

**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).