U.S. Department of Justice

Criminal Division

Office of Assistant Attorney General *Washington, D.C. 20530*

September 12, 2022

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

Congratulations to you and all your new colleagues on your confirmation to the United States Sentencing Commission. We are thrilled that after more than three and a half years without a quorum, the Commission has been reconstituted with a full complement of commissioners. The new commissioners are an esteemed group of attorneys with tremendously varied and diverse backgrounds and experiences in and around the federal criminal justice system. We believe the Commission is now well-positioned to take on all its many statutory duties and to address critical sentencing issues affecting the federal courts and the American people. We are eager to begin working with you, the other commissioners, and the Commission's staff to address this vital work before the Commission.

Before we discuss that work, though, we want to first thank Judge Danny Reeves, the Commission staff, and especially Judge Charles Breyer, for being wonderful stewards of the Commission over the last several years while the Commission lacked a quorum. Their leadership and commitment to the cause of justice ensured that the Commission was able to continue to play a vital role in the federal justice community even as it was unable to amend the Sentencing Guidelines. We know, directly and keenly, the importance of the Commission's research and data functions, and we thank Judge Breyer and the Commission staff for continuing to produce informative and valuable research and data products, including those comparing the recidivism rates of various types of offenders, on compassionate release and the implementation of the FIRST STEP Act, on the influence of the Guidelines on sentencing decisions, on sentencing case law, and on developments not just pertaining to federal sentencing but more generally to the federal criminal justice system as a whole.

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The Sentencing Reform Act of 1984 requires the Criminal Division to submit to the Commission, at least annually, a report commenting on the operation of the Sentencing Guidelines, suggesting changes to the Sentencing Guidelines that appear to be warranted, and otherwise assessing the Commission's work.[1] We are pleased to submit this report pursuant to the Act.

The Commission last amended the Sentencing Guidelines in May 2018. Since then, Congress enacted and President Trump signed into law the FIRST STEP Act of 2018,[2] which has been described by many as the most significant criminal justice reform legislation in a generation. National protests took place around the country and around the world following the murder of George Floyd, with calls for greater fairness in the criminal justice system, including in the courts. The COVID-19 pandemic impacted prosecution and sentencing trends, the use of home confinement, and the size of the federal prison population. Since March 26, 2020, 46,805 inmates have been placed on home confinement, a tremendous increase from pre-pandemic practice.[3] From March 2020 until September 31, 2021, more than 22,500 inmates petitioned for compassionate release (where in prior years only a few dozen petitions were filed),[4] leaving courts to struggle over what qualifies as "extraordinary and compelling" under an outdated guideline.[5] At the same time, the nature and incidence of crime changed dramatically over the course of the pandemic, while overdose deaths due to opioids continued at a devastating pace. And all the while, the Supreme Court and the lower courts were grappling, in thousands of cases, with what is and what isn't a "crime of violence" and "controlled substance offense" and how to sentence repeat offenders.

Most recently, in response to increased gun violence, including many mass shootings, Congress passed bipartisan firearms legislation addressing trafficking and straw purchasing, increasing the penalties for firearms possession by felons and other prohibited persons, and directing the Commission to amend the Guidelines in this area. We expect that all these events, and more, will drive the new Commission's agenda over the coming years.

We think that as the new Commission begins its work, it should focus first on implementing criminal justice legislation enacted by Congress since the Commission lost its quorum and other critical operational issues that are dividing the lower federal courts and creating unwarranted sentencing disparities. Beyond this, we think the Commission should review the federal sentencing system as a whole and also address other critical crime-specific sentencing issues in the Guidelines. We think a comprehensive examination of the federal sentencing system – that includes defining how the Commission wants the various purposes of federal sentencing to be achieved – is long overdue. Over the next two years or so, by addressing both acute legislative and operational issues under the current federal sentencing

[1] *See* 28 U.S.C. § 994(o).
[2] Pub. L. 391, 132 Stat. 5194.
[3] *Coronavirus*, FED. BUREAU OF PRISONS, https://www.bop.gov/coronavirus/ (last visited September 4, 2022).
[4] U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT (May 2022), Table 1 (reporting 22,520 total petitions for compassionate release for fiscal years of 2020 and 2021); *see also* U.S. SENT'G COMM'N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC (March 2022), p. 11 (reporting 20,000 offenders requesting compassionate release at the administrative level between October 2019 and December 2020).
[5] 18 U.S.C. § 3582(c)(1)(A); U.S. SENT'G GUIDELINES MANUAL §1B1.13 (U.S. SENT'G COMM'N 2018).

structure *and* reviewing the overarching architecture of the federal sentencing system, we think the Commission can make immediate and significant improvements to federal sentencing as well as chart a course for a better federal sentencing system for the next generation.

I. Implementing Recent Legislative Enactments

The Commission has always recognized that one of its core responsibilities is to review new criminal justice legislation to determine whether the legislation warrants Commission action in the Guidelines or otherwise. There have been numerous laws enacted by Congress and signed by the President over the past four years or so that require such review, and we urge the Commission to make that review a priority in the coming year. Indeed, only the Commission can implement these and other legislative changes in the Guidelines, and we believe doing so should be one of the Commission's top agenda items this year.

A. The FIRST STEP Act and Compassionate Release

The FIRST STEP Act is the most significant federal criminal justice reform legislation facing the Commission. The Act overhauled corrections law; created a new system of earned time credits for participating in recidivism-reducing programming or other productive activity; and reformed a number of sentencing laws. Importantly, the Act changed the so-called "compassionate release" statute found at Section 3582(c)(1)(A)(i) of Title 18. That statute provides that a court may reduce a term of imprisonment upon a finding of "extraordinary and compelling reasons." It also requires that any such reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." In *Dillon v. United States*, the Supreme Court held that identical language in 18 U.S.C. § 3582(c)(2) makes the Commission's pertinent policy statements binding on sentencing courts.[6]

The Commission is directed in 28 U.S.C. § 994(a)(2) to develop "general policy statements regarding application of the Guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes [of sentencing] set forth in [18 U.S.C. § 3553(a)(2)]," including the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). Section 994(t) further directs that the Commission –

> . . . in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall 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.[7]

[6] *See* 560 U.S. 817, 827 (2010) (considering a guideline amendment which permitted retroactive application of reductions "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission").

[7] 28 U.S.C. § 994(t).

Pursuant to these authorities and mandates, in 2006, the Commission promulgated Section 1B1.13, a policy statement defining "extraordinary and compelling reasons"[8] and in 2016, promulgated commentary under Section 1B1.13 setting forth circumstances under which extraordinary and compelling reasons exist as related to the (A) medical condition, (B) age, and (C) family circumstances of a defendant.[9] In addition, the policy statement, which was most recently amended effective November 1, 2018, provides for "other reasons" justifying a sentence reduction in Application Note 1(D) when, "[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)."[10]

Section 3582(c)(1)(A) was amended in Section 603(b) of the FIRST STEP Act, which became effective December 21, 2018. The law now allows an inmate to file a motion for compassionate release directly with the sentencing court. Previously, only the Bureau of Prisons (BOP) was authorized to file a sentence-reduction motion. Section 3582(c)(1)(A) now provides that a court may act –

> upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier.[11]

The COVID-19 pandemic resulted in the filing of tens of thousands of motions for compassionate release by inmates concerned about exposure to the virus, including some inmates with underlying conditions that placed them at a heightened risk of death or severe illness from COVID-19.[12] Many inmates raised claims unrelated to the pandemic, some connected to the circumstances delineated in Section 1B1.13 and some not. The Department took the position in this litigation that despite not being updated following the enactment of the FIRST STEP Act, the existing compassionate release guideline was nonetheless binding on district courts. Nine appellate courts held that the Section 1B1.13 policy statement is not currently controlling for defendant-filed motions, as it has not been updated and still refers only to motions filed by

[8] U.S. SENT'G COMM'N, Amendment 683, 71 Fed. Reg. 28063 (2006).
[9] U.S. SENT'G COMM'N, Amendment 799, 81 Fed. Reg. 2295 (2016).
[10] U.S. SENT'G GUIDELINES MANUAL §1B1.13 cmt. n.1(D).
[11] 18 U.S.C. § 3582(c)(2). The Act also created new requirements in 18 U.S.C. § 3582(d) for BOP to provide notice to an inmate's attorney, partner, and family members if the inmate is diagnosed with a terminal illness and to assist such persons in filing a motion for compassionate release.
[12] U.S. SENT'G COMM'N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC, p. 32. ("Courts cited the risk of contracting COVID-19 as at least one reason to grant a reduction for 71.5 percent of Offenders Granted Relief and as the only reason for 59.6 percent.").

BOP.[13] Only the Eleventh Circuit held that Section 1B1.13 remains binding on district courts for all compassionate release motions.[14]

These developments have led to wide disparities in the outcomes of compassionate release litigation across the country. The Commission has documented this in its recent report, *Compassionate Release: The Impact of the FIRST STEP Act and COVID-19 Pandemic*.[15] Some courts have granted compassionate release, for example, based on the length of the original sentence and other reasons unrelated to the traditional grounds of compassionate release. This has occurred most frequently in cases addressing multiple – or "stacked" – sentences under 18 U.S.C. § 924(c), the penalties for which were significantly changed in Section 403 of the FIRST STEP Act and which Congress explicitly deemed not to be applied retroactively.[16] Courts are divided regarding whether the changed circumstance involving multiple Section 924(c) charges permits compassionate release.[17]

Some courts have gone even further and employed compassionate release to simply reassess a sentence in light of current mores and the defendant's rehabilitation. For instance, in *United States v. Millan*, the court released a defendant after he served 28 years of a life sentence for drug and firearm crimes, finding "extraordinary" the defendant's "rehabilitation, together with his remorse and contrition, his conduct as model prisoner and man of extraordinary character, his leadership in the religious community at FCI Fairton, his dedication to work with at-risk youth and suicide prevention, and the support of BOP staff at FCI Fairton . . . ."[18]

Other district courts, however, have hewed more closely to the Section 1B1.13 policy statement, granting few compassionate release motions, some even when one or more of the criteria in the policy statement are present. The Commission's inability to issue guidance on this issue has resulted in very different practices from court to court and fundamental unfairness, where some incarcerated individuals have had their sentences substantively reassessed and others not, despite being similarly situated. The Commission's research and data are the best documentation of the growing and significant sentencing disparities. We think it is critical that the Commission take up this issue and amend Section 1B1.13 to directly account for defendant-filed motions under Section 3582(c), given the FIRST STEP Act's creation of that new mechanism. We think the Commission must spell out the circumstances when compassionate

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[13] *See* United States v. Andrews, 12 F.4th 255, 260 (3d Cir. 2021); United States v. Shkambi, 993 F.3d 388 (5th Cir. 2021); United States v. Aruda, 993 F.3d 797, 802 (9th Cir. 2021); United States v. Maumau, 993 F.3d 821 (10th Cir. 2021); United States v. Long, 997 F.3d 342, 354–59 (D.C. Cir. 2021); United States v. Brooker, 976 F.3d 228 (2d Cir. 2020); United States v. McCoy, 981 F.3d 271 (4th Cir. 2020); United States v. Jones, 980 F.3d 1098 (6th Cir. 2020); United States v. Gunn, 980 F.3d 1178 (7th Cir. 2020).

[14] *See* United States v. Bryant, 996 F.3d 1243 (11th Cir. 2021).

[15] *See supra* note 4, p. 46. ("The rate at which offenders were granted relief substantially varied by circuit, and courts disagreed about whether certain reasons not specified in the Commission's policy statement can present an 'extraordinary and compelling' reason for a sentence reduction").

[16] *Id.* at 33 (reporting that courts cited to the FIRST STEP Act's changes to the 18 U.S.C. § 924(c) "stacked" firearm penalties in 36, or 2%, of cases).

[17] *Compare* United States v. Andrews, 12 F.4th 255 (3d Cir. 2021) (denying such relief), United States v. Jarvis, 999 F.3d 442 (6th Cir. 2021) (same), United States v. Thacker, 4 F.4th 569 (7th Cir. 2021) (same), *and* United States v. Bryant, 996 F.3d 1243 (11th Cir. 2021) (same), *with* United States v. Maumau, 993 F.3d 821 (10th Cir. 2021) (permitting relief), *and* United States v. McCoy, 981 F.3d 271 (4th Cir. 2020) (same).

[18] No. 91-CR-685, 2020 WL 1674058, at *15 (S.D.N.Y. Apr. 6, 2020).

release is appropriate for all motions, and when it is not, and to address the developing case law on this issue.

B. The Bipartisan Safer Communities Act

The Bipartisan Safer Communities Act, enacted earlier this year, made a number of significant changes to federal firearms laws, among its many provisions.[19] Of particular importance for federal sentencing are the following: (1) creating new criminal offenses for straw purchasing of firearms and firearms trafficking; (2) increasing the maximum term of imprisonment for unlawful sales, transfers, and possession of firearms from 10 to 15 years, and up to 25 years if the firearm is intended to be used to commit a felony; and (3) directing the Sentencing Commission to review and amend the Guidelines and policy statements to ensure that persons convicted of the new offenses "are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses."[20] We urge the Commission to identify the implementation of the Bipartisan Safer Communities Act as a priority, and to implement the Act without delay.

Because the Act raises the maximum term of imprisonment for certain firearms offenses – notably, Section 922(g) for possession of a firearm by a prohibited person – the Act also provides an opportunity for the Commission to create a more workable guideline structure for repeat and dangerous firearms offenders, something that has become increasingly elusive under the Armed Career Criminal Act (ACCA). Besides receiving a great deal of criticism for its fifteen-year mandatory minimum term, ACCA is plagued in its application by the categorical approach, as discussed more fully below. We urge the Commission to take the opportunity presented by the Bipartisan Safer Communities Act's enactment to amend the firearms guidelines to address Section 922(g) defendants with previous convictions for crimes of violence. By doing so, the Commission can make the firearms guidelines more workable, including by eliminating the categorical approach, and ensure that repeat and dangerous firearms offenses are appropriately sentenced. In addition, such a review would provide an opportunity for the Commission to evaluate trends in gun crime not currently addressed by the firearms guidelines, such as the prevalence of "ghost guns," un-serialized, privately made firearms that are extremely difficult to trace, and the rise of firearms transferred to or accessed by youth and later used in violent crime. The Department is developing specific recommendations on these and other issues related to the firearms guidelines.

C. Other Legislative Enactments

There have been many other legislative enactments that also require Commission action, including changes to the safety valve provision contained in the FIRST STEP Act. In the 2018-

[19] *See* Pub. L. No. 117-159, 136 Stat. 1313 (2022). For example, the Act incentivizes states to enact laws to address gun violence by, among other things, passing "extreme risk protection order" laws to temporarily bar people in crisis from accessing firearms, creates a procedure of enhanced examination of juvenile records as part of the firearms background check process, and narrows the "boyfriend loophole" by adding those who are, or who recently were in, a dating relationship and have been convicted of a misdemeanor crime of domestic violence, after the passage of the bill, from purchasing or possessing a firearm for at least five years. *See id.* §§ 11001-05 12001(a)(1), 12005, 136 Stat. at 1314–24, 1332–33.

[20] *Id.* § 12004(a)(5), 136 Stat. at 1328.

2019 amendment year, the Commission published proposed amendments to the Guidelines addressing various legislative enactments, including –

- **The Allow States and Victims to Fight Online Sex Trafficking Act of 2017**;[21]
- **The FDA Reauthorization Act of 2017**;[22] and
- **The Federal Aviation Administration (FAA) Reauthorization Act of 2018**.[23]

Because the Commission lost its quorum in early 2019, those published amendments were not promulgated.

Since 2019, Congress has enacted other laws that warrant the Commission's attention. We understand that the Commission's General Counsel's Office has been tracking the legislation and can provide a complete list of these newly enacted laws. We mention here just a few as examples –

- **The Rodchenkov Anti-Doping Act of 2019**,[24] which includes a new criminal fraud offense at 21 U.S.C. § 2402 concerning international doping fraud conspiracies.
- **The William M. Thornberry National Defense Authorization Act for Fiscal Year 2021**,[25] which among other things, created several new crimes in Title 31. One, in Section 5335, prohibits concealing, falsifying or misrepresenting a material fact, to or from a financial institution, about the ownership or control of assets involved in certain monetary transactions. Another, in Section 5336, was enacted to combat the use of shell companies to conceal ownership of certain entities that facilitate illicit financial activity and penalizes providing or attempting to provide false or fraudulent beneficial ownership information or failing to report complete or updated information to the Financial Crimes Enforcement Network.

  The Act also reaffirmed the Bank Secrecy Act (BSA) as a critical part of the federal framework for preventing money laundering and the financing of terrorism and an important tool in regulating the growing area of cryptocurrency and other digital assets transactions. Importantly, the Act established new penalties for those convicted of serious BSA violations, including additional penalties for repeat BSA violators. We think the Commission should consider amendments to Section 2S1.3 to implement this legislation and congressional intent to adjust penalties for BSA offenses and to more accurately reflect the gravity of BSA violations that facilitate money laundering and other illicit activity.

[21] *See* Pub. L. No. 115-164, 132 Stat. 1253; *see also* Sentencing Guidelines for United States Courts, 83 Fed. Reg. 65,400, 65,417 (proposed Dec. 20, 2018).
[22] *See* Pub. L. No. 115-52, 131 Stat. 1005; *see also* 83 Fed. Reg. at 65,416.
[23] *See* Pub. L. 115-254, 132 Stat. 3186; *see also* 83 Fed. Reg. at 65,416–17.
[24] *See* Pub. L. 116-259, 134 Stat. 1154.
[25] *See* Pub. L. 116-283, 134 Stat. 3388.

- **The Abolish Human Trafficking Act of 2017**,[26] which increased penalties for several existing human trafficking statutes and created a new restitution statute.

- **The Foreign Intelligence Surveillance Act Amendment Reauthorization Act of 2017**,[27] which converted the offense at 18 U.S.C. § 1924, regarding unauthorized removal and retention of classified materials, from a misdemeanor to a felony and increased the maximum penalty from one year to five.

- **The Combat Online Predators Act of 2020**,[28] which added, among other provisions, an enhanced sentencing penalty at 18 U.S.C. § 2261B for stalkers of children.

- **The Protecting Lawful Streaming Act of 2020**,[29] which created a new felony offense at 18 U.S.C. § 2319C for operating an "illicit transmission service," that is, for providing infringing content via streaming.

- **The Export Control Reform Act of 2018**,[30] which established new offenses involving export control violations under 50 U.S.C. §§ 4801–52.

- **The Prevention of Animal Cruelty and Torture Act of 2019**,[31] which criminalized the conduct underlying "animal crush" videos, which depict extreme violence committed against animals. Prior to the Act's passage, only the distribution of these media, not the violent conduct underlying them, was criminalized under federal law.

We urge the Commission to make implementing these and all recently enacted legislation, through appropriate Guidelines changes, a priority in the coming amendment year.

II. Critical Operational Issues That Demand the Commission's Immediate Attention

In addition to the recent legislative enactments discussed above, there are two critical sentencing issues dividing the lower federal courts that we believe demand the Commission's attention in the coming year: the validity and status of guideline commentary; and the application of the "categorical approach" to determining what is and what is not a crime of violence and controlled substance offense under the Guidelines. These issues impact thousands of victims, individuals sentenced across the country each year, and their family members; they are creating significant and unwarranted sentencing disparities, a concern that goes to the heart of the Commission's mandate; they impact public safety directly; and the Supreme Court has made clear – in statements and in its denials of petitions for *certiorari* – that it will not resolve them but is rather leaving them for the Commission to address. These issues are at the core of federal sentencing and corrections policy and practice and thus, we believe, should be priorities for the Commission to examine.

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[26] *See* Pub. L. No. 115-392, 132 Stat. 5250.
[27] *See* Pub. L. No. 115-118, 132 Stat. 3.
[28] *See* Pub. L. No. 116-249, 134 Stat. 1126.
[29] *See* Pub. L. No. 116-260, 134 Stat. 1182.
[30] *See* Pub. L. No. 115-232, 132 Stat. 2208.
[31] *See* Pub. L. No. 116-72, 133 Stat. 1151.

A. The Validity of Guideline Commentary

An expanding line of case law has called into question the continued viability of guideline commentary – provisions that under the current Guidelines' architecture serve a critical role in interpreting and explaining individual guidelines. The Supreme Court has repeatedly denied *certiorari* in cases that embody the growing circuit split on this issue, leaving the matter to the Commission to address. We believe that because this issue goes to the heart of the Guidelines and their interpretation, the Commission should address it this year.

The Supreme Court first spoke to the relationship between Commission Guidelines and guideline commentary in *Stinson v. United States*.[32] In *Stinson*, the Court likened the Guidelines to agency legislative rules, given that the Commission promulgates the Guidelines through the informal rulemaking process under 5 U.S.C. § 553.[33] "Although the analogy [was] not precise," the commentary to the Guidelines was therefore compared to agency guidance, specifically an agency's interpretation of its own legislative rules.[34] As such, the Court held that the doctrine of *Seminole Rock* deference should apply whenever a court evaluates commentary, i.e. so long as the interpretative or explanatory commentary does not violate the Constitution or a federal statute, the commentary should be given "controlling weight unless it is plainly erroneous or inconsistent with the [guideline]."[35] In doing so, the Court rejected language then in the Guidelines that analogized the commentary to "legislative history or other legal material that hel[p] determine the intent of a drafter."[36] The guideline commentary employing this analogy was subsequently amended to remove this language, consistent with the holding of *Stinson*.[37]

In the years following *Stinson*, a circuit split emerged regarding Application Note 1 to Section 4B1.2, which defines the predicate offenses that determine an individual's "career offender status" under Section 4B1.1(a). Pursuant to Section 4B1.1(a), defendants who have at least two prior felony convictions for a "crime of violence" or a "controlled substance offense," and who are subsequently charged with a felony "crime of violence" or "controlled substance offense," are to be sentenced as career offenders.[38] Section 4B1.2 goes on to define "crime of violence" and "controlled substance offense." The controversy surrounding this guideline first centered on the section's definition of "controlled substance offense," which reads:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing 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, distribute, or dispense.[39]

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[32] 508 U.S. 36 (1993).
[33] *Id.* at 44-45.
[34] *Id*. at 44.
[35] *Id.* at 45 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).
[36] *Stinson*, 508 U.S. at 46 (citing U.S. SENT'G GUIDELINES MANUAL §1B1.7).
[37] *See* U.S. SENT'G GUIDELINES MANUAL §1B1.7.
[38] *Id.* at §4B1.1(a).
[39] *Id.* at §4B1.2(b).

Application Note 1 to Section 4B1.2 further dictates that, for purposes of the guideline, "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[40]

Although most circuit courts, applying *Stinson*, have found Application Note 1 to be consistent with the guideline and thus binding authority,[41] the D.C. Circuit held to the contrary in *United States v. Winstead*.[42] The defendant in the case had been sentenced as a career offender as a result of his two prior drug convictions for attempted possession with intent to distribute and attempted distribution.[43] He argued that the commentary expanded, rather than interpreted or explained, the guideline, as the guideline language did not explicitly include inchoate offenses.[44] As such, he believed his convictions for *attempted* "controlled substance offenses" should not have been used to designate him as a career offender under the Guidelines. Agreeing with the defendant, the D.C. Circuit held the commentary to be inconsistent with the guideline, as "the commentary add[ed] a crime, 'attempted distribution,' that [was] not included in the guideline."[45] Given the perceived inconsistencies, the court held that the guideline controlled and remanded the case for resentencing.[46] The *en banc* Sixth Circuit followed the D.C. Circuit's reasoning shortly after.[47]

The conflict surrounding Section 4B1.2 – and more generally the status of guideline commentary – was further complicated by the 2019 Supreme Court case, *Kisor v. Wilkie*.[48] The Court in *Kisor* "reinforced the limits inherent" to *Seminole Rock*/*Auer* deference, emphasizing that a court must first establish that a genuine ambiguity exists in the relevant legislative rule before deferring to an agency interpretation.[49] To determine whether the relevant legislative rule is ambiguous, *Kisor* stressed that the reviewing court must "exhaust all the 'traditional tools' of construction," such as the text, structure, history, and purpose of the regulation.[50] If a genuine ambiguity exists after applying these traditional interpretive tools, the agency's interpretation must still be "reasonable" and satisfy a multifactor test to ensure the "character and context of

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[40] *Id.* at §4B1.2 cmt. n.1.
[41] *See* United States v. Nieves-Borrero, 856 F.3d 5, 9 (1st Cir. 2017); United States v. Dozier, 848 F.3d 180 (4th Cir. 2017); United States v. Lange, 862 F.3d 1290, 1294 (11th Cir. 2017); United States v. Tate, 822 F.3d 370 (7th Cir. 2016); United States v. Solomon, 592 F. App'x 359, 361 (6th Cir. 2014); United States v. Chavez, 660 F.3d 1215, 1228 (10th Cir. 2011); United States v. Sarbia, 367 F.3d 1079 (9th Cir. 2004); United States v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1995) (en banc); United States v. Hightower, 25 F.3d 182, 185–87 (3d Cir. 1994).
[42] 890 F.3d 1082 (D.C. Cir. 2018).
[43] *Id.* at 1085.
[44] *Id.* at 1090-91.
[45] *Id.*
[46] *See id.* at 1092 ("But surely *Seminole Rock* deference does not extend so far as to allow it to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the guidelines themselves.").
[47] United States v. Havis, 929 F.3d 317 (6th Cir. 2019) (en banc) (per curiam) (holding career offender determination based on a conviction under a Tennessee law that included "attempted transfer" of drugs to be inconsistent with Sentencing Guidelines).
[48] 139 S. Ct. 2400 (2019).
[49] *Id.* at 2415 (internal citations omitted).
[50] *Id.* (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

the agency interpretation entitles it to controlling weight."[51] Following *Kisor*, the Third Circuit adopted the position of the Sixth and D.C. Circuits when faced with the Section 4B1.2 inchoate offense issue, but did so "in light of *Kisor*'s limitations on deference to administrative agencies."[52] Sitting *en banc* in *United States v. Nasir*, the court rejected the formulation of deference set out in *Stinson*, which it had applied in prior precedent, and proceeded through the interpretive steps outlined by *Kisor*.[53]

Since *Kisor*, Courts have raised a host of questions regarding the validity of guideline commentary, thus expanding the body of commentary provisions that are vulnerable to legal attack and greatly expanding the litigation over guideline commentary.[54] For example, in *United States v. Riccardi*, the Sixth Circuit invalidated a portion of the guideline commentary to Section 2B1.1. *Riccardi* involved a postal employee who had pleaded guilty to stealing 1,505 gift cards from the mail, with a value averaging $35 each, for a total of $47,000 in loss.[55] The defendant was sentenced pursuant to Section 2B1.1, which instructs courts to increase the sentencing range based upon the amount of the greater of the intended or actual "loss."[56] Although the guideline does not provide a definition of "loss," the commentary to Section 2B1.1 dictates that in the case of stolen or counterfeit credit cards and access devices, "loss . . . shall be not less than $500 per access device."[57] Over her objection, the defendant was consequently sentenced based upon a loss of $752,500, or $500 per card, rather than the government-calculated total of $47,000 actual loss.[58] Citing *Kisor* on appeal, the Sixth Circuit agreed with the defendant that the $500 minimum was in conflict with the plain language of Section 2B1.1, and represented a "substantive policy choice," rather than an interpretation of the word "loss."[59]

The *Riccardi* decision was especially important for several reasons: (1) the court expressly recognized that the commentary at issue went through notice-and-comment rulemaking, as opposed to prior precedent that eschewed commentary deference due in part to the perceived lack of congressional review;[60] (2) the court recognized that the commentary at issue had been implemented at the request of Congress;[61] and (3) despite having undergone

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[51] *Kisor*, 139 S. Ct. at 2415-18 (internal citations omitted) (listing considerations relevant to deciding an agency interpretation is "reasonable" and so due *Auer* deference, including the interpretation's "character and context" and whether it falls within a rule's "zone of ambiguity," represents the agency's "authoritative" position, implicates the agency's substantive experience, and reflects a "fair and considered judgment").
[52] *See* United States v. Nasir, 17 F.3d 459, 469-72 (3d Cir. 2021).
[53] *Id.* at 470-71 (overruling *United States v. Hightower*, 25 F.3d 182 (3rd Cir. 1994) in rejecting the commentary that included inchoate offenses by examining the plain text of the guideline and finding it to unambiguously exclude such offenses).
[54] *See* United States v. Riccardi, 989 F.3d 476, 484-85 (6th Cir. 2021).
[55] The government only calculated the loss for the cards which had face values – 1,322 of the total 1,505 stolen cards. *Id.* at 480.
[56] U.S. SENT'G GUIDELINES MANUAL §2B1.1.
[57] *Id.* at §2B1.1 cmt. n.3(F)(i).
[58] *Riccardi*, 989 F.3d at 480.
[59] *Id.* at 483, 487.
[60] *Id.* at 483, 488 (citing 65 Fed. Reg. 26,880, 26895 (May 9, 2000); 65 Fed. Reg. 2263, 2668 (Jan. 18, 2000)).
[61] *Riccardi*, 989 F.3d at 482 ("In 1998 Congress told the Commission to review and amend the guidelines 'to provide an appropriate penalty for offenses involving the cloning of wireless telephones[.]'" (quoting Wireless Telephone Protection Act, Pub. L. No. 105-172, § 2(e)(1), 112 Stat. 53, 55 (1998))).

notice-and-comment, the court applied *Kisor* deference meant for agency interpretive rules, due solely to the provision's designation as "commentary."[62]

The case law incorporating *Kisor* has continued to develop at a rapid pace. The Third Circuit, for example, like the Sixth, moved beyond disputes over Section 4B1.2, and recently rejected a portion of the commentary in Section 2K2.1 that cross-references Section 4B1.2.[63] And this past June, the Third Circuit went further still, holding that the commentary to two Chapter Three adjustments were not controlling, namely the commentary for the Aggravating Role adjustment and for Acceptance of Responsibility.[64]

While the majority of circuit courts have, based on prior precedent under *Stinson*, deferred to the commentary under Section 4B1.2 and other guidelines,[65] several appellate courts have followed the decisions of the Third, Sixth, and D.C. Circuits. Under this evolving line of case law, guideline commentary is left in a precarious position. Given the pervasive nature of the commentary within the Manual, "the current structure of the entire Manual itself is called into question."[66] We think this issue must be on the Commission's agenda in the coming year.

B. The Categorical Approach to Determining What is and What is Not a Crime of Violence or Controlled Substance Offense

The application of the "categorical approach" to the Guidelines' "crime of violence" and "controlled substance offense" definitions has resulted in vast and endless litigation. Judges across the country – including on the Supreme Court – have pleaded for the approach to be reformed. The categorical approach has led to odd and widely disparate guideline ranges for defendants depending on both the jurisdiction of their prior convictions and the jurisdiction in which the Guidelines are being calculated.

We believe several changes to the "crime of violence" definition in the Guidelines could substantially reduce sentencing disparities, permit sentencing courts to appropriately exercise their discretion in determining whether a prior conviction is for a violent or drug crime, provide appropriately enhanced penalties for violent and dangerous offenders, as well as dramatically reduce the litigation burden on defendants, prosecutors, and the courts. We think the Commission should couple such changes with a recommendation to Congress for statutory changes to address the categorical approach outside the Guidelines. The Department has previously raised this issue, and the Commission has repeatedly heard from courts and

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[62] *Riccardi*, 989 F.3d at 488-89 (internal citation omitted) ("By placing this loss amount in the commentary, the Commission has retained the power to adjust it tomorrow without satisfying the same procedural safeguards. So the normal administrative principles should apply.").

[63] *See,* United States v. Abreu*,* 32 F.4th 271, 276-78 (3d Cir. 2022) (holding that a conspiracy offense does not qualify under Section 2K2.1 as a "crime of violence").

[64] United States v. Adair, No. 20-1463, 2022 WL 2350277 (3d Cir. June 30, 2022).

[65] *See* United States v. Lewis, 963 F.3d 16, 27 (1st Cir. 2020) (Torruella & Thomspon, JJ., concurring) (sharing the Ninth Circuit's inclination to join the Sixth Circuit if the court were free to do so (citing United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019))); United States v. Broadway, 815 F. App'x 95, 96 n.2 (8th Cir. 2020) (unpublished) (noting that the court was not in a position to overrule prior precedent regarding the commentary, "even if there have been some major developments since 1995").

[66] *See* Memorandum from Honorable Charles R. Breyer 6, Acting Chair, U.S. Sent'g Comm'n (Mar. 12, 2021).

practitioners how determining whether a prior conviction is a predicate "crime of violence," "violent felony," "aggravated felony," or "controlled substance offense" under federal laws and the Guidelines is one of the most vexing application issues in federal sentencing.

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Congress, the Commission, and the Administration have all made clear that for many crime types, significant imprisonment terms are appropriate, but especially long sentences should be reserved for violent offenders and aggravated repeat offenders.[67] All fifty states have identified recidivism as an important sentencing factor for achieving the goals of sentencing.[68] By identifying offenders who are genuinely dangerous, significant prison terms can be imposed in a far more limited way, reserving such sentences only for these offenders. Research – including the Commission's own – has found that a prior conviction for a violent crime (or multiple such crimes) is a reliable indicator of offender dangerousness, culpability, and likeliness to recidivate.[69] As a result, multiple guideline provisions, both substantive and procedural, rely on the definition of "crime of violence" in Section 4B1.2 of the Guidelines.[70] The ability to adequately define what qualifies as a prior aggravating conviction is necessary to achieve sensible crime and sentencing policy.

The categorical approach to determining what qualifies as a prior aggravating conviction focuses on the elements of an offense rather than on the defendant's culpable conduct. The categorical approach forbids courts from looking to the prior conduct of the defendant. Instead, courts applying the categorical approach "identify the *least* culpable conduct" criminalized by the statute and compare that conduct against the relevant statutory definition.[71] Although the categorical approach initially was adopted by the Supreme Court to interpret the definition of a violent felony under ACCA,[72] courts in all circuits use it in the Guidelines context as well.[73]

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[67] *See, e.g.,* 28 U.S.C. § 994(h) (instructing the Commission to write guidelines that increase sentences for serious recidivists); U.S. SENT'G GUIDELINES MANUAL §§4A1.1–2 (requiring sentencing courts to consider defendant's prior record in every case).

[68] *See, e.g.,* Parke v. Raley, 506 U.S. 20, 26 (1992) (recidivism laws "have a long tradition in this country that dates back to colonial times" and currently are in effect in all 50 States).

[69] U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL VIOLENT OFFENDERS RELEASED IN 2010 (February 2022), p. 5 ("Violent offenders recidivated at a higher rate than non-violent offenders. Over an eight-year follow-up period, nearly two-thirds (63.8%) of violent offenders released in 2010 were rearrested, compared to more than one-third (38.4%) of non-violent offenders.").

[70] *See* U.S. SENT'G GUIDELINES MANUAL §§2K1.3, 2K2.1, 2S1.1, 3B1.4, 4A1.1, 4B1.1.

[71] United States v. Harris, 844 F.3d 1260, 1268 n.9 (10th Cir. 2017) (emphasis added); *see also* United States v. Torrez, 869 F.3d 291, 319 (4th Cir. 2017) (noting that the "categorical approach . . . focuses on the least culpable act proscribed by statute rather than the particular culpability of a defendant"); United States v. Verwiebe, 874 F.3d 258, 260–61 (6th Cir. 2017); United States v. Dahl, 833 F.3d 345, 350 (3d Cir. 2016); United States v. Rodriguez-Negrete, 772 F.3d 221, 225 (5th Cir. 2014).

[72] United States v. Taylor, 495 U.S. 575, 591-600 (1990).

[73] *See, e.g.*, United States v. McCollum, 885 F.3d 300, 306 (4th Cir. 2018); United States v. Jones, 878 F.3d 10 (2d Cir. 2017); United States v. Dahl, 833 F.3d 345, 353 (3d Cir. 2016); United States v. Howell, 838 F.3d 489, 494 (5th Cir. 2016); United States v. Martinez-Cruz, 836 F.3d 1305, 1308-12 (10th Cir. 2016); United States v. Simmons, 782 F.3d 510 (9th Cir. 2015); United States v. Martinez, 762 F.3d 127, 133 (1st Cir. 2014); United States v. Estrella, 758 F.3d 1239, 1244 (11th Cir. 2014); United States v. Roblero-Ramirez, 716 F.3d 1122, 1125 (8th Cir. 2013); United States v. Woods, 576 F.3d 400, 403-04 (7th Cir. 2009); United States v. Andrews, 479 F.3d 894 (D.C. Cir. 2007); United States v. Montanez, 442 F.3d 485, 487 (6th Cir. 2006).

Simply stated, the categorical approach unnecessarily uses a theoretical approach that focuses on elements of a statutory offense – and the least culpable, hypothetical way to satisfy those elements – at the expense of the defendant's previous conduct and the effects of that conduct.

Many courts have now criticized using the categorical approach in the Sentencing Guidelines. As the Fifth Circuit *en banc* court unanimously stated in 2018:

> It is high time for this court to take a mulligan on [crimes of violence]. The well-intentioned experiment that launched fifteen years ago has crashed and burned. By requiring sentencing courts and this court to ignore the specifics of prior convictions well beyond what the categorical approach and Supreme Court precedent instruct, our jurisprudence has proven unworkable and unwise. By employing the term "crime of violence," Congress and the U.S. Sentencing Commission obviously meant to implement a policy of penalizing felons for past crimes that are, by any reasonable reckoning, "violent," hence the term.[74]

Sixth Circuit Judge Amal Thapar likewise has criticized the categorical approach as an "elements lottery that leads to arbitrary results" and has suggested allowing a district court to look to whether "the underlying criminal conduct was actually violent."[75] As Judge Thapar explains,

> "Each categorical-approach case (and there is no shortage of them) . . . requires the judge to (1) mull through any number of hypothetical ways to commit a crime that have nothing to do with the facts of the prior conviction; (2) mine electronic databases for state court cases (precedential or not) depicting non-violent ways of commission; and (3) scrutinize those state court cases, some of which are old and predate the categorical approach, to determine their import."[76]

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[74] United States v. Reyes-Contreras, 910 F.3d 169, 186 (5th Cir. 2018) (en banc); *see also* United States v. Scott, 14 F.4th 190, 200–02 (3d Cir. 2021) (Phipps, J., dissenting) (providing a lengthy compendium of the unflattering descriptions and pejorative labels justices and judges have assigned to the categorical approach).

[75] *See* United States v. Burris, 912 F.3d 386, 410 (6th Cir. 2019) (en banc) (Thapar, J., concurring); *see also* Martinez, 762 F.3d at 133 (internal quotation marks omitted) ("And notwithstanding the absence of Sixth Amendment constraints in the context of Guidelines calculations, we have previously determined that the categorical approach, for all of its anomalous results, applies fully to the determination of whether a prior offense constitutes a crime of violence under the Guidelines.").

[76] Burris, 912 F.3d at 407 (Thapar, J., concurring); *see also* United States v. Scott, 990 F.3d 94, 126 (2d Cir. 2021) (en banc) (Park, J., concurring) ("As a growing number of judges across the country have explained, the categorical approach perverts the will of Congress, leads to inconsistent results, wastes judicial resources, and undermines confidence in the administration of justice.").

The Commission itself has recognized the burdens that the categorical approach places on the criminal justice system.[77] And in December of 2018, the Commission acknowledged that "courts have applied the categorical approach to guideline provisions, even though the Guidelines do not expressly require such analysis."[78]

The results from the categorical approach vary widely and can be counterintuitive. Washington second-degree murder, for example, is not considered a "crime of violence" under the Guidelines.[79] North Carolina second-degree rape is not a crime of violence for purposes of the Guidelines either.[80] Just as troubling, defendants in different jurisdictions who engage in essentially the same conduct are treated differently based solely on the quirks of statutory drafting in the state in which they were convicted.[81]

We recognize that one of the obstacles to reforming the categorical approach has been the severity levels associated with many recidivist provisions, both statutory and in the Sentencing Guidelines. We believe that certain of these levels are not optimally set. The Department has supported reducing mandatory statutory penalties for certain criminal offenses. And the Department is currently considering supporting legislative proposals that would reduce mandatory statutory penalties for additional recidivist provisions. Similarly, Congress is considering legislation permitting defendants with lengthy sentences to apply for a sentence reduction based upon rehabilitation and demonstrated readiness for reentry. We would welcome the opportunity to work with the Commission to analyze severity levels for various recidivism provisions to determine which ought to be reformed, either by amending guideline provisions directly or by recommending legislative changes to Congress.

While such changes are being considered, however, we urge the Commission to address the categorical approach in the Guidelines and amend the definitions of "crime of violence" and "controlled substance offense" to reduce both the unwarranted sentencing disparities and the extensive litigation that are resulting from the current definitions.

III. Comprehensive Review of the Federal Sentencing System

Because this year's amendment cycle will necessarily be abbreviated as a result of the timing of the confirmation of the new Commission, we think focusing on the most important and far-reaching legislative and operational sentencing issues this year is the most prudent path forward for the Commission. However, there are critical systemic and crime-specific sentencing issues that we believe warrant the Commission's attention, too. We think the Commission has a genuine opportunity and obligation to examine federal sentencing as a system; to look at the fundamental architecture of federal sentencing and the federal Sentencing Guidelines; and to

[77] *See* Sentencing Guidelines for United States Courts, 83 Fed. Reg. 65,400, 65,408 (proposed Dec. 20, 2018) ("Courts and stakeholders have criticized the categorical approach as being an overly complex, time consuming, resource-intensive analysis that often leads to litigation and uncertainty.").
[78] *Id.* at 65,411.
[79] *See* United States v. Vederoff, 914 F.3d 1238 (9th Cir. 2019).
[80] *See*, United States v. Shell, 789 F.3d 335, 339-46 (4th Cir. 2015).
[81] *See* Sentencing Guidelines for United States Courts, 83 Fed. Reg. at 65,408 ("Commenters have also indicated that the categorical approach creates serious and unjust inconsistencies that make the guidelines more cumbersome, complex, and less effective at addressing dangerous repeat offenders.").

recommend a path forward for federal sentencing for the next twenty-five years or more. While we believe these issues may need to wait beyond the current amendment year for full consideration, we think that the Commission should begin such a review by conducting appropriate research, convening regional hearings, and soliciting public comment to obtain the views of stakeholders around the federal sentencing system on whether and how the system should be structurally reformed.

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The Sentencing Reform Act is approaching its fortieth anniversary. The federal Sentencing Guidelines have been in place for almost thirty-five years, and it has been more than seventeen years since the Supreme Court's decision in *United States v. Booker*. Throughout that time, the country has experienced extraordinary changes to crime rates, in public opinion toward the criminal justice system, in the fundamentals of federal corrections law, in critically important decisions by the Supreme Court, and in what we know works to reduce crime and deliver justice.

The President has made a commitment to "rethinking the existing criminal justice system – whom we send to prison and for how long; how people are treated while incarcerated; how prepared they are to reenter society once they have served their time; and the racial inequities that lead to the disproportionate number of incarcerated Black and Brown people."[82] Likewise, the American Law Institute, the Council on Criminal Justice, and many other organizations have similarly recognized the need to review the federal sentencing system periodically and to determine whether any fundamental changes are in order.

We think that the Sentencing Commission has a critical role to play in this examination and that the time to act is now – with a new Commission possessing decades of experience in the current system and after a significant pause in the Commission's work. We believe the Commission should begin this conversation – through research, regional hearings, and other mechanisms – with the various stakeholders of the federal criminal justice system. This includes hearing from judges, victims of crime, formerly and currently incarcerated people, prosecutors, defense attorneys, probation officers, academics, researchers, and the general public. Such hearings could examine the Commission's considerable impact on the federal criminal justice system, the changes that have taken place since the development of the sentencing architecture in 1987, and more.

The federal sentencing system, and the Guidelines developed by the Commission, are used to sentence hundreds of individuals every week in federal courts across the country. The system plays a role in the lives of hundreds of thousands of people: not just those who are sentenced, but also their families, the victims and witnesses of crime, prosecutors, defense attorneys, law enforcement, investigators, judges, and probation officers who are all devoted to the cause of justice. The Commission's statutory mandate demands that the right balance is achieved among the various purposes of sentencing and in the Guidelines' design.

In its report on the impact of *United States v. Booker*, the Commission recognized the disconnect between the legal structure left in the wake of the Supreme Court's new Sixth

[82] Proclamation No. 10171, 86 Fed. Reg. 17,689, 17,689 (Apr. 6, 2021).

Amendment jurisprudence and the structure of the federal Sentencing Guidelines, which was crafted in a different legal context and based on different legal assumptions.[83] In previous Annual Reports to the Commission, we have noted this disconnect and the fact that federal sentencing practice is fragmenting as a result, with sentencing outcomes in some courts closely tied to the Sentencing Guidelines, and sentencing outcomes in others not;[84] with courts accounting for offender characteristics in widely varying ways; and with fundamental policy disagreements among the Judiciary leading to dramatically different sentencing results between judges in the same district, between districts, and between circuits.[85]

In its report on mandatory minimum sentencing statutes and the decision to reduce guideline sentences for drug offenses based on drug type and quantity,[86] the Commission documented how unnecessarily severe sentences for non-violent drug offenses were crowding out other critical public safety investments and how reductions in drug sentencing severity could simultaneously facilitate greater public safety and greater justice.

Moreover, the complexity of the current guidelines system, while perhaps a necessity at a time when the Guidelines operated within its original legal framework, now leads to unnecessary and gross inefficiency. The multitude of aggravating factors in the current Guidelines Manual often require complex factual and legal decision-making, subject to *de novo* appellate review; but that process is then followed by a free-floating and virtually unrestricted analysis under 18 U.S.C. § 3553(a), subject to more deferential appellate review. It is a structure few, if any, would have purposely designed and that leads to a large appellate workload of marginal value, something we have heard repeatedly from appellate judges and appellate lawyers across the country.

We believe the consideration of the future of the federal sentencing system should be informed by the same transparent and open process that is statutorily required for the development of the Guidelines themselves. This process requires open consultation not only with the people who work with the Sentencing Guidelines, but also with the people whose lives may be affected by them. We think the Commission should, in the coming year or so, hold regional hearings and invite those impacted by federal sentencing, those who study federal sentencing, and the supporters and critics of the current sentencing system, and ask them what federal sentencing should look like for the ensuing decades. We believe that this kind of open consultation will identify the strategic priorities for the Commission for the future and provide

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[83] *See* U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2012).

[84] We believe the Commission's methodology for reporting within- and non-guideline sentences masks the actual variation in guideline sentences imposed by courts around the country. Using a different methodology to isolate judicial decision making around the Guidelines, one that eliminates from the analysis cases involving substantial assistance departures, early disposition programs, or a guideline minimum of zero months (as to which judicial decision to vary downward from the Guidelines is precluded and thus not relevant to measuring judicial decisions to sentence within the Guidelines) we find many districts that sentence within the Guidelines in less than a quarter of all cases and others that sentence within the Guidelines more than seventy percent of the time. We suspect that looking at this data judge-by-judge would reveal even more disparate results.

[85] *See* U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 87–89 tbl.30 (2021) (presenting data on offenders' appeals of sentencing determinations by circuit).

[86] U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, (2011).

insight into how the federal sentencing system should be reformed in light of constitutional constraints, policy imperatives, and the experiences of the last forty years.

A systemic reform project, which will require much of the Commission's focus, could lead, we believe, to a more sustainable and effective and just sentencing system – in both statutes and guidelines – and one that would be recognized as such by all constituencies. The elements of such a design would include: (1) statutory minimum and maximum penalties that are more proportional, that are not unnecessarily severe, and that promote consistent rather than haphazard application; (2) a new, simpler set of sentencing guidelines that will better align the sentencing process with the legal framework announced by the Supreme Court in *United States v. Booker* and better achieve the goals of the Sentencing Reform Act; and (3) statutes and guidelines that carry severity levels that will, as a whole, keep the federal prison population within the current prison capacity and budget constraints, so that resources can be allocated in a more balanced way to maximize both public safety and justice. Such a system might also take into account the abolishment of parole in the federal system, and increasingly broad stakeholder (and often judicial) support for the idea that after a long period of incarceration and successful rehabilitation, as well as possible intervening changes in laws that were not made retroactive, certain defendants should be afforded an opportunity for a second look at their overall term of incarceration. While implementing such a system is not necessarily something the Commission could achieve on its own, the Commission could consider whether such proposals would ideally be part of a systemic sentencing reform project, and advocate accordingly to Congress.

The design of a new sentencing regime will not be something that will be implemented in a year or two; it will take research, development, diplomacy, and advocacy for years to come. But such a design is needed, as criminal justice stakeholders struggle with piecemeal reforms and the application of those reforms, prospectively and retrospectively, while trying to address serious and ever-changing crime challenges facing the country.

We believe this comprehensive reform project can help shape federal sentencing policy for years to come and can drive reforms that will lead to federal sentences that better achieve equal justice under law and improve public safety. Moreover, we think the Commission is uniquely situated to strengthen the partnership in policy between the branches and among the criminal justice stakeholders that will enable our political system to make these reforms a reality and sustainable. We recommend that this be a primary Commission focus in 2023.

IV. Crime-Specific Sentencing Issues

In addition to beginning a comprehensive review of the federal sentencing system, we think the Commission should address a number of crime-specific sentencing issues that warrant reform. There are many such issues, and we set out several we believe should be priorities. We think it important the Commission address one or more of these issues this first amendment year.

A. Cocaine Sentencing Policy

For almost thirty years, there has been no greater symbol of racial inequity in sentencing policy than the federal sentencing disparity between offenses involving crack cocaine and those

involving powder cocaine. The Commission has written numerous reports on the issue, first under the leadership of Judge Richard Conaboy and later many others, and it has led the effort to treat crack and powder cocaine offenses more equally. We think the Commission should address this issue this year.

In its reports, the Commission has exposed the unwarranted disparity and its corrosive impact on trust and confidence in criminal justice.[87] The analysis and advocacy of the Commission, the Judiciary, the Obama Administration, and many non-governmental organizations led to the enactment of the Fair Sentencing Act of 2010. The Commission's subsequent amendments to the Sentencing Guidelines implementing the Act, and later application of those amendments retroactively to thousands of imprisoned offenders, were supported both by the Judiciary and the Department of Justice and have made an important contribution to reform and justice.

But the disparity remains and has been recognized on a bipartisan basis in Congress. We believe the Commission would be remiss not to address it, even if it can only do so in a limited way. Pending in Congress is legislation – the EQUAL Act – that would once and for all eliminate the continuing disparity.[88] We urge the Commission to join us in asking Congress to pass the EQUAL Act.

Under both current federal drug statutes and the Sentencing Guidelines, offenses involving crack cocaine are treated significantly more harshly than offenses involving the same amount of powder cocaine. Currently, the five- and ten-year mandatory terms of imprisonment under Sections 841 and 960 of Title 21 are triggered by 500 grams and five kilograms of cocaine, respectively. Crack cocaine offenses, however, are treated differently from other forms of cocaine – under provisions specific to crack cocaine, the five- and ten-year mandatory terms are triggered by 28 and 280 grams of crack cocaine, respectively.

The drug tables set forth in the Sentencing Guidelines reflect these differing thresholds. An offense involving 28 grams of crack cocaine, for example, is subject to a base offense level of 24, while an offense involving the same quantity of cocaine powder is subject to an offense level 12. An offense involving 280 grams of crack cocaine is subject to a base offense level 30, while an offense involving the same quantity of cocaine powder is subject to an offense level 18.

The disparate treatment of these two different forms of cocaine results in comparatively longer sentences for defendants convicted of offenses involving crack versus powder cocaine. The median sentence for defendants convicted of an offense involving crack cocaine and not subject to a mandatory minimum term at sentencing was 33 months, and the median drug quantity was 24.7 grams. By contrast, the median sentence for defendants convicted of an offense involving powder cocaine and not subject to a mandatory minimum term at sentencing

[87] *See* U.S. SENT'G COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT (2014); U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 130–33 (2004).

[88] *See* Eliminating a Quantifiably Unjust Application of the Law Act or the EQUAL Act, S.79, 117th Cong. (2021).

was 24 months, and the median drug quantity was 455.1 grams.[89] These comparatively harsher results primarily affect Black defendants. During Fiscal Year 2021, seventy-eight percent of the defendants convicted for a federal crack cocaine offense were Black.[90] By contrast, only twenty-five percent of defendants convicted for a powder cocaine offense were Black.

On June 22, 2021, the Department urged Congress to pass the EQUAL Act, including the retroactive application of its sentencing provisions.[91] The EQUAL Act, which passed the House with overwhelming bipartisan support on September 28, 2021, would eliminate the disparate threshold quantities required to trigger mandatory minimum penalties for offenses involving crack cocaine by eliminating the specific crack cocaine provisions. As noted by the Department in its public statement in support of the Act, there is no scientific basis for treating crack cocaine and powder cocaine offenses differently. There are no significant pharmacological differences between the drugs; they are two forms of the same drug, with powder cocaine readily convertible into about the same amount of crack cocaine.[92] Indeed, according to the National Institute on Drug Abuse (NIDA), the intensity and duration of cocaine's effects depends primarily on the method of administration – snorting, smoking, or injecting – rather than the form of the cocaine.[93]

As we acknowledged in the Department's statement in support of the EQUAL Act, there are differences in the ways crack and powder cocaine are manufactured, and there may be resulting differences in the way that they are trafficked. Crack cocaine distribution may be more likely to involve weapon possession, violence, or other aggravating factors that should be accounted for in sentencing policy. But the best way to reflect higher rates of violence, weapon possession, and other aggravating factors is not to provide for higher penalties for all crack offenses, but rather to apply sentencing enhancements to offenses that in fact involve aggravating factors, regardless of the substance involved.

Indeed, such aggravating factors are already addressed through various guideline provisions. For example, the Guidelines address circumstances under which a defendant has engaged in violence,[94] and/or has used a firearm in an offense.[95] The Guidelines also reflect

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[89] The Sentencing Commission reports that for a significant number of drug cases in its monitoring dataset, there is no associated drug quantity information. For this particular sample of cases, 31.3% of powder cocaine cases and 29.6% of crack cocaine cases are missing data on drug amounts. According to the Commission's data codebook, this typically happens "because both parties agreed to a Base Offense Level and the documents do not specify a corresponding drug amount."

[90] *See* U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 110 tbl.D-2 (2021).

[91] *Examining Federal Sentencing for Crack and Powder Cocaine: Hearing on S.79 Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (statement of U.S. Dep't of J.).

[92] *Id*.

[93] NAT'L INST. ON DRUG ABUSE, COCAINE DRUGFACTS (2021).

[94] *See, e.g.,* U.S. SENT'G GUIDELINES MANUAL §2D1.1(b)(2) ("If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels"). The Department has previously argued that this enhancement is insufficient, and that there should be a greater enhancement for offenses that actually involve violence.

[95] *See, e.g., id*. §2D1.1(b)(1) (If a dangerous weapon (including a firearm) was possessed, increase by 2 levels").

statutory law by separately addressing cases that have caused serious bodily injury or death.[96] The Guidelines provide an upward adjustment to the applicable sentencing range when a defendant played an organizing, leadership, managerial, or supervisory role,[97] and a decrease for when the defendant was a minor participant.[98] More generally, the nature and extent of a defendant's prior record is also incorporated in the recommended guideline range.[99] All of these enhancements apply regardless of the substance involved in an offense.

Because the Guidelines already account for aggravating factors that may occur more often in crack cocaine offenses, the Department believes the Commission should recommend to Congress the enactment of the EQUAL Act. In addition, the Commission should consider reminding sentencing courts of their obligation, when considering the statutory sentencing factors under 18 U.S.C. § 3553(a), to consider the pharmacological similarities between powder cocaine and crack cocaine and whether it is appropriate to impose a variance consistent with the relevant base offense level for powder cocaine.

B. Sexual Abuse Crimes by Federal Corrections and Other Law Enforcement Officers

We recommend that the Commission review – and strengthen – the guideline provisions for sexual abuse committed by federal corrections employees against those in their custody, and that it implement guideline provisions for new sexual misconduct statutes that were recently enacted under the 2022 Reauthorization of the Violence Against Women Act (VAWA) and go into effect on October 1, 2022.[100]

First, the Department strongly believes that the current guideline provisions applicable to sexual abuse of a ward, in violation of 18 U.S.C. § 2243(b), are insufficiently punitive in light of the egregious conduct at issue in these cases, the statutory maximum penalties provided by Congress, and the far more onerous guidelines that apply to other comparable sex offenses. Section 2243(b) makes it a crime for a federal corrections employee to engage in a sexual act with someone in official detention and under the employee's authority. The statutory maximum imprisonment penalty for the offense is, appropriately, 15 years. And yet, the base offense level for such offenses is level 14, pursuant to Section 2A3.3, which corresponds to a sentencing range of only 15 to 21 months imprisonment for a defendant in the lowest criminal history category.[101] The gap is more noteworthy in light of the absence of enhancements and upward adjustments in Section 2A3.3 to increase guidelines ranges for especially egregious offenses in the prison setting. Ultimately, this large gap – between the default sentence under the applicable guideline

[96] *See id* §2D1.1(a)(4) ("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").
[97] *Id.* §3B1.1 (providing a 4-level increase for organizers or leaders, 3-levels for managers or supervisors, among other things).
[98] *Id*. §3B1.2 ("(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels. (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.").
[99] *See id.* §§4A1.1–4B1.5.
[100] *See* 18 U.S.C. § 2242(3) (Sexual Abuse via Lack of Consent or Coercion), § 2243(c) (Sexual Abuse of An Individual in Federal Custody), and 18 U.S.C. § 250 (Civil Rights Offenses Involving Sexual Misconduct).
[101] Most, if not all, defendants prosecuted under this statute are federal employees, who by nature of their occupation and conditions of employment, will not have a criminal history.

and the maximum penalty provided by Congress – lays bare the failure of this guideline to achieve the sentencing objectives set forth in 18 U.S.C. § 3553(a).

In addition, when compared to the governing guideline for abusive sexual contact in the prison setting – which applies to sexual contact by a federal corrections employee short of a sexual act, in violation of 18 U.S.C. § 2244(a)(4) – the inadequacy of Section 2A3.3 and its base offense level of 14 is even more stark. The applicable guideline for abusive sexual contact is Section 2A3.4, which provides for a base offense level of 12. Two levels are added if the victim was in the custody, care, or under the supervisory control of the defendant, which would always be the case in BOP sexual misconduct prosecutions.[102] Thus, the adjusted offense level for sexual abuse of a ward and for abusive sexual contact (involving a BOP corrections officer and incarcerated victim) is the same: level 14. In short, the Guidelines currently and inexplicably recommend the same sentence for a corrections officer who engages in intercourse with an inmate as it does for a corrections officer who gropes an inmate, even though the former carries a maximum of 15 years in prison and is objectively far more egregious, while the latter carries a maximum imprisonment term of two years.

Moreover, the base offense level of 14 for a violation of 18 U.S.C. § 2243(b) is markedly lower than the offense level for other federal sexual abuse statutes in Chapter 109A, such as 18 U.S.C. § 2241 (Aggravated sexual abuse) and 18 U.S.C. § 2242 (Sexual abuse), where the base offense level for either is at least 30, and 32 if the victim is in custody. Admittedly, violations of these other sexual abuse statutes largely require physical force or fear of physical harm, but corrections officers often do not have to use those methods to gain submission of their victims, given their positions of authority. The Department believes the 18-level disparity between the offense level for Section 2243(b) crimes and the crimes referenced above fails to account for the coercive nature of the prison environment and the disparate power dynamic between the corrections officer and victim.[103] While the Department is not necessarily recommending that the base offense level for a violation of 18 U.S.C. § 2243(b) be increased 18 levels, we believe the Commission should increase the base offense level in Section 2A3.3 to significantly reduce the disparity in these penalties.

The Department's recent prosecution of BOP corrections officer Hosea Lee in the Eastern District of Kentucky underscores the relative and unwarranted leniency of the guideline provisions for Section 2243(b) offenses. Lee served as a Drug Treatment Specialist, and he eventually pleaded guilty to five counts of violating 18 U.S.C. § 2243(b) for engaging in sexual acts with four different female inmates who were assigned to his drug treatment classes. Not unlike similarly situated defendants, he groomed his victims, exploiting their vulnerabilities, which he knew from treating them. He sought to cover up his conduct by avoiding detection on surveillance video and by providing bottles of water to the victims so they could swallow the evidence. Under Section 2A3.3, Lee's advisory guideline range was just 18 to 24 months. As a

[102] *See* § 2A3.4(a), (b)(3).
[103] *See also* 18 U.S.C. § 1591(b)(1) (sex trafficking by coercion; base offense level 34, pursuant to §2G1.1(a)(1)); 18 U.S.C. §§ 242, 250 (deprivation of rights involving sexual misconduct; offense level of at least 36, pursuant to §2H1.1, §2A3.1, based on an offense level of 30 for the underlying sexual abuse offense plus a six-level increase for action by a public official or under color of law).

result, the government moved for an upward variance – which it frequently does under this guideline – and the court saw fit to vary upward to a sentence of 80 months in prison.[104]

In addition to revisiting the guideline for violations of Section 2243(b), we recommend that the Commission revisit the application (or non-application) of the abuse of a position of trust adjustment under Section 3B1.3 of the Guidelines in sex crimes cases involving federal corrections staff, as well as other government actors. As the Commission is well aware, Section 3B1.3 provides a two-level increase if the defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense. Application Note 1 explains that this refers to a position characterized by professional or managerial discretion, i.e., substantial discretionary judgment that is ordinarily given considerable deference.

However, the application notes for the guideline provisions dealing with offenses under 18 U.S.C. §§ 242, 2241, 2242, 2243(b), and 2244 provide that the abuse of trust enhancement should not apply in cases where victim is in the custody, care, or supervisory control of the defendant, including in a correctional facility.[105] We believe this across-the-board limitation on the abuse of trust enhancement for victims of law enforcement-committed sexual assault is unwarranted. There are circumstances where the enhancement is appropriate – and not redundant of the base offense level or other applicable enhancements – examples of which the Department would be pleased to provide the Commission. The aforementioned cases involving the BOP Drug Treatment Officer and chaplain (*see* note 104) are two such examples, where each defendant served both as a member of the corrections staff and a person who exploited a particular position of trust and the faith of victims to facilitate his crimes.

Finally, we recommend that the Commission consider several new statutes enacted as part of the 2022 VAWA Reauthorization Act to determine the appropriate and necessary updates to the Guidelines for those provisions. First, 18 U.S.C. § 2243(c) now makes it a crime, punishable up to 15 years in prison, for a federal law enforcement officer to "knowingly engage in a sexual act with an individual who is under arrest, under supervision, in detention, or in Federal custody." This new subsection essentially expands jurisdiction of 18 U.S.C. § 2243(b) (sexual abuse of a ward) beyond federal facilities to all federal law enforcement. We ask that the Commission consider the aforementioned recommendations with regard to violations of Section 2243(b) and apply them consistently to violations of Section 2243(c). Second, 18 U.S.C. § 250 now provides a penalty structure for civil rights offenses involving sexual misconduct. Third, 18 U.S.C. § 2242(3) now makes it a crime punishable by up to life in prison to "engage in a sexual act with another person without that other person's consent, to include doing so through

[104] Similarly, the Department prosecuted James Highhouse, a chaplain from a BOP facility in the Northern District of California, who, like Hosea Lee, was sentenced in August 2022. Highhouse pleaded guilty to two counts of 18 U.S.C. § 2243(b), two counts of 18 U.S.C. § 2244(a)(4), and one count of 18 U.S.C. § 1001, for his repeated sexual abuse of an incarcerated woman over a nine-month period. Despite the egregious nature of the conduct and his predatory pattern of behavior with other incarcerated women, Highhouse faced an advisory guidelines range of only 24 to 30 months. Ultimately, despite having never before imposed an upward variance, the court granted the government's motion for an upward variance and sentenced the defendant to 84 months in prison. In doing so, the court expressed its shock as to how low the advisory guideline range was given the severity of the conduct.

[105] *See* §2H1.1, Application Note 5, §2A3.1(b)(3), Application Note 3(B); §2A3.3, Application Note 4, and §2A3.4, Application Note 4(B).

coercion." We would be happy to work with the Commission to suggest alternatives for making relevant guideline updates or modifications in light of the latter two statutory changes.

Given the gravity of these offenses, the importance of holding corrections and other law enforcement officers accountable for sexual misconduct, the vulnerability of victims in custodial settings, and the importance of maintaining public trust and accountability for our corrections systems, we believe the Commission should make it a top priority to address the guideline provisions discussed above pertaining to sexual abuse crimes by federal corrections and other law enforcement officers.

C. Other Crime-Specific Guideline Issues.

Overdoses and imitation pills. According to the Centers for Disease Control and Prevention, the United States experienced more than 107,000 deaths from drug overdoses during 2021, and more than two-thirds were from synthetic opioids like fentanyl.[106] Fueling the problem are vast quantities of imitation pills containing fentanyl and other synthetic opioids, easily purchased and widely available. Many overdose victims have no idea they are ingesting deadly drugs until it is too late. In September 2019, the Drug Enforcement Administration (DEA) reported the seizure of more than 9.5 million counterfeit pills, more than the previous two years combined, and that DEA laboratory testing revealed that two out of every five fake pills with fentanyl contain a potentially lethal dose (at least two milligrams).[107] We urge the Commission to take up this issue and consider amending the drug trafficking guideline to address imitation pills.

Human Smuggling Organizations. On June 27, 2022, forty-six migrants were found dead inside a sweltering tractor-trailer vehicle abandoned on the side of a road near San Antonio, Texas.[108] This incident was one of the deadliest in recent history, but, sadly, similar scenarios have been happening for years.[109] Last year, to address the threats posed by both corruption and by transnational human smuggling and trafficking networks, Attorney General Merrick Garland announced the establishment of Joint Task Force Alpha, a law enforcement task force composed of agents and personnel from the Justice Department and the Department of Homeland Security.[110] And earlier this year, President Biden and Secretary of Homeland Security Alejandro Mayorkas announced an Executive Branch-wide effort to disrupt and dismantle human smuggling

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[106] *See* Press Release, Ctr. for Disease Control, U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 – But Are Still Up 15% (May 11, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm.
[107] *See* Press Release, Drug Enforcement Admin., DEA Issues Public Safety Alert on Sharp Increase in Fake Prescription Pills Containing Fentanyl and Meth (Sept. 27, 2021), https://www.dea.gov/press-releases/2021/09/27/dea-issues-public-safety-alert.
[108] *See* Arelis R. Hernández, Nick Miroff &Maria Sacchetti, *46 Migrants Found Dead in Texas Inside Sweltering Tractor-Trailer*, WASH. POST (updated June 28, 2022), https://www.washingtonpost.com/nation/2022/06/27/migrants-dead-texas/.
[109] *See, e.g.*, Eva Ruth Moravec, Todd C. Frankel & Avi Selk, *9 People Dead After at Least 39 Were Found Packed in a Sweltering Tractor-Trailer in San Antonio*, WASH. POST (July 23, 2017), https://www.washingtonpost.com/national/at-least-39-people-found-packed-into-sweltering-tractor-trailer-in-san-antonio/2017/07/23/c160b680-3b41-43ab-9e9c-cf133a3ca683_story.html.
[110] U.S. Dep't of Justice, *Attorney General Announces Initiatives to Combat Human Smuggling and Trafficking and to Fight Corruption in Central America* (June 7, 2021), https://www.justice.gov/opa/pr/attorney-general-announces-initiatives-combat-human-smuggling-and-trafficking-and-fight.

efforts in Latin America and along the southwest border.[111] We urge the Commission to review the guideline for alien smuggling offenses, Section 2L1.1, and to consider amending it to more effectively account for the very serious victimization caused by human smuggling, including sexual assault, serious bodily injury, and death.[112] The Commission should also consider changes to the guideline to address offenses where the defendant personally was involved in sexual abuse or sexual assault of a migrant, was involved in the death or serious bodily injury of more than one person, was involved in smuggling a known or suspected terrorist, or was involved in subjecting a child to serious risks of injury or death, regardless of whether the child was "unaccompanied."

Cyber Intrusions Interfering with an Election. We believe amendments to the guidelines are needed to address the increased threat posed by activities of foreign governments and their agents to interfere with America's free and open political system. Specifically, we think the Commission should consider making the existing six-level enhancement under Section 2B1.1(b)(19)(A)(iii) applicable to offenses under 18 U.S.C. § 1030 involving substantial disruption of a critical infrastructure and conducted for the purpose of interfering in an election or resulting in interference with an election.

Domestic Terrorism. We think the Commission should address the increasing number of domestic terrorism offenses where the perpetrator's purpose is to intimidate a civilian population through violent acts but where the defendant is not convicted under one of the "federal crimes of terrorism" included in Section 3A1.4.[113] In recent years, there have been mass shootings intended to intimidate persons of a specific religion and others to intimidate persons of a particular race or ethnicity. We think this area of sentencing law is of critical importance and warrants further review.

Agents of Foreign Governments. We think the Commission should create a new guideline for offenses under two criminal offenses related to the actions of agents of foreign governments – 18 U.S.C. § 951 and the Foreign Agents Registration Act. Both of these offenses currently lack an applicable guideline. We also believe the Commission should clarify and strengthen the guidelines applicable to economic espionage and theft of commercial trade secrets offenses under 18 U.S.C. §§ 1831 and 1832, and invite courts to consider a broader set of factors in estimating the amount of "loss" attributable to trade secret offenses.

Hate Crimes and the Deprivation of Rights under Color of Law. We recommend amending Section 3A1.1 regarding hate crime motivation, so that the three-level enhancement currently in the guideline may be applied to offenses committed under color of law. Currently, because of a "Special Instruction" at Section 3A1.1(c)(1), the three-level increase may be applied to nearly every federal offense except for an offense committed under color of law. As a result, if for example a police officer is convicted of assaulting and causing bodily injury to a motorist during an illegal arrest, and

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[111] The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables*, (June 10, 2022) (noting the goals of "…preventing and tackling migrant smuggling and trafficking in persons" and of "strengthened bilateral and regional law enforcement information sharing and cooperation to combat migrant smuggling and human trafficking."), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/.

[112] See Sarah R. Saldaña, Dir., U.S. Immigr. and Customs Enf't, Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Jan. 15 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160321/DHS.pdf.

[113] *See* U.S. SENT'G GUIDELINES MANUAL §3A1.4 cmt. n.1 ("For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5)").

if the fact-finder finds that the officer selected the victim *because* of the victim's actual or perceived race or color, the hate crime motivation would nevertheless make no difference in calculating the applicable guideline range. Although this enhancement will not apply to a great number of cases, still, if a federal court fails to account for the additional harm in selecting a victim because of that victim's race, such a failure may erode public confidence in that court and in the sentencing system more generally.

Benefits Fraud During Natural Disasters and Emergencies. Finally, we recommend an expansion of the specific offense characteristic for fraud of government benefits during natural disasters and emergencies. More specifically, we suggest expanding the existing enhancement for fraud during a national emergency under Section 2B1.1(b)(12) to make it applicable to *all* emergency declarations, and to make it applicable to *any* fraud, including identification fraud under Section 1028 of Title 18, fraud related to an access device under Section 1029, fraud in connection with computers under Section 1030, and fraud involving the interception and disclosure of wire, oral, or electronic communications under Section 2511. In addition, we recommend adding an enhancement for when the defendant committed a fraud during the national emergency knowing or intending that it benefit a foreign government.

Conclusion

A strong, consistent, and balanced federal sentencing system is important to improving public safety across the country and furthering justice. As we have set out in this report, there are operational, systemic, and crime-specific issues in federal sentencing that require the Commission's attention in order to meet these goals for federal sentencing.

The first years of the new Commission are critical and will set the tone for the years ahead. We think the Commission can take on many of the operational issues plaguing federal sentencing, start a review of the systemic health of the federal sentencing system and its structural elements, and address crime-specific sentencing issues too.

Over the last two decades, the Commission itself has identified significant and wide-ranging flaws in federal sentencing, and we look forward to discussing all of this with the Commission and how it can set a path to a more sensible, effective, efficient, fair, and stable sentencing policy long into the future.

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to beginning our work together.

Sincerely,

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