July 15, 2024

The Honorable Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle, NE
Washington D.C., 20002-8002

Dear Chair Reeves and Members of the Commission:

Thank you for seeking public comment on what the U.S. Sentencing Commission (hereafter "Commission") should prioritize during the amendment cycle ending May 1, 2025. On behalf of Right on Crime—a national criminal justice campaign of the Texas Public Policy Foundation focused on conservative, data-driven solutions to reduce crime, restore victims, reform offenders and lower taxpayer costs—and Due Process Institute—a nonprofit bipartisan organization that works to honor, preserve, and restore procedural fairness in the criminal justice system— we are pleased to submit the following recommendations.

In its solicitation dated June 1, 2024, the Commission wrote that it was seeking recommendations on "specific avenues of research or policymaking that would allow the Commission to fulfill [its] statutory goals" of improving federal sentencing policies and practices to increase consistency, avoid unwarranted sentencing disparities, and more accurately reflect the realities of the criminal justice system.[1] We applaud the Commission for pursuing input from the public on how to improve the federal Sentencing Guidelines (hereafter "Guidelines"). Such a transparent and communicative process is essential for good governance and building trust. As such, this amendments process will assuredly encourage a comprehensive dialogue on meaningful and data-driven improvements to the criminal justice system that the Commission can undertake, while understanding that other solutions may be better delegated to Congress.

To that end, Right on Crime and Due Process Institute respectfully submit to the Commission the below recommendations to the Guidelines for the amendment cycle ending May 1, 2025.

Relevant Conduct

Uncharged conduct:

Relevant conduct is a broad term encompassing "[a] range of conduct that is relevant to determining the applicable offense level."[2] Its extensive application in sentencing makes it a "cornerstone" of the Guidelines.[3] But such ubiquity is not always good. For instance, the Guidelines permit somewhat unlimited consideration of uncharged conduct for sentencing purposes. Such consideration can invariably lead to the imposition of a more severe sentence than what is necessary or fair. As the Guidelines currently permit, relevant conduct easily encompasses too much uncharged conduct and results in defendants being sentenced for acts not covered in a count of conviction. In fact,

[1] Proposed Priorities for Amendment Cycle, 89 Fed. Reg. 47892 (June 4, 2024); *see also* Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1)(A) et. seq.
[2] U.S.S.G. § 1B1.3, comment background.
[3] U.S. Sentencing Comm'n, *Simplification Draft Paper: Relevant Conduct and Real Offense Sentencing*.

not only can prosecutors enhance sentences without having to prove the conduct beyond a reasonable doubt, but they can also increase sentence lengths without even bringing an indictment alleging that conduct. This flies in the face of constitutional fairness and underlying due process principles. The Guidelines' wide berth acceptance of consideration of uncharged conduct unfortunately negates the need for a grand jury and findings of guilt. Simply put, "sentencing a defendant based on uncharged conduct is suspect as both a constitutional and policy matter."[4] To that end, the "Commission has the authority to address th[is] issue[], and it should."[5]

To remedy this problem, we recommend that the Commission assesses how to narrow the scope and application of uncharged relevant conduct, similar to how it has addressed acquitted conduct sentencing to date.[6] Specifically, the Commission could narrow the scope of relevant uncharged conduct, moving closer to a charge-offense system where a defendant is sentenced only to those charges of which he or she is found guilty. Alternatively, the Commission could change the way relevant uncharged conduct is used. For instance, there could be a cap on the increases attributable to uncharged conduct or a bar on its consideration except for purposes of mitigation. A combination or individual consideration of either would greatly improve fairness, predictability, and consistency of sentencing.

Acquitted conduct:

Earlier this year, the Commission amended the Guidelines to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the Guidelines.[7] This unanimous vote was a long-awaited and meaningful step towards ending the unfair practice of allowing federal judges to consider acquitted conduct to enhance a criminal defendant's sentence. However, the Commission's most recent amendment did not forbid its use wholesale; rather, the prohibition of considering acquitted conduct by a sentencing court is limited to federal acquitted conduct that does not also establish the instant offense of conviction.

This curtailed approach is much appreciated and needed. But more can be done. To that end, we recommend that the Commission proposes an amendment that would completely prohibit the use of acquitted conduct in federal sentencing except for the purposes of sentence mitigation. Such an approach has already been considered by this Commission[8] and in bipartisan legislation.[9] The Commission can use this amendments cycle to finish this important job and ban acquitted conduct from being considered in federal sentencing.

Drug Crimes

Methamphetamine purity considerations:

Methamphetamine is the most common drug in the federal criminal legal system.[10] But, unlike the vast majority of the illicit drugs subject to federal criminal penalties, methamphetamine offenders are subjected to different sentences based on the purity of the drug involved in the offense. The current statutory penalties effectively create a 10-to-1 ratio, where it takes ten times less pure methamphetamine to trigger the same penalty as it would for a more pure, detectable amount of methamphetamine.[11] The Guidelines similarly use drug purity as a proxy for a

[4] *U.S. v. Brasher*, No. 23-1180 (7th Cir. June 28, 2024).
[5] *Id*.
[6] *See* more on this below; *see also infra* n. 3.
[7] Amendments to the Sentencing Guidelines, Amendment 1 (U.S. Sentencing Comm'n 2024).
[8] *Id*.; *see also* Proposed Amendments to the Sentencing Guidelines, Proposed Amendment 3 (U.S. Sentencing Comm'n 2023).
[9] "Prohibiting Punishment of Acquitted Conduct Act of 2023," S. 2788, 118th Cong. (2024); H.R. 5430, 118th Cong.
[10] U.S. Sentencing Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 13, 2024).
[11] *Id*.

defendant's culpability.[12] This disparity has resulted in overly punitive and lengthy sentences for offenders culpable of the same conduct.

The impetus of the purity distinction for methamphetamine offenders was rooted in addressing the domestic production crisis earlier this century.[13] However, most methamphetamine now distributed and used in the United States originated in Mexico and is smuggled across the southwest border.[14] And more so, the purity of this Mexican-made methamphetamine rarely tests less than 90% pure.[15] So the alleged purpose behind the purity disparity is now moot.

A growing number of federal courts have recognized the absurdity of this purity distinction.[16] To that end, we urge the Commission to eliminate this arbitrary and meaningless purity distinction, and instead apply the "mixture" Guidelines for all methamphetamine cases. This will result in more predictable and consistent sentencing ranges for offenders while still ensuring that culpable actors are held accountable for their illegal methamphetamine-related acts.

Measuring drug quantity:

It is no secret that production, manufacture and distribution of illicit drugs has radically changed in the last decade. What used to be a plant-based trade is now largely synthetic, with drug cartels and trafficking organizations capitalizing on a high-volume and low-cost business model.[17] Americans see this most vividly in the spread of methamphetamine and synthetic opioids, like fentanyl. Synthetic drugs like fentanyl are responsible for nearly all the fatal overdoses and poisonings in our country.[18]

Currently, the statutory penalties and accompanying Guidelines are based on the quantity of drugs. These were largely created when plant-based drugs, such as cocaine and heroin, still dominated the criminal legal system. But the quantities to trigger many of these mandatory minimums and associated sentencing ranges are not entirely effective for synthetic drugs like fentanyl, fentanyl analogues, and methamphetamine. It is not our recommendation for Congress to lower the quantity thresholds of these drugs for mandatory minimums to trigger, or for the Commission to consider similar quantity readjustments to make it easier for harsh sentences to be imposed. Rather, we urge the Commission to evaluate and consider the utility, effectiveness, and dangers of the current drug quantities needed for federal sentences to be imposed with the advent and continued growth of synthetic drugs.

The imprecise and troubling nature of quantity-based sentences is particularly apparent when considering the discrepancy in available sentences between the weight of a finished drug product and the amount of precursors or drug materials found. In general, once a drug is found and its identity is determined, the next step in a prosecution is to measure the drug quantity. The quantity may be a "mixture or substance containing a detectable amount of the controlled substance."[19] Determining this quantity is, unfortunately, an imprecise science. In fact, except in cases where the government seizes and then measures all the drugs attributable to a defendant, the court must

[12] U.S.S.G. § 2D1.1 comment 27(C).
[13] *Supra* n. 10.
[14] U.S. Drug Enforcement Administration, *National Drug Threat Assessment 2024*, p. 2 (July 5, 2024).
[15] *Supra* n. 10.
[16] *See, e.g., United States v. Robinson*, No. 21-14, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022); *United States v. Moreno*, 583 F. Supp. 3d 739 (W.D. Va. 2019).
[17] *Supra* n. 14.
[18] According to the Centers for Disease Control and Prevention (CDC), synthetic opioids were involved in 74,225 deaths in 2022–68% of the total 111,036 deaths that year–and psychostimulants, the class of drugs that includes methamphetamine, were involved in 31% of the overall deaths. Provisional CDC data for January-June 2023 shows that nearly 38,000 people died as the result of a synthetic opioid (usually fentanyl) overdose or poisoning in the first six months of the year.
[19] U.S.S.G. § 2D1.1, Notes to Drug Quantity Table (A); *see also* comment 1.

"approximate the quantity of the controlled substance."[20] This means that courts are forced to exercise significant discretion in estimating drug quantities.

This is in and of itself worrisome, illustrating the vast discrepancies that could unfurl from a discretionary determination about quantity. But two other considerations make this even worse. First, courts may rely on financial records to estimate drug quantity.[21] When cash is seized as part of a drug investigation, courts may equate it with a corresponding drug quantity. Second, courts may use the size or capability of a drug laboratory to estimate drug quantities.[22] The "theoretical mass yield" that can be calculated based on these two premises is bizarre and disconnected to actual drug quantities possessed by a defendant.

Courts have signaled hesitancies with these Guidelines provisions, urging that they must be applied "on the side of caution" when estimating drug quantities and that a court must determine the lesser punishment when possible.[23] In short, using the Guidelines to get a theoretical mass yield of a drug quantity for sentencing purposes has been "discouraged[,]" and deemed to be both "an inappropriate methodology to calculate drug quantity[,]" and "unreliable[.]"[24]

We urge this Commission to remove financial records and laboratory capabilities language from the Guidelines—thus removing guess work and unreliable methodologies—so that criminal defendants are sentenced based on the quantity of drugs actually in their possession.

Role vs. quantity:

In a similar vein, the undersigned organizations believe that the Commission should study and consider a revision of its Guidelines language that focuses an individual's culpability on all the circumstances of the case as opposed to just quantity. Sentencing enhancements already exist that are at a prosecutor's disposal for identifying leaders, organizers or managers of criminal enterprises. Therefore, if a particular defendant's case warrants it, those enhancements are applied. But as both the methamphetamine purity issue and the growing prevalence of synthetic drugs illustrate, quantity-based determinations for sentencing are no longer probative. A role-based approach is likely a better long-term solution, and the Commission is uniquely equipped and situated to evaluate this method.

Intended Loss

When an individual commits a theft, embezzles, or damages property, prosecutors are tasked with determining the amount of property lost. In general, the Guidelines currently define "loss" as the "greater of actual loss or intended loss."[25] The higher the victim's calculated loss, the higher the sentencing range can be. For a prosecutor, a key question is if the defendant should be on the hook for "intended loss," a concept that is mentioned only in the Commentary and not in the loss Guideline itself.

Intended loss can far exceed what is actually lost. This Commentary language grants prosecutors with a great deal of discretion to inflate a defendant's sentencing range, which can lead to a significant and unreasonable disparity in prison sentences.

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[20] *Id*. at comment 5.
[21] U.S.S.G. § 2D1.1 comment 5 ("[T]he court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant[.]").
[22] *Id*. ("[T]e court may consider . . . the size or capability of the laboratory involved.").
[23] *United States v. Forrester*, 616 F.3d 929, 949 (9th Cir. 2010); *see also United States v. Chase*, 499 F.3d 1061, 1069 (9th Cir. 2007).
[24] *Id*. (citing *Chase*, 499 F.3d at 1069).
[25] U.S.S.G. § 2B1.1 comment 3(A).

We urge the Commission to eliminate the Commentary language allowing for considerations of intended loss, instead only allowing a sentencing range to apply to the amount of actual loss. This will result in a more consistent and fair adjudication of cases and will put the Commission in line with some federal courts that have recently rejected the "intended loss" approach.[26]

White Collar Crimes

Sophisticated means:

For white collar crimes, the Guidelines provide a sentencing enhancement if "sophisticated means" were used. This is defined as conduct that is "especially complex or especially intricate."[27] However, the Guidelines illustrate such "complex" and "intricate" conduct as the main office for a telemarketing scheme being in one jurisdiction while the solicitation operations are in another jurisdiction.[28] Also, "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore accounts" are cited as examples of "sophisticated means."[29]

This two-level enhancement is easily overused in our modern, digital world. "Sophisticated means" is an extremely subjective standard, particularly when looking at our highly–if not entirely–digitized world and what was once "sophisticated" is now mundane. The Commission should consider how to better refine the definition of and attendant examples for "sophisticated means." The Commentary language should be updated to better reflect modern business practices and issues. We do not think that this sentencing enhancement is wholly without purpose and should therefore be maintained. However, it is being overused and has the capacity for misuse. The Commission can and should proactively work to prevent this.

Position of trust:

The Guidelines permit a sentencing enhancement when a defendant abuses his or her position of public or private trust, which is based on the notion that people who hold a position of trust relative to a victim are viewed as more culpable.[30] Based on the application notes, it is fair to say that this enhancement should apply when there is a professional or managerial discretion afforded to the defendant's role.

We believe this sentencing enhancement serves an important role in holding certain defendants accountable. However, this language should be clarified to rectify confusion over when the enhancement applies. For instance, the current language–directed and limited almost entirely to those in professional or managerial positions–is too broad. Based on its text, prosecutors could argue that the enhancement applies to almost anyone. The argument could easily be made that someone in the human resources department holds a position of trust, even if not in a managerial role relative to a victim. The broad language of the amendment could also be read to encompass a manager at a fast-food restaurant, a substitute teacher, or mid-level manager at a paper company. Surely, this enhancement loses its intent and teeth when it can be over-applied.

To that end, the Commission should limit a "position of trust" to instances where a fiduciary or quasi-fiduciary obligation exists. Several courts have already interpreted "position of trust" to mean this.[31] In refining the language to encompass fiduciary or quasi-fiduciary relationships, the universe of eligible defendants will inevitably narrow,

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[26] *See United States v. Banks*, No. 19-3812, 20-2235 (W.D. Penn. March 29, 2022).
[27] U.S.S.G. § 2B1.1(b)(10)(C) comment 9(B); *see also* 2T1.1(b), comment 5; 2T3.1(b)(2), comment 5.
[28] *Id*.
[29] *Id*.
[30] U.S.S.G. § 3B1.3.
[31] *See, e.g., United States v. Huggins*, No. 15-1676 (2d Cir. Dec. 19, 2016); *see also United States v. Ntshona*, 156 F.3d 318, 320 – 21 (2d Cir. Sept. 10, 1998); *United States v. Jolly*, 102 F.3d 46, 49 (2d Cir. Dec. 5, 1996); *United States v. Brunson*, 54 F.3d 673, 677 (10th Cir. 1995).

but the intent of the enhancement will importantly be clarified. This will result in far more consistency in the handing down of criminal sentences among circuits.

Obstruction of Justice

Enhancements:

If a federal criminal defendant obstructs justice, there are several avenues a prosecutor may pursue to enhance his or her sentence. Pursuant to § 2J1.2(b)(3), the sentencing range may be increased by two levels if the offense was "extensive in scope, planning, or preparation[.]" No further notes or information is provided by the Commission on what it means for an offense to be so extensive in scope or that the government had to do so much planning or preparation as to warrant the two-level enhancement. To wit, such vague language is easily weaponized and used against criminal defendants unfairly. This is particularly easy to imagine in a politically motivated or emotionally heightened prosecution.

Therefore, it is our recommendation that this language be entirely removed from the Guidelines. In the alternative, the Commission must clarify what "extensive in scope, planning, or preparation" means.

Eliminate obstruction enhancements for people who testify in their own defense:

If a criminal defendant chooses to take the stand and testify in his or her own defense in a criminal prosecution, there is nothing in statutory law or in the Guidelines prohibiting the government from seeking an obstruction charge or obstruction enhancements for allegedly slowing down the prosecution. A defendant has the right to testify in his own defense, and similarly is afforded the constitutional privilege to not testify. Coercing his or her testimony is unlawful. To wit, any use of an obstruction charge or sentencing enhancement in the presence or absence of such testimony runs afoul of the promised constitutional protections of the Fifth Amendment. It follows that the Guidelines should do its best to ensure such protections. Therefore, we recommend that the Guidelines explicitly prohibit the use of obstruction of justice offenses[32] or enhancements[33] when a criminal defendant testifies in his or her own defense.

We greatly appreciate the Commission's thoughtful and thorough review of these recommendations and look forward to continuing to work with the Commission to improve our criminal justice system.

Sincerely,

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[32] U.S.S.G. § 2J1.2.
[33] U.S.S.G. § 3C1.1.