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July 18, 2025

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Priorities for the 2025–2026 Amendment Cycle

Dear Judge Reeves:

During the last amendment cycle, after roundtables, extensive public comment, and public hearings, the Commission made bipartisan and commonsense changes to the *Guidelines Manual* that reflect the “advancement in knowledge of human behavior as it relates to the criminal justice process.”¹ We applaud these critical policy updates, which arrive momentarily on the heels of the Guidelines’ fortieth anniversary, and coincide with *Booker*’s twentieth anniversary.

We hope to see continued forward momentum on this year’s proposed priorities, which we enthusiastically support.² Among other topics, we focus this letter on several of these proposals, including:

- [Guidance on appropriate sentence types](#) (pp. 2–13)
- [Drug trafficking offenses](#) (pp. 13–14)
- [Economic offenses](#) (pp. 14–15)
- [Career Offender](#) (pp.15–17)

¹ 28 U.S.C. § 991(b)(1)(C).

² See USSC, [Notice of Proposed 2025–2026 Priorities](#) (2025).

- [Acknowledging “good behavior”](#) (pp. 17–26)
- [Simplification](#) (pp. 26–27)
- [The Bureau of Prisons](#) (pp. 27–28)
- [Data collection](#) (pp. 28–30)

We encourage the Commission to also revisit our May 2025 Annual Letter, where we addressed some of these (and other) topics.³ These priorities, along with our suggested reforms, will enable courts to better effectuate the purposes of sentencing. As always, we welcome this opportunity to draw on our unique institutional knowledge and practice experience and to work collaboratively with the Commission to promote empirically based changes that simplify the Guidelines and save taxpayer resources without compromising public safety.

I. Proposed Priority No. 1: Guidance on the Appropriate Sentencing Option

Defenders are excited to see the Commission prioritize how best to provide courts additional guidance on selecting the appropriate sentence type. Regrettably, in designing the Guidelines, the first Commission disregarded past federal sentencing practices of imposing noncustodial sentences in many cases,⁴ diverged from the Sentencing Reform Act’s (SRA) sentencing options and mandates, and made a series of other choices that solidified prison as the preordained default outcome for federal sentencing.⁵

³ See [Defenders’ Annual Letter to the USSC](#), at 3–14 (May 16, 2025).

⁴ See [Defenders’ Comments on the USSC’s 2024–2025 Proposed Priorities](#), at 4 (July 15, 2024) (discussing how the original Commission “prioritized imprisonment over the use of probation, fine-only, or alternative sentences” and how proportions of imprisonment and imprisonment lengths soared after the *Manual*’s introduction); Melissa Hamilton, *Prison-by-Default: Challenging the Federal Sentencing Policy’s Presumption of Incarceration*, 51 Hous. L. Rev. 1271, 1289 (2014) (noting that the “sentencing table from the very beginning . . . excluded from its recommended ‘norms’ approximately 50% of all cases—that is, the numerous cases in which judges had believed it appropriate to impose probation or some other nonprison sentence.”).

⁵ See USSG, Ch. 1, Pt. A, p. 1.9 ([1987](#)) (“The Commission’s solution to this problem [of courts giving probationary sentences] has been to write guidelines that classify as ‘serious’ (and therefore subject to mandatory prison sentences) many offenses for which probation is

For nearly four decades the Guidelines have failed to heed the SRA’s mandate that the Commission provide guidance not just on the appropriate imprisonment length, *but also on whether to impose a prison sentence in the first place*. The result: a mass incarceration crisis that has devastated communities of color, led to wasteful corrections overspending, and compounded the ongoing, unabated disaster at the overcrowded Bureau of Prisons, all while doing little to protect the public.⁶

But things do not have to be this way. This Commission has the power to correct course. As a group of current and former district judges and U.S. attorneys recently urged, the “Guidelines should look to limit the incarceration of low-risk [individuals] to cases in which no viable alternative would meet the system’s needs.”⁷ To do so, we suggest the Commission revisit the *Manual’s* empirically-lacking default recommendation of imprisonment in almost every case. It should remodel the first three parts of Chapter Five and incorporate a new guideline that gives judges guidance on the “in/out” decision and on *all* sentencing options available by statute,⁸ without the need for the confusing “zones” on the Sentencing Table—topics we address below.⁹

now frequently given.”); Thomas W. Hillier, II, *Linking Judicial Sentences to Congressional Purposes*, 8 Fed. Sent. Rep. 24, 24–25 (1995) (discussing history of the *Guidelines Manual* and explaining the need for an “in/out” guideline).

⁶ See [Defender Comment on the USSC’s 2025 Drug Offenses Proposed Amendments](#), at 8–13 (Mar. 3, 2025) (discussing the Commission’s statutory obligations to address BOP overpopulation crisis fueled by lengthy drug incarceration sentences); see also [Kent B. Alexander, U.S. Attorney, N.D.Ga. \(1994-1997\) et. al., Comment to the USSC on the 2024 Proposed Priorities](#), at 1 (July 15, 2024) (“In addition to negatively impacting the defendant, lengthy periods of incarceration devastate the families and communities left behind and have little if any impact in reducing recidivism.”); see also Ellen C. Brotman, [Make Probation a Real Option at Sentencing](#), 23 Fed. Sent. R. 257, 257 (2011) (“[I]ncarceration has become the default sentence, with disastrous consequences for society at large and for [sentenced] individual[s], . . . their families, and their communities.”).

⁷ [Alexander et al. 2024 Priority Comment](#), at 1.

⁸ The “in/out” decision refers to “the determination as to whether a [person convicted of a federal crime] is sentenced to any term of imprisonment, as compared to some alternative to prison, such as fine-only, probation, or other type of community supervision.” Hamilton, at 1274.

⁹ As Defenders urged most recently in last year’s priority letter, the Commission should tackle this problematic default also by addressing the ever-present problem of “factor creep” by “liberally pruning specific offense characteristics” and recalibrating sentencing ranges

A. The *Guideline Manual*'s failure to address the “in/out” decision and its default to imprisonment provides courts no meaningful guidance on appropriate sentencing options under the SRA.

The *Manual*'s structure, particularly Chapter Five and the Sentencing Table, has created a nearly universal default outcome of imprisonment. Looking at the Table, it is easy to forget that imposing a sentence does not necessarily require imposing a sentence of *imprisonment*. As an initial matter, the Table—prominently placed at the beginning of Chapter Five and reprinted for quick reference on the very last page of the *Manual*—explicitly uses “months of imprisonment” as its unit of measurement, helping to solidify prison terms as the norm.¹⁰ And apart from the few cells in Zone A of the Table, every sentencing range calls for some recommended minimum period of imprisonment above zero, creating a powerful cognitive effect anchored toward prison time.¹¹ What's more, in every cell in each zone—including Zone A—prison is *always* an option; yet, visually, the Table obscures the statutory availability of probation-only or fine-only sentences.¹² And the “zones,” which purport to offer guidance on noncustodial sentences, inject unnecessary complexity and explicitly take noncustodial options off the table for most individuals,

down by lowering base offense levels and eliminating provisions that double-count criminal history. [Defender Comment on Proposed 2024–2025 Priorities](#), at 8. Doing so would also better reflect the sentences judges already find most appropriate. *See id.*

¹⁰ The choice to begin Chapter Five with the Table as Part A, coming before the Parts discussing terms of probation and imprisonment, also solidifies this default.

¹¹ *See generally* Mark Bennett, J., *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); Birte Englich et al., [Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making](#), 32 Personality & Soc. Psych. Bull. 188, 197 (2006).

¹² Hamilton, at 1287 (“Under the Guidelines, prison sentences dominate. Indeed, alternatives, including straight probation, are never a default in the sense that prison is an option in every case, even for minor misdemeanors”); *see also* Brotman, at 257 (“[T]he Sentencing Table provides no combination of offense level and criminal history category that creates a heartland of probation-only sentence and excludes the possibility of imprisonment, even in cases involving [people with no criminal history] and nonviolent offenses. Every one of the 258 specific ranges, even the range triggered by an offense level of I and a criminal history score of zero, includes imprisonment as a suggested option.”).

regardless of whether statute allows those options.¹³ Even the label “alternative” sentence telegraphs to decisionmakers that prison is the sentencing norm.¹⁴ It’s no wonder then that in fiscal year 2024, only 7% of federally-sentenced cases received a noncustodial sentence.¹⁵

Unlike the *Manual*, the SRA contemplates a variety of sentence types (probation, probation with conditions, fines, and imprisonment). And unlike the *Manual*, the SRA does not treat imprisonment as the default sentence. Section 3553(a) instructs judges to consider the “kinds of sentences available,” before turning to the guideline range established for the individual’s conduct.¹⁶ Likewise, § 3582(a), governing the imposition of prison terms, describes the order of operations for two decisions: first, “whether to impose a term of imprisonment,” and *then* “if a term of imprisonment is to be imposed, determining the length of the term.”¹⁷

Largely mirroring § 3582(a), the Commission’s organic statute requires it to promulgate guidelines addressing two distinct judicial decisions: (1) the determination of “whether to impose a sentence to probation, a fine, or a term of imprisonment,” and (2) the determination of the “the appropriate amount of a fine

¹³ Unless otherwise prohibited by statute, the SRA deems individuals sentenced for offenses other than Class A or B felonies eligible for probation sentences, meaning probation is statutorily available in a wide variety of cases. 18 U.S.C. § 3561(a). Yet, in fiscal year 2024, out of sentenced cases assigned to a zone, 71% fell in Zone D. The data used for these analyses were extracted from the U.S. Sentencing Commission’s “Individual Datafiles” for fiscal year 2024. The Commission’s “Individual Datafiles” are publicly available for download on its [website](#).

¹⁴ Cf. Herbert J. Hoelter, *Sentencing Alternatives—Back to the Future*, 22 Fed. Sent. Rep. 53, 56 (2009) (“The culture of punishment solely through imprisonment has permeated the system for so long that lawmakers, judges, district attorneys, and probation officers think that justice can only be satisfied through a sentence of incarceration.”).

¹⁵ USSC, [2024 Sourcebook of Federal Sentencing Statistics](#), at 35 fig. 6 (2024).

¹⁶ Compare 18 U.S.C. § 3553(a)(3) with § 3553(a)(4).

¹⁷ § 3582(a); see also Terence F. MacCarthy et. al., *Individualized Sentences and Alternatives to Imprisonment*, 5 Fed. Sent. Rep. 211, 212 (1993) (discussing statutory mandate).

or the appropriate length of a term of probation or a term of imprisonment.”¹⁸ These requirements are consistent with the SRA’s legislative record: Congress admonished the newly-formed Commission to consider, when crafting the Guidelines, what role, if any, certain factors should have on the recommended “in/out” decision.¹⁹ Other factors were not supposed to be used to determine the appropriate sentence length, though they might factor into deciding whether to imprison someone at all.²⁰

Similarly, § 994(j)’s mandate that the guidelines “reflect the general appropriateness of imposing a sentence other than imprisonment” for certain individuals with no criminal history contemplates an initial, distinctive “in/out” decisional step.²¹ As one sentencing policy expert observed, Congress “was not just

¹⁸ 28 U.S.C. §§ 994(a)(1)(A), (a)(1)(B); *see also* MacCarthy et. al., at 212; Hamilton, at 1290 ([R]eflecting a prison bias, the Commission has unfortunately chosen not to provide substantive guidance on the “in/out” decision. This continues to be surprising considering Congress expressly directed it to do so in the Reform Act legislation in order to assist judges who are statutorily required to ascertain if a probation sentence is statutorily permissible.”).

¹⁹ [S. Rep. No. 98-225](#), at 172–74.

²⁰ For example, Congress advised the Commission that the need for an educational program “should be an inappropriate consideration in determining the appropriate length of [a prison] term,” though it might call for a sentence of probation instead of prison. *Id.* at 172–73; *see also id.* at 174–75 (education, vocational skills, employment record, family ties and responsibilities, and community ties generally should not be used to imprison someone or increase their prison term, though “they may, in an appropriate case, call for the use of a term of probation instead of imprisonment”); Charlie E. Varnon, *Restoring Probation, Parsimony and Purposes to the Sentencing Reform Act*, 5 Fed. Sent. R. 217, 217 (1993) (“Congress appropriately restricted consideration of education, vocational skills, employment, and family and community ties *only when a term of imprisonment is recommended* But Congress did *not* restrict consideration of personal characteristics when other sentences—like fines and probation—are recommended. The problem is, we do not yet have guidelines that specifically recommend a fine or probation. This situation is in serious conflict with much that was good in the long history of criminal sentencing.”); *see also* USSC, [Simplification Draft Paper: Departures and Offender Characteristics](#), at II(E)(3) (last visited July 14, 2025) (“[I]n assessing the flexibility the Commission has to address the offender characteristics enumerated in subsection (e), it appears that Congress’s concern was asymmetrical: Congress wanted to ensure that the lack of the enumerated factors would *not increase the likelihood of prison* – not that these factors would have no bearing on the possibility of probation.”).

²¹ 28 U.S.C. § 994(j); *cf.*, e.g., [Alexander et al. 2024 Priority Comment](#), at 1 (“In 1984, Congress enacted 28 U.S.C. § 994(j) Yet, over the last 40 years, our federal criminal

focused on the length of prison terms; it expressed concern about the overuse of prison as the typical type of sentence.”²² Perhaps *most* tellingly, the SRA Senate Report states that the “guidelines are required to provide guidance for the judge in determining whether to sentence a convicted defendant to probation, to pay a fine, or to a term of imprisonment. This guidance may prove to be one of the most important parts of the guidelines process”²³ By not separating the “in/out” decision from the sentencing range determination and obscuring the statutorily available noncustodial sentencing options, §§5A, 5B1, and 5C effectively skip over this logical first step.²⁴

Some jurisdictions are ahead of the U.S. federal system in requiring a threshold “in/out” decision. For instance, in Wisconsin and New Jersey—which do not have sentencing guidelines—sentencing courts must first consider (and reject) probation before determining imprisonment length.²⁵ In Alabama and Utah—states

justice system has favored a presumption of imprisonment as the default form of punishment, resulting in mass incarceration.”).

²² Hamilton, at 1285 & n.72 (discussing how the “Senate Report underlying the [SRA] represents that committee members actually intended that probation and intermediate sanctions be available more often than they had been before the Guidelines” and criticizes the pre-Guidelines “lack of guidance on nonprison sentences”).

²³ [S. Rep. No. 98-225](#), at 163–64; *see also* Hamilton, at 1290 & n.105 (stating that the House Report accompanying the SRA agrees with the Senate Report, referring to the decision whether to imprison as “the most fundamental sentencing decision” and criticizing state commissions that focus instead on guiding only the length of prison terms, rather than the kinds of sentences (quoting H.R. Rep. No. 98-1017, at 102 (1986))).

²⁴ *See* Gerald R. Smith, *A Renewed Call for an “In/Out” Guideline*, 12 Fed. Sent. Rep. 110, 111 (1999) (“The absence of an ‘in/out’ guideline and the generally binding nature of the guidelines have made a mockery of the statute. . . . The statutory process is ignored as courts proceed directly to the grid.”); MacCarthy et. al, at 212 (“The Commission’s failure to heed these directives resulted in a system under which the only question is how long.”); *see also* Brotman, at 257 (“Despite these clear [Congressional] directives, no chapter, or even section of the Guidelines points the sentencing court to factors that should be considered in answering the threshold question of whether to imprison.”).

²⁵ *See State v. Gallion*, 678 N.W.2d 197, 204 (Wis. 2004) (case law establishes that in Wisconsin sentencing courts should consider probation as “the first alternative” punishment and that a custodial sentence should be imposed only if probation is rejected); *State v. Baylass*, 553 A.2d 326, 328 (N.J. 1989) (when neither a statutory presumption of imprisonment nor non-incarceration applies, courts must weigh statutory aggravating and

with sentencing guidelines—the guidelines incorporate a separate step where courts make an initial “in/out” decision before turning to sentence length.²⁶ Outside of the United States, England and Wales, which have statutory purposes of sentencing similar to ours, recently updated their Guidelines to offer judges additional detailed guidance on the variety of sentence types available.²⁷ While England and Wales have a statutory “custody threshold” that discourages custodial sentences unless the offense was serious, and the U.S. statutory scheme has no exact corollary, the SRA’s text and legislative history show that Congress intended the Guidelines to give guidance on the types of sentences available. This Commission can, and should, finally bring the *Manual* in line with the SRA’s statutory scheme by providing “in/out” guidance on the front end.²⁸ In addition to being more faithful to the SRA,

mitigating factors to determine whether to sentence to probation or prison before turning to question of presumptive custodial sentence lengths).

²⁶ In Alabama, courts use a combination of worksheets, instructions, and tables to determine the sentence. There, sentencing is a two-step process requiring the court to first fill out a “Prison In/Out Worksheet” to determine whether prison is appropriate. If prison is appropriate, the court then determines imprisonment length by filling out a “Prison Sentence Length Worksheet.” See Robina Inst., [Jurisdiction Profile: Alabama](#), at 4–5 (Aug. 2019); Ala. Sent. Comm’n, [Presumptive and Voluntary Sentencing Standards 2024 Manual](#), at 18 (Oct. 1, 2024). In Utah, sentencing involves five steps, at Step 4 the court determines whether the guidelines presume probation, jail as a condition of probation, or imprisonment and at Step 5 the court calculates the presumed sentence. See Utah Sent. Comm’n, [Adult Sentencing, Release, & Supervision Guidelines](#), at 28 (May 7, 2025).

²⁷ Sentencing Council of England and Wales, [Imposition of community and custodial sentences - Effective from 1 September 2025](#) (eff. Sept. 1, 2025) (discussing guideline and statutory custody threshold and noting that a “custodial sentence must not be imposed unless the offence (or the combination of the offence and one or more offences associated with it) was so serious that neither a fine alone nor a community sentence can be justified”); see also [UK Sentencing Act 2020](#), c. 17, § 57 (Eng.).

²⁸ This critique and suggestion are not new. See, e.g., Brotman, at 257 (“[T]he Commission should . . . draft a new Guidelines chapter that provides the district courts meaningful assistance on the question of when to impose probation.”); Smith at 110 (urging “Commission to promulgate an ‘in/out’ guideline. Such a guideline would permit a sentencing judge to determine whether probation would be appropriate *before* turning to the sentencing grid.”); Hillier II, at 24 (“Instead of following the path envisioned by Congress, §1B1.1 of the guidelines requires judges to move directly to the sentencing grid to decide the fate of a defendant. The purposes of sentencing and sentencing options available to a judge are eschewed.”).

encouraging probation and other alternative sentences in a broader range of cases would help ameliorate BOP's burgeoning overpopulation and understaffing crises.

Below we discuss why continued adjustment of the Table's sentencing zones does not adequately address the SRA's mandates, then we provide ideas for how the Commission might start to rethink Chapter 5.

B. Tinkering at the margins of the sentencing zones is an unsatisfactory substitute for much-needed Chapter 5 reforms.

On top of defaulting to imprisonment, the *Manual's* advisory sentencing ranges have drifted ever-upward since 1987, with noncustodial sentences becoming increasingly rare in the federal system after introduction of the Guidelines.²⁹ Last year, several commenters suggested modifying or expanding the Sentencing Table's zones to help address this problem by encouraging noncustodial and alternative sentences in more cases.³⁰ Defenders have made similar recommendations in the past.³¹ These suggestions show widespread recognition that the Guidelines fail to promote the full range of sentencing options available by statute. But based on the data we have, Defenders worry that tinkering around the edges of the zones will

²⁹ See [Defenders' 2025 Annual Letter](#), at 9 ("After the Sentencing Reform Act of 1984 and the introduction of the Guidelines, the percentage of noncustodial sentences dropped drastically. This continues on today; in fiscal year 2024, only 7% of sentenced cases received a sentence of probation or fine alone."); [Defenders' 2024–2025 Priority Comment](#), at 4 ("The original Commission actively chose to disregard past practice and it prioritized imprisonment over the use of probation, fine-only, or alternative sentences. . . . [F]or federal convictions terminating in 1985 . . . 34% were sentenced to imprisonment only.").

³⁰ See, e.g., [Center for Justice and Human Dignity & Aleph Institute Comments on the USSC's 2024 Proposed Priorities](#), at 5 (July 15, 2024); [American Bar Association Comments on the USSC's 2024 Proposed Priorities](#), at 2 (July 15, 2024); [Tzedek Association Comments on the USSC's 2024 Proposed Priorities](#), at 23–24 (July 15, 2024); [Michael O'Hear Comments on the USSC's 2024 Proposed Priorities](#), at 1 (July 15, 2024); [Judge Stefan Underhill Comments on the USSC's Proposed 2024 Priorities](#), at 4 (July 15, 2024); [Alexander et al. 2024 Priority Comment](#), at 2; cf., e.g., Cecelia Klingele, *What's Missing? The Absence of Probation in Federal Sentencing Reform*, 34 Fed. Sent. R. 322, 324 (2022) (suggesting the Commission "place more offenses within Zones A and B" to increase proportion of cases receiving federal probation).

³¹ See, e.g., [Defenders' Comments on the USSC's 2017–2018 Proposed Priorities](#), at 21 (July 31, 2017) (encouraging the Commission to "[e]xpand Zone B by 2 levels to an 18-24 month range rather than simply consolidate Zones B and C.").

accomplish little in the way of encouraging broader use of noncustodial and hybrid sentences, while injecting unnecessary complexity into the sentencing formula and explicitly taking noncustodial options off the table under the guidelines in most cases, even when those alternatives are permitted by statute.³²

In fact, despite the well-intentioned expansion of Zones B and C over a decade ago, the Commission found a “continued decreasing trend in the imposition of alternative sentences.”³³ Even after this expansion, in fiscal year 2024, 71% of sentenced cases assigned to a zone fell into Zone D,³⁴ where the Guidelines advise “the minimum term shall be satisfied by a sentence of imprisonment.”³⁵ The Commission has also documented racial disparities in who receives alternative sentences under the zone regime.³⁶ And the zones tend to be a complicating, rather than simplifying, feature of the Guidelines.³⁷ Compounding these myriad problems

³² Unless otherwise prohibited by statute, the SRA deemed individuals sentenced for offenses other than Class A (maximum sentence of life imprisonment or death) or Class B (maximum sentence of 25 years to life) felonies eligible for probation, meaning probation is statutorily available in a wide variety of cases. *See* 18 U.S.C. §§ 3561(a), 3559(a).

³³ *See* USSC, [Alternative Sentencing in the Federal Criminal Justice System](#), at 1 (2015); *cf.* USSC, [Sentencing Options Under the Guidelines \(Staff Discussion Paper\)](#), at 14 (1996) (“These numbers show that judges often do not impose alternative sentences although they are available under the guidelines.”). Even today the zones do little to promote noncustodial sentences. In fiscal year 2024, 29% of federally sentenced cases fell within Zones A, B, or C. Yet 77% of those cases received prison-only sentences. And out of U.S. Citizens sentenced in fiscal year 2024, only 16% of sentenced cases fell within Zones A, B, or C. Of those cases falling in the lower zones, 50% still received prison-only sentences. The data used for these analyses were extracted from the U.S. Sentencing Commission’s “Individual Datafiles” for fiscal year 2024. The Commission’s “Individual Datafiles” are publicly available for download on its [website](#).

³⁴ The data used for these analyses were extracted from the U.S. Sentencing Commission’s “Individual Datafiles” for fiscal year 2024. The Commission’s “Individual Datafiles” are publicly available for download on its [website](#).

³⁵ USSG §5C1.1(f).

³⁶ USSC, [Alternative Sentencing](#), at 21 (“Eligible White offenders were sentenced to alternative sentences at higher rates than eligible Black, Hispanic, and offenders in the Other race category.”).

³⁷ The zones have long been a point of confusion. *See* USSC, [Staff Discussion Paper](#), at 14 (“In all, 26 (28.9%) of the hotline calls in the sample indicated some uncertainty about when

is the fact that the *Manual* largely skips over what should be a major decision step in the sentencing process—whether to impose a prison term in the first place, as discussed above.

Instead of making small modifications to the zones, the Commission should consider reworking §§5A, 5B, and 5C and removing the zones. In place of zones, the *Manual* should include a guideline providing more meaningful guidance to steer courts toward the broader array of available sentence types, and away from custodial sentences in more cases.³⁸ This means that, before presenting judges with the prison-centric Sentencing Table or guidance on sentence *length*, the *Manual* should prompt judges to think about the *types* of sentencing options available and whether a noncustodial sentence can further the statutory purposes of sentencing.³⁹

C. When considering how to provide courts better guidance on selecting the appropriate sentencing option, the Commission might look to its recent changes to the supervised release policy statements.

What might this “in/out” guidance look like? The new supervised release policy statements offer a potential blueprint. For example, the policy statements in Chapter 5, Part D, offer courts guidance on imposition of a supervised release term and elevate the importance of conducting an individualized assessment.⁴⁰ We

and to what extent the court could substitute an alternative sentence for prison. No other topic appeared to consistently pose a problem.”).

³⁸ Given the low proportion of noncustodial sentences and disparities seen even within cases currently “eligible” for noncustodial sentences under the zones, we have little reason to believe that expanding the zones will provide sufficient guidance. That said, if the Commission is unable to revise chapter 5 to provide adequate guidance on statutorily available sentencing types, we continue to urge it to explore a variety of ways to increase the use of alternatives to incarceration. See [Defenders’ 2022 Annual Letter](#), at 25 (summarizing past Defender proposals to better encourage alternatives to incarceration).

³⁹ See, e.g., MacCarthy et. al., at 212 (“The refusal to separate the in-out[] decision from the question of length of sentence is perhaps the single greatest impediment to the imposition of alternative sentences.”).

⁴⁰ In particular, the amendment removed the previous requirement to impose supervised release in cases involving a prison sentence of over one year in §5D1.1, responding to “widespread concern that supervised release often is ordered reflexively when deciding of the individual before the court.” USSC, [Amendments to the Sentencing Guidelines](#), at 32 (April 30, 2025).

understand the supervised release disposition does not serve retributive purposes, but it is striking that §5D1.1 now calls for a careful, individualized assessment of the need for a supervised release term, while §§5A–C do not require this individualized assessment of the need for imprisonment—despite the statutory importance of individualized sentencing.⁴¹

We urge the Commission, having overhauled the supervised release policy statements and simplified the (former) three-step process,⁴² to continue clarifying the sentencing process to give better guidance and promote truly individualized sentencing. Before even arriving at the imprisonment-heavy Sentencing Table, the *Manual* could have a standalone section offering guidance on selecting the appropriate sentence type. This guideline might, for example, instruct judges that, in determining what type of sentence to impose, the court should conduct an individualized assessment applying the §3553(a) factors. It might instruct that, unless otherwise foreclosed by statute, the court should consider whether a probation, fine-only, or other noncustodial/hybrid sentence can fulfill the statutory purposes of punishment.⁴³ It should provide guidance on when these other sentences might be appropriate, which would assist courts and effectuate the SRA’s intent.

Although certainly different from the current structure of the *Manual*, these suggestions are not new. As far back as the mid-1990s, Commission staff exploring sentencing options suggested an alternatives table that sentencers could use to

⁴¹ Instead, the current §5C1.1 begins by telling judges that a “sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.” And as discussed above, every cell in the table permits a term of imprisonment.

⁴² USSC, [2025 Amendments](#) at 80 (new “instructions set forth in §1B1.1 are structured to reflect a two-step process whereby the sentencing court must first correctly calculate the applicable guideline range as the ‘starting point and initial benchmark’ and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a).”).

⁴³ Similar to the current §5C1.1, note 10, the new guideline should also provide guidance to “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, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.” 18 U.S.C. § 994(j).

determine the length of any noncustodial or alternative sanctions.⁴⁴ While providing better guidance on alternative sentences has been recommended by numerous commenters for as long as the Guidelines have existed, it is also likely to be the subject of spirited discussions and debate amongst stakeholders and may be worthy of a roundtable or working group. However the Commission decides to proceed, we wish to be included, along with other stakeholders, early and often as the Commission examines how the Guidelines can provide additional guidance on selecting the sentence type.

II. Proposed Priority No. 2: Drug Trafficking Offenses

Defenders are glad the Commission has tentatively prioritized further examining §2D1.1's penalty structure and the methamphetamine purity distinctions. The 2025 amendment to the mitigating role provisions outlined in §2D1.1 is an important step in recalibrating the drug trafficking guideline to better account for lesser culpability, but we hope it does not mark the end of the Commission's efforts to de-emphasize drug weight as the primary proxy for culpability. And although the Commission considered ways to equalize the methamphetamine guidelines during the last amendment cycle, it ultimately did not change the current 10:1 ratio between meth-mixture and meth-actual.

As Defenders have urged before, the Commission should consider further amendments to §2D1.1 to produce meaningfully lower guideline ranges, and to eliminate the methamphetamine purity distinctions by using the meth-mixture (or lower) thresholds for all meth-related offenses.⁴⁵ We encourage the Commission to revisit these letters and comments. The issues we discussed in those comments persisted through fiscal year 2024, with only 26% of individuals sentenced for methamphetamine offenses receiving sentences within the applicable guideline range.⁴⁶ Sentences under §2D1.1, including methamphetamine sentences, continue to contribute to racial disparities and mass incarceration, while failing to measure harm or culpability or to improve public safety. While drug sentences have remained high, drug overdose deaths plummeted by more than 26% in 2024—a

⁴⁴ See USSC, [Staff Discussion Paper](#), at 24–25.

⁴⁵ See, e.g., [Defender Comment on USSC's 2025 Drug Offenses Proposed Amendment](#), at 1–32; [Defenders' Annual Letter to the USSC](#), at 2–10 (May 15, 2024); [Defenders' Annual Letter to the USSC](#), at 3–13 (May 24, 2023).

⁴⁶ See [2024 Sourcebook](#) at 97.

decrease most experts attribute to public health solutions, such as increased availability of treatment.⁴⁷ We hope that the Commission will build on its work from the last amendment cycle and finally eliminate the methamphetamine purity disparity by bringing meth-actual/ice offense levels down to the current meth-mixture levels—or even by equalizing *and lowering* both levels, support for which was provided at the March 2025 hearing by drug policy expert Jonathan Caulkins.⁴⁸

As for fentanyl-related offenses, we continue to oppose any new specific offense characteristics (SOCs) for these cases.⁴⁹ There have been no statutory changes that require guideline amendments. Congress passed the HALT Fentanyl Act in June 2025, but the Act simply makes permanent the scheduling of fentanyl-related substances that first went into effect in 2018; it does not change the penalties currently in effect for those substances.⁵⁰

III. Proposed Priority No. 3: Economic Offenses

Defenders support reexamining the economic offenses guideline, §2B1.1. Defenders, academics, and stakeholders have criticized this empirically deficient guideline for decades.⁵¹ This guideline—bloated by the overly punitive loss table,

⁴⁷ CDC, [Provisional Drug Overdose Death Counts](#) (last reviewed June 11, 2025) (reported number of deaths); *see also* Brian Mann, [Deadliest phase of fentanyl crises eases, as all states see recovery](#), NPR (Mar. 10, 2025).

⁴⁸ *See* [Statement of Jonathan Caulkins to USSC on 2025 Drug Offenses Proposed Amendments](#), at 4 (Mar. 12, 2025) (“I think a case could be made for equalizing the treatment of methamphetamine mixture and methamphetamine (actual) at the same level as cocaine, but I do not know whether such a large shift is permissible.”).

⁴⁹ *See* [Defenders’ Response to USSC Issue for Comment re Offenses Involving Fentanyl, Fentanyl Analogues, and Other Opioids](#), at 2–18 (May 1, 2025).

⁵⁰ [S. 331](#) (Halt All Legal Trafficking of Fentanyl Act, or the HALT Fentanyl Act).

⁵¹ *See, e.g.*, [Defenders’ 2025 Annual Letter](#) at 7 & n.22 (summarizing critiques); [Statement of Daniel Dena on behalf of Defenders to the USSC on 2024 Economic Crimes Proposed Amendments](#), at 13–14 (Feb. 27, 2024) (summarizing critiques). Last year, several Commenters sounded the alarm on the need for a long-overdue overhaul of this broken guideline. *See, e.g.*, [PAG Comments on the USSC’s 2024 Proposed Priorities](#), at 17–18 (July 15, 2024); [Ctr. for Just. and Human Dignity & Aleph Inst. Comments on the USSC’s 2024 Proposed Priorities](#), at 10–11 (July 15, 2024); [A. Brian Albritton, U.S. Atty. M.D.FL. \(2008–2010\), et. al., Comment to the USSC on the 2024 Proposed Priorities](#), at 1–4 (July 15, 2024). The Department of Justice has, on the other hand, encouraged more factor creep and

notes, and countless SOC enhancements—combined with the overreach of the relevant conduct rules, produces sentencing ranges unmoored from individual culpability and oftentimes from relative harm.⁵² That is why judges so often ignore the recommended ranges in economic crimes cases.⁵³

As this Commission embarks on its examination of §2B1.1, it must avoid any further factor creep, which would cast the guideline even farther from the sentences judges deem appropriate in these cases and inject more complexity into an already complex and lengthy guideline. As others have pointed out, the *Manual* is “overly reliant on quantifiable factors” that are poor proxies for culpability.⁵⁴ This guideline is a prime example: “What started as two separate guidelines with loss tables providing up to 11- (fraud) or 13-level (theft) offense level increases based on loss amount and an additional two (fraud) or five (theft) ‘specific offense characteristic’ (SOC) enhancements, has morphed into a combined economic crimes guideline with up to a 30-level loss-based offense level increase and 19 other SOCs.”⁵⁵ The Commission should take its lead from the judges who actually impose sentences under §2B1.1: it should not only eschew increasing §2B1.1’s already high guideline ranges, but also recalibrate those ranges down in a meaningful way.

IV. Proposed Priority No. 4: Career Offender

Defenders have written what amount to several short treatises detailing the myriad problems with the career-offender guideline. We will not rehash them all here; but we will take this opportunity to express that last year’s proposal to eliminate state drug priors from the “controlled substance offense” definition gave us real hope—and later caused significant disappointment—and to urge Commissioners not to abandon this clear solution to multiple vexing problems.

suggested additional enhancements to the already bloated guideline. See [DOJ Comments on the USSC’s 2024 Proposed Priorities](#), at 15–19 (July 15, 2024).

⁵² See [Defenders’ 2025 Annual Letter](#) at 7–8.

⁵³ *Id.*

⁵⁴ [Jonathan Wroblewski, Douglas Berman & Steven Chanenson Comments on the USSC’s 2024 Proposed Priorities](#), at 4 (July 15, 2024).

⁵⁵ [Dena 2024 Statement](#), at 1.

From the start, courts and stakeholders have told the Commission that the career-offender guideline results in sentencing ranges that do not comply with the purposes of sentencing—particularly, but not exclusively, in drug cases.⁵⁶ In 2004, the Commission identified the career-offender guideline’s application to drug cases as one of two provisions that caused the most profound unwarranted racial disparities, with the other one being the old 100-to-1 crack-to-powder ratio.⁵⁷ In 2016, the Commission reported to Congress that, since *Booker*, courts had increasingly departed or varied downward from the career-offender guideline, and by a wide margin—especially (again, not exclusively) in drug cases.⁵⁸ The Commission urged Congress to eliminate at least the possibility of the drug-only career offender.⁵⁹

Last year for the first time, the Commission proposed restricting the “controlled substance offense” definition to federal offenses, consistent with the career-offender directive.⁶⁰ Defenders and other stakeholders were elated: not only would this address concerns about the “categorical approach,” resolve multiple circuit splits, and simplify the career-offender guideline, but it would also finally address underlying concerns about the career-offender guideline that have plagued the career-offender guideline from the start. Indeed, given the very low number of individuals with federal drug priors, it would largely accomplish as a practical matter what the Commission advocated for in 2016: eliminating the drug-only career offender. The proposal got support from many corners, including the

⁵⁶ See USSC, Notice of Proposed Amendments, 54 Fed. Reg. 9122, 9161 (Mar. 3, 1989) (describing various early criticisms of the career-offender guideline); [Tr. of Public Hearing on Proposed Amendments to the USSG](#), at 127 (Apr. 7, 1989) (Sentencing Commissioner and Supreme Court Justice Stephen G. Breyer, describing complaints that came not only from defendants but also judges and prosecutors that career-offender guideline ranges were not rational in some cases).

⁵⁷ USSC, [Fifteen Years of Guidelines Sentencing](#), at 131–35 (2004).

⁵⁸ USSC, [Report to the Congress: Career Offender Sentencing Enhancements](#), at 2, 18, 22–23, 27, 34–37, 44 (2016) (“USSC 2016 Career Offender Report”).

⁵⁹ *Id.* at 44.

⁶⁰ USSC, [Proposed Amendments to the USSG](#), at 2–3, 4 (Dec. 19, 2024); see also [Defender Comments on the USSC’s 2023 Proposed Amendments Re: Controlled Substance Offense and Career Offender](#), at 22–25 (Mar. 14, 2023) (explaining why § 994(h) does not require the career-offender guideline to reach state drug crimes).

Criminal Law Committee.⁶¹ This came as no surprise: at the career-offender roundtable in 2024, the idea of eliminating state drug priors had generated a great deal of enthusiasm from very different stakeholders.

The proposal, of course, failed. We were, and remain, profoundly disappointed. But we write in the hope that last year’s “controlled substance offense” proposal remains on the table. We understand that Commissioners are seeking to resolve multiple concerns about the career-offender guideline at the same time, and the “crime of violence” question is complicated. But the “controlled substance offense” issue is not. Again, by eliminating state drug priors, the Commission would comply with the directive, simplify application of the career-offender guideline, resolve concerns related to the categorical approach, and—importantly—reduce significantly the mismatch between the career-offender guideline and the purposes of sentencing that have plagued the guideline from the start. The Commission can, and should, eliminate state drug priors from the “controlled substance offense” definition even if it needs additional time to deliberate on other potential amendments to the career-offender guideline.

V. Proposed Priority No. 5: Acknowledging “Good Behavior”

We agree that the Commission should examine how the Guidelines fail to provide appropriate adjustments for positive behaviors, such as acceptance of responsibility and substantial assistance. So many of the *Manual’s* provisions target offense conduct (and beyond) and resultant harms; it is essential that the Guidelines also adequately reward accountability, contrition, rehabilitation, and assistance to the government. But as they currently stand, neither §3E1.1 nor §5K1.1 are applied frequently enough to deserving individuals. Moreover, Chapter 3 does not credit post-offense rehabilitation beyond accepting responsibility.

A. Acceptance of Responsibility: The Commission should remove or amend §3E1.1 commentary that courts and prosecutors use to deny the adjustment to deserving individuals.

The Commission should reexamine §3E1.1, focusing on ways some of the commentary inadvertently steers prosecutors and judges away from granting the full (or any) acceptance adjustment to people entitled to it. This commentary has cost people even their 2-level reduction at §3E1.1(a) for reasons unrelated to taking

⁶¹ [Statement of Edmond E. Chang on behalf of CLC to USSC](#), at 3 (Feb. 3, 2025).

accountability for their offense conduct. This is particularly troubling, given concerns that §3E1.1 functions as a penalty on the Sixth Amendment right to trial,⁶² especially in a system where over 97% of individuals plead guilty.⁶³ People who plead guilty give up not only their sacred right to a jury trial, but other constitutional protections as well.⁶⁴ Our clients waive these rights at least partly because they know that if they don't, they will likely receive a significantly higher sentence by losing the benefit of §3E1.1's reduction. It is therefore critical that this adjustment—the only one in the guidelines that accounts for guilty pleas—be applied fairly and consistently. Unfortunately, that is not happening.

1. Application Note 1(A): Relevant Conduct

One of the most straightforward and impactful changes the Commission can make to ensure that §3E1.1 fully accounts for a person's acceptance of responsibility is to remove all references to "relevant conduct" from the commentary, so people who accept responsibility for the offense of conviction receive the adjustment even if they contest relevant conduct or other upward adjustments.

Because of application note 1(A), the §3E1.1 reduction has been unfairly withheld from people who purportedly "falsely den[ie]d" or "frivolously contest[ed]"⁶⁵

⁶² See, e.g., Michael M. O'Hear, [The Need to Reform the Acceptance of Responsibility Adjustment](#), 9 Fed. Sent. Rep. 101, 103 (1996) ("When a reduction that is routinely granted to over eighty percent of defendants is generally denied to defendants who go to trial, one may easily reconceptualize the 'reduction' provision as a penalty imposed for exercising a constitutional right."); Nat'l. Ass'n. of Crim. Def. Lawyers, [The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save it](#) (2018).

⁶³ USSC, [2024 Sourcebook](#), at 30. A district judge in New York has even declared the third point under §3E1.1(b) to be "an unconstitutional penalty imposed on a defendant for exercising his right to trial." *United States v. Tavberidze*, 769 F. Supp. 3d 264, 268 (S.D.N.Y. 2025). While the court's constitutional holding was limited to the third point, it found that "section 3E1.1 in its entirety effectively penalizes a defendant who . . . proceeds to trial based on his decision to exercise his Sixth Amendment right to trial." *Id.* at 270. The Court expressly declined to decide whether the initial two-point reduction at §3E1.1(a) violates the Sixth Amendment. *Id.* at 273.

⁶⁴ Those protections include the right to confront witnesses and the privilege against self-incrimination. See U.S. Const. amends. V, VI.

⁶⁵ USSG §3E1.1 N.1(A).

relevant conduct, whether those challenges were factual or legal in nature.⁶⁶ This is bad policy. Relevant conduct is proven under the lowest legal standard and often with unreliable evidence.⁶⁷ Due process requires an opportunity to contest these enhancements, which can lead to exponentially higher sentences. For these and other reasons, Defenders have repeatedly called on the Commission to reign in the Guidelines' use of unadjudicated conduct under §1B1.3 to increase a person's guideline range.⁶⁸

Requiring sentenced individuals to admit to relevant conduct to benefit from the acceptance reduction chills what little opportunity remains at sentencing for them to exercise their right to due process.⁶⁹ It also creates an ethical dilemma for

⁶⁶ See e.g., [Defenders' Comments on the USSC's 2017 Proposed Amendments](#), at 55–57 (Feb. 20, 2017) (discussing “inconsistent application of the acceptance of responsibility reduction”); [Defenders' Comments on the USSC's 2017–2018 Proposed Priorities](#), at 21–22 (July 31, 2017); [Defenders' Annual Letter to the USSC](#), at 7–9 (June 15, 2015) (detailing recent Seventh Circuit case exemplifying the difficulties application note 1(A) poses for defense counsel); see also, e.g., *United States v. Edwards*, 635 F. App'x 186, 196 (6th Cir. 2015) (Merritt, J., dissenting) (“Counsel did not deny any conduct. He only argued that Edwards' conduct did not suggest a leadership role.”). *Edwards* involved a challenge to the aggravating role enhancement at §3B1.1(a), rather than relevant conduct; yet the court denied any reduction for acceptance of responsibility, even though the role enhancement is mentioned nowhere in §3E1.1.

⁶⁷ See, e.g., *United States v. Slager*, 912 F.3d 224, 233 (4th Cir. 2019) (“When sentencing courts engage in fact finding, preponderance of the evidence is the appropriate standard of proof.” (internal citation and quotation omitted)); *United States v. Clark*, 538 F.3d 803, 813 (7th Cir. 2008) (“[A] sentencing court may credit testimony that is totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant.”) (Internal quotation and citation omitted)).

⁶⁸ See, e.g., [Defenders' 2025 Annual Letter](#), at 5; [Defenders' 2024–2025 Priority Letter](#), at 9–15.

⁶⁹ The commentary's statement that a person “may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection,” USSG §3E1.1 App. N. 1, does not cure the due process concerns. When the government or PSR recommends an enhancement based on relevant conduct (or any specific offense characteristic), courts typically will impose that enhancement absent defense objection; they often do so even when the defense objects to protect the client but does not support the objection with evidence, fearing loss of the acceptance reduction. See, e.g., *United States v. Cirilo*, 803 F.3d 73, 75 (1st Cir. 2015) (sentencing court can rely on defense's failure to present contrary evidence to uphold allegations in the PSR). Thus, the only way to ensure the acceptance reduction is to stand silent, which almost guarantees the

defense attorneys: do we zealously represent our clients and make all reasonable arguments in their defense, only to forfeit their chance at obtaining a §3E1.1 reduction that would significantly lower their sentence?⁷⁰ It serves no legitimate sentencing policy goal to withhold acceptance from a person whose lawyer challenges relevant conduct (to provide counsel's effective assistance) when the sentenced individual has admitted the facts underlying the offense of conviction. Yet that is exactly what §3E1.1 permits.

There is another fundamental problem with the references to relevant conduct in application note 1: determining whether a factual denial is “false,” or whether a challenge (legal or factual) is “frivolous,” is entirely subjective—leading to unwarranted disparities in how courts apply the adjustment.⁷¹ This compounds the disparities resulting from the uneven application of §3E1.1 to relevant conduct based on district (or judge-by-judge) practice. Some Defenders report that they routinely challenge relevant conduct, with no threat of losing points for acceptance, while others practice in districts where courts regularly withhold the adjustment for those very same challenges, often at the urging of the government and/or the probation office. These disparities would disappear if the Commission permitted individuals to contest relevant conduct and still receive the Chapter 3 reduction.

2. Application Note 1(B): Pre-sentencing Conduct Unrelated to the Offense

Some courts deny the §3E1.1 adjustment based on conduct wholly unrelated to the offense, and that cannot reasonably be construed as reflecting a failure to

court will enhance the sentence based on the relevant conduct, or to admit the relevant conduct—even when that conduct can itself give rise to new, additional criminal liability, such as the §2K2.1(b)(6)(B) enhancement for possessing a firearm in connection with another felony. This creates yet another constitutional Hobson's choice: a person must sacrifice their 5th Amendment rights and risk a new criminal charge to obtain the §3E1.1 reduction for a different offense to which they already pled guilty.

⁷⁰ See Margareth Etienne, [*Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of their Lawyers*](#), 78 N.Y.U. L. Rev. 2103, 2107 (2003) (discussing how §3E1.1 is “the loophole that permits judges to regulate defense attorney conduct with the threat of higher sentences for their clients”).

⁷¹ Even judges on the same appellate panel have disagreed about whether a challenge was frivolous. See, e.g., *Edwards*, 635 F. App'x at 196 (Merritt, J., dissenting) (disagreeing with majority regarding whether guideline calculation objection was frivolous).

accept responsibility. Under application note 1(b), among the factors considered in applying the adjustment is a person's "voluntary termination or withdrawal from criminal conduct or associations." Some courts broadly interpret this language to foreclose the reduction for people who have problems on bond or while in pretrial detention. That is, district courts routinely deny the adjustment when a person engages in conduct unrelated to their federal charge but that the court deems "criminal," even when the person has pled guilty and admitted their involvement in the offense, and even though the purportedly criminal activity did not result in criminal charges (or even an arrest).

Defenders report that it is common, for example, for courts in some districts to deny the adjustment to people who test positive for drug use while on pretrial release, based on their theory that drug use shows they have not withdrawn from criminal conduct.⁷² And in one case, a court denied acceptance of responsibility to a person who defended himself in a fight with his cellmate while in pretrial custody, even though he was not the aggressor and acted in self-defense.⁷³

Importantly, none of this conduct has any connection to whether the individual has accepted responsibility for the offense for which they are being sentenced. And these arbitrary denials create unwarranted disparities based on radically different commentary applications from one district, or even one judge, to the next. We urge the Commission to delete application note 1(B), or to at least

⁷² See, e.g., *United States v. Kirkland*, 28 F.3d 49 (7th Cir. 1994) (affirming denial of §3E1.1 reduction for person convicted of 18 U.S.C. § 922(g) who tested positive several times for THC and missed two drug testing appointments while on pretrial release); *United States v. Hall*, 229 F. App'x 898, 900 (11th Cir. 2007) (no reduction for person who tested positive for marijuana three times). This is particularly problematic given the evidence the Commission received related to its 2025 supervised release proposed amendment that relapse is a recognized and common feature of the addiction recovery process, not a moral failing. See, e.g., [Defender Comment on the USSC's 2025 Supervised Release Proposed Amendments](#), at 29–31 (Mar. 3, 2025) (citing sources).

⁷³ See *United States v. Bell*, No. 23-50755, 2025 WL 655802, at *1–2 (5th Cir. Feb. 28, 2025) (district court denied §3E1.1 reduction to a person who threw a punch at the tail end of a physical altercation with a cellmate, after the cellmate punched him in the face and hit him in the head with a water cooler). Finding that Bell did not initiate any violence and appeared to have acted in self-defense, "which would negate the criminality of his conduct," the Fifth Circuit ultimately reversed the district court's denial of the reduction. *Id.* at *4. But the *Bell* court impliedly invited Commission clarification, complaining that "the Guidelines do not define [the] phrase ['criminal conduct'], and there is little guidance on what qualifies as 'criminal.'" *Id.* at *3.

clarify that substance use and other conduct unrelated to the offense of conviction is not a basis to deny the adjustment.

3. Application Note 2: Prosecutors' Misuse of the Adjustment

Despite the plain language of the guideline, including the 2023 amendment to §3E1.1(b), prosecutors continue to argue against a reduction for acceptance of responsibility—all three levels in some districts, just the third level in others—based on a person's decision not to waive their right to appeal the denial of pretrial motions, including motions to suppress and motions to dismiss. Defenders across the country report that U.S. Attorney's Offices refuse to consent to conditional pleas under Federal Rule of Criminal Procedure 11(a)(2), which requires the government to consent in writing for a person to plead guilty while retaining the right to appeal a pretrial motion ruling.⁷⁴

This creates yet another Hobsons' choice for the defense: do our clients plead guilty to receive the adjustment and forfeit the right to appeal the court's ruling on the pretrial motion, or go to trial and risk losing the §3E1.1 adjustment? Often, we attempt to preserve at least the 2-level adjustment at §3E1.1(a) by waiving a jury and having a bench trial in which we stipulate to the facts (or to the testimony that the government's witnesses would offer if they were called to testify), sparing the parties and the court the time and resources of a trial with witnesses.⁷⁵ Prosecutors in these cases routinely refuse to file a motion for the third level off, and in some districts they object to any adjustment under §3E1.1, despite the Commission's clear statement that the adjustment is appropriate "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)."⁷⁶

The government typically relies on the portion of application note 2 that says that a person who proceeds to trial can receive the adjustment only "[i]n rare

⁷⁴ See Fed. R. Crim. Pr. 11(a)(2).

⁷⁵ In some courts, stipulating to facts that constitute essential offense elements moots a motion to suppress, as the stipulation itself creates a separate basis for a conviction; therefore, to preserve the issue, the defense must instead stipulate to the evidence or testimony that the government would offer. See, *e.g.*, *United States v. Larson*, 302 F.3d 1016, 1020 (9th Cir. 2002).

⁷⁶ USSG §3E1.1 App. N. 2.

situations.”⁷⁷ But in our experience, these situations are far from rare,⁷⁸ as is the government’s insistence on flouting the letter and spirit of the guideline. A person who is willing to plead guilty, but who proceeds to a bench “trial” (a trial in name only, at which they contest no facts) because of the *government’s* choice to deny consent for a conditional plea, is (and should be) entitled to an adjustment under §3E1.1(a), and if the trial proceeds by stipulated facts, they should receive the third level off under §3E1.1(b) as well. The Commission should amend §3E1.1 to make this clearer, and to remove the commentary language that exercising the right to trial to preserve a legal issue is a “rare” occurrence.

B. Substantial Assistance: To avoid unwarranted disparities and ensure people who assist the government receive an appropriate reduction, the Commission should remove §5K1.1’s motion requirement and application note 3.

Defenders are pleased to see the Commission prioritize §5K1.1, which has not been substantively amended since 1989. The significant disparity in percentages of §5K1.1 departures across districts demonstrates that it is time to refine the guideline. For example, in fiscal year 2024, a mere 1% of cases sentenced in the District of South Dakota involved a §5K1.1 substantial assistance departure, yet right across the state line, 36% of cases sentenced in the District of North Dakota during that timeframe involved a §5K1.1 substantial assistance departure.⁷⁹ Larger districts show similar disparities: in the District of Arizona, only 2% of sentenced cases involved a §5K1.1 departure, while in the Eastern District of Pennsylvania, the departure was applied in nearly 24% of sentenced cases.⁸⁰

Of course, these statistics do not reflect cases where a person cooperated but the government refused to file a §5K1.1 motion. Defenders in districts with low proportions of §5K1.1 departures report that this is common. Defenders in those

⁷⁷ *Id.*

⁷⁸ For example, many firearms charges are subject to legitimate challenges based on the Supreme Court’s decision in *New York State Rifle & Pistol Ass’n. v. Bruen*, 597 U.S. 1 (2022). The defense should not have to risk losing acceptance points because they want to raise and preserve these entirely legal challenges, but the government will not consent to a conditional plea.

⁷⁹ [2024 Sourcebook](#), at 62.

⁸⁰ [2024 Sourcebook](#), at 61, 63.

districts report that as a result, fewer people in those districts choose to cooperate. As the Commission is likely aware, cooperation involves substantial risk—not just from the specific targets of the cooperation, but from the larger jail/prison population, which will retaliate on any suspected cooperator who cannot prove through their case paperwork that they did not cooperate.⁸¹ In districts with low §5K1.1 rates, there's little incentive to incur those risks.

One step the Commission should take to address these disparities and to incentivize more cooperation is to require a government motion only when the person being sentenced seeks a sentence below an applicable mandatory minimum, consistent with 18 U.S.C. § 3553(e). Not all cooperation cases involve mandatory minimum sentences, and even in those that do, the law already permits the Court to consider a person's cooperation under § 3553(a) to impose a below-guidelines sentence at or above the mandatory minimum, without any government motion.⁸² Section 5K1.1's requirement of a government motion in all cases conflicts with post-*Booker* caselaw, and it should be amended.

The Commission should also delete application note 3 to §5K1.1, which instructs directs courts to give “substantial weight” to the government's evaluation of a person's cooperation. Defenders across the country report that the government is misusing this guideline. Prosecutors are often stingy with the number of levels they will recommend for substantial assistance. In some districts they set a low ceiling applicable to all cooperators, regardless of the nature, extent, and result of a person's cooperation (*e.g.*, limiting recommendations to 4 levels off), which runs afoul of the requirement of individualized sentencing and creates unwarranted similarities. In other districts, prosecutors refuse to file §5K1.1 motions unless the cooperation leads to an arrest—a circumstance beyond the cooperator's control, reflecting law enforcement priorities and resources more than their helpfulness. And despite the guideline's clear instruction to consider the timeliness of a person's

⁸¹ Defense counsel often receive requests from their incarcerated clients to send them copies of their dockets to prove they did not cooperate. Other incarcerated individuals look for skipped docket numbers or filings under seal to conclude someone did cooperate. The BOP limits a person's access to their own PSR so that other individuals will not demand to inspect if for information about cooperation.

⁸² See, *e.g.*, *United States v. Robinson*, 741 F.3d 588, 599 (5th Cir. 2014) (“We now join our sister circuits in holding that a sentencing court has the power to consider a defendant's cooperation under §3553(a), irrespective of whether the Government files a §5K1.1 motion.”).

cooperation, prosecutors in some districts will not give credit for cooperation provided before a person is charged. This means people who cooperate upon their arrest, before they're able to discuss the matter with counsel, do not receive credit for that cooperation—even if it leads to an arrest. Unfortunately, because of application note 3, when a prosecutor undervalues a person's cooperation, the court is likely to do so as well.⁸³ Eliminating this commentary would not preclude the court from considering the government's evaluation; it would simply ensure that it does not receive undue weight, and that a person's substantial assistance is fully accounted for.

C. The Commission should add a Chapter 3 adjustment for post-offense rehabilitation.

As the Commission examines whether the guidelines provide appropriate adjustments for “good behavior,” it should look beyond §3E1.1 and §5K1.1 to consider other types of behavior that should be incentivized and rewarded—such as a person's post-offense rehabilitation. For many of our clients, “their arrest and conviction mark the beginning of a process of reckoning with their behavior and transforming their relationship to the law and law-enforcement authorities.”⁸⁴ Whether detained or released pretrial, our clients often demonstrate significant post-offense rehabilitation, reflected by, among other things: gainful employment; a commitment to sobriety; devotion to family; serving their communities; and compliance with the terms of pretrial supervision (or commitment to self-improvement for people detained pretrial).⁸⁵ It is not uncommon for a person who stands before the court for sentencing to be much different from the person who

⁸³ See USSG §5K1.1 App. N. 3 (“Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance. . .”).

⁸⁴ [Comment of Judge Leo T. Sorokin on USSC's 2024-2025 Proposed Priorities](#), at 3 (July 15, 2024).

⁸⁵ As Defenders have explained before, 28 U.S.C. § 994(e)'s mandate was meant to ensure that courts did not inappropriately use factors indicating disadvantage to impose or lengthen incarceration, but Congress did not intend the Commission to disregard the mitigating value of factors indicating post-offense rehabilitation. See [Defenders' 2023 Annual Letter](#), at 15–16.

committed the offense, which often occurs years before the sentence is imposed.⁸⁶ The Commission should follow Judge Sorokin’s suggestion and “encourage consideration of changed or transformed behavior at sentencing” by adding a Chapter 3 downward adjustment for post-offense rehabilitation that applies regardless of whether a person exercises their right to trial or provides substantial assistance.⁸⁷

VI. Proposed Priority No. 6: Simplification

Defenders stand ready to continue assisting the Commission with its decades-long effort to simplify the complex and voluminous *Guidelines Manual*. As we have urged in the past, this Commission should revisit the complicated and racially disparate criminal history rules. Among other things, the Commission should revisit Part A of the 2023 Youthful Individuals Amendment.⁸⁸ At a minimum, this Commission can publish a report examining the impact of the current criminal history rules and can publish information previously gathered on our updated understanding of youthful culpability.

Defenders are also delighted to see the Commission prioritizing examination of seldom-used SOC’s and adjustments. After 38 years, reading the *Manual* can feel like visiting a haunted house, filled with the ghosts of good intentions and news cycles past, which resulted in a variety of upward adjustments addressing only niche or fleeting problems. Stakeholders across the spectrum have long bemoaned the problem of guideline factor creep.⁸⁹ This Commission should keep this in mind

⁸⁶ And as we have touched on before, the Guidelines increase punishment based on criminal history, a static (fixed) risk factor, yet fail to consider “dynamic” risk factors, which, unlike static factors, offer more current insights on risk as well as protective factors that can decrease recidivism risk. Recent scholarship has documented the value of such dynamic factors in risk assessment, providing empirical support for what we already know: People can change, especially when given the tools and support needed to do so. See [Defenders’ 2025 Annual Letter](#), at 6 n.16 (discussing the lack of dynamic risk factors in Chapter Four).

⁸⁷ *Id.*; see also [Defender Comment on USSC’s 2023 Proposed Amendments](#), at 3 (Mar. 14, 2023).

⁸⁸ See [Defenders’ 2025 Annual Letter](#), at 5–7 (urging Commission to revisit scholarship and testimony on youthful individuals).

⁸⁹ See [Defenders’ 2024-2025 Priorities Comment](#), at 6 (documenting factor creep and increases in ranges of five most common guidelines).

the next time a stakeholder asks for a new upward SOC to address a novel concern raised by the media or elsewhere, and it should resist the temptation to increase severity via new SOC's in an attempt to address ever-evolving issues that are better addressed by § 3553(a).⁹⁰ Beyond the bloat, the *Manual* is filled with a plethora of ways to increase sentencing ranges, and very few formal ways to account for positive characteristics and behavior. We urge the Commission to prune underutilized or excessive enhancements and, as discussed above, offer guidance to allow consideration of positive attributes to further the statutory purposes of sentencing.⁹¹

VII. Proposed Priority No. 7: The Bureau of Prisons

Defenders again encourage the Commission to address the very real problems plaguing the Bureau of Prisons. We have written at length about the ongoing crisis in its understaffed and overcrowded institutions.⁹² This Commission can be a part of the solution.

Specifically, there are three steps this Commission can, and should, take to carry out its statutory duty under § 994(g) to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.” *First*, the Commission should rework Chapter Five to provide guidance on the “in/out” decision in a way that meaningfully promotes noncustodial sentences, as discussed above. *Second*, it should recalibrate guideline ranges down, as Defenders requested in our priority letter last year. And *third*, it should issue an empirical report on how BOP, as an institution, fails to further the statutory purposes of sentencing. Section 994(g)’s overcapacity threshold has been crossed, with overwhelming evidence suggesting that BOP is not, in fact, “effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2).” It is time for this Commission to renew its

⁹⁰ The fast pace of technological advancements has made it clear that offenses will look different over time, and that the answer is not adding a new niche enhancement in response to every new development (such as the outdated “use of a computer” enhancements). *Accord* [Wroblewski et. al. 2024 Priority Comment](#), at 5 (recommending that the Commission “take a holistic look at the entire Guidelines enterprise”).

⁹¹ *See supra*, Section V.C.

⁹² *See* [Defender 2025 Drug Offenses Comment](#), at 8–13 (discussing the Commission's statutory obligations to address BOP overpopulation crisis fueled by lengthy drug incarceration sentences).

commitment to its statutory obligation to mitigate the crises at BOP, with all the attendant devastating consequences to imprisoned individuals, their families, and their communities.

VIII. Data publication and transparency

We end this letter with requests specific to the Commission’s data collection and publication process after the Simplification amendment.

A. Sentence placement relative to guideline range

With the deletion of departures, Defenders urge the Commission to change its variable on sentence placement relative to guideline range such that researchers and stakeholders have more information on sentencing outcomes. As we have noted before,⁹³ the current placement variable provides only limited information. Because it operates in the disjunctive, it might be obscuring variances and providing an insufficient and incomplete picture of the reasons for a sentencing outcome.

To fix this: (1) the placement variable should be reconfigured to include disjunctive options for sentences “above,” “within,” “government-sponsored below,” or “below” range; and (2) two additional variables should be added: one to indicate whether a case involved a §5K1.1 or substantial assistance adjustment,⁹⁴ and one to indicate whether a case involved a §3F1.1 “fast track” adjustment. That way, researchers will be able to see the bigger picture.

B. Mandatory minimums

The current mandatory minimum variables can lead to confusion as to whether a mandatory minimum penalty was *applicable* as opposed to actually *imposed*, particularly in cases involving multiple counts, all carrying a mandatory minimum. It can be difficult to tell which mandatory minimum count was actually

⁹³ [Defenders’ 2025–2026 Annual Letter](#), at 11–12.

⁹⁴ We note that while the terms “§5K1.1” and “substantial assistance” under § 3553(e) are often used interchangeably, they are not the same, as discussed above in Section V.B. Therefore, we urge the Commission to create a variable that accounts for this difference instead of conflating the two. For example, the new 5K/substantial assistance variable could have coding options for whether a case involved a reduction pursuant to a §3553(e) motion, under §5K1.1, both, or neither.

imposed, particularly when multiple counts carried a mandatory minimum penalty. This appears to be in part due to the nature of the current Statement of Reasons form, which allows users to select inconsistent options. However, the Commission can rework its mandatory minimum variables to provide better information on mandatory minimum penalties, which are important sources of sentencing disparity, and we urge it do so to provide stakeholders with a more accurate and complete picture of sentencing practices.

C. Transparency

As we have requested in the past, we urge the Commission to release the “dynamic” dataset underlying its JSIN tool (which we understand to be different than the “Individual Datafiles” dataset released once a year to the public), as well as preserve past versions of the tool. As more courts and stakeholders rely on this tool, it is troubling that its outputs cannot be replicated by outside researchers with access to the public datasets. It is also troubling that previous years’ results simply disappear, which can create problems if JSIN was at issue in a case pending on appeal or resentencing.

We were very pleased to see that the Commission’s “Individual Datafiles” were released this year in a CSV file, which will make them more accessible to a broader audience of users. This is an important step toward better access to sentencing data. However, with respect to the fiscal year 2024 datafile, we were disappointed to see that the variable indicating what month a case was sentenced (SENTMON) is no longer present, and we hope the Commission will replace that missing information and include it in the future. We also continue to urge the Commission to make public its resentencing and supervised release datasets. Beyond this, to reduce information asymmetry, the Commission should revisit its outdated agreement with the AO and grant Defenders equal access to its datafiles, so we have access on par with the DOJ.⁹⁵

This Commission has pledged to operate in “a deliberative, empirically based, and inclusive manner,”⁹⁶ but to do so fully would require it to treat Defenders as an equal stakeholder, on par with the DOJ and the Parole Commission. Beyond the

⁹⁵ See [Defenders’ 2024–2025 Annual Letter](#), at 16–17 (discussing institutionalized information asymmetries and unequal access to data).

⁹⁶ Chair Carlton W. Reeves, [Remarks at USSC Public Meeting](#), at 4 (Oct. 28, 2022).

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lack of a Defender Representative member on the Commission, Defenders lack equal access to Commission data. This Commission can fix this.

* * *

Defenders are excited about this amendment cycle's proposed priorities and look forward to working with the Commission to help extend the many successes of the past three years.

Very truly yours,



Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Sentencing Resource Counsel
Federal Public and Community Defenders

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Scott A.C. Meisler, Commissioner *Ex officio*
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