



By the Grace of G-d

July 16, 2026

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

Re: Tzedek Association Comments on the Commission's Proposed 2026-2027 Policy Priorities

Dear Judge Reeves and Members of the Commission,

Tzedek Association again welcomes the opportunity to suggest policy priorities for the upcoming cycle. Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian relief both in the United States and throughout the world. Tzedek is particularly committed to promoting reform of the current American sentencing system, informed by its deeply held belief in the dignity and worth of every human being. Tzedek seeks a system that is more humane, fair, and just.

While Tzedek has been heartened by the valuable, albeit incremental, reforms undertaken by the Commission in recent years, other significant reforms that have garnered support from individuals and groups across the ideological spectrum have not yet been implemented. Especially in light of data reflecting substantial, nationwide, long-term declines in many categories of crime, the Commission should seize every opportunity to foster a criminal justice system that tempers the need for punishment with compassion, and to ensure that sentencing policy is informed by empirical evidence rather than outdated and counterproductive policies that ignore the innate human capacity for growth and change.

Over the past couple of years, Tzedek has proposed a compendium of reforms in response to the Commission’s requests for public input. During the last amendment cycle, for example, the Commission considered proposals that could have fundamentally addressed various significant deficiencies in the application of the United States Sentencing Guidelines (“U.S.S.G.”) to economic crimes and provided new sentencing reductions based on post-offense behavior and rehabilitative efforts. Unfortunately, many significant and broadly supported reform proposals have not yet been implemented. Nevertheless, Tzedek continues to respectfully urge the Commission to consider bold action to effectuate a much-needed paradigm shift to correct what Tzedek believes are fundamental flaws that have plagued federal sentencing for decades.

This year, Tzedek’s principal new recommendation is that the Commission respond to recent decisions by the Supreme Court by clarifying and strengthening the compassionate release policy statement. In doing so, the Commission has an important opportunity not merely to conform the Guidelines to the Court’s holdings, but also to reaffirm that compassionate release must remain a meaningful—and meaningfully available—mechanism for redressing prison terms that have become greater than necessary.

Reaffirmation of Previously Proposed Priorities

Apart from the new recommendation, which is articulated below, Tzedek summarizes and reiterates the priorities it has urged the Commission to consider in recent years. For each of these, a comprehensive supporting analysis and underlying rationale was provided in Tzedek’s proposed priorities submitted on July 15, 2024, and July 18, 2025, which are appended to this submission as Exhibits 1 and 2, and which are also posted on the Commission’s website.¹ The following is an annotated summary to highlight the nature and points of emphasis in those prior proposals.

➤ Implement Fundamental *Mens Rea* Reform

In myriad ways, the Guidelines either overstate or fail to consider *mens rea*, motive, and individual culpability. To

¹ Tzedek Association, Proposed Priorities for the 2024–2025 Amendment Cycle (July 15, 2024); Tzedek Association, Proposed Priorities for the 2025–2026 Amendment Cycle (July 18, 2025), available at <https://www.ussc.gov/policymaking/public-comment/public-comment-july-15-2024> and <https://www.ussc.gov/policymaking/public-comment/public-comment-july-18-2025>.

ensure that this vital moral anchor in the criminal law is preserved, numerous reforms are essential to correct this deficiency. Exhibit 1, pp. 18-19; Exhibit 2, pp. 2-8.

➤ **Reformulation of Base Offense Level Calculation for Economic Crime and Drug Offenses**

To address arbitrary adjustments based upon external factors that often bear no relation to an individual's true culpability and establish presumptive sentences that are disproportionately harsh, the Commission should consider replacing and/or fundamentally reforming the operation of the loss table under U.S.S.G. § 2B1.1 and the Drug Quantity Table under § 2D1.1. Exhibit 1, pp. 5-7; Exhibit 2, pp. 4-8.

➤ **Expand Alternatives to Incarceration**

Mounting evidence from states and select federal districts shows that non-prison sentences and alternative forms of punishment, including diversion and restorative justice programs, result in decreased recidivism. Yet, the Commission's data document the continued rarity of non-prison sentences, an undeniable fact at odds with Congress's directive that the Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or other serious offense." 28 U.S.C. § 994(j). Tzedek has proposed a litany of reforms that will expand the availability of alternatives to incarceration to encourage their greater use by judges at sentencing. Exhibit 1, pp. 22-25; Exhibit 2, pp. 22-25.

➤ **Implement Various Measures to Ameliorate the Trial Penalty**

Tzedek and many others have noted the astonishingly high percentage of cases disposed of via guilty plea, a consequence of the significantly increased penalties imposed upon those accused persons who avail themselves of their fundamental

right to trial.² This trial penalty or trial tax, which emanates from the prosecution’s unilateral control over charging decisions and its presentation of relevant conduct, should be addressed through a panoply of reforms that are within the Commission’s purview. These reforms include changes related to acceptance of responsibility, obstruction, relevant conduct determinations, and substantial assistance. Exhibit 1, pp. 10-18; Exhibit 2, pp. 17-21.

➤ **Identify Collateral Consequences and Their Punitive Impact**

Collateral consequences are the multitude of debarments, disabilities, and deprivations that flow from a criminal conviction, even though they are not ordinarily contained within the penalty provisions in criminal statutes. Tzedek has repeatedly urged the Commission to review and assess the prevalence, severity, and cumulative real-world impact of these inherently punitive consequences, and to propose mechanisms that enable courts to account for those consequences when calibrating other criminal sanctions. Exhibit 1, p. 25; Exhibit 2, pp. 25-26.

➤ **Establish Presumptive Maximum Sentences and Implement Reforms to Offense Level 43**

Tzedek urges the Commission to implement reforms to prevent the imposition of life sentences on nonviolent offenders and curtail the use of life sentences, particularly with respect to individuals with little or no criminal history. Exhibit 2, p. 16.

² Notably, in their concurring opinion in *Hunter v. United States*, 608 U.S. ____ (2026), Justices Neil Gorsuch, Sonia Sotomayor and Ketanji Brown Jackson wrote at length about “plea bargaining’s excesses” and urged corrective measures to address “coercive prosecutorial tactics designed to induce defendants to take plea deals.” Slip op. at 1-16. Tzedek respectfully asserts that the Commission could and should take a leading role in “some of the work still ahead” to ensure our sentencing structures and practices do not unduly undermine our Nation’s historical commitment to the right to trial.

➤ **Recommendation that Judges, DOJ Officials, and Others Visit Federal Prisons**

Public officials whose work often requires them to seek or impose prison sentences should have a firsthand sense of the conditions in those institutions. The Commission should take steps to institutionalize the practice of bringing those public officials into federal prisons. Exhibit 1, p. 26; Exhibit 2, pp. 26-27.

The Commission Should Amend § 1B1.13 to Reflect the Supreme Court’s Rulings and to Provide Guidance, by Articulating a Totality of the Circumstances Standard, to Encourage Increased Use of Compassionate Release

The Supreme Court recently issued two rulings providing guidance on what types of claims provide a basis for a sentencing reduction under the “extraordinary and compelling reasons” statutory standard set forth in 18 U.S.C. § 3582.³

Notwithstanding that 28 U.S.C. § 994(t) reflects Congress’s intent to expressly vest the Commission with authority to “describe what should be considered extraordinary and compelling reasons for a sentence reduction,” the Court reasoned in *Rutherford* that the nonretroactive provisions of amendments to 18 U.S.C. § 924(c) foreclosed reliance upon those provisions as an “extraordinary and compelling reason” for a sentence reduction. The Court in *Fernandez* held that, because the provisions of 28 U.S.C. § 2255 prescribe the means for a prisoner to collaterally attack a federal conviction, arguments that are based on the asserted invalidity of a conviction are not among the “extraordinary and compelling reasons” that can justify compassionate release.

Clearly, the Commission must amend U.S.S.G. § 1B1.13 to reflect the holdings in *Rutherford* and *Fernandez*, but in so doing it should not lose sight of its congressional responsibility and unique ability to exercise broad and data-informed judgment regarding “what should be considered extraordinary and compelling reasons for a sentence reduction.” 28 U.S.C. § 994(t).

³ *Rutherford v. United States*, 608 U.S. ____ (2026); *Fernandez v. United States*, 608 U.S. ____ (2026).

Drawing on data and experiences since Congress enacted the First Step Act, which had the express goal of “Increasing the Use and Transparency of Compassionate Release,” the Commission not only can, but should, exercise its statutory authority to more fulsomely define what constitutes extraordinary and compelling reasons to ensure both that the totality of a prisoner’s circumstances is considered and that compassionate release is employed more robustly. Particularly since the end of the COVID pandemic, and even given this Commission’s efforts in 2023 to foster a justifiably broad understanding of the kinds of circumstances warranting a sentencing reduction, grants of compassionate release have remained extraordinarily rare, suggesting a systemic underappreciation of cases and circumstances in which Congress sought increased use of compassionate release.

The Commission’s own data suggest that, despite Congress’s directive to increase the use of compassionate release, the mechanism continues to be employed only in the rarest of circumstances. Consequently, the Commission should provide additional guidance through U.S.S.G. § 1B1.13 to effectuate the First Step Act’s objective of increasing the use of compassionate release.

Indeed, according to the Commission’s data analyzing compassionate release motions decided in fiscal year 2025, only 394 of the 2,795 motions were granted, while 2,401 were denied.⁴ To put this in perspective, on an average weekday, federal courts nationwide granted fewer than two compassionate release motions while denying approximately nine. During that same period, the Commission’s data show that 61,557 people were sentenced to federal prison,⁵ an average of approximately 237 people on each and every weekday—underscoring just how extraordinarily rare compassionate release has become relative to how many are sent into the federal prison system.

Given that the total federal prison population exceeds 150,000 persons,⁶ if only as few as 0.1 percent of the total federal prison population were to receive reductions each month, that would amount to 150 grants per month, and yet the latest data

⁴ U.S.S.C., Compassionate Release Data Report: Fiscal Year 2025 (May 20, 2026), <https://www.ussc.gov/research/data-reports/compassionate-release-data-reports>

⁵ U.S.S.C. 2025 Sourcebook of Federal Sentencing Statistics, Table 13, www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2025/2025_Sourcebook.pdf.

⁶ Federal Bureau of Prisons, Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp.

show that less than 25 compassionate release motions are granted each month⁷—roughly one-sixth of the number that even a 0.1 percent monthly reduction rate would produce. Recent trends also show that fewer such motions are being filed, suggesting that federal prisoners have become understandably discouraged by the steadily declining number of compassionate release grants.

Surely, the present rate of compassionate release grants—approximately 0.014 percent per month relative to the total federal prison population of roughly 150,000—is not what the compassionate release framework was designed to produce when Congress enacted compassionate release provisions, vested the Commission with authority to define the applicable criteria for compassionate release, and later, through the First Step Act, sought to increase its availability by empowering defendants, rather than solely the Bureau of Prisons (BOP), to bring these applications. “Extraordinary” may mean 1 in 100 or even 1 in 1,000, but a “rounding error” rate of approximately one grant for every 7,200 incarcerated people each month approaches functional unavailability. In choosing the word “extraordinary,” Congress did not mean for compassionate release to become functionally nonexistent. Although “extraordinary” necessarily denotes something beyond what is usual, regular, or customary,⁸ there comes a point at which data persistently documenting the extreme rarity of compassionate release cease to reflect a demanding statutory standard and instead demonstrate that the mechanism is no longer functioning as Congress intended.

The underutilization of compassionate release becomes even more striking when considering data documenting that more than 10,000 people incarcerated by the BOP are 61 years or older,⁹ many of whom suffer from chronic and often life-threatening medical conditions. *See generally* Emily Widra, Prison Policy Initiative, *The Aging Prison Population: Causes, Costs, and Consequences* (Aug. 2023); Office of the Inspector General, U.S. Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (revised Feb. 2016) [*Aging Inmate Population*]. Over a decade ago, the Justice Department’s Inspector General urged the BOP to “facilitate the release of appropriate aging inmates.”

⁷ U.S.S.C., Compassionate Release Data Report: Preliminary Fiscal Year 2026 Cumulative Data through 2nd Quarter (May 2026), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY26Q2-Compassionate-Release.pdf>.

⁸ The dictionary definition of “extraordinary” is “going beyond what is usual, regular, or customary,” www.merriam-webster.com.

⁹ Federal Bureau of Prisons, Inmate Age, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

Aging Inmate Population, p. 54. Given the size and medical vulnerability of this population, one would reasonably expect the BOP to initiate compassionate release on their behalf more frequently. Yet Commission data indicate that, in Fiscal Year 2025, only 16 prisoners of the 394 granted compassionate release motions were brought by the Director of the BOP. That only 16 granted motions originated with the BOP more than a decade after the Inspector General’s recommendation—and after Congress sought to increase the use of compassionate release through the First Step Act—is difficult to reconcile with either development. Though the Commission cannot directly remedy the BOP’s practices in this regard, it can and should approach revisions to U.S.S.G. § 1B1.13 with a full understanding of the problem before it. The current challenge is not overuse of compassionate release, but profound underuse.

Looking beyond the aging prisoner population, it must be underscored that all forms of second-look sentencing recognize every prisoner’s capacity for human change and redemption. Even after eliminating parole, Congress preserved sentence reduction authority precisely because it recognized the indisputable fact that people can change and mature. Given that federal sentences of 10, 20, or 30 years—or even life imprisonment—are routinely imposed, it is inevitable that many prisoners will experience profound changes in their health or family circumstances, significant rehabilitation, or other consequential developments in their lives that may constitute “extraordinary and compelling circumstances” meriting compassionate release. A justice system that fails to recognize those changes approaches the barbaric. Compassionate release exists precisely to ensure that the justice system has an opportunity to assess whether continued imprisonment remains just and necessary in light of those changed circumstances.

Significantly, even as the Supreme Court determined that the existing statutory terms for sentence reductions do not include arguments based on the nonretroactive amendment to 18 U.S.C. § 924(c) at issue in *Rutherford* or an attack on a conviction’s validity, it made abundantly clear that 18 U.S.C. § 3582(c)(1)(A), through the statutory label of “compassionate release” in the First Step Act, Congress “highlights its focus on granting mercy.”¹⁰ The *Rutherford* and *Fernandez* opinions emphasize that the primary focus of many compassionate release grants will involve relief based upon changes in a person’s circumstances or other developments warranting a sentence reduction.

¹⁰ *Fernandez*, *supra*, slip op. at p. 11.

Further, explained the Supreme Court, Congress’s express direction that “rehabilitation alone” cannot constitute an extraordinary and compelling reason “suggests nothing about what other reasons might qualify as ‘extraordinary and compelling.’”¹¹ And rehabilitation still may—and often should—form part of the totality of circumstances courts consider when ruling on sentence reduction motions. In fact, the Court in *Fernandez* expressly noted that “Congress has permitted the Sentencing Commission to treat a defendant’s rehabilitation as a relevant consideration in granting compassionate release.”¹² Likewise, while the type of statutory change that Congress has expressly made nonretroactive, such as the § 924(c) amendment at issue in *Rutherford*, cannot serve as an extraordinary and compelling reason, either alone or in combination with other factors, it may still, where otherwise permissible, serve as a “relevant consideration” in determining the extent of a reduction once a defendant has otherwise established extraordinary and compelling reasons.

Thus, in responding to *Rutherford* and *Fernandez*, the Commission should recognize that these decisions establish distinct limitations on compassionate release. As discussed above, *Rutherford* forecloses reliance on the disparity created by Congress’s expressly nonretroactive amendment to § 924(c) as an extraordinary and compelling reason. *Fernandez* separately holds that compassionate release may not be used as a vehicle to attack the validity of a conviction—a form of relief Congress has channeled through 28 U.S.C. § 2255. Neither decision, however, forecloses the Commission from identifying other extraordinary changes in a defendant’s personal circumstances, experiences during incarceration, or other sentencing-related circumstances. To qualify as extraordinary and compelling, such circumstances must not themselves rely on claims Congress has made nonretroactive or on a collateral attack on the validity of a conviction. Indeed, the Supreme Court specifically declined to address “whether there are reasons beyond personal circumstances that could qualify as ‘extraordinary and compelling.’”¹³ More generally, Tzedek submits that the Commission should adopt a robust view of “what should be considered extraordinary and compelling reasons for a sentence reduction,” 28 U.S.C. § 994(t), because satisfying the Commission’s policy statement is a necessary but not sufficient condition for relief; courts must also consider the applicable 18 U.S.C. § 3553(a) factors.

¹¹ *Rutherford*, *supra*, slip op. at p. 13.

¹² *Fernandez*, *supra*, slip op. at p. 11.

¹³ *Rutherford*, slip op. at p. 10.

Importantly, nothing in this proposal diminishes the paramount importance of protecting public safety. Compassionate release should remain available only where, after a comprehensive assessment of the defendant’s circumstances and the overall purposes of sentencing, a court determines that compassionate release is consistent with public safety.

Ultimately, compassionate release is not an exception to justice; it is an essential component of justice. A justice system that cannot extend compassion when compassion is warranted is incomplete. Put differently, when the justice system extends compassion to incarcerated individuals, it affirms their humanity. That, in turn, fosters redemption and personal transformation—goals that lie at the heart of a just system of punishment. This mechanism has been deliberately preserved because our sentencing system recognizes that people change, circumstances change, and continued imprisonment can, over time, cease to serve the very purposes of sentencing. The Commission should ensure that its policy statement fully reflects that principle.

To effectuate these suggestions and to ensure that courts consider all reasons that might warrant compassionate release, the Commission should exercise its authority under 28 U.S.C. § 994(t) to promulgate the following amendments to § 1B1.13:¹⁴

➤ Add a new subsection (b) as follows:

(b) Reasons That Do Not Alone Qualify as Extraordinary—
Grounds advanced in support of a sentence reduction that functionally seek retroactive application of a statutory change Congress expressly made nonretroactive, or that functionally attack the validity of a conviction, do not qualify as “extraordinary” under 18 U.S.C. § 3582(c)(1)(A). If a defendant otherwise establishes extraordinary and compelling reasons, a statutory change that Congress expressly made nonretroactive may, to the extent permitted under 18 U.S.C. § 3553(a), inform the extent of any sentence reduction.

➤ Redesignate the prefatory language in current subsection (b) as subsection (c) as follows:

¹⁴ This proposed revision draws, with significant modifications and additions, on Jonathan J. Wroblewski, What Compassionate Release Could Still Be, Sentencing Matters (June 4, 2026), <https://sentencing.substack.com/p/what-compassionate-release-could>.

EXTRAORDINARY AND COMPELLING REASONS—
Extraordinary and compelling reasons exist under any of the
following circumstances or a combination thereof . . .

- Revise the current subsection (6) as follows:

Totality of Circumstances After a Substantial Period of Incarceration.—Where a person has served more than 50 percent—and at least four years—of the imposed term of imprisonment, substantial changes in that person’s circumstances, considered in their totality, may constitute extraordinary and compelling reasons. Relevant considerations may include new personal or family circumstances, experiences during incarceration, age, medical condition, contributions to the community, evidence that the sentence reflects a miscarriage of justice, rehabilitation, and any combination of these or other pertinent factors.¹⁵

This modification embraces the guiding principle that in considering a compassionate release application, courts must evaluate the totality of a defendant’s circumstances as they exist at the time of the motion, rather than focusing on any single factor in isolation, rigid categories, or mechanical rules. Age, deteriorating health, extraordinary family circumstances, broad legal and policy developments such as relevant new constitutional rulings (which are not explicitly foreclosed by clear congressional enactments), sentencing disparities, evidence of exceptional post-sentence achievement, and other significant

¹⁵ Tzedek includes as one of the non-exclusive bases for finding extraordinary and compelling circumstances that a “defendant’s sentence reflects a miscarriage of justice,” mindful of the Supreme Court’s recent decision in *Hunter v. United States*, 608 U.S. ___, June 18, 2026. *Hunter* held that an agreement not to appeal a sentence is unenforceable when it would result in a miscarriage of justice, meaning that it would leave in place the kind of egregious error that would bring the judicial system into disrepute. The Court declined to say precisely what constitutes such a miscarriage of justice but that “some faults in sentencing can” constitute the kind of error likely to discredit the judiciary. *Id.* at 11-12. Justice Gorsuch’s concurrence, joined by Justices Sotomayor and Jackson, posited that errors that “threaten to require individuals to linger longer in federal prison than the law demands” may be the kinds of errors that promote a “rightly diminished view of the judicial process and its integrity” such as would vitiate an appeal waiver. *Id.* Gorsuch, J. concurrence, p. 11. Tzedek submits that where a defendant’s sentence reflects a miscarriage of justice, compassionate release may be appropriate when viewed in combination with other factors.

developments should not be viewed as isolated silos. Rather, the policy statement should make clear that these considerations may reinforce one another and, when viewed collectively, establish extraordinary and compelling reasons warranting relief through a comprehensive assessment of the defendant's current circumstances.

Conclusion

The Commission has an important opportunity during this amendment cycle to preserve compassionate release as a meaningful mechanism for proportionality, individualized justice, and second-look review while remaining fully faithful to the Supreme Court's recent decisions and the paramount importance of public safety. By adopting a totality-of-the-circumstances framework, the Commission can ensure that § 1B1.13 recognizes not only accountability, but also redemption, changed circumstances, and the enduring capacity for human growth.

Beyond compassionate release, the substantial reforms summarized in the first section of this letter are no less important priorities for the Commission to address well-established deficiencies in the application of the Guidelines.

Tzedek applauds the Commission's continued openness to public participation and respectfully submits that this amendment cycle presents an important opportunity to strengthen compassionate release and advance a more humane, evidence-based, and just federal sentencing system. Tzedek deeply appreciates the opportunity to share its perspective on the priorities for the 2026-27 cycle and looks forward to providing additional input and support for the Commission's work.

Sincerely,



Rabbi Moshe Margaretten¹⁶
President

¹⁶ Tzedek gratefully acknowledges the instrumental assistance and counsel of Norman L. Reimer and Professor Douglas A. Berman in the preparation of this submission.

Exhibit 'A'



By the Grace of G-d

July 15, 2024

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

Re: Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities

Dear Judge Reeves and Members of the Commission,

Tzedek Association welcomes the opportunity to comment on the Commission's proposed priorities for the cycle ending May 1, 2025. Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian cases around the globe. Tzedek is committed to championing the civil rights of those mistreated by the criminal justice system, empowering individuals to be productive citizens and aiding the less fortunate. Tzedek seeks a society that values compassion and fairness.

In recent years, Tzedek has championed ground-breaking reforms such as the First Step Act and the provisions in the CARES Act, which allowed for home-confinement for incarcerated individuals vulnerable to COVID-19 based on CDC criteria, as well as other measures to ensure that the criminal justice system embraces fundamental core values that reflect a belief in the unbounded human capacity for atonement and redemption. Both the First Step Act and the CARES Act stemmed from efforts initiated by Tzedek. They reflect Tzedek's view that a criminal justice system worthy of our nation must temper the need for punishment with compassion and must be informed by empirical evidence rather than reflexive



and arbitrary policies and mechanisms that ignore that innate human capacity for growth and change.

Introductory Comment Regarding the Current Priority Cycle

Tzedek commends the Commission for noting that this cycle coincides with the 40th anniversary of the Sentencing Reform Act of 1984 (SRA) and for its expressed intent to focus on furthering the array of statutory purposes and missions set forth in the Act, including the various responsibilities entrusted to the Commission by such statutes as 28 U.S.C. § 991, 28 U.S.C. § 995, and 18 U.S.C. § 3553. Tzedek construes this expression of intent as signifying that the Commission is interested in broad, if not bold, thinking and input that challenges the status quo, especially those areas in which federal sentencing practices can be considerably improved and corrected. Indeed, the criminal justice system today requires radical change, a complete paradigm shift. This cycle presents a critical opportunity to correct fundamental flaws that have plagued federal sentencing practices for the decades since the enactment of the SRA. If not now, when?

Although the federal prison population shrank somewhat over the last decade, especially during the peak of COVID-19, this 40th anniversary of the SRA presents an auspicious occasion to reflect upon and address the vast expansion of the federal prison population since its enactment. It defies logic that the United States is the “Land of the Free” and yet the nation incarcerates more people both per capita and quantitatively than any other country in the planet. Taking away a person’s freedom is government’s greatest power short of warfare; it should be exercised with a lot more care and restraint than it is today.

Tzedek urges the Commission to particularly note the relative scarcity of non-custodial sentences, the lack of empirical data showing that specific prior criminal adjudication is predictive of recidivism, and the irrefutable scientific evidence that has emerged concerning age and brain development. This evidence shows that even for more serious offenses, young people mature and age out of antisocial behavior and establishes the efficacy of diversionary programs to address the underlying pathologies that lead to criminal behavior as viable alternatives to lengthy incarceration. It is equally important to note the extraordinary increase in the elderly population, a result of irrationally long sentences that fail to account for the undeniable evidence that, for the most part, the continued incarceration of the elderly is an extremely costly endeavor with de minimis public safety benefits due to the low recidivism risk.

This anniversary is also an appropriate opportunity to recognize the established fact that minorities tend to endure disproportionate harshness under the sentencing process that has evolved since the enactment of the SRA.

Given that context, Tzedek encourages the Commission to use this cycle to initiate bold and transformative action to rectify fundamental flaws in the sentencing process and ensure that the latest scientific and empirical data is reflected in sentencing policy. Tzedek notes that even in an era of unprecedented ideological division, criminal justice policy reform has drawn interest and support from across the ideological and political spectrum. Many important national criminal justice reforms, including the most significant recent federal criminal justice reform legislation, the First Step Act, enjoyed broad bipartisan support, precisely because of an emerging consensus about the limits and harms of overly harsh, inflexible, and excessively punitive approaches to sentencing.

The Commission should approach this cycle armed with empirical data that shows that modifying harsh and rigid sentencing practices decreases recidivism and crime, and thereby contributes to public safety and heartened by the fact that there is broad ideological support for sound criminal justice reform. And it should do so recognizing that purging irrational disparities, which disproportionately burdens marginalized communities and fosters universal distrust, if not outright disdain for the criminal justice system, is a worthy goal.

A Menu of Proposed Priorities to Combat Excessive Harshness and Unwarranted Disparity

From Tzedek's perspective, an unfortunate legacy of the SRA has been 1) the proliferation of excessively punitive sentences and 2) systemic disparities that manifest themselves in various phases of the criminal justice process. With respect to sentencing, both these overarching problems are exacerbated by the current version of the United States Sentencing Guidelines (U.S.S.G.).

It is important to recognize that the flaws that Tzedek urges the Commission to address are intricate and interconnected. There are many contributing factors to these two foundational problems and thus there are many steps necessary to correct them. Tzedek also recognizes that the Commission and the U.S.S.G. can only go so far in addressing a criminal justice system that reflects a fundamental shift to ever increasing prosecutorial domination of sentencing outcomes at the expense of judicial discretion. The adoption of mandatory minimum sentences, the fact that charging decisions and plea offers are opaque and largely beyond the reach of the

judiciary, and that the most ubiquitous and powerful vehicle to moderate sentences (a downward departure for “substantial assistance”) is solely within the control of the prosecution are matters largely beyond the power of the Commission to rectify. Additionally, well-established principles of federal conspiracy law and a growing tendency of Congress to enact criminal statutes without due regard for traditional notions of *mens rea* are similarly beyond the Commission’s reach.

Nevertheless, there are many steps that the Commission can take to ameliorate many of the most egregious outcomes that arise from these trends. And, of course, to the extent that the Commission recognizes that certain laws contribute to unwarranted harshness and disparity, the Commission can and should exercise its authority pursuant to 28 U.S.C. § 994(w)(3) to recommend legislative reform.

To provide important context for the proposed priorities described below, it is useful to define what Tzedek references when it refers to “unnecessary harshness” and “systemic disparities.”

The SRA establishes this benchmark for the imposition of sentence: “The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.” 18 U.S.C. § 3553(a). The Act then goes on to direct the court to consider “the nature and circumstances of the offense and the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1) and four distinct objectives of a sentence. 18 U.S.C. § 3553(a)(2)(A)-(D).

Tzedek joins the increasing array of stakeholders and observers who believe that sentences that far exceed what is necessary are routinely imposed, without appropriate regard for empirical data that shows that overly punitive sentencing is unnecessarily detrimental and destructive to individuals, families, and communities, and fails to promote public safety. Excessive harshness arises at various points in the sentencing process prescribed by the Application Instructions set forth in U.S.S.G. § 1B1.1. The proposals below are intended to address unwarranted severity in the calculation of base offense level, which in many cases rely upon false and misleading benchmarks to assess the severity of the crime, the application of adjustments related to acceptance of responsibility and obstruction of justice, the determination of criminal history, eligibility for various sentencing options, and misapplication and underutilization of U.S.S.G. departures.

Tzedek defines “systemic disparity” as a broad concept that not only embraces concerns that excessively harsh sentences tend to impact racial and ethnic

minorities more than others, but also includes irrational distinctions that overstate a person’s criminal responsibility both individually and in relation to others whose criminal conduct is more severe – even in the same or a related case - but results in lesser punishment. These irrational distinctions arise from many factors, including inadequate consideration of criminal intent (*mens rea*), the use of arbitrary benchmarks to assess severity of the crime, unchecked prosecutorial charge and relevant conduct manipulation, the institutionalization of a “trial penalty,” and a systemic failure to adequately consider mitigating factors.

The following menu of proposals seeks to address both excessive harshness and disparity, recognizing that these two outcomes are often inextricably interwoven in the application of the U.S.S.G. In some cases, the proposals overlap and in some cases, they are mutually exclusive. Tzedek’s objective is to provide the Commission with an array of suggestions for its consideration. While some of the suggestions are quite specific, where the proposed revision clearly addresses a specific problem, others are presented more generally with the expectation that if the Commissions deems the proposal worthy of consideration, it will invite more specific input as the cycle unfolds.

Reformulate Base Offense Level Calculation for Theft and Drug Offenses

The single greatest driver of excessive harshness and disparity in federal sentencing derives from the formulaic approach to base offense level calculation. Driven by the application of arbitrary adjustments based on external factors that often bear no relation to an individual’s true culpability, the U.S.S.G. establish presumptive sentences that are disproportionately harsh and overly excessive.¹ In particular, the use of the loss table for economic offenses in U.S.S.G. § 2B1.1 and the Drug Quantity Table under U.S.S.G. § 2D1.1 should be replaced. Tzedek believes that the current focus on quantification serves as an unreliable and unjust proxy for individual culpability and factors set forth in 18 U.S.C. § 3553(a), which a court should consider in imposing sentence.

¹ For example, sentences that are in essence a life sentence for nonviolent offenses are unacceptable. See *United States v. Rubashkin*, where a presidential commutation was granted to a man in his fifties who was sentenced to 27 years for fraud, a sentence “which many have called excessive in light of its disparity with sentences imposed for similar crimes.”

<https://trumpwhitehouse.archives.gov/briefings-statements/president-trump-commutes-sentence-sholom-rubashkin/>

By now the stories of individuals whose criminality is vastly overstated through the application of these provisions are well-established and are surely recognized by the Commission. Whether it is the individual who is recruited to participate in a narcotics conspiracy, with absolutely no knowledge of the quantities involved, or the mid-level bookkeeper, whose false entries contribute to a fraud whose scope is beyond her knowledge, the draconian presumptive sentences can be wholly excessive and disproportionate. It is time for the Commission to look at alternative approaches.

While in previous cycles Tzedek has proposed a revision of the loss table to rein in overly harsh sentencing,² a better approach is to identify key factors which a judge may consider in determining an individual's culpability. In the area of fraud, this approach is endorsed by the Task Force on the Reform of Federal Sentencing of Economic Crimes created by the *Criminal Justice Section* of the American Bar Association.³ While the ABA proposal retains some consideration for loss value, it substantially shifts the emphasis to consideration of other factors reflecting individual culpability, an approach that is far more likely to result in a reasonable and proportionate sentence. And notably, to the extent that "loss" remains a relevant factor, the ABA proposal significantly adjusts the loss table to address the fact that the loss values in the current Guideline established years ago are poorly calibrated.

Tzedek similarly urges the Commission to formulate a completely revised culpability-focused approach to the determination of the base offense level for drug offenses. Given the pervasive statutory mandatory minimums that apply to many drug offenses, there is virtually no justification for the mechanistic application of the Drug Quantify Table to enhance the base level, rather than a more individualized assessment of culpability. The Commission should completely end the practice of determining the base level for drug offenses through a reference to the weight of the drugs and replace it with a guideline that directs the court to look at an array of factors to assess individual culpability. In combination with the next proposal, this would establish a regime in which any sentence for a nonviolent

² See Tzedek Association, Public Comment to the U.S. Sentencing Commission's Request for Comment on Proposed Priorities for Amendment Cycle 2023-2024 (August 1, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=195

³ See A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes (November 10, 2014), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf

controlled substance offense that did not carry a statutory minimum would be capped at 5 years, absent a substantial criminal history.

Establish Presumptive Maximum Sentences

As noted above, 18 U.S.C. § 3553(a) provides that a “court shall impose a sentence sufficient, but not greater than necessary,” to comply with the purposes of sentencing set forth in the Act. Despite this statutory directive to avoid excessive sentences, the severity of federal sentences has increased dramatically since the advent of the SRA. In 1986, the year before the U.S. Sentencing Guidelines became effective, only just over half of all federal sentences included some term of imprisonment;⁴ in Fiscal Year 2023, according to Commission data, 92.4 percent of all federal sentences included a prison term.⁵ And the prison sentences are too long. Countless commentaries, reports and studies advancing a wide array of reform proposals support the proposition that the U.S. incarcerates too many people for too long, despite increasing evidence that overly harsh sentencing has disparate impact on some populations and no corresponding public safety benefits.⁶

A range of factors contribute to undue sentence severity in the federal system because the U.S.S.G. are suffused with a vast array of often overlapping and severe enhancements, some of which are specifically addressed in this submission, but all of which contribute to disproportionately harsh sentences, especially for those who exercise the right to trial. Tzedek proposes that for most criminal conduct, especially when committed by those with either no substantial or minimal history of prior criminal conduct, the Commission should promulgate presumptive maximum sentences. Judges would retain the authority to sentence above these presumptive sentencing caps provided specific reasons for doing so can be

⁴ Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, *Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90* (June 1992), <https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf>.

⁵ U.S. Sentencing Comm’n, *2023 Annual Report and Sourcebook of Federal Sentencing Statistics*, Figure 6. <https://www.ussc.gov/research/sourcebook-2023>.

⁶ See, e.g., Council on Criminal Justice Task Force, *How Long is Long Enough?*, March 2023, <https://counciloncj.foleon.com/tfls/long-sentences-final-report/> (defining “long sentences” as prison sentences of 10 years or more); Vera Institute of Justice, *A New Paradigm for Sentencing in the United States*, February, 2023, <https://www.vera.org/downloads/publications/Vera-Sentencing-Report-2023.pdf>; Long-Term Sentences: Time to Reconsider the Scale of Punishment, UMKC Law Review, Vol. 87:1, 2018, also available at The Sentencing Project, <https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/>.

articulated based on factors that should be tied to the specific individual and the specific conduct which is the subject of the conviction.

Tzedek proposes a two-tier cap approach:

Category 1: 15-year presumptive maximum for all federal crimes other than acts of terrorism, treason, murder, rape, or any crime of violence if the defendant was previously convicted of any prior state or federal felony.

Category 2: 5-year presumptive maximum if the defendant is not convicted of a crime of violence, has no substantial criminal history, and makes efforts to ameliorate the harm caused by the criminal conduct, such as through restitution or community service, or takes other steps to reduce recidivism risk, such as successful completion of treatment, counseling and/or participation in a restorative justice program.

As necessary to effectuate these presumptive maximum categories, Tzedek urges the Commission to propose an advisory list of aggravating factors that may provide the basis for a court to be authorized to impose a sentence longer than the presumptive maximum and that the Commission recommend that Congress amend 18 U.S.C. § 3553 to provide the necessary statutory authority to implement the presumptive maximum sentence construct, notwithstanding other preexisting statutes.

Offense Level 43 Reform

Tzedek supports a specific reform to Base Offense Level calculation in the sentencing table to amend the U.S.S.G. to remove the recommendation that a base level of 43 should necessarily result in a life sentence. A defendant can get to that base level because of the severity of the conduct (e.g. First Degree Murder, Unlawful Manufacturing, Importing, Exporting or Trafficking, (if resulting in death or serious bodily injury and the defendant had prior conviction for a similar offense), and Treason (if tantamount to waging war against the United States)). But a defendant can also get to that level through aggravating factors based on such factors as drug weight, role in the offense, etc.

Tzedek joins other groups who share the strong view that life sentences should be spared for the most heinous of crimes, should almost never be imposed for non-violent offenses, and clearly should not be mandated for those with little or no criminal history. Accordingly, the Commission should amend the U.S.S.G. to

eliminate the level 43 life recommendation and substitute a sentencing range, especially for those with a Criminal History of less than IV.

Criminal History

Just as the mechanistic approach to loss calculation and drug quantity can distort and often exaggerate an individual's criminal responsibility, so too can the point system approach to criminal history lead to distorted outcomes. These distortions arise from multiple factors: variable sentencing practices among states, counties, and localities, which can result in arbitrarily overstated criminal history based upon local sentencing practices; over-policing of certain populations and communities, which results in higher criminal histories and therefore longer sentences for some groups; failure to adequately account for age at the time of the prior offenses, except for limited circumstances; failure to recognize that prior imprisonment itself may have contributed to subsequent criminality; and countless more intangibles such as the offender's current age, family circumstances, and employment history.

Tzedek proposes that the current point system be replaced with more adaptive categories that will provide the sentencing judge with an opportunity to make a qualitative assessment of a person's criminal history. To provide greater flexibility within a criminal history range and to underscore the importance of a court making a qualitative rather than a quantitative assessment of criminal history, Tzedek suggests that the current model, which has six criminal history categories, be condensed into four categories: 1) no or limited criminal history; 2) low criminal history; 3) moderate criminal history; or 4) extensive criminal history. The Commission should draw on its extensive recidivism research to promulgate empirically sound criteria to aid courts in making the necessary assessment. These criteria should include an evaluation of the age at the time of the prior offenses, the nature of the offense and the extent to which the conduct evinced a motive for personal gain or reflected impulsive or reactive behavior, the extent to which the offender intentionally caused significant harm to others, whether prior sentences included treatment or any ameliorative component to address underlying pathologies, and other criteria that objectively justify enhanced punishment.

To aid in the promulgation of these criteria, Tzedek urges the Commission to undertake a multifaceted study to assess whether and to what extent criminal history scoring is assessing points for past conduct that has little or no additional risk-predictive value. Such a study should also assess whether unique personal factors, such as age, employment history, family circumstances, community

support, and medical and mental health issues are more risk-predictive than a mere point-based quantification of criminal history standing alone.

Ameliorating the Trial Penalty

As reported in the 2023 Sourcebook, 97.2 percent of all cases were disposed of by a guilty plea.⁷ This is relatively consistent with data from the past several years. It is generally now well-established that a principal reason why trials have virtually disappeared from the federal criminal justice system is a phenomenon known as the trial penalty.⁸ The trial penalty has essentially so burdened the fundamental right to a trial and is so costly to the accused – in terms of the additional years of imprisonment one faces if convicted after trial – as to transform the system into a plea-bargaining assembly line. Indeed, if one were to eliminate from the data those cases that proceed to trial where the crime is so heinous that the government makes no offer, the frequency of meaningful trials is even more miniscule. It is beyond the scope of this submission to detail the many reasons why the loss of criminal trials, and the accompanying pre-trial litigation through which courts and juries can exercise a check on government excess, is detrimental to justice. Suffice it to say that this system of pleas is clearly not what was envisioned by the founders and is a development that has been decried by advocacy groups across the ideological spectrum.⁹

The various studies of the trial penalty rightly note that one of, if not the main driver of the trial penalty is the government's unilateral control over charging decisions and the impact of mandatory minimum sentences and the U.S.S.G., even since they were rendered advisory. Prosecutors alone can select the charges and have the power to determine what conduct to urge the court to consider in imposing sentence. It is established practice for prosecutors to bring superseding indictments, add new charges and threaten to withdraw prior offers for those who

⁷ See: FY 2023 Sourcebook, *supra*, note 5, Table 11. <https://www.ussc.gov/research/sourcebook-2023>

⁸ American Bar Association/Criminal Justice Section, *Plea Bargaining Task Force Report*, 2023, <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf>; Federal Sentencing Reporter, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, Vol 31, Issue 4 -5, April/June 2019, <https://online.ucpress.edu/fsr/issue/31/4-5>; National Association of Criminal Defense Lawyers, *The Trial Penalty on the Verge of Extinction and How to Save It* (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>

⁹ *Id.*, especially, Federal Sentencing Reporter, *Tyranny of the Trial Penalty*.

do not capitulate. It is also routine practice for prosecutors to extract all manner of waivers as the price of the plea, thereby preventing legitimate issues that implicate other constitutional rights from ever being subjected to judicial review.

While some of the contributors to the trial penalty are beyond the scope of the Commission, there are many factors that could be alleviated by the Commission. One such contributor has been the use of acquitted conduct to enhance a sentence. Tzedek lauds the Commission for partially addressing this factor in the last amendment cycle. Tzedek now urges the Commission to take additional steps and tackle several other factors, which overly burden the right to trial and incentivize even the arguably innocent defendant to “cut a deal” rather than risk the consequences of the trial to which they are theoretically entitled.

- **Relevant Conduct**

Last year, when Tzedek commented on the proposed revisions to address the use of acquitted conduct, it urged the Commission “to consider in future cycles reforms that address the pernicious impact of sentencing based upon uncharged conduct.”¹⁰ Tzedek now urges the Commission to tackle the extraordinary harshness and disparity that have arisen from the use of uncharged conduct under the rubric of determining Relevant Conduct pursuant to U.S.S.G. § 1B1.3.

The context for this proposed reform is the indisputable fact that the government pervasively and routinely uses the threat that a sentence will be enhanced with uncharged conduct to coerce defendants to plead guilty. Because of the operation of the U.S.S.G., the government exploits the current process that requires a court to consider relevant conduct under U.S.S.G. § 1B1.3 and directs the court to enhance the sentence, without the evidentiary safeguards of trial, if the other conduct is established by a preponderance of the evidence pursuant to U.S.S.G. § 6A1.3. This process makes a mockery of the fundamental constitutional right to a trial by jury. That right is so essential that it is mentioned multiple times in the Constitution and the Bill of Rights (e.g. Art. III, § 1 [3]; Amendment VI; Amendment VII). Indeed, even in the context of civil matters, the Supreme Court in the term just concluded struck down a statute that vested the executive branch with the power to impose a civil fine for fraud rather than afford the defendant the constitutional right to a jury

¹⁰ See Letter from Tzedek Association, *Re: Proposed 2023-2024 Amendments and Issues for Comment* (February 20, 2024), <https://www.ussc.gov/policymaking/public-comment/public-comment-february-22-2024#pa3> 531, 533-53

trial.¹¹ It is hard to fathom and, in Tzedek’s view, unacceptable that the federal criminal justice system has evolved to the point where one can be severely punished for conduct absent any finding or admission of guilt and upon the low preponderance of the evidence threshold.

While there are cases where the individual’s responsibility for the full scope of the criminality is embraced within the count of conviction and the jury’s finding of guilt beyond a reasonable doubt, in virtually all multi-defendant prosecutions, especially when (as is usually the case) there is a conspiracy charge, that is not so. The operation of § 1B1.3, which *inter alia* involves “all acts and omission reasonably foreseeable in connection with that criminal activity” (§ 1B1.3(a)(1)(B)), and that provision’s interaction with § 6A1.3 (and the accompanying commentary), which allow a court to rely on assertions without the procedural protections of a trial on a finding of “probable accuracy,” truly allow the tail to wag the dog. Further, the current approach to uncharged conduct also implicates important concerns with respect to the evisceration of *mens rea* requirements, which are addressed later in this submission.

In sum, the Commission’s efforts to adopt a real offense as opposed to a charge offense sentencing model to prevent the prosecution from “influenc[ing] the sentence by increasing or decreasing the number of counts in the indictment”¹² has been frustrated by how relevant conduct leads to the same problems of undue prosecutorial control over sentencing factors. In actuality, the process is even worse in terms of promoting excessive harshness and unwarranted disparity because it permits prosecutorial arguments that lead to sentencing enhancements based on conduct that is neither charged and nor proved beyond a reasonable doubt. Tzedek firmly believes that the U.S.S.G. should be restructured to minimize this bludgeon, which is routinely deployed to assert overbearing leverage to extract guilty pleas and to punish those who assert their right to a trial.

Tzedek urges the Commission to think broadly about how best to address this fundamental flaw. There are numerous possible approaches, each of which implicates other aspects of the current sentencing regime. For example, one approach might be to revise the U.S.S.G. to have far fewer offense levels, but with considerably wider ranges, essentially evolving into a system where the charged conduct is the anchor. If that were the case, then a solution that will constrain how

¹¹ *SEC v. Jarkesy*, No. 22-859 (S. Ct. June 27, 2024).

¹² See U.S. Sentencing Comm’n, Real Offense v. Charge Offense, Guidelines Manual 2023, Ch. 1, Pt A(1)(4)(a).

uncharged conduct drives the sentence might be to amend § 1B1.3 to limit relevant conduct to adjustments with the guideline range. Broader ranges, of course, could run afoul of the statutory 25 percent rule (28 U.S.C. § 994(b)(2)), and therefore would likely require legislative action.

Another possibility could be to revise §1B1.3 to limit the scope of any increase to the guideline established by the application of U.S.S.G. Chapter 2 for the offense conduct charged and admitted or proved at trial.

Yet another possibility is to amend U.S.S.G. § 6A1.3 to provide that when a relevant fact in dispute relates to uncharged conduct the court may not rely upon that fact unless admitted or found beyond a reasonable doubt.

Any of these approaches, or others, are obviously significant change - but significant change is necessary if the Commission is to curtail the pervasive trial penalty. Accordingly, Tzedek urges the Commission to prioritize a reconsideration of how uncharged and unproved conduct is taken into consideration and invite thoughtful and comprehensive proposals as part of the current amendment cycle.

- **Acceptance of Responsibility**

Not all individuals who proceed to trial do so as an act of defiance or stubborn denial. There are cases where an individual has a legitimate defense. This is especially true when the ultimate issue relates to intent. If the right to a jury trial is to have meaning, it should not be that merely because one puts the government to its constitutional duty to prove its case, they are automatically disqualified from receiving a third point for acceptance of responsibility.¹³ Accordingly, Tzedek proposes that the Commission amend U.S.S.G. § 3E1.1 to provide that a court may award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

Additionally, in practice, proceeding to trial is not just about the third point, it about all three of the acceptance points. Proceeding to trial will almost always mean not getting any points off, especially since U.S.S.G. § 3E1.1 App. N.2

¹³ This is all the more important if one believes that trial should be the norm and the default for the Government to take away somebody's freedom. In our system, a defendant is allowed to go to trial even if they lack a good defense and even if defiant or stubborn, and a decision to exercise a constitutional right alone should not be the basis for additional criminal punishment. Nor should proceeding to trial automatically support a finding that a person is without remorse or recognition of wrong-doing.

provide that it will be the “rare situation []” where a person “may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial,” and unequivocally states that the adjustment “is not intended to apply to a defendant who puts the government to its burden of proof at trial...” Tzedek believes this approach is flawed.

First, there is nothing inherently inconsistent in maintaining that the government cannot prove its case and yet sincerely express regret and accept responsibility for one’s conduct. Second, it is fundamentally inconsistent with the constitutional right to a trial to cast that right as merely a “burden” that the government must shoulder rather than the norm that is contemplated by the Constitution. Third, while there certainly may be circumstances where a defendant’s behavior or failure to express remorse may justify denial of an acceptance adjustment, Tzedek believes that the Commission should not put its finger on the scale with an Application Note that clearly states that denial of acceptance should be the norm whenever a defendant goes to trial.

Accordingly, Tzedek proposes that the Commission strike the first sentence of Application Note 2 to U.S.S.G. § 3E1.1 and strike “[i]n rare situations” from the beginning of sentence two. Additionally, the last sentence should be amended to make clear that post-trial statements or conduct, including the completion of any treatment programs, payment of restitution or other manifestations of remorse may also be considered in determining whether to grant an acceptance reduction following a conviction at trial.

- **Obstruction**

It is common practice to assess an obstruction enhancement when a defendant testifies at a hearing on a motion to suppress evidence or at trial. This practice chills fundamental constitutional rights by imposing an unwarranted tax merely for presenting a claim for consideration by the court or jury. In a sense, it uniquely places the defendant in a “double or nothing” dilemma. If the court or jury rejects their version, they not only lose the motion or the trial, but they get an additional penalty merely for presenting their version.¹⁴

The imposition of an obstruction enhancement solely for testifying should be contrasted with situations in which a defendant does more than provide their own

¹⁴ Note that no corresponding penalty is imposed upon the government or the government’s witnesses when their witnesses are not believed, or a jury renders a not guilty verdict.

account by taking independent steps to obstruct or impede justice, such as by presenting false evidence or any of the numerous others way that a defendant or a subject of an investigation may affirmatively engage in efforts to frustrate the administration of justice. In those situations, the assessment of the enhancement remains appropriate.

Accordingly, Tzedek proposes that the text of U.S.S.G. § 3E1.1 should be amended to make clear that the obstruction adjustment should not be assessed solely for testifying at a hearing or trial in support of the defendant's rendition of the facts. Similarly, Application Note 2 should also be amended to reflect this principle.

- **Departures for Substantial Assistance**

There may be no greater contributor to irrational disparity in federal sentencing practice than the current statutory and U.S.S.G. framework that vests the government with the sole power to seek a downward departure for a defendant who provides substantial assistance.

At the outset, Tzedek notes that as a matter of fundamental principle, there is something profoundly disturbing about a system of justice that pervasively relies upon the testimony of cooperating witnesses to initiate or buttress investigations and/or prosecutions of others. Further, courts, scholars and experience teach us that testimony of such witnesses is often unreliable.¹⁵ Indeed, false testimony from cooperating witnesses is a major contributor to wrongful convictions in the very small subset of criminal cases in which DNA evidence is available to support an eventual exoneration.¹⁶ For cases in which there is no biological evidence, which is the case the overwhelming majority of federal prosecutions, it is virtually

¹⁵ See *Giglio v. United States*, 405 U.S. 150 (1972); *On Lee v. United States*, 343 U.S. 747, 757 (1952); *United States v. Bernal Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 108, 108 (2006); Schatz, DeLoach, Hillgartner, Fessinger, Wetmore, Douglass, Bornstein, and LeGrant, *The Truth About Snitches: An Archival Analysis of Informant Testimony*, Psychiatry, Psychology and Law, (Nov. 10, 2020), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9090405/>

¹⁶ See Innocence Project, *Unregulated Jailhouse Informant Testimony Deeply Harms Our System of Justice*, <https://innocenceproject.org/informing-injustice-the-disturbing-use-of-jailhouse-informants/> (last visited July 11, 2024), (False informant testimony contributed to nearly one in five of the 375 DNA-based exonerations); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 744 (2016) (The use of informant testimony is so pervasive throughout the criminal legal system, but only a fraction of wrongful convictions are challenged postconviction.)

impossible to establish the extent to which cooperator testimony contributes to an unwarranted conviction.¹⁷

Notwithstanding these concerns, Tzedek recognizes that the government use of and reward for cooperation is a key element of the current federal criminal justice system. According to the data from 2023, 10.2 percent of all sentences imposed involved U.S.S.G § 5K1.1 motions, with 100 percent of those sentences beneath the guideline range. The mean decrease in those cases was a sentence reduction of 56.3 percent.¹⁸ The current application of this incredible power to avoid both mandatory minimum sentences and guideline sentencing ranges is highly problematic. There are all too many cases in which the determining factor as to who gets this benefit turns on such arbitrary factors as 1) who gets to the government first;¹⁹ 2) who gets an attorney that is more inclined to promote or recommend an early guilty plea and cooperation rather than an attorney who is more deliberative and committed to assessing the evidence before providing a recommendation to plead and cooperate; or 3) who has the most information to offer.

The first two of these factors are determined by arbitrary factors that have little or nothing to do with an individual's state of mind and level of culpability. And the third factor is a manifestation of the most abusive aspect of the substantial assistance departure, namely that the most culpable defendants are often in the best position to provide truly substantial assistance and the least culpable are in the worst position. The Commission is no doubt aware of the many cases in which more culpable defendants cooperate and receive far lesser sentences than other co-defendant who ranked lower in the criminal enterprise, especially when the less culpable are convicted after trial.

¹⁷ The Guidelines, government, and judges should also pay attention to how dangerous cooperation often is and to how incredibly little the Federal Bureau of Prisons (BOP) does to actually protect cooperators. The Guidelines should remind judges of the possible dangers related to cooperation and to factor that in both in whether to depart for somebody who did not cooperate and/or for someone who did.

¹⁸ See FY 2023 Sourcebook, *supra*, note 5, Tables 29 and 37., and Figure 9, (over the ten-year period of 2014 – 2023 § 5K1.1 departures have ranged between 10.2 and 12.87 percent of sentences imposed, only dropping below 10 percent during the peak COVID-19 years of 2020 and 2021).

¹⁹ It must be noted that while it might be an indication of extreme contrition if a defendant cooperates early, it is just as likely that it may be because a defendant got counsel sooner than other co-defendants or that their attorney's workload was such that the attorney brought their client to the government before counsel could do so for co-defendants. That is hardly a legitimate basis to deprive the other defendants of access to this relief mechanism.

Additionally, there are some circumstances where an individual is willing to cooperate, but the government will not agree that the cooperation is substantial if it does not include implicating a loved one, sometimes including parents, spouses, children or siblings. To mandatorily deny the departure when the sole reason why a cooperative individual cannot provide substantial assistance is a reluctance to cooperate against a close family member undercuts values which should be extolled rather than denigrated.

While it may seem like the current structure is necessary to ensure that the government secures cooperation to pursue other wrongdoers, those who practiced law before the U.S.S.G. know that this is not the case. Prior to the SRA, there was a time when the judge's authority to reduce a sentence pursuant to F.R. Cr. P. 35 was more than adequate to ensure that cooperators were rewarded. But it also left open the possibility that even a defendant who could not provide "substantial assistance" could nevertheless secure a sentence reduction for making good faith efforts to cooperate. There was no evidence that the government was unable to secure cooperation when the authority to determine who qualified for a benefit from cooperation was shared with the court.

Tzedek urges the Commission to address the disparity that results from the way the U.S.S.G. § 5K1.1 operates by amending the section to include a provision that would permit the court to grant a downward departure, notwithstanding the absence of motion by the government, provided a defendant made a good faith effort to cooperate, and that although the defendant could not truthfully provide substantial assistance it was not through any fault of the defendant.²⁰

Tzedek further recognizes that pursuant to 18 U.S.C. 3553(e), a sentence below a mandatory minimum requires a motion by the government attesting to the defendant's substantial assistance.²¹ Accordingly, Tzedek urges the Commission to recommend that Congress implement a statutory revision to similarly permit the court to consider imposing a sentence below a mandatory minimum by authorizing

²⁰ Notably, there are sincerely held religious beliefs that certain people of faith have that prevent them from cooperating. Accordingly, courts should be advised to consider such a departure without motion of the government, when the defendant made a good faith effort in cases where the extent of their cooperation was limited by good faith religious boundaries.

²¹ See *Melendez v. United States*, 518 U.S. 120 (1996) (holding that absent a motion by the government to depart from the mandatory minimum due to substantial assistance, a sentencing court lacks authority to do so).

a court to grant a departure where a defendant has made good faith efforts to provide substantial assistance.²²

Aberrant Behavior Departure

There are circumstances in which a heretofore law-abiding individual, often with an exemplary background, encounters some kind of trauma which leads to criminal behavior. Where the behavior is impulsive, not well thought out and wholly out of character, it may be deemed aberrant. The current text of U.S.S.G. § 5K2.20 (b), however, limits the departure to “single criminal occurrence” or a “single criminal transaction.” This tends to negate the other three criteria, most notably that the crime was of limited duration. Tzedek urges the Commission to amend this guideline to make clear that it is the limited duration, the lack of significant planning and the marked deviation from a law-abiding life, that is controlling – and that the mere fact that there were multiple acts is not a mandatory disqualifier.

***Mens Rea* Reform**

Mens rea, or criminal intent, is the moral anchor of a criminal code. An unintended consequence of the SRA, which has received far too little attention, is the extent to which the U.S.S.G. approach to sentencing has eviscerated traditional notions of *mens rea*.

The Honorable Judge Jack Weinstein & Fred Bernstein wrote²³:

“In the guidelines era, *mens rea* has been all but eliminated from the sentencing of drug offenders. This development is a disastrous departure from the great traditions of Anglo-American law...It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial...Punishing a defendant for facts she ‘reasonably should have foreseen’ is tantamount to punishing negligent conduct. This is a substantial departure from 2b1 traditional principles of *mens rea*. The Model Penal Code, for example, permits criminal liability

²² As noted above, one of the more grotesques elements of cooperation is that often it requires a person to inculcate a loved one and thus choose between an extremely close relationship and longer prison terms. Accordingly, courts should be advised not to penalize a person when the inability to provide substantial assistance arises solely because it would require the inculcation of someone in such a relationship.

²³ Judge Jack Weinstein & Fred Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Federal Sentencing Reporter 121 (1994).

only in cases of extreme negligence, and then only rarely. Moreover, punishments are ‘proportional’ to mental states.”

The Honorable Judge Gerard E. Lynch similarly wrote²⁴:

“The guidelines significantly muddle questions of *mens rea* as applied to factors that can have a dramatic effect on culpability...The lack of attention to *mens rea* issues [means] the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases.”

Tzedek believes that the need for the reform of *mens rea* is long overdue. As noted in the above sections, reliance upon arithmetic formulations related to loss amount or drug quantity, as well as reliance upon numerous other enhancing factors without proof of a defendant’s knowledge and intent, are poor substitutes for an assessment of individual culpability.

Tzedek urges the Commission to review and revise the U.S.S.G. to ensure they properly incorporate and ensure courts properly consider *mens rea*, motive, purpose and personal culpability issues at sentencing. This review and revision of the U.S.S.G. should ensure: (a) that aggravating sentencing enhancements are imposed only in instances in which the defendant exhibited sufficient *mens rea* with respect to a sentencing factor to justify the corresponding sentencing enhancement, and (b) that the sufficient *mens rea* is adequately proven at the appropriate level of proof. The government should generally be required to prove a culpable state of mind with respect to any key offense facts that impact guideline ranges, such as the quantity of drugs or the amount of loss involved in the offense, and proof of a more culpable state of mind should generally be required for greater sentencing enhancements. This review and revision of the U.S.S.G. should also ensure that courts are fully and clearly instructed to consider any and all mitigating aspects of a defendant’s *mens rea*, including motive, purpose, and personal culpability as a basis for a departure under the U.S.S.G.

Departures for Family Hardship

The incarceration of a parent can have devastating effects on children. Astonishingly, the number of minors with a parent in prison increased 500%

²⁴ Judge Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 Federal Sentencing Reporter 112 (1994).

between 1980 and 2000.²⁵ In 2007, there were 1.7 million children in America with a parent in prison, more than 70% of whom were children of color.²⁶ A study based on U.S. Department of Justice statistics found that between 1980 and 2019, the number of incarcerated women increased by more than 700% – and about 60% of these incarcerated women have children under age 18.²⁷

Incarceration of a parent, and especially of a mother, is associated with a host of poor outcomes for children, including a substantially increased likelihood of being incarcerated themselves as adults. One study found that a majority of children with an incarcerated parent are subject to four or more risk factors.²⁸ Obviously, almost immediately, family income (already low among this group) drops sharply when a parent is incarcerated. About one-third of children with an incarcerated parent live in poverty.²⁹

Children’s behaviors also diverge dramatically from their peers who do not have an incarcerated parent. One study found that children with an incarcerated parent “had higher levels of problem behaviors between the 5th and 10th grades,” with the differences being significant and increasing over the course of this time period. Moreover, “serious” delinquency – essentially, conduct that was otherwise a felony crime – was significantly higher for this group than for children without incarcerated parents.³⁰

Overall, and not surprisingly, having an incarcerated parent was strongly correlated in children with increased rates of substance abuse, mental health disorders, violence, anti-social behaviors, learning disabilities, homelessness, and mental and physical health issues (including migraines, asthma, high cholesterol, depression, anxiety, and post-traumatic stress disorder).³¹

²⁵ Leila Morsy & Richard Rothstein, *Mass incarceration and children’s outcomes*, Economic Policy Institute (Dec. 15, 2016), <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/>.

²⁶ D.H. Dallaire, *Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 Family Relations 440 (2007).

²⁷ The Sentencing Project, *Incarcerated Women and Girls* (Nov. 20, 2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>.

²⁸ J. Poehlmann, *Children’s family environments and intellectual outcomes during maternal incarceration*, 67 J. Marriage & Family 1275 (2005).

²⁹ Jean M. Kjellstrand & J. Mark Eddy, *Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior Across Adolescence*, 50 J. Offender Rehab. 18 (Jan. 1, 2011).

³⁰ Kjellstrand & Eddy, *supra* note 29.

³¹ Morsy & Rothstein, *supra* note 25.

Incarceration of a mother especially seems to have an outsized impact on children. Adult children of incarcerated mothers were 2.5 times more likely to be incarcerated than the adult children of fathers. The risk of incarceration for the adult children of women who used drugs regularly was particularly high.³² And nearly half of all children with an incarcerated mother live in poverty, as opposed to slightly less than one-third who have an incarcerated father.³³

Given the deleterious impact of parental incarceration, it seems clear that reducing the number of parents and caregivers who are incarcerated is not just good criminal justice policy, it is a pro-family policy that can serve society's interests in many ways.

The Commission long ago promulgated a policy statement that mere "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted." (§ 5H1.6). Since nearly every person has some family ties and responsibilities, this old policy statement is understandable. But, before and since the *Booker* ruling, federal judges have recognized there are many situations in which family hardships are directly relevant to the sentencing purposes and considerations Congress set forth in 18 U.S.C. § 3553(a). Indeed, the Commission data show that family considerations are consistently one of the most commonly cited factors for traditional departures and for variances from the U.S.S.G.

Tzedek also stresses the imperative to have compassion, including compassion for a defendant's children, spouse or other family member who would be greatly affected by a long sentence. Examples may include a family member with a fatal illness, young children who would be essentially orphaned for a long period of time, special needs children who would surely regress due to the incarceration, and spouses who would not know how to feed their children. Contrary to the thinking of many, showing compassion is a strength, not a weakness. It is a sign of true leadership, and an idea fundamental to the American way. The fact that compelling family dynamics may be common is not a reason to ignore it at sentencing.

To more effectively guide federal judges toward appropriately considering family hardships at sentencing Tzedek urges the Commission to consider amending the U.S.S.G. § 5H1.6, and that the accompany commentary make clear that family ties

³² Dallaire, *supra*.

³³ Kjellstrand, et al., *supra*.

and relationships are relevant and should be assessed by the court in determining whether a departure is warranted.

Expansion of Alternatives to Incarceration

Tzedek vigorously urges the Commission to undertake multiple steps to encourage the robust use of diversion and restorative justice programs as alternatives to incarceration, and to adopt the necessary amendments to make non-jail sentences more broadly available.

It is well-established in states and the federal districts which have started diversion and alternative to incarceration (ATI) programs that these initiatives promote less severe sentences and ultimately result in decreased recidivism. This should not be a surprise because criminal behavior is often the inevitable result of underlying pathologies, such as substance abuse and addiction, mental health problems, and other issues that can better be addressed through treatment, counseling, and community support rather than through imprisonment. Unfortunately, however, these alternatives are all too rare in the federal system. As reported in the 2023 Sourcebook of Federal Sentencing Statistics, only 5.9 percent of federal defendants received a sentence of probation, which stands in stark contrast to 63 percent in 1986.³⁴

Tzedek passionately encourages the Commission to take all appropriate steps to promote the expansion of ATI programs. In addition to expanding the availability of information and best practices related to ATI, the Commission should more generally promote alternatives to incarceration, including the use of home confinement, electronic monitoring, intermittent (e.g. weekend) jail sentences, and other forms of supervision. There needs to be far greater emphasis on the criminogenic consequences of jail sentences and the cascading impact of incarceration on families. Sentencing practices that facilitate rehabilitation and minimize recidivism also promote public safety and respect for the law.

Accordingly, Tzedek proposes that the Commission plan a national convening in the form of a Commission-sponsored symposium, and/or conduct a series of regional hearings to give much needed attention to alternatives to prison. Federal judges, U.S. Probation, lawmakers, prosecutors, states and localities nationwide –

³⁴ See FY 2023 Sourcebook, *supra*, note 5, fig. 6 and Table 13; Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90 (June 1992), <https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf>

as well as many other stakeholders and interested parties – could and would draw considerable guidance from a Commission-sponsored event that brought together leading researchers and scholars to discuss the role of alternatives to incarceration in promoting public safety. In addition to informing this Commission’s work, one (or a series of major events) on this topic would help advance collective knowledge of whether and when incarceration is needed and appropriate as a response to a range of wrongdoing.

Concomitantly, the Commission should take steps to address the fact that over the 40 year history of the SRA, there has been marked decrease in the imposition of non-jail sentences, such as probation – a development that there is no empirical basis to conclude promotes public safety and is plainly at odds with the intent of the SRA. Congress, in the SRA, stated clearly that the Commission “shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense,” and also provided that the U.S.S.G. should direct that imprisonment is generally appropriate only when persons are “convicted of a crime of violence that results in serious bodily injury.” 28 U.S.C. § 994(j). Yet, the undeniable fact is that this mandate is almost entirely ignored in today’s sentencing system. Indeed, the Commission’s most recent data shows that in FY 2023 for the 43.9 percent of sentenced persons who had the lowest criminal history score (CHC 1),³⁵ the mean sentence imposed on that group, (many of whom would fit the category Congress indicated should generally receive a “sentence other than imprisonment”), was imprisonment for 45 months (nearly 4 years).³⁶

Additionally, because there is empirical evidence showing that even individuals with a prior criminal history can benefit from ATI, there is no rational basis to categorically exclude such individuals from these beneficial approaches. To the contrary, ATI in many cases offers the best hope of reducing recidivism. Further, since higher criminal history scores are more common for defendants of color, which correlates to over-policing of certain communities, expanding the availability of these programs to include those with modest criminal histories will ensure that ATI does not exacerbate racial and ethnic disparity.

To ensure that the U.S.S.G. implement the statutory preference that first offenders qualify for non-jail sentences and to ensure the broadest availability of non-jail

³⁵See FY 2023 Sourcebook, *supra*, note 5, fig. 7.

³⁶ See FY 2023 Sourcebook, *supra*, note 5, Table 28.

alternatives for all defendants who may benefit from ATI, Tzedek proposes the following array of reforms:

- The Commission should amend U.S.S.G. §§ 5B1.1 and 5C1.1 to make ATI sentences available for all sentences imposed pursuant to Zones A, B, and C of the Sentencing Table.
- The Commission should amend U.S.S.G. § 3E1.1 (Acceptance of Responsibility), Part 5F (Sentencing Options), and Part 5H (Specific Offender Characteristics) to provide for downward adjustments and departures for individuals who participate in court-approved ATI programs. Courts should be given broad discretion to consider the level and extent of participation in determining the extent of the adjustment and the departure.
- The Commission should consider promulgating best practices for ATI programs to ensure fair access and to ensure that they do not replicate pre-existing racial, ethnic, and economic disparities and that individuals who may not benefit from participation in such a program retain eligibility for a non-jail alternative sentence. Simply because a defendant does not have a condition that warrants participation in some kind of treatment program should not lead to imprisonment where a different alternative sentence is appropriate.
- The Commission should advise Congress to amend 18 U.S.C. § 3553(b) to insert a subsection that would address alternatives to prison sentences. The new subsection should establish that, at least for defendants with no prior felony convictions for federal or state criminal offenses, and no act of violence was involved in the offense for which they were convicted, it shall be presumed, absent a specific judicial finding of aggravating circumstances, that alternatives to prison shall be sufficient to satisfy justice and the other purposes set forth under § 3553(a) of Title 18. Such legislation should make clear that this provision applies irrespective of any pre-existing statute which prescribes a mandatory sentence of imprisonment.

Examples of alternatives to prison sentences should include: Home-confinement, supervised probation, community service, intermittent confinement (being home on weekends and in prison on weekdays or vice versa), fines, restitution payments

to victims, electronic monitoring, participation in rehabilitation programs, participation in faith-based programs, placement in residential confinement centers (centers based in communities for the purpose of confinement similar to Residential Reentry Centers currently contracted by the BOP), and other alternatives to prison.

Identify Collateral Consequences and Their Punitive Impact

It is now widely recognized that criminal convictions result in wide-ranging collateral sanctions. Often these sanctions bear no rational relationship to the nature of the crime nor are there any reasonable temporal limitations on these consequences. Collateral consequences can impact family rights, access to housing and education, immigration status, access to credit, all manner of prospective employment and countless other aspects of human endeavor. Nevertheless, when convicted of a crime these consequences are a component of the punishment suffered by the defendant and, because the sentencing court invariably lacks authority to eliminate them, they should be considered as such by a sentencing court and serve as a ground for downward departure.

Accordingly, Tzedek proposes that the Commission should review collateral sanctions imposed by federal and state laws to ensure courts properly consider the nature and impact of collateral consequences likely to be endured by federal defendants. The Commission should conduct research and issue a report concerning the array of collateral consequences faced by federal defendants. This report should give special attention to whether and how collateral consequences may undermine or otherwise impede the effectiveness of the recidivism reduction provisions in Title I of the FIRST STEP Act of 2018 and should include specific recommendations to Congress as to how to mitigate the harmful impacts of collateral consequences, as well as recommendations for courts as to how they should adjust sentencing practices in recognition of the punitive nature of collateral consequences.

Tzedek further proposes that the Commission create a new encouraged departure factor, perhaps as § 5H1.13, which would advise courts to consider departing downward based on factors relating to punitive collateral consequences resulting from the defendant's prosecution. Examples should include loss of employment and income, mandatory removal from the country, or other formal and informal societal sanctions, coupled with the defendant's demonstration of genuine remorse and sincere effort to make amends to any victims or the broader community.

Recommendation that Judges, DOJ Officials and Others Visit Federal Prisons

As an organization that works with prisoners, Tzedek is acutely aware of the conditions of confinement in our nation's prisons. The impetus for this proposal is simple: those involved in sentencing persons to imprisonment should be keenly aware of the conditions of those institutions and have some first-hand knowledge of what life in prison is like. The Commission conducts training sessions for judges and other court personnel throughout the year, and Commission staff speak at numerous circuit conferences and other like events. In line with such sessions Tzedek proposes that the Commission should make a concerted effort to make visits to prison an integral part of this training and other programming.

Additionally, Tzedek urges the Commission to recommend that Congress amend 28 U.S.C. § 134, mandating that within one year of their initial appointment, and every five years thereafter, all United States District Judges,³⁷ United States Magistrate Judges, United States Circuit Judges, United States Supreme Court Justices, all U.S. Attorneys, Assistant U.S. Attorneys, the U.S. Attorney General, the Deputy Attorney General, and all attorneys of the Criminal Division of the U.S. Justice Department, should visit at least one federal prison. The BOP should be required to help coordinate these visits and help ensure that these visitors shall have access to all areas within the prison and be permitted to speak with any prison staff and prisoners.

Conclusion

Through its regular review of the U.S.S.G., the Commission plays a pivotal role in enlightening our justice system. This Commission, in particular, has taken a number of important and exceedingly valuable steps toward an improved federal sentencing system through its Guideline amendments in the recent amendment cycles. But there is much more work to do, and significant and ambitious reforms are needed to more fully address the substantial and systemic problems of the current federal sentencing system. We pray that the above recommendations and input will serve the Commission well in its noble and critical endeavor to greatly improve our justice system in general and our sentencing system in particular.

³⁷ As a case in point, Judge Mark W. Bennett, former U.S. District Judge to the Northern District of Iowa, visited 400 inmates he had sentenced, encouraging other judges to follow suit. <https://www.desmoinesregister.com/story/opinion/columnists/rekha-basu/2019/10/31/judge-pursued-justice-where-others-didnt-visiting-inmates-prison/4107681002/>

Tzedek appreciates the opportunity to provide its input on priorities for the current amendment cycle and looks forward to continuing to work with the Commission in the pursuit of justice.

Sincerely,

A handwritten signature in black ink, appearing to read "Moshe Margaretten". The signature is fluid and cursive, with a long horizontal stroke at the end.

Rabbi Moshe Margaretten³⁸
President

³⁸ Tzedek wishes to express enormous gratitude to Norman L. Reimer and Professor Douglas A. Berman for their instrumental assistance and counsel to formulate this document.

Exhibit 'B'



July 18, 2025

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

Re: Tzedek Association Comments on the Commission's Proposed 2025-26 Policy Priorities

Dear Judge Reeves and Members of the Commission,

Tzedek Association is again exceedingly grateful for the annual opportunity to comment on the Commission's proposed priorities for the upcoming cycle. Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian cases around the globe. Tzedek is committed to championing the civil rights of those mistreated by the criminal justice system, empowering individuals to be productive citizens and aiding the less fortunate. Tzedek seeks a society that values compassion and fairness. To that end, Tzedek is proud of its efforts to champion the First Step Act and the home confinement provision within the CARES Act, and to provide input to the Commission via both written submissions and oral testimony.

In recent years, Tzedek has been heartened by the Commission's willingness to take steps that reflect Tzedek's view that a criminal justice system worthy of our nation must temper the need for punishment with compassion and must be informed by empirical evidence rather than reflexive and arbitrary policies and mechanisms that ignore the innate human capacity for growth and change.



More specifically, Tzedek extols the Commission for its thoughtful, principled, and impactful accomplishments over the past several years. From recent amendments addressing compassionate release and criminal history scoring, to the recent efforts to reevaluate the scope and structure of economic crime enhancements under § 2B1.1, and from the efforts to simplify the guideline calculation process to the limitations on the use of acquitted conduct, the Commission has demonstrated a deep commitment to data-driven reform and greater fairness in federal sentencing.

Tzedek is especially grateful for the Commission’s willingness to engage with diverse stakeholders and to pursue policies that promote proportionality, rehabilitation, and public safety. Tzedek also extends heartfelt thanks for the opportunity for Norman Reimer to testify before the Commission earlier this year on behalf of Tzedek—an invaluable forum to share the organization’s perspectives and advocate for a fairer justice system.

Introductory Comment Regarding the Current Priority Cycle

Overall, Tzedek commends the Commission for the breadth of the possible priorities for the 2025-2026 cycle. Despite meaningful progress through the Commission’s adoption of recent amendments, Tzedek continues to believe there is still considerably more work to do to effectuate a much-needed paradigm shift in the application of federal criminal law to correct fundamental flaws that have plagued federal sentencing practices for decades. Tzedek’s comments seek to address several potential priorities identified by the Commission and suggest additional priorities that are closely connected to those priorities.

As it has in the past, Tzedek strongly urges the Commission to act boldly to implement the kind of overarching course correction that can restore fairness and humanity, while remaining faithful to the statutory framework for sentencing.

I. The Continuing Need for *Mens Rea* Reform

Consistent with its recent submissions to the Commission, Tzedek continues to see a critical need to address the absence of adequate *mens rea* considerations in the sentencing process. *Mens rea*, or criminal intent, is the moral anchor of a criminal code and a just and effective scheme of criminal punishments. In general, the United States Sentencing Guidelines (“U.S.S.G.”) as currently constructed tend to ignore and essentially eviscerate traditional notions of *mens rea* as a fundamental feature of a sound sentence system. Tzedek believes that the Guidelines should reflect the fundamental principles that punishment should be proportionate to the

offender's culpability, and *mens rea*, or criminal intent should be a key factor in determining that culpability.

Concerns about the undermining of *mens rea* principles have been expressed by astute jurists and commentators for many years. For example, the Honorable Judge Jack Weinstein & Fred Bernstein wrote¹:

“In the guidelines era, *mens rea* has been all but eliminated from the sentencing of drug offenders. This development is a disastrous departure from the great traditions of Anglo-American law...It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial...Punishing a defendant for facts she ‘reasonably should have foreseen’ is tantamount to punishing negligent conduct. This is a substantial departure from traditional principles of *mens rea*. The Model Penal Code, for example, permits criminal liability only in cases of extreme negligence, and then only rarely. Moreover, punishments are ‘proportional’ to mental states.”

The Honorable Judge Gerard E. Lynch similarly wrote²:

“The guidelines significantly muddle questions of *mens rea* as applied to factors that can have a dramatic effect on culpability...The lack of attention to *mens rea* issues [means] the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases.”

Tzedek believes that the need for *mens rea* reform is long overdue, and that the issue merits sustained attention across many guidelines and in conjunction with this Commission's proposed priorities. Specifically, this issue is directly related to proposed priorities (2) and (3) focused on examining the drug and economic offense guidelines, §2D1.1 and §2B1.1; it is also related to broader priorities (1) and (6) examining how the guidelines can provide guidance to courts to select appropriate sentencing options and exploring means for continued simplification of the U.S.S.G.

¹ Judge Jack Weinstein & Fred Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Federal Sentencing Reporter 121 (1994).

² Judge Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 Federal Sentencing Reporter 112 (1994).

As a general matter, Tzedek urges the Commission to review and revise all components of the U.S.S.G. to ensure they properly incorporate, and to ensure courts properly consider *mens rea*, motive, purpose, and personal culpability issues at sentencing. This review and revision of the U.S.S.G. should ensure: (a) that aggravating sentencing enhancements are imposed only in instances in which the defendant exhibited sufficient *mens rea* with respect to a sentencing factor to justify the corresponding sentencing enhancement, and (b) that the sufficient *mens rea* is adequately proven at the appropriate level of proof.

The government should generally be required to prove a culpable state of mind with respect to any and all key offense facts that impact guideline ranges, such as the quantity of drugs or the amount of financial loss involved in the offense, and proof of a more culpable state of mind should generally be required for greater sentencing enhancements. Review and revision of the U.S.S.G. to reflect these principles should also ensure that courts are fully and clearly instructed to consider all mitigating aspects of a defendant's *mens rea*, including motive, purpose, and personal culpability in determining the appropriate sentence.³

The two areas in which there is the greatest need for *mens rea* reform is with respect to §§ 2B1.1 and 2D1.1, two specific guidelines noted in the Commission's latest proposed priorities. Addressing the *mens rea* deficiencies in these sections will not only address unnecessary harshness but also help provide improved guidance to courts while simplifying the sentencing process.

A. Reformulate Base Offense Level Calculation for Economic Crimes and Drug Offenses

The single greatest driver of excessive harshness and disparity in federal sentencing derives from the dated formulaic approach to base offense level calculations that disregards *mens rea* considerations to focus on metrics that often

³ The significant guideline simplification amendments now pending before Congress, which will remove most departure-related policy statements, creates a heightened risk that judges may not readily and regularly consider all mitigating *mens rea* matters. Though imperfect and incomplete, policy statements expressly addressing matters such as "Mental and Emotional Conditions" and "Aberrant Behavior" served to signal to the parties and to jurists that mental state issues are important matters in the sentencing process. The Commission can and should work on guideline revisions to ensure these matters and others related to culpability are never overlooked or slighted in the sentencing process.

serve as very poor proxies for actual culpability. Driven by the application of adjustments based on factors that often bear no relation to an individual's true culpability, the U.S.S.G. establishes presumptive sentences that are often disproportionately harsh and overly excessive for less serious offenders.⁴ In particular, the use of the "Loss Table" for economic offenses in U.S.S.G. § 2B1.1 and the "Drug Quantity Table" under U.S.S.G. § 2D1.1 should be replaced—or at the very least modified—through reforms that tether sentence lengths to *mens rea* and other culpability criteria. Tzedek believes that the current focus on quantification serves as an unreliable and unjust proxy, and in a way contradictory to individual culpability and factors set forth in 18 U.S.C. § 3553(a). The Commission's own data shows that courts largely agree that these guidelines consistently fail to guide courts effectively. While judges sentence below the drug and fraud table guidelines in a significant majority of cases, reinforcing the idea that substantial reform is a bold but necessary step toward a more just sentencing system, judges (often those recently appointed to the bench) still lean too heavily on these drug and fraud tables.

In today's federal sentencing framework, numerical formulas tied to loss amounts and drug weights have largely supplanted the pursuit of individualized justice. The enhancement structures under §§ 2B1.1 and 2D1.1 have become increasingly disconnected from a defendant's actual culpability, relying instead on mechanical calculations and doctrinal intricacies that often fail to reflect the nuanced realities of true aggravating and mitigating factors for individual defendants. In particular, the interpretation of "loss" in § 2B1.1 has drawn criticism for reducing complex conduct into rigid mathematical estimates. As a result, defense attorneys frequently express frustration that their roles have shifted from advocates to calculators and number-crunchers, navigating a system where human storytelling and meaningful context are simply overshadowed by spreadsheets and point tables.

By now the stories of individuals whose criminality is vastly overstated through the application of these provisions are well-established and are surely well-known by the Commission. These have resulted in grossly unjust sentences. Whether it is

⁴ For example, sentences that are in essence a life sentence for nonviolent offenses are unacceptable. See *United States v. Rubashkin*, where a presidential commutation was granted to a man in his fifties who was sentenced to 27 years for fraud, a sentence "which many have called excessive in light of its disparity with sentences imposed for similar crimes."

<https://trumpwhitehouse.archives.gov/briefings-statements/president-trump-commutes-sentence-sholom-rubashkin/>

the girlfriend or a hired driver recruited to participate in a narcotics conspiracy, with absolutely no knowledge of the quantities involved, or the mid-level bookkeeper, whose false entries contribute to a fraud whose scope is beyond his or her knowledge, the draconian presumptive sentences, based on metrics that disregard *mens rea*, can be wholly excessive and disproportionate. (Notably, recent presidents from both parties have registered their judgment on these kinds of excessive sentences by commuting and/or pardoning a historic number of nonviolent drug and fraud offenders.) It is high time for the Commission to look at alternative approaches.

The optimum approach is to identify key culpability factors such as *mens rea*, motive and purpose, factors that judges already recognize are central in determining an individual's culpability but which currently do not find sound expression in the guidelines. Accordingly, Tzedek urges the Commission to formulate a completely revised culpability-focused approach to the determination of the base offense level for drug offenses and economic offenses. These comments address loss calculation in the next sub-section of this letter.

With respect to drug offenses, given the pervasive statutory mandatory minimums that apply to many drug offenses which the Commission cannot directly change, there is no sound justification for having the Drug Quantify Table drive guideline ranges, rather than a more individualized assessment of culpability. The Commission should completely end the practice of centering the base level for drug offenses through a reference to the weight of the drugs and develop a guideline that directs the court to focus on individual culpability factors, such as role, knowledge, motivation, external pressures, and other factors relevant to the circumstances pertaining in each case. While drug weight should still be a factor to consider in appropriate circumstances, especially when a defendant is knowing and purposeful about trafficking large quantities of drugs, it should no longer serve as the principal driver in the determination of the base offense level in § 2D1.1.

B. Alternative Approaches to Economic Offenses for § 2B1.1

The need for *mens rea* reform is especially acute with respect to proposed priority (3) (examination of § 2B1.1), and Tzedek supports significant and wholesale reform. The portions of the U.S.S.G. on federal fraud crimes—embezzlement, thefts, securities fraud, insider trading, and related crimes—have long been the subject of extensive and bipartisan criticisms. Due to the U.S.S.G. instructions to use the *higher* of “intended” or “actual” loss, numerous overlapping sentencing enhancements, and a tendency to treat similarly intentional conduct/results and

unintended conduct/results, there is a broad consensus that the fraud guidelines often recommend excessive punishment for many types of economic offenses. These guidelines often result in widely disparate sentences for like conduct, and federal judges regularly register their disapproval of these sentencing guidelines by varying from them in a wide range of cases.⁵

Though structured with various elements, this proposal fundamentally seeks to alleviate at least some of the excessive harshness of these fraud guidelines by focusing more closely on defendants' actual intent and directing judges to consider mitigating, as well as aggravating, factors. Reforms that better align the fraud guidelines with actual culpability and other sound sentencing factors will help reduce disparity as judges will be more likely to follow guideline recommendations.

Accordingly, Tzedek urges the Commission to fundamentally rethink and restructure the entire fraud Guideline by exploring amendments that would allow the Guideline to function without a Loss Table to focus on a defendants' *mens rea*, motive, culpability and the extent to which they deliberately inflicted economic hardship on discrete individuals. Under such an approach, there may be cases in which the intended loss is a more significant factor than the actual loss or gain; but the reverse may also be true in many cases. Thus, this new approach would jettison the notion that courts should rely upon the higher of either intended or actual loss in favor of one that focuses on the unique circumstances of the case and the true *mens rea* of the individual offender. In that context, loss amounts should be a factor—just as under the proposed revision to § 2D1.1 outlined above, drug weight should be a factor—but numerical benchmarks unconnected to real culpability would cease to be the principal driver in determining the guideline range and the severity of the recommended sentence.

If the Commission does not fundamentally rethink this Guideline as Tzedek proposes, then the Commission should at least significantly reform and simplify the Loss Table in § 2B1.1. With financial crimes now, it is the government's (sometimes fanciful) construction of loss amounts that (too greatly) drives the sentence. All too often, loss calculations are built on suppositions about intent or resulting harm and they often push a Guideline sentence to a length of time that the

⁵ David DeBold & Matthew Benjamin. "Losing Ground"—*In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. Penn. L. Rev. 141 (2011).

average person would consider outrageously long and a punishment that does not sensibly meet the crime given the defendant's actual culpability.

Indeed, the current Loss Table is outdated, most certainly does not reflect inflation since its adoption, creates a false sense of precision, and is excessively complicated. A million dollars today is not what it was when the Table was created, and frauds that the government claims involve \$975,000 and \$1,005,000 are not meaningfully different because of the distinct "loss" amount. The Loss Table currently functions arbitrarily and results in human beings often losing their freedom for a greatly excessive amount of time. That is wrong, unjust and must be fixed. Taking away a citizen's freedom is the government's greatest power and thus must be exercised with fairness and with the utmost care. In the annexed attachment Tzedek proposes two alternatives for revision of the Loss Table but does so strongly urging the Commission to opt for the more sweeping change outlined above so that there is no need for a formal Loss Table.

II. Proposals Concerning Priority (5)

Tzedek lauds the Commission for identifying an examination of §§ 3E1.1 (Acceptance of Responsibility) and 5K1.1 (Substantial Assistance to Authorities) as potential priorities during this cycle and takes this opportunity to resubmit and augment its previous proposals in these areas.

A. Acceptance of Responsibility Reform

Not all individuals who proceed to trial do so as an act of defiance or stubborn denial. There are cases where an individual has a legitimate defense. This is especially true when the ultimate issue relates to intent. If the right to a jury trial is to have meaning, it should not be that merely because one puts the government to its constitutional duty to prove its case, they are automatically disqualified from receiving a third point for acceptance of responsibility.⁶ Accordingly, Tzedek proposes that the Commission amend U.S.S.G. § 3E1.1 to provide that a court may

⁶ This is even more important if one believes that trial should be the norm and the default for the Government to take away somebody's freedom. In our system, a defendant has a constitutional right to a jury trial even if they lack a good defense and even if defiant or stubborn, and a decision to exercise that right alone should not be the basis for additional criminal punishment. Nor should a defendant's decision to proceed to trial automatically support a finding that a person is without remorse or recognition of wrongdoing.

award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

Additionally, in practice, proceeding to trial is not just about the third point, it is about all three of the acceptance points. Proceeding to trial will almost always mean not getting any points off, especially since U.S.S.G. § 3E1.1 Application Note 2 provides that it will be the “rare situation []” where a person “may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial,” and unequivocally states that the adjustment “is not intended to apply to a defendant who puts the government to its burden of proof at trial...” Tzedek believes this approach is flawed.

First, there is nothing inherently inconsistent in maintaining that the government cannot meet its burden of proof and still sincerely expressing regret and accepting responsibility for one’s conduct. Second, it is fundamentally inconsistent with the constitutional right to a trial to cast that right as merely a “burden” that the government must shoulder rather than the norm that is contemplated by the Constitution. Third, while there certainly may be circumstances where a defendant’s behavior or failure to express remorse may justify denial of an acceptance adjustment, Tzedek believes that the Commission should not put its finger on the scale with an Application Note that clearly states that denial of acceptance should be the norm whenever a defendant goes to trial.

Accordingly, Tzedek proposes that the Commission strike the first sentence of Application Note 2 to U.S.S.G. § 3E1.1 and strike “[i]n rare situations” from the beginning of sentence three. Additionally, the last sentence should be amended to make clear that post-trial statements or conduct, including the completion of any treatment programs, payment of restitution or other manifestations of remorse may also be considered in determining whether to grant an acceptance reduction following a conviction at trial.

1. Contributions to the Community

Firm in the belief that no one should automatically be defined by a misdeed, particularly where it represents a single departure from an otherwise fruitful and law-abiding life, Tzedek urges the Commission to consider an additional qualifying factor under Acceptance of Responsibility. Specifically, where an individual has rendered extraordinary service to the community, such as, for example, serving as a volunteer Emergency Medical Technician, a volunteer at a homeless shelter or a soup kitchen, or any of the numerous ways that individuals provide service to the

community, either before or after the commission of an offense, the Commission should provide for an additional one-point reduction.

B. Obstruction Reform

Closely related to § 3E1.1 is § 3C1.1. Indeed, Application Note 4 to § 3E1.1 is a statement that conduct resulting in an enhancement under § 3C1.1 ordinarily indicates that a defendant has not accepted responsibility for criminal conduct. Because it is common practice to assess an obstruction enhancement when a defendant testifies at a motion hearing or at trial—and may be assessed just for filing an affidavit that contradicts a law enforcement account of a search, seizure, or alleged statement—meaningful reform of § 3E1.1 must necessarily include § 3C1.1 reform. This practice of imposing the obstruction enhancement merely for involvement in motion practice or asserting a right or defense chills fundamental constitutional rights by imposing an unwarranted tax merely for presenting a claim for consideration by the court or jury. In a sense, it uniquely places the defendant in a “double or nothing” dilemma. If the court or jury rejects their version, they not only lose the motion or the trial, but they get an additional significant penalty merely for presenting their arguments or version of events.⁷

The imposition of an obstruction enhancement solely for testifying should be contrasted with situations in which a defendant does more than provide their own account by taking independent steps that obstruct or impede justice, such as by presenting false evidence or any of the numerous others way that a defendant or a subject of an investigation may affirmatively engage in efforts to frustrate the administration of justice. In those situations, the assessment of the enhancement remains appropriate.

Accordingly, Tzedek proposes that the text of U.S.S.G. § 3E1.1 be amended to make clear that the obstruction adjustment should not be assessed solely for testifying at a hearing or trial in support of the defendant’s rendition of the facts. Similarly, Application Note 2 of § 3C1.1 and Note 4 to § 3E1.1 should also be amended to reflect this principle.

C. Substantial Assistance to Authorities Reform

⁷ Note that no corresponding penalty is imposed upon the government or the government’s witnesses when their witnesses are not believed, or a jury renders a not guilty verdict.

There may be no greater contributor to irrational disparity in federal sentencing practice than the current statutory and U.S.S.G. framework that vests the government with the sole power to seek a downward departure for a defendant who provides substantial assistance.

At the outset, Tzedek notes that as a matter of fundamental principle, there is something profoundly disturbing about a system of justice that pervasively relies upon the testimony of cooperating witnesses to initiate, or buttress investigations and/or prosecutions of others. Further, courts, scholars and experience teach us that testimony of such witnesses is often unreliable.⁸ Indeed, false testimony from cooperating witnesses is a major contributor to wrongful convictions in the very small subset of criminal cases in which DNA evidence is available to support an eventual exoneration.⁹ For cases in which there is no biological evidence, which is the case in the overwhelming majority of federal prosecutions, it is virtually impossible to establish the extent to which cooperator testimony contributes to an unwarranted conviction.¹⁰

⁸ See *Giglio v. United States*, 405 U.S. 150 (1972); *On Lee v. United States*, 343 U.S. 747, 757 (1952); *United States v. Bernal Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 108, 108 (2006); Jeffrey S. Neuschatz, Danielle K. DeLoach, Megan A. Hillgartner, Melanie B. Fessinger, Stacy A. Wetmore, Amy B. Douglass, Brian H. Bornstein and Alexis M. Le Grand, *The Truth About Snitches: An Archival Analysis of Informant Testimony*, 28 Psychiatry, Psychology and Law 508-530 (Nov. 10, 2020), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9090405/>

⁹ See Innocence Project, *Unregulated Jailhouse Informant Testimony Deeply Harms Our System of Justice*, <https://innocenceproject.org/informing-injustice-the-disturbing-use-of-jailhouse-informants/> (last visited July 11, 2024), (False informant testimony contributed to nearly one in five of the 375 DNA-based exonerations); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 744 (2016) (The use of informant testimony is so pervasive throughout the criminal legal system, but only a fraction of wrongful convictions are challenged postconviction.)

¹⁰ The Guidelines, government, and judges should also pay attention to how dangerous cooperation often is and to how incredibly little the Federal Bureau of Prisons (BOP) does to actually protect cooperators. The Guidelines should remind judges of the possible dangers related to cooperation and to factor that in both in whether to depart for somebody who did not cooperate and/or for someone who did.

Notwithstanding these concerns, Tzedek recognizes that the government use of and reward for cooperation is a key element of the current federal criminal justice system. According to the data from 2024, 9.9 percent of all sentences imposed involved U.S.S.G § 5K1.1 motions, with 100 percent of those sentences beneath the guideline range. The mean decrease in those cases was a sentence reduction of 56.5 percent and the median departure was 50.4 percent.¹¹ The current application of this incredible power to avoid both mandatory minimum sentences and guideline sentencing ranges is highly problematic. There are all too many cases in which the determining factor as to who gets this benefit turns on such arbitrary factors as 1) who gets to the government first;¹² 2) who gets an attorney that is more inclined to promote or recommend an early guilty plea and cooperation rather than an attorney who is more deliberative and committed to assessing the evidence before providing a recommendation to plead and cooperate; or 3) who has the most information to offer.

The first two of these factors are determined by arbitrary factors that have nothing to do with justice or an individual's state of mind and level of culpability. And the third factor is a manifestation of the most abusive aspect of the substantial assistance departures, namely that the most culpable defendants are often in the best position to provide truly substantial assistance and the least culpable defendants are in the worst position. The Commission is no doubt aware of the many cases in which more culpable defendants cooperate and receive far lesser sentences than other co-defendants who ranked lower in the criminal enterprise, especially when the less culpable are convicted after trial.

Additionally, there are some circumstances where an individual is willing to cooperate, but the government will not agree that the cooperation is substantial unless it includes implicating a loved one, sometimes including a parent, spouse, child, or sibling. To deny the departure when the sole reason why a cooperative

¹¹ See U.S. Sentencing Comm'n, *2024 Annual Report and Sourcebook of Federal Sentencing Statistics*, <https://www.ussc.gov/research/sourcebook-2024> U.S. Tables 29 and 37, and Figure 9, (over the ten-year period of 2015 – 2024 § 5K1.1 departures have ranged between 8.2 and 12.4 percent of sentences imposed, with 9.9 percent or 6,099 receiving this benefit in 2024).

¹² It must be noted that while it might be an indication of extreme contrition if a defendant cooperates early, it is just as likely that it may be because a defendant got counsel sooner than other co-defendants or that their attorney's workload was such that the attorney brought their client to the government before counsel could do so for co-defendants. That is hardly a legitimate basis to deprive the other defendants of access to this relief mechanism.

individual cannot provide substantial assistance is a reluctance to cooperate against a close family member undercuts values which should be extolled rather than denigrated, and are, at the very least, deeply understandable on a human level.

While it may seem like the current structure is necessary to ensure that the government secures cooperation to pursue other wrongdoers, those who practiced law before the U.S.S.G. know that this is not the case. Prior to the Sentencing Reform Act (“SRA “), there was a time when the judge’s authority to reduce a sentence pursuant to F.R. Cr. P. 35 was more than adequate to ensure that cooperators were rewarded. But it also left open the possibility that even a defendant who could not provide “substantial assistance” could nevertheless secure a sentence reduction for making good faith efforts to cooperate. There was no evidence that the government was unable to secure cooperation when the authority to determine who qualified for a benefit from cooperation was shared with the court.

Accordingly, Tzedek urges the Commission to address the disparity that results from the way the U.S.S.G. § 5K1.1 operates by amending the section to include a provision that would permit the court to grant a downward departure, notwithstanding the absence of motion by the government, provided a defendant made a good faith effort to cooperate, and that although the defendant could not provide substantial assistance it was not through any fault of the defendant.¹³

Tzedek further recognizes that pursuant to 18 U.S.C. 3553(e), a sentence below a mandatory minimum requires a motion by the government attesting to the defendant’s substantial assistance.¹⁴ Hence, Tzedek urges the Commission to recommend that Congress implement a statutory revision to similarly permit the court to consider imposing a sentence below a mandatory minimum by authorizing

¹³ Notably, certain people of faith hold sincere religious beliefs that prevent them from cooperating. Accordingly, courts should be advised to consider such a departure without motion of the government, when the defendant made a good faith effort in cases where the extent of their cooperation was limited by good faith religious boundaries.

¹⁴ See *Melendez v. United States*, 518 U.S. 120 (1996) (holding that absent a motion by the government to depart from the mandatory minimum due to substantial assistance, a sentencing court lacks authority to do so).

a court to grant a departure where a defendant has made good faith efforts to provide substantial assistance.¹⁵

III. Suggested Additional Priorities

As has been conveyed in prior submissions, Tzedek believes that U.S. sentencing practices perpetuate the proliferation of excessively punitive sentences and systemic disparities that are manifest in various phases of the criminal justice process. To address these concerns, Tzedek urges the Commission to consider the following additional proposed priorities:

A. Establish Presumptive Maximum Sentences

18 U.S.C. § 3553(a) provides that a “court shall impose a sentence sufficient, but not greater than necessary,” to comply with the purposes of sentencing set forth in the Act. Despite this statutory directive to avoid excessive sentences, the severity of federal sentences has increased dramatically since the advent of the SRA. In 1986, the year before the U.S. Sentencing Guidelines became effective, only just over half of all federal sentences included some term of imprisonment;¹⁶ in Fiscal Year 2024, according to Commission data, 91.5 percent of all federal sentences included a prison term.¹⁷ And the prison sentences are too long. Countless commentaries, reports and studies advancing a wide array of reform proposals support the proposition that the U.S. incarcerates too many people for too long, despite increasing evidence that overly harsh sentencing has disparate impact on some populations and no corresponding public safety benefits.¹⁸

¹⁵ As noted above, one of the more grotesques elements of cooperation is that often it requires a person to inculcate a loved one and thus choose between an extremely close relationship and longer prison terms. Accordingly, courts should be advised not to penalize a person when the inability to provide substantial assistance arises solely because it would require the inculcation of someone in such a relationship.

¹⁶ Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, *Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90* (June 1992), <https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf>.

¹⁷ See FY 2024 Sourcebook, *supra*, note 11, Figure 6.

¹⁸ See, e.g., Council on Criminal Justice Task Force, *How Long is Long Enough?*, March 2023, <https://counciloncj.foleon.com/tfls/long-sentences-final-report/> (defining “long sentences” as prison sentences of 10 years or more); Vera Institute of Justice, *A New Paradigm for Sentencing in the United States*, February, 2023, <https://www.vera.org/downloads/publications/Vera->

A range of factors contribute to undue sentence severity in the federal system because the U.S.S.G. are suffused with a vast array of often overlapping and severe enhancements, some of which are specifically addressed in this submission, but all of which contribute to disproportionately harsh sentences, especially for those who exercise the right to trial.

Tzedek proposes that for most criminal conduct, especially when committed by those with either no substantial or minimal history of prior criminal conduct, the Commission should promulgate presumptive maximum sentences. Judges would retain the authority to sentence above these presumptive sentencing caps provided specific reasons for doing so can be articulated based on factors that should be tied to the specific individual and the specific conduct which is the subject of the conviction.

Tzedek proposes a two-tier cap approach:

Category 1: 15-year presumptive maximum for all federal crimes other than acts of terrorism, treason, murder, rape, or any crime of violence if the defendant was previously convicted of any prior state or federal felony.

Category 2: 5-year presumptive maximum if the defendant is not convicted of a crime of violence, has no substantial criminal history, and makes efforts to ameliorate the harm caused by the criminal conduct, such as through restitution or community service, or takes other steps to reduce recidivism risk, such as successful completion of treatment, counseling and/or participation in a restorative justice program.

As necessary to effectuate these presumptive maximum categories, Tzedek urges the Commission to propose an advisory list of aggravating factors that may provide the basis for a court to be authorized to impose a sentence longer than the presumptive maximum and that the Commission recommend that Congress amend 18 U.S.C. § 3553 to provide the necessary statutory authority to implement the presumptive maximum sentence construct, notwithstanding other preexisting statutes.

[Sentencing-Report-2023.pdf](https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/); *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, UMKC Law Review, Vol. 87:1, 2018, also available at The Sentencing Project, <https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/>.

B. Offense Level 43 Reform

Tzedek supports a specific reform to Base Offense Level calculation in the sentencing table to amend the U.S.S.G. to remove the recommendation that a base level of 43 should necessarily result in a life sentence. A defendant can get to that base level because of the severity of the conduct (e.g. First Degree Murder, Unlawful Manufacturing, Importing, Exporting or Trafficking, (if resulting in death or serious bodily injury and the defendant had prior conviction for a similar offense), and Treason (if tantamount to waging war against the United States)). But a defendant can also get to that level through aggravating factors based on such factors as drug weight, role in the offense, etc.

Tzedek joins other groups who believe that life sentences should be imposed for only the most heinous crimes, should almost never be imposed for non-violent offenses, and clearly should not be mandated for those with little or no criminal history. Accordingly, the Commission should amend the U.S.S.G. to eliminate the level 43 life recommendation and substitute a sentencing range, especially for those with a Criminal History of less than IV.

C. Criminal History Reform

Just as the mechanistic approach to loss calculation and drug quantity can distort and often exaggerate an individual's criminal responsibility, so too can the point system approach to criminal history lead to distorted outcomes. These distortions arise from multiple factors: variable sentencing practices among states, counties, and localities, which can result in arbitrarily overstated criminal history based upon local sentencing practices; over-policing of certain populations and communities, which results in higher criminal histories and therefore longer sentences for some groups; failure to adequately account for age at the time of the prior offenses, except for limited circumstances; failure to recognize that prior imprisonment itself may have contributed to subsequent criminality; and countless more intangibles such as the offender's current age, family circumstances, and employment history.

Tzedek proposes that the current point system be replaced with more adaptive categories that will provide the sentencing judge with an opportunity to make a qualitative assessment of a person's criminal history. To provide greater flexibility within a criminal history range and to underscore the importance of a court making a qualitative rather than a quantitative assessment of criminal history, Tzedek

suggests that the current model, which has six criminal history categories, be condensed into four categories: 1) no or limited criminal history; 2) low criminal history; 3) moderate criminal history; or 4) extensive criminal history. The Commission should draw on its extensive recidivism research to promulgate empirically sound criteria to aid courts in making the necessary assessment. These criteria should include an evaluation of the age at the time of the prior offenses, the nature of the offense and the extent to which the conduct evinced a motive for personal gain or reflected impulsive or reactive behavior, the extent to which the offender intentionally caused significant harm to others, whether prior sentences included treatment or any ameliorative component to address underlying pathologies, and other criteria that objectively justify enhanced punishment.

To aid in the promulgation of these criteria, Tzedek urges the Commission to undertake a multifaceted study to assess whether and to what extent criminal history scoring is assessing points for past conduct that has little or no additional risk-predictive value. Such a study should also assess whether unique personal factors, such as age, employment history, family circumstances, community support, and medical and mental health issues are more risk-predictive than a mere point-based quantification of criminal history standing alone. Tzedek especially believes that extenuating family circumstances should receive more attention than it currently does

D. Ameliorating the Trial Penalty

As reported in the 2024 Sourcebook, 97.2 percent of all cases were disposed of by a guilty plea,¹⁹ precisely the same percentage as in the prior year and consistent with data from the past several years. It is generally now well-established that a principal reason why trials have virtually disappeared from the federal criminal justice system is a phenomenon known as the trial penalty.²⁰ The trial penalty has essentially so burdened the fundamental right to a trial and is so costly to the

¹⁹ See: FY 2024 Sourcebook, *supra*, note 11, Table 11.

²⁰ American Bar Association/Criminal Justice Section, *Plea Bargaining Task Force Report*, 2023, <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf>; Federal Sentencing Reporter, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, Vol 31, Issue 4 -5, April/June 2019, <https://online.ucpress.edu/fsr/issue/31/4-5>; National Association of Criminal Defense Lawyers, *The Trial Penalty on the Verge of Extinction and How to Save It* (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>

accused—in terms of the additional years of imprisonment one faces if convicted after trial—as to transform the system into a plea-bargaining assembly line. Indeed, if one were to eliminate from the data those cases that proceed to trial where the alleged crime is so heinous that the government makes no offer, the frequency of meaningful trials is even more miniscule.

It is beyond the scope of this submission to detail the many reasons why the loss of criminal trials, and the accompanying pre-trial litigation through which courts and juries can exercise a check on government excess, is detrimental to justice. Suffice it to say that this system of pleas is clearly not what was envisioned by this nation's founders and is a development that has been decried by advocacy groups across the ideological spectrum.²¹

The various studies of the trial penalty rightly note that one of, if not the main drivers of the trial penalty is the government's unilateral control over charging decisions and the impact of mandatory minimum sentences and the U.S.S.G., even since they were rendered advisory. Prosecutors alone can select the charges and have the power to determine what conduct to urge the court to consider in imposing sentence. It is established practice for prosecutors to bring superseding indictments, add new charges and threaten to withdraw prior offers for those who do not capitulate. It is also routine practice for prosecutors to extract all manner of waivers as the price of the plea, thereby preventing legitimate issues that other constitutional rights from ever being subjected to judicial review.

1. Acceptance of Responsibility, Obstruction, and Substantial Assistance Reform

While some of the contributors to the trial penalty are beyond the scope of the Commission, there are many factors that could be alleviated by the Commission. One such contributor has been the use of acquitted conduct to enhance a sentence. Tzedek lauds the Commission for partially addressing this factor in a prior amendment cycle. Other steps that can ameliorate the trial penalty include the proposals outlined above to implement reforms related to acceptance of responsibility, obstruction enhancements and substantial assistance departures.

2. Relevant Conduct Reform

²¹*Id.*, especially, Federal Sentencing Reporter, *Tyranny of the Trial Penalty*.

Tzedek also urges the Commission to take an additional step to tackle a factor that overly burdens the right to trial and incentivizes even the arguably innocent defendant to “cut a deal” rather than risk the consequences of the trial to which they are theoretically entitled. Previously, when Tzedek commented on the proposed revisions to address the use of acquitted conduct, it urged the Commission “to consider in future cycles reforms that address the pernicious impact of sentencing based upon uncharged conduct.”²² Tzedek now urges the Commission to tackle the extraordinary harshness and disparity that have arisen from the use of uncharged conduct under the rubric of determining Relevant Conduct pursuant to U.S.S.G. § 1B1.3.

The context for this proposed reform is the indisputable fact that the government pervasively and routinely uses the threat that a sentence will be enhanced with uncharged conduct to coerce defendants to plead guilty. Because of the operation of the U.S.S.G., the government exploits the current process that requires a court to consider relevant conduct under U.S.S.G. § 1B1.3 and directs the court to enhance the sentence, without the evidentiary safeguards of trial, if the other conduct is established by a preponderance of the evidence pursuant to U.S.S.G. § 6A1.3. This process makes a mockery of the fundamental constitutional right to a trial by jury. That right is so essential that it is mentioned multiple times in the Constitution and the Bill of Rights (e.g. Art. III, § 1 [3]; Amendment VI; Amendment VII). Indeed, even in the context of civil matters, the Supreme Court recently struck down a statute that vested the executive branch with the power to impose a civil fine for fraud rather than afford the defendant the constitutional right to a jury trial.²³ It is hard to fathom and, in Tzedek’s view, unacceptable that the federal criminal justice system has evolved to the point where one can be severely punished for conduct absent any finding or admission of guilt and upon the low preponderance of the evidence threshold.

While there are cases where the individual’s responsibility for the full scope of the criminality is embraced within the count of conviction and the jury’s finding of guilt beyond a reasonable doubt, in virtually all multi-defendant prosecutions, especially when (as is usually the case) there is a conspiracy charge, that is not so. The operation of § 1B1.3, which *inter alia* involves “all acts and omission reasonably foreseeable in connection with that criminal activity” (§

²² See Letter from Tzedek Association, *Re: Proposed 2023-2024 Amendments and Issues for Comment* (February 20, 2024), <https://www.ussc.gov/policymaking/public-comment/public-comment-february-22-2024#pa3> 531, 533-53

²³ *SEC v. Jarkesy*, No. 22-859 (S. Ct. June 27, 2024).

1B1.3(a)(1)(B), and that provision’s interaction with § 6A1.3 (and the accompanying commentary), which allow a court to rely on assertions without the procedural protections of a trial on a finding of “probable accuracy,” truly allow the tail to wag the dog. Further, the current approach to uncharged conduct also implicates important concerns with respect to the evisceration of *mens rea* requirements, addressed earlier in this submission.

In sum, the Commission’s efforts to adopt a real offense as opposed to a charge offense sentencing model to prevent the prosecution from “influenc[ing] the sentence by increasing or decreasing the number of counts in the indictment”²⁴ has been frustrated by how relevant conduct leads to the same problems of undue prosecutorial control over sentencing factors. In actuality, the process is even worse in terms of promoting excessive harshness and unwarranted disparity because it permits prosecutorial arguments that lead to sentencing enhancements based on conduct that is neither charged nor proved beyond a reasonable doubt. Tzedek firmly believes that the U.S.S.G. should be restructured to minimize this bludgeon, which is routinely deployed to assert overbearing leverage to extract guilty pleas and to punish those who assert their right to a trial.

Tzedek urges the Commission to think broadly about how best to address this fundamental flaw. There are numerous possible approaches, each of which implicates other aspects of the current sentencing regime. For example, one approach might be to revise the U.S.S.G. to have far fewer offense levels, but with considerably wider ranges, essentially evolving into a system where the charged conduct is the anchor. If that were the case, then a solution that will constrain how uncharged conduct drives the sentence might be to amend § 1B1.3 to limit relevant conduct to adjustments with the guideline range. Broader ranges, of course, could run afoul of the statutory 25 percent rule (28 U.S.C. § 994(b)(2)), and therefore would likely require legislative action.

Another possibility could be to revise § 1B1.3 to limit the scope of any increase to the guideline established by the application of U.S.S.G. Chapter 2 for the offense conduct charged and admitted or proved at trial.

Yet another possibility is to amend U.S.S.G. § 6A1.3 to provide that when a relevant fact in dispute relates to uncharged conduct the court may not rely upon that fact unless admitted or found beyond a reasonable doubt.

²⁴ See U.S. Sentencing Comm’n, Real Offense v. Charge Offense, Guidelines Manual 2023, Ch. 1, Pt A(1)(4)(a).

Any of these approaches, or others, are obviously significant change—but significant change is necessary if the Commission is to curtail the pervasive trial penalty. Accordingly, Tzedek urges the Commission to prioritize a reconsideration of how uncharged and unproved conduct is taken into consideration and invite thoughtful and comprehensive proposals as part of the current amendment cycle.

E. A Proposed Role for the Commission in Assessing Presidential Clemency

The Commission last looked at presidential clemency with its September 2017 report titled *An Analysis of the Implementation of the 2014 Clemency Initiative*.²⁵ That report largely focused on who received sentence commutations under the Initiative, the effect of the commutations on the sentences for those offenders, and the extent to which it appears that the announced factors were followed. It also endeavored to identify offenders who may have met the stated criteria by the end of President Barack Obama’s terms but did not receive clemency as of the end of his term.

Over the past three administrations, the first Trump Administration, the Biden Administration and now the current Trump Administration, many more commutations (and pardons) have been issued. Tzedek firmly supports the notion of “second chances” and believes in the robust, principled use of the clemency power by the President on the federal level and by Governors or other designated bodies on the state level. Tzedek also recognizes that clemency grants can be controversial and understands that the Commission should avoid offering judgment as to the wisdom of any specific clemency program or individual clemency grant. But particularly when it comes to commutations, Tzedek believes the Commission can play a vital role in helping to inform the use of the constitutional power of clemency by using its unique resources to provide an array of data analyzing past commutations patterns and possible future commutation grounds. For example, a profile of the cases in which commutations have been granted, in terms of the nature of the underlying crime, the prior criminal history, the sentence length, and myriad other factors can provide a treasure trove of information that can inform clemency policies and practices not only at the federal level, but also nationwide.

²⁵ <https://www.ussc.gov/research/research-reports/analysis-implementation-2014-clemency-initiative>

Additionally, a study of recidivism among commutation recipients, especially if compared to similar defendants who did not receive clemency, would be an invaluable resource for those who wield clemency power. To the extent possible, such a study should go back as far as data is readily available and certainly should reach back to include the 2014 Initiative.

Finally, the Commission may consider identifying individuals who are serving outlier and disparate sentences—i.e. sentences that seem aberrantly harsh and inconsistent with broad sentencing norms or in light of recent sentencing reforms based on the available data concerning the relevant crime and criminal history. This work could be invaluable information for the various groups that provide pro bono assistance to deserving clemency candidates and for the executive branch in the exercise of the clemency power. It also would, of course, help to advance a key purpose Congress gave to the Commission, namely helping to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.” 28 U.S.C. § 991(b)(1)(B).

Because there is every reason to believe that clemency, especially commutations, is and should be an increasingly important feature of criminal justice in the United States, Tzedek believes that the Commission should consider data collection in this area as a priority for the upcoming cycle and should consider issuing and regularly updating the three reports suggested above.

F. Expansion of Alternatives to Incarceration

Tzedek vigorously urges the Commission to undertake multiple steps to encourage the robust use of diversion and restorative justice programs as alternatives to incarceration, and to adopt the necessary amendments to make non-jail sentences more broadly available.

It is well-established in states and the federal districts that have started diversion and alternative to incarceration (“ATI”) programs that these initiatives promote less severe sentences and ultimately result in decreased recidivism. This should not be a surprise because criminal behavior is often the inevitable result of underlying pathologies, such as substance abuse and addiction, mental health problems, and other issues that can better be addressed through treatment, counseling, and community support rather than through imprisonment. Unfortunately, however, these alternatives are all too rare in the federal system. As reported in the 2024 Sourcebook of Federal Sentencing Statistics, only 6.9 percent of federal defendants received a sentence of probation, which stands in stark contrast to 63 percent in

1986. Indeed, even when adding sentences that involve fines and alternatives to incarceration to those receiving probationary sentences, 91.5 percent of defendants were sentenced to incarceration.²⁶

Tzedek passionately encourages the Commission to take all appropriate steps to promote the expansion of ATI programs. In addition to expanding the availability of information and best practices related to ATI, the Commission should more generally promote alternatives to incarceration, including the use of home confinement, electronic monitoring, intermittent (e.g. weekend) jail sentences, and other forms of supervision. There needs to be far greater emphasis on the criminogenic consequences of jail sentences and the cascading impact of incarceration on families. Sentencing practices that facilitate rehabilitation and minimize recidivism also promote public safety and respect for the law.

Accordingly, Tzedek proposes that the Commission plan a national convening in the form of a Commission-sponsored symposium, and/or conduct a series of regional hearings to give much needed attention to alternatives to prison. Federal judges, U.S. Probation, lawmakers, prosecutors, states and localities nationwide—as well as many other stakeholders and interested parties—could and would draw considerable guidance from a Commission-sponsored event that brought together leading researchers and scholars to discuss the role of alternatives to incarceration in promoting public safety. In addition to informing this Commission’s work, one (or a series of major events) on this topic would help advance collective knowledge of whether and when incarceration is needed and appropriate as a response to a range of criminal behavior.

Concomitantly, the Commission should take steps to address the fact that since the advent of the SRA, there has been a marked decrease in the imposition of non-jail sentences, such as probation—a development that there is no empirical basis to conclude promotes public safety and is plainly at odds with the intent of the SRA.

Congress, in the SRA, stated clearly that the Commission “shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense,” and also provided that the U.S.S.G. should direct that imprisonment is generally appropriate

²⁶ See FY 2024 Sourcebook, *supra*, note 11, fig. 6 and Table 13; Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90 (June 1992), <https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf>

only when persons are “convicted of a crime of violence that results in serious bodily injury.” 28 U.S.C. § 994(j). Yet, the undeniable fact is that this mandate is almost entirely ignored in today’s sentencing system. Indeed, the Commission’s most recent data shows that in FY 2024 for the 47.1 percent of sentenced persons who had the lowest criminal history score (CHC 1),²⁷ the mean sentence imposed on that group, (many of whom would fit the category Congress indicated should generally receive a “sentence other than imprisonment”), was imprisonment for 46 months (nearly 4 years).²⁸

Additionally, because there is empirical evidence showing that even individuals with a prior criminal history can benefit from ATI, there is no rational basis to categorically exclude such individuals from these beneficial approaches. On the contrary, ATI in many cases offers the best hope of reducing recidivism. Further, since higher criminal history scores are more common for defendants of color, which correlates to over-policing of certain communities, expanding the availability of these programs to include those with modest criminal histories will ensure that ATI does not exacerbate racial and ethnic disparity.

To ensure that the U.S.S.G. implement the statutory preference that first offenders qualify for non-jail sentences and to ensure the broadest availability of non-jail alternatives for all defendants who may benefit from ATI, Tzedek proposes the following array of reforms:

- The Commission should amend U.S.S.G. §§ 5B1.1 and 5C1.1 to make ATI sentences available for all sentences imposed pursuant to Zones A, B, and C of the Sentencing Table.
- The Commission should amend U.S.S.G. § 3E1.1 (Acceptance of Responsibility), and Part 5F (Sentencing Options), to encourage adjustments for individuals who participate in court-approved ATI programs. Courts should be given broad discretion to consider the level and extent of participation in determining the extent of the adjustment.
- The Commission should consider promulgating best practices for ATI programs to ensure fair access and to ensure that they do not replicate pre-existing racial, ethnic, and economic disparities and that

²⁷See FY 2024 Sourcebook, *supra*, note 11, fig. 7.

²⁸ See FY 2024 Sourcebook, *supra*, note 11, Table 28.

individuals who may not benefit from participation in such a program retain eligibility for a non-jail alternative sentence. Simply because a defendant does not have a condition that warrants participation in some kind of treatment program should not lead to imprisonment where a different alternative sentence is appropriate.

- The Commission should advise Congress to amend 18 U.S.C. § 3553(b) to insert a subsection that would address alternatives to prison sentences. The new subsection should establish that, at least for defendants with no prior felony convictions for federal or state criminal offenses, and no act of violence was involved in the offense for which they were convicted, it shall be presumed, absent a specific judicial finding of aggravating circumstances, that alternatives to prison shall be sufficient to satisfy justice and the other purposes set forth under § 3553(a) of Title 18. Such legislation should make clear that this provision applies irrespective of any pre-existing statute which prescribes a mandatory sentence of imprisonment.

Examples of alternatives to prison sentences should include: Home-confinement, supervised probation, community service, intermittent confinement (being home on weekends and in prison on weekdays or vice versa), fines, restitution payments to victims, electronic monitoring, participation in rehabilitation programs, participation in faith-based programs, placement in residential confinement centers (centers based in communities for the purpose of confinement similar to Residential Reentry Centers currently contracted by the BOP), and other alternatives to prison.

G. Identify Collateral Consequences and Their Punitive Impact

It is now widely recognized that criminal convictions result in wide-ranging collateral sanctions. Often these sanctions bear no rational relationship to the nature of the crime nor are there any reasonable temporal limitations on these consequences. Collateral consequences can impact family rights, access to housing and education, immigration status, access to credit, all manner of prospective employment and countless other aspects of human endeavor. Nevertheless, when convicted of a crime these punitive consequences are a component of the punishment suffered by the defendant and, because the sentencing court invariably lacks authority to eliminate them, they should be considered as such by a sentencing court.

Accordingly, Tzedek proposes that the Commission should review collateral sanctions imposed by federal and state laws to ensure courts properly consider the nature and impact of collateral consequences likely to be endured by federal defendants. The Commission should conduct research and issue a report concerning the array of collateral consequences faced by federal defendants.

This report should give special attention to whether and how collateral consequences may undermine or otherwise impede the effectiveness of the recidivism reduction provisions in Title I of the FIRST STEP Act of 2018 and should include specific recommendations to Congress as to how to mitigate the harmful impacts of collateral consequences, as well as recommendations for courts as to how they should adjust sentencing practices in recognition of the punitive nature of collateral consequences.

H. Recommendation that Judges, DOJ Officials and Others Visit Federal Prisons

As an organization that works with prisoners, Tzedek is acutely aware of the conditions of confinement in our nation's prisons. The impetus for this proposal is simple: those involved in sentencing persons to imprisonment should be keenly aware of the conditions of those institutions and have some first-hand knowledge of what life in prison is like. The Commission conducts training sessions for judges and other court personnel throughout the year, and Commission staff speak at numerous circuit conferences and other like events. In line with such sessions Tzedek proposes that the Commission should make a concerted effort to make visits to prison an integral part of this training and other programming.

Additionally, Tzedek urges the Commission to recommend that Congress amend 28 U.S.C. § 134, mandating that within one year of their initial appointment, and every five years thereafter, all United States District Judges,²⁹ United States Magistrate Judges, United States Circuit Judges, United States Supreme Court Justices, all U.S. Attorneys, Assistant U.S. Attorneys, the U.S. Attorney General, the Deputy Attorney General, and all attorneys of the Criminal Division of the U.S. Justice Department, should visit at least one federal prison. The BOP should be required to help coordinate these visits and help ensure that these visitors have

²⁹ As a case in point, Judge Mark W. Bennett, former U.S. District Judge to the Northern District of Iowa, visited 400 inmates he had sentenced, encouraging other judges to follow suit.

<https://www.desmoinesregister.com/story/opinion/columnists/rekha-basu/2019/10/31/judge-pursued-justice-where-others-didnt-visiting-inmates-prison/4107681002/>

access to all areas within the prison and be permitted to speak with any prison staff and prisoners.

Conclusion

Tzedek greatly appreciates the opportunity to share its perspective on the priorities for the 2025-26 cycle and looks forward to continuing to provide import and support for the Commission's important work.

Sincerely,

A handwritten signature in blue ink, appearing to read "Moshe Margaretten".

Rabbi Moshe Margaretten³⁰
President

Attachment

Revision of Section 2B1.1 of the United States Sentencing Guidelines Regarding Fraud & Other Revisions to the Guidelines.

Note: The following proposals are offered solely as alternative considerations should the Commission not pursue the proposal outlined in the body of Tzedek's comments, which

³⁰ Tzedek wishes to express enormous gratitude to Norman L. Reimer and Professor Douglas A. Berman for their instrumental assistance and counsel to formulate this document.

would jettison the loss table approach in favor of one that more meaningfully on individual *mens rea* and the unique circumstances of each case.

1. The Loss Table in Section 2B1.1 is outdated, excessive and exceedingly unfair in creating a false sense of precision and in being excessively complicated. Moreover, loss is only a sound aggravating factor in a Guideline calculation if a defendant both intended *and* actually caused a significant loss. Importantly, the current Guideline already rightly recommends a departure if and when the Guideline “substantially understates” or “substantially overstates” the seriousness of the offense, and so sentencing judges can and do have authority to look beyond the crude metric of loss. Assessment of loss should be just one component of determining a fair and effective sentence for an economic offense, and hence, we propose that the USSC revise Section 2B1.1 of the United States Sentencing Guidelines by amending and revising the Table in Section (b) to read as follows or similar:

“b) Specific Offense Characteristics

If the intended and actual loss roughly exceeded \$100,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
Loss intended or actual loss is less than roughly \$100,000	no loss-specific increase
Loss intended and actual loss is more than roughly \$100,000 and less than roughly \$1,000,000	add 3
Loss intended and actual loss is more than roughly \$1,000,000 and less than roughly \$50,000,000	add 6
Loss intended and actual loss is more than roughly \$50,000,000 and less than roughly \$250,000,000	add 9
Loss intended and actual loss is more than roughly \$250,000,000 and less than roughly \$1,000,000,000	add 12
Loss intended and actual loss is more than roughly \$1,000,000,000	add 15.

If the Commission is disinclined to rework the structure of the Loss Table as recommended above, Tzedek recommends that the Commission revise the loss amounts in Section 2B1.1 as follow to provide greater fairness and consideration of current economic conditions and factors:

“b) Specific Offense Characteristics

If the loss exceeded \$100,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
\$100,000 or less	no increase
More than \$100,000	add 2

More than \$250,000	add 3
More than \$500,000	add 4
More than \$1,000,000	add 5
More than \$10,000,000	add 6
More than \$50,000,000	add 8
More than \$100,000,000	add 10
More than \$150,000,000	add 12
More than \$200,000,000	add 14
More than \$250,000,000	add 16
More than \$375,000,000	add 18
More than \$500,000,000	add 20
More than \$750,000,000	add 25
More than \$1,000,000,000	add 30.