

**FEDERAL DEFENDER
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July 15, 2024

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

Re: Defender Comment on Proposed 2024–2025 Priorities

Dear Judge Reeves:

This year and next mark two milestones: the SRA’s fortieth anniversary and *Booker*’s twentieth.¹ Almost since the Guidelines Manual went live, the Commission has studied significant potential reforms in response to complaints that the Manual is too complicated and that it calls for sentences that for many common offenses are too high. In 2009, it seemed like we’d finally see change: the Commission held listening sessions around the country to consider what a post-*Booker* Manual should look like.² But today, nearly 20 years post-*Booker*, the Manual looks much the same as it did when it launched—just bigger.

To be clear, we understand. There are always discrete issues that demand the Commission’s attention: circuit splits, Supreme Court opinions, new criminal statutes. But we have taken note that the Commission’s request for policy priorities this year looks different than in the past. The Commission has turned the question back to us: what are *our* priorities? It has suggested a willingness to consider real, big-picture reforms. So, while Defenders do not abandon the policy priorities we recommended in our recent

¹ See *United States v. Booker*, 543 U.S. 220 (2005).

² See USSC, [News Release re Public Hearing](#) (May 22, 2009).

annual letter, we use this opportunity—*Booker*’s upcoming twentieth anniversary and the Commission’s open-ended request for proposals in light of the SRA’s fortieth anniversary—to ask the Commission to prioritize real, significant reforms that are empirically based and that will also simplify the Guidelines Manual.

We offer three big changes: (1) recalibrating downward some of the most common guidelines (below); (2) reforming the “relevant conduct” rules so that guideline calculations center around offenses of conviction and knowing or intentional behavior (beginning at page 9); and (3) contracting the “career offender” guideline so that it covers only what Congress has required it to cover, and no more (beginning at page 17).

This letter focuses on the “why”: why these reforms should be priorities. As for the “how,” in this letter’s final section, we propose an innovation: stakeholder working groups that would meet with Commission staff (and potentially Commissioners themselves) to hash out the details. We are hopeful that this sort of collaborative, dynamic input could finally break through the inertia that has stymied structural reform for decades.

I. Recalibrating sentencing ranges down

Over the years, each Commission has made piecemeal additions to the Manual, resulting in sprawl atop a platform of already-shaky empirical underpinnings and in guideline ranges that are very often too high. It is time for an overhaul. This Commission can and should recalibrate guideline ranges downward to better “reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process.”³

The original Manual is no sacred text. The first Commission, faced with a gargantuan task, recognized that the initial guidelines were “but the first step in an evolutionary process.”⁴ The first Commission did not employ empirical means to calibrate many of the original guidelines, including some

³ 28 U.S.C. § 991(b)(1)(C).

⁴ USSG, ch. 1, part A (Original Introduction to the Guidelines Manual).

of today's most frequently applied guidelines—regarding firearms,⁵ economic crimes,⁶ and drugs.⁷ And it is unclear if the creators of the first Manual studied or simulated how the initial guidelines might deliver unintended racially disparate outcomes once implemented,⁸ even though we now understand that it is almost impossible to discuss the federal criminal legal system without considering racial disparities present at every decision point in a case.⁹

⁵ See USSC, [*Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*](#) 18 (1987) (“1987 Supplementary Report”) (“[S]tatistical analyses usually provided the starting point for the guidelines that were adopted, [but] in some instances these analyses were of little value in explaining or rationalizing current sentences. Firearms violations provide a notable example.”) (footnote omitted).

⁶ See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 20–23 (1988) (“A second area of traditional compromise involves the Commission's decision to increase the severity of punishment for white-collar crime.”).

⁷ See *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) (“The Commission did not use [an] empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the [Anti-Drug Abuse Act of 1986’s (ADAA)] weight-driven scheme.”); *United States v. Diaz*, No. 11-CR-00821-2(JG), 2013 WL 322243, *3–*6 (E.D.N.Y. Jan. 28, 2013) (explaining the origins of the drug guidelines, including the original Commission’s decision to “jettison[] its data entirely” and incorporate the ADAA’s mandatory minimums into the drug quantity table).

⁸ 1987 *Supplementary Report*, *supra* note 5; Michael K. Block & William M. Rhodes, *Forecasting the Impact of the Federal Sentencing Guidelines*, 7 Behavioral Science & the Law 51 (1989); see also Brent Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 Hofstra Law Review 1167, 1299 (2017) (“The original Commission undertook a study that estimated the effect that the guidelines, along with the new mandatory minimum statutory penalties that Congress also recently had enacted, would have on the federal prison population.”).

⁹ See Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 Am. Crim. L. Rev. 1685, 1714 (Apr. 2021) (“From policing, to pretrial detention, to charging decisions, the War on Drugs has facilitated massive destruction. . . . Therefore, a Reconstruction Sentencing model cannot [be] solely about sentencing.”). A 2022 Commission report provided a promising step in the holistic research direction, by examining race in

The original Commission actively chose to disregard past practice and it prioritized imprisonment over the use of probation, fine-only, or alternative sentences.¹⁰ Non-prison sentences were far more common in the pre-Sentencing Guidelines era: for federal convictions terminating in 1985, 37% of convicted individuals were sentenced to probation only, 34% were sentenced to imprisonment only, 16% were sentenced to both incarceration and probation, and 12% were sentenced to pay a fine only.¹¹ In fiscal year 2023, almost 90% of sentenced cases received a sentence of imprisonment alone.¹²

Sentence lengths, too, ballooned under the Guidelines. Pre-Guidelines, the average time served in prison was 23 months in drug cases, 7 months in fraud cases, 6 months in immigration cases, and 14 months in firearms cases.¹³ While an apples-to-apples comparison is not possible given changes in variables, statutes, and other factors, the difference in contemporary sentencing proves dramatic. In fiscal year 2023, the average sentence length

case events prior to conviction. USSC, [What Do Federal Firearms Offenses Really Look Like?](#) 33 (2022) (“The Commission’s analysis revealed racial differences between the 27.5 percent of firearms offenders arrested following a routine police patrol compared to firearms offenders who were arrested for other reasons”).

¹⁰ See Melissa Hamilton, *Prison-By-Default: Challenging the Federal Sentencing Policy’s Presumption of Incarceration*, 51 Hous. L. Rev. 1271, 1290 (2014) (“[T]he Commission chose to analyze in depth those past sentences in which a term of imprisonment was given and only those that went to trial, though acknowledging that, at the time, 85% of cases were pleas which often attracted reduced sentences.” (citations omitted)).

¹¹ U.S. Dept. of Just., Bureau of Just. Stats., [Compendium of Federal Justice Statistics, 1985](#) 41 (July 1990).

¹² USSC, [2023 Sourcebook of Federal Sentencing Statistics](#) fig. 6 (2023) (“2023 Sourcebook”) (89.8% received an imprisonment-only sentence; 2.6% received a sentence of imprisonment and alternatives); see also USSC, [Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform](#) 43 & fig. 2.2 (Nov. 2004) (“Fifteen Year Report”) (showing trends away from probation and toward more prison and split sentences, in the early years of the Guidelines).

¹³ See 1987 Supplementary Report, *supra* note 5, at 69, tbl. 3.

was 81 months for drug offenses,¹⁴ 22 months for fraud offenses, 12 months for immigration offenses, and 49 months for firearms offenses.¹⁵

In addition to being harsh, the Sentencing Guidelines are also needlessly complex—and have grown ever more so. And the Guidelines’ ever-increasing complexity has compounded its harshness.¹⁶ The Commission explored a proposal for simplifying the Guidelines almost thirty years ago.¹⁷ Justice Breyer, architect of the Guidelines, has urged simplification, pointing out the problem of what he termed “add-ons.”¹⁸ But instead of becoming simpler, over the years, the guidelines have only grown in complexity and severity as each Commission has reacted to discrete legal developments and made piecemeal changes to the Manual.¹⁹

¹⁴ This includes both drug possession and drug trafficking offenses combined.

¹⁵ See 2023 Sourcebook, *supra* note 12, at tbl. 15. These figures include alternative months; because courts employ alternatives sparingly, the resulting averages would likely not change much without them.

¹⁶ Justice Breyer has noted the danger of offense-level creep over time. See Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 36 Fed. Sent. Rep. 244, 249 (2024 reprint, orig. pub’d 1999) (“[D]ifferent individuals . . . may not fully work out the effect of their proposals on aspects of the Guidelines that may seem mere details but that, in fact, are critical to the Guidelines’ basic structure. For example, every additional six levels doubles the amount of punishment.”); see also R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 753 (2001) (“[T]he guidelines system has become precisely what the first Commission tried to shy away from when it abandoned the pure real offense system: a system where the Commission lists precisely which harms to take into account and how to calculate them. However, the system is inherently unstable because of continual factor creep.”).

¹⁷ See 60 Fed. Reg. 49,316 (Sept. 22, 1995).

¹⁸ Stephen G. Breyer, *The Original U.S. Sentencing Guidelines and Suggestions for a Fairer Future*, 46 Hofstra L. Rev. 799, 804 (2018) (“My final suggestion, one for the Commission, is simplification. Simplification is important and everybody knows that.”).

¹⁹ See, e.g., Breyer, *Guidelines Revisited*, *supra* note 16, at 249.

The table below shows how this factor creep has led to elevated offense levels under the (currently) most commonly-applied guidelines:

	1987 ²⁰			2023 ²¹		
	Lowest BOL	Highest BOL	Number of SOC enhancements	Lowest BOL	Highest BOL	Number of SOC enhancements
§2B1.1	4	4	6	6	7	20
§2D1.1	6	43	1	6	43	16
§2K2.1 ²²	9	9	1	6	26	7
§2L1.1	6	6	2	12	25	8
§2L1.2	6	6	1	8	8	3

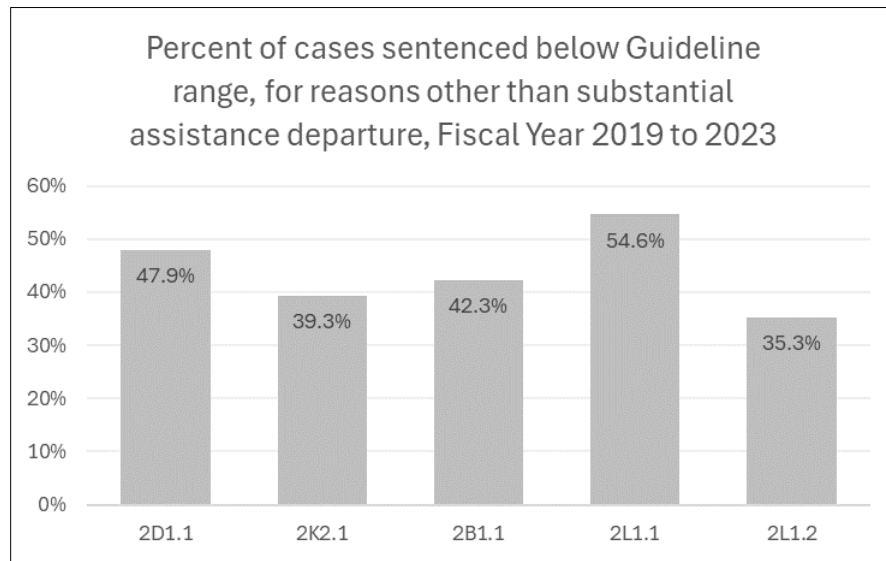
The bulk of the resulting complex and inflated sentencing ranges did not stem from careful empirical study. And while it is difficult to know what courts would do absent mandatory minimums or advisory guideline ranges, what we do know is that for these most commonly-applied guidelines, sentences routinely fall well below the advisory guideline range.

Below, the next figure illustrates the proportion of cases sentenced below the guideline range (for reasons other than substantial assistance departures) for the five most common primary guidelines during the past five fiscal years:

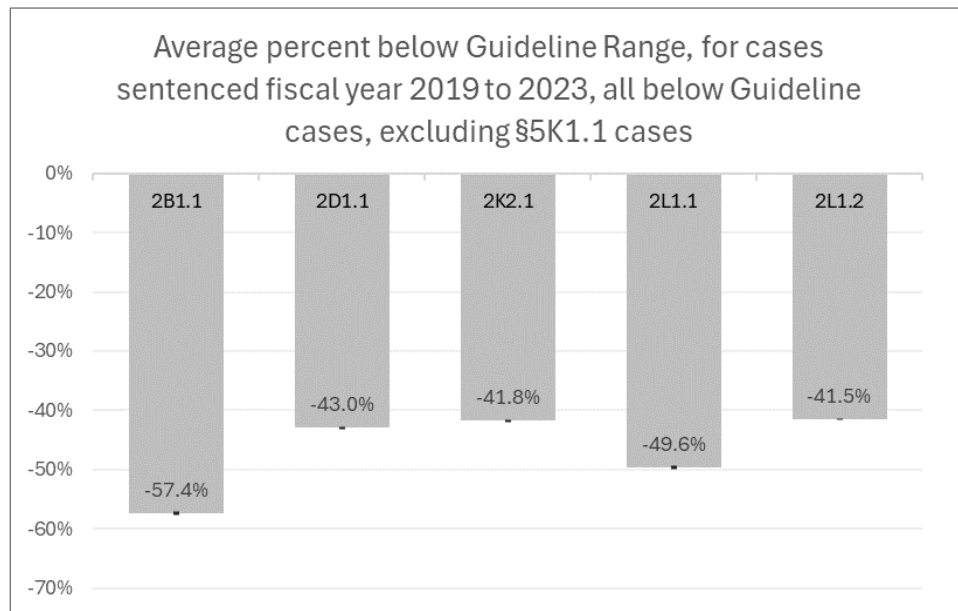
²⁰ See USSG, ch. 2 (Nov. 1, 1987).

²¹ See USSG, ch. 2 (Nov. 1, 2023).

²² There were three different firearms guidelines in the original manual. Section 2K2.1 dealt specifically with receipt, possession, or transportation of a firearm by a prohibited person. In 1987, §2K2.2 and §2K2.3 had highest available base offense levels of 12.



Moreover, courts aren't just deviating from guideline ranges a bit, they are imposing well-below-range sentences. The figure below illustrates the average percentage below the guideline range, for cases sentenced below the range for reasons other than substantial assistance departures, for the five most common primary guidelines during the past five fiscal years:



In short, the data show that courts in the post-*Booker* era often give sentences well below the advisory range, despite the ranges' powerful anchoring effect. The sentencing ranges that the Guidelines Manual produces thus are out of step in most cases with the sentences that judges find to

advance penological purposes in line with § 3553(a).²³ The original Commission expected that “continuing research, experience, and analysis will result in modifications and revisions to the guidelines,” which is why the Commission was established “as a permanent agency to monitor sentencing practices in the federal courts.”²⁴ It is high time for the Commission to listen to sentencing courts and reduce the Guidelines’ harshness and complexity.

The Commission should revisit and recalibrate the most commonly-applied guidelines—by lowering base offense levels, untethering offense levels from failed quantity-based proxies such as drug weight or loss amount, eliminating Chapter Two provisions that double-count criminal history,²⁵ and liberally pruning specific offense characteristics. And more generally, the Commission should encourage the increased use of problem-solving courts, non-custodial sentences like probation, and alternatives to incarceration such as community or home confinement.²⁶ These changes would both simplify the Guidelines Manual and bring sentencing ranges down—closer to what sentencing judges deem appropriate under § 3553(a).

²³ See also 18 U.S.C. § 3553(a)(1).

²⁴ USSG, ch. 1, part A (Original Introduction to the Guidelines Manual).

²⁵ This is a problem in the three most common primary guidelines: §§2D1.1, 2L1.2, and 2K2.1. As originally promulgated, neither §2D1.1 nor §2K2.1 contained enhancements based on prior convictions; §2L1.2(b)(1) contained only one two-level increase for individuals who previously had unlawfully entered the United States. See USSG §§2D1.1, 2K2.1, 2L1.2 (1987). Since then, the Commission has added enhancements based on prior convictions (which already increase the range along the criminal history axis), compounding punishment. See USSG §§2D1.1, 2K2.1, 2L1.2 (2023). The vast majority of individuals sentenced under these guidelines are Black and Hispanic, and double-counting criminal history in these guidelines compound racial disparities that pervade our nation’s criminal legal systems.

²⁶ The Commission should also deploy its empirical might to study key drivers of disparity that happen before sentencing such as policing, arrest, and charging practices. Racial disparities in sentence length are real, but they are not solely attributable to judges imposing sentences, given the outsized role of prosecutors in charging and plea practices. See M. Marit Rehavi & Sonja Starr, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L. J. 2, 78 (2013) (“Our research suggests that racial disparities in recent years have been largely driven by the cases in which judges have the least sentencing discretion: those with mandatory minimums.”).

II. Revisiting “relevant conduct”

Earlier this year, the Commission began the process of reigning in the expansive relevant-conduct guideline by limiting the use of acquitted conduct in calculating the sentencing range.²⁷ This decision was animated by “persistent concern[s]” raised by jurists and others about the unfair practice of enhancing a person’s guideline range for conduct that a jury found was not proven beyond a reasonable doubt.²⁸ As a logical outgrowth of this new policy, the Commission should prioritize additional §1B1.3 reforms.

As discussed below, the Commission should: (1) restrict the use of uncharged and dismissed conduct (including cross-references to more serious guidelines) in calculating sentencing ranges; (2) require specific intent, rather than reasonable foreseeability, to hold an individual accountable for jointly undertaken criminal activity; and (3) establish a default “knowledge” or “intent” requirement for application of Chapter Two base offense level enhancements and specific offense characteristics where the relevant enhancement does not otherwise explicitly set forth a mens rea requirement. These changes would promote certainty, proportionality, and fairness in sentencing and reduce unwarranted disparities,²⁹ with the added benefit of dramatically simplifying operation of the guidelines.

Uncharged and Dismissed Conduct. While the staunchest criticisms of the Guidelines’ relevant-conduct rules have been aimed at acquitted-conduct sentencing,³⁰ judges and other stakeholders have also long condemned the use of unadjudicated conduct to increase guideline ranges

²⁷ See USSC, [Amendments to the Sentencing Guidelines and Reasons for Amendment](#) 1–5 (Apr. 30, 2024).

²⁸ *Id.* at 1.

²⁹ See 28 U.S.C. §§ 991(b)(1)(B), 994(f).

³⁰ See, e.g., *McClinton v. United States*, 600 U.S. ___, 143 S. Ct. 2400, 2402 (2023) (Sotomayor, J., statement respecting denial of certiorari) (distinguishing acquittals from “conduct that was never charged and passed upon by a jury” because of the significance the Founders attached to the jury’s ability to modulate punishment through a verdict of acquittal).

under the Commission’s “modified real-offense” approach.³¹ In a 2010 Commission survey, 69% of judge respondents said they believed it was not advisable to consider dismissed conduct at sentencing, and 68% said the same thing about uncharged conduct referenced only in the PSR.³² Defenders and others have, over the years, encouraged the Commission to eliminate or

³¹ See generally, e.g., [Transcript of Public Hearing before the U.S. Sent’g Comm.](#), Atlanta, GA, at 73 (Feb. 10–11, 2009) (Lyle Yurko, Practitioners Advisory Group) (“[T]he relevant conduct portion of the guidelines needs further reform. Relevant conduct is complex and therefore sometimes unevenly applied.”); NACDL & John R. Steer, *An Interview with John R. Steer, Former Vice Chair of the U.S. Sent’g Comm’n*, 32-SEP Champ. 40, 42 (2008) (recommending decreasing the weight given to unconvicted conduct that is part of the same course of conduct or scheme as the convicted conduct under §1B1.3(a)(2)–(3) because “[t]hat is the aspect of the [relevant conduct] guideline . . . most difficult to defend”); Am. College of Trial Lawyers Fed. Crim. Proc. Comm., *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001) (suggesting changes to address the unfairness of the relevant conduct rules); David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523 (1993); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681 (1992); Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rep. 355, 356 (1992) (“The single feature of the federal sentencing guidelines that state judges and judges and judicial administrators outside the United States find most astonishing is the Commission’s policy decision to base guideline application on the defendant’s relevant conduct, including conduct alleged in charges that were dismissed or that resulted in acquittals or that were never filed. More than once when describing the relevant conduct system to government officials and judges outside the United States, I have been accused of misreporting or exaggerating.”); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161 (1991) (law review article written by an Eighth Circuit judge recommending the Commission move toward an offense-of-conviction model to avoid the unwarranted disparities and due process problems of the modified real-offense model); *United States v. Silverman*, 976 F.2d 1502, 1519–31 (6th Cir. 1992) (Merritt, C.J., dissenting); *United States v. Galloway*, 976 F.2d 414, 437 (8th Cir. 1992) (Bright, J., dissenting, joined by Arnold, C.J., Lay, J., and McMillian, J.).

³² See USSC, [Results of Survey of United States District Judges January 2010 through March 2010](#) tbl. 5 (2010).

significantly limit the effect of unconvicted conduct on the guideline range, and we encourage the Commission to revisit those letters and suggestions.³³

There are three primary policy reasons to revisit this rule:

- *First*, the use of uncharged or dismissed conduct that was “part of the same course of conduct or common scheme or plan as the offense of conviction”³⁴ drastically increases prosecutors’ power to manipulate sentences by declining to bring weakly-supported charges that wouldn’t withstand the “beyond a reasonable doubt” standard, while advocating for an increased sentence based on those same allegations under a less exacting standard.³⁵

³³ See, e.g., [Fed. Defenders’ Annual Letter to the U.S. Sent’g Comm.](#), at 24–31 (May 17, 2013); [Fed. Defenders Comment on the U.S. Sent’g Comm’s Proposed Priorities for Amendment Cycle Ending May 1, 2013](#), at 33–36 (July 23, 2012); [Fed. Defenders Comments on the U.S. Sent’g Comm’s Proposed Priorities for Amendment Cycle Ending May 1, \[2012\]](#), at 29–33 (Aug. 26, 2011); [Testimony of Alan Dubois and Nicole Kaplan on behalf of Fed. Defenders before the U.S. Sent’g Comm on “The Sentencing Reform Act of 1984: 25 Years Later.”](#) Atlanta, GA, at 24–26 (Feb. 19, 2009); cf. [Fed. Defenders’ Annual Letter to the U.S. Sent’g Comm.](#), at 4–7 (June 14, 2018) (focusing primarily on “acquitted conduct” but also discussing the problems with using uncharged conduct to enhance the guidelines).

³⁴ See §1B1.3(a)(2) (this section applies to aggregable offenses such as fraud and drug trafficking).

³⁵ See, e.g., Am. College of Trial Lawyers, *supra* note 31, at 1490–91 (discussing the “strategic advantage” the relevant conduct rules provide prosecutors, who can introduce “problematic charges through the Presentence Report at sentencing”); Freed, *supra* note 31, at 1714 (“The basic conceptual flaw in applying ‘relevant conduct’ following a guilty plea is that, contrary to the Commission’s rationale, it *enhances* rather than reduces the power of the prosecutor. Indeed, it allows a prosecutor to increase [a person’s] sentence more easily by *dropping* charges than by bringing them.”); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. Cal. L. Rev. 289, 307 (1992) (“The alternative of seeking sentence enhancements instead of convictions certainly adds to the prosecutor’s arsenal and affects the balance of power in sentencing, not simply by limiting the judge’s power but by shifting it to the prosecutors and probation officers who draft the facts on which the sentencing will be based.”); Benson B. Weintraub, *Hidden Disparity Under the Sentencing Guidelines*, 4 Fed. Sent. Rep. 148, 148 (1991) (“Perhaps the most serious form of hidden disparity comes from the shift toward predetermination of sentences by the government. In addition to the charging process, the prosecutor largely

- *Second*, this practice carries with it basic fairness, notice, certainty, and proportionality problems for individuals convicted of one offense who are then subject to (at times, extreme) sentencing enhancements for other uncharged crimes without the procedural safeguards attendant to a trial.³⁶
- *Third*, as the Commission has long acknowledged, using uncharged and dismissed conduct to enhance sentences under §1B1.3(a)(2) leads to unwarranted sentencing disparities.³⁷ Because the rules are complex and rely on untrustworthy evidence, and because different actors hold different views toward relevant conduct, their application can vary widely from one courtroom to the next.³⁸

determines the time to be served by an [individual] by controlling the flow of information to the United States Probation Officer and district judge which impact relevant conduct determinations, adjustments under Chapter 3, and potential grounds for departure.”); Reitz, *supra* note 31, at 564 (“[I]t is exceedingly strange to cast real-offense sentencing as a brake on prosecutorial power when the great force of its impact is in the opposite direction. Real-offense practice gives the government two opportunities to establish criminal conduct: once at trial or by plea, and again at sentencing. Indeed, the second bite at the apple is a dramatic addition to the state’s arsenal because so many trial protections have fallen by the wayside. This creates the temptation, if not the practice, of undercharging or underbargaining on the part of prosecutors, who can wait for sentencing to make out their full case.”); Heaney, *supra* note 31, at 229.

³⁶ See, e.g., Am. College of Trial Lawyers, *supra* note 31, at 1502 (highlighting the lack of notice of relevant conduct facts until the PSR is issued); Heaney, *supra* note 31, at 208–12, 217–25 (addressing the serious due process issues raised by the relevant conduct rule); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. Crim. Law & Criminol. 1550, 1564 (1981) (“Real offense sentencing undermines the importance of the substantive criminal law, nullifies the law of evidence, and is irreconcilable with the notion that punishment can be imposed only in respect to offenses admitted or proven.”).

³⁷ See USSC, *Simplification Draft Paper: Relevant Conduct and Real Offense Sentencing* (Nov. 1996) (“Since the initial set of guidelines were issued in 1987, the Commission’s training staff has found that the relevant conduct guideline has been among the most troublesome for application and that the guideline’s application has been very inconsistent across districts and circuits.”).

³⁸ See, e.g., *Fifteen Year Report*, *supra* note 9, at 50, 87 (Nov. 2004) (noting that the relevant conduct rule is inconsistently applied because of ambiguity in the

In addition to these concerns, supposed real-offense sentencing is in tension with the Commission’s enabling statute, which dictates that guidelines should reflect the appropriateness of imposing an incremental penalty for each offense that a person “is *convicted of*.”³⁹ The enabling statute also instructs the Commission avoid unwarranted disparities among people with similar records “who have been *found guilty of* similar conduct.”⁴⁰ And, as with using acquitted conduct to enhance a guideline range, the use of uncharged conduct can lead to severe, multifold increases in sentences that

language of the rule, law enforcement’s role in establishing it, and untrustworthy evidence); Freed, *supra* note 31, at 1715 (“District judges, prosecutors, defenders, and probation officers are today demonstrating widely different attitudes and practices respecting relevant conduct within and across districts.”); Yellen, *supra* note 31, at 451 (“The complexity of the relevant conduct standard also contributes to unwarranted disparity. Complexity invites errors in application or inconsistent interpretation of key concepts.”); Pamela B. Lawrence & Paul J. Hofer, Federal Judicial Center Research Division, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 4 Fed. Sent. Rep. 330, 331–34 (1992) (relevant conduct hypotheticals administered by the FJC to a representative sample of probation officers resulted in wide variation in base offense levels and guidelines ranges for three similarly-situated individuals charged with drug trafficking); *United States v. Quinn*, 472 F. Supp. 2d 104, 106–11 (D. Mass. 2007) (discussing drastically different applications of relevant conduct rule by two different probation officers in similar cases).

³⁹ 28 U.S.C. § 994(l)(1) (emphasis added); *see also Galloway*, 976 F.2d at 430–31 (Beam, J. dissenting, joined by Lay, Bright, McMillian, JJ.) (“The clear implication [of § 994(l)] is that Congress did not intend the guidelines to punish separate instances of unconvicted conduct incrementally. Any other interpretation renders the words chosen by Congress meaningless. Had Congress wanted separate unconvicted offenses to be punished incrementally, it could have done so simply by replacing the phrase ‘is convicted of’ with the word ‘commits.’” (citations omitted)).

⁴⁰ 28 U.S.C. § 991(b)(1)(B); *see also Galloway*, 976 F.2d at 432 (Beam, J. dissenting, joined by Lay, Bright, McMillian, JJ.) (“The plain language of [§ 991(b)(1)(B)] indicates that Congress sought, in large part, to equalize sentences based on *convicted* criminal conduct.”); *cf. Rachel E. Barkow, Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1628 (“Congress did not command [that the Guidelines instruct judges to consider relevant conduct], nor is there any evidence in the Sentencing Reform Act’s legislative history that suggests Congress even intended this outcome. Instructing judges to consider ‘real’ conduct was a discretionary decision by one set of Commission members who seemed to believe that Guidelines could and should occupy the entire field.”).

are out of all proportion to culpability.⁴¹ The combined impact of the drug and fraud guidelines' focus on drug quantity or loss amount instead of better indicators of culpability *and* their reliance on uncharged or dismissed relevant conduct is particularly pernicious.⁴² As one scholar observed: "The pervasiveness of the effect of relevant conduct under the guidelines, both in theory and in practice, renders it a rather large tail wagging a small dog."⁴³

Now, on the SRA's fortieth anniversary and on the heels of the *Booker*'s twentieth anniversary (*Booker* being about protecting rights that are undermined by reliance on facts not found by juries), the Commission should investigate ways to contract §1B1.3. Fortunately, this Commission would not be starting from scratch. In fact, since the early days of the Guidelines Manual, the Commission has considered limiting the impact of uncharged and dismissed conduct, although these efforts have never led to meaningful reforms. Through its "simplification project" in the 1990s, Commission staff laid out several options to reduce the influence of uncharged and dismissed

⁴¹ See, e.g., *United States v. Barfield*, 941 F.3d 757, 760 (5th Cir. 2019) (uncharged methamphetamine trafficking conduct alleged in PSR increased drug quantity from 25 grams to 12.2 kilograms, yielding a base offense level of 38 and a guidelines range of 360 months to life); *United States v. Rose*, 20 F.3d 367, 370–73 (9th Cir. 1994) (uncharged money laundering increased loss amount from \$275,000 to \$2.5 million and resulted in a seven-year increase in the sentence); *United States v. Townley*, 929 F.2d 365, 369 (8th Cir. 1991) (uncharged drug conduct led to an 18-level increase in the base offense level and a seven-fold increase in the guidelines range); *United States v. Ebbole*, 917 F.2d 1495, 1495–96 (7th Cir. 1990) (uncharged drug conduct more than tripled the sentencing range from 27 to 33 months to 92 to 115 months).

⁴² See Yellen, *supra* note 31, at 451–52 ("Proportionality, too, has been an elusive goal. In fact, the aggregation required by the Guidelines' alleged related-offense principle, combined with the Guidelines' excessive reliance on harm- and quantity-based specific offense characteristics has reinforced disproportionate sentencing." (footnotes omitted)); Am. College of Trial Lawyers, *supra* note 31, at 1493–94 ("While approximately 80% of all cases are sentenced on the basis of a quantity or amount-driven guideline, many judges, scholars, prosecutors, and members of the public believe that the Guidelines overemphasize quantity to the exclusion of situational and [personal] characteristics that are better indicators of culpability. The inclusion of uncharged aggregable offenses magnifies this disproportionality." (footnotes omitted)).

⁴³ Heaney, *supra* note 31, at 217.

conduct on guideline ranges.⁴⁴ Others have suggested similar reforms.⁴⁵ The Commission even announced as a policy priority during the 1996–97 amendment cycle, “substantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence.”⁴⁶

The Commission has, in the past, looked for guidance from the states—which have widely “adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines.”⁴⁷ It should continue this exploration, and perhaps invite state sentencing commissioners to join the conversation. There’s no evidence to suggest that the states’ decision to focus sentencing primarily on the offense(s) of conviction has decreased public safety; on the contrary, many

⁴⁴ See *Relevant Conduct Simplification Paper*, *supra* note 37.

⁴⁵ See Am. College of Trial Lawyers, *supra* note 31, at 1495–97 (proposing a four-level or 25% cap on the increase for uncharged, aggregable offenses and the removal of cross-references to more serious guidelines in favor of a discretionary upward departure); NACDL & Steer, *supra* note 31, at 42 (“Why should, for example, the drugs associated with an uncharged, or charged and dismissed, count be given the same guideline weight as an equivalent drug quantity in the count(s) of conviction? Why don’t we, instead, give less weight to the unconvicted conduct by, for example, counting all the drugs in the convicted counts but only half the drugs in the unconvicted conduct?”); Dubois & Kaplan 2009 Testimony, *supra* note 33, at 26 (encouraging the Commission to (1) eliminate uncharged and acquitted offenses from the definition of relevant conduct, (2) limit the impact of dismissed counts on the guidelines range to the lesser of four levels or 25% of the number of levels in the applicable table attributable to the offense of conviction under §1B1.3(a)(1), and (3) eliminate cross-references to guidelines for more serious offenses than the offense of conviction).

⁴⁶ USSC, [*Notice of Priority Areas for Commission Research and Amendment Consideration*](#), 61 Fed. Reg. 34,465, 34,465 (July 2, 1996).

⁴⁷ Phyllis J. Newton, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent. Rep. 68, 69 (1995); see also Kelly Lyn Mitchell, [*State Sentencing Guidelines: A Garden Full of Variety*](#), 81-SEP Fed. Probation 28, 28 (2017) (noting that state sentencing systems “rely more heavily on the charged offense to differentiate between crimes and to assign appropriate sentences” than the federal guidelines system).

states have maintained low crime rates and reduced incarceration rates after adopting their guidelines.⁴⁸

Other amendments to §1B1.3. Revising the relevant-conduct guideline to eliminate dismissed and uncharged conduct is the most essential reform that’s needed. But when the Commission undertakes this reform, it makes sense to address other problems with that guideline. The two that we raise here both relate to mens rea.

- The current relevant conduct rule requires individuals engaged in “jointly undertaken criminal activity” to be held accountable for the conduct of others under a “reasonable foreseeability” standard—a civil tort standard.⁴⁹ This “standard is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing.”⁵⁰ The Commission should require that the individual knew about, intended, and agreed to the acts or omissions of another before holding her liable for those acts or omissions.⁵¹

⁴⁸ See Defenders’ 2013 Annual Letter, *supra* note 33, at 31 (citations omitted).

⁴⁹ See §1B1.3(a)(1)(B).

⁵⁰ *Elonis v. United States*, 575 U.S. 723, 737–38 (2015) (cleaned up); see also *Morrisette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

⁵¹ The Commission has explored other options for this provision in the past. See 80 Fed. Reg. 2570, 2578–79 (Jan. 16, 2015); see also [Statement of Jon Sands on behalf of Fed. Defenders to the U.S. Sent’g Comm on Proposed Amendments to “Mitigating Role,” “Single Sentence Rule,” and “Jointly Undertaken Criminal Activity.”](#) at 23 (Mar. 12, 2015). And Defenders have written about the issue many times. See [Fed. Defender Comments on the U.S. Sent’g Comm’s 2023–24 Proposed Priorities](#), at 18 (Aug. 1, 2023); [Fed. Defenders’ Annual Letter to the U.S. Sent’g Comm](#), at 11–12 (Sept. 14, 2022); [Fed. Defenders’ Annual Letter to the U.S. Sent’g Comm](#), at 7–8 (June 14, 2018); [Fed. Defenders’ Annual Letter to the U.S. Sent’g Comm](#), at 7 (PDF p. 11) (June, 2015).

- The relevant conduct rule should provide a default mens rea requirement that would ensure that guideline calculations are more closely tied to culpability.⁵² We have raised this issue in the recent past.⁵³ We again urge the Commission to prioritize mens rea reform throughout the Manual, and we think that this could be accomplished easily and efficiently by adding a default knowledge or intent requirement to §1B1.3.

III. Contracting the career-offender definition as much as possible

We all know the career-offender guideline is a problem: it calls for sentences that are greater than necessary for most individuals; it exacerbates racial disparities; and it reduces Chapter Four’s predictive accuracy. Where the career-offender guideline applies, courts give below-guideline sentences in most cases—especially in drug cases, but also in crime-of-violence cases.⁵⁴ The Commission in 2016 called for Congress to amend the directive that spawned the career-offender guideline, 18 U.S.C. § 994(h), to eliminate the possibility of “[d]rug trafficking only career offenders.”⁵⁵

⁵² As originally drafted in 1987, §1B1.3 appears to have contained a limited default mens rea requirement for determining “injury relevant to the offense of conviction,” which included “harm which is caused *intentionally, recklessly* or by *criminal negligence* in the course of conduct relevant to the offense of conviction.” USSG §1B1.3 (Nov. 1, 1987) (emphasis added). However, that language was removed two years later. *Cf.* §1B1.3 (Nov. 1, 1989); *see also* USSG App. C, Amend. 76 (Nov. 1, 1989) (stating the referenced language was removed as “unnecessary and potentially confusing”).

⁵³ *See, e.g., Fed. Defenders’ Annual Letter to the U.S. Sent’g Comm.*, at 13 & n.28 (May 15, 2024); *Defenders’ 2022 Annual Letter*, *supra* note 51, at 10–11 (providing examples from §§2K2.1, 2D1.1, and 3B1.4).

⁵⁴ USSC, *Career Offender QuickFacts* (this information was compiled from the Sentencing Commission’s individual datafiles for fiscal years 2019 through 2023); *see also* USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 34–37 (Aug. 2016) (“Sentences Imposed and Relative to the Guideline Range,” separated out by “career offender pathway”).

⁵⁵ USSC 2016 Report to the Congress, *supra* note 54, at 3.

We hope Congress will eventually amend § 994(h). But in the meantime, the Commission should contract the problematic career-offender guideline as much as § 994(h) permits. We are optimistic that this reform can become reality this amendment cycle. In February, the Commission held a day-long roundtable discussion of the career-offender guideline and categorical approach that brought together judges, defense attorneys, prosecutors, and academics.⁵⁶ The idea was to try to find novel solutions to a seemingly intractable problem: the categorical approach that is used to determine who is a “career offender” is deeply unpopular, but every analytical alternative would have the effect of expanding the reach of the problematic career-offender guideline.

The roundtable was lively and productive. And by the end of the day, participants with very different interests and views were coalescing around the idea of pairing any elimination of the categorical approach with two changes that would significantly reduce the number of prior convictions that get assessed (under any analytical approach) under §4B1.2:

- Eliminating prior state drug convictions entirely from the analysis—an idea that Defenders proposed in our comments to the Commission in 2023.⁵⁷

⁵⁶ See USSC, [Roundtable on Career Offender & the Categorical Approach](#) (Feb. 7, 2024).

⁵⁷ See [Fed. Defender Comment on the U.S. Sent’g Comm’s 2023 Proposed Amendments on Circuit Conflict re: Controlled Substance Offense \(Proposal 4B\) and Proposals to Amend Career Offender Guideline \(Proposal 6\)](#), at 22–25 (Mar. 14, 2023). Section 994(h) refers only to prior federal drug convictions. Most prior convictions are state convictions, so eliminating prior state drug convictions would go a long way toward the Commission’s larger goal of eliminating drug offenses entirely from the career-offender guideline. And while, at first glance, it may seem incongruent to eliminate state drug predicates while keeping federal drug predicates, it is entirely rational for the federal courts to focus on prior convictions that reflect federal legislative and executive priorities and where we know that federal judicial and prosecutorial standards were met. This change would eliminate the categorical approach as it relates to drug offenses without further ado: courts would need only determine whether there was a prior conviction under one of the listed federal statutes. This change would also eliminate a circuit split over the definition of “controlled substance offense.”

- Requiring that any potential “crime of violence” garnered significant prison time, in order to avoid capturing convictions for theoretically “violent,” but actually quite minor, offenses.⁵⁸

We urge the Commission to prioritize amending the career-offender guideline this year in a manner that contracts, rather than expands, the reach of that guideline, in line with what was discussed at February’s roundtable. This would be a major reform in its own right. But also, it would free-up the Commission to focus on other big, structural reforms, rather than continuing to debate the categorical approach year after year.

IV. Enlisting stakeholders to collaborate to find workable solutions to tough problems

The Commission’s productive career-offender roundtable, discussed above, opened our eyes to the value of processes that get stakeholders and Commissioners talking to one another to find solutions to tough problems. The Commission has already done what is needed—hopefully—for career offender. We encourage the Commission to organize similar roundtables, or perhaps working groups that meet regularly for a set period, to figure out how best to implement other significant reforms.

The Commission’s formal amendment process has its place. But although it works well for minor amendments and updates, it may well stymie more significant reforms. Under the formal process, stakeholders submit comments to the Commission and present testimony advocating for their positions. We do not see other stakeholders’ advocacy until immediately before the hearings and, at the hearings, stakeholders generally talk around each other. After hearings, Commissioners go behind closed doors to make decisions. This process does not encourage collaboration or compromise or creativity, which may make it difficult for the Commission to take bold steps.

⁵⁸ The prior sentence would not be a perfect reflection of an offense’s seriousness, given that state charging and sentencing practices vary widely, but it may be the best evidence we have. One way the Commission could reduce disparities based on state sentencing practices is to focus on the length of sentence that was actually served, not just imposed, given that a judge’s decision to impose a three-year sentence in a state with a parole system that permits release after six months is not equivalent to a three-year sentence in a state with no parole.

Last year’s “Simplification” proposal regarding departures provides a case in point. The elimination of departures requires extensive amendments so, to some extent, it is a major change. But witnesses agreed last year that the concept of departures is mostly obsolete, so perhaps the Commission’s simplification proposal was less a structural reform than a post-*Booker* update. Even so, that proposal stalled. Defenders supported eliminating departures generally but objected to how the proposal accomplished that. Our comment provided a roadmap for eliminating departures without creating new problems.⁵⁹ At the same time we filed our comment, other stakeholders—notably CLC and DOJ—criticized many of the same aspects of the proposal we did, but, rather than commenting on our roadmap (which they did not have when they wrote their comments), they asked the Commission to slow down. At the hearing, this disconnect was on display: when Commissioners asked various witnesses what they thought about eliminating departures in line with what we had proposed, their responses were generally positive, but no one had gotten into the nitty-gritty. With that, the comment period ended.

If the Commission were to adopt the first and second priorities that Defenders propose in this letter, it is hard to imagine getting to a set of amendments without doing things differently. And it should be noted that while these priorities are significant reforms, they aren’t *groundbreaking*. If the Commission truly wants to think big, it could study and learn from the experience of other countries within the common law tradition and explore punishment structures beyond the grid.⁶⁰ And we encourage this exploration. But the point here is that it should be relatively easy to recalibrate many (or most, or even all) guidelines downward and to significantly limit the relevant-conduct guideline. But under the Commission’s typical process, we worry that it could be challenging indeed.

Defenders propose, then, that the Commission set up collaborative processes for these and/or other significant reform priorities, to help the

⁵⁹ See [Fed. Defender Comment on the U.S. Sent’g Comm’s Proposed Amendment on Simplification of the Three-Step Process \(Proposal 7\)](#) (Feb. 22, 2024).

⁶⁰ See, e.g., Julian V. Roberts, *The Evolution of Sentencing Guidelines in Minnesota and England and Wales*, 48 Crime & Just. 187, 188 (2019) (“No other country has adopted a two-dimensional matrix structure for its guidelines.”).

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Commission get from priorities to proposals, and ultimately to amendments. The most important component of a productive process would seem to be the participation of individuals with a solid grasp of the policy issues and relevant experience, along with a willingness to speak frankly, listen earnestly, and work collaboratively. Working groups of this sort might include Commissioners but could also utilize Commission staff. If the Commission is interested in this concept but isn't sure how best to set up processes, Defenders would be happy to share additional ideas and we're confident that other stakeholders would do the same.

Very truly yours,



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