

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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May 15, 2024

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

Re: Proposed Priorities for the 2024-2025 Amendment Cycle

Dear Judge Reeves:

Defenders appreciate the opportunity to share our unique perspectives and experience and we look forward to another productive guideline amendment cycle. Pursuant to 28 U.S.C. § 994(o), this letter identifies the sentencing policy issues we believe the Commission should prioritize this year.

First, there are two issues that this letter does not focus on, but only because we presume they are already among the Commission's top priorities: (1) narrowing the reach of the career-offender guideline and (2) eliminating departures. Defenders have recently provided extensive comments on both topics.¹ In February, the Commission held a roundtable on the career-offender guideline and the categorical approach, which revealed substantial agreement on the need to narrow the scope of the guideline. And the hearing on last cycle's "simplification" proposal revealed that judges, probation officers, defense counsel, and DOJ all agree, conceptually, with eliminating departures from the Guidelines Manual—although DOJ and the Criminal Law Committee urged the Commission to take additional time to consider the matter more fully. We hope these two issues will be on the Commission's agenda this year.

¹ See Fed. Defenders' Comments on the U.S. Sent'g Comm's Proposed Amendments ([Career Offender](#)) (Mar. 14, 2023); Fed. Defenders' Comments on the U.S. Sent'g Comm's Proposed Amendments (Defender's 2023 Comments) ([Simplification: Proposal 7](#)) (Feb. 22, 2024).

What this letter *does* focus on is a topic that Defenders (and others) have raised time and again, so far to no avail: the need to eliminate the disparities in the methamphetamine guidelines. We do not ignore the many other problems that plague federal sentencing; in sections II and III (pp. 10–17) of this letter, we enumerate additional suggested priorities and repeat our requests for greater involvement in the Commission’s work. But the current situation with methamphetamine sentencing is untenable, and we devote the bulk of our letter to this topic in the hope of effectively communicating that the issue demands this Commission’s most urgent attention.

I. The time has come to fix the methamphetamine offense levels.

Federal drug laws and sentencing policies are key drivers of mass incarceration in this country.² And, like many guidelines, §2D1.1 operates unevenly, with Black and Latino individuals sentenced for federal drug trafficking offenses at higher rates than their white counterparts.³

What’s more, research overwhelmingly shows that increased drug-crime prosecutions and ever-stiffening drug penalties have utterly failed to curb drug

² See, e.g., Jeremy Travis et. al., Nat’l Research Council, [The Growth of Incarceration in the United States: Exploring Causes and Consequences](#) 120, 152 (2014) (describing how law enforcement efforts to target drug crime, the passage of harsh federal drug laws in the 1980s, and more punitive drug sentencing led to “historically unprecedented” imprisonment rates for low-level drug crime); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 Hastings L. J. 423, 429 (2013) (“The war on drugs, beginning in the 1980s, vastly expanded drug crime prosecutions and made prison sentences for drug offenses routine. From 1980 to 2007, there was a roughly twenty-fold increase in the number of [individuals sentenced to federal prison] for drug offenses—from 4900 in 1980 to 98,675 in 2007.” (citations omitted)); cf. Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295, 295, 302 (2013) (discussing the severity of the drug trafficking guidelines and the dramatic increase in the prosecution and incarceration of people involved in drug crimes in the last 50 years).

³ While an exact comparison of Commission data to census data is not possible due to differences in timeframe and other variables, Black (only) individuals made up 27.7% of individuals sentenced under §2D1.1 in fiscal year 2023, as opposed to an estimated 13.6% of the U.S. population. Hispanic or Latino individuals made up 43.6% of individuals sentenced under §2D1.1 in FY 2023, as opposed to an estimated 19.1% of the U.S. population. Non-Hispanic or Latino white individuals made up 25.7% of individuals sentenced under §2D1.1 in FY 2023, as opposed to an estimated 58.9% of the U.S. population. Compare USSC, *FY 2023 Sourcebook of Federal Sentencing Statistics* [tbl. D-2](#) (2023) (“2023 Sourcebook”) with U.S. Census Bureau, [QuickFacts: United States](#) (last visited May 14, 2024).

dealing or use,⁴ or overdose deaths.⁵ In recognition of this, the Commission has reduced the drug sentencing guidelines several times over the last 17 years, often applying those amendments retroactively.⁶ Those amendments have mitigated the severity of the drug guidelines in important ways, helping to move drug sentencing in the direction of fairer, more rational outcomes. The Commission should now take another step forward and eliminate the distinctions in the guidelines between pure forms of methamphetamine and methamphetamine mixtures by punishing all methamphetamine offenses at the lower base offense levels.

Today, federal methamphetamine sentences dramatically exceed those for other major federal drug-trafficking crimes—both in volume and in average sentence length. In fiscal year 2022, nearly 50% of those sentenced under §2D1.1 were convicted of an offense with a primary drug type of methamphetamine.⁷

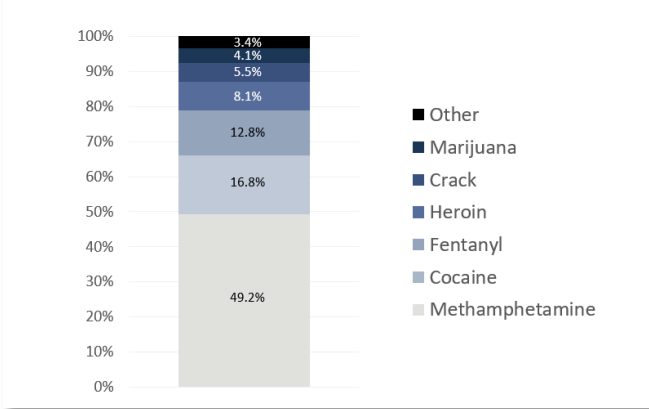
⁴ A comprehensive review of deterrence studies led the National Research Council to conclude: “insufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects.” Travis et al., *supra* n.2, at 90. Instead, “the best empirical evidence suggests that successive iterations of the war on drugs . . . are unlikely to have markedly or clearly reduced drug crime over the past three decades.” *Id.* at 154. The Commission has itself acknowledged that incarceration of retail-level drug dealers does not curtail drug trafficking: “[C]riminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.” USSC, [*Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*](#) 134 (2004). As for use, see, e.g., Leo Beletsky et al., *Fatal Re-entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, 7 Ne. U. L.J. 149, 155 (2015) (“The War on Drugs has had little impact on the rate of drug abuse in the United States.”).

⁵ See Leo Beletsky et al., [*Drug-Induced Panic: Overdose mortalities and related harms require a public health response, not more criminalization and incarceration*](#), INQUEST (Apr. 14, 2022); see also Lindsay LaSalle, Drug Pol’y Alliance, [*An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws are Counterproductive and Inhumane*](#) 39 (2017) (providing data and information showing that drug-induced homicide prosecutions will not reduce drug overdose death rates).

⁶ See, e.g., USSG, App. C., Amends. 706 (Nov. 1, 2007), 750 (Parts A & C) (Nov. 1, 2011), 782 (Nov. 1, 2014).

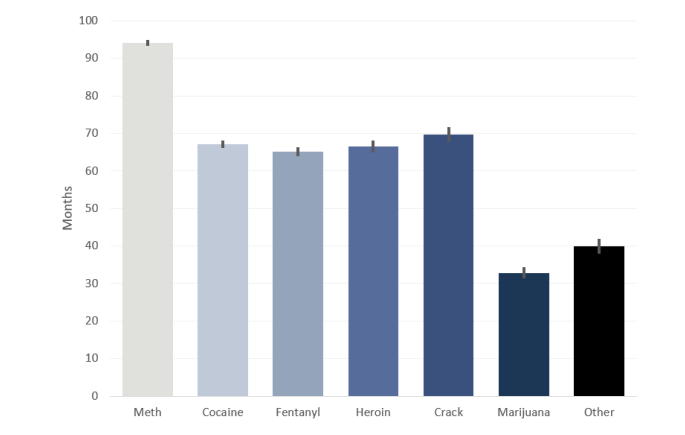
⁷ The data used for the analyses detailed in this section of our letter were extracted from the U.S. Sentencing Commission’s “Individual Datafiles” for the relevant fiscal year(s)

Primary drug type for all §2D1.1 cases, FY 2022



And the average length for methamphetamine sentences was well over 90 months, compared to average sentence lengths at or below 70 months for the other major drug types;⁸ this makes sense given the high advisory offense levels in meth-actual/ice cases. Yet, as Defenders emphasized in our Annual Letter last year, “empirical evidence suggests that pure methamphetamine is not more dangerous (and may be even *less* dangerous) than many of the other major drug types.”⁹

Average sentence lengths for all §2D1.1 cases, FY 2022



discussed. These datafiles are publicly available for download on the Commission’s website. U.S. Sent’g Comm’n, Commission Datafiles (last visited April 25, 2024).

⁸ Error bars in the graphic indicate standard error of the mean.

⁹ [Fed. Defenders’ Annual Letter to the U.S. Sent’g Comm.](#), at 12 (May 24, 2023) (Defenders’ 2023 Annual Letter) (citing sources).

When it comes to methamphetamine sentencing, unwarranted disparities abound. *First*, as illustrated in the above graphic, there's the disparity between the sentencing ranges for those charged with methamphetamine offenses and those charged with other drug offenses.

Second, in many meth cases, and in particular, all meth-actual/ice cases, there's a disparity between offense seriousness and the punishment the guidelines call for.¹⁰ There is no empirical basis for punishing meth-actual and ice ten times more harshly than meth-mixture.¹¹ As Defenders urged last year, it may make sense to single out pure substances for specialized treatment if purity were related to culpability (role in the drug-trafficking hierarchy), but purity is a poor proxy for culpability in meth cases: purity of street-level methamphetamine has been above 90% for many years, with seizures of methamphetamine sampled by the DEA in the first half of 2019 averaging over 97% pure.¹² Thus, street-level dealers and couriers

¹⁰ See 28 U.S.C. § 991(b)(1)(A) (the Commission must establish sentencing policies that meet the purposes of sentencing, including the need for the sentence to reflect the seriousness of the offense); 18 U.S.C. § 3553(a)(2)(A). To be clear, even the meth-mixture offense levels often result in guidelines ranges that are too high, with meth-mixture sentences falling, on average, 30% below the guideline range. But this just reinforces that the much higher offense levels for meth-actual/ice are indefensible.

¹¹ See USSG §2D1.1(c) (Drug Quantity Table) (establishing a 10:1 ratio between meth-actual/ice and meth-mixture); see also Defenders' 2023 Annual Letter, at 8–13; *United States v. Robinson*, No. 3:21-CR-14-CWR-FKB-2, 2022 WL 17904534, *3 (S.D. Miss. Dec. 23, 2022) (cataloging cases holding that the 10:1 ratio in the methamphetamine guideline lacks an empirical basis).

¹² Defenders' 2023 Annual Letter, at 8–9 (citing U.S. Dep't of Just., Drug Enf't Admin., [Drug Enforcement Administration 2020 National Drug Threat Assessment](#) 19–20 & fig. 12 (Mar. 2021) (DEA 2020 Threat Assessment)); see also *Robinson*, 2022 WL 17904534, at *3 (“Given the on-the-ground reality in methamphetamine cases, the better way to determine culpability is to examine all of the circumstances of the defendant’s case and life—seeing the defendant as a ‘whole person,’ as the Supreme Court [has instructed]. . . . In the context of methamphetamine . . . purity is no longer probative of the defendant’s culpability.”); 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, 37 (2021) (“Particularly given the ease with which cartels can move pure methamphetamine across the U.S.-Mexico border, . . . purity no longer indicates anything about proximity or access to the producing source, or about the level of control a given defendant may have in the drug distribution chain.”).

are subject to guideline penalties meant for those playing a more “prominent role in the criminal enterprise.”¹³

An ever-growing number of judges recognize the flaws with the meth-actual and ice offense levels, some applying the mixture offense levels in all methamphetamine cases.¹⁴ When this occurs, it alleviates the irrational disparity between offense severity and the guideline-recommended sentences, but it creates a *third* disparity given that other courts apply the guidelines as written, and others fashion their own, unique ratios. Even though most courts impose below-guideline sentences in meth-actual and ice cases, not all courts do,¹⁵ and there were pronounced discrepancies in the extent of below-guideline sentences in cases from fiscal years 2018 to 2022:¹⁶ from a low of 9% below the bottom of the guidelines in the Eastern District of Texas (represented below in light blue) to a high of 65% below the bottom of the guidelines in the Eastern District of New York (represented below in dark blue).¹⁷

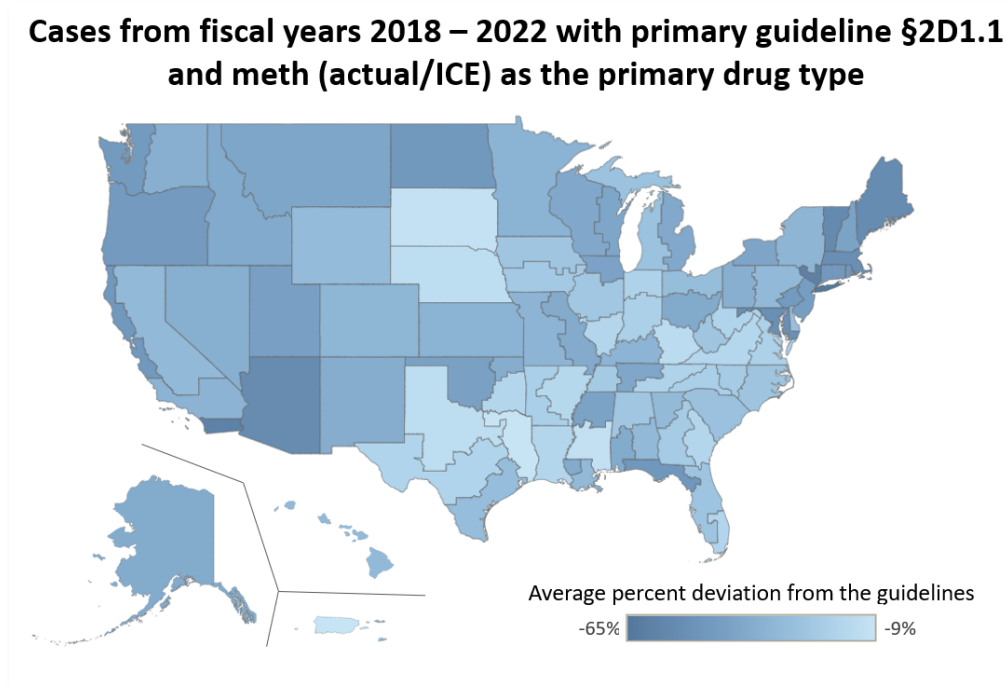
¹³ USSG §2D1.1 cmt. n. 27(C) (justifying heightened penalties for unusually pure substances based on the idea that purity may indicate a prominent role and proximity to the source of the drugs); *see also United States v. Havel*, No. 4:21-CR-3075, 2023 WL 1930686, *5 (D. Neb. Feb. 10, 2023) (“[T]he ready availability of methamphetamine (actual) to everyone in the chain of distribution, from the kingpin to the mule to the end user, has utterly severed any connection between the purity of the drug and the defendant’s position in the criminal enterprise—and as a result, contrary to § 3553(a), the guideline is treating all of them like kingpins.”).

¹⁴ *See* Defenders’ 2023 Annual Letter, at 10 n.45 (citing cases).

¹⁵ For individuals sentenced in fiscal year 2022 under primary guideline §2D1.1 with a primary drug type of methamphetamine (actual) or “ice,” courts imposed guideline-range sentences in more than 20% of such cases, after excluding any counts of conviction under 18 U.S.C. § 924(c).

¹⁶ Here, “extent of below-guideline sentences” refers to the extent of the average percentage difference between the low end of the guideline range and the length of sentence actually imposed.

¹⁷ To calculate the averages for this map, below-guideline-range percentages were represented as negative, within-range were represented as zero, and above-range were represented as positive. Across all districts, on average, sentences in these cases fell below the guideline ranges. Even the harshest district imposed, on average, a 9% below-range sentence in these cases.

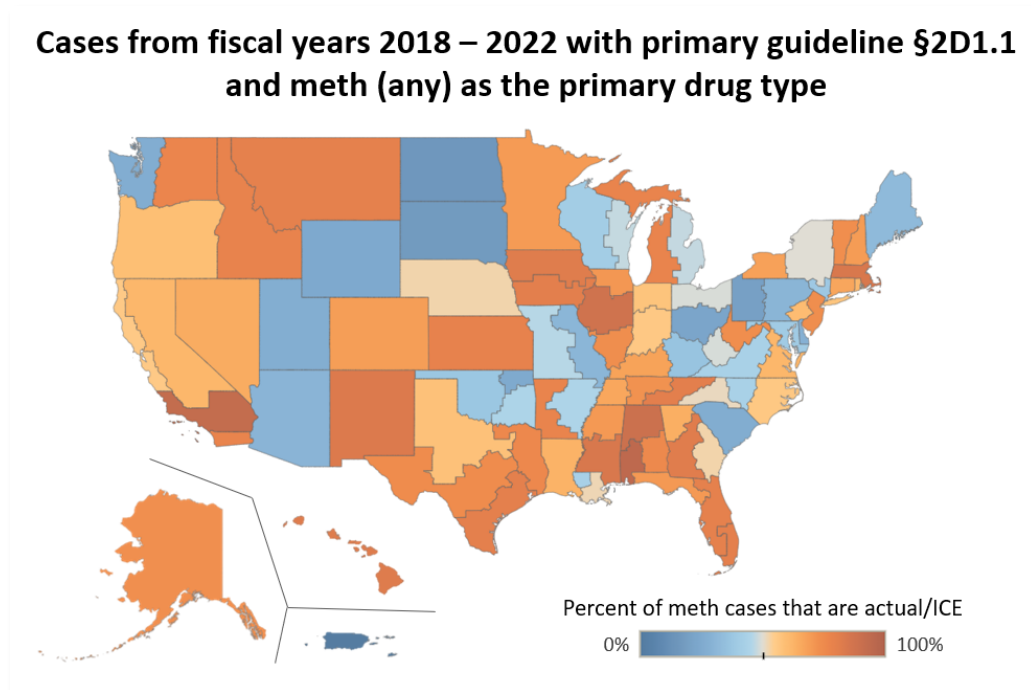


In this way, meth-actual sentencing becomes a game of chance: outcomes are tied to district culture regarding fidelity to the guidelines more than anything else. Even intra-district, there are significant differences in how individual judges treat meth-actual cases from one courtroom to the next. Take, for instance, anecdotal experience reported from the Southern District of West Virginia. Of the seven sitting district judges there, four explicitly reject the meth-actual and ice offense levels for policy reasons and apply a 1:1 ratio with the mixture offense levels. A fifth judge appears to be doing the same, albeit without expressly stating a policy disagreement. Of the two remaining judges, one applies a 5:1 ratio and the other the guidelines' 10:1 ratio. Prosecutors seem to be aware of the judges' differing positions on methamphetamine sentencing and are making testing, charging, and plea decisions based on those understandings.¹⁸

A more generalized look at all methamphetamine sentencing from fiscal years 2018 to 2022 reveals a *fourth* nationwide disparity—this time related to whether the applicable guideline will involve the meth-mixture or the meth-

¹⁸ This discussion of sentencing practices in the Southern District of West Virginia is informed by the on-the-ground experience of Senior Litigator AFPD Lex Coleman, who has been practicing there for over 15 years. Mr. Coleman recently wrote a law review article about disparities in federal methamphetamine sentencing. See Coleman, *supra* n.12.

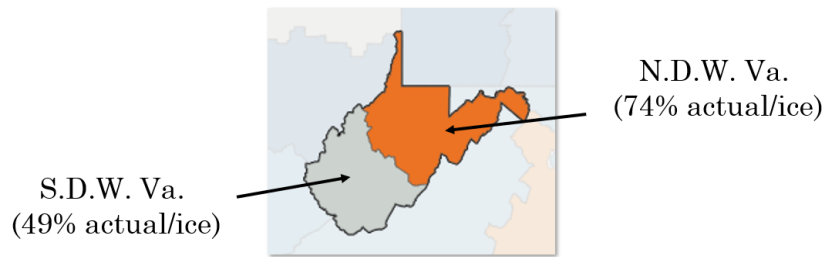
actual/ice offense levels. For instance, you have states like North Dakota and South Dakota (represented below in gradations of dark blue) where cases infrequently involved the meth-actual/ice guidelines.¹⁹ On the other hand, you have states like neighboring Montana and Idaho (represented below in gradations of dark orange), where cases often involved the meth-actual/ice guidelines.²⁰



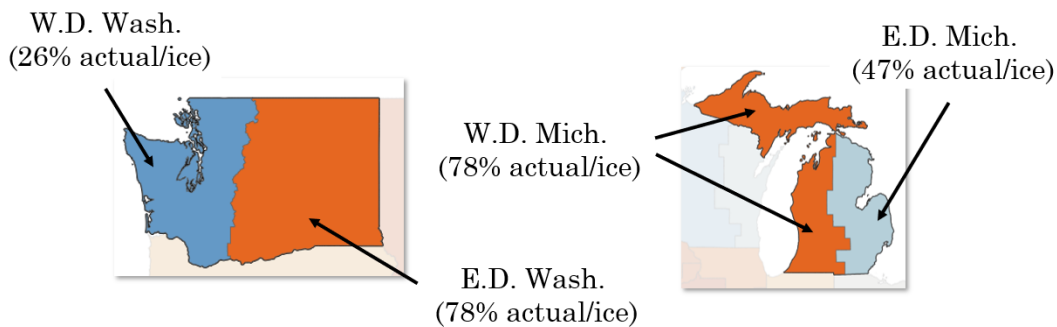
Here, too, there are district-level disparities within some states. For example, zooming in, again, on West Virginia, whether a person is sentenced using actual/ice or mixture offense levels could depend on which district she's in. In the Northern District, nearly 74% of methamphetamine sentences were assessed under the actual/ice offense levels during the relevant time period; in the Southern District, just under 50% were.

¹⁹ Blue indicates that less than half of cases are actual or ice cases, and orange indicates that more than half of cases are actual or ice cases. Courts applied the meth-actual/ice offense levels in an average of 15% of meth cases in North Dakota, and 17% of meth cases in South Dakota.

²⁰ Courts applied the meth-actual/ice offense levels in an average of 80% of meth cases in Montana, and 79% of meth cases in Idaho.



Similar patterns prevailed in states like Washington and Michigan.



These differences are not explained by varying purity levels in different localities.²¹ Instead, they turn primarily on whether prosecutors pursue laboratory testing, an arbitrary factor that is untethered to culpability.²²

²¹ Methamphetamine sampled through the DEA's methamphetamine profiling program (MPP) in 2019 averaged over 97% pure. DEA 2020 Threat Assessment at 19–20 & fig. 12. The MPP samples methamphetamine derived from each DEA regional laboratory across the country. U.S. Dep't of Just., Drug Enforcement Admin., [Methamphetamine Profiling Program](#) 2 (July 2013); *see also* Coleman, *supra* n.12, at 37 ("It has been accepted for over fifteen years that most (if not all) of the methamphetamine in the United States is extremely pure and extremely inexpensive . . .").

²² *See* Defenders' 2023 Annual Letter, at 11; *Havel*, 2023 WL 1930686, at *5 ("[D]iffering outcomes are driven by whether or not methamphetamine is tested for purity in the first place. And as a multitude of courts have again observed, whether or not testing occurs for some or all of the methamphetamine for which a defendant is being held responsible is largely dependent on arbitrary conditions that have no bearing on the § 3553(a) factors which *should* be driving sentencing decisions."). Some U.S. Attorneys' Offices do not typically seek purity testing until they start preparing for trial while others seek purity testing as a matter of course, and still others leave this decision to plea bargaining. Moreover, Defenders report that some judges direct the USAO to test for purity in every meth case before sentencing. Whether a substance is tested might also depend on whether

To be clear, the unwarranted disparities caused by the purity-based distinction in the methamphetamine guidelines is emblematic of larger structural flaws in §2D1.1. And Defenders urge the Commission to address the drug guidelines holistically. Defenders have long encouraged the Commission to reimagine §2D1.1 by delinking the drug quantity table from statutory mandatory thresholds, revising the flawed drug conversion tables, and placing less emphasis on drug quantity and more emphasis on a person's role in the offense and direct and intended harms.²³ Defenders would welcome the opportunity to propose, in detail, a new imagining of §2D1.1.

But the journey of a thousand miles begins with a single step. The Commission is statutorily obligated to address unwarranted disparities.²⁴ And prioritizing mitigating the meth-related disparities described above, by eliminating the meth-actual and ice offense levels from the drug quantity table, is a crucial and urgently needed step toward fairer, more rational drug sentencing.

II. Other reforms also deserve the Commission's attention.

Beyond methamphetamine specifically, and §2D1.1 more generally, and beyond the issues that Defenders presume will be on this year's agenda (career offender and departures), below are other suggested priorities—some structural and some more discrete—for the Commission's consideration:

it was seized and available for testing, or whether the lab is able to timely complete the testing, among other factors. *See, e.g., United States v. Hartle*, No. 4:16-00233-BLW, 2017 WL 2608221, *3 (June 15, 2017).

²³ *See, e.g.,* Defenders' 2023 Annual Letter, at 7 n.34 (cataloging past letters and comments); [Fed. Defenders' Annual Letter to the U.S. Sent'g Comm](#) at 13–18 (Sept. 14, 2022) (Defenders' 2022 Annual Letter); *cf. Havel*, 2023 WL 1930686, at *4 (“[I]t's well-established that the drug trafficking guidelines don't reflect the Sentencing Commission's exercise of its institutional role and collection of empirical data—rather, the Commission chose to anchor the drug-trafficking guidelines to the mandatory minimum sentences that Congress established for drug offenses.”).

²⁴ 28 U.S.C. § 991(b)(1)(A), (B).

- Reform the economic-crimes guideline to place less reliance on loss amount as a measure of culpability.²⁵
- Amend the supervised release (SR) guidelines and policy statements to:
 - advise imposition of SR and minimum lengths of supervision only when required by statute,
 - encourage shorter SR terms and early termination of supervision in more cases,
 - narrow the standard and special conditions of supervision, and
 - promote rehabilitation rather than reimprisonment.²⁶

²⁵ Section 2B1.1’s complexity, with its “30-level loss-based offense level increase and 19 other SOCs” and its overreliance on loss—especially the “greater of actual or intended loss”—as a proxy for culpability, leads to excessive guideline ranges that are routinely rejected by courts. [Statement of Daniel Dena](#) on behalf of Fed. Defenders to the U.S. Sent’g Comm on Proposal #1: Loss, at 1 (Feb. 27, 2024); *see also, e.g.*, [Fed. Defenders’ Annual Letter to the U.S. Sent’g Comm](#) at 15–21 (May 17, 2013) (Defenders’ 2013 Annual Letter); [Testimony of Kathryn N. Nester](#) on behalf of Fed. Defenders to the U.S. Sent’g Comm, at 1–2, 5–7 (Mar. 14, 2012) (Nester Testimony); [Letter from Marjorie Meyers](#) on behalf of the Fed. Defenders to the U.S. Sent’g Comm at 2–3 (Aug. 26, 2011) (Defenders’ 2011 Priorities Letter). The Commission’s recent decision to move the “greater of” rule from the guideline’s commentary to its text compounds this problem. *See* USSC, [Amendments to the Sentencing Guidelines](#) 6–17 (Apr. 30, 2024); Dena Statement, at 17, 20. The Commission should work with stakeholders to study and overhaul §2B1.1 during the upcoming amendment cycle.

²⁶ At the front end (sentencings), the Guidelines Manual recommends imposing SR in too many cases and for too long; and the standard and special conditions of supervision lack individualization and are broader than necessary. *See* §§5D1.1(a)(2) (requiring SR whenever a sentence of more than one year is imposed); 5D1.2 (setting high minimum and maximum terms of SR); 5D1.3(c), (d) (outlining many, broad standard and special conditions of SR). In fiscal year 2023, SR was ordered in nearly 83% of cases for an average of 47 months. *See 2023 Sourcebook* [tbl. 18](#). Decreases in the imposition, length, and conditions of supervision would likely result in fewer revocations. *See* Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission*, 28 Fed. Sent. Rep. 231, 232 (2016). In 2011, the Commission explored ways to ameliorate some of these problems but did not make major changes. *See* USSC, [Proposed Amendments to the Sentencing Guidelines](#) 78–85 (Jan. 19, 2011) (proposing to reduce the number of cases in which the court is required by the guidelines to impose SR under §5D1.1 and to lower or eliminate the minimum supervision lengths required by §5D1.2); *see also* [Testimony of Jane McClellan](#) on

- Revise criminal history rules that perpetuate harmful racial disparities, add needless complexity to the guideline calculation, and lead to overinflated guideline ranges that fail to advance the goals of sentencing.²⁷

behalf of Fed. Defenders to the U.S. Sent’g Comm, at 7–10 (Feb. 16, 2011) (recommending similar and additional reforms). At the back end (violation hearings), Chapter 7’s punitive and outdated policy statements focus on retribution and offense severity as primary factors in handling violations of SR, even though the SR statute and legislative history of the Sentencing Reform Act (SRA) reveal that SR was intended to facilitate rehabilitation and reintegration into the community, not expedient reimprisonment. *See, e.g.*, Demleitner, *supra*, at 232 (“In passing the [SRA], Congress mandated that SR be imposed not to achieve punitive but rather rehabilitative goals. For long-term prisoners, SR should facilitate integration, and for select prisoners with short-term prison sentences, it would provide for rehabilitation and supervision.”); Stefan R. Underhill, *Supervised Release Needs Rehabilitation*, 10 Va. J. Crim. L. 1, 6 (2024) (“The legislative history of the [SRA] shows that Congress intended supervised release to focus on rehabilitation, not serve as an efficient mechanism for reimprisonment.”); *id.* at 20 (“The distressingly high rate of reimprisonment for technical violations of supervised release is precisely what the Sentencing Guidelines consistently promote.”); Jacob Schuman, *Revocation and Retribution*, 96 Wash. L. Rev. 881, 904 (2021) (“The retributive theory of revocation contradicts the structure, statute, and purpose of supervised release.”). Encouraging revocation whenever a person on supervision commits a Grade A or B violation, recommending a revocation sentence run consecutive to any sentence the individual is already serving, and recommending reimprisonment for *every* violation are just three of the ways the supervised release policy statements run counter to statute and promote mass incarceration. *See* §§7B1.3(a)(1), (f); 7B1.4(a) (Revocation Table).

²⁷ During the 2022–23 amendment cycle, the Commission made empirically-based changes to Chapter 4 that mitigate some of these flaws. We encourage the Commission to continue its forward momentum in four ways. *First*, amend §4A1.2(d) to exclude all sentences resulting from offenses committed before age 18 from the criminal history calculation. *See, e.g.*, Defenders’ 2023 Comments ([Youthful Individuals: Proposal 2](#)), at 1–32 (advocating for the Commission to adopt Option 3 of its 2023-24 proposed amendment on youthful individuals). *Second*, amend §4A1.2(a)(2)’s single sentence rule. *See, e.g.*, [Letter from Michael Caruso](#) on behalf of the Fed. Defenders to the U.S. Sent’g Comm at 5–10 (Aug. 10, 2018) (Defenders’ 2018 Priorities Letter) (explaining how the Commission’s modification of former §4A1.2(a)(2) in 2007 has led to unwarranted disparities and to the “unintended consequence” of counting separately some prior sentences arising from the same criminal conduct based only on “happenstance”). *Third*, eliminate revocation sentences from the criminal history calculation (§4A1.2(k)). *See, e.g.*, Defenders’ 2018 Priorities Letter, at 2–5 (supporting a Commission-proposed study of how the guidelines treat revocations under §4A1.2(k) and advocating for a simple rule excluding all revocations from the criminal history score); [Fed. Defender Comments on the U.S. Sent’g Comm’s Proposed Amendments](#),

- Ensure that the guidelines incorporate (where feasible) a *mens rea* requirement, a bedrock principle of criminal culpability.²⁸
- Eliminate the limitation on retroactive sentence reductions in §1B1.10(b)(2)(A) that prevents courts from lowering most below-guideline sentences, even where § 3553(a) factors support it.²⁹
- Explicitly exempt “money mules” convicted of bulk-cash smuggling from duplicative enhancements under §§2S1.3(b)(1) and (b)(2).³⁰

Defenders offer these suggestions against the backdrop of the BOP’s current operational challenges and the Commission’s statutory obligations to: (1) “minimize the likelihood that the Federal prison population will exceed the capacity of the

at 37–41 (Feb. 20, 2017) (describing how §4A1.2(k) is needlessly complicated and harsh and why not counting revocations is the better rule). *Fourth*, modify §4B1.1(b)’s CHC VI requirement. *See, e.g.*, Defenders’ 2022 Annual Letter, at 24–25 (emphasizing the adverse racial impact of the career offender guideline and that most people designated “career offenders” have a recidivism risk similar to those in lower criminal history categories).

²⁸ *See Ruan v. United States*, 597 U.S. 450, 457 (2022). The Commission should add a culpable *mens rea*, or “scienter,” requirement to the enhancements in §§2K2.1(b)(4)(A) (stolen firearm) and 2K2.1(b)(4)(B)(i) (illegible serial number), and to the enhanced base offense levels in 2K2.1(a) for certain types of firearms. It should also heighten the mental intent required under the relevant conduct guideline for jointly undertaken criminal activity, at §1B1.3(a)(1)(B). There are strict liability enhancements in the drug guidelines, Chapter 3, and in other places, that the Commission should amend as well. *See generally* Defenders’ 2022 Annual Letter, at 9–12.

²⁹ *See generally* Stephen R. Sady, *Retroactive Guidelines Amendments Must Apply to Individuals Who Receive Below-Guidelines Sentences to Protect the Individualized Sentencing Required by Federal Sentencing Statutes*, 36 Fed. Sent. Rep. 153 (2024) (advocating for a return to the pre-2008 version of §1B1.10 that permitted courts to reduce sentences regardless of whether the original sentence was below the newly amended guideline range).

³⁰ The Commission’s recent amendment to §2S1.3(b)(2), adding the phrase “while violating another law of the United States” to this two-level enhancement, risks increasing unwarranted disparities by exposing low-level “money mules” to four-levels of enhancements for the same conduct under subsections (b)(1) and (b)(2). *See [Statement of Deirdre von Dornum](#)* on behalf of Fed. Defenders to the U.S. Sent’g Comm on Proposal #5, Part C: Offenses Involving Records and Reports on Monetary Instruments Transactions, at 9–11 (Feb. 27, 2024). DOJ’s concerns, which led to the amendment, involved high-profile tax offenses rather than “border bust” cash smuggling offenses committed by low-level Hispanic individuals, which make up the bulk of §2S1.3 cases. *See id.* at 6–8.

Federal prisons,”³¹ and (2) avoid unwarranted sentencing disparities among individuals with similar records who have been found guilty of similar conduct.³²

Severe and unprecedented staffing shortages,³³ overcrowding,³⁴ and deteriorating infrastructure³⁵ currently plague the BOP, threatening the safety and security of incarcerated individuals and staff alike.³⁶ Indeed, the BOP estimates it is currently operating at 10% overcapacity,³⁷ with correctional officer staffing levels

³¹ 28 U.S.C. § 994(g).

³² *Id.* § 991(b)(1)(B).

³³ See [Letter from Brandy Moore-White](#) on behalf of the Council of Prison Locals to the President of the United States, Joe Biden (last accessed Apr. 16, 2024) (detailing “critical level” staffing shortages and low pay that place “an unsustainable burden” on the BOP’s workforce and “compromise[es] the safety and security of both staff and inmates”); U.S. Dep’t of Just., Office of the Inspector General, [Evaluation of Issues Surrounding Inmate Deaths in Federal Bureau of Prisons Institutions](#) 64–69 (2024) (*OIG Inmate Death Report*) (identifying chronic understaffing at BOP, especially in health and psychology services positions, and the use of “stopgap measures,” such as mandated overtime and temporary reassignment, as factors contributing to inmate deaths); Cecilia Vega et al., [Federal prisons, short on correctional officers, rely on other staff to supervise offenders](#), CBS News, Jan. 28, 2024.

³⁴ See Fed. Bureau of Prisons, [Program Fact Sheet 2](#) (May 13, 2024) (“The FBOP continues to experience crowding in medium and low facilities.”).

³⁵ See U.S. Dep’t of Just., Office of the Inspector General, [Audit of the Federal Bureau of Prisons’ Efforts to Maintain and Construct Institutions](#) 5 (2023) (“The BOP projects that the inmate population, along with overcrowding in certain parts of the system, will increase through at least FY 2024. At the same time, the BOP’s institutions are aging and deteriorating.”); see also Ryan Tarinelli, [Congress poised to spend less on federal prison infrastructure](#), Roll Call, Sept. 12, 2023.

³⁶ See U.S. Gov’t Accountability Off., [Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure](#) 25 (2012) (“BOP officials said the increasing inmate population and staffing ratios negatively affect inmate conduct and the imposition of discipline, thereby affecting security and safety. A 2005 BOP report on the effects of crowding and staffing levels in federal prisons on inmate violence rates concluded that population pressures on both staffing levels and inmate living space have an upward impact on serious prison violence.”).

³⁷ See U.S. Dep’t of Just., Fed. Bureau of Prisons, [FY 2024 Performance Budget: Congressional Submission](#) 7 (last visited May 14, 2024).

40% below what’s needed.³⁸ In addition to escalating the risk for harm at BOP facilities, chronic overcrowding and understaffing impedes the delivery of recidivism-reducing programming and rehabilitative services such as a job training, education courses, recreation, and counseling for mental illness and substance abuse.³⁹ Thus, it is imperative that this Commission take seriously its mandate to address BOP overcrowding by mitigating the harshness of the current guidelines. If implemented, our suggestions would help to safely reduce the federal prison population, while also alleviating unwarranted sentencing disparities.⁴⁰

³⁸ See [The Nation’s Correctional Staffing Crisis: Assessing the Toll on Correctional Officers and Incarcerated Persons, Hearing Before the Subcommittee on Criminal Justice and Counterterrorism, Senate, 118th Cong. 2 \(2024\) \(Correctional Staffing Crisis\) \(statement of Brandy Moore White, Nat. President of Council of Prison Locals\)](#) (2024 Moore White Statement) (“As of the end of 2023, we have approximately 12,300 correctional officers, which is over 8,000 or 40% below the appropriated number of 20,446. This number follows a year of ‘hiring initiatives’ enacted by the agency. With the current staffing levels in the Bureau of Prisons, the First Step Act cannot be enacted.”).

³⁹ See Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049, 1058; *Correctional Staffing Crisis*, 2024 Moore White Statement, at 3; *OIG Inmate Death Report*, at 64; *Correctional Staffing Crisis* ([statement of Sen. Cory Booker, Chairman](#), Subcomm. on Crim. Just. and Counterterrorism) (discussing the correlation between lack of access to substance use and mental health treatment in prisons and increased difficulties successfully reintegrated into society upon release).

⁴⁰ Importantly, research from state practices shows “a very weak relationship between higher incarceration rates and lower crime rates.” Don Stemen, Vera Institute of Just., [The Prison Paradox: More Incarceration Will Not Make Us Safer](#) 1 (2017). Between the years 2000 and 2015, 19 states from a “diverse cross-section of the United States” reduced both imprisonment and crime rates. *Id.* at 4. 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* n.39, at 1054–74, 1093 (cataloging the criminogenic effects of incarceration and arguing that prisons may cause more crime than they prevent). There are more effective and less expensive ways to reduce crime than prison, including: community crime prevention strategies, alternatives to incarceration, and community corrections. See Stemen, *supra*, at 3–4; Dep’t of Just., Bureau of Just. Assistance, the Council of State Govts., & Nat. Reentry Resource Ctr., [50 States, 1 Goal: Examining State-Level Recidivism Trends in the Second Chance Act Era](#) 1 (Apr. 16, 2024).

III. The Commission should take steps to treat Defenders as partners, on par with DOJ, so that we can better assist the Commission with its important work.

The Commission is rightfully focused right now on setting priorities for the upcoming amendment cycle. But even while it does this important work, it should also address the asymmetry between Defenders and DOJ in how we are able to work with the Commission.

Most importantly, the Commission should add a Defender representative to the Commission and support legislation adding a Defender *ex officio* member. For decades, Defenders have asked the Commission to support legislation adding a Federal Defender *ex officio* member to the Sentencing Commission and scholars have decried the structural imbalance caused by the absence of a Defender voice on the Commission.⁴¹ Until there's a legislative fix, the Commission should invite a Defender representative to participate in the nonpublic, substantive work of the Commission and amend its *Rules of Practice and Procedure* to make this Defender involvement standard practice.

Also, the Commission should grant Defenders equal access to its data. The Commission holds unique institutional power as the collector and gatekeeper of federal sentencing data and, unlike DOJ, Defenders lack full access to the Commission's datafiles. The anonymized public dataset that Defenders can access is stripped of information that can pinpoint key drivers of disparity, such as initial and subsequent charging decisions and a full overview of mandatory-minimum charges, which makes it less meaningful. Thus, the Commission should revisit its agreement with the Administrative Office of the U.S. Courts and allow Defenders the same level of access as DOJ.⁴² Further, we ask the Commission to regularly

⁴¹ See, e.g., Defenders' 2013 Annual Letter, at 5–6; Defenders' 2011 Priorities Letter, at 33–36; Mark Osler & Judge Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DePaul J. for Soc. Just. 117, 165–66 (2014) ("The DOJ and the defender community, especially through an ex officio Sentencing Commissioner from the Federal Public Defender, should have equal opportunities before the Sentencing Commission. This would enhance the perception of fairness of the Sentencing Commission and give it a much needed and more balanced perspective. It would also bring it in line with the majority of state sentencing commissions." (citations omitted)).

⁴² In 1988, the Commission reached an agreement with the AO that prohibits the Commission from disclosing information that could "identify an individual defendant or

share with us its resentencing and supervised release datasets, as well as the datasets underlying its JSIN data tool to help us better understand the Commission's work and, in turn, provide better feedback.⁴³

As always, Defenders would be happy to further discuss any of the above suggestions and requests. We appreciate the impactful work that this Commission does.

Very truly yours,

/s/ Heather Williams

Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Leslie E. Scott
Sentencing Resource Counsel
Federal Public and Community Defenders

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Jonathan J. Wroblewski, Commissioner *Ex officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

other person identified in the sentencing information" without "the express permission of the court for which the information was prepared[.]" USSC, [*Public Access to Sentencing Commission Documents and Data*](#) 5 (Aug. 2018).

⁴³ See 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.").