FAMM

February 10, 2026

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

Re: Comment on December 2025 Proposed Amendments

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. Nearly 35 years later, we mobilize communities of incarcerated persons and their families affected by unjust sentences to illuminate the human face of sentencing. For most of our history, FAMM has been an active advocate before the U.S. Sentencing Commission, participating in hearings, public comments, and meetings with staff and commissioners.

The Sentencing Guidelines are a critical piece of the work that FAMM does and are of the utmost importance to the people FAMM represents – the Sentencing Guidelines help determine how long loved ones will be away from home. With our members in mind, over 75,000 people nationwide, we welcome the opportunity to comment on the proposed amendments from December 2025.

A. The Commission has a statutory obligation to consider the impact of the guidelines on the BOP.

At the outset, we want to underscore that Congress mandated the Commission account for the impact an amendment will have on the Bureau of Prisons (BOP).[1] As FAMM and others have written about in past cycles,[2] the BOP is an agency in crisis.[3] The challenges facing the BOP are a "top management and performance challenge" for the Department of Justice.[4] Although there

[1] 28 U.S.C. § 994(g) ("The Commission, in promulgating guidelines . . . shall take into account the nature and capacity of the penal, correctional, and other facilities and services available . . . . The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.").
[2] *See, e.g.*, FAMM Comment to the Commission re: Proposed Amendments at 4-5 (Mar. 3, 2025).
[3] *See* Office of the Inspector General, *Ongoing Challenges Facing the Federal Bureau of Prisons*, (Jan. 26, 2026), *last visited Feb. 9, 2026,* https://oig.justice.gov/reports/top-management-and-performance-challenges-facing-department-justice-2025.
[4] *Id.*

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has been leadership change within the agency, the issues persist: crumbling infrastructure, staffing shortages,[5] staff misconduct,[6] among others. Moreover, there are persistent reports of abuse by staff (including sexual and physical), lack of healthcare, lack of programming, and increasing amounts of contraband. Given these conditions, it begs the question of what rehabilitation is served by sentencing people to lengthy time in prison.

Put simply, the BOP cannot handle the population of 153,123 people that it currently has in custody.[7] Of that total, 43% of the population are made up of people who committed drug offenses, the largest offense type by far.[8] As the Commission endeavors to update the guidelines it must consider whether these guidelines are appropriate in light of the dire situation at the BOP.

With that in mind, we turn to our comments on the proposed amendments.

B. Proposal 1: Drug Offenses

1. *Part A - FAMM supports Option 1 with a threshold no higher than a mixture of methamphetamine.*

Vanessa Crowe was twelve years old when she started using drugs.[9] She spent a lot of time around her older cousin, whom she idolized. And her cousin thought it was "cool" to introduce Vanessa to the drugs that she was using. From age 12 to 23, Vanessa was stuck in a cycle of addiction. This cycle saw her through the birth of her three children. After the birth of her third child, Vanessa got clean. She stayed clean for twelve years, but as Vanessa said, "then life happened, and I did not know how to deal with life on life's terms." Vanessa relapsed after over a decade of sobriety.

As Vanessa put it: "You start using drugs and it takes over and then you have to figure out a way to feed the monster, a way to keep your family fed, a way to survive."

Feeding the monster meant that Vanessa began selling drugs to support her own habit. Vanessa was not a cartel member, and she was certainly not a "kingpin;" she was a mother of three who

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[5] A recent Marshall Project story noted how staffing shortages are impacting psychologists at BOP. Because of staffing shortages, psychologists have been augmented to act as prison guards. Beth Schwartzapfel, *Amid Catastrophic Shortage, Psychologists Flee Federal Prisons in Droves,* The Marshall Project (Jan. 26, 2026), https://www.themarshallproject.org/2026/01/26/mental-health-federal-prisons-staffing-shortages.

[6] United States Gov. Accountability Office, *Strategic Approach Needed to Prevent and Address Employee Misconduct*, (Sept. 2025) (a majority of staff misconduct cases remain unresolved for over a year), https://files.gao.gov/reports/GAO-25-107339/index.html.

[7] Federal Bureaus of Prisons, Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited, January 29, 2026).

[8] *Id.* at https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Feb. 9, 2026).

[9] All facts from Vanessa's story were relayed by Vanessa to FAMM's General Counsel, with permission to recite them here.

desperately needed help. Which is why, when she found herself facing a nearly twenty year federal sentence for trafficking of methamphetamine, she felt a sledgehammer had been dropped on her. "I had no clue what I was selling; I did not even know there was a difference between pure meth or a mixture of meth. I was just selling so that I could turn around and use," Vanessa recalls. But the drugs she was selling were pure methamphetamine, and so she was sentenced as if she were at the top of the drug trafficking chain.

When Vanessa was sentenced to nearly twenty years in prison for trafficking actual meth, her children were 16, 19, and 21. "It was horrifying trying to mother from prison in a 15-minute phone call, but I did the best I could," Vanessa recalls. Upon reflection, Vanessa is adamant that she needed intervention at the time of her arrest. She had hit rock bottom and needed help. "I needed to go to prison. But did I need twenty years? Absolutely not. I could have been released after five or six years; there was no more rehabilitation that I needed."

In January 2025, after serving ten years, Vanessa received a commutation – her prison sentence was cut nearly in half.[10] In commuting the sentences of individuals with non-violent drug offenses, many of them methamphetamine offenses, the President recognized that these sentences were no longer serving the purposes of punishment. Vanessa did not need another decade in prison to rehabilitate herself; she came a long way on her own.

In fact, in all her years in federal custody, Vanessa *received no meaningful programming on substance abuse treatment or counseling*. When Vanessa first entered prison, she was told that ***her sentence was too long for*** BOP's residential drug treatment program, ***RDAP***. When her sentence was commuted in January 2025, facing an April 2025 release date, Vanessa once again sought to enroll in RDAP to help her transition home, and this time she was told that her sentence was ***too short*** to enroll in BOP's substance abuse programming.

If BOP does not have the capacity to enroll people with long drug sentences in meaningful substance abuse programming, what value is derived from these long sentences? This is particularly so as drugs are rampant in prisons, staffing is short, and infrastructures are crumbling. Unnecessarily long sentences in prison keep members of the community like Vanessa away from family for longer than necessary, without offering the resources needed to return home safely.

Vanessa found the strength to stay sober on her own. She cannot tolerate missing another day with her children or grandchild, and that resolve gives her the strength to stay clean. But this sobriety is one that she came to with no thanks to the decade she spent in prison.

Vanessa is remarkable and her story reflects her tenacious spirit. Vanessa's story, however, is not unique.

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[10] Executive commutation, Warrant 3 at 11 (January 17, 2025), https://www.justice.gov/pardon/media/1385601/dl?inline.

FAMM has previously shared the stories of other FAMM members, Celeste Blair and Debi Campbell,[11] who also spent excessive time in prison for meth offenses; women who had a history of addiction and were selling drugs to support their habit. The stories of these women underscore what is at stake with the meth sentencing guideline – excessive punishment that drains taxpayer dollars, separates families for longer than necessary, and does not serve the purposes of punishment.

Methamphetamine sentences are some of the harshest drug sentences in federal court. People sentenced to meth offenses received longer sentences than people sentenced for trafficking fentanyl, heroin, or cocaine.[12] And meth cases dominate the federal docket.[13] Thus, addressing meth sentences is critical to ensuring that the Commission is acting in accord with its statutory obligation in 994(g).

As the Commission's own report concluded, the lengthy sentences for meth offenses are attributed to the outdated purity distinctions between actual methamphetamine and a mixture of methamphetamine.[14] Not only can current drug purity reliance lead to unwarranted sentencing disparities,[15] but it can also lead to street-level users, people like Vanessa, serving exorbitant time in prison based on the illusion that their culpability is akin to that of a cartel member.

FAMM urges the Commission to eliminate the purity distinction in meth offenses. We believe that the only reasonable way to do this is through Proposed Option 1. Option 2, in contrast, would introduce ambiguity, unnecessary fact finding, and unpredictability to an already complex guideline.[16]

Option 1 eliminates the purity distinction and proposes different drug weights for the methamphetamine quantity threshold – meth actual, meth mixture, crack cocaine, or fentanyl. The Commission should use the current levels for a mixture of methamphetamine for the methamphetamine quantity threshold. There is no justification – in law, policy or practice – for setting meth weights at the current levels for meth actual, crack cocaine, or fentanyl.

a. <u>Crack cocaine should not be considered as a quantity threshold for meth.</u>

Tethering one long-criticized drug disparity to another long-criticized drug disparity could seriously undermine confidence in the Sentencing Commission. Few drug disparities have

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[11] FAMM Comment to the Commission re: Proposed Amendments (Mar. 3, 2025).
[12] USSC, Methamphetamine trafficking Offenses in the Federal Criminal Justice System at 4 (June 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf ("USSC Meth Report").
[13] USSC Meth Report at 4.
[14] USSC Meth Report at 32-35.
[15] USSC Meth Report at 43.
[16] *See* USSC *Proposed Amendments, Methamphetamine* at 5 (proposing option 2 which would reduce a base offense level based on certain factors and in certain circumstances), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202512_prelim-RF.pdf.

engendered more public backlash than the crack/powder disparity, with crack being recognized as unjustly high and racially pernicious.[17] The Commission itself has long criticized the crack-cocaine/powder cocaine disparity and called for reform.[18] Even though crack cocaine quantity thresholds are lower today, they are still too high. Thus, it is hard to conceive of any gain that would be made by doubling down on crack sentencing lengths for meth offenses.

The Commission's proposal to use crack cocaine likely has its origin in the 1988 Congress, which set the same mandatory minimum quantity thresholds for meth actual and crack cocaine. But it is hard to make sense of why the Commission would want to revisit that history when the Commission's own research and advocacy has been critical of it.[19] Moreover, the current crack cocaine sentencing structure has evolved since the 1988 Congress, rendering the connection between the two drugs even more irrelevant.[20] Statutory alignment from over thirty years ago should not drive current drug sentencing policy.

b. <u>Meth actual quantity thresholds are outdated and should not be used for current meth sentences.</u>

Proposing crack cocaine as a quantity threshold rests on the flawed assumption that meth actual is an appropriate baseline for today's meth sentences. The Commission has invested significant effort in researching meth offenses and collecting information from experts. The weight of this research counsels against setting all meth offenses at the meth actual levels.

For starters, judges across the country recognize that meth actual sentences are too long and do not reflect the individual before them for sentencing. In FY 2024, 57% of all meth offenses were for methamphetamine actual. And yet, in that same period, less than one-third of people sentenced for a meth offense in FY 2024 were sentenced within the guideline-range.[21] Most

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[17] *See, e.g.,* The Associated Press, *US Att'y Gen. Moves to end Crack Cocaine Sentencing Disparities* (Dec. 17, 2022), https://www.theguardian.com/us-news/2022/dec/17/merrick-garland-sentencing-disparities-crack-cocaine.
[18] *See* USSC, *Fifteen Years of Guidelines Sentencing* at xvi, 51, 132 (Nov. 2004) (detailing the Commission's reports in 1995, 1997, 2002, and 2007 asking Congress to reduce the crack/powder disparity given its disparate sentencing impact), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.
[19] *Id.*
[20] *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010); First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018); *Cf.* U.S. Sentencing comm'n, Guidelines Manual, App. C, amend. 706, 711, and 713; USSG, App. C, amend. 782 (effective Nov. 1, 2014).
[21] USSC *Quick Facts, Methamphetamine Trafficking*, FY 2024 at 2. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Methamphetamine_FY24.pdf.

people convicted of meth actual offenses received a sentence well below the average guideline minimum for meth actual.[22]

Moreover, the assumed heightened culpability that was assigned to trafficking in pure meth has been disproven by the Commission's own research.[23] The Commission's data report in 2024 found from a random sample of sentenced individuals that the average purity for street-level dealers was only marginally below that for wholesale traffickers or high-level suppliers – 91.3%, 94.1%, and 95.2% respectively.[24]

If the long sentences for pure meth were achieving their job of disincentivizing the sale of pure meth, then one would imagine there would be fewer cases with pure meth and more cases with a mixture of meth. But the opposite is true. Meth is purer now than ever because of how meth is currently being produced.[25] Thus, promulgating a methamphetamine guideline that is tethered to meth actual ignores all the research and work the Commission has done to understand the current meth market. It also would perpetuate the unnecessarily long sentences of people like Vanessa.

c. <u>There is no logical reason to tie meth and fentanyl quantity thresholds.</u>

The Commission should not equate meth and fentanyl. Notably, fentanyl levels are *lower* than meth actual levels. While we appreciate that if fentanyl levels were used for meth offenses, it would reduce the unnecessarily high offense levels for meth actual, we nonetheless struggle to understand any justification for tethering the quantity thresholds in meth offenses to the quantity threshold in fentanyl offenses. Meth and fentanyl have very different pharmacological qualities, different market dynamics, different resulting harms, and different production processes.[26] The two should not be connected for the purposes of setting a guideline range. This is particularly so as there has been increasing pressure to augment fentanyl sentences and steps to do so could also continue to unnecessarily increase meth offense levels.

d. <u>All meth offenses should be set at a quantity threshold for a mixture of meth.</u>

What remains from the proposed options is the quantity threshold for a mixture of meth. This is the only option that is supported by both the Commission's research as well as experts who testified before the Commission. According to Jonathan Caulkins, "[w]hatever the balancing of arguments pro and con for [purity distinctions] in the past, methamphetamine market conditions have changed over the last 10 to 20 years. . . . I suggest . . . 'Methamphetamine (actual)' be

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[22] *See id.*; *see also* USSC, Public Data Briefing, Proposed Amendments on Drug Offenses at 6-7, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026_Drug-Offenses.pdf.
[23] *Supra n.* 15.
[24] USSC Meth Report at Fig. 23.
[25] *Id.*; *see also* testimony of Jonathan Caulkins (Aug. 5, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20250805/Caulkins.pdf.
[26] *See id.* at 2-3.

sentenced as methamphetamine mixture is today. . ."[27] This position is also supported by data on how judges sentence meth offenses today.[28]

We urge the Commission to adopt Option 1 at a level no greater than a mixture of methamphetamine. As the Commission reviews its proposals, we hope it does so with people like Vanessa in mind. People who have substance abuse disorder and who were over-sentenced, many of whom receive little to no opportunities for reform in an over-burdened prison system.

2. *Part C: FAMM opposes the proposed enhancements for offenses involving fentanyl and fentanyl analogues.*

FAMM has long maintained that the opioid epidemic, which is a public health emergency, cannot be solved by increasing criminal sentences.[29] And yet, it seems that when a public health issue relating to drug use and overdose emerges, system actors are quick to suggest long sentences to intervene.[30]

Why do long sentences not deter drug use and drug related crime? For starters, people who are engaged in criminal activity often have no idea that the punishment has been increased.[31] Moreover, the people most impacted by harsh sentences are often low-level traffickers not the major traffickers at the top of the criminal organization who long sentences intend to capture.[32] Low-level traffickers will be replaced, while the leader/organizers continue to operate their

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[27] In fact, J. Caulkins details the reasons that meth offenses should be set at a quantity threshold of powder cocaine, which is meaningfully lower than meth actual. *Caulkins id.* at 8. We would certainly support an amendment to the meth quantity thresholds that would bring meth offenses in line with cocaine offenses. However, considering the proposed amendments, we support a quantity threshold no higher than a mixture of meth.

[28] USSC Meth Report at 51 ("individual sentenced for trafficking meth mixture were sentenced within guideline range more frequently than either actual or ice traffickers.").

[29] See FAMM Response to Issue for Comment on Fentanyl (citing FAMM 2007 comment);

[30] *See e.g.,* Letter from Senator Jeff Sessions 45-46 (March 30, 2007) ("The 100:1 ratio of crack to powder cocaine was enacted largely to prevent the spread of crack cocaine across America. . ."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200703/200703_PCpt11.pdf; Letter from Senators Patrick Leahy, Edward Kennedy, Joseph R. Biden, Dianne Feinstein, & Richard Durbin (2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200703/200703_PCpt11.pdf ("Two decades ago, our Nation knew little about crack other than the fear that it was more dangerous than the powder form and would greatly increase drug-related violence. Since that time, the matter has been studied extensively by the Commission").

[31] *Nat'l Inst. of Justice, Five Things About Deterrence (May 2016), https://www.ojp.gov/pdffiles1/nij/247350.pdf.*

[32] *Id.* ("imprisoning individual drug dealers seldom reduces the availability of drugs or the number of traffickers"); *see also* Letter to the Commission from the Drug Policy Alliance 9-10 (March 6, 2018), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180306/DPA.pdf.

organizations (known as the replacement effect).[33] The Commission already knows this reality. In one of its own reports the Commission observed that, "criminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high.[34] Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else."[35] Finally, many people convicted of drug trafficking offenses have substance abuse disorders themselves, which greatly influence their decision-making.[36]

FAMM members have loved ones who are users of fentanyl and fentanyl analogues. FAMM members have lost loved ones to opioid use disorder. And yet, FAMM does not believe that increasing sentences will address the tragic realities of the opioid crisis. When people are dying from drugs and it feels like there is no hope, we appreciate that fear may take the reins and direct the public's response. But we must learn from our history that when fear is in the driver's seat, we tend to create more problems than we solve.[37]

Undoubtedly, the opioid crisis is a public health epidemic.[38] And public health intervention strategies are working. Overdose deaths from all drugs, including, opioids are *declining* substantially – by nearly 24%.[39] The reduction in fatal overdoses for fentanyl is even more

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[33] *See id.*

[34] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 131 (2004).

[35] *Id.*

[36] Leslie E. Scott, *Substance Use Disorder's Impact on Criminal Decision-Making and Role in Federal Sentencing Jurisprudence: Arguing for Culpability-Based SUD mitigation*, 19 Ohio State J. of Criminal Law 471, 471-77 (2022), https://moritzlaw.osu.edu/sites/default/files/2023-02/7%20-%20Scott.pdf.

[37] See Jelani Jefferson Exum, *Reconstructing Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs* 58 Am. Crim. L. Rev 1685, 1687 (2021), https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2021/07/58-4_Exum-Reconstruction-Sentencin.pdf; *see also* Christopher Coyne & Abigail Hall, Cato Institute, *Four Decades and Counting: The Continued Failure of the War on Drugs* 1 (2017), https://www.cato.org/policy-analysis/four-decades-counting-continued-failure-war-drugs; Jeremy Travis et. al., Nat'l Res. Council, *Incarceration in the United States: Exploring Causes and Consequences* at 154 (2014) ("[T]he best empirical evidence suggests that the successive iterations of the war on drugs—through a substantial public policy effort—are unlikely to have markedly or clearly reduced drug crime over the past three decades.").

[38] Determination that a Public Health Crisis Exists, (Oct. 26, 2017), https://aspr.hhs.gov/legal/PHE/Pages/opioids.aspx.

[39] *See, e.g.,* Brian Mann, *Deadliest Phase of Fentanyl Crisis Eases, as all States see Recovery*, NPR (Mar. 10, 2025), https://www.npr.org/2025/03/07/nx-s1-5295618/fentanyl-overdose-drugs; Center for Disease Control, CDC Reports Nearly 24% Decline in U.S Drug Overdose Deaths. (Feb. 25, 2025), https://www.cdc.gov/media/releases/2025/2025-cdc-reports-decline-in-us-drugoverdose-deaths.html.

significant than the overall reduction in overdose deaths for all drugs – around 30.6%.[40] Researchers attribute these positive trends to increased distribution of naloxone, increased evidence-based treatment for substance abuse disorder, shifts in the illegal drug supply,[41] and investment in prevention and response programs.[42] Lengthy sentences are not responsible for reduced overdose deaths or reduced drug crime. In fact, creating longer sentences may actually disrupt these positive trends. Incarcerating people with opioid abuse disorder can lead to more fatal overdoses.[43]

Moreover, as discussed above[44] and in previous comments, the BOP cannot handle the population that it currently has. Given the Commission's statutory obligation to consider the impact of its proposals on the prison population, increasing prison sentences for drug offenses is not the way forward. This is particularly so when the Commission is considering doing so via specific offense characteristics. The Commission simply cannot account for every aggravating factor that may pertain to fentanyl and fentanyl analogue offenses – attempting to do so undermines the Commission's effort to simplify the guidelines.[45] Judges can always consider unique circumstances of a case in determining the most appropriate sentence.[46] But the proposed enhancements belie everything that we know about most people sentenced for drug offenses – they are unaware of what they are selling or to whom they are selling.

a. <u>FAMM opposes the proposed enhancement involving people under age 18 or 21.</u>

Likely to address issues with younger people using and overdosing from fentanyl, the Commission proposes enhancing sentences for individuals who sell fentanyl to youth. We oppose this proposed enhancement.[47] In Fiscal year 2023, only 37 cases involved distribution of fentanyl or fentanyl analogue to a person under the age of 21.[48] And in 77% of those cases, the person selling was a street level dealer.[49] Moreover, the average age of the person selling to young people was also young.[50] With this data in mind, it seems like this enhancement would

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[40] *Supra* n. 39, Mann ("It has been a complete shock to see the [overdose deaths] declining in the way they have been").
[41] For a more comprehensive conversation about Xylazine, see the Comment submitted by the Federal Defenders.
[42] *Supra* n. 39.
[43] Nora D. Volkow, *Addiction Should be Treated, not Penalized*, J. of Neuropsychopharmacology (Aug. 2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC8369862/.
[44] *Supra* Section A.
[45] See USSC *Proposed Amendments: Simplification* (Dec. 2025).
[46] 18 U.S.C. § 3553(a).
[47] USSC *Proposed Amendments: Enhancements for Offenses Involving Fentanyl or Fentanyl Analogues* (Dec. 2025).
[48] USSC, Public Data Briefing: Proposed Amendments on Drug Offenses 29 (2026), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026_Drug-Offenses.pdf.
[49] *Id.* at 30.
[50] *Id.* at 32 (average age of 26).

only serve to add punishment to those who are among the least culpable – young, street-level dealers who are most likely selling to support their own drug habit. To the extent that a case presents particularly egregious facts around selling to youth, a judge could of course consider those as part of the § 3553(a) factors, but the Commission need not add this enhancement to the guidelines.

If, however, the commission resolves to include this enhancement, it should set the age at 18 and there should be a strict *mens rea* provision requiring that the person selling the drugs has both knowledge of the age of the individual and knowledge that what they were selling was fentanyl or a fentanyl analogue. Finally, if the Commission chooses to move forward with this proposed amendment, we support an additional limitation that will only add this enhancement if there is an age differential between the person who received the drugs and the person who sold drugs of at least eight years. This age differential is in line with the upper level of the average age of individuals selling to youth.[51]

b. <u>FAMM opposes the proposed enhancement involving the dark web.</u>

We urge the Commission to decline to adopt an enhancement that would increase the sentencing range for individuals who purchase fentanyl through the dark web.[52] Using the dark web is fairly commonplace in drug trafficking and does not suggest an increased culpability. Moreover, it does not seem that there is any data or evidence supporting the notion that use of the dark web makes fentanyl or opioids more lethal than those sold on the street. It is simply a modern way to participate in drug trafficking. The dark web may well be the modern-day street-corner. Given how ubiquitous the internet and technology are, this enhancement threatens to be over broad without actually addressing the problems of fentanyl and fentanyl analogues. What is more, as technology rapidly changes, this enhancement is likely to be obsolete when new technology emerges.

c. <u>FAMM opposes the proposed enhancement involving fentanyl mixed with xylazine.</u>

The Commission proposed an enhancement that would increase punishment for individuals convicted of fentanyl offenses that involved xylazine.[53] The emergence of xylazine in fentanyl reflects the desperation of a group of people who have a deadly habit and will use whatever is sold to them to satisfy their addiction. People are not likely *seeking* out xylazine, but, rather, using it because it is what is available. As such, we are hard pressed to see how there could be *any* deterrent effect by enhancing punishment for the sale of fentanyl mixed with xylazine.

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[51] *Id.*
[52] USSC *Proposed Amendments: Enhancements for Offenses Involving Fentanyl or Fentanyl Analogues* (Dec. 2025).
[53] *Id.*

Moreover, increasing punishment of individuals with cases involving xylazine will exacerbate racial disparities. A whopping 82% of people with fentanyl offenses that included xylazine were Black or Hispanic.[54]

In addition, given how new xylazine is to the drug market, the Commission should spend more time researching and understanding xylazine and the impact of xylazine as compared to fentanyl. Over 150 scientists and public health experts agree that more time is needed to understand what is transpiring in the drug market and the impact it will have.[55]

d. FAMM opposes the proposed enhancement involving a tableting or encapsulating machine.

We are sensitive to the Commission's concerns that traffickers may be using tableting machines to legitimize fentanyl, appearing as a prescription drug when it is in fact an illicit and lethal substance. Likely with this concern in mind, the Commission proposes an enhancement for fentanyl offenses that involve a tableting/encapsulating machine. But the Commission has already adopted an enhancement related to fake-pills and has spent time in recent amendment cycles revisiting and clarifying that enhancement.[56] It is difficult to see what additional value would be gained from adding this enhancement that has not already been accounted for. As such, we oppose this proposal.

C. Proposal 2: FAMM Supports the Inflationary Adjustment

The monetary tables and values have not changed in over a decade. Meanwhile, inflation has soared. This means that people are serving longer than necessary sentences based solely on the monetary table that was in place reflecting outdated dollar values. We support the Commission in updating the monetary tables and values to reflect modern inflation.

That said, we echo the concern raised by the Federal Defenders, that the *fine table* should not be changed. Fines and monetary value are inherently different. Fine amounts do not need to be corrected. As it is, many people cannot pay their court-imposed fines.[57] The fees often function to deepen an individual's involvement in the criminal justice system, and may also thwart an

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[54] *Supra* n. 48.

[55] Aaron Bailey, et. al., *Letter to Congress re: Opposition to Placing Xylazine on Schedule III of the CSA* (Sec. 203, Title II of H.R. 4531) (December 11, 2023), http://drugpolicy.org/news/in-response-to-house-vote-on-xylazine-criminalization-hundreds-of-medical-experts-scientists-advocates-call-for-a-public-health-approach/.

[56] *See* USSG §2D1.1(b)(13).

[57] *See* Douglas N. Evans, *Exposing the Financial Barriers to Offender Reintegration,* Research & Evaluation Center, John Jay College of Criminal Justice, The Debt Penalty at Executive Summary (Aug. 2014), https://www.prisonlegalnews.org/media/publications/The%20Debt%20Penalty%20Financial%20Barriers%20to%20Offender%20Reintegration%20John%20Jay%20College%202014.pdf.

individual's successful re-entry into the community.[58] Moreover one study researching court fines and fees in states found that the money collected fails at "efficiently raising revenue."[59] For these reasons, we think that the fine table is already more than enough to capture the consequences of the criminal activity. Increasing the fine table would only levy additional and unnecessary punishment on people who are already struggling to fulfill court-ordered payments.

D. Proposal 3: Economic crimes

FAMM has long been critical of the guideline for economic crimes.[60] We are grateful to the Commission for proposing revisions to § 2B1.1. FAMM supports and adopts, by reference, the comment submitted by the Federal and Public Defenders on Economic Crimes.

E. Proposal 4: Post-offense rehabilitation

FAMM works with individuals whose loved ones face federal sentences or have already been sentenced. One common theme we hear is "yes, my loved one messed up, but then they tried to get their act together and it did not matter." With the proposal to account for post-offense rehabilitation, the Commission is signaling that those positive behaviors do matter when it comes to culpability. Additionally, the amendment can make an important contribution to public safety. Most people sentenced to time in federal prison will one day return home. Their demonstrated efforts to account for their behavior and change course is a jump start to their success in prison, and to their success upon their return home. FAMM wholeheartedly supports the Commission's work to recognize and incentivize post-offense rehabilitation.

To this end, the Commission has proposed two options.[61] For the reasons discussed below, FAMM supports the Federal Defenders suggested language for post-offense rehabilitation, which builds on Option 1.

1. *This proposal gives guideline credit for an individual's own behavior, which will help judges mete out sentences that are sufficient but not greater than necessary.*

The goal of sentencing as set out in 18 U.S.C. § 3553(a) is to ensure the sentence is "sufficient, but not greater than necessary" to advance the foundational purposes of punishment. The "purpose[] of the United States Sentencing Commission" is to support and advance 18 U.S.C.

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[58] Keith Finlay, et al., *The Impact of Criminal Financial Sanctions: A Multi-State Analysis of Survey and Administrative Data* (Aug. 2023), https://www.nber.org/system/files/working_papers/w31581/w31581.pdf.
[59] Matthew Menendez & Lauren Brooke Eisen, *The Steep Costs of Criminal Justice Fees & Fines* (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines.
[60] *See* FAMM Comment to the Commission at 3 (March 18, 2015), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/FAMM.pdf.
[61] *See USSC Proposed Amendments* at 81 (Dec. 2025).

§ 3553(a).[62] Thus, it is squarely within the Commission's authority to include a guideline provision that encourages judges to look at how an individual's positive post-offense behavior demonstrates the likelihood for rehabilitation and reduced recidivism. Crediting such conduct advances the rehabilitative and public safety goals of § 3553(a). Enshrining this proposal in the guidelines will help to ensure that judges account for this behavior when assessing how much time is appropriate for an individual to serve in prison.[63]

Put simply, people who take steps to better themselves likely need less time in prison before they are ready to return to society, and the guidelines should reflect that reality. Without it, people may be serving sentences that are greater than necessary, in direct tension with § 3553(a) and the Commission's own enabling statute.

Currently, the only meaningful opportunities for a post-offense reduction are tied to an individual's willingness to cooperate with authorities – either in accepting responsibility (§3E1.1) or providing substantial assistance to the government (§5K1.1). In an era in which Sixth Amendment rights often cave to prosecutorial power,[64] it is critical to provide a pathway for a reduction distinct from those that are tied to cooperation with the government.

The current post-offense reductions, and those proposed by the Commission, serve multiple purposes and should be crafted to apply cumulatively. Additionally, an individual should be able to receive the maximum number of reductions under all three and there should not be a cap on the reduction level for this proposal, §3E1.1, and §5K1.1. This will encourage and recognize individuals who demonstrate significant post-offense rehabilitation, take responsibility for their actions, and provide useful information to the government. Accounting for these behaviors cumulatively will also help ensure that the ultimate sentence is not greater than necessary and based on the individual's propensity for rehabilitation.

2. *Flexibility is essential to ensure that unwarranted disparities are not baked into the guidelines.*

People come to federal court with diverse backgrounds – geographic, economic, familial, etc. They vary with respect to the resources available to them. Moreover, the guidelines favor

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[62] 28 U.S.C § 991(b).

[63] Jelani Jefferson Exum, *Why March to a Uniform Beat? Adding Honesty and Proportionality to the Tune of Federal Sentencing*, 15 Tex. J. on C.L. & C.R. 141, 169 (2010) ("Psychological anchoring studies suggest that it is difficult for decision-makers to break away from their initial starting point. Therefore, beginning the sentencing determination with the Guidelines makes it difficult for a sentencing court to give equal consideration to other § 3553(a) factors."). It is equally important, however, that the Commission clarify that nothing in the guideline restricts judges from continuing to use their discretion under § 3553(a).

[64] NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial 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.

individualization whenever possible.[65] As the Commission considers the post-offense conduct proposal, it must allow for an individualized assessment based on that person's unique situation. Option 2, which proposes eligibility based on efforts that "go beyond the typical actions" is not workable – there is no *typical* case, each person's situation is unique.

Some people who are released pre-trial have a very short amount of time between the beginning of a criminal case and sentencing. Some people live in rural areas, where access to programming or resources may be limited by geography rather than willingness to reform. Some people may lack the financial resources to pay for support and require court-ordered interventions.

As the Commission recognizes, some individuals can only access rehabilitative services through a court-order because they would otherwise not have the financial means to participate.[66] These individuals should *not be penalized* for participating in court-ordered programs. As individuals who are about to enter court-ordered sentences, demonstrating compliance with court-ordered interventions addresses the same concerns as someone who would participate on their own accord. Similarly, the Commission should not penalize individuals who only begin their participation after they are indicted or under investigation. Some people need the rock-bottom wakeup call of government intervention to reassess their behavior and make a change. Doing so at that point does not diminish their positive behavior.

Many individuals are held in pre-trial release. Some are in BOP, but many are held in local jails or detention centers where the programming that is available to them is minimal, at best. Someone who is held in custody pretrial may have limited opportunities to demonstrate their commitment to rehabilitation, and what opportunity they do have will certainly look different than people in the community pre-sentencing. Their efforts to demonstrate positive behavior might include fostering relationships with family members, sobriety, participating in or attempting to sign up for programming (even if the programming is not available to them), among other things.[67] They may also not be able to enroll in programs at detention centers or jails at no fault of their own; this should not be held against them.

The Commission would not be alone in recognizing individuals who intend to participate in programming but, through no fault of their own, cannot access it. The First Step Act will provide earned time credit to individuals as though they were participating in evidence-based programming and productive activities but cannot because of an institution's waitlist, or an interruption in programming that is not fault of their own.[68]

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[65] *See* 28 U.S.C. § 991(b)(1)(B) (charging the Commission to draft guidelines that avoid unwarranted disparities among similarly situated defendants and "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors . . . .").
[66] USSC Proposed Amendments at 84 Issue for comment 4 (Dec. 2025).
[67] It may also be useful to examine the list of productive activities under the first step. These productive activities include: productive use of free-time, family interactions, personal growth and development classes, community service projects, among others. https://www.bop.gov/policy/progstat/5410.01_cn2.pdf at 7.
[68] *Id.*

Accounting for differences in how one's positive post-offense rehabilitation is recognized is particularly important given the racial and economic disparities in the population detained pretrial.[69] If the guidelines fail to account for a variety of circumstances, it may actually create unwarranted disparities.[70]

For the reasons above, we agree with the Federal Defender's proposal that supports Option 1 and moves the list of examples to a non-exhaustive application note. That said, the flat 4-level reduction in Option 2 is preferable to the tiered reduction in Option 1. Their proposal is rescripted here for clarity:

§3E1.2. Post-Offense Rehabilitation

(a) If the defendant demonstrates prior to sentencing positive post-offense behavior or rehabilitative efforts, decrease the offense level by **4** levels.

(b) In determining whether a defendant qualifies for a reduction under subsection (a), the court shall consider the actions and efforts undertaken by the defendant for the benefit of the defendant's own rehabilitation, victim(s) of the offense, community, or other people. A non-exhaustive list of examples of such actions and efforts can be found in Application Note 1.

In making such a determination, the court may consider any positive post-offense behavior or rehabilitative efforts undertaken by the defendant.

These actions and efforts may take place whether a person is detained or released pretrial. Lack of access to resources, formal treatment, or other programming either in the community or in a detention facility, through no fault of the defendant, does not preclude application of the reduction if the defendant has otherwise made efforts at, and demonstrated a commitment to, post-offense rehabilitation.

(c) This reduction does not limit the court in any way with respect to its consideration of 18 U.S.C. § 3553(a) factors as laid out in §1B1.1(b).

Application Notes:

1. ~~Appropriate considerations include the following~~ Examples of conduct to which subsection (a) might apply are as follows:

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[69] Jennifer Skeem et al., *Place Matters: Racial Disparities in Pretrial Detention Recommendations Across the U.S.*, 86 Federal Probation 5, 8 (Dec. 2022) (discussing varying disparities across districts), https://www.uscourts.gov/sites/default/files/86_3_2_0.pdf.
[70] 28 U.S.C. § 994.

a. The defendant took appropriate steps to reduce or remedy the harm caused by the offense.

b. The defendant ~~[made voluntary payment of]~~ paid restitution or ~~[voluntarily]~~ entered into an installment payment schedule for making restitution to any victims of the offense(s)~~.~~, or returned or made a good faith effort to return the money or property to any victim. However, an individual's financial inability to make restitution payments shall not preclude application of this adjustment.

c. The defendant completed or is successfully participating in a ~~[voluntary]~~ ~~court~~ rehabilitation program.

d. The defendant completed or is successfully participating in a treatment program to address the abuse of, or has maintained sobriety from, drugs, alcohol, ~~or~~ gambling, or other forms of addiction.

e. The defendant completed or is successfully participating in counseling or therapeutic services (e.g., mental health or anger management).

f. The defendant completed or is successfully participating in a General Education Development (or similar) program, vocational training, or skills training.

g. The defendant maintained or obtained gainful employment.

h. The defendant provided ~~[voluntary and]~~ ~~consistent~~ financial or other support to family members, community members, or dependents or repaired fractured relationships with family or community members who have been positive influences in the defendant's life.

i. The defendant performed volunteer or other civic, charitable, or public service ~~in the community~~.

j. The defendant assisted in preventing another person from engaging in unlawful conduct.

k. The defendant assisted in promoting another person's rehabilitation (e.g., identifying or getting into treatment a person with an addiction ~~addicted to or regularly abusing controlled substances~~).

l. The defendant voluntarily ceased the criminal activity prior to the defendant's knowledge of the criminal investigation or prosecution for the offense.

F. Proposal 5: Multiple Counts

The multiple counts rule was intended to clarify and simplify the accounting needed for individuals with multiple offenses; it was meant to avoid double counting. In reality, however, the rule has engendered confusion and is frequently misapplied.[71] With this in mind, we support the Commission as it strives to simplify this important, yet confusing rule. For the reasons articulated by the Federal Defenders, we do not oppose this proposal.

G. Proposal 6: Simplification

As part of the Commission's goal of simplifying the guidelines,[72] the Commission has identified twenty-six specific offense characteristics that have not been used by courts in the last five fiscal years. Within the past twenty-five years, the identified specific offense characteristics were only sparingly applied. FAMM supports Proposal 6 and applauds the Commission for the hard work of identifying and eliminating outdated provisions.

H. Proposal 7: Sophisticated Means

The Commission has proposed two options pertaining to the sophisticated means enhancement. Option 1 would position the sophisticated means enhancement in Chapter 3 where it could ostensibly apply to any offense. Option 2 would keep the enhancement applicable to the five offenses to which it already applies and amend the definition of "sophisticated means."

Many problems have been recognized with the sophisticated means enhancement in its current state – ambiguity, over-application, disparity in application, among others.[73] As one commentator observed, the sophisticated means enhancement suffers from "sentencing creep." In other words, "various participants within the federal criminal justice system have grown comfortable with a broader definition and application of [sophisticated means] than they may have originally intended."[74] Sentencing creep via the broadening of sophisticated means has serious consequences: "a mechanism meant to sort the worst from merely the bad instead becomes a six to eighteen month add-on in prison time for nearly everyone."[75] These problems inherent to the sophisticated means enhancement will creep into *all* of guidelines if the enhancement is relocated to Chapter 3. We urge the Commission not to do this.

The Commission's proposed definition of "sophisticated means" does not ameliorate the identified problems. The proposal uses "complexity [of a] typical offense" as the point of comparison to mete out what conduct is sophisticated such that it should be subject to enhanced punishment. If this definition were adopted, courts would have to litigate the contours of a

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[71] *USSC Proposed Amendment* at 90 (emphasis added).

[72] USSC, "Notice of Final Priorities," 90 FR 39263, 39264 (Aug 14, 2025).

[73] *See* Miriam Baer, *Unsophisticated Sentencing*, Cal. Western School of Law 63-68 (2015), https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1510&context=fs

[74] *Id.* at 84-85.

[75] *Id.*

"typical offense." This will increase litigation and also likely create unwarranted disparities based on how "typical offense" is viewed by different courts across different jurisdictions.

If the Commission is intent on modifying the definition of sophisticated means, FAMM supports the definition proposed by the Federal Defenders. But FAMM urges the Commission to not position this enhancement in Chapter 3 and, instead, limit it to the five offenses to which it currently applies.

I. Conclusion

On behalf of our members, FAMM is grateful for the opportunity to participate in the Sentencing Commission's amendment cycle, as we strive to help make the guidelines more fair for individuals and their loved ones.

Sincerely,

Shanna Rifkin
General Counsel