

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

150 West Flagler Street, Suite 1500
Miami, Florida 33130-1556

Chair: Michael Caruso

Phone: 305.533.4200

September 14, 2022

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 2022-2023 Amendment Cycle

Dear Judge Reeves:

On December 21, 2018, Congress took a critical first step towards “making our sentencing laws fairer and smarter.”¹ By lowering draconian mandatory penalties, expanding compassionate release and safety-valve, and providing retroactive relief from a discredited crack-powder sentencing disparity, Congress recognized that the tough-on-crime policies that fueled mass incarceration and entrenched racial disparities did little to enhance public safety.² The Commission should continue what Congress started: both by implementing the changes to the guidelines prompted by the First Step Act—like amending §1B1.13—and also, by making critical improvements of its own to make federal sentencing policy fairer.

¹ 164 Cong. Rec. S7828 (daily ed. Dec. 19, 2018) (statement of Sen. Schumer).

² First Step Act of 2018, Pub. L. No. 115-391, tit. IV, §§ 401-404, 132 Stat. 5194, 5220-22 (2018); *id.* at tit. VI, § 603(b) (“First Step Act”); *see also, e.g.*, 164 Cong. Rec. H10363 (daily ed. Dec. 20, 2018) (statement of Rep. Jeffries) (“The First Step Act is a product of work that this body has decided to do out of recognition that we cannot allow overcriminalization to continue to persist in this country.”); 164 Cong. Rec. H10364 (daily ed. Dec. 20, 2018) (statement of Rep. Sensenbrenner) (recognizing the First Step Act as a “historic” “action” towards “reducing crime, enacting fair sentencing laws, and restoring lives”); 164 Cong. Rec. S7753-01, S7763 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) (“The War on Drugs—which has fueled so much of the explosion of our prison population—has really been a war on certain people and certain communities and not on others.”).

Pursuant to 28 U.S.C. § 994(o), this letter identifies several priorities the Federal Public and Community Defenders hope the Commission will consider in the upcoming amendment cycle. Each of these priorities, if implemented, would make strides towards providing more certain and fairer sentencing policy.³

I. Compassionate Release

In the First Step Act, Congress, “dissatisfied with the stinginess of compassionate release grants[,] deliberately broadened [compassionate release] availability.”⁴ Prior to the First Step Act, courts could resolve only compassionate release motions brought by the Bureau of Prisons (BOP). Because BOP rarely brought these motions, Congress “increas[ed] the use and transparency of compassionate release,” amending 18 U.S.C. § 3582(c)(1)(A) to allow incarcerated individuals to petition the courts directly.⁵

While Congress changed who could move for compassionate release, it maintained § 3582(c)(1)(A)’s exacting, yet flexible, standard: “extraordinary or compelling reasons” must exist to warrant a sentence reduction, and any reduction must be “consistent with applicable policy statements issued by the Sentencing Commission.”⁶

Because nearly every circuit agrees that §1B1.13, the current policy statement governing compassionate release, applies only to BOP-filed motions,⁷ we expect the Commission will amend it to provide guidance for motions filed by individuals. As

³ See 28 U.S.C. § 991(b)(1)(B).

⁴ *United States v. Long*, 997 F.3d 342, 359 (D.C. Cir. 2021).

⁵ First Step Act, at tit. VI, § 603(b) (codified at 18 U.S.C. § 3582(c)(1)(A)). See, e.g., *United States v. Brooker*, 976 F.3d 228, 232 (2d Cir. 2020) (recognizing that prior to the First Step Act, “BOP used [compassionate release] sparingly, to say the least”).

⁶ 18 U.S.C. § 3582(c)(1)(A).

⁷ See *United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *Brooker*, 976 F.3d at 235-36; *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180-81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *Long*, 997 F.3d at 355. But see *United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021). The Eighth Circuit has not decided the issue.

we urged in last year’s annual letter, any amendment to §1B1.13 should continue to recognize the responsive standard that Congress set.⁸ When Congress enacted § 3582(c)(1)(A), it recognized the need for a standard that would remain adaptable to unknown or unanticipated developments that may justify a modification of sentence. Referred to by sponsors as a “safety-valve,” Congress intended § 3582(c)(1)(A) to be used to modify a sentence in an unusual instance where the “circumstances are so changed” that it “would be inequitable” to maintain the original sentence.⁹ While Congress provided “severe illness” as an example of an extraordinary and compelling circumstance that would warrant this relief, it also recognized there would exist “other extraordinary and compelling circumstances” that justify sentencing modifications as well.¹⁰

The Commission’s amended policy statement should reflect Congress’ intent. The extraordinary and compelling standard is undoubtedly rigorous. And §1B1.13 should continue to “describe those characteristic or significant qualities or features” that typically meet this rigorous standard.¹¹ But the amended policy statement must allow courts to respond to “other extraordinary and compelling circumstances,” too. Whether it be a global pandemic, an “unusually long sentence”¹² now recognized by law and society as inhumane, or another unforeseen circumstance that we cannot presently contemplate, these reasons are—by definition—extraordinary and cannot be reduced to a finite list.¹³ An amended policy statement which guides, not binds, courts to resolve compassionate release motions is consistent with Congress’ intent and the Commission’s obligation to

⁸ Letter from Michael Caruso, Chair, Fed. Def. Sent’g Guidelines Comm., to the Hon. Charles R. Breyer, Acting Chair, U.S. Sent’g Comm’n (Oct. 7, 2021).

⁹ S. Rep. No. 98-225, at 121 (1983), *as reprinted in*, 1984 U.S.C.C.A.N. 3182, 3304.

¹⁰ *Id.* at 55.

¹¹ *McGee*, 992 F.3d at 1045.

¹² S. Rep. No. 98-225 at 55.

¹³ *See generally id.* at 121 (describing § 3582(c)(1)(A) as a “safety-valve,” which would apply “regardless of length of sentence” and would “permit[] later review of sentences in particularly compelling situations”); *Setser v. United States*, 566 U.S. 231, 242-43 (2012) (citing § 3582(c)(1)(A) as the mechanism to use when a district court’s “failure to anticipate developments that take place after the first sentencing . . . produces unfairness to the defendant” (cleaned up)).

establish sentencing policies that reflect the “advancement in knowledge of human behavior as it relates to the criminal justice process.”¹⁴

Courts understand the exceptional nature of § 3582(c)(1)(A) relief and Commission-collected data continue to show that courts use their discretion to grant this relief judiciously.¹⁵ As the Commission prepares to amend §1B1.13, we urge it to implement a policy statement that remains faithful to the First Step Act’s mission to increase the use of compassionate release and continues to recognize the courts’ “unique position” to determine the circumstances that warrant relief.¹⁶

II. Prohibit Acquitted Conduct

In 2004, the Supreme Court recognized it would be “absurd” for a judge to “sentence a man for committing murder even [though] the jury convicted him only of illegally possessing the firearm used to commit it.”¹⁷ Almost two decades later, the federal sentencing guidelines still permit this absurdity.¹⁸ There is nothing stopping the Commission from prohibiting reliance on acquitted conduct. Congress has not required acquitted conduct to be considered at sentencing—in fact, there is broad bipartisan agreement as to the inappropriateness of its use.¹⁹ Other guidelines

¹⁴ 28 U.S.C. § 991(b)(1)(C).

¹⁵ Over 80 percent of the compassionate release motions filed since 2020 have been denied and the denial rate is increasing. *Compare* USSC, *United States Sentencing Commission Compassionate Release Data Report* tbl. 1 (Sept. 2022) (reporting an 83.3 percent denial rate), *with* USSC, *U.S. Sentencing Commission Compassionate Release Data Report* tbl. 1 (May 2022) (reporting an 82.8 percent denial rate), *and* USSC, *U.S. Sentencing Commission Compassionate Release Data Report* tbl. 1 (Sept. 2021) (reporting an 82.5 percent denial rate).

¹⁶ USSG §1B1.13 cmt. n.4.

¹⁷ *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

¹⁸ *See* USSG §1B1.3 cmt., backg’d (“Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.”); §6A1.3 cmt. (“Any information may be considered” to determine relevant facts “so long as it has sufficient indicia of reliability to support its probable accuracy.”); *see also* *United States v. Watts*, 519 U.S. 148, 156 (1997).

¹⁹ On March 28, 2022, the House of Representatives voted 405 to 12 to pass H.R. 1621, Prohibiting Punishment of Acquitted Conduct Act of 2021, which, if enacted, would prohibit the consideration of acquitted conduct at sentencing, except for mitigating a sentence. *See Vote Details, Roll Call 83, Bill Number: H.R. 1621*, Off. of the Clerk, U.S. House of Reps., (Mar. 2022), <https://bit.ly/3B1yPMS> (reporting votes by party); Prohibiting Punishment of

systems have not needed acquitted conduct sentencing to achieve fairness.²⁰ And courts around the country continue to denounce its use.²¹ We urge the Commission to amend the relevant conduct guideline to prohibit reliance on acquitted conduct.²²

The evils of acquitted conduct sentencing are real and well-documented. By depriving individuals of adequate notice of a possible sentence and “entirely trivializ[ing]” the jury’s fact-finding function,²³ the use of acquitted conduct to increase sentences is a “dubious infringement” on the Fifth and Sixth Amendments.²⁴ Acquitted conduct sentencing also dangerously enhances prosecutorial power. It incentivizes prosecutors to overcharge, knowing that even if they lose some charges at trial, they get a second bite at the apple (without the

Acquitted Conduct Act of 2021, H.R. 1621, 117th Cong. (2022), <https://bit.ly/3BrTmvq>. See also Prohibiting Punishment of Acquitted Conduct Act of 2021, S. 601, 117th Cong. (2022), <https://bit.ly/3QC55vG> (bipartisan Senate companion bill).

²⁰ See Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1626, 1628-29 (2012).

²¹ See, e.g., *United States v. Khatallah*, 41 F.4th 608, 651-54 (D.C. Cir. 2022) (Millet, J., concurring); *United States v. Martinez*, 769 F. App’x 12, 17 (2d Cir. 2019) (Pooler, J., concurring); *United States v. Brown*, 892 F.3d 385, 408-09 (D.C. Cir. 2018) (Millet, J., concurring); *United States v. Lasley*, 832 F.3d 910, 920-22 (8th Cir. 2016) (Bright, J., Dissenting); *United States v. Alejandro-Montanez*, 778 F.3d 352, 362–63 (1st Cir. 2015) (Torruella, J., concurring); *United States v. Bell*, 808 F.3d 926, 927-28 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of r’hrsg en banc); *id.* at 929-32 (Millet, J., concurring in denial of r’hrsg en banc); *United States v. Canania*, 532 F.3d 764, 776-78 (8th Cir. 2008) (Bright, J., concurring); *United States v. White*, 551 F.3d 381, 391-97 (6th Cir. 2008) (Merritt, J., dissenting); *United States v. Mercado*, 474 F.3d 654, 658-665 (9th Cir. 2007) (Fletcher, B., J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349-53 (11th Cir. 2006) (Barkett, J., specially concurring); *United States v. Sumerour*, No. 3:18-CR-582, 2020 WL 5983202, at *4 (N.D. Tex. 2020); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.), *vacated by*, 271 F. App’x 298 (4th Cir. 2008); *United States v. Pimental*, 367 F. Supp. 2d 143, 152-53 (D. Mass. 2005) (Gertner, J.); *People v. Beck*, 939 N.W.2d 213, 225-26 (Mich. 2019).

²² While we focus this letter on acquitted conduct, the Commission should similarly eliminate the use of uncharged and dismissed conduct or significantly limit its ability to increase the guideline range.

²³ *Canania*, 532 F.3d at 776.

²⁴ *Bell*, 808 F.3d at 928.

Rules of Evidence and a lower standard of proof).²⁵ Overcharging, in turn, coerces pleas, while allowing the government to use the charges they dismiss or threaten to justify higher sentences.²⁶

Perhaps most salient here though, acquitted conduct sentencing is bad sentencing policy. A primary purpose of the Commission is to establish sentencing policies and practices that “provide certainty and fairness in meeting the purposes of sentencing” and “avoid[] unwarranted sentencing disparities.”²⁷ Acquitted conduct sentencing does neither.

Certainty and fairness. Described by courts as “Kafka-esque,”²⁸ “perverse,”²⁹ and “uniquely malevolent,”³⁰ acquitted conduct sentencing is neither certain, nor fair. “Most lawyers, as well as ordinary citizens unfamiliar with the daily procedures of criminal law administration, are astonished to learn that a person in this society

²⁵ See *Brown*, 892 F.3d at 408 (describing an indictment that included “a mélange of [] drug- and violence-related offenses” that “collapsed like a house of cards” when Mr. Brown decided to go to trial); see also *Canania*, 532 F.3d at 776; Barkow, *supra* note 20, at 1629.

²⁶ See generally *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (recognizing that overcharging “effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”); see also USSG §5K2.21 (allowing upward departures to reflect dismissed and uncharged conduct not already considered to determine the applicable guideline range). The Commission recently did an impact analysis on acquitted conduct sentencing, noting that the use of acquitted conduct at sentencing “did not occur often” last year. See USSC, Impact Analysis of S. 601, the Prohibiting Punishment of Acquitted Conduct Act of 2021 2 (2022), <https://bit.ly/3xh2KQd>. But because the *potential* use of acquitted conduct sentencing impacts all stages of a case from charging to plea negotiations to sentencing and because, as set forth, *infra*, the policy diminishes respect for the law, it impacts cases far beyond the few cases the Commission has identified.

²⁷ 28 U.S.C. § 991(b)(1)(B). The guidelines the Commission promulgates must similarly give “particular attention” to these two requirements. See 28 U.S.C. § 994(f).

²⁸ *Ibanga*, 454 F. Supp. 2d at 536.

²⁹ *Faust*, 456 F.3d at 1353.

³⁰ *Canania*, 532 F.3d at 777.

may be sentenced to prison on the basis of conduct of which a jury has acquitted him, or on the basis of charges that did not result in conviction.”³¹

Because society views acquitted conduct sentencing as irrational and “fundamentally unfair,”³² it frustrates the purposes of sentencing.³³ By “undermin[ing] the claim of the criminal justice system to be doing justice, and thus its broader legitimacy,” acquitted conduct sentencing promotes disrespect for the law.³⁴ And because most people could not reasonably anticipate that facts rejected by a jury could still be used to increase a sentence, this practice fails to promote general or specific deterrence.³⁵

Avoid unwarranted disparities. Acquitted conduct sentencing also conflicts with the Commission’s mission to establish policies that “avoid unwarranted sentencing disparities.”³⁶

Unwarranted disparities occur when people found guilty of similar conduct are treated differently and when people found guilty of dissimilar conduct are treated as the same.³⁷ Increasing sentences based on acquitted conduct creates disparities

³¹ Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers* 101 Yale L. J. 1681, 1714 (1992); see also Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing* 76 Tenn. L. Rev. 235, 296-300 (2009).

³² *Martinez*, 769 F. App’x at 17; see also *Canania*, 532 F.3d at 778, n.4 (quoting a juror’s letter to sentencing court); *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) (“To be sure, we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence. . . .”).

³³ See 28 U.S.C. § 991(b)(1)(B).

³⁴ Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John’s L. Rev. 1415, 1463 (2010); see also Ngov, *supra* note 31, at 296-300.

³⁵ See Murray, *supra* note 34, 1464-65 (recognizing that acquitted conduct sentencing “may actually be counter-productive” to general deterrence); Ngov, *supra* note 31, at 302-03 (noting that specific deterrence requires a person to make a rational association between conduct and an increased sentence, which is not likely to happen with acquitted conduct sentencing).

³⁶ 28 U.S.C. §§ 991(b)(1)(B), 994(f).

³⁷ See 18 U.S.C. § 3553(a)(6); *Gall v. United States*, 552 U.S. 38, 55 (2007) (recognizing that avoiding “unwarranted similarities among [individuals] not similarly situated” is relevant

of both types. By looking beyond the offense of conviction, the approach treats people “who have been found guilty of similar criminal conduct” differently.³⁸ And it treats people acquitted of criminal conduct the same as if they were convicted.³⁹

In addition to the disparities that manifest from courts who rely on acquitted conduct, disparities result from courts who reject it. The Commission has known for years that most district judges disagree with acquitted conduct sentencing,⁴⁰ and a growing number of judges are renouncing it on a case-by-case basis.⁴¹ This summer, a circuit judge confirmed that “district courts not only *can* vary downward to sidestep reliance on acquitted conduct, but. . . *should* based on bedrock legal principles.”⁴² So long as the Commission maintains this policy, disparities are an “inescapable consequence of. . . judges who reject acquitted conduct sentencing and those who embrace it in varying degrees.”⁴³

While the Supreme Court has yet to invalidate acquitted conduct sentencing, “[f]ew misconceptions about government are more mischievous than the idea that a policy

to the disparity analysis); USSC, *Fifteen Years of Guideline Sentencing* 113 (2004), <https://bit.ly/2BZj3XB> (“Fifteen Year Report”) (recognizing disparities occur from both unwarranted different and unwarranted similar treatment).

³⁸ 18 U.S.C. § 3553(a)(6).

³⁹ See, e.g., Ngov, *supra* note 31, at 243, 304-07.

⁴⁰ USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 5 (2010), <https://bit.ly/3w9T4WX> (reporting only 16 percent of district judges believe acquitted conduct should be considered “relevant conduct” at sentencing).

⁴¹ See *United States v. Medley*, 34 F. 4th 326, 336 & n.3 (4th Cir. 2022) (recognizing “a growing number of critics of this practice.”); see also *supra* note 21.

⁴² *United States v. Khatallah*, 41 F.4th 608, 652 (D.C. Cir. 2022) (Millet, J., concurring) (emphasis added). See also *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of r’hrng en banc) (“[F]ederal district judges have power in individual cases to disclaim reliance on acquitted or uncharged conduct.”); Murray, *supra* note 34, at 1459 (“[A]s a doctrinal matter, judges have the discretion to limit their use of prior acquitted conduct in sentencing. Further. . . to do so would be wise as a policy matter.”).

⁴³ Lucius T. Outlaw III, *Giving an Acquittal its Due: Why a Quartet of Sixth Amendment Cases Means the End of United States v. Watts and Acquitted Conduct Sentencing*, 5 U. Denv. Crim. L. Rev. 173, 180 (2015).

is sound simply because a court finds it permissible.”⁴⁴ The Sentencing Commission can, and should, amend the relevant conduct rules to prohibit the use of acquitted conduct.

III. Mens Rea Reform

Consistent with the Commission’s duty to establish policies that ensure fair and certain sentencing, we urge the Commission to reform the guidelines manual to specify that any provisions that recommend increased punishment require evidence of intent. To do this, it should remove strict liability or negligence enhancements and heighten the mental intent required under the relevant conduct provision for jointly undertaken criminal activity.

A. Ensure guideline increases require evidence of intent.

As the Supreme Court reiterated this year, as a general matter, “wrongdoing must be conscious to be criminal.”⁴⁵ It is “universal and persistent in mature systems of criminal law” that a person must possess a culpable mens rea, or “scienter,” to be held criminally responsible for her acts.⁴⁶ Mens rea requirements advance this principle by helping to “separate those who understand the wrongful nature of their act from those who do not.”⁴⁷

The Commission has confirmed the importance of mens rea in specific circumstances. For instance, in 2016, the Commission amended §§2G2.1, 2G2.2, and 2G3.1 to make clear that the two-level distribution enhancements apply only if a person “*knowingly* engaged in distribution.”⁴⁸ Prior to that change, several circuits

⁴⁴ Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, Address at the American Bar Association Annual Meeting 6 (rev. Aug. 14, 2003), <https://bit.ly/3bQMmHT> (discussing mandatory minimums).

⁴⁵ *Ruan v. United States*, --- U.S. ---, 142 S. Ct. 2370, 2376 (2022) (marks omitted) (quoting *Elonis v. United States*, 575 U.S. 723, 734 (2015)).

⁴⁶ *Id.* at 2376-77 (quoting *Rehaif v. United States*, --- U.S. ---, 139 S. Ct. 2191, 2196 (2019)) (citing *Morissette v. United States*, 342 U.S. 246, 250-52 (1952)).

⁴⁷ *Rehaif*, 139 S. Ct. at 2196 (marks omitted) (quoting *United States v. X-Citement Video*, 513 U.S. 64, 72-73, n.3 (1994)).

⁴⁸ USSC, App. C. Amend. 801, Reason for Amendment (Nov. 1, 2016) (emphasis added). This amendment made a similar change to the five-level distribution enhancement—amending the guidelines to require a person to have the “specific purpose of distributing child pornographic material to another person in exchange for any valuable consideration.”

applied the enhancement for distribution of child pornography simply because a person used a file-sharing program, and regardless of whether the person knew the program had distribution capabilities or intended to distribute files.⁴⁹ Other specific provisions similarly identify a required mens rea.⁵⁰

But the guidelines manual is still peppered with numerous provisions that are silent as to (or expressly do not require) intent. Take §2K2.1, the primary guideline for firearms offenses. If the firearm involved was one “described in 26 U.S.C. § 5845(a)” or “capable of accepting a large capacity magazine,” courts have applied a heightened base offense level—whether the person charged was aware of the firearm’s characteristics or capability or not.⁵¹ Section 2K2.1(b)(4) directs that if the firearm was stolen, a two-level increase is added. If the firearm had an altered or obliterated serial number, a four-level increase applies. According to the Commission, these enhancements “appl[y] regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.”⁵²

Provisions without scienter requirements are not just in §2K2.1. Section §2D1.1’s base offense level increases for drug quantity may apply regardless of whether the person knew the amount or type of drugs he had.⁵³ A person who involved a minor

⁴⁹ See *id.* (collecting cases).

⁵⁰ See, e.g., USSG §2B1.1(b)(10)(C) (requiring “intentional[]” engagement in sophisticated means); §2B1.1 cmt. n.3(A)(iii) (defining intended loss as “the pecuniary harm that the defendant purposefully sought to inflict”); §2D1.1(b)(13) (requiring “knowing[]” misrepresentation or marketing of a substance); §2D1.1 cmt. n.17 (requiring someone to “knowingly maintain” a premises for the purpose of distributing drugs); §2K1.3(a)(4) (requiring “knowing” distribution of to a prohibited person); see also §5K2.1 (departure provision for if death resulted instructs court to consider the person’s “state of mind” and whether death or serious injury was “intended or knowingly risked”); USSG §5K2.2 (departure provision for physical injury directs a “less substantial departure” if the person “(though criminally negligent) did not knowingly create the risk of harm”).

⁵¹ USSG §§2K2.1(a)(1); (a)(3); (a)(4)(B). See *United States v. Miller*, 11 F.4th 944, 956-57 (8th Cir. 2021); *United States v. Cherry*, 855 F.3d 813, 817 (7th Cir. 2017); *United States v. Fry*, 51 F.3d 543, 546 (5th Cir. 1995).

⁵² USSG §2K2.1 cmt. n.8(B). See also *United States v. Prien-Pinto*, 917 F.3d 1155, 1156, 1160-61 (9th Cir. 2019) (collecting cases).

⁵³ See, e.g., USSG §1B1.3 cmt. n.4(A)(i) (providing as an example of relevant conduct under §1B1.3(a)(1)(A) “the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the

in an offense is subject to a two-level upward adjustment under §3B1.4 even if he did not know the person was underage.⁵⁴ And, at least in the Fifth Circuit, a person is subject to a two-level enhancement under §2D1.1(b)(5) even if she didn't know the methamphetamine she bought had been unlawfully imported.⁵⁵

Strict liability punishment is “disfavored”⁵⁶ and these provisions stand “in serious tension with deeply rooted principles of justice and responsibility.”⁵⁷ We urge the Commission to amend the guidelines to specify that provisions which recommend increased punishment require evidence of intent.

B. Heighten the mental intent required for jointly undertaken criminal activity.

Sufficient mens rea is also critical when attributing the conduct of others to the person being sentenced. According to §1B1.3(a)(1)(B), the conduct of others can be used to enhance a person's sentence so long as that jointly undertaken conduct was “reasonably foreseeable.” Because reasonable foreseeability “effectively imposes a negligence standard for a co-conspirator's crime,”⁵⁸ we urge the Commission to revise this standard.

suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance”); *see also, e.g., United States v. Albarado-Tizoc*, 656 F.3d 740, 743 (7th Cir. 2011); *United States v. Alvarez-Coria*, 447 F.3d 1340, 1344 (11th Cir. 2006); *United States v. Salazar*, 5 F.3d 445, 446 (9th Cir. 1993); *United States v. Obi*, 947 F.2d 1031, 1032 (2d Cir. 1991). *Cf. Mcfadden v. United States*, 576 U.S. 186, 188 (2015).

⁵⁴ *See United States v. Voegtlin*, 437 F.3d 741, 748 (8th Cir. 2006) (collecting cases).

⁵⁵ *See United States v. Serfass*, 684 F.3d 548, 552 (5th Cir. 2012); *United States v. Jewell*, No. 20-10814, 2021 WL 3640491, at *3 (5th Cir. Aug. 17, 2021); *but see United States v. Job*, 871 F.3d 852, 871 (9th Cir. 2017) (rejecting *Serfass*' reading of §2D1.1(b)(5) where the government never advanced the argument in district court).

⁵⁶ *Staples v. United States*, 511 U.S. 600, 606 (1994).

⁵⁷ *United States v. Burwell*, 690 F.3d 500, 530 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

⁵⁸ Mark Noferi, *Towards Attention: A “New” Due Process Limit on Pinkerton Conspiracy Liability*, 33 Am. J. Crim. L. 91, 100, n.4 (citing Paul Robinson, *Imputed Criminal Liability*, 93 Yale L. J. 609, 638-39 (1984)); *see also Elonis*, 575 U.S. at 738 (recognizing that a reasonable person standard “reduces culpability” “to negligence” (internal citation omitted)).

In 2015, the Commission considered whether the intent standard for jointly undertaken criminal activity should be heightened.⁵⁹ As Defenders commented then, requiring a higher mental state would better serve the purposes of sentencing, including deterrence and just punishment.⁶⁰ Since that time, the Supreme Court has recognized that while a “reasonable person standard is a familiar feature of civil liability in tort law, [it] is inconsistent with ‘the conventional requirement for criminal conduct—*awareness* of some wrong doing.’”⁶¹

The purposes of sentencing are not furthered by holding a person responsible for the acts of another simply because he was negligent in not understanding what the other person might do and the consequences of the other person’s actions. A higher mental state should be required.

IV. Reform the Drug Trafficking Guidelines

One of the primary features of the First Step Act was its incremental reforms to the oppressive drug laws that fuel mass incarceration, have a disproportionate impact on communities of color, and keep people incarcerated for far longer than necessary.⁶² But more work needs to be done. Individuals sentenced for drug offenses still make up over 45 percent of BOP’s total population—more than any other offense type by far.⁶³ And sentences for those convicted of drug trafficking are long—averaging 74 months last year.⁶⁴

⁵⁹ See 80 Fed. Reg. 2570-01, 2579, 2015 WL 188325 (Jan. 16, 2015).

⁶⁰ See 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 2-5 (Mar. 18, 2015).

⁶¹ *Elonis*, 575 U.S. at 738 (quoting *Staples*, 511 U.S., at 606-07) (emphasis in *Elonis*).

⁶² See First Step Act, at tit. IV, §§ 401; see also Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentences in the Aftermath of the War on Drugs*, 58 Am. Crim. L. Rev. 1685, 1694-98, 1707-08 (2021) (recounting the casualties of the War on Drugs).

⁶³ See *BOP Statistics: Inmate Offenses*, Bureau of Prisons, <https://bit.ly/3B0qsks> (last visited Sept. 11, 2022) (reporting 45.2 percent of individuals in BOP serving sentences for drug offenses. The next largest offense type is weapons offenses at 21.4 percent).

⁶⁴ See USSC, *Fiscal Year 2021 Quick Facts on Drug Trafficking Offenses* 1 (2022), <https://bit.ly/3RRKp3Z>.

The Commission is uniquely poised to continue this work. By reforming the guidelines that govern drug offenses, the Commission can establish policies that increase “certainty and fairness in sentencing,” and account for “the nature and capacity” of the BOP.⁶⁵

A. Amend §2D1.1.

Section 2D1.1 “was *born* broken”⁶⁶ and fixing it should be a top priority for the Commission. Meaningful reform should include: (1) delinking the Drug Quantity Table from the statutory penalties; (2) revising the drug conversion table; and (3) rewriting the drug trafficking guidelines to better reflect actual culpability.

Delink the Drug Quantity Table. The base offense levels in the drug trafficking guidelines are not the product of expertise or empirical data.⁶⁷ Rather, when setting the base offense levels, the Commission “incorporat[ed] the statutory mandatory minimum sentences [set by Congress in the Anti-Drug Abuse Act of 1986] and extrapolate[ed] upward and downward to set guideline sentencing ranges for all drug quantities.”⁶⁸ While the Commission wisely lowered the corresponding guideline ranges that include the mandatory minimum penalties through two retroactive amendments,⁶⁹ the Drug Quantity Table is still linked to the quantity thresholds set by Congress. This should change.

Based on severely flawed assumptions—including that drug quantity is a meaningful proxy for culpability—Congress’ mandatory penalties were meant to distinguish descending roles in the drug distribution chain: from “kingpins” to “serious traffickers,” to lower-level actors.⁷⁰ But it is no secret that this scheme

⁶⁵ 28 U.S.C. §§ 994(f), (g).

⁶⁶ *United States v. Diaz*, No. 11-CR-00821-2(JG), 2013 WL 322243, at *9 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) (emphasis in original); *see also United States v. Johnson*, 379 F. Supp.3d 1213, 1220 (M.D. Ala. 2019) (collecting cases).

⁶⁷ *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.”).

⁶⁸ USSC, App. C. Amend. 782, Reason for Amendment (effective Nov. 1, 2014).

⁶⁹ *See id.*; USSC, App. C. Amend. 706 (effective Nov. 1, 2007).

⁷⁰ USSC, *2002 Report to the Congress: Federal Cocaine Sentencing Policy* 6-7 (2002), <https://bit.ly/2rlb3Iy>.

fails to operate as intended because “the quantity of drugs involved in an offense is not closely related to the [person’s] function in the offense.”⁷¹

By doubling-down on the law’s flawed penalty structure, the drug trafficking guidelines are similarly divorced from actual culpability and “produce[] ranges that are excessively severe across a broad range of cases.”⁷²

In addition to parroting the flawed quantity-based thresholds, §2D1.1 also mimics the drug statutes’ penalty distinctions based on purity. For instance, the guidelines punish methamphetamine (actual) ten times more severely than methamphetamine mixture.⁷³ Indeed, methamphetamine (actual) has replaced crack cocaine’s 100:1 ratio with powder cocaine, making it one of the most harshly punished drugs under the guidelines.⁷⁴ But again, research and data do not support this severe treatment. Purity of methamphetamine is not indicative of a person’s role or position in the chain of distribution because practically *all* methamphetamine in the United States today is close to 100 percent pure.⁷⁵ Because “the Commission’s assumption regarding the connection between methamphetamine purity and criminal role is

⁷¹ USSC, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 168 (2011), <https://bit.ly/3wKeGJJ>; *see also* Fifteen Year Report, at 50.

⁷² *Diaz*, 2013 WL 322243, at *1; *see also United States v. Cabrera*, 567 F. Supp. 2d 271, 277 (D. Mass. 2008); *see also* E. L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quantitative Criminology 155, 156 (2009) (decrying the “excessive uniformity” in the drug guidelines resulting in persons of “widely different culpability receiv[ing] unreasonably similar sentences”).

⁷³ *Compare* USSG §2D1.1(c) (setting a 10:1 quantity ratio between methamphetamine and “a mixture or substance containing a detectable amount of methamphetamine”), *with* 21 U.S.C. §§ 841(b)(1)(A)(viii) & (b)(1)(B)(viii). The guideline also mirrors § 841’s purity distinction for PCP. *Compare* §2D1.1(c), *with* 21 U.S.C. §§ 841(b)(1)(A)(iv) & (b)(1)(B)(iv). Section 2D1.1 similarly employs this purity scheme for amphetamine even though the drug statutes do not. *See* §2D1.1(c).

⁷⁴ Amphetamine (actual) and “Ice” (“a mixture or substance containing d-methamphetamine hydrochloride of at least 80 [percent] purity”) also have a 100:1 ratio to powder cocaine. *See* USSG §§2D1.1(c)(*)(C); *id.* at cmt. n.8(D). LSD has the highest ratio to powder cocaine at 500:1.

⁷⁵ *See* U.S. Dep’t of Justice Drug Enf’t Admin., *Drug Enforcement Administration 2020 National Drug Threat Assessment* 24 (Mar. 2021), <https://bit.ly/3CN1qrI> (reporting that methamphetamine purity averaged at 97.2 percent in the first half of 2019).

divorced from reality,”⁷⁶ courts around the country have rejected the methamphetamine guideline on policy grounds.⁷⁷

Defenders recognize that so long as Congress’ mandatory penalties are still on the books, the Commission must account for them within the guidelines structure.⁷⁸ But this can be done without further compounding a sentencing policy that is “deeply and structurally flawed.”⁷⁹ For instance, the Commission could set the base offense level below the mandatory minimums and rely on specific offense characteristics and adjustments more tailored to the role in the offense to reach the mandatory minimum in appropriate cases. Or the Commission could set base offense levels without regard to the mandatory minimums and, in cases where the guideline calculation does not reach the mandatory minimum, §5G1.1(b) would set the mandatory minimum term as the guideline sentence.

Revise the drug conversion tables. The flaws of §2D1.1’s quantity-based penalty structure are compounded by the guideline’s drug conversion tables. While the Commission “used the sentences provided in, and equivalencies derived from [21 U.S.C. § 841(b)(1)], as the primary basis for the guideline sentences,” the statute

⁷⁶ *Johnson*, 379 F. Supp. 3d at 1225 (quoting *United States v. Ibarra-Sandoval*, 265 F. Supp. 3d 1249, 1255 (D.N.M. 2017)).

⁷⁷ See, e.g., *United States v. Carillo*, 440 F. Supp.3d 1149, 1155 (E.D. Ca. 2020); *United States v. Moreno*, 583 F. Supp. 3d ---, 2019 WL 3557889, at *2-4 (W.D. Va., Aug. 5, 2019); *Johnson*, 379 F. Supp. 3d at 1226; *United States v. Pereda*, No. 18-cr-00228-CMA, 2019 WL 463027, at *4 (D. Colo., Feb. 6, 2019); *United States v. Bean*, 371 F. Supp. 3d 46, 54 (D.N.H. 2019); *United States v. Requena*, No.4:18-cr-175-BLW, 2019 WL 177932, at *1 (D. Idaho Jan. 11, 2019); *United States v. Hoover*, No. 4:17-cr-327-BLW, 2018 WL 5924500, at *1 (D. Idaho Nov. 13, 2018); *United States v. Ferguson*, No. Cr 17-204 (JRT/BRT), 2018 WL 3682509, at *3 (D. Minn. Aug. 2, 2018); *United States v. Nawanna*, 321 F. Supp. 3d 943, 951-955 (N.D. Iowa 2018); *United States v. Harry*, 313 F. Supp. 3d 969, 974 (N.D. Iowa 2018); *Ibarra-Sandoval*, 265 F. Supp. 3d at 1257; *United States v. Hartle*, No. 4:16-cr-00233-BLW, 2017 WL 2608221, at *1 (D. Idaho, June 15, 2017); *United States v. Jennings*, No. 4:16-cr-00048-BLW, 2017 WL 2609038, at *1 (D. Idaho, June 15, 2017); *United States v. Hayes*, 948 F. Supp. 2d 1009, 1015 (N.D. Iowa 2013).

⁷⁸ See 28 U.S.C. § 994(a).

⁷⁹ *Diaz*, 2013 WL 322243, at *1. Indeed, the Commission did not incorporate the statutory minimum penalty triggers into the base offense levels for LSD or for marijuana plants. See *Kimbrough*, 552 U.S. at 102-05 (citing *Neal v. United States*, 516 U.S. 284, 295 (1996)); USSG §2D1.1 cmt., backg’d.

references only the most common controlled substances.⁸⁰ For all other substances, judges are directed to consult §2D1.1's drug conversion tables, which set forth a converted drug weight (previously called "marijuana-equivalency") for less common drugs.⁸¹

Unfortunately, many of the conversion rates set by the Commission lack sufficient empirical support.⁸² For example, in response to a 2000 congressional directive to increase the sentences for MDMA, the Commission changed the then-marijuana equivalency ratio from 35:1 grams to 500:1 grams—2.5 times higher than the ratio for cocaine to marijuana.⁸³ But the reasons for such a dramatic increase in the MDMA ratio are unsupported by empirical evidence. At the time the increased ratio was implemented, the Federation of American Scientists stated there was "no justification, either pharmacologically or in policy terms" for the increase.⁸⁴ Since that time, much of the research relied on by the Commission to support the increased ratio has been widely criticized, discredited, or retracted.⁸⁵

Courts have rejected the 500:1 ratio, recognizing that this guideline fails to reflect current scientific knowledge, is the product of a "selective and incomplete" analysis,

⁸⁰ USSG §2D1.1 cmt. n.8(A).

⁸¹ *Id.* See USSG App. C, Amend. 808 (effective Nov. 1, 2018) (replacing "marijuana equivalency" with "converted drug weight").

⁸² See, e.g., 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 12-15 (Mar. 10, 2017) ("Defender Mar. 10, 2017 Letter"); 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 7-13 (July 15, 2013) ("Defender July 25, 2013 Letter"); 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 7-15 (May 17, 2013).

⁸³ See USSG App. C, Amend. 609 (effective May 1, 2001); USSG App. C, Amend. 621 (effective Nov. 1, 2001).

⁸⁴ Amanda Kay, *Comment, The Agony of Ecstasy: Reconsidering the Punitive Approach to United States Drug Policy*, 29 Fordham Urb. L.J. 2133, 2172 (2002).

⁸⁵ See, e.g., Defender July 15, 2013 Letter, at 9-11 & n.51 (citing Donald G. McNeil, Jr., Research on Ecstasy Is Clouded By Errors, N.Y. Times, Dec. 2, 2003, at F1-F2, <https://nyti.ms/3TZHdoF>); see also *United States v. Sepling*, 944 F.3d 138, 147 (3d. Cir. 2019); *United States v. McCarthy*, No. 09 Cr. 1336(WHP), 2011 WL 1991146, *3-4 (S.D.N.Y. May 19, 2011).

and perpetuates unwarranted disparities.⁸⁶ Because the flaws to the MDMA ratio are so apparent, one circuit found that failing to challenge it contributed to ineffective assistance of counsel.⁸⁷

Reflect actual culpability. So long as §2D1.1 elevates drug quantity above all else, it will fail to meaningfully identify sentences sufficient, but not greater than necessary. While quantity is not immaterial to culpability, the drug trafficking guideline’s excessive emphasis on this factor is misplaced.⁸⁸

Defenders have offered numerous suggestions over the years on how to revise §2D1.1 to better reflect actual culpability.⁸⁹ These suggestions include to focus more on a person’s role in the offense, and the direct and intended harms caused by the offense. Defenders recognize that society’s understanding on how to best address drug misuse continues to evolve. We are eager to work with the Commission to deemphasize the type and quantity-based scheme and revise the guideline to better

⁸⁶ *McCarthy*, at 2011 WL 1991146, at *3-4; *see also United States v. Qayyem*, No. 10 Cr. 19 (KMW), 2012 WL 92287, at *5 (S.D.N.Y. Jan. 11, 2011). Other courts have followed the guideline ratio but acknowledged its uncertain foundation. *See, e.g., United States v. Thompson*, No. 10-CR-30168-01-MJR, 2012 WL 1884661, at *5 (S.D. Ill. May 23, 2012); *United States v. Kamper*, 860 F. Supp. 2d. 596, 609 (E.D. Tenn. 2012) (recognizing the “considerable uncertainty about both the science and policies underlying the MDMA-to-marijuana ratio” but declining to reject it), *disapproved on appeal by United States v. Kamper*, 748 F.3d 728, 742 (6th Cir. 2014) (“The district court in the instant case misunderstood its authority to reject the Guidelines’ MDMA-to-marijuana equivalency ratio and replace it with a more appropriate ratio.”).

⁸⁷ *See Sepling*, 944 F.3d at 145.

⁸⁸ The fraud guideline—§2B1.1—suffers from much of the same problems as §2D1.1. By elevating loss amount above all else and using it as a proxy for offense seriousness and individual culpability, the guideline fails to identify meaningful differences among cases and is unable to guide courts towards sentences sufficient, but not greater than necessary. *See, e.g., Barry Boss and Kara Kapp, How the Economic Guideline Lost its Way, and How to Save It*, 18 Ohio St. J. Crim. L. 605, 614-19 (2021).

⁸⁹ *See, e.g.,* Defender Mar. 10, 2017 Letter, at 1-15; 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 2-5 (May 12, 2014); *see also* 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) (“Defender June 14, 2018 Letter”).

reflect the “advancement in knowledge of human behavior” as it relates to drug trafficking offenses.⁹⁰

B. Revise §4B1.2’s definition of “controlled substance offense.”

We urge the Commission to narrow the career offender guideline’s definition of “controlled substance offense” to only the federal drug felonies enumerated in the directive.

In 28 U.S.C. § 994(h), Congress directed that the guidelines specify a sentence “at or near” the statutory maximum for persons convicted of certain felony federal drug offenses who have previously sustained two or more prior convictions for an enumerated federal drug offenses or a “crime of violence.” The Commission responded to this directive by creating the career offender guideline.⁹¹

Like §2D1.1, the career offender guideline is broken. Last year, as similar to years prior, courts rejected the guideline as too high in almost 80 percent of cases where it applied.⁹² Despite this high below-guidelines rate, sentences for those designated as career offenders are still long, averaging almost 12 years.⁹³ Commission data show that the career offender guideline does a poor job of identifying persons at the greatest risk of recidivism and makes the Criminal History Category (CHC) a worse predictor of recidivism.⁹⁴ And most disturbingly, the guideline has a significant

⁹⁰ 28 U.S.C. § 991(b)(1)(C).

⁹¹ See USSG §4B1.1 cmt., backg’d.

⁹² USSC, *FY2021 Individual Datafiles* (79.7 percent of cases were sentenced below the guidelines range).

⁹³ USSC, *Fiscal Year 2021 Quick Facts on Career Offenders* 1 (2022), <https://bit.ly/3AKpBnY> (“CO Quick Facts”).

⁹⁴ See, e.g., Fifteen Year Report, at 133-34; USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004), <https://bit.ly/2rWyjNy> (“Measuring Recidivism”); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19, figs. 7A & 7B (2016), <https://bit.ly/2tcqmUP>; USSC, *Recidivism of Federal Offenders Released in 2010* 28-29, fig. 16 (2021), <https://bit.ly/3RV3TVs>; USSC, *Recidivism of Federal Drug Trafficking Offenders Released in 2010* 31 & fig. 14 (2022), <https://bit.ly/3dbcsNa> (“Recidivism of Federal Drug Trafficking”).

adverse impact on Black individuals, without clearly promoting an important purpose of sentencing.⁹⁵

The career offender guideline is particularly problematic as applied to persons with drug convictions. Indeed, in 2016, the Commission recognized that the guideline fails to meaningfully identify the most severe cases that warrant enhanced sentences and requested that Congress revise § 994(h) to exclude persons convicted of only drug-trafficking offenses.⁹⁶

The Commission can narrow the “controlled substance offense” definition without action by Congress. The definition is broader than Congress requires and includes federal and state drug offenses not enumerated in the directive.⁹⁷ By revising the guideline to encompass solely the federal drug offenses required by Congress, the Commission can “take a more targeted approach” and “better tailor the significantly enhanced penalties required for career offenders.”⁹⁸

V. Deemphasize Criminal History

Aside from a person’s offense level, his criminal history score is the single most powerful factor driving the guideline range. It does not need to be. To be sure, Congress directed that the Commission take criminal history into account in several

⁹⁵ Fifteen Year Report, at 134; *compare* USSC, *2021 Sourcebook of Federal Sentencing Statistics* tbl. 5 (2022), <https://bit.ly/3TL44UL> (FY 2021 Sourcebook) (reporting 23.1 percent of all federally sentenced individuals last year were Black), *with* CO Quick Facts, at 1 (reporting 58.2 percent of all individuals designated as career offenders were Black).

⁹⁶ USSC, *Report to Congress: Career Offender Sentencing Enhancements 7-8* (2016), <https://bit.ly/3AGjS2A> (“CO Report”).

⁹⁷ *Compare* 28 U.S.C. § 994(h) (listing offenses “described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46”), *with* USSG §4B1.2(b) (defining “controlled substance offense” as any “offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense”); *see also id.* at cmt. n.1 (including inchoate offenses and other federal offenses as “controlled substance offenses”).

⁹⁸ CO Report, at 6.

discrete ways.⁹⁹ But the Commission is not required to elevate criminal history to the extent it does. There are strong reasons not to. The criminal history rules are numerous, complex, and often lead to unjust, and unnecessarily long sentences that perpetuate racial disparities. And research confirms that increasing sentences based on prior criminal convictions is often not justified by the purposes of sentencing.¹⁰⁰

This year the Commission should commit to examining Chapter 4 with an eye towards deemphasizing criminal history. Defenders have offered numerous suggestions over the years as to how criminal history could be afforded less weight.¹⁰¹ We elaborate on several below.

Exclude prior offenses committed before age 18. Since 1987, §4A1.2(d) has directed that both adult and juvenile convictions for offenses committed before age

⁹⁹ See 28 U.S.C. § 994(d)(10) (directing the Commission to consider, to the extent relevant, criminal history when establishing the guidelines and policy statements); *id.* § 994(h) (directing the Commission to assure the guidelines recommend a sentence “at or near” the statutory maximum for individuals convicted of certain felonies who sustained at least two prior convictions for certain felonies); *id.* § 994(j) (directing the Commission to assure the guidelines “reflect the general appropriateness” of a sentence other than imprisonment for a “first offender” who has not been convicted of a “crime of violence or otherwise serious offense”).

¹⁰⁰ See Rhys Hester et al., *Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences* 47 Crime & Just. 209, 242 (2018) (“The high cost and adverse effects of prior record sentencing enhancements might be tolerable if they served important punishment purposes, but all of the potential justifications for these enhancements are weak.”); see also Christopher Lewis, *The Paradox of Recidivism*, 70 Emory L.J. 1209, 1270 (2021).

¹⁰¹ See, e.g., Amy Baron-Evans & David Patton, *A Response to Judge Pryor’s Proposal to “Fix” the Guidelines: A Cure Worse than the Disease*, 29 Fed. Sent’g Rep. 104, 117 (Dec. 2016-Feb. 2017) (collecting suggestions to deemphasize criminal history, including eliminating misdemeanor and petty offenses, eliminating double counting of criminal history points in Chapter 2, and providing a downward departure for age at time of release to reflect “aging out of risky occupations”); see also 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 2-3, 14-19 (July 31, 2017) (“Defender July 31, 2017 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 2-3, 20-44 (Feb. 20, 2017) (“Defender Feb. 20, 2017 Letter”).

eighteen can qualify for criminal history points.¹⁰² It is time for the Commission to revise this rule. The reasons to exclude offenses committed prior to eighteen from Chapter 4 are legion.

The Supreme Court has repeatedly said juveniles are less culpable than adults.¹⁰³ Research continuously supports this. Juveniles are less able to restrain their impulses, more vulnerable to peer pressure and “adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.”¹⁰⁴ Juvenile adjudication practices vary widely among jurisdictions resulting in unwarranted disparity.¹⁰⁵ And, it is well-recognized that young persons of color are overrepresented at every stage of the juvenile justice system.¹⁰⁶

¹⁰² USSG §4A1.2(d) (effective Nov. 1, 1987).

¹⁰³ See *Montgomery v. Louisiana*, 577 U.S. 190, 207 (2016) (recognizing that, in announcing a new substantive rule of constitutional law, *Miller v. Alabama*, 567 U.S. 460, 472 (2012) established that “the penological justifications for life without parole collapse in light of the distinctive attributes of youth.”); *Miller*, 567 U.S. at 472 (recognizing blameworthiness is “not as strong with a minor as with an adult.” (internal cites ad marks omitted)); *Graham v. Florida*, 560 U.S. 48, 75 (2010) (acknowledging the “limited culpability of juvenile nonhomicide offenders”); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the Constitution “forbid[s] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed,” “resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime”).

¹⁰⁴ See, e.g., *Miller*, 567 U.S. at 2464 n.5 (quoting Brief for American Psychological Association et al. as *Amici Curiae*); Amber Venturelli, *Young Adults and Criminal Culpability* 23 U. Pa. J. of Const. L. 1161-69 (2021) (collecting research).

¹⁰⁵ See, e.g., Juvenile Justice: Geography, Policy, Practice & Statistics (JJGPS), <http://www.jjgps.org/> (last visited Sept. 12, 2022) (identifying various standards for age boundaries, waivers to adult court, competency, waiver and timing of counsel, diversion, and release decisions).

¹⁰⁶ 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), <https://bit.ly/3ew5Rx4> (reporting that youths of color are more likely to be arrested and less likely to be diverted than white peers); U.S. Dep’t of Justice, *OJJDP Statistical Briefing Book* (revised June 2022), <https://bit.ly/3cYqO35> (reporting Black juveniles were arrested more than twice as often as white peers in 2020); Lindsey E. Smith et al., *Reimagining Restitution: New Approaches to Support Youth and Communities* 16-17, Juvenile Law Center (2022), <https://bit.ly/3x3t0gC> (discussing racial disparities at various stages in juvenile justice

If the Commission is not inclined to exclude all prior offenses committed before the age of eighteen from the criminal history calculations, it should at least exclude juvenile adjudications. In addition to the reasons above, juvenile adjudications are less reliable than adult convictions and carry fewer procedural safeguards than are provided in adult courts.¹⁰⁷ Further, §4A1.2(d)(2)(A)’s measurement of the length of “confinement” for juvenile adjudications is a poor proxy for the seriousness of the offense because the juvenile justice system’s primary goal is rehabilitation and the period of confinement imposed does not necessarily relate to offense severity.¹⁰⁸

Defenders supported the Commission’s 2016 proposal to exclude prior juvenile adjudications from the criminal history calculations and hope the Commission will revisit it this year.¹⁰⁹ At a bare minimum, the Commission should encourage a downward departure to account for prior offenses committed before age eighteen.

Exclude revocations from criminal history calculations. According to §4A1.2(k), the term of imprisonment for a revocation of probation, parole, or supervised release is added to the original term of imprisonment when computing criminal history points for a prior offense. This means revocations can both increase the number of points a prior conviction is assessed and can “revive otherwise stale convictions”—even if the revocation was based on a technical, or non-criminal violation, like failing to observe a curfew, missing a meeting with a probation officer, or drinking alcohol.¹¹⁰ A 2019 Commission report indicated that in a study group composed of a sample of persons sentenced in 2016 who had at least one criminal history point, over a third had at least one scored conviction with a

system); Eli Hager, *Racial Inequality in US Youth Detention Wider Than Ever, Experts Say*, The Guardian (Mar. 8, 2021), <https://bit.ly/3Rpak39> (discussing racial gap in detention in and release rates from juvenile detention facilities).

¹⁰⁷ See Defender Feb. 20, 2017 Letter, at 22-27 & accompanying notes.

¹⁰⁸ See *id.* at 27 & accompanying notes.

¹⁰⁹ See 81 Fed. Reg. 92003, 92011, 2016 WL 7326419 (Dec. 19, 2016); Defender Feb. 20, 2017 Letter, at 20-37.

¹¹⁰ USSC, *Revocations Among Federal Offenders* 5-6 & 11 (2019), <https://bit.ly/3x1fYjG> (citing USSG §4A1.2(k)) (“Revocations Report”); see also Kendra Bradner & Vincent Schiraldi, *Racial Inequities in New York Parole Supervision* 3, Columbia University Justice Lab (2020), <https://bit.ly/3Dkiyp1>; Alex Roth et al., *The Perils of Probation: How Supervision Contributes to Jail Populations* 6-7, Vera Institute of Justice (2021), <https://bit.ly/3QxNrZX>.

revocation. Of that third, over 60 percent were assessed additional criminal history points due to the revocation(s).¹¹¹ And while the Commission “cannot state with certainty how often revocations are based on . . . technical violations,” available data indicate that between 22.5 percent and 61.1 percent of revocations counted were for technical violations.¹¹²

The current rule does not further important purposes of sentencing. Revocations do not reflect the seriousness of a prior offense—indeed, they don’t need to be based on criminal activity at all. And if a revocation is based on new criminal offense, any new conviction would be assessed its own criminal history points, if warranted.¹¹³ Relying on revocations exacerbate unwarranted disparities because revocation practices and rates vary widely between jurisdictions and supervision officers.¹¹⁴ And, because research shows that Blacks and Latinx individuals are more likely than whites to be on supervision, be subject to longer terms of supervision than similarly situated whites, and are more likely to be revoked at higher rates, the current rule may have a disproportionate impact on racial and ethnic minorities.¹¹⁵ We urge the Commission to explore its previous 2016 proposal to amend §4A1.2(k) to provide that revocations “are not to be counted for purposes of calculating criminal history points.”¹¹⁶

Eliminate or restrict the use of status points. This year, the Commission should eliminate or restrict §4A1.1(d)’s rule which assigns two additional criminal history

¹¹¹ See Revocations Report, at 2, 9-10. And over one half had an increased CHC. See *id.* at 10.

¹¹² *Id.* at 30.

¹¹³ See USSG §4A1.2 cmt. n.11.

¹¹⁴ See, e.g., Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. Crim. L. & Criminology 1015, 1038-39 (2013).

¹¹⁵ See, e.g., Bradner & Schiraldi, *supra* note 110, at 3 (collecting research on national racial inequities in parole and reporting that “Black people are 4.15 times more likely to be under parole supervision than white people, and Latinx people are 15 [percent] more likely than white people to be under parole,” that “Black and Latinx people remain on probation and parole longer than similarly situated white people,” and that research suggests that disparities exist in parole violation charges and outcomes); see also Roth, *supra* note 110, at 8; Defender Feb. 20, 2017 Letter, at 41, n.201 (collecting studies).

¹¹⁶ 81 Fed. Reg. 92003, at 92012.

points if a person commits the instant offense “while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release or escape status.” In the last five years, these “status points” increased a person’s criminal history category in 61.5 percent of cases in which they were applied.¹¹⁷ But while these status points regularly increase guideline ranges (and are connected with higher sentences),¹¹⁸ a recent Commission report confirms that the rule lacks an empirical basis. “Status points only minimally improve” the criminal history score’s prediction of rearrest—by only 0.2 percent.¹¹⁹ Data from this report also show that Black individuals are disproportionately more likely to get status points than other groups.¹²⁰

We have commented in the past that §4A1.1(d) sweeps too broadly and “unjustly increas[es] the criminal history score in a variety of scenarios.”¹²¹ Now that the Commission admits that status points cannot be justified on recidivism prediction grounds,¹²² we urge it to eliminate or restrict the use of status points—and consider making any ameliorative amendment to §4A1.1(d) retroactive.

Modify §4B1.1(b)’s CHC VI requirement. According to §4B1.1(b) “A career offender’s criminal history category in every case. . . shall be Category VI.” However, most persons designated as career offenders have a recidivism risk more akin to persons in lower CHCs, making this automatic assignment of CHC VI unduly severe.¹²³ Last year 56 percent of persons designated as career offenders

¹¹⁷ USSC, *Revisiting Status Points* 2 (2022), <https://bit.ly/3RXl3lf> (“Revisiting Status Points”).

¹¹⁸ *See id.* at 12, fig. 5 (“The average prison sentence imposed for status offenders was 66 months, which is 21 months longer than the average for non-status offenders (45 months).”).

¹¹⁹ *Id.* at 3.

¹²⁰ *See id.* at 6-7 (comparing 47.5 percent of Blacks given status points with the 37.5 percent given status points across all individuals. The 47.5 percent is calculated from Table 1 where 32.7 percent of the 76,337 individuals with status points were Black and 21.7 percent of the 127,162 individuals without status points were Black).

¹²¹ Defender July 31, 2017 Letter, at 19.

¹²² *See Revisiting Status Points*, at 18.

¹²³ *Measuring Recidivism*, at 9 (“In sum, it appears that assigning offenders to criminal history category VI, under the career criminal or armed career criminal guidelines, is for

were assigned a higher CHC than would have applied under the normal operation of the guidelines.¹²⁴ Since we know the career offender guideline has a severe adverse impact on Black individuals and is regularly rejected by courts as too severe,¹²⁵ the Commission should eliminate the CHC VI requirement to help ameliorate some of the guideline's harm.

VI. Alternatives to Incarceration and “First Offenders”

The Commission should also prioritize increasing the availability of alternatives to incarceration.

When Congress passed the SRA, it recognized that there had been “too much reliance on terms of imprisonment when other types of sentences would serve the purpose of sentencing equally well.” And so, they sought to increase the “range of [sentencing] options from which to fashion an appropriate sentence.”¹²⁶ Congress instructed judges to consider “the kinds of sentences available” prior to determining a sentence sufficient, but not greater than necessary.¹²⁷ It also directed the Commission to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”¹²⁸

Unfortunately, the use of probation dramatically *decreased* after the SRA. “Before the guidelines, almost 50 [percent] of federal sentences were to straight probation.

reasons other than their recidivism risk.”); *Recidivism of Federal Violent Offenders Released in 2010* 29 & fig. 14 (2022), <https://bit.ly/3RWmvnR> (reporting that those designated as “violent” career offenders and armed career criminals are rearrested at rates similar to similarly situated people between CHC II and III and that those designated as “non-violent” career offenders and armed career criminals are rearrested at rates similar to similarly situated people between CHC III and IV); *Recidivism of Federal Drug Trafficking*, at 31 & fig. 14 (reporting that persons designated as career offenders and armed career criminals are rearrested at rates similar to similarly situated people between CHC III and IV).

¹²⁴ CO Quick Facts, at 1.

¹²⁵ See *supra* notes 92, 94, & 95.

¹²⁶ S. Rep. No. 98-225, at 50, 59.

¹²⁷ 18 U.S.C. § 3553(a)(3).

¹²⁸ 28 U.S.C. §994(j).

Under the initial guidelines, that figure dropped to around 15 [percent].”¹²⁹ Last year, straight probation was imposed in only 6.2 percent of cases.¹³⁰ And while the Commission has set alternatives to incarceration as a priority issue several times in the past, it has made only modest changes to the manual.¹³¹ More must be done.

Defenders have offered extensive feedback as to ways the Commission can better encourage alternatives to incarceration.¹³² For instance, we have proposed that the Commission eliminate the zones on the Sentencing Table. If the zones are maintained, the Commission could expand Zones B and C so that more people might benefit from enhanced sentencing options and revise §5C1.1 to permit non-prison sentences for all zones.¹³³ We have also suggested that the Commission delete §5C1.1 Comment 8, which discourages alternatives to imprisonment for persons in CHC III and higher, and that it expand Comment 7’s invited departure for those who suffer from a substance abuse disorder or mental illness to persons in Zone D.

At a minimum, we encourage the Commission to revisit some of the reforms it proposed—but did not adopt—during the 2017-18 Amendment Cycle. In 2018, the

¹²⁹ Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers* 56 Stan. L. Rev. 1211, 1222 (2004).

¹³⁰ FY 2021 Sourcebook, at fig. 6 & tbl. 14 (excluding non-U.S. Citizens, probation only sentences were imposed 8.1 percent of the time); *see also* Cecelia Klingele, *What’s Missing? The Absence of Probation in Federal Sentencing Reform* 34 Fed. Sent’g Rep. 322, 324 (2022) (recognizing that while for some offenses, probation is prohibited by statute, judges are still imposing imprisonment in many cases where probation is available).

¹³¹ *See, e.g.*, USSG App. C, Amend. 811 (effective Nov. 1, 2018) (adding cmt. n.4 to §5C1.1 defining “first offender” and recommending “the court consider a sentence other than a sentence of imprisonment”); USSG App. C, Amend. 738 (effective Nov. 1, 2010) (expanding Zone B and Zone C of the Sentencing Table by one level each); *id.*, Amend. 462 (effective Nov. 1, 1992) (expanding the number of cells of the Sentencing Table in which straight probation is permissible).

¹³² *See, e.g.*, 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 6-21 (Oct. 10, 2017); Defender Feb. 20, 2017 Letter, at 2-19; Letter from Marjorie Meyers, Chair, Fed. Def. Sent’g Guidelines Comm., to the Hon. Patti B. Saris, Chair, U.S. Sent’g Comm’n 12-13 (June 15, 2015); *see also* Klingele, *supra* note 130, at 324-25.

¹³³ *Id.*; *See also* USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5 (2015), <https://bit.ly/2TpD9xN> (recognizing that the low rate of alternative sentences “primarily is due to the predominance of offenders whose sentencing ranges were in Zone D of the Sentencing Table, in which the guidelines provide for a term of imprisonment”).

Commission finally implemented a provision in response to § 994(j).¹³⁴ But it construed the directive narrowly and failed to promulgate proposed alternatives that would have more meaningfully captured the spirit of the directive. For example, the Commission did not establish a presumption of probation for “first offenders,” as originally proposed, opting instead to ask district courts only to “consider imposing a sentence other than imprisonment” for persons who qualify as “first offenders.”¹³⁵ It defined “first offenders” narrowly, excluding not only persons with prior convictions, but also persons with “other comparable judicial dispositions”—including juvenile adjudications, diversions, and deferred dispositions.¹³⁶ The Commission declined to adopt §4B1.2’s definition of “crime of violence,” opting instead to exclude anyone who “use[d] violence or credible threats of violence or possess[ed] a firearm or other dangerous weapon in connection with the offense of conviction.”¹³⁷ It also failed to promulgate its proposed amendments to provide offense level decreases for “first offenders” and to consolidate Zones B and C in the Sentencing Table.¹³⁸

Defenders are eager to work with the Commission to better “reflect the general appropriateness of non-prison sentences” for “first offenders” and to expand opportunities for other individuals to receive alternative sentences.

VII. Support a Federal Defender Ex Officio

Finally, we request that the Commission support the current legislation proposing to add a Federal Defender ex officio member to the Sentencing Commission.¹³⁹ The statutory addition of a defender voice would put the Commission on par with almost all other sentencing commissions nationwide and would bring an increased balance of viewpoint to the Commission’s work.

¹³⁴ See USSG App. C, Amend. 811 (effective Nov. 1, 2018).

¹³⁵ Compare 82 Fed. Reg. 40651-01 at 40657, 2017 WL 3635792 (Aug. 25, 2017) (proposing that “the court ordinarily should impose a sentence other than a sentence of imprisonment” for a “first offender”), with USSG §5C1.1 cmt. n.4.

¹³⁶ Compare 82 Fed. Reg. 40651-01, at 40657, with USSG §5C1.1 cmt. n.4.

¹³⁷ Compare 82 Fed. Reg. 40651-01, at 40657, with USSG §5C1.1 cmt. n.4.

¹³⁸ See 82 Fed. Reg. 40651-01, at 40657-58.

¹³⁹ See Sentencing Commission Improvements Act, S. 3286, 117th Cong. (2021), <https://bit.ly/3TW9HQi>.

Federal Defenders bring a “distinct and essential perspective”¹⁴⁰ to sentencing policy. Along with CJA counsel, Defenders represent the vast majority of persons charged with federal crimes. Among our ranks 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, prosecutors, law enforcement officials, correctional administrators, community treatment providers, and other stakeholders.

The lack of a Defender ex officio deprives the Commission of this valuable insight at crucial stages in the amendment process. While Defenders may offer comment and participate in hearings, we do not have a voice during the Commission’s internal discussions and debates. Unlike the Department of Justice, Defenders are not privy to staff briefings, nor do we see staff reports, memos, results of special coding projects, or the myriad amendment-related data analyses. We do not see drafts of Commission reports and are unable offer comments and encourage revisions. We do not see proposed amendments before they are published. And we do not see proposed final amendments before the Commission reads them aloud in public during its vote, all of which clearly follows deliberations closed to the public.

Numerous scholars and judges have recognized that the lack of a Defender ex officio deprives the Commission of an essential balance.¹⁴¹ Defenders and the Department of Justice should have an equal voice in setting sentencing policy and should be equal partners in improving the guideline system. We urge the Commission to support this important change.

¹⁴⁰ Press Release, Sen. Cory Booker, Booker and Durbin Introduce Legislation Aimed at Increasing Membership within the U.S. Sentencing Commission (Nov. 30, 2021), <https://bit.ly/3QwMMbe>.

¹⁴¹ See, e.g., Rachel E. Barkow, *Evolving Role of the United States Sentencing Commission*, 33 Fed. Sent’g Rep. 3, 4, 9 (2020); Mark Osler & Hon. Mark W. Bennett, *A “Holocaust in Slow Motion?” America’s Mass Incarceration* 7 DePaul J. for Soc. Just. 117, 165-66 (2014); Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol’y Rev. 93, 109 (1999); see also Hon. William K. Sessions III, *At the Crossroads of the Three Branches: the U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles* 26 J. L. & Pol. 305, 322 (2011); Hon. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Plea Sentence Bargains*, 36 Hofstra L. Rev. 639, 646 (2008).

VIII. Conclusion

This is an exciting time for the Commission and for those who are impacted by its work. The Federal Public and Community Defenders are eager to collaborate with the Commission this year on improving federal sentencing policy.

Very truly yours,
/s/ Michael Caruso
Michael Caruso
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

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