July 18, 2025

Dear Judge Reeves and Members of the United States Sentencing Commission:

Thank you for seeking public comment on proposed and additional priorities for the U.S. Sentencing Commission's ("Commission") amendment cycle ending May 1, 2026. On behalf of Right On Crime—a national criminal justice campaign of the Texas Public Policy Foundation focused on conservative, data-driven solutions to reduce crime, restore victims, reform offenders and lower taxpayer costs— I am pleased to submit the following comments and recommendations.

In its solicitation dated June 9, 2025, the Commission invited comment on nine amendment priorities, including a catch-all whereby the Commission would also consider "other miscellaneous issues[.]"[1] Right On Crime applauds the Commission for pursuing input from the public on how to improve the federal Sentencing Guidelines (hereafter "Guidelines"). Such a transparent and communicative process is essential for good governance and building trust. As such, this amendments process will assuredly encourage a comprehensive dialogue on meaningful and data-driven improvements to the criminal justice system that the Commission can undertake, while understanding that other solutions may be better delegated to Congress.

To that end, Right On Crime respectfully submits to the Commission the below select comments and further recommendations to the Guidelines for the amendment cycle ending May 1, 2026.

(1) Drug Trafficking offenses under §2D1.1

Methamphetamine purity distinctions:

Methamphetamine is the most common drug in the federal criminal justice system.[2] But, unlike the vast majority of the illicit drugs subject to federal criminal penalties, methamphetamine offenders are subjected to different sentences based on the purity of the drug involved in the offense. The current statutory penalties effectively create a 10-to-1 ratio, where it takes ten times less pure methamphetamine to trigger the same penalty as it would for a more pure, detectable amount of methamphetamine.[3] The Guidelines similarly use drug purity as a proxy for a defendant's culpability.[4] This disparity has resulted in overly punitive and lengthy sentences for offenders culpable of the same conduct.

The impetus of the purity distinction for methamphetamine offenders was rooted in addressing the domestic production crisis earlier this century.[5] However, most methamphetamine now distributed and used in the United States originated in Mexico and is smuggled across the southwest border.[6] And more so, the purity of this Mexican-made methamphetamine rarely tests less than 90% pure.[7] So the alleged purpose behind the purity disparity is now moot.

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[1] U.S. Sentencing Comm'n, Federal Register Notice of Proposed 2025 – 2026 Priorities, available at https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2025-2026-priorities.
[2] U.S. Sentencing Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 13, 2024).
[3] *Id*.
[4] U.S.S.G. § 2D1.1 comment 27(C).
[5] *Supra* n. 2.
[6] U.S. Drug Enforcement Administration, *National Drug Threat Assessment 2025*, p. 25 (May 2025).
[7] *Supra* n. 2.

A growing number of federal courts have recognized the absurdity of this purity distinction.[8] To that end, Right On Crime urges the Commission to eliminate this arbitrary and meaningless purity distinction and instead apply the "mixture" Guidelines for all methamphetamine cases. This will result in more predictable and consistent sentencing ranges for offenders while still ensuring that culpable actors are held accountable for their illegal methamphetamine-related acts.

Possible Statutory Changes Relating to Fentanyl:

As the Commission knows, Congress recently advanced the *HALT Fentanyl Act*, which amends the *Controlled Substances Act* to permanently classify illicit fentanyl analogues – also known as fentanyl-related substances (FRS) – as Schedule I.[9] President Trump signed this bill into law on July 16, 2025. Including all FRS into Schedule I will certainly impact federal criminal sentencing and the Guidelines.

For instance, all individuals who manufacture, import, or possess with the intent to distribute FRS will face mandatory minimum sentences aligned with other Schedule I drugs. Right On Crime believes that the Commission should follow the mandate from Congress and include FRS drugs adjusted penalty ranges accordingly in the Guidelines. However, to assist in balancing an inadvertent overinclusion of criminal behavior,[10] the Commission could include commentary language allowing judges to consider the following relevant factors when deciding where in the statutory range a defendant's sentence should be: scientific developments, research, or studies that call into question or undermine the lethality of the instant FRS that could warrant the statutory mandatory minimum overly punitive; the role of the defendant in the manufacture, distribution, or importation of the FRS; and the mens rea of the defendant.[11]

Similarly, the Commission should review and study opportunities for petitions, hearings, or comparable re-sentencing options for defendants who were convicted and sentenced to a federal crime involving FRS but where the instant FRS involved was later found to be inert or not within the bounds of Schedule I.[12]

The *HALT Fentanyl Act* was passed by Congress on a bipartisan basis with the hopes of fighting against the scourge of fentanyl drugs. It is Right On Crime's hope that this law is effective in combatting drug cartels, transnational criminal organizations, and other nefarious criminal groups. Likewise, Right On Crime believes that the Commission can assist in supporting holistic sentencing options to ensure that sentences are reflective of the cumulative nature of the crime.

Measuring drug quantity:

It is no secret that production, manufacture and distribution of illicit drugs has radically changed in the last decade. What used to be a plant-based trade is now largely synthetic, with drug cartels and trafficking

[8] *See, e.g., United States v. Robinson*, No. 21-14, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022); *United States v. Moreno*, 583 F. Supp. 3d 739 (W.D. Va. 2019).
[9] S. 331, 119th Cong. Available at https://www.congress.gov/bill/119th-congress/senate-bill/331/text?s=1&r=1&q=%7B%22search%22%3A%22halt+fentanyl%22%7D.
[10] *See, e.g.*, U.S. Gov't Accountability Off., *Synthetic Opioids: Considerations for the Class-Wide Scheduling of Fentanyl-Related Substances*, Apr. 2021, p. 60 – 64.
[11] Such factors could arguably be encompassed already in 18 U.S.C. 3553(a), but its inclusion specifically in reference to FRS could be beneficial for practitioners and judges alike.
[12] The Drug Enforcement Administration defines Schedule I drugs are those that have "no currently accepted medical use and a high potential for abuse." U.S. Drug Enforcement Administration, Drug Scheduling, https://www.dea.gov/drug-information/drug-scheduling (accessed July 8, 2025).

organizations capitalizing on a high-volume and low-cost business model.[13] Americans see this most explicitly in the spread of methamphetamine and synthetic opioids, like fentanyl. Synthetic drugs like fentanyl are responsible for nearly all the fatal overdoses and poisonings in our country.[14]

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

The imprecise and troubling nature of quantity-based sentences is particularly apparent when considering the discrepancy in available sentences between the weight of a finished drug product and the amount of precursors or drug materials found. In general, once a drug is found and its identity is determined, the next step in a prosecution is to measure the drug quantity. The quantity may be a "mixture or substance containing a detectable amount of the controlled substance."[15] Determining this quantity is, unfortunately, an imprecise science. In fact, except in cases where the government seizes and then measures all the drugs attributable to a defendant, the court must "approximate the quantity of the controlled substance."[16] This means that courts are forced to exercise significant discretion in estimating drug quantities.

This is in and of itself worrisome, illustrating the vast discrepancies that could unfurl from a discretionary determination about quantity. But two other considerations make this even worse. First, courts may rely on financial records to estimate drug quantity.[17] When cash is seized as part of a drug investigation, courts may equate it with a corresponding drug quantity. Second, courts may use the size or capability of a drug laboratory to estimate drug quantities.[18] The "theoretical mass yield" that can be calculated based on these two premises is bizarre and disconnected to actual drug quantities possessed by a defendant.

Courts have signaled hesitancies with these Guidelines provisions, urging that they must be applied "on the side of caution" when estimating drug quantities and that a court must determine the lesser punishment when possible.[19] In short, using the Guidelines to get a theoretical mass yield of a drug

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[13] *Supra* n. 6, at p. 5.
[14] According to the Centers for Disease Control and Prevention (CDC), synthetic opioids were involved in 74,225 deaths in 2022–68% of the total 111,036 deaths that year–and psychostimulants, the class of drugs that includes methamphetamine, were involved in 31% of the overall deaths. Provisional CDC data for January-June 2023 shows that nearly 38,000 people died as the result of a synthetic opioid (usually fentanyl) overdose or poisoning in the first six months of the year.
[15] U.S.S.G. § 2D1.1, Notes to Drug Quantity Table (A); *see also* comment 1.
[16] *Id*. at comment 5.
[17] U.S.S.G. § 2D1.1 comment 5 ("[T]he court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant[.]").
[18] *Id*. ("[T]e court may consider . . . the size or capability of the laboratory involved.").
[19] *United States v. Forrester*, 616 F.3d 929, 949 (9th Cir. 2010); *see also United States v. Chase*, 499 F.3d 1061, 1069 (9th Cir. 2007).

quantity for sentencing purposes has been "discouraged[,]" and deemed to be both "an inappropriate methodology to calculate drug quantity[,]" and "unreliable[.]"[20]

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

Role vs. quantity:

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

(2) Examination of Theft, Property Destruction, and Fraud Under §2B1.1

Actual loss, intended loss, and gain

When an individual commits a theft, embezzles, or damages property, prosecutors are tasked with determining the amount of property lost. In general, the Guidelines currently define "loss" as the "greater of actual loss or intended loss."[21] The higher the victim's calculated loss, the higher the sentencing range can be. For a prosecutor, a key question is if the defendant should be on the hook for "intended loss," a concept that is mentioned only in the Commentary and not in the loss Guideline itself.

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

Right On Crime urges the Commission to eliminate the Commentary language allowing for considerations of intended loss, instead only allowing a sentencing range to apply to the amount of actual loss. This will result in a more consistent and fair adjudication of cases and will put the Commission in line with some federal courts that have recently rejected the "intended loss" approach.[22]

(3) Bureau of Prisons' Effectiveness in Meeting Sentencing Purposes of 18 U.S.C. 3553(a)(2) and Amendments to Help Improve Practices.

The Federal Bureau of Prisons (BOP) has been plagued with several issues, ranging from safety challenges to implementation of the *First Step Act*. The safety, security, and rehabilitation of federal inmates depend largely on a well-functioning BOP. Right On Crime is pleased that the Commission is

[20] *Id*. (citing *Chase*, 499 F.3d at 1069).
[21] U.S.S.G. § 2B1.1 comment 3(A).
[22] *See United States v. Banks*, 55 F.4th 246 (3d Cir. 2022).

reviewing policies and improvements to the Guidelines that ensure the dual goal of punishment and rehabilitation are met.

To that end, a close alignment of the BOP's role and mission and 18 U.S.C. 3553(a)(2) is warranted. 18 U.S.C. 3553(a)(2) outlines factors that a court must consider before imposing a sentence, including:

> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[23]

In sum, sentences must punish the offender appropriately, deter similar criminal behavior, protect public safety, yet not cut off the defendant from rehabilitation while incarcerated. The BOP has several opportunities to better align itself with these statutory factors.

Continue to implement the First Step Act

The First Step Act made several changes to how the BOP facilities rehabilitate federal prisoners, particularly with regards to earned time credits (ETCs).

The First Step Act allows mostly minimum and low security prisoners the ability to earn up to 15 days per month off their sentences (capped at 365 days) by participating in certain programs and productive activities. After that, prisoners can earn credits that will count towards a home confinement sentence. But some prisoners have received too many credits, and some none. Attributed largely to computer errors, BOP Director William Marshall has made clear that transparent calculations and communications on ETCs are a priority.[24] To assist in implementation of the First Step Act's ETC program, the Commission could consider adding language in commentary of the Guidelines to encourage consistent and transparent ETC calculations for eligible offenders as part of the sentence. This will align the BOP with the sentencing factors of 18 U.S.C. 3553(a)(2) more closely because it will encourage more consistent and effective treatment, training, and programming for the individual while in BOP custody.

Increase the use of home confinement

There are two pervasive and dangerous issues that the BOP is facing: understaffing and increased costs for house BOP inmates. In the past decade, the number of BOP staff has dropped significantly. Concurrently, the number of prisoners in BOP facilities and the cost to incarcerate them have increased. These dueling issues illustrate the need for the BOP to reduce its current costs and prioritize facility security. The best policy path for this is home confinement.

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[23] 18 U.S.C. 3553(a)(2)(A)-(D).
[24] Pavlo, Walter, *Bureau of Prisons Director William Marshall Addresses Challenges*, Forbes, June 30, 2025, available at: https://www.forbes.com/sites/walterpavlo/2025/06/30/exclusive-interview-with-bureau-of-prisons-director-william-marshall/.

Under 18 U.S.C. 3624(c)(2), the BOP may "place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or six months." Home confinement is meant primarily for "prisoners with lower risk levels."[25] This authority was expanded through Attorney General Barr during the COVID-19 pandemic as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). In 2020, federal prisoners were allowed to serve a portion of their sentence in home confinement under the following criteria: being in low or minimum security; having a clean misconduct record; no history of violence, sex, or terrorism offenses; a viable re-entry plan; a minimum or low risk score on a risk assessment tool; and serving a substantial portion of their sentence (at least 50% or 25% with 18 months or less remaining).[26]

After release from home confinement, these CARES Act-eligible individuals had a 3.6% recidivism rate over one year. To compare, those without the eligibility parameters of the CARES Act had a 13.0% recidivism rate.[27] And to distinguish the public safety outcome even further, the average recidivism rate of all offenders has hovers around 50%.[28]

Targeted use of home confinement is a public safety centered policy that also alleviates many of the pressures facing the BOP, including staffing shortages and prisoner population growth. The Commission could consider opportunities to amend the Guidelines that would encourage more deliberate and expansive home confinement opportunities, in line with CARES Act eligibility. Similarly, the Commission should consider researching those individuals who have been eligible for and successful on home confinement. Such information could help lawmakers, judges, and advocates understand the cost savings and public safety benefits to permanent home confinement eligibility expansion.

Limit use of solitary confinement and lockdowns

Special Housing Units (SHUs) are housing units in BOP facilities where inmates are securely separated from the general inmate population and may be housed either alone or with other inmates. According to the BOP, SHUs help ensure the safety, security, and orderly operation of correctional facilities, and protect the public, by providing alternative housing assignments for inmates removed from the general population.[29] However, some reports have indicated that the use of solitary confinement and other SHUs can result in an increased use of recidivism.[30]

Compounding this is the ubiquity – or even overuse – of solitary confinement and special housing. It has been reported that BOP has isolated prisoners in cells for up to 23 hours per day.[31] As of October 2023, the BOP continued to house about 8% of its population (about 12,000 individuals) in these settings.[32]

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[25] 18 U.S.C. 3624(c)(2).
[26] William Barr, *Memorandum from the Attorney General: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, April 3, 2020, found at: https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000.
[27] Jason Gwinn, PhD, *Cares Act: Analysis of Recidivism*, March 2024, U.S Department of Justice, Federal Bureau of Prisons, Information Technology & Data Division, Office of Research & Evaluation (www2.fed.bop.gov/202403-cares-act-white-paper).
[28] U.S. Sentencing Com'n, *Recidivism of Federal Offenders Released in 2010* (Sept. 30, 2021).
[29] U.S. Dep't of Justice, Federal Bureau of Prisons, Program Statement, *Special Housing Units* (Nov. 23, 2016).
[30] Andreea Matei, Urban Institute, *Solitary Confinement in US Prisons* (Aug. 2022); *see also* Ilanit Turner and Noelle Collins, Right On Crime, *A Call to Reform Federal Solitary Confinement* (Jan. 2022).
[31] U.S. Gov't Accountability Office, *Bureau of Prisons: Additional Actions Needed to Improve Restrictive Housing Practices* (Feb. 2024); *see also* U.S. Dep't of Justice, Office of the Inspector General, *Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness* (July 2017).
[32] *Id.*

Federal inmates are also placed into isolation – including SHUs and solitary confinement – if there is a facility-wide lockdown. The frequency of lockdowns can hamper inmate access to programs and activities, including those eligible for First Step Act ETCs. This in turn can also negatively impact inmate success rates upon reentry.

Therefore, the opaque and incongruent use of SHUs, solitary confinement, and isolation runs afoul of 18 U.S.C. 3553(a)(2). It undermines access to meaningful programming and public safety. The Commission should explore options at its disposal to encourage the BOP to provide access to First Step Act ETC-eligible programs while inmates are in SHUs, solitary confinement, or lockdowns. The Commission could also research and publish data on public safety impacts on solitary confinement.

Compassionate Release

Pursuant to section 18 U.S.C. 3582(c)(1)(A), courts are authorized to reduce a defendant's term of imprisonment based on "extraordinary and compelling reasons." When considering any compassionate release motions, the court must find that "extraordinary and compelling reasons" warrant such a reduction and that any reduction "is consistent with applicable policy statements issued by the Sentencing Commission."[33] Compassionate release allows inmates to qualify for early release under certain criteria, most frequently because of illness or age. This is a particularly important tool with elderly inmates who require medical care or have aged out of crime. Given the high cost of operating a federal correctional facility and increased costs for accommodating specific needs for aging inmates, additional opportunities to balance fiscal responsibility with public safety should be explored.

Before December 2018, courts were authorized to consider compassionate release motions only if they were filed by the Director of the Bureau of Prisons. In December 2018, Congress amended the law, allowing federal inmates themselves to seek early release in certain circumstances.[34] The Commission addressed compassionate release in 2023, even choosing to expand the eligibility for extraordinary and compelling reasons for a sentence reduction.[35]

Yet, despite both actions by Congress and the Commission, compassionate release motions are denied more frequently than granted.[36] In fact, in April 2024, a motion for compassionate release was almost 7.5 times more likely to be denied than granted.[37] There may be a few reasons for this disparity in motions received and motions granted. Perhaps some motions are not meritorious or fall outside the parameters of 18 U.S.C. 3564(c)(1)(A). Or perhaps the BOP could do more to support inmates – particularly those in elderly or aging populations – with their motions.

Yet, as it stands, only 4% of requests in the BOP are granted.[38] The BOP could improve this by reducing barriers. For instance, the BOP could make it easier for inmates to receive care and documentation from a physician about their ailments that may be relevant for a compassionate release motion. The BOP could

[33] 18 U.S.C. 3582(c)(1)(A).
[34] *First Step Act*, Pub. L. 115-391 (Dec. 21, 2018).
[35] USSG §1B1.13.
[36] *See, e.g.*, https://datawrapper.dwcdn.net/PHAC8/full.pdf.
[37] *Id*. Also, it is worth noting that this is well outside the timeframe of the COVID-19 pandemic.
[38] Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, FAMM (June 2018).

issue affidavits in support of an inmate's meritorious motion. And the BOP could look for individual cases where a compassionate release motion may be warranted, in addition to inmate-instigated motions.

To the extent that the Sentencing Commission can, it should consider including language in the Guidelines and conduct research on the BOP's role in facilitating increased use of effective compassionate release.

(4) Other Possible Amendments for Consideration

Relevant Conduct: Uncharged conduct

Relevant conduct is a broad term encompassing "[a] range of conduct that is relevant to determining the applicable offense level."[39] Its extensive application in sentencing makes it a "cornerstone" of the Guidelines.[40] But such ubiquity is not always good. For instance, the Guidelines permit somewhat unlimited consideration of uncharged conduct for sentencing purposes. Such consideration can invariably lead to the imposition of a more severe sentence than what is necessary or fair. As the Guidelines currently permit, relevant conduct easily encompasses too much uncharged conduct and results in defendants being sentenced for acts not covered in a count of conviction. In fact, not only can prosecutors enhance sentences without having to prove the conduct beyond a reasonable doubt, but they can also increase sentence lengths without even bringing an indictment alleging that conduct. This flies in the face of constitutional fairness and underlying due process principles. The Guidelines' wide berth acceptance of consideration of uncharged conduct unfortunately negates the need for a grand jury and findings of guilt. Simply put, "sentencing a defendant based on uncharged conduct is suspect as both a constitutional and policy matter."[41] To that end, the "Commission has the authority to address th[is] issue[], and it should."[42]

To remedy this problem, Right On Crime recommends that the Commission assesses how to narrow the scope and application of uncharged relevant conduct, similar to how it has addressed acquitted conduct sentencing to date.[43] Specifically, the Commission could narrow the scope of relevant uncharged conduct, moving closer to a charge-offense system where a defendant is sentenced only to those charges of which he or she is found guilty. Alternatively, the Commission could change the way relevant uncharged conduct is used. For instance, there could be a cap on the increases attributable to uncharged conduct or a bar on its consideration except for purposes of mitigation. A combination or individual consideration of either would greatly improve fairness, predictability, and consistency of sentencing.

Relevant Conduct: Acquitted conduct:

Last year, the Commission amended the Guidelines to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the Guidelines.[44] This unanimous vote was a long-awaited and meaningful step towards ending the unfair practice of allowing federal judges to consider acquitted conduct to enhance a criminal defendant's sentence. However, the Commission's amendment did not forbid its use wholesale; rather, the prohibition of considering

[39] U.S.S.G. § 1B1.3, comment background.
[40] U.S. Sentencing Comm'n, *Simplification Draft Paper: Relevant Conduct and Real Offense Sentencing*.
[41] *U.S. v. Brasher*, No. 23-1180 (7th Cir. June 28, 2024).
[42] *Id*.
[43] *See* more on this below; *see also supra* n. 41.
[44] Amendments to the Sentencing Guidelines, Amendment 1 (U.S. Sentencing Comm'n 2024).

acquitted conduct by a sentencing court is limited to federal acquitted conduct that does not also establish the instant offense of conviction.

This curtailed approach is much appreciated and needed. But more can be done. To that end, Right On Crime recommends that the Commission proposes an amendment that would completely prohibit the use of acquitted conduct in federal sentencing except for the purposes of sentence mitigation. Such an approach has already been considered by this Commission[45] and in bipartisan legislation.[46] The Commission can use this amendments cycle to finish this important job and ban acquitted conduct from being considered in federal sentencing.

White Collar Crimes: Sophisticated means:

For white collar crimes, the Guidelines provide a sentencing enhancement if "sophisticated means" were used. This is defined as conduct that is "especially complex or especially intricate."[47] However, the Guidelines illustrate such "complex" and "intricate" conduct as the main office for a telemarketing scheme being in one jurisdiction while the solicitation operations are in another jurisdiction.[48] Also, "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore accounts" are cited as examples of "sophisticated means."[49]

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

White Collar Crimes: Position of trust:

The Guidelines permit a sentencing enhancement when a defendant abuses his or her position of public or private trust, which is based on the notion that people who hold a position of trust relative to a victim are viewed as more culpable.[50] Based on the application notes, it is fair to say that this enhancement should apply when there is a professional or managerial discretion afforded to the defendant's role.

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

[45] *Id.*; *see also* Proposed Amendments to the Sentencing Guidelines, Proposed Amendment 3 (U.S. Sentencing Comm'n 2023).
[46] "Prohibiting Punishment of Acquitted Conduct Act of 2023," S. 2788, 118th Cong. (2024); H.R. 5430, 118th Cong.
[47] U.S.S.G. § 2B1.1(b)(10)(C) comment 9(B); *see also* 2T1.1(b), comment 5; 2T3.1(b)(2), comment 5.
[48] *Id.*
[49] *Id.*
[50] U.S.S.G. § 3B1.3.

substitute teacher, or mid-level manager at a paper company. Surely, this enhancement loses its intent and teeth when it can be over-applied.

To that end, the Commission should limit a "position of trust" to instances where a fiduciary or quasi-fiduciary obligation exists. Several courts have already interpreted "position of trust" to mean this.[51] In refining the language to encompass fiduciary or quasi-fiduciary relationships, the universe of eligible defendants will inevitably narrow, but the intent of the enhancement will importantly be clarified. This will result in far more consistency in the handing down of criminal sentences among circuits.

Obstruction of Justice Enhancements:

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

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

If a criminal defendant chooses to take the stand and testify in his or her own defense in a criminal prosecution, there is nothing in statutory law or in the Guidelines prohibiting the government from seeking an obstruction charge or obstruction enhancements for allegedly slowing down the prosecution. A defendant has the right to testify in his own defense, and similarly is afforded the constitutional privilege to not testify. Coercing his or her testimony is unlawful. To wit, any use of an obstruction charge or sentencing enhancement in the presence or absence of such testimony runs afoul of the promised constitutional protections of the Fifth Amendment. It follows that the Guidelines should do its best to ensure such protections. Therefore, Right On Crime recommends that the Guidelines explicitly prohibit the use of obstruction of justice offenses[52] or enhancements[53] when a criminal defendant testifies in his or her own defense.

Artificial Intelligence

Artificial intelligence (AI) is a force multiplier, allowing criminals to commit crimes more efficiently and with higher sophistication, while also allowing law enforcement to detect and stop criminal activity with more precision. For better or for worse, AI is here to stay. One question for the criminal justice community, and the Commission in particular, is how sentencing should or should not be impacted if the bad actor uses AI. Right On Crime believes a thoughtful and intentional approach is necessary, where the equities of punishment and rehabilitation are balanced appropriately.

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[51] *See, e.g., United States v. Huggins*, No. 15-1676 (2d Cir. Dec. 19, 2016); *see also United States v. Ntshona*, 156 F.3d 318, 320 – 21 (2d Cir. Sept. 10, 1998); *United States v. Jolly*, 102 F.3d 46, 49 (2d Cir. Dec. 5, 1996); *United States v. Brunson*, 54 F.3d 673, 677 (10th Cir. 1995).
[52] U.S.S.G. § 2J1.2.
[53] U.S.S.G. § 3C1.1.

As AI tools continue to grow more sophisticated and capable, the potential harms from this technology also increase. For example, AI allows criminals to execute more sophisticated and scalable fraud schemes. "Scams have evolved well beyond the 'Nigerian prince' emails of the 1990s, with fraudsters now able to create messages that appear to come from friends or family members in distress..."[54] And this impacts even high-ranking government officials. Earlier this month, for example, AI-savvy fraudsters mimicked Secretary of State Marco Rubio's voice and reached out to foreign ministers, a U.S. Senator, and a Governor.[55] This criminal attempt comes weeks after the FBI issued a public service announcement to warn against malicious actors impersonating senior U.S. officials.[56] These outreach efforts are intended to build rapport to gain access to personal information or perhaps even more nefarious – to undermine American interests.

Similarly, with the use of Generative AI, criminals are using the technology for "sextortion."[57] Historically, suspects will coerce the victims to send explicit pictures and then blackmail the victim. The perpetrators threaten to release the photos to friends and family if the victim does not make payment.[58] Through the use of Generative AI, deepfakes are created by the perpetrators by taking innocuous pictures of the victims and transforming them into sexualized, nude and graphic photos.

These crimes are serious, the victims real, and the consequences grave. The threat of AI will continue to grow, urging its users (such as law enforcement) to be educated; criminal justice agencies to be transparent; and policymakers to be thoughtful.

There is no question that AI can make some crimes more dangerous and may justify tougher penalties in rare cases— such as crimes committed with a firearm. But applying harsh enhancements across the board could overwhelm the justice system and lead to excessive punishment. We need to be smart: reserve longer sentences for when AI clearly increases harm, while preserving room for accountability, rehabilitation, and judicial discretion.

Our existing laws offer a firm foundation, one that may not need to be sub-categorized if AI is used. Identity theft using AI is still identity theft. Drug trafficking using AI is still drug trafficking. The means exacerbate efficiency, but the crime is often still the same. Simply put, the mere presence of AI – without an apparent and significant increase in dangerous – may not warrant sentences longer than currently authorized by Congress

Right On Crime believes that the Commission should conduct research on the sentencing outcomes in cases involving AI. It would be helpful to know the scope of federal cases involving AI and the

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[54] U.S. Dep't of Homeland Security, Public-Private Analytic Exchange Program, *Impact of Artificial Intelligence on Criminal and Illicit Activities* (2024).
[55] Samantha Jo-Roth, *Marco Rubio deepfake scam underscores the 'explosion' of AI voice impersonation*, Washington Examiner, July 11, 2025, available at: https://www.washingtonexaminer.com/news/senate/3468316/marco-rubio-deepfake-scam-explosion-ai-voice-impersonation-robocalls/.
[56] Federal Bureau of Investigations Public Service Announcement, Alert Number: I-051525-PSA, *Senior US Officials Impersonated in Malicious Messaging Campaign* (May 15, 2025).
[57] National Center on Missing and Exploited Children, *The Growing Concerns of Generative AI and Child Sexual Exploitation*, https://www.missingkids.org/blog/2024/the-growing-concerns-of-generative-ai-and-child-sexual-exploitation (accessed July 14, 2025).
[58] Reuven Aronashvili, Forbes, *The Evolution of Sextortion Attacks: How Generative AI is Taking a Front Seat*, Feb. 20, 2024, available at: https://www.forbes.com/councils/forbestechcouncil/2024/02/20/the-evolution-of-sextortion-attacks-how-generative-ai-is-taking-a-front-seat/.

sentencing ranges, including any variances, stiffer penalties, and types of crimes typically committed. Also, the Commission could provide information on feedback from practitioners, judges, and advocates on conflicts in understanding how to hand down criminal sentences where AI is involved. Lastly, the Commission could consider adding language in Chapter 3 that would make it clear that enhancements should not be applied because of the presence of AI unless an act of Congress affirmatively permits.[59]

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

Sincerely,

Brett Tolman
Executive Director
Right On Crime

[59] To be sure, this can and very well should change in the future depending on the types of crimes, victims, and outcomes of crimes committed using AI. But such language could be beneficial for consistency in sentences and to provide temporary clarity to litigators and judges navigating this developing landscape.