

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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May 24, 2023

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

Re: Proposed Priorities for the 2023-2024 Amendment Cycle

Dear Judge Reeves:

Defenders were grateful for the opportunity to work with the Commission during last year's amendment cycle. We appreciated the Commission's dedication to operating in a "deliberative, empirically based, and inclusive manner,"¹ and were gratified by the Commission's commitment to hear not just from those who work in the criminal justice space, but from formerly and presently incarcerated people "who have lived out the consequences of [the Commission's] choices."² Their stories underscore the impact of the sentencing policies implemented last cycle, and the work still left to do. This year, we look forward to continued collaboration with an eye toward further data-driven improvements to the guidelines that will address this country's mass-incarceration crisis and protect the community.³

¹ [Remarks of Judge Carlton W. Reeves](#), Chair of the U.S. Sent'g Comm'n, Washington, D.C., at 4 (Oct. 28, 2022).

² [Remarks of Judge Carlton W. Reeves](#), Chair of the U.S. Sent'g Comm'n, Washington, D.C., at 7 (Apr. 5, 2023) ("Chair's April 2023 Remarks").

³ The Commission has an important role to play in redressing the harms of mass incarceration. See, e.g., Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295, 308–13 (2013) (discussing the consequences of mass incarceration, the Commission's broad powers to address it, and how the Commission might do so).

The Commission is directed to set policies that meet the purposes of sentencing, including to promote public safety.⁴ At the same time, the Commission must “take into account the nature and capacity of the penal, correctional, and other facilities . . . available” and formulate guidelines “to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons[.]”⁵ “Overcrowded prisons are demonstrably more violent than those that do not exceed their capacity.”⁶ Yet, currently, the Bureau of Prisons is operating under “crowded” conditions in high and medium security facilities,⁷ and with “aging and deteriorating” infrastructure.⁸ The guideline changes we recommend below would address these concerns without threatening—and indeed, while enhancing—community safety. More, they are informed by research and data, in line with the Commission’s characteristic empirical approach.⁹

Importantly, research from state practices shows “a very weak relationship between higher incarceration rates and lower crime rates.”¹⁰ Between the years 2000 and 2015, 19 states from a “diverse cross-section of the United States” reduced both imprisonment and crime rates.¹¹ Researchers recommend more effective and

⁴ See 28 U.S.C. § 991(b)(1)(A); 18 U.S.C. § 3553(a)(2)(C).

⁵ 28 U.S.C. § 994(g).

⁶ Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049, 1094 (2008).

⁷ See Fed. Bureau of Prisons, [Program Fact Sheet](#) (Oct. 31, 2021).

⁸ Dep’t of Justice, Office of the Inspector General, [Audit of the Federal Bureau of Prisons’ Efforts to Maintain and Construct Institutions](#) 12 (2023).

⁹ See *Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

¹⁰ Don Stemen, [The Prison Paradox: More Incarceration Will Not Make Us Safer](#), Vera Inst. of Justice, at 1 (2017). As this evidence brief explains, increased incarceration has no impact on violent crime and may even increase crime at the community level by “disrupti[ng] . . . families and social groups that would help keep crime rates low” and at the individual level by facilitating antisocial bonds and because of collateral consequences like loss of housing and employment. *Id.* at 2; see also, e.g., Pritikin, *supra* note 6, at 1054–74, 1093 (cataloging the criminogenic effects of incarceration and arguing that prisons may cause more crime than they prevent).

¹¹ Stemen, *supra* note 10, at 4; see also *id.* at 4, fig. 1.

less expensive ways to reduce crime than prison, including: community crime prevention strategies, alternatives to incarceration, and community corrections.¹²

With this in mind, we urge the Commission to prioritize the following policy changes:

- delink the drug quantity table at §2D1.1 from statutory mandatory minimums and eliminate the empirically unsound base offense levels for methamphetamine (actual) and “Ice”;
- modernize Chapter 5’s policy statements related to individual characteristics so that they align with post-*Booker* sentencing practices;
- deemphasize criminal history in the guidelines and exclude convictions for offenses committed before age 18 from the criminal history computation;
- add additional mens rea requirements to §2K2.1(b)(4);
- prohibit acquitted conduct sentencing; and
- support a Defender ex officio.

Each suggestion, if implemented, would further the Commission’s duties to establish certain and just sentencing policies that meet the purposes of sentencing and reflect advancement in human knowledge.¹³

I. Reimagine the Drug Trafficking Guidelines—Starting with Methamphetamine

The Commission is tasked with establishing federal sentencing policies that “provide certainty and fairness”; “avoid[] unwarranted . . . disparities among defendants with similar records who have been found guilty of similar criminal conduct”; and “reflect, to the extent practicable, advancement in knowledge of

¹² See *id.* at 3–4.

¹³ See 28 U.S.C. § 991(b)(1) (setting forth the purposes of the Sentencing Commission).

human behavior” related to the criminal justice process.¹⁴ Unfortunately, the drug trafficking guidelines miss the mark on all three fronts.

The Commission should craft more rational drug sentencing policy by delinking the drug guidelines from statutory mandatory minimums and, at a minimum, eliminating the meth-actual and “Ice” base offense levels.

Delink the Drug Quantity Table. The original Commission generally endeavored to employ an empirical approach to establish guideline ranges based on data about past sentencing practices compiled from thousands of pre-guidelines cases.¹⁵ However, the Commission parted ways with this studied approach when it developed the drug trafficking guidelines.¹⁶ Instead, it derived the initial Drug Quantity Table (DQT) by linking the offense levels for drug crimes to the stiff mandatory minimum penalties in the Anti-Drug Abuse Act of 1986 (“ADAA”).¹⁷ Indeed, it originally set base offense levels slightly *above* the ADAA’s mandatory minimums to incentivize guilty pleas and cooperation with the government.¹⁸

In the ADAA, Congress used drug quantity as a proxy for role in the drug scheme hierarchy. Congress established ten-year mandatory minimums to target “kingpins,” referred to as the “masterminds who are really running the operations.”¹⁹ It set five-year mandatory minimums to target “middle-level dealers,” including “serious traffickers,” who Congress characterized as “the managers of

¹⁴ *Id.*

¹⁵ See *Kimbrough*, 552 U.S. at 96 (citing USSG §1A1.1, intro. cmt.); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17–18 (1988).

¹⁶ See *Gall v. United States*, 552 U.S. 38, 46 n. 2 (2007); *Kimbrough* 552 U.S. at 96-97; *United States v. Diaz*, No. 11-CR-00821, 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013).

¹⁷ See USSC, App. C. Amend. 782, Reason for Amendment (eff. Nov. 1, 2014) (“When Congress passed the [ADAA], the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities.”); see also *Kimbrough*, 552 U.S. at 96–97, 109.

¹⁸ See Hon. Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 Am. Crim. L. Rev. 1, 6 (2015); USSC, [Special Report to the Congress: Cocaine and Federal Sentencing Policy](#) 148 (1995) (“Cocaine Policy Special Report”).

¹⁹ [Cocaine Policy Special Report](#), at 119 (quoting 132 Cong. Rec. S. 14,300 (Sept. 30, 1986)).

retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials and doing so in substantial street quantities.”²⁰ Congress did not research whether the most culpable players in the drug trade could be identified “by the amount of drugs with which they are involved.”²¹ Rather, the drug weight thresholds that triggered the mandatory minimums were “hastily chosen in the heat of partisan debate and based on demonstrably mistaken assumptions.”²²

The result of these mandatory minimums, and of the Commission’s decision to key the drug trafficking guideline to them, has been a dramatic rise in average sentences for drug traffickers compared to the pre-guidelines era.²³ While the Commission modestly lowered the guideline ranges that include mandatory minimum penalties through several retroactive amendments,²⁴ the DQT is regrettably still linked to the quantity thresholds set by Congress.

The result: excessive sentences for people who perform lower-level functions in the drug trade.²⁵ For instance, the Commission conducted a special coding project in 2010 to assess the functions performed by people sentenced for drug trafficking.²⁶ The Commission determined that the “base offense levels that included or exceeded the five-year mandatory minimum penalty often applied to every function, even

²⁰ *Id.* at 119–20 (quoting H.R. Rep. No. 845, 99th Cong., 2d Sess. pt. 1, at 16–17 (1986)).

²¹ *Id.* at 119 (quoting 132 Cong. Rec. S. 14,300 (Sept. 30, 1986)); see also [Statement of Michael Nachmanoff](#) Before the U.S. Sent’g Comm’n, Washington, D.C., at 4 (May 27, 2010) (“Mandatory minimums, however, focus on extreme examples rather than the most mitigated case. They are passed in reaction to the headlines of the day and political competition, and are not based on empirical research.”).

²² [Statement of James Skuthan](#) Before the U.S. Sent’g Comm’n, Washington, D.C., at 7 (Mar. 17, 2011) (“Skuthan Statement”) (citing *Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong., 1st Sess., at 166, 169–70 (June 26, 2007) (statement of Eric Sterling)).

²³ See *Diaz*, 2013 WL 322243, at *5.

²⁴ See USSC, App. C. Amends. 782 (eff. Nov. 1, 2014), 713 (eff. Mar. 3, 2008), & 706 (eff. Nov. 1, 2007).

²⁵ See, e.g., Paul J. Hofer, *Beyond the Heartland: Sentencing under the Advisory Federal Guidelines*, 49 Duquesne L. Rev. 675, 686 (2011).

²⁶ See USSC, [2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System](#) 165 (2011) (“Mandatory Minimum Report”).

those that may not be considered functions typically performed by ‘major’ or ‘serious’ drug traffickers.”²⁷ The Commission concluded that drug quantity was not as closely related to a person’s function as Congress expected and mandatory minimums in drug cases may apply more broadly than Congress intended.²⁸

District judges understand that the drug table calls for excessive sentences. At a 2009 Commission hearing, U.S. District Judge for the Northern District of California, Vaughn R. Walker, testified that “[t]he use of quantity as a proxy for culpability” rests on “the [Hollywood] illusion of the drug kingpin.”²⁹ While “[g]rand and despicable characters make for compelling narratives in films, television shows, and novels[,]” Judge Walker remarked, such characters “are not the ones who are cast in court. . . . We shouldn’t predicate our rulemaking on an attempt to ensnare an illusory villain.”³⁰ Numerous other judges have similarly testified in favor of delinking the drug guidelines from the ADAA.³¹ And 58 percent of judges who responded to the Commission’s 2010 judicial survey believed the guidelines should be delinked from statutory mandatory minimums.³² Indeed, judges demonstrate

²⁷ *Id.* at 169. Notably, “[t]he majority of [people] in nearly every function category were convicted of an offense carrying a mandatory minimum penalty[.]” *Id.* at 167. Low-level street dealers were convicted of an offense carrying a mandatory minimum in 65.5 percent of cases, couriers in 49.6 percent of cases, and mules in 43.1 percent of cases. *See id.* at 167 & 168 fig. 8-9.

²⁸ *See id.* at 169, 350.

²⁹ Tr. of Public Hearing Before the U.S. Sent’g Comm’n, Stanford, Cal., at 17–18 (May 28, 2009) ([Hon. Walker](#)) (“Walker Transcript”).

³⁰ *Id.* at 18–19.

³¹ *See, e.g.*, Tr. of Public Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 19–20, 70–71 (Sept. 9, 2009) ([Hon. Holderman](#)); Tr. of Public Hearing Before the U.S. Sentencing Comm’n, New York, New York, at 92–93 (July 9, 2009) ([Hon. Newman](#)); Tr. of Public Hearing Before the U.S. Sent’g Comm’n, Atlanta, Georgia, at 24, 26–27 (Feb. 10–11, 2009) ([Hon. Tjoflat](#)).

³² *See* USSC, [Results of Survey of United States District Judges January 2010 through March 2010](#) Tbl. 3 (2010) (“2010 Survey”); *see also* General Accounting Office, [Sentencing Guidelines: Central Questions Remain Unanswered](#) 17 (1992) (the “most frequently cited problems” with the drug guidelines in judicial interviews were their severity and inflexibility).

their concerns through the sentences they impose: below-guideline sentences in most drug-trafficking cases.³³

Defenders have long advocated for the Commission to reimagine §2D1.1 by delinking the drug guidelines from the severe quantity-based mandatory minimum penalties of the ADAA.³⁴ We've suggested that the Commission focus more on a person's role in the offense, and the direct and intended harms caused by the offense, rather than on quantity. Likewise, a voluminous corpus of scholarly³⁵ and

³³ In Fiscal Year 2021, courts imposed below-guideline sentences in 71 percent of all drug cases sentenced under primary guideline §2D1.1 with no 924(c) count, using the 2021 Guidelines Manual. The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Offender Datafiles" for Fiscal Year 2021. The Commission's "Individual Offender Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, [Commission Datafiles](#) (last visited May 22, 2023).

³⁴ See, e.g., [Letter from Michael Caruso](#), Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 13–18 (Sept. 14, 2022) ("Defenders 2022 Annual Letter"); [Letter from Michael Caruso](#), Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. William H. Pryor, Jr., Acting Chair, U.S. Sent'g Comm'n, at 15 (June 14, 2018) ("Defenders 2018 Annual Letter"); [Letter from Marjorie Meyers](#), Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. William H. Pryor, Jr., Acting Chair, U.S. Sent'g Comm'n, at 2–5 (Mar. 10, 2017); [Letter from Marjorie Meyers](#), Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 2 (May 12, 2014); [Statement of Julia O'Connell](#) Before the U.S. Sent'g Comm'n, Austin, Tex., at 14–15 (Nov. 19, 2009) ("O'Connell Statement"); [Skuthan Statement](#), at 1–17; [Statement of Nicholas T. Drees](#) Before the U.S. Sent'g Comm'n, Denver, Colo., at 21–25 (Oct. 21, 2009).

³⁵ See, e.g., Lex A. Coleman, *Crack 2.0: Federal Methamphetamine Sentencing Policy, the Crack/Meth Sentencing Disparity, and the Meth/Meth-Mixture Ratio—Why Drug Type, Quantity, and Purity Remain "Incredibly Poor Proxies" for Sentencing Culpability under 21 U.S.C. § 841(B) and U.S.S.G. § 2D1.1*, 34 Fed. Sent. Rep. 29, 29–30, 36, 39–40 (2021); Paul J. Hofer, [Ranking Drug Harms for Sentencing Policy](#) 17–25 (2015); Kevin Bennardo, *Decoupling Federal Offense Guidelines from Statutory Limits on Sentencing*, 78 Mo. L. Rev. 683, 697–99, 701–15 (2013); Hofer, *supra* note 25, at 685–87; Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 Alb. L. Rev. 749, 760 (2000) (reporting on a preliminary finding of a USSC task force that using drug quantity as a proxy for culpability "was considered to cause the most injustice in sentencing for low-end individuals who held a minor role in large quantity drug offenses"); Steven B. Wasserman, *Sentencing Guidelines: Toward Sentencing Reform for Drug Couriers*, 61 Brook. L. Rev. 643, 653 (1995) ("Drug weight should be demoted as a sentencing factor for drug couriers . . ."); Peter Reuter & Jonathan Caulkins, [Redefining the Goals of National Drug Policy: Recommendations from a Working Group](#), 85 Am. J. Pub. Health 1059, 1062 (1995) ("The

judicial³⁶ literature has long lamented the drug guidelines' myopic reliance on quantity as the primary measure of a person's blameworthiness.

Defenders remain eager to work with the Commission on this important issue. And while we recognize that reimagining the drug guidelines may take some study and time, there is one concrete step toward more rational drug sentencing policy the Commission can take immediately: eliminate the methamphetamine (actual) and "Ice" base offense levels from the DQT.

Eliminate the Meth-Actual and "Ice" Guidelines. The guidelines treat methamphetamine offenses differently depending on the purity of the substance involved. Offenses involving "methamphetamine (actual)" (pure methamphetamine) and offenses involving "Ice" (a mixture or substance of at least 80 percent purity) are punished ten times more severely than methamphetamine that either has not been tested or is treated as a "mixture" or "substance" containing methamphetamine.³⁷ No other drug is punished more harshly based on purity.³⁸

This purity-based distinction is problematic for three reasons. *First*, the guidelines assign higher base offense levels to higher-purity methamphetamine

US Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.”).

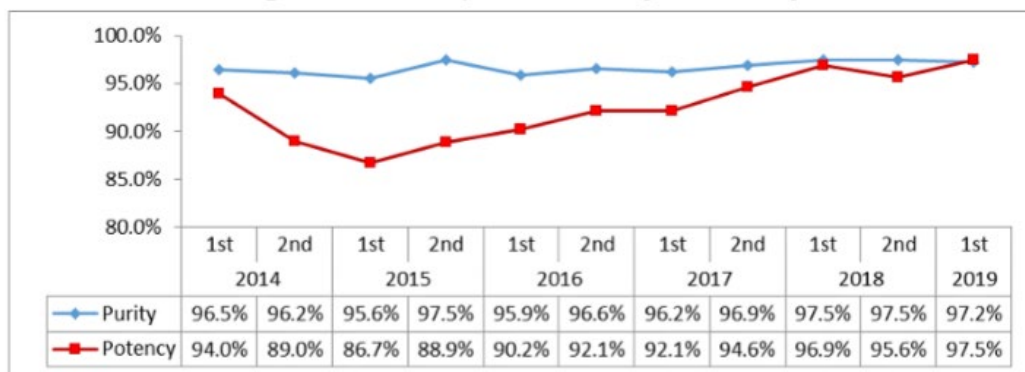
³⁶ See, e.g., Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sent’g Comm’n* 2 (1995) (“[T]he Judicial Conference . . . encourages the Commission to study the wisdom of drug-sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved.”); *United States v. Robinson*, No. 21-CR-14-CRW, 2022 WL 17904534, at *3 (S.D. Miss. Dec. 23, 2022) (sentences should be determined by “examin[ing] all of the circumstances of the defendant’s case and life – seeing the defendant as a whole person, as the Supreme Court [has] instructed[.]” (citation and quotation marks omitted); *United States v. Hubel*, 625 F. Supp. 2d 845, 853 (D. Neb. 2008) (the Commission should focus on “[w]here the defendant falls in [the drug conspiracy hierarchy]” to assess culpability); *Diaz*, 2013 WL 322243, at *12 (suggesting the Commission consider the individual’s role, compensation, whether he had a proprietary interest in the drugs, how long he was involved in drug trafficking, and both his motivation for the offense and for desisting to set drug trafficking offense levels); *United States v. Haynes*, 557 F. Supp. 2d 200, 205 (D. Mass. 2008) (stating that drug quantity “provides an unsatisfying and empty stand-in for the concerns underlying our current sentencing regime”).

³⁷ See USSG §2D1.1(c).

³⁸ See *United States v. Hayes*, 948 F. Supp. 2d 1009, 1025 (N.D. Iowa 2013).

based on a false presumption that purity “is probative of the defendant’s role or position in the chain of distribution,” and is, therefore, a proxy for culpability.³⁹ While there might once have been some truth to this premise, when methamphetamine “was cut as it worked its way down to the street-level dealer or user,” market dynamics have changed and purity no longer equates with role or culpability.⁴⁰ Purity of street-level methamphetamine has been above 90% for many years and in the first half of 2019, seizures of methamphetamine sampled by the DEA averaged 97.2 percent pure.⁴¹

Figure 12. Methamphetamine Purity and Potency



Source: DEA Methamphetamine Profiling Program

Countless courts have recognized: when the “average” methamphetamine bought on the street is nearly 100 percent pure, purity is an ineffective measure of role in the offense, proximity to the original supplier, or moral and legal

³⁹ USSG §2D1.1 cmt. n. 27(C). According to this application note, “[s]ince controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs.” *Id.*; see *United States v. Ibarra-Sandoval*, 265 F. Supp. 3d 1249, 1255 (D.N.M. 2017) (recognizing that the theory underlying the purity-based distinction in the methamphetamine guidelines is found at application note 27(C)).

⁴⁰ *United States v. Nawanna*, 321 F. Supp. 3d 943, 951 (N.D. Iowa 2018).

⁴¹ See U.S. Dep’t of Justice Drug Enf’t Admin., [Drug Enforcement Administration 2020 National Drug Threat Assessment](#) 19–20, 20 fig. 12 (Mar. 2021) (“2020 Drug Threat Assessment”); see also *Ibarra-Sandoval*, 265 F. Supp. 3d at 1254–55 (“As a result of increased cartel control over methamphetamine distribution, the average purity of methamphetamine has increased to over 90 percent while the price per gram has dropped to about \$70.”).

blameworthiness.⁴² Everyone—from the drug kingpin to the street dealer to the end user—has access to pure methamphetamine, effectively “sever[ing] any connection between the purity of the drug and the defendant’s position in the criminal enterprise”⁴³

The Commission, by its own language, has suggested that sentence increases based on purity should apply only where the substance is so “*unusually* pure” as to be indicative of a top-level distributor.⁴⁴ But there’s nothing *unusual* about methamphetamine purity in today’s market. In recognition of this, courts around the country are increasingly rejecting the methamphetamine (actual) and Ice guidelines—often applying the methamphetamine mixture guideline instead.⁴⁵

⁴² See, e.g., *Robinson*, 2022 WL 17904534, at *3; *United States v. Bean*, 371 F. Supp. 3d 46, 52 (D.N.H. 2019); *United States v. Hartle*, No. 4:16-cv-00233-BLW, 2017 WL 2608221, at *3 (D. Idaho June 15, 2017); *Ibarra-Sandoval*, 265 F. Supp. 3d at 1255-56.

⁴³ *United States v. Havel*, No. 21-CR-3075, 2023 WL 1930686, at *5 (D. Neb. Feb. 10, 2023); see also *Robinson*, 2022 WL 17904534, at *3 (“The DEA data show that most methamphetamine confiscated today is ‘pure’ regardless of whether the defendant is a kingpin or a low-level addict.”); cf. *United States v. Ortega*, No. 8:09CR400, 2010 WL 1994870, at *7 (D. Neb. May 17, 2010) (“The two-tiered actual/mixture approach . . . is only an accurate measure of culpability when it corresponds to a defendant’s position in the typical hierarchy that characterizes most drug conspiracies”). Compounding this problem, the stringent meth-actual guideline applies irrespective of whether the accused knew he was dealing methamphetamine, let alone its purity level. See *Hartle*, 2017 WL 2608221, at *3 (“The importance assigned to purity is even less justified for a low-level offender who has no knowledge or control of the purity level.”).

⁴⁴ USSG §2D1.1 cmt. n. 27(C) (emphasis added).

⁴⁵ See, e.g., *United States v. Celestin*, No. 21-125, 2023 WL 2018004, at *3–5 (E.D. La. Feb. 15, 2023); *Havel*, 2023 WL 1930686, at *6; *Robinson*, 2022 WL 17904534, at *3–4; *United States v. Carillo*, 440 F. Supp.3d 1149, 1155 (E.D. Ca. 2020); *United States v. Moreno*, 583 F. Supp. 3d 739, 742–45 (W.D. Va. 2019); *United States v. Johnson*, 379 F. Supp. 3d 1213, 1226 (M.D. Ala. 2019); *United States v. Pereda*, No. 18-cr-00228-CMA, 2019 WL 463027, at *4 (D. Colo., Feb. 6, 2019); *Bean*, 371 F. Supp. 3d at 54–56; *United States v. Requena*, No.4:18-cr-175-BLW, 2019 WL 177932, at *4 (D. Idaho Jan. 11, 2019); *United States v. Hoover*, No. 4:17-cr-327-BLW, 2018 WL 5924500, at *4 (D. Idaho Nov. 13, 2018); *United States v. Ferguson*, No. Cr 17-204, 2018 WL 3682509, at *3-4 (D. Minn. Aug. 2, 2018); *Nawanna*, 321 F. Supp. 3d at 956; *United States v. Harry*, 313 F. Supp. 3d 969, 974 (N.D. Iowa 2018); *Ibarra-Sandoval*, 265 F. Supp. 3d at 1257; *Hartle*, 2017 WL 2608221, at *4; *United States v. Jennings*, No. 4:16-cr-00048-BLW, 2017 WL 2609038, at *4 (D. Idaho June 15, 2017); *Hayes*, 948 F. Supp. 2d at 1015; *Ortega*, 2010 WL 1994870, at *7.

Indeed, in Fiscal Year 2021, courts imposed below-guideline sentences in 77.4 percent of cases using the methamphetamine (actual) or Ice guidelines.⁴⁶

Second, the ubiquity of high purity methamphetamine in today's market means that sentencing variations will turn primarily on whether the government pursues laboratory testing.⁴⁷ This leads to arbitrary and unwarranted disparities between similar individuals and false uniformity between dissimilar ones. Because numerous random factors untethered to culpability determine whether testing is completed in a given case, the guideline-recommended sentences for methamphetamine are often based on happenstance.⁴⁸

Third, the severe sentencing ranges produced by the methamphetamine (actual) and Ice guidelines create unwarranted disparities between methamphetamine and other drug offenses. In Fiscal Year 2022, the average sentence length for methamphetamine trafficking was higher than that for all other major drug types.⁴⁹ "While federal sentences for trafficking of many drugs have

⁴⁶ Specifically, this refers to cases sentenced in Fiscal Year 2021 under primary guideline §2D1.1, with a primary drug type of methamphetamine (actual) or Ice, after excluding any counts of conviction under 18 U.S.C. § 924(c). The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Offender Datafiles" for Fiscal Year 2021. The Commission's "Individual Offender Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, [Commission Datafiles](#) (last visited May 22, 2023).

⁴⁷ See, e.g., *Havel*, 2023 WL 1930686, at *5. The Commission recognized this phenomenon years ago when it reviewed a small representative sample of 155 drug cases involving methamphetamine and found that only 36.8 percent were sentenced using the methamphetamine (actual) guideline despite the high purity of street-level methamphetamine. When a purity analysis was conducted, the methamphetamine (actual) guideline was used, but when no purity analysis was reported in the presentence report, the methamphetamine mixture guideline was used. See USSC, [Methamphetamine Final Report](#) 15 (1999) ("*Meth Report*").

⁴⁸ See *Hartle*, 2017 WL 2608221, at *3 (listing some of the reasons why testing isn't performed, including, among others, the test lab being too busy); *Ferguson*, 2018 WL 3682509, at *4 (referring to the testing decision as "completely arbitrary" and noting that "[a] lab technician's work speed should not determine the number of years a person spends behind bars"); *Ibarra-Sandoval*, 265 F. Supp. 3d at 1257 (commenting that methamphetamine purity testing "occurs capriciously").

⁴⁹ See USSC, [2022 Sourcebook of Federal Sentencing Statistics](#) 124, fig. D-3 (2022) (average sentencing for methamphetamine in Fiscal Year 2022 was 94 months compared to 70

become shorter or held steady in recent years, methamphetamine has been one of the clearest exceptions to this trend.”⁵⁰ And this is unwarranted: empirical evidence suggests that pure methamphetamine is not more dangerous (and may even be *less* dangerous) than many of the other major drug types.⁵¹

This has led at least one commentator to dub the methamphetamine actual/mixture disparity “crack 2.0.”⁵² Indeed, methamphetamine (actual) and Ice are currently punished 5.6 times more harshly than crack cocaine under the guidelines and 100 times more harshly than powder cocaine.⁵³ Yet, the DEA’s “2020 National Drug Threat Assessment Summary,” depicts both the market dynamics and threats posed by cocaine and methamphetamine as being similar.⁵⁴

The Commission’s enhancements to methamphetamine base offense levels over the years were driven by statutory mandatory minimums and directives to the

months for crack cocaine, 68 months for powder cocaine, 66 months for heroin, and 65 months for fentanyl).

⁵⁰ Jake J. Smith, *Why Are Meth Sentences Getting Longer?*, 34 Fed. Sent. Rep. 44, 44 (2021).

⁵¹ See *Bean*, 371 F. Supp. 3d at 54; *Harry*, 313 F. Supp. 3d at 973; *Hayes*, 948 F. Supp. 2d at 1026 (“[M]any drug abuse experts contend that methamphetamine is not the most harmful drug.”); Hofer, *supra* note 35, at 10–17 (examining drug harm studies looking at multiple criteria and determining that methamphetamine fell behind other substances in all categories); David J. Nutt et. al., [Drug harms in the UK: a multicriteria decision analysis](#), 376 Lancet 1558, 1560-61 & Figs. 2, 3, 4 (2010) (ranking methamphetamine’s overall harmfulness behind that of alcohol, heroin, and crack cocaine); see also [Letter from Marjorie Meyers](#), Chair, Fed. Def. Sent’g Guidelines Comm., to the Hon. Patti B. Saris, Chair, U.S. Sent’g Comm’n, at 11-13 (May 17, 2013) (“Defenders 2013 Annual Letter”) (discussing data showing meth and other stimulants to be less harmful than other drugs that are punished less severely).

⁵² Coleman, *supra* note 35, at 30; cf. Stephanie R. Bush-Baskette & Vivian C. Smith, *Is Meth the New Crack for Women in the War on Drugs? Factors Affecting Sentencing Outcomes for Women and Parallels Between Meth and Crack*, 7 Fem. Criminol. 48 (2011); *Hayes*, 948 F. Supp. 2d at 1026 (comparing the false assumptions behind the crack/powder disparity to problems with the methamphetamine guidelines); [Defenders 2013 Annual Letter](#), at 10 (The methamphetamine (actual) guideline “is tainted with exaggerated fears and political considerations just as is the history of the crack cocaine guideline”).

⁵³ See USSG §2D1.1(c).

⁵⁴ See [2020 Drug Threat Assessment](#) at 19–36; see also Coleman, *supra* note 35, at 31 (“For over twenty years . . . the DEA has depicted drug market dynamics for cocaine and methamphetamine as being similar if not the same . . .”).

Commission to increase penalties.⁵⁵ Most notably, the Methamphetamine Trafficking Penalty Act of 1998 cut the methamphetamine quantities that triggered mandatory minimums in half, leading to the current guideline regime.⁵⁶ An “overt objective” of the Act was to equate penalties for methamphetamine (actual) to those for crack cocaine.⁵⁷ However, crack cocaine mandatory penalties were decreased significantly by the Fair Sentencing Act of 2010 without a commensurate decrease to methamphetamine (actual) penalties,⁵⁸ leading to the significantly harsher treatment of methamphetamine(actual) than crack cocaine in the guidelines today.

The defects of the drug trafficking guidelines—especially methamphetamine (actual) and Ice offense levels—desperately need repair. Defenders stand ready to work with the Commission to amend these guidelines.

II. Modernize USSG, Chapter 5, Parts H, K

For nearly two decades, federal courts have operated in an advisory guidelines system. Yet the policy statements in Chapter Five, Parts H and K are inconsistent with statutory law, judicial practice, and empirical evidence that

⁵⁵ See USSC, App. C, Amend. 125, Reason for Amendment (eff. Nov. 1, 1989) (citing as one reason for the amendment “to reflect the statutory change with respect to methamphetamine”); Amend. 555, Reason for Amendment (eff. Nov. 1, 1997) (indicating that the amendment responded to the Congressional directive in the Comprehensive Methamphetamine Control Act of 1996 to increase penalties for methamphetamine trafficking by “reducing by one-half the quantity of a mixture or substance containing methamphetamine corresponding to each offense level in the Drug Quantity Table”); Amend. 594, Reason for Amendment (eff. Nov. 1, 2000) (conforming methamphetamine (actual) penalties to “the more stringent mandatory minimums established by the [Methamphetamine Trafficking Penalty Enhancement Act of 1998].”); *see also* Hofer, *supra* note 35, at 8 (describing the methamphetamine guidelines as “motivated more by political considerations than empirical evidence”); [Defenders 2013 Annual Letter](#), at 9 (“The history of the methamphetamine guideline shows that the guidelines increase over time, not because of evidence showing that methamphetamine was more dangerous than other drugs, but because of the Commission’s response to congressional actions for political reasons.”). For an overview of the statutory and guideline amendment history for methamphetamine trafficking, *see generally*, [Meth Report](#) at 7–13.

⁵⁶ See [Meth Report](#) at 12 (citing Pub. L. No. 105-277, Division E, 112 Stat. 2681 (1998)).

⁵⁷ *Id.*

⁵⁸ See Pub. L. No. 111-220, 124 Stat. 2372 (2010).

accompany this system. Defenders urge the Commission to modernize Chapter 5 to provide appropriate guidance to judges in a post-*Booker* world.

Statutory Law. In the Sentencing Reform Act (SRA), Congress directed the Commission to consider whether 11 personal characteristics, “among others,” have relevance to the sentencing determination and to account for them to the extent they are relevant.⁵⁹ To implement this mandate, the Commission crafted the policy statements in Chapter 5H. According to the Commission, the purpose of these policy statements “is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner.”⁶⁰ Unfortunately, the framework provided in Chapter 5H prohibits, discourages, or limits consideration of mitigating factors that are critical to crafting a sentence consistent with § 3553(a).⁶¹ Likewise, several 5K downward departure policy statements are overly restrictive.⁶²

Mitigating factors take a back seat in Chapter 5 (and throughout the Guidelines Manual), while aggravating factors are emphasized.⁶³ This does not

⁵⁹ These include: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood. *See* 28 U.S.C. § 994(d).

⁶⁰ USSG §5H, Intro. cmt.

⁶¹ For instance, Chapter 5H *prohibits* consideration of gambling addiction (§5H1.4) and lack of guidance as a youth and disadvantaged upbringing (§5H1.12); *discourages* consideration of educational and vocational skills (§5H1.2), drug or alcohol dependence (§5H1.4), employment record (§5H1.5), family ties and responsibilities (§5H1.6), and civic, charitable, or public service, employment-related contributions, or good works (§5H1.11); and *permits, only if present to an unusual degree*, consideration of age-related factors (§5H1.1), physical condition (§5H1.4), mental and emotional condition (§5H1.3), and military service (§5H1.11).

⁶² *See, e.g.*, USSG §§5K2.12 (coercion and duress departure inapplicable where duress relates to “personal financial difficulties and economic pressures upon a trade or business”); 5K2.13 (diminished mental capacity departure not available where it results from voluntary use of drugs or other intoxicants); 5K2.20 (aberrant behavior departure prohibited under four circumstances).

⁶³ *See* Carissa Byrne Hessick & Douglas Berman, *Toward a Theory of Mitigation*, 96 B.U. L. Rev. 161, 162 & n.1 (2016); Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1658 (2012).

have to be. In enacting the SRA, “Congress did not intend to eliminate judges’ ‘thoughtful imposition of individualized sentences.’”⁶⁴ Rather, Congress wanted the guideline system to “maintain ‘sufficient flexibility to permit individualized sentences when warranted by *mitigating* or aggravating factors not taken into account in’ the guidelines.”⁶⁵ Congress “believed that ‘the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case.’”⁶⁶

The original Commission did not study the need to omit most mitigating factors from the guidelines while amplifying aggravating ones, nor did it explain its decision to stymie the flexibility Congress envisaged.⁶⁷ To be sure, 28 U.S.C. § 994(e) states that it is “general[ly] inappropriat[e]” for the guidelines to consider education, vocation, employment, and family and community ties to recommend a term or length of imprisonment.⁶⁸ But Congress intended this language to ensure that courts did not *inappropriately use or lengthen incarceration* to account for an individual’s *lack of* community/family ties, employment or vocational history, or education—factors indicating disadvantage.⁶⁹ Congress did not intend to prevent

⁶⁴ Baron-Evans & Stith, *supra* note 63, at 1648 (quoting S. Rep. No. 98-225, at 52 (1983)).

⁶⁵ *Id.* at 1657–58 (quoting 28 U.S.C. § 991(b)(1)(B)) (emphasis added).

⁶⁶ *Id.* at 1648 (quoting S. Rep. No. 98-225, at 52).

⁶⁷ See Amy Baron-Evans & Jennifer Niles Coffin, [No More Math Without Subtraction: Deconstructing the Guidelines’ Prohibitions and Restrictions on Mitigating Factors](#) 36–37 (2011) (observing that the original Commission made no attempt to determine the impact of mitigating personal characteristics on past sentences even though such characteristics were routinely considered before the guidelines, and did not explain why it failed to do so).

⁶⁸ 28 U.S.C. § 994(e); see also USSG App. C., Amend. 357, Reason for Amendment (eff. Nov. 1, 1990) (explaining that amendment “clarifies the relationship of 28 U.S.C. § 994(e) to certain of the policy statements contained in this part.”).

⁶⁹ See S. Rep. 98-225, at 175 (“The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those who lack education, employment and stabilizing ties.”); see also Baron-Evans & Coffin, *supra* note 67, at 28 (arguing that “[t]his means that the factors listed in § 994(e) should not be used to choose prison over probation, or a lengthier prison term”); Baron-Evans & Stith, *supra* note 63, at 1658–59 (“[The Enabling Act] directed only that the Commission was not to recommend imprisonment instead of probation or a longer prison term based on the defendant’s lack of education, employment, or stabilizing ties. But the SRA made clear that those and other factors were appropriate considerations in mitigation of a sentence.”); USSC, [Simplification Draft Paper: Departures and Offender Characteristics](#), at II(E)(3) (last visited May 23, 2023) (“[I]n assessing the flexibility the Commission has to address the offender characteristics

the Commission and courts from considering the *mitigating value* of these five factors. “Section 994(e) was one of three provisions of the SRA that reflected Congress’s judgment that prison was not an appropriate means of rehabilitation and that a term of imprisonment should therefore not be imposed or lengthened solely on the theory that prison might be rehabilitative.”⁷⁰ Thus, consideration of these factors may call for leniency, but should not lead to harsher treatment.⁷¹

The individualized sentencing that Congress contemplated when it enacted the SRA requires courts to evaluate the whole person: their past, present, and future goals, plans, and needs. Under 18 U.S.C. § 3553(a), courts must examine the nature of the offense and the “history and characteristics” of the individual, as well as the need for the sentence to serve the purposes of sentencing (which necessarily varies based on the individual), to impose a sentence that is “sufficient, but not greater than necessary.” The Supreme Court has also emphasized that “the possession of the fullest information possible concerning the defendant’s life and characteristics” is “highly relevant—if not essential—to the selection of an appropriate sentence[.]”⁷² Indeed, “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an

enumerated in subsection (e), it appears that Congress’s concern was asymmetrical: Congress wanted to ensure that the lack of the enumerated factors would not increase the likelihood of prison—not that these factors could have no bearing on the possibility of probation.”).

⁷⁰ Baron-Evans & Stith, *supra* note 63, at 1658 n.147 (citing S. Rep. No. 98-225, at 67 n.140, 76, 119); *see also* *Tapia v. United States* 564 U.S. 319, 329–30 (2011) (interpreting the other two statutory provisions from barring the Commission and courts from imposing or lengthening a period of confinement based on a person’s rehabilitative needs). Indeed, the relevant Senate Report states that these factors “may, in an appropriate case, call for the use of a term of probation instead of imprisonment” S. Rep. 98-225, at 174.

⁷¹ Any other reading would conflict with § 994(d), which gives the Commission discretion to determine whether these same matters and others are relevant to sentencing. *See* Baron-Evans & Stith, *supra* note 63, at 1659 n.148 (“Congress directed the Commission to consider the relevance of eleven characteristics, ‘among others,’ in establishing categories of offenders in the guidelines and policy statements regarding the type, length, and conditions of sentences.”).

⁷² *Pepper*, 562 U.S. at 488 (citation and quotation marks omitted); *see also* *Gall*, 552 U.S. at 55–58 (upholding a non-guideline sentence of probation based in part on personal characteristics the §5H policy statements discourage).

individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”⁷³

Judicial Practice. Much of Chapter 5H, and portions of 5K, violate the SRA’s and Supreme Court’s mandates and are out-of-step with judicial sentencing practices post-*Booker*.⁷⁴ The factors these policy statements restrict have been found by district courts to be highly salient to the sentencing determination, including: gambling addiction;⁷⁵ substance use disorder;⁷⁶ age;⁷⁷ employment

⁷³ *Koon v. United States*, 518 U.S. 81, 113 (1996).

⁷⁴ *See, e.g., Rita v. United States*, 551 U.S. 338, 364–65 (2007) (Stevens, J., concurring) (“The Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics These are, however, matters that § 3553(a) authorizes the sentencing judge to consider. As such, they are factors that an appellate court must consider under *Booker*’s abuse-of-discretion standard.” (internal citation omitted)).

⁷⁵ *See, e.g., United States v. Dikiara*, 50 F. Supp. 3d 1029, 1032–33 (E.D. Wis. 2014).

⁷⁶ *See, e.g., United States v. Mosley*, 277 F. Supp. 3d 1294, 1298 (M.D. Ala. 2017) (“Given what substance abuse does to the brain, the court is unwilling simply to chalk up Mosley’s difficulties to a character flaw and lock him away, at least without first giving proper weight to whether and how that mental disorder affects his culpability for his conduct. Without such an assessment, a court risks effectively punishing a defendant for his or her disease.”); *United States v. Hendrickson*, 25 F. Supp. 3d 1166 (N.D. Iowa 2014); *cf.* Nancy Gertner, *Keynote address: Criminal Justice Reform*, 8 Drexel L. Rev. 261, 264 (2016) (describing ways in which addiction mitigates punishment under the traditional theories of sentencing).

⁷⁷ *See, e.g., United States v. Nellum*, No. 2:04-CR-30-PS, 2005 WL 300073, at *3 (N.D. Ind. Feb. 3, 2005) (the fact that a 57-year-old man is less likely to recidivate than a younger person is “plainly relevant” to the sentencing decision under § 3553(a)(2)(C)); *United States v. Rosario*, Nos. 99-CR-533 (ARR), 12-CV-3432 (ARR), 2018 WL 3785095 (E.D.N.Y. Aug. 9, 2018) (examining the fundamental differences between the adolescent and adult brain and resentencing Mr. Rosario to a lesser term of imprisonment to account for his youth-related immaturity and susceptibility to poor influences).

record;⁷⁸ education;⁷⁹ family ties and responsibilities;⁸⁰ adverse childhood experiences and trauma;⁸¹ aberrant behavior;⁸² and public service,⁸³ among others. Given Chapter 5's restrictions, district courts have had to *vary* downward, rather than depart, to account for these factors.⁸⁴

⁷⁸ See, e.g., *United States v. Marsh*, 820 F. Supp. 2d 320 (E.D.N.Y. 2011) (sentencing multiple people involved in fraud scheme to below-guideline sentences in part because their long history of lawful employment made it less likely they would reoffend).

⁷⁹ See, e.g., *United States v. Rowan*, No. 06-321, 2007 WL 127739, at *9 (E.D. Pa. Jan. 10, 2007) (observing that a person's need for educational or vocational training "will be better served" by "probation and home detention" than incarceration).

⁸⁰ See, e.g., *United States v. Chamness*, No. 5:11-CR-00054-R, 2012 WL 3109494, at *6 (W.D. Ky. July 31, 2012) ("[T]he family circumstances of a criminal defendant often play an important role when judges craft sentences from the Guideline's factors." (citing cases)); *United States v. Pokuua*, 782 F. Supp. 747, 747–49 (E.D.N.Y. 1992) (granting a downward departure to "time served" for a pregnant mother who would have lost custody of her newborn child if sentenced within her guideline range). In addition to conflicting with § 3553(a), §5H1.6 is in tension with the Commission's recently adopted policy statement for reductions in sentence, §1B1.13. Under the current §5H1.6, family ties and responsibilities are considered "not ordinarily relevant in determining whether a departure may be warranted"; but these same ties and responsibilities can support a later reduction in sentence. See USSG §1B1.13(b)(3) (eff. Nov. 1, 2023).

⁸¹ See, e.g., *United States v. Carter*, 506 F. Supp. 3d 1204, 1208–13 (M.D. Ala. 2020) (discussing Mr. Carter's pervasive childhood trauma, its relevance to his culpability, and how it influenced the decision to grant a downward variance); cf. Gertner, *supra* note 76, at 264 ("Scientists are evaluating the impact of stress on specific neural structures at particular times in a child's life, as well as the role that neglect plays in cognitive delays and increasing the risk of psychological disorders.").

⁸² See, e.g., *United States v. Germosen*, 473 F. Supp. 2d 221 (D. Mass. 2007).

⁸³ See, e.g., *United States v. Ribot*, 97 F. Supp. 2d 74, 85 (D. Mass. 1999) (describing Mr. Ribot's "real and important contributions to the communities in which he has lived"); see also [Letter from Hon. Robert Holmes Bell](#), U.S. District Court for the Western District of Michigan, to the U.S. Sent'g Comm'n, Washington, D.C., at 1–2 (Mar. 1, 2010) (noting that Chapter 5H has been "troubling" from its inception as it conflicts with § 3553(a) and recounting a pre-*Booker* sentencing over which he presided and experienced "difficulties . . . attempting to bring the factor found in § 5H1.11 in line with [the individual's] 'history and characteristics'").

⁸⁴ Cf. [Statement of Hon. Robin J. Cauthron](#), U.S. District Court for the Western District of Oklahoma, Before the U.S. Sent'g Comm'n, Austin, Tex., at 2 (Nov. 19, 2009) ("It seems to me that offense characteristics more often than not are sufficiently taken into account in

Circuit courts agree that Chapter 5 fails to provide meaningful guidance in an advisory guideline system. The Fourth Circuit has even suggested that a presumptively reasonable, within-guideline sentence could be *substantively unreasonable* if it fails to treat a person’s history of substance use disorder as a mitigator⁸⁵—a factor USSG §5H1.4 describes as “ordinarily not a reason for a downward departure.” And in discussing the Commission’s “irrational” decision to restrict consideration of substance misuse and other mitigating factors in Chapter 5H, former Sixth Circuit Judge Gilbert Merritt excoriated the guidelines as “not a reliable or even a rational guide to sentencing.”⁸⁶ He went on:

If the federal judiciary is to impose just sentences after *Booker*, it must extricate itself from the prevailing mindset under the Guidelines that includes almost all conceivable enhancements and aggravators while excluding from consideration almost all significant mitigating circumstances.⁸⁷

At regional Commission hearings in 2009 and 2010, judges from around the country testified that recognition of personal mitigating factors is essential to fair sentencing.⁸⁸ For instance, at a 2009 hearing in Denver, U.S. District Judge for the

the Guideline calculation. For me, it is usually offender characteristics, which would not have justified a Guideline departure, but which lead me to vary.”); [O’Connell Statement](#) at 2 (“Judges in my districts have shown an interest in post-offense rehabilitative efforts as a basis for below guideline sentences, as well as mental health issues, family circumstances, and age. They usually do not use the ‘departure’ provisions of the guidelines, instead they impose variances.”).

⁸⁵ See *United States v. Freeman*, 992 F.3d 268, 279–80 (4th Cir. 2021), *aff’d en banc*, 24 F.4th 320, 332 (2022) (vacating portion of the panel opinion holding that the within-guideline sentence was substantively unreasonable as unnecessary to disposition of the appeal).

⁸⁶ *United States v. Eversole*, 487 F.3d 1024, 1037 (6th Cir. 2007) (Merritt, J., dissenting).

⁸⁷ *Id.*

⁸⁸ See, e.g., Tr. of Public Hearing Before the U.S. Sent’g Comm’n, Denver, Col., at 290 (Oct. 21, 2009) ([Hon. Pratt](#)) (arguing that having a “positive impact” on the community should be taken into account by the guidelines); Tr. of Public Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 91 (Sept. 9, 2009) ([Hon. McCalla](#)) (recommending inclusion of “significant progress toward rehabilitation” as a mitigating factor in the guidelines); Tr. of Public Hearing Before the U.S. Sent’g Comm’n, Stanford, Cal., at 86–88 (May 28, 2009) ([Hon. Shea](#)) (describing how the “social profile” of the person being sentenced impacts the sentencing decision).

District of Kansas, John Thomas Marten, bemoaned the guidelines' uniform treatment of people with dissimilar backgrounds. "[E]quality is not in treating different things similarly; equality is in treating different things differently," he stated.⁸⁹ "I don't understand why all of these things that differentiate one person from another are disfavored factors for purposes of sentencing."⁹⁰

At the same hearing, U.S. District Judge for the District of Minnesota, Joan Ericksen, pointed out the confusion created by the disconnect between Chapter 5 and § 3553(a).⁹¹ She suggested the Commission and courts should be guided by "empirical research" and "what . . . the people who study this have to say about it."⁹² She then offered that the Commission could collect data on the influence of certain personal characteristics to sentencing decisions and rework these policy statements to create a "clearinghouse" of information for judges to use in the exercise of their discretion.⁹³

Empirical Evidence. The Commission already attempts to collect and disseminate some of this information. In addition to its annual sourcebook, the Commission has in past years surveyed federal judges for their thoughts on the guidelines. The survey data bolster the commonsense conclusion that courts care about precisely the personal mitigators that Chapter 5 minimizes. Many of the federal judge respondents to the Commission's 2010 survey viewed these factors as "ordinarily relevant to departure and/or variance consideration."⁹⁴

⁸⁹ Tr. of Public Hearing Before the U.S. Sent'g Comm'n, Denver, Col., at 64 (Oct. 20, 2009) ([Hon. Marten](#)).

⁹⁰ *Id.*

⁹¹ See *id.* at 274 ([Hon. Ericksen](#)). Adding to the confusion, Chapter 5H is internally inconsistent at times. For instance, a disadvantaged upbringing is not relevant in determining whether a departure is warranted under §5H1.12, yet, mental and emotional conditions may be relevant if present to an unusual degree under §5H1.3. But childhood trauma related to a disadvantaged upbringing may lead to mental and emotional imbalance later in life.

⁹² *Id.* at 281.

⁹³ *Id.* at 282, 283.

⁹⁴ See [2010 Survey](#), at tbl. 13.

IV. Departures and Variances

Question 13. Factors to Consider at Sentencing

Table 13. Relevance of various characteristics at sentencing.

	Is Ordinarily Relevant to Within-Range Determination	Is Ordinarily Relevant to Departure and/or Variance Consideration	Never Relevant	
	Percent of Judges Responding Affirmatively			Number
Age	57%	67%	0%	639
Education	46	48	5	639
Vocational Skills	41	41	6	639
Mental Condition	65	79	0	639
Emotional Condition	51	60	3	639
Physical Condition	51	64	1	639
Drug Dependence	50	49	5	639
Alcohol Dependence	48	47	5	639
Gambling Addiction	38	39	10	639
Employment Record	62	65	2	639
Family Ties and Responsibilities	57	62	2	639
Community Ties	46	49	5	639
Dependence on Criminal Livelihood	56	55	12	639
Stress Related to Military Service	48	64	4	225*
Civic, Charitable, or Public Service	52	60	2	639
Employment-Related Contributions	43	47	9	639
Prior Good Works	55	62	3	639
Lack of Guidance as a Youth	49	49	7	639
Disadvantaged Upbringing	48	50	7	639
Diminished Capacity	66	80	0	639
Voluntary Disclosure of Offense	70	74	0	639
Post-Sentencing Rehabilitative Efforts	51	57	6	639
Post-Offense Rehabilitative Efforts	61	70	1	639
Aberrant Behavior	64	74	1	639
Exceptional Efforts to Fulfill Restitution Obligations	62	75	1	639
Undue Influence Related to Affection, Relationship, or Fear of Other Offender(s)	57	68	3	639

Note. *Data for "stress related to military service" was collected from judges who responded on paper questionnaires and was erroneously omitted from the online survey. "Number" refers to respondents who answered question. Percents do not sum to 100% because many judges responded affirmatively to more than one condition.

A pre-*Booker* version of the survey from 2003 asked circuit and district judges about the challenges to guidelines sentencing; a popular response was “judicial discretion,” with respondents feeling that “the sentencing [j]udge should be given more opportunity to take into account the personal characteristics of the defendants.”⁹⁵

Empirical studies also underscore the relevance of personal characteristics to sentencing. For instance, in a recent study on the relationship between sentencing mitigation advocacy and sentence imposed, law professor and former federal prosecutor John B. Meixner Jr. found that presenting more robust mitigation correlated with lower sentences relative to the guideline range.⁹⁶ Professor Meixner

⁹⁵ See USSC, [Survey of Article III Judges on the Federal Sentencing Guidelines](#), at PDF 44 & III-24 (2003).

⁹⁶ See John B. Meixner Jr., *Modern Sentencing Mitigation*, 116 Nw. U. L. Rev. 1395, 1443, 1444 fig. 2 (2022). Professor Meixner quantitatively coded sentencing memoranda filed by defense attorneys in 300 noncapital, federal felony cases for discussion of more than 12 mitigating factors across three distinct categories—offense, personal, and theories of punishment. See *id.* at 1399, 1425–26. He then “statistically test[ed] how the mitigation arguments predict sentencing decisions.” *Id.* at 1425

determined that judges were particularly compelled by personal mitigation—the very kind that Chapters 5H and 5K diminish.⁹⁷ Increased amounts of personal mitigation were “strongly associated” with reduced sentences, and “significantly predicted the deviation of the sentence from the midpoint of the Guideline range,” despite the “Guidelines minimization of mitigation.”⁹⁸ This is not surprising: research—such as empirical studies on recidivism and neuroscientific developments on the impact of youth, trauma, and substance abuse on the brain—establishes crucial connections between many of the personal mitigators addressed in Chapter 5 and the purposes of sentencing.⁹⁹ Thus, “[judges’] sentences reflect the modern, post-*Booker* structure: rather than adhering to the strict Guideline approach, judges go outside the Guidelines to individualize their sentences based on mitigating evidence.”¹⁰⁰

Defenders and defense practitioners have, in the past, encouraged the Commission to update the guideline policy statements in Chapter 5 to better reflect this modern, post-*Booker* structure,¹⁰¹ but its amendments have been modest.¹⁰² If

⁹⁷ See *id.* at 1444–46, 1454–55.

⁹⁸ *Id.* at 1445, 1454, 1453.

⁹⁹ See generally Baron-Evans & Coffin, *supra* note 67, at 44–195 (conducting a comprehensive review of empirical research, including Sentencing Commission and other data, and discussing how each of the Chapter 5 factors influence rearrest rates (and, thus, the need for incapacitation) and culpability); see also Leslie E. Scott, *Substance Use Disorder’s (SUD) Impact on Criminal Decision-Making and Role in Federal Sentencing Jurisprudence: Arguing for Culpability-Based SUD Mitigation*, 19 Ohio St. J. Crim. L. 471, 510–523 (2022) (examining the impact of substance use disorder on the brain and behavior through a retributive lens).

¹⁰⁰ Meixner, *supra* note 96, at 1453–54.

¹⁰¹ See, e.g., [Letter from Michael Caruso](#), Chair, Federal Defender Sent’g Guidelines Comm., to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sent’g Comm’n, at 14–19 (Aug. 10, 2018); [Statement of Margy Meyers & Marianne Mariano](#) Before the U.S. Sent’g Comm’n, Washington, D.C., at 54–81 (Mar. 17, 2010); [O’Connell Statement](#), at 2–10; [Statement of Thomas W. Hillier II & Davina Chen](#) Before the U.S. Sent’g Comm’n, Stanford, Cal., at 31–37 (May 27, 2009); [Testimony of Alan Dubois & Nicole Kaplan](#) Before the U.S. Sent’g Comm’n, Atlanta, Georgia, at 47–50 (Feb. 10, 2009); see also [Testimony of Eric A. Tirschwell](#), Practitioners Advisory Grp., Before the U.S. Sent’g Comm’n, Washington, D.C., at 1–4 (Mar. 17, 2010); [Statement of Cynthia Hujar Orr](#), National Ass’n of Crim. Defense Lawyers Before the U.S. Sent’g Comm’n, Washington, D.C., at 1–3 (Mar. 17, 2010).

¹⁰² See, e.g., USSG, App. C., Amend. 739 (eff. Nov. 1, 2010).

these provisions are to have force post-*Booker*, the Commission must do more. The Commission should restructure this Chapter to provide meaningful guidance consistent with current sentencing practices and courts' obligations under § 3553(a).

III. Continue to Reform the Criminal History Rules

Last year, the Commission took impactful steps to ensure that the criminal history rules do not produce sentences greater than necessary to serve the purposes of § 3553(a).¹⁰³ By eliminating (or reducing) status points, making ameliorative changes for people with zero criminal history points, and referencing marijuana possession priors in the downward departure commentary to USSG §4A1.3, the Commission recognized that some of the current criminal history rules lead to perverse outcomes. Defenders are encouraged by this forward momentum—the result of “advancement in knowledge of human behavior as it relates to the criminal justice process.”¹⁰⁴ But we hope these steps are just the beginning of a movement in the direction of diminishing the overall impact of criminal history that perpetuates racial disparities and leads to unfairly long sentences.¹⁰⁵

Last year, we offered several additional suggestions on ways the Commission could deemphasize criminal history to make the guidelines adhere more closely to the parsimony principle.¹⁰⁶ We hope the Commission will revisit that letter and prioritize those suggestions for this year's cycle.¹⁰⁷ In particular, and as in previous years, we strongly encourage the Commission to exclude convictions for offenses committed before age 18 from the criminal history calculation, especially from the

¹⁰³ See 88 Fed. Reg. 28254-01, 28269–28275, 2023 WL 3199918 (May 3, 2023).

¹⁰⁴ 28 U.S.C. § 991(b)(1)(C).

¹⁰⁵ See [Letter from Michael Caruso](#), Chair, Federal Defender Sent'g Guidelines Comm., to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 14 & n.64 (Oct. 17, 2022) (discussing scholarly and legal consensus that Black people are more often the targets of law enforcement stops, searches, arrests, and prosecutions than white people).

¹⁰⁶ See 18 U.S.C. § 3553(a) (sentences should be “sufficient, but not greater than necessary” to serve the purposes of sentencing).

¹⁰⁷ In addition to addressing the treatment of persons with zero criminal history points and status points, we asked the Commission to: (1) exclude offenses committed before age 18 from the criminal history calculation; (2) exclude revocations from the criminal history calculation; and (3) modify the career offender guideline's CHC VI requirement. See [Defenders 2022 Annual Letter](#), at 19–25.

career offender guideline.¹⁰⁸ At a minimum, *juvenile adjudications* should be excluded; they are less reliable than adult adjudications, carry fewer procedural protections, and juvenile sentence length is a poor proxy for offense seriousness.¹⁰⁹ Developmental neuroscience, behavioral psychology, and Supreme Court precedent further justify excluding youthful convictions.

Neuroscience and Psychology Research. Since 1987, §4A1.2(d) has directed that both adult and juvenile convictions for offenses committed before age eighteen can qualify for criminal history points.¹¹⁰ This rule is ill-advised. Decades of developmental neuroscience and behavioral psychology research evinces that young people are *less culpable* than older people whose brains and character traits are more fully formed. Neuroscientific studies reveal “that the areas of the brain that govern impulse control, planning, and foresight of consequences mature slowly over the course of adolescence and into early adulthood, while the arousal of the limbic system around puberty increases sensation seeking in early adolescence.”¹¹¹ In concert with these neuroscience findings, “[a] large body of behavioral research confirms that adolescents are more impulsive, risk-seeking, subject to peer

¹⁰⁸ See, e.g., *id.*; [Defenders’ 2018 Annual Letter](#), at 11–12; [Letter from Marjorie Meyers](#), Chair, Fed. Def. Sent’g Guidelines Comm., to the Honorable William H. Pryor, Acting Chair, U.S. Sent’g Comm’n, at 17–18 (July 31, 2017); [Letter from Marjorie Meyers](#), Acting Chair, Fed. Def. Sent’g Guidelines Comm., to the Honorable William H. Pryor, Chair, U.S. Sent’g Comm’n, at 20–37 (Feb. 20, 2017) (“Meyers 2017 Letter”).

¹⁰⁹ See [Meyers 2017 Letter](#), at 22–27 (explaining how the origin and purpose of juvenile courts led to weaker procedural safeguards in juvenile delinquency proceedings than in adult proceedings and a more attenuated relationship between sentence length and offense severity).

¹¹⁰ USSG §4A1.2(d) (eff. Nov. 1, 1987).

¹¹¹ Elizabeth S. Scott, “*Children are Different*”: *Constitutional Values and Justice Policy*, 11 Ohio St. J. Crim. L. 71, 87 (2013); see also USSC, [Youthful Offenders in the Federal System](#) 6–7 (2017) (a 2015 meta-analysis of brain development studies established that the development and maturation of the prefrontal cortex is not completed until the mid-20s); Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 Psychol. Pub. Pol’y & L. 410, 414–15 (2017) (describing brain imaging studies that evidence immaturity in regions of the young person’s brain critical to executive function and heightened responsiveness in the socioemotional incentive-processing system, which taxes the capacities for self-regulation); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“[P]arts of the brain involved in behavior control continue to mature through late adolescence.”).

influence, and inclined to focus on immediate consequences of their choices than are adults.”¹¹²

Supreme Court Opinions on Youthful Criminality. The Supreme Court has long recognized that people who commit crimes before age 18 should be treated differently than adults. In a string of opinions, the Court relied on neuroscience and behavioral psychology to proscribe excessive punishment for people who commit crimes before their eighteenth birthday.¹¹³ And over four decades ago, the Court acknowledged that “youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage.”¹¹⁴ It has underscored the “broad agreement” that “adolescents as a class are less mature and responsible than adults.”¹¹⁵ According to the Court, youths’ lack of life experience, intelligence, and education compared to adults makes them “less able to evaluate the consequences of [their] conduct [and] more apt to be motivated by mere emotion or peer pressure than is an adult.”¹¹⁶

The current criminal history rules—which generally treat convictions for youthful offenses on par with adult convictions—utterly fail to account for advancements in neuropsychology, as well as decades-old Supreme Court precedent

¹¹² Scott, *supra* note 111, at 87; *see also* Steinberg, *supra* note 111, at 413–14 (discussing behavioral studies revealing that compared to adults, youth are more impulsive, more likely to engage in sensation-seeking, more likely to succumb to peer pressure, and more likely to consider immediate gratification than the future consequences of their actions); Elizabeth Cauffman et al., *How Developmental Science Influences Juvenile Justice Reform*, 8 UC Irvine L. Rev. 21, 29 (2018) (same); *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (recognizing three behavioral “gaps” between adolescents and adults that illustrate the reduced culpability of adolescents who commit crime).

¹¹³ *See Miller*, 567 U.S. at 471–79 (mandatory life without parole for people who commit crimes under age 18 violates the Eighth Amendment); *Graham*, 560 U.S. at 67–69, 72–73, 82 (life without parole violates the Eighth Amendment when imposed on juveniles who commit nonhomicide offenses); *Roper v. Simmons*, 543 U.S. 551, 568–78 (2005) (invalidating the death penalty for people who commit crimes under age 18).

¹¹⁴ *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *see also Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“[D]uring their formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”).

¹¹⁵ *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988).

¹¹⁶ *Id.* at 835.

indicating that young people are less culpable than adults. The Commission should prioritize fixing this.¹¹⁷

IV. Add Mens Rea to the USSG §2K2.1(b)(4) Enhancement

Defenders hope the Commission will continue to consider adding a scienter requirement to USSG §2K2.1(b)(4). During the last amendment cycle, the Commission asked whether it should revise the enhancement at §2K2.1(b)(4) by adding a mental intent requirement.¹¹⁸ In response, both Defenders and DOJ supported one.¹¹⁹ Defenders emphasized four reasons why scienter is essential. First, the presence of conscious wrongdoing is a long-standing, bedrock principle of criminal law. Second, the strict-liability enhancements at §2K2.1(b)(4) disparately impact Black people. Third, the strict-liability standard serves no legitimate purpose of sentencing. And fourth, the Commission has never articulated an empirically justified policy reason for the lack of scienter in §2K2.1(b)(4).¹²⁰

Beyond these reasons, the knowledge or willful blindness standard in the new enhancement for privately made firearms (PMFs) supports a symmetrical,

¹¹⁷ Doing so would also help guard against unwarranted and racialized disparities: juvenile adjudication practices vary considerably among different jurisdictions, *see, e.g.*, [Juvenile Justice: Geography, Policy, Practice & Statistics](#) (JJGPS) (last visited May 18, 2023) (identifying various standards for age boundaries, waivers to adult court, competency, waiver and timing of counsel, diversion, and release decisions), and young people of color are overrepresented in the juvenile justice system, *see, e.g.*, Richard A. Mendel, [Diversion: A Hidden Key to Combating Racial and Ethnic Disparities in Juvenile Justice](#) 1–2, The Sentencing Project (2022) (reporting that youths of color are more likely to be arrested and less likely to be diverted than their white peers).

¹¹⁸ *See* 88 Fed. Reg. 7180-01, 7197–98, 2023 WL 1438480 (Feb. 2, 2023) (“Issue for Comment”).

¹¹⁹ *See* [Letter from Jonathan J. Wroblewski](#), Office of Policy and Leg., U.S. Dept. of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent’g Comm’n, at 7 (Feb. 27, 2023). The DOJ supported adding a mens rea requirement, and suggested shifting the burden of proof to the defense to show the individual did not know, and had no reason to believe, the firearm was stolen, missing a serial number, or had an altered or obliterated serial number. *See id.* The Defenders requested a mens rea requirement for all of §2K2.1(b)(4) and opposed the limiting features proposed by the DOJ. *See* Fed. Public and Community Def. Comment on Firearms Offenses ([Proposal 3](#)), at 22–23 (Mar. 14, 2023) (“Defenders’ 2023 Firearms Comment”).

¹²⁰ *See* [Defenders’ 2023 Firearms Comment](#), at 21–27.

across-the-board mens rea requirement for all of §2K2.1(b)(4).¹²¹ The Commission added PMFs to §2K2.1(b)(4) because it believes “there is no meaningful distinction between a firearm with an obliterated serial number . . . and a firearm not marked with a serial number.”¹²² If there’s “no meaningful distinction,” between the differing bases for the (b)(4) enhancements, then there’s no meaningful reason to refrain from adding a mental intent requirement to the stolen-firearm and the obliterated-serial-number enhancements.

V. Prohibit Acquitted Conduct Sentencing

Defenders also hope the Commission will prohibit or limit acquitted conduct sentencing next year. Numerous commenters wrote to the Commission last year about its acquitted conduct proposal; most were strongly in favor of limiting or eliminating the use of acquitted conduct to enhance the guideline range.¹²³ While we were disappointed that the Commission did not address this critical issue last year, we were heartened to hear at the April 5, 2023 Public Meeting that the Commission intends to resolve questions involving acquitted conduct next year.¹²⁴ We are eager to work with the Commission on this issue.

VI. Support a Defender Ex Officio

Finally, we ask the Commission to support adding a Federal Defender ex officio member to the Sentencing Commission.¹²⁵ As we have explained, Federal Defenders bring an essential, unique perspective and voice to sentencing policy. Defenders, along with CJA-appointed counsel, represent the vast majority of people charged with federal crimes. Among us are lawyers who have devoted their entire professional careers to indigent defense work and possess the kind of experience and judgment that can only be acquired through continuous day-to-day interaction with all players in the criminal justice system: judges, probation officers,

¹²¹ See 88 Fed. Reg. 28254-01, 28267, 28269, 2023 WL 3199918 (May 3, 2023).

¹²² *Id.* at 28269 (Reason for Amendment).

¹²³ See USSC, [Public Comments on Proposed Amendment No. 8 – Acquitted Conduct](#) (Mar. 14, 2023).

¹²⁴ See [Chair’s April 2023 Remarks](#), at 22–23.

¹²⁵ The “[Sentencing Commission Improvements Act of 2023](#),” currently pending in the Senate, would make this change.

prosecutors, law enforcement officials, correctional administrators, community treatment providers, stakeholders, *and clients*.

A Defender ex officio would allow Defenders to better represent our clients in this important policy space. It would also provide the Commission with valuable support and insight at crucial stages of the amendment process. A Defender ex officio to work alongside DOJ's ex officio, would go a long way towards providing the Commission a fuller picture of how particular guideline language might operate on the ground. We urge the Commission to support this change.

VIII. Conclusion

“Liberty is the norm.”¹²⁶ Therefore, it is essential that “every moment of incarceration [is] justified.”¹²⁷ Recently, the Commission rightly recognized that its policy choices have a concrete, perceptible impact on the lives of everyday people. For those who find themselves or their loved ones embroiled in the federal criminal justice system, large, and even small, differences in the sentence imposed can have life-altering consequences.¹²⁸ Prioritizing the guideline changes we suggest above will make all the difference in the lives of the people who count on this Commission to implement fair, rational, and empirically justified sentencing policies. We look forward to both the challenges and the opportunities that the new amendment cycle presents.

Very truly yours,

/s/ Michael Caruso

Michael Caruso

Federal Public Defender

Chair, Federal Defender Sentencing

Guidelines Committee

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¹²⁶ *United States v. Faison*, No. GJH-19-27, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020).

¹²⁷ *Id.*

¹²⁸ See [Chair’s April 2023 Remarks](#), at 6–7 (“The difference between ten and fifteen years may determine whether a parent sees his young child graduate high school; the difference between ten and fifteen months may determine whether a son sees his sick parent before that parent passes away; the difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family.”) (quoting *Faison*, 2020 WL 815699, at *1).

Hon. Carlton W. Reeves

May 24, 2023

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