “may not be able to provide its trauma treatment program to all eligible female inmates until late in their incarceration, or ever.” U.S. Dep’t of Just., Off. of the Inspector Gen., *Review of the Federal Bureau of Prisons’ Management of Its Female Inmate Population* at i (2018), <https://bityl.co/GxND> (hereinafter *OIG Report on Incarcerated Women*).

¹³ U.S. Dep’t of Just., Off. of the Inspector Gen., *Review of the Federal Bureau of Prisons’ Use of Restrictive Housing for Inmates with Mental Illness* at ii (2017), <https://bityl.co/GxN9> (hereinafter *OIG Report on Mental Illness*). This report goes on to explain that the BOP cannot even “accurately determine the number of inmates who have mental illness” because of widespread reporting failures: “institution staff do not always document mental disorders.” *Id.* And overreliance on restrictive housing continues unabated. Indeed, it has gotten even worse over time. *See* U.S. Dep’t of Just., *Department of Justice Efforts to Ensure that Restrictive Housing in Federal Detention Facilities is Used Rarely, Applied Fairly, and Subject to Reasonable Constraints, and to Implement Other Legal Requirements and Policy Recommendations* at 6 (2022), <https://bit.ly/3S99999> (finding that “restrictive housing placements have increased by 29% since . . . 2016. . .”).

resolution of *multiple* OIG recommendations related to revising or creating BOP policies concerning various correctional and safety issues.”¹⁴

The simple reality, as Senator Jon Ossoff put it, is the federal correctional system is “horribly dysfunctional.”¹⁵ Only by implementing substantial institutional reforms, believing reported abuse when those held in custody are the reporters, and thoroughly and timely investigating claims of misconduct can the DOJ redress these failures and begin to meet the minimum standard of care for our clients and others in its custody. Meanwhile, the only effective way to protect individuals from future abuse and neglect in prison is to responsibly reduce our federal prison population—moving everyone we possibly can out of harm’s way.¹⁶

III. The Sexual Abuse Offenses amendments

The proposed Sexual Abuse Offenses amendments emerge from this backdrop of correctional and law enforcement dysfunction. The Commission proposes three changes:

- 1) update the guidelines to incorporate two new criminal statutes—18 U.S.C. § 250 (referenced to §2H1.1 and addressing *Offenses Involving Individual Rights*) and § 2243(c) (referenced to §2A3.3 and addressing *Criminal Sexual Abuse of an Individual in Federal Custody*);

¹⁴ U.S. Dep’t of Justice, Off. of the Inspector Gen., *Impact of the Failure to Conduct Formal Policy Negotiations on the Federal Bureau of Prisons’ Implementation of the FIRST STEP Act and Closure of Office of the Inspector General Recommendations* at 1 (2021) (emphases added), <https://bit.ly.co/GxNt>.

¹⁵ Chloe Folmar, *Senate group to examine federal prison system after corruption, abuse allegations*, The Hill (Feb. 17, 2022), <https://bit.ly.co/GxPk>.

¹⁶ See generally Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, 35(1) Fed. Sent’g Rep. 12 (2022), <https://bit.ly.co/GzMJ>.

- 2) add a blanket 8-level increase to §2A3.3's base offense level (BOL) from 14 to 22, more than doubling the recommended advisory guideline range;¹⁷ and
- 3) add a cross reference from §2A3.3 to §2A3.1 (*Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse*) “[i]f the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242).”

We object to the proposed 8-level increase to §2A3.3's BOL.¹⁸ The grotesque rate of sexual abuse against people in custody indicts the ingrained culture of abuse and neglect in federal detention. But reflexively increasing penalties will not deliver what is most desperately needed: swift and immediate intervention to move victims to a place of safety and to provide care, followed by a timely and thorough investigation. There is no reliable, objective study or evidence that these guideline changes would protect people in prison from further abuses. To the contrary, our country's historic instinct to address every crisis by ratcheting up criminal penalties gives the United States the ignominious distinction of having the highest incarceration rate per capita in the world, without commensurate public safety gains.¹⁹

The proposed BOL increase is no solution to federal corrections' systemic cultural dysfunction. This amendment may distract from measures the federal correctional system needs to undertake. It is unlikely to deter

¹⁷ Under the current §2A3.3, the recommended advisory guideline range for an individual in Criminal History category I is 15-21 months. *See* USSG, Ch. 5, Part A. Under the proposed amendment, that range will leap to 41-51 months, meaning the advisory range will call for sentences approximately 250% longer than it does now.

¹⁸ This increase has its origins in the DOJ's most recent annual letter to the Commission. *See* DOJ Annual Letter to the U.S. Sentencing Commission at 21-22 (Sept. 12, 2022).

¹⁹ *See* Wendy Sawyer & Peter Wagner, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2022* (Mar. 14, 2022), <https://bit.ly.co/H24g> (“The U.S. locks up more people per capita than any other nation, at the staggering rate of 573 per 100,000 residents.”); *see also* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005) (describing institutional dynamics making “the guidelines a one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules”).

future abuse. And it is inconsistent with this Commission's duty to fashion evidence-based, deliberative responses to "carry out an effective, humane, and rational sentencing policy."²⁰

A. Addressing the sexual violence epidemic within DOJ institutions requires systemic institutional reform.

As both the DOJ and Congress have repeatedly recognized, federal corrections need to be overhauled.²¹ To address the overlapping crises within federal corrections, the DOJ must undertake systemic institutional reform by:

- 1) recruiting, properly training, and supervising rehabilitation-focused staff;²²
- 2) fixing the federal correctional system's dilapidated and unsafe infrastructure;²³

²⁰ 28 U.S.C. § 995(a)(20).

²¹ See, e.g., Majority Staff, H. Subcomm. on Nat'l Security of the Comm. on Oversight & Accountability, Mem. on Independent Investigations and Employee Discipline at the Bureau of Prisons 1 (Jan. 2, 2019), <https://bit.ly.co/GxJK> (describing "ample opportunity for misconduct to be glossed over and retaliation and intimidation to prevail"); Senate Sexual Abuse Report at 3; DOJ Sexual Abuse Report at 2 (recommending the BOP "chang[e] the culture and environment in BOP facilities" to prevent sexual abuse); see also OIG Report on Incarcerated Women at i-ii (finding systematic failures to provide appropriate programming, including trauma care, to incarcerated women); OIG Report on Mental Illness at i-ii (finding systematic failures to appropriately care for people with mental illness).

²² See *Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 7 (2022) (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), <https://bit.ly.co/HAF7> (acknowledging as inadequate the mere five weeks of formal training for new federal correctional officers); *Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the S. Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs.*, 117th Cong. 3 (2022) (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), <https://bit.ly.co/HAF7> (explaining that ending epidemic of sexual violence within federal corrections "begins with changing the culture and environment in Bureau facilities").

²³ See DOJ Sexual Abuse Report at 9 (federal correctional system needs significant technological upgrades and to overhaul their video monitoring and retention system to keep incarcerated people safe); *Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. On the Judiciary*, 117th Cong. 7 (statement

- 3) implementing policies that empower people in prison to assert their rights and get help from their attorneys;²⁴ and
- 4) reducing our prison population.

Doubling down on punishment through a sweeping, dramatic enhancement to §2A3.3's BOL won't do anything to accomplish these critical cultural and policy changes. Instead, consistent with its statutory obligations,²⁵ the Commission should recommend specific changes to our federal correctional system's nature and capacity, including:

- Increased community-based corrections use;
- Increased sentence reduction eligibility and availability under the Residential Drug Abuse Program (RDAP) by allowing individuals with detainers to participate, maximizing the length of sentence reductions, increasing community corrections participation in RDAP, and

of Colette S. Peters, Dir., Fed. Bureau of Prisons), *supra* note 22, <https://bitly.co/GxNz> ("Infrastructure within many [BOP] facilities is rapidly deteriorating and in need of extensive work and repairs to maintain safe, secure, and functioning correctional institutions.").

²⁴ The DOJ must empower the people it imprisons to report staff misconduct, and the federal correctional system needs to listen to and believe those people when they do so. The Deputy Attorney General has recently recognized BOP "should adopt an early-intervention approach that identifies warning signals and enables and rewards reporting." DOJ Sexual Abuse Report at 6. Nor is this recommendation new. In fact, over twenty years ago, the Government Accountability Office (GAO) made similar recommendations to BOP. Government Accountability Office, *Women in Prison: Sexual Misconduct by Correctional Staff* 2 (1999), <https://bitly.co/HAFo> ("We are making a recommendation to the Director, BOP, to develop systems and procedures for monitoring, analyzing, and reporting allegations of staff-on-inmate sexual misconduct in federal prisons."). But more is needed. The DOJ also needs to facilitate confidential and easily accessible communication lines between people in prison and their attorneys, who can bring abuse and neglect to the DOJ's attention. Too often, attorney/incarcerated client communication difficulties result because facilities lack private phone, mail, or email options for such privileged and sensitive communications.

²⁵ See 28 U.S.C. § 994(g) (The Commission "shall make recommendations concerning any change or expansion in the nature or capacity of [penal, correctional, and other] facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.").

eliminating mere firearm possession as disqualification for RDAP sentence reductions;²⁶

- Eliminating sentence computation rules that create longer sentences based on:
 - 1) refusals to provide pretrial custody credit for time spent in immigration detention;
 - 2) failures to award pretrial custody credit for state concurrent sentences; and
 - 3) failures to award good time credits for time in state custody on partially concurrent sentences;²⁷ and
- Maximizing the First Step Act's Earned Time Credit program implementation.

Overcrowded prisons create conditions for abuse, neglect, and impunity.²⁸ To keep people safe, the Commission should prioritize measures to ensure that nobody remains in prison longer than absolutely necessary.

²⁶ The firearm- and detainer-based disqualifications appear nowhere in the statute and are simply BOP policy decisions. *See Jacks v. Crabtree*, 114 F.3d 983, 985 n.2 (9th Cir. 1997) (DOJ's concession that individuals serving time for firearm possession "are eligible under section 3621(e)(2)(B)" for the RDAP reduction); BOP Program Statement 5331.02, Early Release Procedures Under 18 U.S.C. § 3621(e) at 5 (March 16, 2009), <https://bit.ly.co/HBEE> (precluding individuals with detainers from obtaining early release through RDAP).

²⁷ *See Sady, supra* note 16, at 17 (describing the federal correctional system's sentence computation rules that—in a manner "inconsistent with the relevant statutes"—serve to "increase[] sentences by failing to count time in official detention, by creating de facto consecutive sentences, and by failing to provide good time credits for the concurrent portion of federal sentences served in state custody").

²⁸ *See Morag MacDonald, Overcrowding and its impact on prison conditions and health*, 14(2) Int'l J. of Prisoner Health 65, 65 (2018), <https://bit.ly.co/GxOS> ("Overcrowded prisons can lead to insanitary, violent conditions that are harmful to the physical and mental well-being of prisoners."); Stephanie Baggio, et al., *Do overcrowding and turnover cause violence in prison?*, 10 Frontiers in Psychiatry 1, 3 (Jan. 2020), <https://bit.ly.co/GxOR> ("Reduction of prison overcrowding and turnover appear critical to reduce prisoners' vulnerability. . . ."); *see also Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. On the Judiciary*, 117th Cong. 6 (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), *supra* note 22

B. The proposed 8-level increase to §2A3.3's base offense level will not deter sexual assault.

In contrast to the systemic interventions described above, the proposed 8-level increase to §2A3.3's BOL will not effectively deter future abuse. The general deterrence benefit of "severe prison terms, specifically, is quite limited."²⁹ As the DOJ's National Institute of Justice has explained, "increasing the severity of punishment does little to deter crime"—"[t]he certainty of being caught is a vastly more powerful deterrent."³⁰

This applies with special emphasis to sexual assault perpetrated by correctional or law enforcement personnel, for whom the consequences from detection and prosecution are already severe. As a class, law enforcement and correctional employees who commit sexual assault already face catastrophic punishment once their conduct is discovered:

- 1) losing their profession,
- 2) the lifelong collateral consequences of a federal felony conviction, and
- 3) potentially, an even more ruinous status transformation from correctional officer to sex offender.³¹

Instead, law enforcement and correctional officers commit sexual abuse crimes because the culture of corrections doesn't take those offenses seriously, and because they know—based on institutional failures to investigate these crimes—that it is highly unlikely they will be caught. To prevent sexual abuse of people in prison, the focus must be on increasing "the

(anticipating "capacity deficits of 3,054 for medium security male facilities and 1,743 for low security male facilities" as of September 29, 2022).

²⁹ Melissa Hamilton, *Some Facts About Life: The Law, Theory, and Practice of Life Sentences*, 20 Lewis & Clark L. Rev. 803, 821 (2016) ("The lost deterrence function in lengthening sentences is also likely due, to a significant degree, to the recognition from behavioral law and economics studies that offenders often are not rational thinkers who carefully measure the benefits of their actions against potential distant or long-term legal consequences.").

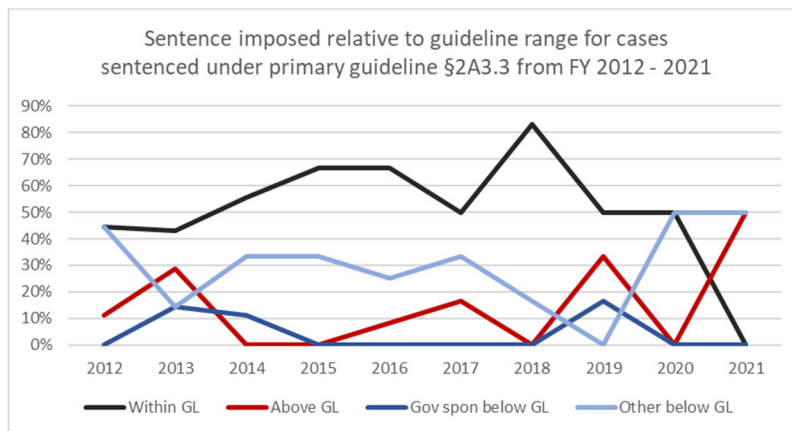
³⁰ U.S. Dep't of Just., Nat'l Inst. of Just., *Five Things About Deterrence* at 1 (May 2016), <https://bityl.co/GxO2>.

³¹ See *United States v. Fuentes*, 856 F. App'x 533, 534 (5th Cir. Aug. 18, 2021) ("[A]n offense under § 2243(b) is a 'sex offense' under SORNA.").

certainty of being caught,” not “the severity of punishment.”³² Further enhancing the guidelines punishment—over and above the current sentencing range and the other profoundly life-altering consequences that flow from a § 2243 conviction—is unnecessary.

C. The proposed increase fails to discharge the Commission’s obligation to devise a rational sentencing system through a deliberative, evidence-based approach.

Finally, the Commission should not adopt the proposed amendment to §2A3.3’s BOL because it does not represent a careful, evidence-based, deliberative approach to this guideline. Historically, §2A3.3—which covers an enormous range of conduct—has been infrequently applied.³³ As such, sentences under §2A3.3 vary substantially. From FY2012 through FY2021, roughly 55% of cases sentenced under primary guideline §2A3.3 received a within-guidelines sentence, 32% received a below-guidelines sentence, and 12% of cases received an above-guidelines sentence.³⁴



These data do not support categorically increasing §2A3.3’s BOL by 8 levels. Instead, they suggest differing conduct that can result in radically different sentences. Before amending §2A3.3, the Commission must conduct a

³² See *Five Things About Deterrence*, *supra* note 30.

³³ According to data extracted from the Commission’s “Individual Offender Datafiles” spanning fiscal years 2012 to 2021, only 65 cases were sentenced under primary guideline §2A3.3. The Commission’s “Individual Offender Datafiles” are publicly available for download on its website. USSC, Commission Datafiles, <https://bityl.co/HBGG>.

³⁴ See *id.*

more searching, prospective study of the cases to which §2A3.3 applies and the sentences imposed under it.

This is particularly true given the enormous Congressional-, Executive-, and Commission-driven changes coming to §2A3.3.

Congress recently enacted two new criminal statutes—18 U.S.C. §§ 250 and 2243(c). Limited sentencing information exists for prosecutions under either of these statutes. But that will change: Congress, in enacting these new offenses, required the Attorney General to document the “number of reports made, during the previous year, to Federal law enforcement agencies regarding persons engaging in a sexual act while acting under color of law,” and the GAO to provide “a report on any violations of section 2243(c) of title 18.” Both reports are due March 15, 2023. These reports will provide important information that the Commission should carefully consider before increasing §2A3.3’s BOL.

The Executive, too, promises significant action in this arena. The DOJ recently indicated it plans to prioritize prosecutions of correctional and law enforcement personnel who perpetrate sexual abuse, meaning the Commission should soon have significantly more sentencing data on sentences imposed under §2A3.3.³⁵ As of August 2022, BOP has a new director, Collette Peters, who has promised to prioritize cultural change.³⁶ Instead of intervening to try to redress federal correctional dysfunction through a likely ineffectual change to §2A3.3’s BOL, the Commission should hold back and ensure that accountability remains squarely on those who are truly responsible for fixing this problem: the DOJ and the federal correctional system itself.

Finally, the Commission has proposed indexing § 2243(c) to §2A3.3 and expanding §2A3.3’s title to expressly cover *Criminal Sexual Abuse of an*

³⁵ DOJ Sexual Abuse Report at 2-3.

³⁶ See *Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the S. Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov’t Affs.*, 117th Cong. 3, *supra* note 22 (committing to “changing the culture and environment in Bureau facilities”).

Individual in Federal Custody.³⁷ If implemented, this expansion of §2A3.3 has the potential to significantly change the pattern of cases sentenced directly under it.

Given the enormous variety in sentences imposed under §2A3.3 so far (i.e., before adding § 2243(c) convictions) and the significant changes to §2A3.3's underlying statutory, enforcement, and guideline regimes either already enacted or in the works, this is not the time to adopt a blanket, 8-level increase to §2A3.3's BOL. Instead, the Commission should forebear from increasing §2A3.3's BOL until it has thoroughly examined these changes' impact on §2A3.3 sentencings, so it can ensure any amendment to §2A3.3 is careful, deliberative, and evidence based.³⁸

III. Conclusion

The only realistic way to keep people safe from the enormous perils of federal incarceration—including the intolerable risk of sexual assault by correctional officers—is to decrease the criminal legal system's reflexive reliance on lengthy incarceration and to change the institutional culture of federal corrections.

We therefore welcome this cycle's amendments recognizing the wrongheadedness of imprisoning people by default instead of as a last resort. And we oppose any proposed amendments that will further our country's position as world leader of mass incarceration.

As to §2A3.3's proposed BOL 8-level increase from 14 to 22, we encourage the Commission to defer any decision until more information is available. Thank you for inviting me to testify before you again.

³⁷ 18 U.S.C. § 2243(c)—which criminalizes sexual abuse “of an individual in federal custody”—provides that “[w]hoever, while acting in their capacity as a Federal law enforcement officer, knowingly engages in a sexual act with an individual who is under arrest, under supervision, in detention, or in Federal custody, shall be fined under this title, imprisoned not more than 15 years, or both.”

³⁸ See *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) (“[T]he Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.”) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

**Federal Public and Community Defenders
Comment on Alternatives-to-Incarceration
Programs (Proposal 10)**

March 14, 2023

The Commission seeks comment on whether (and, if so, how) it should study court-sponsored, community-based correctional programs, such as diversion and other alternatives-to-incarceration programs. It also invites comment on whether participation in such programs should be a basis for a departure.¹ Defenders appreciate the opportunity to comment.

First, Defenders strongly endorse a departure to a non-custodial sanction for people who have demonstrated presentence rehabilitation, including (but not limited to) people who have successfully participated in diversion or alternatives-to-incarceration programs—whether court-sponsored or otherwise. Such a departure would bring the Guidelines into conformity with evidence-based sentencing practices and 18 U.S.C. § 3553(a).

Second, if the Commission undertakes any study of court-sponsored diversion or alternatives-to-incarceration programs, we strongly encourage it to include Defenders in the development and study process. Doing so would be consistent with the fundamental approach of these programs, in which courts, probation officers, pretrial services officers, treatment providers, prosecutors, and defenders work collaboratively.

I. The Commission should amend the Guidelines to include a departure to a non-custodial sanction for people who demonstrate presentence rehabilitation.

A. The Commission should drive a significant shift toward the use of community-based corrections in the federal criminal legal system.

Defenders strongly support increased use of community-based corrections in lieu of prison. Community-based corrections should be a centerpiece of any parsimonious sentencing scheme.² “The case for use of community punishments in a rational society is a no-brainer.”³ Community-based corrections are more effective than prison at rehabilitating people.⁴

¹ Proposed Amendments, 88 Fed. Reg. 7180, 7227 (Feb. 2, 2023).

² See 18 U.S.C. § 3553(a) (requiring courts to impose sentences “not greater than necessary” to accomplish federal sentencing purposes).

³ Michael Tonry, *Community Punishments*, in 4 *Reforming Criminal Justice: Punishment, Incarceration, and Release* 187 (2017), <https://bit.ly/co/HTae>.

⁴ See *id.* at 189-190 (collecting studies showing that “people sentenced to imprisonment are more, not less, likely to reoffend than are comparable people sentenced to community punishments”); Marsha Weissman, *Aspiring to the*

They are also more effective at reducing recidivism because they avoid the criminogenic effects of removing people from their family, community, and livelihood, and placing them into an environment that inculcates “maladaptive [and] dysfunctional” traits.⁵ They avoid the catastrophic collateral consequences that prison inflicts on incarcerated people’s families—consequences that generate and intensify a cycle of poverty and crime, and which disproportionately harm communities of color.⁶ Indeed, until the unconstitutional mandatory-guideline regime distorted federal sentencing

Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration, 33 N.Y.U. Rev. L. & Soc. Change 235, 243 (2009) (“[Alternatives-to-incarceration] participants and probationers were significantly less likely to be rearrested than people who received jail sentences—forty-one percent of ATI participants and forty-two percent of probationers were rearrested, compared to fifty-three percent of people released from jail.”); Just. Pol’y Inst., *Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety* 16 (2009), <https://bitly.co/HSBM> (“Community-based alternatives, which do not necessarily include probation or parole, are a cost-effective means of redirecting people away from prison while protecting public safety and maintaining accountability.”); see also Damon M. Petrich, et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 Crime & Just. 353, 357 (2021) (“[C]ustodial sanctions have a null or criminogenic effect on reoffending when compared with noncustodial sanctions such as probation.”).

⁵ See Nat’l Rsch. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 194 (2014), <https://bitly.co/HS4X>; see also The Charles Colson Task Force on Fed. Corrs., *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* 20 (2016), <https://bitly.co/HRyj> (“Incarceration is a highly punitive, costly, and potentially harmful intervention that should be used sparingly and judiciously.”).

⁶ See Nat’l Rsch. Council, *The Growth of Incarceration in the United States: Issue Brief* (Sept. 2014), <https://bitly.co/HS4l> (“Incarceration is strongly correlated with negative social and economic consequences for prisoners’ families.”); Hedwig Lee, et al., *Assessing mass incarceration’s effects on families* 374 Science 227–281 (2021), <https://bitly.co/HS51>; Exec. Office of the President of the U.S., *Economic Perspectives on Incarceration and the Criminal Justice System* 5 (2016), <https://bitly.co/HSBN> (“Parental incarceration is a strong risk factor for a number of adverse outcomes, including antisocial and violent behavior, mental health problems, school dropout, and unemployment.”); see also Michelle Alexander, *The New Jim Crow* 7 (rev. ed. 2012) (“The racial dimension of mass incarceration is its most striking feature.”).

practice, community-based corrections were widely understood to be the just sentence in nearly half of all federal criminal cases.⁷

While community-based corrections are generally preferable to prison, they also need to be implemented carefully. The United States doesn't just have a mass incarceration problem, it also has a mass supervision problem.⁸ In designing community-based sentencing regimes, therefore, we must be careful to ensure that the community-based sentence represents the most cost-effective and proven intervention that promotes public safety while involving the lightest and shortest possible intrusion onto a person's liberty, privacy, and dignity.

B. The Guidelines should be amended to strongly encourage the use of community-based corrections in lieu of prison.

Courts should be encouraged to depart from prison to community-based corrections for people who have demonstrated presentence rehabilitation, such as by maintaining exemplary compliance with pretrial release conditions or through other strides toward rehabilitation. The Guidelines should, for example, call for such a departure for people who successfully complete—or make sustained progress in—a diversionary or alternative-to-incarceration program. But they should also go further and encourage judges to depart from any otherwise applicable guideline range to a community-based sentence (such as probation) for anyone who has

⁷ Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 Stan. L. Rev. 1211, 1222 (2004) (Until the Guidelines were enacted, “almost 50 [percent] of federal sentences were to straight probation.”).

⁸ See Evangeline Lopoo, et al., *How Little Supervision Can We Have?*, 6 Ann. Rev. Criminology 23, 29 (2023) (finding that “mass supervision” has “expand[ed] . . . even as crime rates fluctuate”); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J. Crim. L. 180, 216–17 (2013) (noting that even though “supervising low-risk individuals can sometimes be a mistake” supervised release is virtually always imposed in federal criminal cases); Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 1015 (2013), (“The broad application of supervised release has meant that indeterminacy has taken a firm hold of the federal sentencing system.”); see also Kate Weisburd, *Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System* 6 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930296 (“Monitoring and its attendant rules significantly burden basic rights, liberty and dignity”).

demonstrated presentence rehabilitation, regardless of their participation in a diversionary or alternative-to-incarceration program.

As they currently stand, the Guidelines fail to adequately account for what the Supreme Court has called a “critical” factor in sentencing: post-conviction rehabilitation.⁹ The Guidelines currently “discourage” rehabilitation-based departures,¹⁰ a position that is out of step with considered judicial practice, which views postconviction rehabilitation as an enormously important factor.¹¹ This stark divergence between sentencing practice and the Guidelines has contributed to the growth in the rate of downward variances over time.¹² Guideline ranges continue to have a strong anchoring effect at sentencing, though, so this divergence has also driven sentences artificially higher, causing people who are fit candidates for community sentences to be placed in prison, which helps to drive mass incarceration in the United States.¹³

⁹ *Pepper v. United States*, 562 U.S. 476, 492 (2011).

¹⁰ *Koon v. United States*, 518 U.S. 81, 95–96 (1996).

¹¹ See *Pepper*, 562 U.S. at 492; see also Carolin E. Guentert & Ryan H. Gerber, *A Judge’s Attempt at Sentencing Consistency After Booker: Judge Jack B. Weinstein’s Guidelines for Sentencing*, 41 Cardozo L. Rev. 1, 77–78 (2019) (“A judge taking account of *all* the § 3553(a) factors may often reach a different result than the one recommended by the Guidelines, because the Guideline ranges do not account for the many factors in a person’s history and their capacity for rehabilitation.” (citing Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 19–20 (1998))). Notwithstanding the Guidelines’ approach to rehabilitation, circuit courts of appeals have even reversed district courts for not considering remarkable rehabilitation. See, e.g., *United States v. Robertson*, 662 F.3d 871, 878 (7th Cir. 2011) (reversing low-end-guideline sentences because the district court failed to adequately consider “strong evidence of rehabilitation in imposing its sentence”); *United States v. Preacely*, 628 F.3d 72, 81 (2d Cir. 2010) (reversing a below-guideline sentence in face of “compelling evidence that Preacely embarked on a three-year course of rehabilitation”).

¹² See U.S. Sentencing Comm’n, *The Influence of the Guidelines on Federal Sentencing* 22 (2020), <https://bit.ly.co/HSBm> (noting that rate of downward variances grew from 13.4 percent in 2008 to 24.3 percent in 2014, before narrowing to 21.9 percent in 2017).

¹³ See Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 491 (2014) (explaining how the “anchoring effect” of the Guidelines “impact[s] the length of sentences . . . impose[d] by

To remedy these problems, the Guidelines should be amended to include a departure to a community-based sentence for anyone who has demonstrated presentence rehabilitation. This departure should apply to people who have successfully completed a diversionary or alternative-to-incarceration program—or who, in the judgment of the sentencing court, otherwise deserve credit for participation in similar programming. And it should equally apply to people who demonstrate compliance with pretrial release conditions or other rehabilitative efforts. Regardless of participation in a court-sponsored diversion or alternatives-to-incarceration program, a person who does well on pretrial release—or otherwise shows rehabilitation—should presumptively receive a community-based sentence unless strong reasons exist to believe that such punishment is insufficient and that greater punishment is necessary.

C. Defenders should be full partners in any study of court-sponsored diversion or alternatives-to-incarceration programs that the Commission undertakes.

Defenders strongly encourage the Commission to act now to amend the Guidelines to provide for a departure to non-custodial sanctions for individuals who demonstrate presentence rehabilitation. If the Commission also elects to study court-sponsored diversion and alternatives-to-incarceration programs, Defenders stand ready to partner in the construction and implementation of that study; the analysis of its results; and the development of recommendations, policy statements, or guidelines.¹⁴

Defenders would bring an invaluable perspective to this project. Court-sponsored diversion and alternatives-to-incarceration programs are necessarily designed to be partnerships between the court, probation officers, pretrial services officers, treatment providers, defenders, and prosecutors.¹⁵

subconsciously influencing judges to give greater weight to the now-advisory Federal Sentencing Guidelines than to other important sentencing factors.”).

¹⁴ Defenders also urge the Commission to include the perspectives of people who have moved through the criminal legal system and who have participated in court-sponsored diversion and alternatives-to-incarceration programs. These individuals have invaluable perspectives to share about how these programs should be designed.

¹⁵ See, e.g., Vanita Gupta, Assoc. Att’y Gen., *Remarks at the American Bar Association Criminal Justice Section Awards Luncheon* (Nov. 18, 2022), <https://bit.ly/co/HRv8> (explaining that with diversionary and alternatives-to-

Defenders have a unique perspective and would be able to highlight important obstacles to successful diversionary and alternatives-to-incarceration programs that—absent our participation—would otherwise risk being overlooked or deemphasized. Defenders’ perspectives could inform:

- How to ensure that people who participate in these programs nonetheless receive zealous representation from defense counsel—and how to design the programs to reduce ethical dilemmas for defenders;¹⁶
- How to mitigate the risk that these programs “unnecessarily expand[] criminal surveillance, diminish[] procedural protections, and potentially even increas[e] incarceration”;¹⁷
- How to promote equity by ensuring that access to diversionary and alternative-to-incarceration programs is controlled by fair, evidence-based, and objective criteria;¹⁸ and

incarceration programs, partnerships among courts, prosecutors, and defenders are “necessary for equal justice”); *see also* 2 Nat’l Ass’n. of Drug Ct. Profs., *Adult Drug Court: Best Practice Standards* 38 (2015), <https://bit.ly/3YEu4Z> (best practices for diversionary or alternative-to-incarceration program to be staffed by a “multidisciplinary team” of “partner agencies” which includes defenders and others). Additionally, Defenders play a critical role in advising clients whether to participate in these programs; for these programs to work, they need to satisfy fairness, ethical, and evidentiary standards such that Defenders can in good faith counsel our clients to enroll.

¹⁶ *See generally* Tamar M. Meekins, *Risky Business: Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 Berkeley J. Crim. L. 75 (2007); *see also* Nat’l Drug Ct. Inst., *Critical Issues for Defense Attorneys in Drug Court* 1 (2003), <https://bit.ly/420r5Hw> (“Defense attorneys sometime walk a delicate, ethical tightrope, if they are to advance the therapeutic ideal that informs drug court, without doing damage to their obligations as zealous advocates for their client.”).

¹⁷ Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 Geo. L.J. 1587, 1591 (2012); *see* Am. Bar Ass’n Criminal Justice Standards Nos. 1.2(h), 5.3(a) (2022), <https://bit.ly/HXUe> (“Jurisdictions should exercise special care to avoid a program’s net-widening potential”—i.e., its potential to “cause[] criminal legal system interventions to increase in number and intensity [more] than would have occurred in the absence of the program”).

¹⁸ *See* Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 Berkeley J. Crim. L. 47, 81–82 (2017) (describing the need for evidence-based criteria to ensure equal access to diversionary and alternatives-to-incarceration programs); *see also* Leah Wang, Prison Pol’y Initiative,

- How to design court-sponsored diversionary and alternatives-to-incarceration programs to recognize that setbacks and struggles are a natural part of recovery and, more generally, to mitigate the risks that attend any program that merges treatment and punishment.

Diversionary and alternatives-to-incarceration programs have proliferated at the same time as pretrial-detention rates have skyrocketed,¹⁹ judges—influenced by the Guidelines—have continued defaulting to prison sentences,²⁰ and federal prosecutors have offered diversion less and less often.²¹ Any Commission study must examine these structural issues, and Defenders are well-positioned to provide input and expertise on them.

Court-sponsored diversion and alternatives-to-incarceration programs cannot work properly unless they are fair, evidence-based, and objective. Defenders are necessary partners in these programs when they are up and running; they must also be partners in their study and design.

II. Conclusion

The Commission should amend the Guidelines to provide for a departure to a community-based sentence for anybody who demonstrates presentence rehabilitation. If the Commission elects to study court-sponsored diversion and alternatives-to-incarceration programs, it should include Defenders as equal partners in design, implementation, and analysis of that study, to ensure that the unique perspective of those who represent the accused is properly accounted for.

Racial disparities in diversion: A research roundup (Mar. 7, 2023), <https://bityl.co/HXUo> (collecting studies “suggest[ing] diversion is routinely denied to people of color, sending them deeper into the criminal legal system”).

¹⁹ See Alison Siegler, et al., *Freedom Denied: How the Culture of Detention Created a Federal Jail Crisis* 16 (2022), <https://bityl.co/HRwc> (“Federal pretrial jailing rates have been skyrocketing for decades.”); see also Fed. Jud. Ctr., *The Bail Reform Act of 1984: Fourth Edition* ix (2022), <https://bit.ly/3Zf9rOu> (noting the “growing concern that the pretrial detention rate is too high”).

²⁰ See, e.g., Courtney R. Semisch, U.S. Sentencing Comm’n, *Alternative Sentencing in the Federal Criminal Justice System* 1 (2015), <https://bityl.co/HRwn> (noting the “continued decreasing trend in the imposition of alternative sentences” due in significant part to the Guidelines).

²¹ See Scott-Hayward, *supra* note 18 at 66 fig. 1 (showing a steady decrease in number of pretrial diversion cases activated between 2001 and 2015).

**Federal Public and Community Defenders
Comment on Counterfeit Pills (Proposal 11)**

March 14, 2023

The following excerpt from the March 2023 Statement of Michael Caruso contains Defenders’ comments on Proposed Amendment 11.

* * * * *

II. Counterfeit Pills

The Commission has also proposed an amendment to respond to “concerns expressed by the Drug Enforcement Administration (DEA)” about “illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills.”⁵⁴ The proposal would add a two-level enhancement to §2D1.1(b)(13) for people who “represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl . . . or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug.”⁵⁵ The Defenders oppose the addition of this enhancement to §2D1.1(b)(13) for three reasons.

First, in the 2018 amendment cycle (the last full cycle the Commission had a quorum), the Commission examined—and rejected—a similar proposal after undertaking a study involving “extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings.”⁵⁶ The current proposal, by contrast, is unsupported by any meaningful administrative record. Instead, the sole basis for this proposed amendment appears to be a one-page letter submitted by the DEA and briefly endorsed in the DOJ’s own submissions to the Commission. We agree that counterfeit pills pose a significant risk to public safety—but are skeptical that increasing penalties for those substances will either reduce their availability or mitigate an increasingly tainted drug supply.

Second, the proposed amendment lacks an adequate *mens rea* standard, placing it out of step with recent Supreme Court jurisprudence emphasizing that “wrongdoing must be conscious to be criminal.”⁵⁷ As the Defenders observed in our annual letter, which urged the Commission to “amend the guidelines to specify that provisions which recommend increased punishment require evidence of intent,”⁵⁸ provisions with inadequate *mens rea* standards stand “in serious tension with deeply rooted principles of

⁵⁴ 2023 Proposed Amendments, at 7228.

⁵⁵ *Id.*

⁵⁶ USSG App. C, Amend. 807 (Nov. 1, 2018); USSG §2D1.1(b)(13).

⁵⁷ *Ruan v. United States*, 142 S. Ct. 2370, 2376 (2022) (cleaned up).

⁵⁸ Defenders’ Annual Letter to the Sentencing Commission at 9 (Sept. 14, 2022).

justice and responsibility.”⁵⁹ *Mens rea* requirements help to “separate those who understand the wrongful nature of their act from those who do not.”⁶⁰ The proposed amendment would undermine this goal and take the guidelines in the wrong direction.

Finally, the amendment is overbroad, as it would likely operate to add a two-level enhancement in every case involving counterfeit pills, regardless of the culpability or role of the person being sentenced.

A. The proposed amendment is not evidence-based or empirically supported and would repeat past mistakes.

During the 2018 amendment cycle, the Commission considered—and rejected—a very similar amendment to the drug guideline to the one the DEA has proposed. That proposed amendment lacked a *mens rea* requirement and would have increased punishment for anyone who misrepresented or mismarketed fentanyl or an analogue as another drug.⁶¹ The Commission rejected this approach and instead, in Amendment 807, added a four-level enhancement for “*knowingly* misrepresenting or *knowingly* marketing” fentanyl or a fentanyl analogue “as another substance.”⁶² The Commission based its decision on a “multiyear study,” which “included extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings.”⁶³ The Commission also explained that it had deliberately included a *mens rea* requirement in this specific offense characteristic “to ensure that only the most culpable offenders are subjected to these increased penalties.”⁶⁴ Perhaps recognizing that illegal drug use inherently carries risk, the Commission explained that it was particularly

⁵⁹ *Id.* (quoting *United States v. Burwell*, 690 F.3d 500, 530 (D.C. Cir. 2012) (Kavanaugh, C.J., dissenting)).

⁶⁰ *Id.* (quoting *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019)).

⁶¹ See USSC, *Notice of Proposed Amendments to Sentencing Guidelines*, 83 Fed. Reg. 3869, 3875 (Jan. 26, 2018) (providing alternative versions of §2D1.1(b)(13)—one with a *mens rea* of knowingly and the other without).

⁶² See Amend. 807 (emphasis added); see also USSG §2D1.1(b)(13).

⁶³ See Amend. 807.

⁶⁴ *Id.*

focused on protecting users who were “inexperienced or unaware of what substance he or she is using.”⁶⁵

That multiyear study remains the Commission’s most recent critical assessment of synthetic drugs. What new information is available to the Commission—*e.g.*, data on emerging trends in how fentanyl and its analogues are produced and distributed—does not support further increasing penalties for fentanyl-related mismarketing. The DEA has explained that “[t]he vast majority of counterfeit pills brought into the United States are produced in Mexico, and China is supplying chemicals for the manufacturing of fentanyl in Mexico.”⁶⁶ The international origins of counterfeit pills make it unlikely that increasing punishment for domestic mismarketing will be effective. Sentencing trends also counsel against the enhancement. Courts continue to vary downward in more than one-third of fentanyl cases and nearly half of fentanyl-analogue cases,⁶⁷ and there is no indication that the few upward variances that occur in these cases—3.5% of variances in fentanyl and 1.7% of variances in fentanyl-analogue cases—are being driven by concerns that §2D1.1(b)(13) is not punitive enough.⁶⁸ With sentencing courts varying upward so rarely, the judiciary is not signaling a need for §2D1.1(b)(13) to be modified.⁶⁹

Defenders are also concerned that expanding §2D1.1(b)(13) this cycle would repeat the mistakes of the past. Drug addiction and overdose are unquestionably pressing public health problems in the United States. But there is over thirty years of evidence that enhancing penalties for drug crimes will not reduce the supply of drugs, the incidence of substance-use disorder, or the number of drug-related deaths. Moreover, the overdose crisis, which

⁶⁵ *Id.*

⁶⁶ See, *e.g.*, Press Release, DEA, *DEA Issues Public Safety Alert on Sharp Increase in Fake Prescription Pills Containing Fentanyl and Meth* (Sept. 27, 2021), <https://tinyurl.com/4f42mzrn>.

⁶⁷ See USSC, *Quick Facts: Fentanyl Trafficking Offenses* at 2 (2021), <https://tinyurl.com/mryxzbv>; USSC, *Quick Facts: Fentanyl Analogue Trafficking Offenses* at 2 (2021), <https://tinyurl.com/2s3739u6>.

⁶⁸ See *Fentanyl Trafficking Offenses*, *supra* note 67 at 2; *Fentanyl Analogue Trafficking Offenses*, *supra* note 67 at 2.

⁶⁹ Based on a survey of case law and transcripts, Defenders did not find examples of a court asking the Commission to expand §2D1.1(b)(13).

has run parallel to the War on Drugs for the past three decades,⁷⁰ is a clear indictment of the failure of punitive responses to curb drug use.

The War on Drugs started nearly fifty years ago when President Nixon characterized drug abuse as “America’s public enemy number one.”⁷¹ Fifteen years later, President Reagan warned that “illegal drugs were every bit as much a threat to the United States as enemy planes and missiles.”⁷² This rhetoric led to hard-hearted, but ultimately soft-headed, criminal legal policies that continue to bedevil the criminal legal system today.⁷³

The DEA’s effort to expand §2D1.1(b)(13) this amendment cycle is today’s version of this message. Whereas President Nixon described drugs in 1971 as “public enemy number one,” today fentanyl is, according to the DEA, “the single deadliest drug threat our nation has ever encountered.”⁷⁴

⁷⁰ See Hawre Jalal, *et al.*, *Changing Dynamics of the Drug Overdose Epidemic in the United States from 1979 through 2016*, Science (Sept. 21, 2018), <https://tinyurl.com/yckncdsm>.

⁷¹ Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control* (Jun. 17, 1971), <https://tinyurl.com/5n7wn95f>.

⁷² Ronald Reagan, *Remarks on Signing the Just Say No to Drugs Week Proclamation*, Ronald Reagan Presidential Library & Museum (May 20, 1986) <https://tinyurl.com/3xj9cwb9>.

⁷³ See, e.g., Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 213 (2019); Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, Ctr. for Am. Progress (May 10, 2019), <https://tinyurl.com/v38ew5ps>; see also USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) (recognizing unfairness of 100:1 crack/powder disparity); *Hearing on Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 117th Cong. (June 17, 2021) (statement of Kyana Givens, Assistant Federal Public Defender); *Hearing on An Epidemic within a Pandemic: Understanding Substance Use and Misuse in America Before the Subcomm. on Health of the H. Energy & Commerce Comm.*, 117th Cong. (Apr. 14, 2021) (statement of Patricia L. Richman, National Sentencing Resource Counsel, Federal Public & Community Defenders); *Hearing on Fentanyl Analogues: Perspectives on Classwide Scheduling Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 116th Cong. (Jan. 28, 2020) (statement of Keven Butler, Federal Public Defender for the Northern District of Alabama).

⁷⁴ DEA, *Fentanyl Awareness*, <https://tinyurl.com/32kd85e9> (last visited Feb. 26, 2023).

Whereas, in 1986, “illegal drugs were every bit as much a threat to the United States as enemy planes and missiles,” today the DEA calls fentanyl a threat to “national security,” and drug warriors seek to have it classified as a “weapon of mass destruction.”⁷⁵

The rhetoric of the War on Drugs led to increased penalties that did nothing to address the drug crisis in this country and instead fueled the crisis of mass incarceration. The Commission should take care not to retread that path. Instead of targeting kingpins and managers, the proposed amendment would disproportionately apply to lower-level drug distributors whose knowledge and wherewithal are limited—a far cry from the manufacturers “producing pills in bright rainbow colors to drive addiction and increase sales.”⁷⁶ It would exacerbate racial disparities in punishment, as people of color comprise over 78% of those sentenced in fentanyl cases and over 86% of those sentenced in fentanyl analogue cases.⁷⁷ And there is no reason to believe it would have any meaningful impact on America’s addiction and overdose crises.⁷⁸

The Commission carefully considered this topic in 2018 and opted not to take the action the DEA now seeks. Therefore, Defenders believe the Commission should not revisit §2D1.1(b)(13) absent further study.

⁷⁵ *Id.*; see Joseph Longley, Regina LaBelle & Shelley Weizman, *Quick Take: Illicitly Manufactured Fentanyl as a Weapon of Mass Destruction: Rhetoric & Reality*, O’Neill Institute, Georgetown Law (Nov. 2022), <https://tinyurl.com/4secuvam>.

⁷⁶ See DEA Letter to the Sentencing Commission at 1 (Oct. 17, 2022); see also Press Release, DEA, *supra* note 66.

⁷⁷ See Fentanyl Trafficking Offenses, *supra* note 67 at 1; Fentanyl Analogue Trafficking Offenses, *supra* note 67 at 1.

⁷⁸ See Bryce Pardo, et al., *The Future of Fentanyl and Other Synthetic Opioids*, Rand Corp. xxvi (2019), <https://tinyurl.com/ycy4rwxu> (“There is little reason to believe that tougher sentences, including drug-induced homicide laws for low-level retailers and easily replaced functionaries (e.g., couriers) will make a positive difference.”).

B. The proposed amendment is inconsistent with basic principles of punishment.

The Defenders are concerned by the lack of an adequate *mens rea* element in the proposed amendment.

In 2018, when the Commission was considering whether to include a *mens rea* requirement in §2D1.1(b)(13), the Defenders pointed to then-recent Supreme Court precedent that supported the inclusion of that element in the guideline.⁷⁹ That same observation applies today, as a series of recent Supreme Court cases have stressed that predicated punishment on scienter—knowledge or consciousness of wrongdoing—is a “basic principle that underlies the criminal law.”⁸⁰ By omitting an appropriate *mens rea* requirement, the proposed amendment contravenes this “basic principle” and risks injecting a “disfavored” form of liability into the guidelines that would stand “in serious tension with deeply rooted principles of justice and responsibility.”⁸¹ The Defenders oppose this move away from an appropriately scienter-based system of punishment.

Defenders are also concerned about the workability of the proposed amendment’s “reason to believe” standard. Courts have struggled to apply such a standard in various contexts, resulting in multiple circuit splits.⁸² These workability concerns underscore that a “reason to believe” standard should not be added into §2D1.1.

⁷⁹ See Statement of Kevin Butler Before the U.S. Sentencing Comm’n, Washington D.C., at 33 (Mar. 14, 2018) (citing *McFadden v. United States*, 135 S. Ct. 2298, 2305 (2015)).

⁸⁰ See, e.g., *Rehaif*, 139 S. Ct. at 2196; *Ruan*, 142 S. Ct. at 2381 (“[A]s a general matter, our criminal law seeks to punish the vicious will. With few exceptions ‘wrongdoing must be conscious to be criminal.’”) (cleaned up).

⁸¹ *United States v. Burwell*, 690 F.3d 500, 430 (D.C. Cir. 2012) (Kavanaugh, C.J., dissenting).

⁸² See, e.g., *United States v. Maley*, 1 F.4th 816, 820 (10th Cir. 2021) (noting circuit split over standard for determining whether police officer has “reason to believe” the subject of an arrest warrant is in a particular dwelling); *United States v. Khattab*, 536 F.3d 765, 769 (7th Cir. 2008) (noting circuit split over meaning of “reasonable cause to believe” in 21 U.S.C. § 841(c)(2)).

C. The proposed amendment is overbroad.

Finally, because the enhancement would be triggered by any “reason to believe” that a substance was not legitimate, it would likely apply in every single counterfeit pill case involving fentanyl and fentanyl analogues. The message that many pills are counterfeit is widespread. The DEA, along with state and local governments, has launched a national public awareness campaign to raise awareness among users.⁸³ The topic also receives significant attention from federal, state, and local media outlets.⁸⁴ We expect prosecutors would point to these headlines and media campaigns to argue that our clients had “reason to believe” the substance they were distributing was not legitimate.

By dint of its broad applicability, the proposed amendment would echo the discredited crack/powder model of punishing identical substances differently—simply because of their form and regardless of the culpability or role of the person being sentenced. It would also extend §2D1.1(b)(13) to apply in cases where all parties to the drug transaction knew the substance contained fentanyl, and even to people who, though they may have negligently misdescribed the drugs they were selling, had no reason to believe they were distributing fentanyl. Thus, unlike §2D1.1(b)(13) as it currently stands—which applies only to individuals who knowingly distribute drugs by means of fraud—the proposed amendment would not effectively distinguish between more and less culpable offenses.

We urge the Commission not to adopt this proposed amendment.

⁸³ See, e.g., DEA, *DEA Social Media Communications: “One Pill Can Kill” Social Media Campaign*, <https://tinyurl.com/yuh2djhs> (last accessed February 24, 2023); Gina Jordan, *Florida’s attorney general launches the One Pill Can Kill Website to Combat Fentanyl*, WUSF Public Media (Nov. 4, 2022), <https://tinyurl.com/374zy6jt>.

⁸⁴ See, e.g., Jan Hoffman, *Fentanyl Tainted Pills Bought on Social Media Cause Youth Drug Deaths to Soar*, N.Y. Times (May 19, 2022), <https://tinyurl.com/mthxwbak>; David Ovalle, *Potent, often disguised: What to know about fentanyl causing overdoses in South Florida*, The Miami Herald (Mar. 14, 2022), <https://tinyurl.com/pwue7etd>.