

Collected policy arguments for downward variances from the drug-trafficking guideline, U.S.S.G. § 2D1.1

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*This outline is SRC's attempt to gather and distribute policy arguments that may be effective in convincing judges to vary downward from the drug-trafficking guideline. We already made a more specific outline for meth cases, and we may at some point make other outlines specific to other particular drugs. This outline addresses more general, overarching flaws with U.S.S.G. § 2D1.1 – particularly the setting of base offense levels via the drug quantity table: lack of any empirical foundation and unwarranted harshness. This outline will be less helpful in constructing arguments that are focused on research related to a specific drug, see, e.g., *United States v. McCarthy*, No. 09 CR. 1136 WHP, 2011 WL 1991146, at *2 (S.D.N.Y. May 19, 2011) (“*McCarthy challenges the MDMA Guidelines on the grounds that recent research undercuts the Commission's finding that MDMA is neurotoxic.*”), or related to § 2D1.1's alternative base offense levels keyed to the causation of death, etc., see § 2D1.1(a)(1)–(4), although many of the arguments re § 3553(a) factors could still be useful.*

This is in outline form, to make it easier for attorneys to pick and choose among arguments and citations, which have been borrowed primarily from defender and other filings with the Sentencing Commission. Because we have been criticizing § 2D1.1 for so long – really, as long as it has existed – this outline is incredibly dense and bulky. Therefore, in an individual case, it usually will not make sense to convert large sections of this outline into a sentencing memo. Also, some points and citations will be more or less appealing to individual judges, depending on their legal philosophy. Please, use discretion. Also, note that in some places, this outline breaks the third wall in a sidenote or prompts you to insert something about your client in the context of the policy argument; we've highlighted those bits in yellow.

The arguments described in this outline are intended to be useful in sentencing memos asking for a below-guideline sentence. Therefore, we would be remiss if we did not emphasize at the outset that our sentencing memos are generally most effective when we center them around our clients' stories. That is, even where there is an excellent, compelling policy argument for rejecting the guideline range, a sentencing pitch cannot rest on that policy argument alone. Ultimately, the court is sentencing an individual person, under the standard described at § 3553(a), and sentencing memos work best when they are framed around that individual person's story, and the reasons that a lower-than-guideline-range sentence is appropriate, with the guideline-focused argument being just one piece of that – even if it is an important piece.

If anyone reviewing this has ideas about points to add, remove, or change in this outline, please let us know – email Shelley Fite at shelley_fite@fd.org. We intend to update this outline from time to time and would love to hear your suggestions on how to improve it.

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- a. Section 2D1.1's drug-type-and-quantity-based guideline ranges are not grounded in data or other empirical evidence, or national experience, and they are not entitled to deference.
- b. Section 2D1.1 calls for sentences that are too harsh in most cases, do not further the goals of sentencing, and contribute to pernicious racial disparities.

I. Background

- a. Congress's flawed mandatory-minimum scheme based on drug type and quantity
 - i. Federal drug sentencing is built around a structure of mandatory minimum sentences that are triggered by certain drug types and weights – a scheme that began with the Anti-Drug Abuse Act of 1986 (“ADAA”).¹
 - ii. The ADAA is one of the most important and lasting pieces of legislation in the so-called War on Drugs, which President Nixon declared back in 1971.² The War on Drugs, of course, is now understood to be an abject failure – drugs of all kinds remain widely available and are cheaper than ever, and drug overdose deaths have gone up since that time rather than down.³

¹ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, § 1002.

² See National Public Radio, *Timeline: America's War on Drugs* (Apr. 2, 2007), <https://www.npr.org/2007/04/02/9252490/timeline-americas-war-on-drugs>. Incidentally, a Nixon aide would later say that the war on drugs was really targeted at Nixon's enemies: “the antiwar left and black people.” Tom LoBianco, *Report: Nixon aide says Nixon's war on drugs targeted blacks, hippies*, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.html>. Before the recent “war on drugs” period, recreational drugs had been either unregulated by the federal government or, starting in the early nineteenth century, regulated as a market concern. See Mark Osler, *Why Not Treat Drug Crimes as White-Collar Crimes?*, 61 Wayne L. Rev. 1, 6–8 (2015).

³ See, e.g., Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, Cato Institute, at 1 (Apr. 12, 2017), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-811-updated.pdf> (“We conclude that prohibition is not only ineffective, but counterproductive, at achieving the goals of policymakers both domestically and abroad. Given the insights from economics and the available data, we find that the domestic War on Drugs has contributed to an increase in drug overdoses and fostered and sustained the creation of powerful drug cartels. Internationally, we find that prohibition not only fails in its own right, but also actively undermines the goals of the Global War on Terror.”); Brian Mann, *After 50 years of the war on drugs, what good is it doing for us*, NPR (June 17, 2021) (“During months of interviews for this project, NPR found a growing consensus across the political spectrum – including among some in law enforcement – that the drug war simply didn’t work.”), <https://www.npr.org/2021/06/17/1006495476/after-50-years-of-the-war-on-drugs-what-good-is-it-doing-for-us>; Brendan Walden, *Addicted to the War on Drugs*, 5 U. Pa. J. L. & Pub. Aff. 1, 2 (2019) (“Today, problematic drug use and addiction remain as prevalent and devastating as ever. In 2017, American life expectancy decreased for the third year in a row for the first time in a century, due in part to 70,000 fatal drug overdoses, now the leading cause of death for Americans under 55. Our predominate response to this public health crisis is still aggressive drug enforcement and mass incarceration.”); Hon. Whitman Knapp, *The War on Drugs*, 5 Fed. Sent. Rep. 294, 294 (Vera Inst. Just. 1993) (federal judge stating that the

- iii. Perhaps most notoriously, the ADAA created the 100-to-1 ratio for crack-to-powder-cocaine sentencing.⁴ But the ADAA set mandatory-minimum sentences for seven drug types (in addition to crack and powder cocaine: heroin, PCP, LSD, fentanyl and its analogs, and marijuana), based on specific quantity cut-offs for each drug type.⁵ Two years later, in the Anti-Drug Abuse Act of 1988, Congress added to this scheme a set of mandatory-minimums for an additional drug type: methamphetamine.⁶
- iv. The idea behind this quantity-based mandatory-minimum scheme was that higher drug quantities acted as a “proxy” for role in the drug scheme hierarchy: mandatory minimums “typically would apply to discrete categories of traffickers – specifically, ‘major’ traffickers (ten-year minimum) and ‘serious’ traffickers (five-year minimum).”⁷ As Senator Byrd, the Senate Minority Leader, put it at the time of enactment, the ten-year minimum was for “kingpins” – the “masterminds who are really running the operations” who could “be identified by the amount of drugs with which they are involved.”⁸ The five-year minimum was for “middle-level dealers” – individuals a House Report characterized as “the managers of retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials and doing so in substantial street quantities.”⁹
- v. But there was no empirical evidence supporting that the most culpable players in the drug trade could be identified “by the amount of drugs with which they are involved.”¹⁰ Rather, the

United States’ “accomplishments in Vietnam were a brilliant success compared with its accomplishments in the ‘War on Drugs.’”).

⁴ *Kimbrough v. United States*, 552 U.S. 85, 95 (2007).

⁵ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, § 1002.

⁶ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat 4181, § 6470(g).

⁷ U.S. Sent’g Comm., *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 119–20 (Feb. 1995), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf.

⁸ *Id.* (quoting 132 Cong. Rec. S14,300 (daily ed. Sept. 30, 1986) (statement of Sen. Byrd)); *see also id.* at 119 n.31 (quoting other similar statements in the congressional record).

⁹ *Id.* at 119–20 (quoting H.R. Rep. No 99-845, at 16–17 (1986)).

¹⁰ *Id.* at 119 (quoting 132 Cong. Rec. S14,300 (daily ed. Sept. 30, 1986) (statement of Sen. Byrd)); *see also* Statement of Michael Nachmanoff Before the U.S. Sent’g Comm., Washington, D.C., at 4 (May 27, 2010) (“Mandatory minimums, however, focus on extreme examples rather than the most mitigated case. They are passed in reaction to the headlines of the day and political competition, and are not based on

quantity thresholds that triggered the mandatory minimums were recommended by law enforcement and “hastily chosen in the heat of partisan debate and based on demonstrably mistaken assumptions.”¹¹ Or, as one former congressional staffer involved with the ADAA put it, “These were magical numbers . . . we were just jumping in and picking numbers out of our a**.”¹²

- b. The Sentencing Commission’s original sin: building U.S.S.G. § 2D1.1 around Congress’s flawed mandatory-minimum scheme
 - i. Through the Sentencing Reform Act of 1984, Congress created the U.S. Sentencing Commission and charged the Commission with promulgating sentencing guidelines “which assure the meeting of the purposes of sentencing as set forth in” 18 U.S.C. § 3553(a)(2): just punishment, deterrence, protection of the public, and rehabilitation.¹³
 - ii. Under this scheme, the Commission “fills an important institutional role: it has the capacity courts lack to base its determinations on empirical data and national experience, guided by professional staff with appropriate expertise.”¹⁴ Theoretically, at

empirical research.”), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Nachmanoff.pdf.

¹¹ Statement of James Skuthan Before the U.S. Sent’g Comm’n, Washington, D.C., at 7 (Mar. 17, 2011), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110317/Testimony_FPD_Skuthan.pdf.

¹² Connor Narciso, *We still have a crack problem*, Audible Blog (July 5, 2017) (describing an audio interview (linked in the blog post) with former lawyer with the House Judiciary Committee Eric Sterling, regarding the numbers behind the ADAA), <https://www.audible.com/blog/we-still-have-a-crack-problem>. Sterling played a “central role in Congress’s enactment of the infamous mandatory minimum drug sentences in 1986” and was honored by the ATF and U.S. Postal Inspection Service for his work. Law Enforcement Action Partnership bio, available at <https://lawenforcementactionpartnership.org/wp-content/uploads/2024/07/Eric-Sterling.pdf> (accessed Oct. 29, 2024). In 2007, Sterling provided the House Judiciary Committee with a statement explaining that the architects of the ADAA had “made some huge mistakes. First, the quantity triggers that we chose are wrong. They are much too small. They bear no relation to actual quantities distributed by the major and high-level traffickers and serious retail drug trafficking operations, the operations that were intended by the subcommittee to be the focus of the federal effort.” *Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. at 166, 169–70 (June 26, 2007) (statement of Eric Sterling, in the appendix to the transcript), <https://www.govinfo.gov/content/pkg/CHRG-110hhrg36343/pdf/CHRG-110hhrg36343.pdf>. **[[Note to practitioners: depending on the judge, the more colorful quote in the body of this outline may be inappropriate.]]**

¹³ 28 U.S.C. §§ 991(b)(1)(A) & 994(g).

¹⁴ *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

least, this allows the Sentencing Commission to produce guidelines that, in the ordinary case, “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.”¹⁵

- iii. In accordance with this, the original Commission generally endeavored to employ an empirical approach to establish guideline ranges based on data about past sentencing practices compiled from thousands of pre-guidelines cases.¹⁶
- iv. However, the Commission did something different with § 2D1.1: it “departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.”¹⁷
 - 1. The Commission created § 2D1.1’s Drug Quantity Table (DQT) by mechanically basing the offense levels for drug crimes on the ADAA quantities that triggered stiff mandatory minimum penalties – numbers that, again, had not been based on empirical evidence – and then building the table around those.¹⁸ Indeed, the Commission actually set base offense levels slightly *above* the ADAA’s mandatory minimums “to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities.”¹⁹

¹⁵ *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)).

¹⁶ See *Kimbrough*, 552 U.S. at 96 (citing U.S.S.G. § 1A1.1, intro. cmt.); Hon. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17–18 (1988).

¹⁷ *Gall v. United States*, 552 U.S. 38, 46 n.2 (2007) (quoting *Kimbrough* 552 U.S. at 96–97); see also *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013) (“The flaw is simply stated: the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.”).

¹⁸ See U.S.S.C., App’x C. Amend. 782, Reason for Amendment (eff. Nov. 1, 2014) (“When Congress passed the [ADAA], the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities.”); see also *Kimbrough*, 552 U.S. at 96–97, 109.

¹⁹ U.S. Sent’g Comm., *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 148 (1995), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf.

2. For substances that do not trigger mandatory minimum sentences and do not appear on the DQT, the Commission created a “Drug Equivalency Table,” which attempts to compare myriad controlled substances to substances that *do* trigger minimums and *are* on the DQT.²⁰ In any given case, courts are able to use the table to calculate a “Converted Drug Weight” (previously articulated as “marijuana equivalency,” although marijuana quantities were not pharmacological equivalents, but simply sentencing slots) that, in turn, generates sentencing ranges under the DQT’s quantity-based framework.
3. The Commission built § 2D1.1 around the ADAA’s mandatory minimums even though those minimums were much higher than the pre-guideline sentences for the same offense.²¹ At the time it adopted the new guidelines, the Commission projected that drug sentences would increase from 23.1 months’ imprisonment to 57.7 months’ imprisonment.²² In fiscal year 2023, even after the drug-level reductions a decade ago, the average sentence length was 82 months.²³ And we know § 2D1.1 would have called for an

²⁰ U.S.S.G. § 2D1.1, Notes to Drug Quantity Table 8(D).

²¹ U.S. Sent’g Comm., *Fifteen Years of Guidelines Sentencing*, at 49 (Nov. 2004) (“The drug trafficking guideline that ultimately was promulgated, in combination with the relevant conduct rule discussed below, had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.”), <https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap2.pdf>; see also Pew Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return* (Aug. 27, 2015), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>.

²² U.S. Sent’g Comm., *Supp. Rep. on the Initial Sent’g Guidelines and Policy Stat’ts*, at 61 (June 18, 1987) (describing the results of the Commission’s simulation model: post-ADAA but pre-guidelines, sentences were projected to increase from 23.1 to 56.8 months; under the new guidelines, sentences were projected to increase to 57.7 months), https://www.usc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf. Interestingly, the Commission’s simulation model, used to calculate these projected sentences, “assume[d] that defendants are able to negotiate for sentences that are less than the mandatory minimum for the drug law and that are less than the sentence prescribed by the guidelines for career offenders,” based on “state experiences” in which sentences were “often . . . less than required by statute or the guidelines.” *Id.* at 58 n.100.

²³ U.S. Sent’g Comm., *Quick Facts: Drug Trafficking Offenses* (FY2023), https://www.usc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Drug_Trafficking_FY23.pdf.

even higher sentence than this: the vast majority of drug-trafficking sentences are below the guideline range.²⁴

4. And the Commission did this without questioning whether Congress's drug-quantity thresholds were meaningful in determining role in the offense or whether they would in some other way help judges fulfill their duty under § 3553(a) to determine sentences that were "sufficient, but not greater than necessary," to comply with the purposes of sentencing. In theory, the original Commission "view[ed] the guideline-writing process as evolutionary," expecting that "continued research, experience, and analysis" would result in revisions.²⁵ But in practice, things have not worked that way: today's DQT looks a lot like the original.
- c. The Commission has amended § 2D1.1 many times since 1987, usually only to comply with a congressional directives, resulting in a patchwork of disjointed amendments layered over the original, flawed, quantity-based guideline scheme.²⁶
 - i. Congress has directed the Commission to take action with respect to the drug-trafficking guidelines on many occasions – by elevating base offense levels related to particular drug types and by adding sentence-enhancing specific offense characteristics.²⁷
 1. It is well understood that when a guideline is impacted by a congressional directive, that impact is based on politics, not data.²⁸ Unlike the Sentencing Commission, Congress is

²⁴ See U.S. Sent'g Comm, FY 2023 *Sourcebook of Federal Sentencing Statistics* tbl. D-14 (2023), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/TableD14.pdf>.

²⁵ U.S.S.G. ch. 1, pt. A; see also Ronnie M. Scotkin, *The Development of the Guideline for Drug Trafficking Offenses*, 26 *Crim. Law Bull.* 50, 58-59 (1990) (a "Guideline Analyst" for the Commission, closing his article on the development of § 2D1.1 by emphasizing the Commission's commitment to revisit the guideline as new information and data became available).

²⁶ In order to keep this section relatively manageable, the section does not even address directives that led to new language regarding departures or cross-references, or new commentary. And it does not address directives addressing base offense levels for death-resulting offenses.

²⁷ Indeed, of § 2D1.1's 18 specific offense characteristics, only six were not promulgated in response to a directive: (b)(1), (6), (7), (10), (13), and (16).

²⁸ See Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 *Geo. Mason L. Rev.* 1001, 1023-24 (2001) (article by one of the original Sentencing Commissioners and one of the Commission's initial staff members, explaining that in

under no obligation to ensure that its policies meet the purposes of sentencing, to conduct empirical research, or to consult with all stakeholders. Congress, unlike the Commission, is free to legislate piecemeal in response to a highly publicized case, or in response to lobbying by the Department of Justice or other interest groups.

2. The Commission has promulgated a number of amendments elevating base offense levels related to particular drug types based on congressional directives, which track news headlines over time:
 - a. The Commission created the “Ice” guideline, in which 80% pure crystal meth would be treated like “Methamphetamine (actual)”²⁹;

the modern guidelines era, “congressional micro-management of the guidelines amendment process” occurs “through specific statutory ‘directives’ that the Commission either ‘consider’ or actually adopt a new guideline provision, typically involving an enhancement to sentence levels for a specific type of offense or even a specific offense characteristic, often by a given number of ‘offense levels’ actually specified in the legislation. As one might expect from a purely political process, this type of legislation tends to reflect the congressional concerns du jour . . . and therefore tends to be ad hoc and non-systematic. We do not mean to suggest that there is anything improper in Congress legislating in response to the popular will: that is what Congress – as opposed to the Commission – constitutionally is authorized to do, as Congress is a politically responsive body whose members stand for election. However, this type of legislation obviously makes the Commission’s job of systematic rationalization of sentences more difficult, and tends to reinforce a misconception of the Commission as the ‘junior-varsity’ that exists simply to carry out the transitory political will.”); see also U.S. Sent’g Comm., *Fifteen Years of Guidelines Sentencing*, at 73 (Nov. 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf (“The frequent mandatory minimum legislation and specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress.”); *United States v. Kelly*, 868 F. Supp. 2d 1202, 1204 (D. N.M. 2012) (explaining in a different context (the child-pornography-guideline context) that a guideline provision based on a directive is owed less deference because it is “not the product of the Sentencing Commission’s usual institutional competence and expertise, but is instead the result of numerous politically-based Congressional directives”).

²⁹ U.S.S.G. App’x C, amend. 370 (eff. Nov. 1, 1991), which was responsive to the directive in § 2701 in the Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789 (directing the Commission to elevate sentences for “smokable crystal methamphetamine”).

- b. The Commission increased penalties for meth mixture³⁰; meth precursor chemicals³¹; flunitrazepam³²; MDMA and related substances sold as ecstasy³³; amphetamine³⁴; meth precursor chemicals – again³⁵; GHB³⁶; and anabolic steroids.³⁷

³⁰ U.S.S.G. App'x C, amend. 555 (eff. Nov. 1, 1997), which was responsive to the directive in § 301 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099 (directing the Commission “to provide for increased penalties for unlawful manufacturing, importing, exporting, and trafficking of methamphetamine, and other similar offenses”).

³¹ U.S.S.G. App'x C, amend. 557 (eff. Nov. 1, 1997), which was responsive to the directive in § 302 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099 (directing the Commission to “increase by at least two levels the offense level for offenses involving” certain precursor chemicals).

³² U.S.S.G. App'x C, amend. 556 (eff. Nov. 1, 1997), which was responsive to the directive in § 2 of the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. 104-305, 110 Stat. 3807 (directing the Commission to “review and amend, as appropriate, the sentencing guidelines for offenses involving flunitrazepam,” and in doing so, “ensure that the sentencing guidelines for offenses involving flunitrazepam reflect the serious nature of such offenses”).

³³ U.S.S.G. App'x C, amend. 609 (eff. May 1, 2001), which was responsive to the directive in § 3664 of the Ecstasy Anti-Proliferation Act of 2000, Pub. L. 106-310, 114 Stat. 1101, tit. XXXVI, subtit. C (directing the Commission to “review and amend the Federal sentencing guidelines to provide for increased penalties such that those penalties reflect the seriousness of these offenses and the need to deter them”).

³⁴ U.S.S.G. App'x C, amend. 610 (eff. May 1, 2001), which was responsive to the directive in § 3611 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106-310, 114 Stat. 1101, tit. XXXVI, subtit. A (directing the Commission to “review and amend its guidelines [relating to amphetamine] to provide for increased penalties such that those penalties are comparable to the base offense level for methamphetamine”).

³⁵ U.S.S.G. App'x C, amend. 611, 625 (eff. May 1, 2001), which was responsive to § 3651 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106-310, 114 Stat. 1101, tit. XXXVI, subtit. A (directing the Commission to “review and amend its guidelines to provide for increased penalties” for offenses related to ephedrine, phenylpropanolamine, or pseudoephedrine, “such that those penalties corresponded to the quantity of controlled substance that could reasonably have been manufactured using the quantity of ephedrine, phenylpropanolamine, or pseudoephedrine possessed or distributed”; and to “review and amend its guidelines to provide for increased penalties” related to other list I chemicals, “such that those penalties reflect the dangerous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine and amphetamine”).

³⁶ U.S.S.G. App'x C, amend. 667 (eff. Nov. 1, 2004), which was responsive to § 608 of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (“PROTECT”) Act of 2003, Pub. L. 108-21, 117 Stat. 650 (directing the Commission to “review the Federal sentencing guidelines with respect to offenses involving gamma hydroxybutyric acid (GHB)” and “consider amending the Federal sentencing guidelines to provide for increased penalties such that those penalties reflect the seriousness of offenses involving GHB and the need to deter them”).

³⁷ U.S.S.G. App'x C, amend. 681 (eff. Mar. 27, 2006), which was responsive to § 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108-358, 118 Stat. 1661 (directing the Commission to “review the Federal sentencing guidelines with respect to offenses involving anabolic steroids” and “consider amending the Federal sentencing guidelines to provide for increased penalties with respect to offenses

[[Note to practitioners: if your case involves one of the substances that was the subject of a sentence-increasing directive, this is fodder for a substance-specific policy argument, beyond the more generally applicable arguments outlined in this document.]]

3. The Commission has also promulgated a number of amendments based on directives that added sentence-enhancing specific offense characteristics, including where:
 - a. the offense involved use of “an aircraft other than a regularly scheduled commercial air carrier . . . to import the controlled substance” or “the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance”³⁸;
 - b. the individual was convicted under 18 U.S.C. § 1791(a)(1) and sentenced under § 1791(b)(1) (drug trafficking in a prison)³⁹;
 - c. “the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility”⁴⁰;

involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use”). Note that the Commission effectuated this increase in penalties via specific offense characteristics (rather than the DQT), with what is now § 2D1.1(b)(8) and (b)(9).

³⁸ U.S.S.G. App’x C, amend. 134 (eff. Nov. 1, 1989), which was responsive to § 6453 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat 4181 (directing the Commission to “promulgate guidelines, or . . . amend existing guidelines” so that cases involving precisely the categories that ultimately went into the amendment would get an offense level that is “two levels greater” than the person would otherwise have been assigned).

³⁹ U.S.S.G. App’x C, amend. 203 (eff. Nov. 1, 1989), which was responsive to § 6468 of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat 4181 (directing the Commission to “promulgate guidelines, or shall amend existing guidelines, to provide that a defendant convicted of violating” 18 U.S.C. § 1791(a)(1) and sentenced under § 1791(b)(1) gets an offense level that is “two levels greater” than the person would otherwise have been assigned).

⁴⁰ U.S.S.G. App’x C, amend. 514 (eff. Nov. 1, 1995), which was responsive to § 90103 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (directing the Commission to “amend its sentencing guidelines to appropriately enhance the penalty for a person convicted of an offense” involving trafficking controlled substances in a federal prison or detention facility).

- d. the conduct “involved any discharge, emission, release, transportation, treatment, storage, or disposal violation” covered by various environmental laws⁴¹;
- e. the offense involved manufacture of amphetamine or methamphetamine that created a substantial risk of harm to human life or the environment – with a *further* increase for harm to “a minor or an incompetent”⁴²;
- f. the individual “used violence, made a credible threat to use violence, or directed the use of violence”⁴³;

⁴¹ U.S.S.G. App’x C, amend. 555 (Nov. 1, 1997), which was responsive to § 303 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099 (directing the Commission to “determine whether the Sentencing Guidelines adequately punish” offenses related to environmental violations “and, if not, promulgate guidelines or amend existing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of such an offense”).

⁴² U.S.S.G. App’x C, amend. 608 (eff. Dec. 16, 2000), which was responsive to § 3612 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106-310, 114 Stat. 1101, tit. XXXVI, subtit. A (directing the Commission to “amend the Federal sentencing guidelines” applicable to methamphetamine and amphetamine manufacture cases to add at least 6 offense levels (for an adjusted offense level of no less than 30) if the offense “created a substantial risk of harm to the life of a minor or incompetent”, or 3 offense levels (for an adjusted offense level of no less than 27) if the offense “created a substantial risk of harm” to any other person or the environment).

⁴³ U.S.S.G. App’x C, amend. 748 (eff. Nov. 1, 2010), which was responsive to § 5 of the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (directing the Commission to “review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense”). Under this enhancement, a prosecutor can obtain a two-level enhancement, based on a preponderance of the evidence, for conduct that previously required a conviction under 21 U.S.C. § 856 and which, prior to the congressional directive and resulting amendment, it not even result in a higher offense level if there was a conviction. In addition, the guideline applicable to § 856 offenses requires a four-level *decrease* and an offense level cap of 26 if “the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises.” *See* U.S.S.G. § 2D1.8(a)(2). This functions as a sort of specialized mitigating role reduction for § 856 offenses, because if the defendant receives the 4-level reduction, then the mitigating role adjustment under § 3B1.2 does not apply. *See* § 2D1.8(b)(1). But no such decrease was incorporated into § 2D1.1(b)(12), so that a person sentenced under § 2D1.1(b)(12) but who meets the requirements for the 4-level reduction under § 2D1.8 will not benefit from the reduction or the offense level cap that would apply *had he or she actually been convicted* of the offense. So not only can the government obtain a higher sentence without a conviction, but it can also avoid the specialized reduction for those with the described mitigating role. In short, this amendment not only increased the offense level for nearly every defendant whose offense involved conduct covered by § 856, whether convicted or not, but it also eliminated the reduction for those with a mitigating role in the offense for those sentenced under § 2D1.1, and reduced the impact of the special role reduction for those sentenced under § 2D1.8. The Commission has not provided any policy rationale – much less one supported by empirical evidence and in terms of serving

- g. the individual bribed, or attempted to bribe, a law enforcement office to facilitate the offense⁴⁴;
 - h. the individual maintained a premises for the purpose of manufacturing or distributing a controlled substance⁴⁵; or
 - i. the individual is subject to an aggravating role enhancement and also has one or more enumerated aggravating factors.⁴⁶
4. Two Acts have contained directives that resulted in *ameliorative* amendments, related to the creation of the safety valve at 18 U.S.C. § 3553(f),⁴⁷ and the reduction of the disparity between powder and crack cocaine offenses, from 100-to-1 to 18-to-1.⁴⁸

the purposes of sentencing under 18 U.S.C. § 3553(a) – for this change in course, or for the effective increase in sentences for those with a mitigating role in an § 856 offense.

⁴⁴ U.S.S.G. App'x C, amend. 748 (eff. Nov. 1, 2010), which was responsive to § 6 of the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (directing the Commission to “review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels” if the defendant was involved in bribery, maintained a drug establishment, or gets an aggravated role adjustment, and also his offense involved one or more listed “super-aggravating factors”).

⁴⁵ U.S.S.G. App'x C, amend. 748 (eff. Nov. 1, 2010), which was responsive to § 6 of the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (directing the Commission to “review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels” if the defendant was involved in bribery, maintained a drug establishment, or gets an aggravated role adjustment, and also his offense involved one or more listed “super-aggravating factors”).

⁴⁶ U.S.S.G. App'x C, amend. 748 (eff. Nov. 1, 2010), which was responsive to § 6 of the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (directing the Commission to “review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels” if the defendant was involved in bribery, maintained a drug establishment, or gets an aggravated role adjustment, and also his offense involved one or more listed “super-aggravating factors”).

⁴⁷ U.S.S.G. App'x C, amend. 515 (eff. Nov. 1, 1995), which was responsive to § 80001 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (directing the Commission to “promulgate guidelines, or amendments to guidelines, to carry out the purposes of this section and the amendment made by this section”).

⁴⁸ U.S.S.G. App'x C, amend. 748 (eff. Nov. 1, 2010), which was responsive to § 8 of the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (directing the Sentencing Commission to amend the guideline “as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law”). In addition to reducing sentences for crack offenses, in the same amendment, in response to § 7 of the Fair Sentencing Act, the Commission added the mitigating specific offense characteristic that is currently enumerated at § 2D1.1(b)(17), for a defendant who receives a “minimal participant” 4-level adjustment under U.S.S.G. § 3B1.2(a) and also has several additional specific

[[Note to practitioners: if your case involves one of the specific offense characteristics that was the subject of a sentence-increasing directive, this is fodder for an SOC-specific policy argument, beyond the more generally applicable arguments outlined in this document.]]

- ii. On three occasions, the Commission has promulgated ameliorative amendments that reduced DQT-based base offense levels: twice for crack-cocaine offenses (Amendments 706 and 748) and once for all controlled substances (Amendment 782). Each of these amendments reduced offense levels by two levels, leading to a helpful (albeit modest) reduction in drug sentences.
- iii. But as one judge has put it, the Commission's ameliorative amendments applying to § 2D1.1, though "commendable in spirit, amount to gnats around the ankles of the elephant."⁴⁹ It remains true that § 2D1.1 is a laundry-list of specific offense characteristics that were mostly responsive to congressional directives, built on a foundation of statutory mandatory minimums, resulting in a patchwork guideline that fails to sentence drug crimes proportionately, fairly, or effectively.⁵⁰

mitigating characteristics. This new reduction is not likely to apply by its terms in many cases. Note that the defendant must have received *no* monetary compensation from the illegal transaction to be eligible for a reduction, whereas a defendant can be subject to the super-aggravator for "using" another person when the other person received "little or no" compensation. In addition, the defendant must have been "otherwise unlikely" to commit the offense, whereas there is no such requirement for purposes of the super-aggravator. In other words, the provision allowing for consideration of this *mitigating* factor sets forth stricter requirements than the aggravator, for no reason. While this reduction was clearly designed to lower sentences in what are commonly known as "girlfriend" drug cases, it is unknown why the provision was drawn so narrowly or why it was drawn more narrowly than a similar aggravator. A defendant who almost meets these requirements, or meets every requirement except those that make it stricter than the aggravator, should get the reduction as a variance.

⁴⁹ *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at *7 (E.D.N.Y. Jan. 28, 2013); *see also United States v. G.L.*, 305 F.R.D. 47, 51 (E.D.N.Y. 2015) ("Although the Sentencing Guidelines for drug crimes have been reduced, they are still excessive.").

⁵⁰ *See* Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) (The guidelines embody "factor creep," where "more and more adjustments are added" and "it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.").

II. Background: the post-*Booker* sentencing framework

- a. Section 2D1.1's framework was created under the Sentencing Reform Act's mandatory guideline scheme. The Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005), of course, ruled that this mandatory scheme was unconstitutional. Post-*Booker*, it remains true that sentencing courts are required to correctly calculate the guideline range, but the guidelines are no longer binding.⁵¹ And in determining a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing at § 3553(a), district courts may "not presume that the guideline range is reasonable."⁵²
- b. Sentencing courts should consider whether a guideline sentence is inappropriate either because "the Guidelines reflect an unsound judgment," or otherwise fail to properly reflect the purposes of sentencing set forth in 18 U.S.C. § 3553(a).⁵³ In doing so, they can vary from a particular guideline as a policy matter—even categorically (that is, in every case).⁵⁴ This is particularly appropriate where a guideline "do[es] not exemplify the Commission's exercise of its characteristic institutional role."⁵⁵ That is, an advisory imprisonment range proposed by a particular guideline is only as good as that guideline's development and empirical foundation. And where a guideline does not exemplify the Sentencing Commission's "characteristic institutional role," it is entitled to less deference.⁵⁶
- c. The Supreme Court in *Kimbrough* and *Spears* held that it was reasonable for the court to disregard § 2D1.1's guideline range that resulted from a quantity-based offense level that lacked any empirical basis—instead, the range was simply keyed to Congress's mandatory minimum scheme and based on politics.⁵⁷ The petitioners in *Kimbrough* and *Spears* were challenging § 2D1.1 as applied to crack-cocaine offenses, but the Supreme Court's comment about the quantity-based offense levels lacking any

⁵¹ *Gall v. United States*, 552 U.S. 38, 49 (2007).

⁵² *See id.* at 49–50.

⁵³ *Rita*, 551 U.S. at 357.

⁵⁴ *See Kimbrough*, 552 U.S. at 109; *Spears v. United States*, 555 U.S. 261, 264–66, 268 (2009).

⁵⁵ *Kimbrough*, 552 U.S. at 109 (finding it was not an abuse of discretion to conclude "that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case.").

⁵⁶ *See id.* at 575.

⁵⁷ *See id.* at 566–73, 575; *Spears*, 842–44.

empirical basis applies to the DQT generally and counsels against any deference to the DQT-based guideline range **in this case**.

[[Note to practitioners: The term “vary” (derived from “variance”) refers to a deviation from the guideline range that is not expressly permitted by the Guidelines Manual as a “departure,” as that term is defined at U.S.S.G. § 1B1.1. In certain districts, attorneys arguing for a below-guideline sentence may find it useful to use both terms: variance and departure. Although policy-based deviations from a guideline are commonly understood to be variances, the Guideline Manual’s general departure language at U.S.S.G. § 5K2.0(a)(2)(B) might also be applied to the same circumstances.]]

III. Policy arguments for varying downward from § 2D1.1’s overly harsh guideline ranges

- a. Section 2D1.1’s drug-type-and-quantity-based guideline ranges are not grounded in data or other empirical evidence, or national experience, and they are not entitled to deference.
 - i. The Commission did not draw from past practice, national experience, empirical evidence, or the purposes of sentencing when it developed the guidelines for drug trafficking crimes. Instead, as described in detail above, the Commission simply keyed § 2D1.1 to statutory mandatory minimums based on drug weight, which were based on an assumption that drug weight served as a proxy for role in the offense.⁵⁸
 - ii. As it turns out, Congress’s (and, by extension, the Commission’s) assumption that quantity was a meaningful proxy for role in the offense is incorrect – at least, at the quantity cut-offs that Congress set. Commission research for years has demonstrated that the quantity thresholds found in the statutes, and incorporated into the DQT, often do not align with the sentences that Congress intended

⁵⁸ As one district judge has explained, the ADAA did not require this: “The Commission had several options for addressing” the problem of how to design a drug-trafficking guideline where there were also mandatory-minimum sentences that would occasionally apply. *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243, at *5 (E.D.N.Y. Jan. 28, 2013). The option most commonly adopted by state sentencing guidelines is to simply design the guideline as appropriate, then allow a mandatory-minimum to trump it when applicable. *Id.*

for various functional roles.⁵⁹ Indeed, the Department of Justice reached essentially the same conclusion as early as 1994.⁶⁰

- iii. What's more, the quantity of drugs reflected in an individual's guideline calculation is often higher than that reflected in the count

⁵⁹ See U.S. Sent'g Comm., *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at 166–69 & Fig. 8-10 (2011) (reporting on a special coding project, in which the Commission placed each individual sentenced under § 2D1.1 in one of nine function categories—from “High-Level Supplier/Importer” to “Manager/Supervisor” to “Wholesaler” to “Mule,” and finding that the “base offense levels that included or exceeded the five-year mandatory minimum penalty often applied to every function, even those that may not be considered functions typically performed by ‘major’ or ‘serious’ drug traffickers”), <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>. The categories that the Commission considered the lowest-level, “couriers” and “mules,” were able to get more downward adjustments than some other functions, but ultimately still garnered adjusted offense levels that would result in a roughly 3–4-year sentencing range for an individual with no criminal history whatsoever. See *id.* at 169 & Fig. 8-10 (showing that, on average, couriers received an adjusted offense level 21 and mules an adjusted offense level 20); see also U.S.S.G. ch. 5, pt. A (Sentencing Table); see also Hon. Patti B. Saris, *A Generational Shift For Federal Drug Sentences*, 52 Am. Crim. L. Rev. 1, 12–13 (2015) (former chair of the Sentencing Commission explaining that the Commission had found that mandatory minimums applied “in large numbers to every function in a drug organization, from couriers and mules who transport drugs often at the lowest levels of a drug organization all the way up to high-level suppliers and importers who bring large quantities of drugs into the United States,” with the category most often subject to mandatory-minimums at the time of sentencing being “street-level dealers—many levels down from kingpins and organizers”). Just this year, the Commission released a report specific to meth offenses showing that, although there was some correlation between quantity and function (although *no* correlation between purity and function), the function with the highest quantity was “courier”: “[c]ouriers had double the quantity of methamphetamine, compared to high level suppliers.” U.S. Sent'g Comm., *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, at 39 (June 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

⁶⁰ U.S. Dep't of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, at 45 (Feb. 4, 1994) (“One may have expected that larger drug quantities would be associated with the higher level functional roles. This was not the case. Instead, what table 30 and figure 3A show is that the distribution of the amount of drugs is the same across the different functional roles. If there is a difference, street-level dealers were involved with less drug quantities than high-level dealers, couriers, or those with a peripheral role. In fact, those with a peripheral role were involved with more drugs than couriers and street-level dealers and almost as much as high-level dealers.”), <https://www.ojp.gov/pdffiles1/Digitization/147721NCJRS.pdf>.

of conviction,⁶¹ and it can be inflated by the actions of others.⁶² Also, it can be arbitrary.⁶³ Estimates of drug quantities that were not actually seized are necessarily approximations and, given the incentives that other actors have to inflate quantities, very often unreliable. Moreover, the quantity of drugs involved in a case can be easily manipulated by law enforcement agents and confidential informants.⁶⁴ So while the calculation of an offense level based on drug quantity might feel like a precise mathematical exercise, “[t]he precision is false.”⁶⁵

- iv. Since its inception, federal judges have complained to the Commission that § 2D1.1 focuses too heavily on drug quantity and results in excessive sentencing ranges for low-level drug traffickers.⁶⁶ Indeed, when the Commission surveyed judges more

⁶¹ U.S. Sent’g Comm., *Report of the Drugs/Role/Harmonization Working Group*, at 21 (Nov. 10, 1992) (“The mandatory minimum penalties have consistently been interpreted to allow for aggregation of drug amounts only in cases involving convictions for conspiracy. In cases involving only a single distribution count or counts, a defendant will qualify for a mandatory minimum penalty only if the amount specified in that penalty is distributed in any single transaction. The provisions of relevant conduct relating to drug offenses and the structure of the drug guideline, however, are centered around the concept of aggregation, regardless of whether there is a conviction, on a conspiracy count or not. This sometimes results in defendants who do not qualify for mandatory minimum penalties under 21 U.S.C. § 841 receiving sentences at or above the mandatory minimum ‘anchors’ in the drug table.”), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/drugs/111992_Drugs_Role.pdf.

⁶² See U.S. Sent’g Comm., *Report of the Drugs/Role/Harmonization Working Group*, at 3 (Nov. 10, 1992) (“While Congress intended that offenders who traffic in large amounts of drugs’ receive substantial terms of imprisonment, it cannot be said that Congress required that defendants such as the off-loader in the preceding example receive more than ten years imprisonment. In certain cases, the drug guidelines would require such a sentence because of the way § 2D1.1 was designed (i.e., using the five- and ten-year statutory amounts to anchor the offense levels in the Drug Quantity Table at § 2D1.1 and increasing the sentence for larger drug quantities in a proportional manner.”), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/drugs/111992_Drugs_Role.pdf.

⁶³ *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (“In other words, the Guidelines are susceptible to the possibility that the effect of ‘relevant conduct’ on the sentencing range can depend on something as impossible to know as how aggressively someone, whether prosecutor or probation officer or perhaps even judge, has probed to learn information about a defendant’s past illegal activities.”).

⁶⁴ Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich. L. Rev. 2385 (1996); Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187 (1993).

⁶⁵ Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. Rep. 180 (Vera Inst. Just. Feb. 1999) (speaking of the guideline-calculation exercise more generally).

⁶⁶ See, e.g., Daniel J. Freed & Marc Miller, *Editors’ Observations*, 2 Fed. Sent. Rep. 189, 190 (Vera Inst. Just. 1990) (complaining about judges’ inability to factor individual characteristics into the guideline

calculation and, in this context, describing an early case sentenced under the new guidelines in which the judge complained about the lack of distinction between “a drug dealer who preys on society and needs to be imprisoned” and “an addict defendant who is a medical case and a victim of those drug dealers selling miniscule amounts of drugs to support her habit, and thus needs treatment rather than incarceration”); Stat’t of Hon. Vincent L. Broderick, Chair, Judicial Conference Crim. L. & Prob’n Admin. Comm., to the U.S. Sent’g Comm., *reprinted at* 3 Fed. Sent. Rep. 276, 279 (Vera Inst. Just. 1991) (“The Commission has requested comment on whether the Guidelines place too great a reliance on drug quantity in punishing drug offenders, particularly for less culpable aiders and abettors (proposed amendment 11). They do. The Guidelines often force judges to impose draconian sentences on mules or other marginally involved participants which are grossly disproportionate to their culpability or threat to the community.”); Tr. of Hearing (Mar. 5, 1991) (testimony of Hon. Mark Wolf on behalf of the Jud’l Conf.’s Comm. on Crim. L. and Prob’n) (“Yes, we believe that the guidelines place excessive reliance on quantity, with inadequate room to consider role in the offense. The result is that low- level drug offenders receive proportionately far more severe punishment than mid- and high - level drug offenders, and the problem is compounded by the reality that the street-level guy or the mule or the lookout usually knows little about the larger operation, and, thus, has no one to roll over on, while the kingpin has all kinds of useful information with which to buy a 5K1.l departure. . . . To this end, we believe that the Commission should seriously consider the development of guidelines and policy statements to broaden the discretion of sentencing judges in weighing the relative severity of drug offenses according to individualized offense and offender characteristics, without being dominated by issues of drug quantity. We hope that the Commission will observe the principle of parsimony codified in 18 U.S.C., section 3553(a), to develop a broad-based approach that will allow the courts to impose sentences which are ‘sufficient, but not greater than necessary to achieve the purposes of sentencing.’”), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/19910305/19910305_Transcript.pdf; Ltr. from Hon. Maryanne Trump Barry, Chair of the Jud’l Conf. Crim. L. Comm., to the U.S. Sent’g Comm., at 2 (Mar. 6, 1995) (in the context of advocating for the Sentencing Commission to simplify role adjustments, noting that the Judicial Conference had “repeatedly urged that sentences in drug cases be driven less by drug quantity”), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/199503/199503_PCpt2.pdf (PDF p. 18); Ltr. from Paul G. Cassell, Chair of the Jud’l Conf. Crim. L. Comm., to the U.S. Sent’g Comm., at 1–5 (Mar. 16, 2007) (full letter dedicated to a single issue: the Judicial Conference’s view that “when the Commission is promulgating base offense levels for guidelines used for offenses with mandatory minimums, the Commission should set the base offense level irrespective of the mandatory minimum term of imprisonment that may be imposed by statute”), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200703/200703_PCpt4.pdf (PDF p. 31–35); Tr. of Public Hearing Before the U.S. Sent’g Comm., Stanford, Cal., at 17–18 (May 28, 2009) (Hon. Walker) (“The use of quantity as a proxy for culpability is not only imprecise, it also rests on an unrealistic assumption about narcotics trafficking. I believe that the initial motivation for this policy decision rests basically on an illusion, the illusion of the [Hollywood] drug kingpin.”), https://www.ussc.gov/sites/default/files/Transcript_20090527-28.pdf; *see id.* at 19 (“[T]he Drug Quantity Table is really little more than rank pseudo-social science. The Drug Quantity Table assumes, for example, that one kilogram of marijuana represents the equivalent harm to society of one gram of heroin, but the one gram of cocaine is only as harmful as 200 grams of marijuana, while a gram of MDMA equates to 500 grams or a half-kilogram of marijuana. Exactly where these numbers stack up with social harm associated with these drugs is never explained. . . . there simply is no justification.”); Tr. of Public Hearing Before the U.S. Sent’g Comm., New York, New York, at 92–93 (July 9, 2009) (Hon. Newman) (“You are the Sentencing Commission within the judicial branch. What we need from you, even under the era of mandatory minimums, is your best judgment of what the sentence should be for a person who transports a certain amount of heroin or has a certain kingpin role or a certain mule role. We,

than a decade ago, 58% of respondents agreed with the proposition that “[t]he sentencing guidelines should be ‘de-linked’ from statutory mandatory minimum sentences.”⁶⁷ Nineteen percent of judges were “neutral” on this proposition – meaning that only 22% of judges thought that § 2D1.1 should *not* be delinked from mandatory-minimum sentences.⁶⁸ Others have also long called for reform – and not just defense attorneys.⁶⁹

- v. Since the Supreme Court held that courts may vary from an applicable guideline range based on a policy disagreement (in a case finding that § 2D1.1 was not based on empirical evidence⁷⁰), many district judges have issued written sentencing memoranda to explain their decision to reject § 2D1.1’s ranges as a policy matter.⁷¹

the country, needs your judgment what the right sentence should be.”), https://www.ussc.gov/sites/default/files/Public_Hearing_Transcript_0.pdf.

⁶⁷ U.S. Sent’g Comm., *Results of Survey of United States District Judges January 2010 through March 2010*, at Tbl. 3 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

⁶⁸ *Id.*

⁶⁹ See, e.g., Peter H. Reuter & Jonathan P. Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) (reporting recommendations of a RAND corporation working group, which concluded: “The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.”); General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered*, at 155 (1992) (noting that the most commonly cited problems with the then-new guideline system were “reduced judicial discretion, inflexibility, and harshness”), <http://archive.gao.gov/d33t10/147316.pdf>. Even the public, when surveyed by the Sentencing Commission, indicated that the guidelines over-emphasized drug quantity and produced “much harsher” sentences in drug trafficking cases than they would have given. U.S. Sent’g Comm., *Survey of Public Opinion on Sentencing Federal Crimes* (Mar. 14, 1997), <https://www.ussc.gov/research/research-reports/survey-public-opinion-sentencing-federal-crimes>.

⁷⁰ *Kimbrough v. United States*, 552 U.S. 85, 96–97 (2007).

⁷¹ See, e.g., *United States v. Moreno*, 583 F. Supp. 3d 739, 743 (W.D. Va. 2019) (“As recognized by an emerging chorus of district courts around the country, one problem with the Sentencing Commission’s promulgation of the methamphetamine Guidelines is that the Sentencing Commission deviated from the empirical approach when setting the Guideline ranges for drug offenses. Rather, the Commission chose to instead key the Guidelines to the statutory mandatory minimum sentences that Congress established for those crimes.” (cleaned up)); *United States v. Johnson*, 379 F. Supp. 3d 1213, 1218 (M.D. Ala. 2019) (noting that “district courts have granted variances at least in part because the drug-trafficking guidelines are not rooted in empirical evidence” and collecting cases, and ultimately acting accordingly); *United States v. Ibarra-Sandoval*, 265 F. Supp. 3d 1249, 1253 (D.N.M. 2017) (“[T]he drug offense Guidelines are not a reflection of the Commission’s institutional strengths, and a district court has more discretion to vary from the drug offense Guidelines based on policy disagreements than in a case where the applicable guidelines were promulgated pursuant to the Commission’s usual empirical approach.”); *United States v. Fanfair*, 379 F. Supp. 3d 138, 141 (E.D.N.Y. 2019) (imposing a below-guideline sentence of time served based on individualized factors and also with citation to Diaz’s criticism of § 2D1.1; *United States v. Diaz*,

- b. Section 2D1.1 calls for sentences that are too harsh in most cases, do not further the goals of sentencing, and contribute to pernicious racial disparities.
 - i. Section 3553(a) calls for sentencing courts to impose sentences that are “sufficient, but not greater than necessary” to comply with the purposes of sentencing: just punishment, deterrence, protection of the public from further crimes of the defendant, and rehabilitation. The Sentencing Commission’s data supports this, in that it shows that district courts overwhelmingly impose below-guideline-range sentences in drug cases.⁷²
 - ii. In fact, § 2D1.1’s overly harsh guideline ranges do not further the goals of sentencing
 1. **Just punishment:** There is no public outcry for lengthy sentences for individuals convicted of drug offenses. Indeed, public opinion has moved in the direction of *lower* sentences

No. 11-CR-00821-2 (JG), 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013) (exhaustively describing § 2D1.1’s history and its inability to distinguish meaningfully between defendants, and ultimately deciding that “[u]ntil the Commission does the job right . . . the current ranges will be given very little weight by this Court”); *United States v. Hubel*, 625 F. Supp. 2d 845, 849 (D. Neb. 2008) (criticizing the Commission for not employing “its characteristic empirical approach when setting the Guidelines ranges for drug offenses”); *United States v. Cabrera*, 567 F. Supp. 2d 271, 276 (D. Mass. 2008) (“As I have elsewhere noted, the Sentencing Commission has never explained how drug quantity is meant to measure offense seriousness, and significantly, how it correlates with the purposes of sentencing under 18 U.S.C. § 3553(a). The only explanation, which one has to infer from the Guidelines, is that drug quantity is somehow a proxy for culpability. The problem is that sometimes it is an adequate proxy, and sometimes it is not. . . . In this case, drug quantity most assuredly is not an accurate proxy.”).

⁷² The Sentencing Commission’s Sourcebook for FY2023 sentences reveals that only 26.6% of individuals convicted of drug-trafficking offenses received guideline-range sentences. U.S. Sent’g Comm., 2023 *Sourcebook of Federal Sentencing Statistics*, tbl. 31, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table31.pdf>. In contrast, 41.1% received variances, *id.*, which other Sourcebook tables clarify were overwhelmingly below range, *compare id.* at tbl. 40 (Extent of Downward Variances By Type of Crime) (7,446 downward variances for drug-trafficking offenses), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table40.pdf>, with *id.* tbl. 36 (Extent of Upward Variances By Type of Crime) (251 upward variances for drug-trafficking offenses), <https://www.ussc.gov/sites/default/files/2024-02/Table36.pdf>. An additional 31.9% of FY2023 cases received downward departures under U.S.S.G. § 5K1.1, § 5K3.1, and/or other departure provisions. *Id.* at tbl. 31. Note that the data do not reveal what percentage of individuals receiving downward departures *also* received downward variances. Also note that the top basis for downward departures (other than §§ 5K1.1 or 5K3.1) is the variance-like “[g]eneral mitigating circumstances.” U.S. Sent’g Comm., 2024 *Simplification Data* (breaking down data regarding departures), <https://www.ussc.gov/education/backgrounders/2024-simplification-data>.

for drug offenses.⁷³ To the extent that people think lengthy sentences are needed, that is for kingpins – cartel leaders and the like. **This case most assuredly does not involve such a person**, although § 2D1.1 and its DQT would have this Court sentence him like one.

2. **Deterrence:** It is well-documented that the severity of a prison sentence does not have a meaningful deterrent effect; that is, marginal increases in punishment do not increase any deterrent effect arising from the fact of punishment.⁷⁴ Decades of lengthy sentences in drug cases have not had a deterrent effect on the drug market: a Pew study in 2018

⁷³ See The Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems* (Mar. 8, 2018) (“Across demographic groups and political parties, U.S. voters strongly support a range of major changes in how the states and federal government punish people who commit drug offenses. A nationwide telephone survey of 1,200 registered voters, conducted for Pew in 2016 by the Mellman Group and Public Opinion Strategies, found that nearly 80 percent favor ending mandatory minimum sentences for drug offenses. By wide margins, voters also backed other reforms that would reduce the federal prison population. More than 8 in 10 favored permitting federal prisoners to cut their time behind bars by up to 30 percent by participating in drug treatment and job training programs that are shown to decrease recidivism. Sixty-one percent believed prisons hold too many drug offenders and that more prison space should be dedicated to ‘people who have committed acts of violence or terrorism.’”), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>; cf. Peter H. Reuter & Jonathan P. Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) (concluding that “[f]ederal sentences for drug offenders are often too severe,” such that “they offend justice”). These changing attitudes, no doubt, influenced passage of the First Step Act, which, among other things, lowered recidivist-based mandatory minimums for individuals sentenced for drug-trafficking offenses. First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194 § 401.

⁷⁴ See, e.g., Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, at 154 (Jeremy Travis, et al., eds. 2014) (noting that “any deterrent effect of lengthy sentences is modest at best” and that “that the deterrent effect of sentence length may be subject to decreasing returns”), <https://nap.nationalacademies.org/read/18613/chapter/7#153>; Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 Crime & Just. 115, 178 (2009) (“a key finding of our review is that the great majority of studies point to a null or criminogenic effect of the prison experience on subsequent offending”); U.S. Dep’t of Just., Nat’l Inst. of Just., *Five Things About Deterrence*, at 1 (May 2016), (“increasing the severity of punishment does little to deter crime” – “[t]he certainty of being caught is a vastly more powerful deterrent”), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>; Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where do we stand?* 80 Federal Probation 33, 34 (2016) (“Severity of punishment was once thought to deliver the main deterrent effect; the more severe the consequence for law-breaking, the less likely an individual is to commit a crime. However, this assumption has not been supported in the literature.”), http://www.uscourts.gov/sites/default/files/80_3_4_0.pdf; Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28–29 (2006) (explaining that “[i]maginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects” and describing theories for why that is so); Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart 1999) (reviewing the research and finding that the key factor for deterrence appears to be certainty of punishment and not severity of punishment).

found “no statistically significant relationship between state drug imprisonment rates and three indicators of state drug problems: self-reported drug use, drug overdose deaths, and drug arrests,” reinforcing “a large body of prior research that cast doubt on the theory that stiffer prison terms deter drug misuse, distribution, and other drug-law violations.”⁷⁵

3. **Protection of the public:** “Protection of the public” is often treated as synonymous with *incapacitation*: taking an individual off the street prevents that person from committing further offenses for the duration of the sentence. Incapacitation theory at the time the guidelines were created was very much *en vogue*, although researchers have since raised serious questions about incapacitation generally.⁷⁶ But even assuming that incapacitation effectively prevents some crimes (perhaps, for example, domestic violence), there is widespread agreement that it has no real impact on our nation’s multi-billion-dollar drug market:⁷⁷ the loss of any individual supplier is immediately replaced by another supplier.⁷⁸ And beyond incapacitation, research indicates

⁷⁵ The Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems* (Mar. 8, 2018), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>; see also Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, at 154 (Jeremy Travis, et al., eds. 2014) (“[T]he best empirical evidence suggests that successive iterations of the war on drugs . . . are unlikely to have markedly or clearly reduced drug crime over the past three decades.”), <https://nap.nationalacademies.org/read/18613/chapter/7#153>.

⁷⁶ Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 30–31 (2006); see also *id.* at 31 (“Incapacitative considerations have little legitimate place in decisions about individual offenders. The principal difficulty is that current incapacitation policies often, and expensively, target the wrong people. There are five main problems. First, incapacitation strategies targeted on repeat serious offenders generally result in long sentences for older offenders, most of whom in any case would soon desist from crime. This is known as the problem of residual career length; most thirty- or forty-year-old offenders are unlikely to continue as active offenders for long. There may be other justifications for confining such offenders for extended periods; but from an incapacitative perspective, such sentences are expensive, inefficient, and largely ineffective.”).

⁷⁷ Rand Corporation, *Research Brief: How Big is the U.S. Market for Illegal Drugs?* (2014) (summarizing a research paper prepared for the White House, which found that the market between 2000 and 2010 for just cocaine, heroin, marijuana, and methamphetamine was \$100 billion annually), https://www.rand.org/content/dam/rand/pubs/research_briefs/RB9700/RB9770/RAND_RB9770.pdf

⁷⁸ Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, at 144 (Jeremy Travis, et al., eds. 2014) (“From the inception of research on incapacitation, it has been recognized that incarceration of drug dealers is ineffective in preventing drug distribution through incapacitation because dealers are easily replaced.”), <https://nap.nationalacademies.org/read/18613/chapter/7#153>; see also *id.* at 146, Box 5-1 (“Replacement

that lengthy prison sentences can have a *criminogenic* effect on incarcerated individuals.⁷⁹ So, in a case like this one, a

Effects and Drug Arrests”) (describing research and concluding that, in the drug-trafficking context, “[a]rrests and imprisonments of easily replaceable offenders create illicit ‘opportunities’ for others”); Adam B. Weber, *The Courier Conundrum: The High Costs of Prosecuting Low-Level Drug Couriers and What We Can Do About Them*, 87 Fordham L. Rev. 1749, 1783 (2019) (“Crucial to measuring the benefit derived from incapacitating an individual who has committed an offense is the replacement effect of an arrest and subsequent incarceration of a defendant. That is, incapacitation is only effective at reducing crime insofar as new individuals are not willing to replace incarcerated individuals. Many of the shortcomings of the War on Drugs may be due in some part to the replacement effects of incarcerating individuals involved in drug crimes, which are particularly apparent in the case of low-level drug couriers.”); U.S. Sent’g Comm., *Fifteen Years of Guidelines Sentencing*, at 134 (Nov. 2004) (“[C]riminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.”), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap4.pdf>; U.S. Sent’g Comm., *Cocaine and Federal Sentencing Policy*, at 68 (Feb. 1995) (law enforcement reporting that retail dealers who were arrested or otherwise left the market “were almost immediately replaced”), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf; Hon. Whitman Knapp, *The War on Drugs*, 5 Fed. Sent. Rep. 294, 294 (Vera Inst. Just. 1993) (Address delivered on March 24, 1993 to the Merchants Club in New York City) (“I will just tell you that I don’t think you can find a federal—or indeed, a state—judge who will deny a sense of utter futility in presiding over drug prosecutions. It is simply a matter of taking minnows out of a pond; the thousands of dollars and hours spent in processing the particular minnows on trial have absolutely no effect on the life of the pond they used to inhabit.”); Deborah Young, *Rethinking the Commission’s Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 Fed. Sent. Rep. 63, 63 (Vera Inst. Just. 1990) (“Many drug defendants appear to be easily replaceable cogs in the vast drug distribution machinery.”).

⁷⁹ See, e.g., Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where do we stand?* 80 Federal Probation 33, 34 (2016) (discussing research “show[ing] that people who had been punished more severely actually engaged in more crime; this could be due to the punishment creating a chain reaction of other events which reduce individuals’ opportunities for conventional behavior (e.g., stable employment, close family ties) and weakening of social bonds”), http://www.uscourts.gov/sites/default/files/80_3_4_0.pdf; Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 220 & n.163–64 (2019) (discussing studies showing that “longer sentences lead to increased recidivism after release”); Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer* (Vera Inst. Just. 2017), (“At the individual level, there is also some evidence that incarceration itself is criminogenic, meaning that spending time in jail or prison actually increases a person’s risk of engaging in crime in the future. This may be because people learn criminal habits or develop criminal networks while incarcerated, but it may also be because of the collateral consequences that derive from even short periods of incarceration, such as loss of employment, loss of stable housing, or disruption of family ties.”), https://vera-institute.files.svdcn.com/production/downloads/publications/for-the-record-prison-paradox_02.pdf; Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049, 1054–72 (2008) (cataloging the criminogenic effects of incarceration and arguing that prisons may cause more crime than they prevent). At best, lengthy sentences in drug cases may have no real impact on recidivism. Cf. U.S. Sent’g Comm., *Retroactivity & Recidivism: The Drugs Minus Two Amendment*, 1 (July 2020) (“There was no statistically significant difference in the recidivism rates of offenders released early pursuant to retroactive application of the Drugs Minus Two Amendment and a comparable group of offenders who

lengthy prison sentence actually works *against* the penological goal of protecting the public.⁸⁰

4. **Rehabilitation:** Individuals convicted of drug-trafficking offenses often have significant rehabilitative needs, but those needs are best met in the community.⁸¹ Indeed, Congress has recognized that prison is not effective at rehabilitating people, and prohibited courts from extending a prison sentence for rehabilitative purposes.⁸²
- iii. Overly harsh drug-trafficking sentences not only do not advance penological goals, they also create or exacerbate other problems.
5. These lengthy sentences contribute to significant social problems. They exacerbate pernicious racial disparities in

served their full sentences.”), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf; U.S. Sent’g Comm., *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, 1–2 (May 2014) (“[T]here is no evidence that offenders whose sentence lengths were reduced pursuant to retroactive application of the 2007 Crack Cocaine Amendment had higher recidivism rates than a comparison group of crack cocaine offenders who were released before the effective date of the 2007 Crack Cocaine Amendment and who served their full prison terms less earned credits.”), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

⁸⁰ Lynne M. Vieraitis, et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 *Criminology & Pub. Pol’y* 589, 614 (2007) (“Whether the pains associated with imprisonment are deliberate (i.e., purposely designed by administrators) and/or warranted (i.e., the principle of least eligibility), the result is that imprisonment causes harm to prisoners. Moreover, the evidence presented here suggests that the general public suffers harm through increases in crime.”).

⁸¹ National Institute of Corrections, Community Corrections Collaborative Network, *Myths and Facts – Why Incarceration is Not the Best Way to Keep Communities Safe*, <http://www.azp.uscourts.gov/sites/azp/files/EBP%20Myths%20and%20Facts.pdf>; see also U.S. Sent’g Comm., *Staff Discussion Paper: Sentencing Options under the Guidelines*, at 19 (1996) (explaining that “alternatives [to incarceration] divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties”), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/simplification/SENTOPT.pdf>.

⁸² 18 U.S.C. § 3582(a) (“The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”); see also 28 U.S.C. § 994(k) (instructing the Sentencing Commission in designing the guidelines to “insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment”). The Supreme Court in *Tapia v. United States*, 564 U.S. 319 (2011), explained this prohibition.

the criminal legal system.⁸³ And given that lengthy drug sentences are disproportionately visited upon Black men, in particular, they have hollowed out some low-income minority neighborhoods, destabilizing families and communities – factors that are linked to *increased* crime and *increased* demand for drugs.⁸⁴

6. Lengthy drug sentences have also contributed to a crisis within the BOP. Changes in drug sentencing policy at the time of guideline implementation were a primary cause of a dramatic growth in the federal prison population.⁸⁵ This

⁸³ Black (only) individuals made up 27.7% of individuals sentenced under § 2D1.1 in fiscal year 2023, although they are an estimated 13.7% of the U.S. population. Hispanic or Latino individuals made up 43.6% of individuals sentenced under § 2D1.1 in 2023, although they are an estimated 19.5% of the U.S. population. Non-Hispanic or Latino white individuals made up 25.7% of individuals sentenced under § 2D1.1 in FY 2023, as opposed to an estimated 58.4% of the U.S. population. *Compare* U.S. Sent’g Comm., *FY 2023 Sourcebook of Federal Sentencing Statistics* tbl. D-2 (2023) with U.S. Census Bureau, QuickFacts: United States (last visited Nov. 11, 2024).

⁸⁴ Becky Pettit & Carmen Gutierrez, *Mass Incarceration and Racial Inequality*, 77 Am. J. Econ. & Sociol. 1153, 1153–82 (Oct. 29, 2018) (“By removing large numbers of young men from concentrated areas, incarceration reduces neighborhood stability. The cycling of men between correctional facilities and communities may even begin to trigger higher crime rates within a neighborhood, a process [one researcher] describes as ‘coercive mobility.’ Contemporary research suggests that high rates of incarceration increase policing and surveillance in local areas in ways that reinforce further punishment.”), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9540942/>; Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. of Justice, at 2 (2017) (discussing a neighborhood’s “tipping point,” at which incarceration rates are so high among the population that they “break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system; thus, as high incarceration becomes concentrated in certain neighborhoods, any potential public safety benefits are outweighed by the disruption to families and social groups that would help keep crime rates low”), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf; *id.* at 2–3 (“Incarceration reduces employment opportunities, reduces earnings, limits economic mobility and, perhaps more importantly, has an intergenerational impact that increases the chances that children of incarcerated parents will live in poverty and engage in delinquent behavior.”); *see also, e.g.*, Bridget Boland, *Parenting Prison: How Mass Incarceration of Parents Affects Child Development*, 43 Child. Legal Rts. J. 48 (2023); Danielle Snyder, *One Size Does Not Fit All: A Look at the Disproportionate Effects of Federal Mandatory Minimum Drug Sentences on Racial Minorities and How They Have Contributed to the Degradation of the Underprivileged African-American*, 36 Hamline J. Pub. L. & Pol’y 77, 111–15 (2014); Nekima Levy-Pounds, *Par for the Course?: Exploring the Impacts of Incarceration and Marginalization on Poor Black Men in the U.S.*, 14 J. L. Society 29, 34 (2013); Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 Hastings Race & Poverty L. J. 353, 363–377 (2010).

⁸⁵ U.S. Sent’g Comm., *Fifteen Years of Guidelines Sentencing*, at 48 (2004) (“The large number of drug offenders means that overall trends in the use of imprisonment and in average prison terms, reviewed above, are dominated by drug sentencing. Analysis using the Federal Bureau of Prison’s population

unprecedented growth has come at great cost.⁸⁶ And it has led to the severe over-crowding and under-staffing that the Bureau of Prisons now faces.⁸⁷

simulation model demonstrated that three-quarters of the growth in the federal prison population in the early years of guidelines implementation could be attributed to changes in drug sentencing policies (Simon, 1993). Changes in drug sentencing policies are also a primary cause of a widening gap between the average sentences of Black, White, and Hispanic offenders . . .”), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap2.pdf>; see also Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, at 152 (Jeremy Travis, et al., eds. 2014) (describing how law enforcement efforts to target drug crime, the passage of harsh federal drug laws in the 1980s, and more punitive drug sentencing led to “historically unprecedented” imprisonment rates for low-level drug crime), <https://nap.nationalacademies.org/read/18613/chapter/7#153>; Anne R. Traum, *Mass Incarceration at Sentencing*, 64 Hastings L. J. 423, 429 (2013) (“The war on drugs, beginning in the 1980s, vastly expanded drug crime prosecutions and made prison sentences for drug offenses routine. From 1980 to 2007, there was a roughly twenty-fold increase in the number of [individuals sentenced to federal prison] for drug offenses — from 4900 in 1980 to 98,675 in 2007.” (citations omitted)); Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295, 295, 302 (2013) (discussing the severity of the drug trafficking guidelines and the dramatic increase in the prosecution and incarceration of people involved in drug crimes in the last 50 years); Kamala Mallik-Kane et al., *Examining Growth in the Federal Prison Population, 1998 to 2010*, Urban Institute (2012) (“The increase in expected time served by drug offenders was the single greatest contributor to growth in the federal prison population between 1998 and 2010.”), <https://www.ojp.gov/pdffiles1/bjs/grants/239785.pdf>; John Scalia, *The Impact of Changes in Federal Law and Policy on the Sentencing of, and Time Served in Prison By, Drug Defendants Convicted in Federal Courts*, 14 Fed. Sent. Rep. 152 (2002); Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent. Rep. 29 (1990).

⁸⁶ The most recent congressional budget request for the BOP totaled \$8,644,290,000. U.S. Dep’t of Justice, *Federal Prison System FY 2024 Performance Budget Congressional Submission*, at 1, https://www.justice.gov/d9/2023-03/bop_se_fy_2024_pb_narrative_omb_cleared_3.23.2023.pdf. As a pie chart in that request illustrates, 45% of inmates were convicted of drug offenses — the largest piece of the pie by far. *Id.* at 4; see also *id.* at 6 (“The sentencing changes in the 1980s and 1990s not only affected the number of inmates the BOP housed, but also the type of inmates who began coming into the system. For nearly five decades, the Federal inmates the Bureau housed were largely bank robbers and white-collar inmates. However, changes in interdiction and sentencing changed the population’s composition. Currently, almost half of the population is serving sentences for drug offenses. The remainder predominantly includes inmates convicted of weapons offenses, immigration offenses, and sex offenses.”)

⁸⁷ See Fed. Bureau of Prisons, Program Fact Sheet (Oct. 31, 2021), https://www.bop.gov/about/statistics/docs/program_fact_sheet_122021.pdf; see also Dep’t of Justice, Office of the Inspector General, *Audit of the Federal Bureau of Prisons’ Efforts to Maintain and Construct Institutions*, at 12 (2023), https://oig.justice.gov/sites/default/files/reports/23-064_1.pdf; Stat’t of Colleen S. Peters, BOP Director, to the U.S. House of Rep. Judiciary Comm. (July 23, 2024) (“For the past two years, we have worked to stabilize an agency in crisis.”), <https://docs.house.gov/meetings/JU/JU08/20240723/117533/HHRG-118-JU08-Wstate-PetersC-20240723-U2.pdf>.