

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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October 17, 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: Defender Comment on the Commission's Proposed Policy Priorities

Dear Judge Reeves:

The Federal Public and Community Defenders appreciate the opportunity to comment on the Commission's proposed priorities for the amendment cycle ending May 1, 2023.¹ We recognize the Commission faces a challenging amendment cycle ahead and are eager to work together to improve sentencing policy. Defenders commented on several of the Commission's proposed priorities in our annual letter, dated September 14, which we incorporate by reference and attach for the Commission's convenience.² We offer additional comments below.

I. Proposed Priority No. 1: Compassionate Release

As its first proposed priority, the Commission intends to consider amendments to §1B1.13 that would implement the First Step Act's (FSA) changes to 18 U.S.C.

¹ See USSC Proposed Priorities for Amendment Cycle, 87 Fed. Reg. 60438-02, 2022 WL 4985100 (Oct. 5, 2022) ("USSC Proposed Priorities").

² See Letter from Michael Caruso, Chair, Fed. Def. Sent'g Guidelines Comm., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Sept. 14, 2022) ("*Defender Sept. 14, 2022 Letter*" or "September 14 Letter").

§ 3582(c)(1)(A).³ Defenders look forward to working with the Commission to effect Congress’ intent to “increase the use and transparency of compassionate release.”⁴

Implementation of the First Step Act. In the FSA, Congress broadened the availability of 18 U.S.C. § 3582(c)(1)(A) relief by “remov[ing]the Bureau of Prisons [BOP] from its former role as a gatekeeper over compassionate release petitions,”⁵ and allowing individuals to move the court directly for compassionate release.⁶ To implement the FSA, the Commission will need to: (1) amend §1B1.13 to comport with Congress’ direction that § 3582(c)(1)(A) motions may be filed by either an incarcerated individual or the BOP; and (2) make clear that an “extraordinary and compelling reason other than, or in combination with,” those specifically enumerated in §1B1.13 may be determined by either the BOP or the court.⁷

“Extraordinary and Compelling Reasons.” The Commission requested comment on “what should be considered extraordinary and compelling reasons for sentence reductions under 18 U.S.C. § 3582(c)(1)(A).”⁸ As we discussed in our last two annual letters to the Commission, “extraordinary and compelling” reasons are—by definition—extraordinary and cannot be reduced to an exhaustive list.⁹ Indeed, the last few years have taught us that it is impossible to anticipate today

³ See USSC Proposed Priorities at 60439 (citing First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 51945239 (2018) (“FSA”).

⁴ FSA, tit. VI § 603(b) (codified at 18 U.S.C. § 3582(c)(1)(A) (2018)).

⁵ *United States v. McCoy*, 981 F.3d 271, 276 (4th Cir. 2020) (internal citation omitted). See also *United States v. Jones*, 980 F.3d 1098, 1104–05 (6th Cir. 2020) (reviewing the legislative history of the FSA to conclude that congressional modifications to compassionate release were prompted by “frustra[tions] with the BOP’s conservative approach” to filing motions and a desire to “boost grants of compassionate release”).

⁶ See 18 U.S.C. § 3582(c)(1)(A).

⁷ USSG § 1B1.13 cmt. n.1(D). Cf. *United States v. Long*, 997 F.3d 342, 359 (D.C. Cir. 2021) (“At bottom, for a policy statement to be ‘applicable,’ it must, at a minimum, take account of the relevant legislation and the congressional policy that it embodies.”).

⁸ USSC Proposed Priorities, at 60439.

⁹ See *Defender Sept. 14, 2022 Letter*, at 2–4; Letter from Michael Caruso, Chair, Fed. Def. Sent’g Guidelines Comm., to Hon. Charles R. Breyer, Acting Chair, U.S. Sent’g Comm’n, at 2 (Oct. 7, 2021).

the entire universe of circumstances that might warrant compassionate release tomorrow.¹⁰

Whether it be individual circumstances of the incarcerated person or her family; a changing legal landscape; or a global or regional event, like a pandemic, war, or natural disaster, the Commission should make clear that extraordinary and compelling reasons exist whenever the sentencing court finds that factual or legal circumstances relevant to sentencing have so changed since the sentence was imposed that it would be inequitable to maintain the original sentence.¹¹ Because Congress created a rigorous, yet flexible standard, the Commission should continue to recognize that courts are in the best position to consider this standard, along with the policy statement and the § 3553(a) factors to determine whether relief is warranted.¹²

We look forward to working with the Commission as it seeks to provide courts guidance on how to apply the standard that Congress set.

II. Proposed Priority No. 2: Implementing the FSA in §5C1.2 and Related Provisions

In the FSA, Congress amended the existing safety valve provision in 18 U.S.C. § 3553(f) by expanding the possibility of safety valve relief to people with more than one criminal history point and by broadening the list of statutory offenses for which safety valve relief is available to include 46 U.S.C. §§ 70503 and 70506.¹³ Section 5C1.2 has historically matched the criteria set forth in § 3553(f), and §2D1.1(b)(18) and §2D1.11(b)(6) have provided for a two-level downward reduction for people convicted of certain drug offenses who meet the §5C1.2 (and statutory safety valve)

¹⁰ See generally USSC, *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic* 3 (2022), <https://bit.ly/3VkRGvt> (recognizing that over 70% of compassionate release grants during the study period cited COVID-19 as at least one reason for granting relief).

¹¹ See generally S. Rep. No. 98-225, at 121 (1983), as reprinted in, 1984 U.S.C.C.A.N. 3182, 3304.

¹² See USSG §1B1.13 cmt n.4 (“[T]he court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of the reduction) . . .”).

¹³ See FSA, at tit. IV, § 402 (codified at 18 U.S.C. § 3553(f) (2018)).

criteria. Defenders expect that the Commission will update §5C1.2 so that it matches 18 U.S.C. § 3553(f), as amended.¹⁴

The Commission also requested comment on possible amendments to §2D1.1 and §2D1.11 to implement the FSA.¹⁵ To the extent the Commission is considering amendments to §2D1.1(b)(18) and §2D1.11(b)(6), the eligibility for these reductions should be no more restrictive than the requirements set forth in § 3553(f). Indeed, the Commission should take this opportunity to increase the reduction provided by §2D1.1(b)(18) and §2D1.11(b)(6)—from two levels to four. This modification would support Congress’ intent to “more appropriately tailor sentences” for persons convicted of drug offenses¹⁶ and would offset, to some extent, the guidelines’ overemphasis on drug type and quantity to reflect actual culpability.

In our September 14 Letter, Defenders raised several other possible improvements to the drug-trafficking guidelines which would further reflect the spirit of the FSA. These include delinking the drug quantity table from the flawed mandatory minimum penalties, revising the drug conversion tables, and revising the guidelines to better reflect actual culpability.¹⁷ We encourage the Commission to pursue these revisions as well.

III. Proposed Priority No. 3: Firearms

This summer, in the wake of several tragic mass shootings, Congress passed the Bipartisan Safer Communities Act (BSCA).¹⁸ While news reports largely focused on reforms like enhanced background checks and increased funding for mental health

¹⁴ Section 3553(f) now requires the court to impose sentence without regard to any statutory mandatory minimum if the court finds that the individual does not have “more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense as determined under the sentencing guidelines; a prior 3-point offense. . . and a prior 2-point violent offense,” and meets the other requirements for safety valve relief.

¹⁵ See USSC Proposed Priorities, at 60439.

¹⁶ 164 Cong. Rec. H10361 (daily ed. Dec. 20, 2018) (Statement of Rep. Goodlatte).

¹⁷ See *Defender Sept. 14, 2022 Letter*, at 12–18.

¹⁸ See Pub. L. No. 117-159, 136 Stat. 1313 (2022) (“BSCA”). See also Kyana Givens et al., *Federal Time: Congress’ Rush to Respond to Recent Mass Shooting Repeats Historic Mistakes That Fueled Mass Incarceration*, INQUEST (Aug. 11, 2022), <https://bit.ly/3TnAfst> (recounting the rushed passage of the legislation “with virtually no debate or deliberation”).

and violence prevention programs in schools,¹⁹ the BSCA also included new and expanded criminal penalty provisions and a directive to the Commission.²⁰

The Commission has requested comment on possible amendments to §2K2.1 to implement the BSCA.²¹ As an independent expert body, the Commission is in a unique position to inform the question of federal sentencing for firearms offenses with data and information. This duty is no less acute when the Commission implements a directive from Congress. To the contrary, the Commission must work intentionally to identify the amendments required by the BSCA while avoiding unintentionally exacerbating unwarranted racial disparities already prevalent in federal gun enforcement policies.²²

¹⁹ See, e.g., Alan Fram, *Senate Passes Bipartisan Gun Violence Bill, Setting Up Final Approval*, PBS Newshour (June 23, 2022), <https://to.pbs.org/3Vhw9nJ>; Emily Cochrane, *Congress Passes Bipartisan Gun Legislation, Clearing It for Biden*, N.Y. Times (June 24, 2022), <https://nyti.ms/3SMHtGM>.

²⁰ See BSCA, at tit. II. §§ 12001, 12002, 12004, 12005. The directive requires the Commission to:

review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses. In its review, the Commission shall consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors. The Commission shall also review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.

²¹ USSC Proposed Priorities, at 60439.

²² See, e.g., David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L. J. 1011, 1021-25 (2020) (examining racial disparities in federal gun possession prosecutions arising from law enforcement practices that target communities of color).

Defenders encourage the Commission to conduct an intentional review of the sufficiency of its current penalties and share its findings with Congress before determining how best to implement BSCA into the guidelines. Indeed, unlike some past directives to the Commission, the BSCA directive does not contain a timeline for implementation,²³ and it requires the Commission not only to “amend” the guidelines, but to “review” them.²⁴ Among the questions for review is what sentences are sufficient to deter individuals without significant criminal history. And the directive expressly instructs the Commission to consider Congress’ intent that recommended sentences reflect “mitigating factors” such as a person’s role, culpability, and personal history, when determining “appropriate amendment[s]” for certain firearms offenses.²⁵

There is ample reason for the Commission to tread cautiously when determining how best to implement the BSCA directive. First, data indicate that the sentences recommended by §2K2.1 should not be increased.²⁶ In the last five years, courts imposed within-range sentences barely half of the time, with almost all other sentences imposed below the guideline range.²⁷ Below-guideline sentences were particularly prevalent for straw purchase offenses, a category of offenses the BSCA targets. Prior to the BSCA, straw purchase offenses were primarily prosecuted

²³ See, e.g., Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. No. 112-269, § 3(a) (2013) (requiring the Commission to complete its “consideration and review” “not later than 180 days after” the Act’s enactment); Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, tit. IV, § 401(m) (2003) (requiring implementation of directive within 180 days of enactment of the Act).

²⁴ BSCA, at § 12004(a)(5) (emphasis added).

²⁵ *Id.*

²⁶ See generally *Rita v. United States*, 551 U.S. 338, 350 (2007) (recognizing the “ongoing” feedback loop between the Commission—which creates guidelines “that seek to embody the § 3553(a) considerations”—and judges—who “help[]” the Commission revise the guidelines by assessing the same §3553(a) considerations and determining reasonable sentences (whether within or outside the guideline range)).

²⁷ See USSC, *FY 2017 – 2021 Individual Datafiles* (showing 52.4% of sentences under §2K2.1 were imposed within the guidelines range and only 4.7% above the range). Also, the number of below-guideline sentences for persons convicted of firearms offenses has increased over time. See USSC, *What Do Federal Firearms Offenses Really Look Like* 16 & fig. 8 (2022), <https://bit.ly/3VrFdqd> (“*Federal Firearms Offenses*”).

under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).²⁸ In the last five years, courts rejected the guideline range as too severe in almost 70% of cases sentenced under these statutory provisions.²⁹ And almost 70% of people convicted under these provisions were in Criminal History Category I.³⁰

Second, the guidelines already provide several mechanisms to enhance sentences for the firearm transfer and trafficking offenses targeted in the BSCA. For example, §2K2.1 graduates punishment for the number of firearms involved in an offense and assigns a four-level enhancement if the person “engaged in the trafficking of firearms.”³¹ A person receives a heightened base offense level if they were convicted under 18 U.S.C. § 922(d) or under §§ 922(a)(6) or 924(a)(1)(A) and had “knowledge, intent or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.”³² A four-level enhancement applies if a person transfers a firearm “with knowledge, intent or reason to believe it would be used or possessed in connection with another felony offense.”³³ And, if a person transfers a firearm “cited in the offense of conviction with the knowledge or intent that it would be used or possessed in connection with another offense” and the resulting offense level would be higher for the other offense, a cross-reference applies.³⁴

Third, criminal gun enforcement has a long history of disproportionately targeting and harming people of color.³⁵ The Commission’s data bears this out. For example,

²⁸ See USSC, *Primer: Firearms Offenses* 1– 3 (2022), <https://bit.ly/3CNkjdR> (describing each provision). See also Letter from Marjorie Meyers, Chair, Fed. Def. Sent’g Guidelines Comm. to Hon. Patti B. Saris, Chair, U.S. Sent’g Comm’n, at 41– 47 (July 15, 2013) (providing data on persons charged under the three listed provisions and explaining why the sentences for straw purchase offenses do not need to be increased to serve the purposes of sentencing).

²⁹ See USSC FY 2017 – 2021 *Individual Datafiles*.

³⁰ See *id.*

³¹ USSG §§2K2.1(b)(1), (b)(5).

³² *Id.* at (a)(6). See also *id.* at (a)(4)(B).

³³ *Id.* at (b)(6)(B).

³⁴ *Id.* at (c)(1).

³⁵ See, e.g., Patton, *supra* note 22 (“Racial disparity has been part of felon-in-possession prosecutions from the start” because of the communities targeted for enforcement and the

Commission data show people sentenced under primary guideline §2K2.1 are disproportionately Black. While Black people constituted only 13.6% of the U.S. population in 2021, they made up 54.5% of people sentenced under §2K2.1 and 56.2% of those sentenced for 18 U.S.C. § 922(g) in Fiscal Year 2021.³⁶ Black people are more likely to be convicted of a firearms offense carrying a mandatory minimum than any other racial group and generally receive longer average sentences for these convictions.³⁷ Further, Blacks are more likely to be designated “armed career criminals” under 18 U.S.C. § 924(e) and receive supercharged enhancements under §4B1.4.³⁸ In the last five years, a staggering 71.4% of people designated as “armed career criminals” under §4B1.4 were Black.³⁹ Prior Commission data also indicate that Black people designated as “armed career criminals” received longer average

type of firearm offenses charged); Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 315–17 (2007) (recognizing that federal gun enforcement initiatives like “Project Safe Neighborhoods” have historically focused efforts in predominantly Black, urban communities and collecting statistics provided in litigation showing that the vast majority of persons prosecuted in select districts under Project Safe Neighborhoods were Black); Givens, et al., *supra* note 18 (“The ‘vast majority’ of federal firearms sentences are not imposed for violent conduct but for simple possession by a ‘prohibited person’. . . [and] [t]oo often, whether you are deemed a ‘prohibited person’ depends on your skin color and zip code, not the threat you pose to the community.” (internal cites omitted)); Humera Lodhi, *There’s A Large Racial Disparity in Federal Gun Prosecutions in Missouri, Data Shows*, The Kansas City Star (updated July 1, 2022) (reporting racial disparities in both federal gun convictions and sentence lengths and recognizing that “[l]aws focused on felons are ‘racially coded language’. . . because people of color are more likely to come in contact with police, more likely to be arrested, and more likely to be labeled a felon than white people”).

³⁶ Compare U.S. Census Bureau, *U.S. Census Bureau QuickFacts: United States*, <https://bit.ly/3RSUmxC> (last visited Oct. 16, 2022), with *Federal Firearms Offenses*, at 10, and USSC, *FY 2021 Quick Facts on Felon in Possession of a Firearm* 1 (2022), <https://bit.ly/3ROsryV>. Blacks are also less likely to own guns than whites. See Kim Parker, et al., *The Demographics of Gun Ownership*, Pew Research Center (June 22, 2017), <https://pewrsr.ch/3CsBrUN> (reporting that 36% of whites report they are gun owners, and 24% of Blacks report they are gun owners).

³⁷ See USSC, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 6 (2018), <https://bit.ly/2IpsGB8> (“*Firearms Mandatory Minimum Report*”).

³⁸ *Id.*

³⁹ See USSC, *FY 2017 – 2021 Individual Datafiles*.

sentences than similarly designated white people.⁴⁰ While the BSCA risks amplifying these racial inequities through new and expanded penalties and increased prosecutorial discretion,⁴¹ the Commission's mandate requires it guard against making them even worse.⁴²

The Commission also requested comment on “any other changes to §2K2.1 that may be warranted to appropriately address firearms offenses.”⁴³ As evidenced above, increased penalties are unwarranted. The Commission should use this opportunity and the data and information it generates in its review to ensure the guideline provides more meaningful guidance to courts on sentences that are sufficient, but not greater than necessary.

One place to start would be amending §2K2.1(b)(4) and Comment 8(b) to require that a person must know the firearm at issue was stolen or had an obliterated serial number for the enhancement to apply.⁴⁴ The Commission should similarly provide that a person must know the firearm was one “described in 26 U.S.C. § 5845(a)” or “capable of accepting a large capacity magazine” before being subject to a heightened base offense level.⁴⁵

IV. Proposed Priority No. 4A: Acceptance of Responsibility

The Commission has asked for comment on “whether the government may withhold a motion pursuant to subsection (b) of §3E1.1 (Acceptance of Responsibility) because a defendant moved to suppress evidence.”⁴⁶ Currently, the majority of federal circuit courts that have weighed in on this issue agree that the government may not

⁴⁰ *Firearms Mandatory Minimum Report*, at 6.

⁴¹ *See* Givens, et al., *supra* note 18.

⁴² *See* 28 U.S.C. § 994(d).

⁴³ USSC Proposed Priorities, at 60439.

⁴⁴ *See Defender Sept. 14, 2022 Letter*, at 10 & n.52.

⁴⁵ USSG §§2K2.1(a)(1), (a)(3), (a)(4)(B), (a)(5). *See Defender Sept. 14, 2022 Letter*, at 10 & n.51.

⁴⁶ USSC Proposed Priorities, at 60439.

withhold the third acceptance of responsibility level at sentencing because a person exercised her constitutional right to a suppression hearing.⁴⁷

The majority is right. Indeed, the text and commentary already support the majority's stance. The text of §3E1.1(b) specifically refers to "permitting the government to avoid *preparing for trial*" and allocating those resources efficiently as the rationale for the additional one-level reduction. Nothing in the text suggests the reduction is grounded in conserving the resources involved in preparing for a suppression hearing.

The commentary bolsters this reading. Comment 6 emphasizes that to obtain the third level, generally, an individual must have notified the government of her intent to plead guilty "at a sufficiently early point in the process *so that the government may avoid preparing for trial* and the court may schedule its calendar efficiently."⁴⁸ This note further confirms that "[t]he government should not withhold [a motion for the third level] based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."⁴⁹

Although the commentary does not specify the filing of a pretrial motion as an improper ground for withholding the third level, the use of the non-exclusive phrase "such as" indicates that the appeal waiver language was meant to be illustrative of improper grounds rather than exhaustive.⁵⁰ The guideline identifies one reason to withhold the motion: failure to relieve the government of the work required to prepare a federal case *for trial*. Nothing else is fair game.

⁴⁷ See *United States v. Price*, 409 F.3d 436, 443–44 (D.C. Cir. 2005); *United States v. Marquez*, 337 F.3d 1203, 1211 (10th Cir. 2003); *United States v. Kimple*, 27 F.3d 1409, 1414–15 (9th Cir. 1994). The Fifth and Second Circuits reached the opposite conclusion. See *United States v. Longoria*, 958 F.3d 372, 376–79 (5th Cir. 2020), *cert den'd* 141 S. Ct. 978 (Mar. 22, 2021); *United States v. Rogers*, 129 F.3d 76, 80–81 (2d Cir. 1997) (per curiam). But see *United States v. Vargas*, 961 F.3d 566, 583–84 (2d Cir. 2020) (agreeing with *Marquez* that government preparation for a suppression hearing involves less work than trial preparation and is not a proper basis to deny the third-level reduction). In respecting the Court's denial of certiorari in *Longoria*, Justices Sotomayor and Gorsuch recognized this split and suggested, "[t]he Sentencing Commission should have the opportunity to address this issue in the first instance. . . ." 141 S. Ct. at 979.

⁴⁸ USSG §3E1.1 cmt. n.6 (emphasis added).

⁴⁹ *Id.*

⁵⁰ See, e.g., *Such as*, Merriam-Webster Online Dictionary, <https://bit.ly/3rYl4dM> (last visited Oct. 13, 2022) (describing "such as" as an idiom "used to introduce an example or series of examples").

Lastly, legitimate policy and ethical reasons support the majority's view. It is unfair to force advocates to choose between championing clients' constitutional rights and protecting them against an excessive prison sentence. This presents a Hobson's choice⁵¹ that implicates a defense attorney's ethical obligations.⁵²

V. Proposed Priority Nos. 4B & 6: Career Offender

The Commission proposes to consider alternative definitions of “crime of violence” and “controlled substance offense,” and questions whether there is a feasible alternative to the “categorical approach” in determining whether a prior conviction was for a “crime of violence” or “controlled substance offense.”⁵³

The career offender guideline—whether triggered by “controlled substance offenses” or “crimes of violence”—is unfairly racially disparate,⁵⁴ overly severe,⁵⁵ and a poor

⁵¹ A “Hobson's choice” refers to the necessity of accepting one of two or more equally objectionable alternatives. *Hobson's choice*, Merriam-Webster Online Dictionary, <https://bit.ly/3ThTDqP> (last visited Oct. 13, 2022).

⁵² See American Bar Assn., Criminal Justice Standards, Defense Function, Standard 4-1.2(b), *Functions and Duties of Defense Counsel*, <https://bit.ly/3yCpDhI> (“The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.” (emphasis added)).

⁵³ See USSC Proposed Priorities, at 60439.

⁵⁴ Compare USSC, *2021 Sourcebook*, at tbl. 5 (reporting 23.1% of all federally sentenced individuals last year were Black), with USSC, *Fiscal Year 2021 Quick Facts on Career Offenders* 1 (2022), <https://bit.ly/3AKpBnY> (“CO Quick Facts”) (reporting 58.2% of all individuals designated as career offenders were Black). Compare USSC, *Report to Congress: Career Offender Enhancements* 29, fig. 9 (2016) <https://bit.ly/3yhV1BB> (“Career Offender Report”) (reporting that Black individuals represented over 50% of designated career offenders in all three career offender pathway categories in FY 2014), with USSC, *2014 Sourcebook of Federal Sentencing Statistics*, tbl. 4 (2015), <https://bit.ly/3EnaCUt> (reporting that Black individuals represented 20.3% of the federally sentenced population in FY 2014). See also USSC, *Fifteen Years of Guideline Sentencing* 133–34 (2004), <https://bit.ly/2BZj3XB> (“Fifteen Years Report”) (recognizing the career offender guideline has a significant adverse impact on Black individuals without clearly promoting an important purpose of sentencing).

⁵⁵ Last year, the career offender guideline was rejected as too high in almost 80% of cases in which it applied. See USSC, *FY2021 Individual Datafiles* (79.7% of cases were sentenced below the guidelines range). This guideline is frequently rejected as too severe regardless of whether a person's career offender designation is based on “controlled substance offenses,” “crimes of violence,” or both. See *Career Offender Report*, at 34–35, figs. 13 & 15.

measurement of recidivism.⁵⁶ Any amendments that have the effect of broadening the guideline, or its triggering definitions, would be a mistake. Instead, the Commission should spend the limited time it has this year *narrowing* the career offender guideline's reach.⁵⁷ We incorporate by reference our 2019 Comment and Reply Comment which explain our strong opposition to the amendments that were previously proposed and offer some additional comments below.⁵⁸

Definition of “Controlled Substance Offense.” The Commission should not expand §4B1.2's definition of “controlled substance offense,” particularly when the Commission has already recognized that persons with only drug-related offenses should not be subject to severe career offender penalties in the first place.⁵⁹ We refer Commissioners to pages 27–28, and 30–35 of our 2019 Comments and pages 7–8 of our 2019 Reply Comments.

Instead, the Commission should use its authority to *narrow* the “controlled substance offense” definition. Indeed, as we explained in our September 14 Letter, narrowing the definition to only those federal offenses enumerated in § 994(h) is something the Commission can do without congressional action and would go a long

⁵⁶ See, e.g., *Fifteen Years Report*, at 133–34; USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004), <https://bit.ly/2rWyjNy>; 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>.

⁵⁷ While DOJ similarly recognizes that the “severity levels associated with many recidivist provisions,” apparently including the career offender guideline, “are not optimally set,” it proposes that the Commission move forward with expanding the guidelines reach now and work on necessary reforms by the Commission and/or Congress later. See Letter from Kenneth A. Polite, Jr. & Jonathan J. Wroblewski, Dep’t of Justice, to Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n, at 15 (Sept. 12, 2022). DOJ has it backwards. Instead of subjecting more people to a recidivist enhancement that is “not optimally set” while we wait for congressional action that may never come, the Commission should prioritize changes that it has authority to make now to narrow the career offender guideline’s reach.

⁵⁸ See Letter from Michael Caruso, Chair, Fed. Def. Sent’g Guidelines Comm., to the Hon. Charles R. Breyer & Hon. Danny C. Reeves, Comm’rs, U.S. Sent’g Comm’n at 1–35 (Feb. 19, 2019) (“Defenders’ 2019 Comments”); Letter from Michael Caruso, Chair, Fed. Def. Sent’g Guidelines Comm., to the Hon. Charles R. Breyer & Hon. Danny C. Reeves, Comm’rs, U.S. Sent’g Comm’n at 1–8 (Mar. 15, 2019) (Defenders’ 2019 Reply Comments). Excerpts of both letters are attached for the Commission’s convenience.

⁵⁹ *Career Offender Report*, at 7.

way towards ameliorating the career offender guideline's unwarranted severity. This change would also resolve the circuit conflict referenced in Proposed Priority No. 4(B) because all offenses listed in § 994(h) are federal offenses.

If the Commission does not limit the definition of “controlled substance offense” to the federal crimes enumerated in the directive, it should make clear that a drug offense must involve a substance controlled by the Federal CSA to qualify as a “controlled substance offense.” Section 994(h) refers exclusively to federal drug offenses, indicating Congress’ expectation that the drug offenses which trigger career offender status— a federal sentencing enhancement provided under the federal sentencing guidelines—must involve substances criminalized under federal law.

The Categorical Approach. To the extent that the Commission is considering the “Conduct-Based Inquiry” that it proposed in 2019, any rule that would allow non-elemental facts to trigger career offender status runs counter to § 994(h)’s plain language, which refers to *convictions*, not *conduct*.⁶⁰ Worse still, an approach that allows courts to consider conduct underlying a prior conviction would compound the guideline’s present problems, and create new, unjustified costs. Defenders’ 2019 Comments detail the many reasons why the Commission cannot (and should not) abandon the categorical approach. We encourage Commissioners to review pages 4–27 of our 2019 Comments and pages 2–6 of our 2019 Reply Comments.

VI. Proposed Priority Nos. 7 & 8: Reforms to Criminal History and Implementing § 994(j)

We are pleased that the Commission is considering ways to make the Chapter 4 Guidelines fairer and encourage alternatives to incarceration. Reforms like eliminating the use of “status points” and amending the treatment of persons with zero criminal history points are both supported by the Commission’s research and consistent with the Commission’s duties under 28 U.S.C. §§ 994(j) and (g).

The Impact of “Status” Points. The Commission should eliminate §4A1.2(d), which adds two “status points” to an individual’s criminal history score if they

⁶⁰ See *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (confirming that the guidelines “must bow to the specific directives of Congress” and that guideline language “at odds with § 994(h)’s plain language [] must give way”). See also 28 U.S.C. § 994(h) (requiring the Commission to provide an enhanced guideline range for certain “*categories* of defendants” who were “*convicted*” after being twice “previously. . . *convicted*” of certain crimes”).

commit the instant offense “while under any criminal justice sentence.”⁶¹ The rule is contraindicated as a public safety measure by the Commission’s recent research,⁶² and disparately impacts people of color.⁶³ This disparate impact should come as no surprise given the consensus within the legal and scholarly community that Black people are far more likely than whites to be targeted by law enforcement for stops, searches, arrests, and criminal prosecutions.⁶⁴ This is so even in the face of evidence

⁶¹ USSG § 4A1.2(d). *See also* *Defender Sept. 14, 2022 Letter*, at 23–24.

⁶² *See* USSC, *Revisiting Status Points* 3 (2022), <https://bit.ly/3ezGU44> (“Status points only minimally improve the criminal history score’s successful prediction of rearrest—by 0.2 percent.”).

⁶³ *See id.* at 7, tbl. 1; *Defender Sept. 14, 2022 Letter*, at 24 & n.120.

⁶⁴ *See, e.g.,* Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases*, 65 Clev. State L. Rev. 491, 500–01 (2017) (reviewing statistics on crime and arrest rates by race and concluding that the overrepresentation of people of color in the criminal justice system results from “racial disparity in law enforcement practices” rather than “a problem of crime within the black community alone”); Jessica Eaglin & Danyelle Solomon, Brennan Center for Justice, *Reducing Racial Disparities in Jails: Recommendations for Local Practice* 17 (2015) (“Evidence demonstrates that once stopped by a police officer, African Americans are arrested at a higher rate than other racial groups. A recent study of 3,528 police departments found that blacks are more likely to be arrested in almost every city for almost every type of crime. . . . African Americans are almost four times more likely to be arrested for selling drugs and more than twice as likely to be arrested for possessing drugs, even though whites are more likely to sell drugs and equally likely to consume them. African Americans constitute 30% of arrests for drug violation offenses even though they make up only 13% of the total population.”); Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 Stan. L. & Pol’y Rev. 463, 477 (2009) (“The war on drugs, and particularly the special intensity with which it has been waged against open-air drug dealing and crack cocaine, has fueled a massive and demographically disproportionate increase in the number of black males held in the nation’s prisons.”); William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1893 (2000) (describing “anti-vice crusades that target racial or ethnic minorities who live in urban poverty”); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 957 (1999) (“Recent studies support what advocates and scholars have been saying for years: The police target people of color, particularly African Americans, for stops and frisks.”); *cf. Jamison v. McClendon*, 476 F. Supp. 3d 386, 414–15 (S.D. Miss. 2020) (Order Granting Qualified Immunity) (“Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike. United States Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as ‘the world’s greatest deliberative body.’ The ‘vast majority’ of the stops were the result of ‘nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial.’” (citations omitted)).

that Black and white people commit certain offenses at similar rates.⁶⁵ Relatedly, Black and Latino people are more likely to be on supervision and to be subject to longer terms of supervision than whites,⁶⁶ which underscores the uneven impact of the status point rule on these demographic groups.

Treatment of Persons with Zero Criminal History Points. Amendments to the guidelines that recommend lower sentencing ranges and alternatives to incarceration for persons with zero criminal history points are consistent with 28 U.S.C. § 994(j), requiring the Commission to ensure that certain persons who commit non-serious offenses generally receive non-custodial sentences,⁶⁷ and the Commission’s obligation under § 994(g) to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.”⁶⁸

The Commission’s recidivism studies further support different treatment for persons with zero criminal history points.⁶⁹ Indeed, the Commission cited this research when it took a welcome, but modest, step in 2018 to add commentary to Chapter Five encouraging judges to impose a sentence other than imprisonment for a “nonviolent first offender.”⁷⁰ But the Commission can, and should, do more.

There are several ways the Commission could expand upon its salient work. Initially, it should broaden its definition of “first offender” to include, at a minimum,

⁶⁵ See Eaglin & Solomon, *supra* note 64, at 17.

⁶⁶ See *Defender Sept. 14, 2022 Letter*, at 23, n.115 (citing authority).

⁶⁷ 28 U.S.C. § 994(j).

⁶⁸ *Id.* § 994(g). See U.S. Dept. of Justice, *FY 2022 Performance Budget: Congressional Submission Federal Prison System Buildings and Facilities* 1–2 (2022), <https://www.justice.gov/jmd/page/file/1398296/download> (“Although the inmate population has been declining in recent years, as of March 25, 2021, there were 152,097 individuals serving time in federal prisons. . . . The BOP faces challenges in managing the existing federal inmate population and providing for inmates’ care and safety in crowded conditions at higher security levels, as well as the safety of BOP staff and surrounding communities, within budgeted levels.”).

⁶⁹ See, e.g., USSC, *Recidivism of Federal Offenders Released in 2010* 2–3, 26 (2021); USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* 8 (2017); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 18 fig. 6 (2016).

⁷⁰ USSG §5C1.1 cmt. n.4; USSG App. C, Amend. 811, Reason for Amendment (Nov. 1, 2018).

persons with zero criminal history points.⁷¹ There is ample reason to include persons whose offenses were committed prior to age eighteen, as well.⁷² The Commission should also make clear that it recommends a *presumption* of non-incarceration for persons who are “first offenders who ha[ve] not been convicted of a crime of violence or otherwise serious offense.”⁷³ A more inclusive and explicit presumption against incarceration for individuals with minimal criminal history would better respect § 994(j), promote the purposes of sentencing, and reflect “advancements of knowledge of human behavior,” as required by 28 U.S.C. § 991(b)(1), from the Commission’s own recidivism studies.

The Commission’s recidivism research supports additional amendments to lower punishment ranges and promote alternatives to incarceration for people with minimal criminal history. For instance, the Commission may reconsider an amendment it proposed in 2016 and 2017 to establish a new Chapter Four guideline that would provide for an offense level decrease for persons designated as “first offenders.”⁷⁴ The Commission also contemplated expanding Zone B of the Sentencing Table by consolidating Zones B and C, which would have increased the number of people eligible under the guidelines for non-custodial sentencing.⁷⁵

⁷¹ See Letter from Marjorie Meyers, Chair, Fed. Def. Sent’g Guidelines Comm. to the Honorable William H. Pryor, Acting Chair, U.S. Sent’g Comm’n, at 10–12 (Oct. 10, 2017) (“*Defender Oct. 2017 Letter*”); Letter from Marjorie Meyers, Chair, Fed. Def. Sent’g Guidelines Comm. to the Honorable William H. Pryor, Acting Chair, U.S. Sent’g Comm’n, at 6–8 (Feb. 20, 2017) (“*Defender Feb. 2017 Letter*”).

⁷² See *Defender Sept. 14, 2022 Letter*, at 20–22; *Defender Oct. 2017 Letter*, at 10; *Defender Feb. 2017 Letter*, at 6, 20–27. There is also reason to include persons with other minor convictions as “first offenders”. See, e.g., The White House, Press Release, *Statement From President Biden on Marijuana Reform* (Oct. 6, 2022), <https://bit.ly/3TnIEfH> (pardoning prior federal offenses of simple possession of marijuana; recognizing the racial disparities in arrest, prosecution, and conviction rates for marijuana possession; and stating, “no one should be in jail just for using or possessing marijuana”).

⁷³ See 28 U.S.C. § 994(j). This presumption was proposed, but not adopted in 2017. Compare 82 Fed. Reg. 40651-01, 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.

⁷⁴ See 81 Fed. Reg. 92003-01, 92005–92006, 2016 WL 7326419 (Dec. 19, 2016); 82 Fed. Reg. 40651-01, 40657–40658, 2017 WL 3635792 (Aug. 25, 2017).

⁷⁵ See 81 Fed. Reg. at 92005-92006; 81 Fed. Reg. 40651-01, at 40657.

Defenders have expressed support for these, and other, changes and we urge the Commission to reconsider them.⁷⁶

Finally, Defenders have long noted that the guidelines' undue weight on criminal history often results in unjust and unnecessarily long sentences that perpetuate racial disparities. While we are gratified to see the Commission prioritizing lower sentencing ranges and alternatives to incarceration for persons with minimal or no criminal history, we would like the Commission to consider ways to deemphasize criminal history altogether.⁷⁷

VII. Proposed Priority No. 9: Prohibiting Acquitted Conduct

Defenders commend the Commission's proposed priority to amend the Manual to prohibit the use of acquitted conduct when applying the guidelines.⁷⁸ Acquitted conduct sentencing is antithetical to the Commission's mission to establish fair and certain sentencing policies, and contributes to the unwarranted sentencing disparities Congress tasked the Commission to avoid.⁷⁹ We refer Commissioners to pages 6–9 of our September 14 Letter and look forward to supporting the Commission in finally prohibiting this nefarious practice.

VIII. Proposed Priority Nos. 10, 11: Multiyear Studies of Guidelines' Structure and Commentary

We appreciate the Commission's commitment to ensuring that the guidelines system better promotes the purposes of sentencing. We believe, however, there are more pressing priorities that deserve the Commission's attention this year. Because of the timing of Commissioner confirmations, the Commission is already working on an expedited basis to adopt amendments by May 1, 2023. This expedited timetable, combined with the Commission's prioritization of FSA implementation, will make for an already challenging amendment cycle.⁸⁰ We urge the Commission to focus its

⁷⁶ See *Defender Sept. 14, 2022 Letter*, at 25–27; *Defender Oct. 2017 Letter*, at 10–21; *Defender Feb. 2017 Letter*, at 8–19.

⁷⁷ See *Defender Sept. 14, 2022 Letter*, at 19–25 (discussing ways to deemphasize criminal history throughout the guidelines).

⁷⁸ See USSC Proposed Priorities, at 60439.

⁷⁹ See *Defender Sept. 14, 2022 Letter*, at 6–9.

⁸⁰ See USSC, Press Release, *New Commission Proposes Policy Priorities for 2022-2023 Amendment Year: First Step Act Implementation Among Top Tentative Priorities* (Sept. 29, 2022), <https://bit.ly/3TjmBqq>.

efforts this year on improvements to the guidelines that can be meaningfully implemented now.

IX. Proposed Priority No. 12: Multiyear Study of Court Diversion and Alternatives to Incarceration (ATI) Programs; Related Amendments to the Guidelines

Defenders appreciate the Commission’s commitment to exploring ways to encourage alternative sentences, including for persons who have completed ATI programs. Imposition of alternative sentences has drastically decreased since the passage of the Sentencing Reform Act and remains too low today.⁸¹ And while the guidelines encourage noncustodial sentences for certain “first offenders,” this is not the only population that could benefit from alternative sentencing or pretrial diversion away from the justice system altogether. For many districts, ATI programs are an important mechanism for decreasing the overuse of punitive incarceration while promoting public safety and furthering the purposes of sentencing.⁸² A 2014 Report to the Board of Judges of the Eastern District of New York revealed there were only ten ATI programs at that time.⁸³ Today, the Federal Judicial Center reports that there are 144 problem-solving courts—44 deferred sentencing courts, 91 post-conviction courts, and nine hybrid courts (mix of front- and back-end programs) within the federal system.⁸⁴

Defenders look forward to working with the Commission to consider amendments to the guidelines that allow courts to credit a person’s participation in an ATI program. For instance, the Commission might consider amendments that would grant appropriate adjustments in §3E1.1 (Acceptance of Responsibility), or departures in Chapter 5F (Sentencing Options) or Chapter 5H (Specific Offender Characteristics) for successful completion of an ATI program.

⁸¹ See *Defender Sept. 14, 2022 Letter*, at 25–26 & nn.129 & 130.

⁸² See *Defender Oct. 2017 Letter*, at 7–10 (discussing the importance of alternatives to incarceration); *Defender Feb. 2017 Letter* at 3–6 (same).

⁸³ See *Second Report to the Board of Judges on Alternatives to Incarceration* 35-52 (2015), <https://bit.ly/3g4qhy3>.

⁸⁴ See Federal Judicial Center, *National Problem Solving Court Directory and Resources, Directory* (on file with author), <https://fjc.dcn/education/national-problem-solving-court-directory-resources> (last visited Oct. 14, 2022).

X. Conclusion

As the Commission finalizes this year's priorities, we encourage the Commission to support the establishment of a Defender ex officio.⁸⁵ While we appreciate the Commission's consideration of Defenders' written comments, an ex officio member would allow for more responsive insight to the Commission's critical work at all stages of the amendment cycle.

Very truly yours,
/s/ Michael Caruso
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Enclosures

cc (w/ encl.): Hon. Luis Felipe Restrepo, Vice Chair
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⁸⁵ See, e.g., *Defender Sept. 14, 2022 Letter*, at 27–28.