

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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May 16, 2025

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 2025–2026 Amendment Cycle

Dear Judge Reeves:

As this Commission heads into its fourth amendment cycle, Defenders commend the substantial steps taken already to improve federal sentencing policy. But there is more critical work to do, and Defenders are eager to help. Pursuant to 28 U.S.C. § 994(o), this letter identifies the issues we believe the Commission should prioritize this year.

To begin, there are two topics we do not discuss in detail, but only because we addressed them extensively during the last amendment cycle, as both were the subject of proposed amendments: (1) streamlining and narrowing the reach of the broken career-offender guideline and (2) curing unwarranted methamphetamine sentencing disparities by fixing the meth-actual and “Ice” offense levels. The Commission did not adopt those amendments; we hope this was because it needed more time to explore different options,¹ given that courts routinely sentence below

¹ We note that it would be useful to stakeholders, and further the salient goals of inclusivity and transparency, if the Commission explained at its April public meetings not only the amendments it was voting to adopt and the reasons for those amendments, but also why it chose not to adopt others, and whether it was planning to revisit them in a future amendment cycle.

both of these widely-criticized guideline schemes.² Should the Commission reprioritize those topics, we urge it to seek input from stakeholders early and often to ameliorate the unduly harsh ranges and unwarranted disparities these guidelines produce. Defenders stand ready to draw on our decades of diverse expertise and on-the-ground practice experience (in both federal and state courts) to provide in-depth input on these issues.

We focus the rest of this letter on several additional steps we believe the Commission should take this amendment cycle, including:

- Add a default mens rea requirement throughout the Manual (pp. [3–5](#))
- Eliminate or restrict the use of unconvicted conduct (p. [5](#))
- Exclude youthful criminal history from the guidelines (pp. [5–7](#))
- Fix the overly punitive economic crimes guideline (pp. [7–9](#))
- Encourage courts to utilize alternatives to incarceration (pp. [9–10](#))
- Improve access to sentencing and supervised release data (pp. [10–12](#))
- Add a Defender representative to the Commission (pp. [12–14](#))

The first five recommendations highlight necessary and discrete updates to various areas of the Manual, while the final two identify procedural changes that would provide Defenders and other stakeholders with more information and increase transparency, allowing us to better assist the Commission. All of these suggested steps follow the path this Commission has already taken, and they are logical outgrowths of guideline amendments or other changes instituted or considered in recent years.

² See, e.g., [Statement of Juval O. Scott on behalf of Defenders to USSC on Proposed Amendments to the Career Offender Guideline](#), at 1–2 (Mar. 8, 2023) (“[T]he career offender guideline is already the least influential guideline, with judges imposing below-guideline sentences in nearly 80% of cases.”); [Defender Comment on the USSC’s 2025 Drug Offenses Proposed Amendment](#), at 29 (Mar. 3, 2025) (“[G]uideline ranges for all meth cases—but especially ‘Ice’ and meth-actual cases—are far too high, with courts imposing below-guideline sentences in the vast majority of cases.”).

I. Mens Rea Reform

Defenders have long encouraged the Commission to add a mens rea requirement to enhancements throughout the Manual lacking an express “intent” element.³ Likewise, for decades scholars have lamented the punishment roulette created by strict liability and negligence sentencing factors,⁴ which conflict with § 3553(a)’s mandate to impose “just punishment” that “reflect[s] the seriousness of the offense” and “afford[s] adequate deterrence.”⁵ While many guideline increases do require a criminal state of mind,⁶ several do not,⁷ resulting in disparities due to strict liability sentencing enhancements that have no place in our common law system.

Given mens rea’s role as a bedrock principle of criminal liability, the Commission should bring the entire Manual in line with the notion that

³ See, e.g., [Defender Comments on the USSC’s 2025 Firearms Offenses Proposed Amendments](#), at B-1–B-6 (Feb. 3, 2025); [Defender Comment on the USSC’s Proposed 2024–2025 Priorities](#), at 17 (July 15, 2024); [Statement of Deirdre D. von Dornum on behalf of Defenders to USSC on 2025 Circuit Conflicts Proposed Amendments](#), at A-15–A-20 (Feb. 27, 2024); [Defender Comment on the USSC’s 2023 Firearms Offenses Proposed Amendment](#), at 20–27 (March 14, 2023); [Defenders’ 2022 Annual Letter to USSC](#), at 9–12 (Sept. 14, 2022).

⁴ See, e.g., Jonathan Wroblewski, [Did the Sentencing Commission Just Make the Guidelines Even Worse?](#), Sentencing Matters Substack (Apr. 14, 2025) (discussing conversation on problems with the Guidelines and citing the lack of “accounting for culpability factors in most guidelines”); Michael Serota, [Strict Liability Abolition](#), 98 NYU L. Rev 112, 181 (2023) (“Even more consequential is the breadth of strict liability in drug distribution statutes, which focus the length of a sentence on ‘fairly arbitrary questions about how the drugs involved in a transaction are to be classified or quantified instead of on a defendant’s actual culpability.’” (quoting Douglas A. Berman, *The Second Circuit: Attributing Drug Quantities to Narcotics Offenders*, 6 Fed. Sent. Rep. 247, 251 (1994))); Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Fed. Sent. Rep. 121 (1994) (“[M]ens rea has been all but eliminated from the sentencing of drug offen[ses].”).

⁵ 18 U.S.C. § 3553(a)(2)(A); see also *United States v. Handy*, 570 F. Supp. 2d 437, 480 (E.D.N.Y. 2008) (discussing failure of strict liability enhancement to deter, as “a person cannot be deterred from doing what he or she does not know is being done”).

⁶ See [Defenders’ 2022 Annual Letter](#), at 9–10 & n.50 (providing specific examples).

⁷ There are, for instance, strict liability enhancements in the drug guidelines and in Chapter Three as well. See generally *id.* at 10–12.

“wrongdoing must be conscious to be criminal.”⁸ As Defenders urged last July, one simple way to do so would be to modify §1B1.3 to add a default mens rea requirement of knowledge or intent, unless otherwise specified, consistent with the Model Penal Code.⁹

In addition to adopting a default mens rea requirement, the Commission should eliminate the “reasonable foreseeability” standard for jointly undertaken criminal activity in §1B1.3(a)(1)(B), and instead require that the individual knew about, intended, and agreed to the acts or omissions of another before holding them accountable for those acts or omissions.¹⁰ Reasonable foreseeability, a “familiar feature of civil liability in tort law,” effectively “imposes a negligence standard for a

⁸ *Ruan v. United States*, 597 U.S. 450, 457 (2022) (quoting *Elonis v. United States*, 575 U.S. 723, 734 (2015) and *Morissette v. United States*, 342 U.S. 246, 250 (1952)). Every first-year law student learns that most criminal acts require evidence of mens rea, or “guilty mind,” before punishment can be imposed. See, e.g., The Heritage Foundation, [Without Intent Revisited: Assessing the Intent Requirement in Federal Criminal Law 10 Years Later](#) (Dec. 13, 2021) (“[A]s a society and under the law, we draw distinctions between conduct—even the same conduct—depending on whether it occurs accidentally or intentionally.”); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635, 642 (1993) (discussing origins of a mental state requirement in Anglo-Saxon common law). Courts have generally recognized an exception for minor, public welfare offenses that do not carry severe penalties. See *Staples v. United States*, 511 U.S. 600, 616–19 (1994).

⁹ [Defenders’ 2024–2025 Priority Letter](#), at 17 & n.52 (discussing history of §1B1.3, which originally contained a limited mens rea default requirement); see also Model Penal Code § 2.02(1) (“Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”). At a minimum, the Commission should take this opportunity to fix the disparity-generating logical inconsistency within §2K2.1(b)(4). Last year, the Commission proposed, but did not adopt, an amendment establishing a mens rea requirement in the strict liability enhancements for stolen firearms and firearms with modified serial numbers, on par with that contained in the unserialized firearms enhancement. USSC, [Proposed Amendments to the Sentencing Guidelines](#), at 44–46 (Dec. 19, 2024). As the Commission says ““there is no meaningful distinction between a firearm with an obliterated serial number . . . and a firearm not marked with a serial number,” equalizing the mens rea requirements across the enhancements makes sense. USSG, App. C., [Amend. 819](#) (Nov. 1, 2023). The Commission should also add a knowledge requirement to the §2K2.1 enhanced base offense levels, especially given §2K2.1’s outsized impact on people of color. See [von Dornum Testimony](#), at A-14 (discussing racial disparities).

¹⁰ See [Defenders’ 2024–2025 Priority Letter](#), at 16.

co-conspirator's crime," and is therefore unsuitable for criminal responsibility and imprisonment.¹¹ This not only creates unwarranted disparities between those who knew about such acts, and those who did not, but also leads to absurd and unjust results. The above mens rea reforms would ensure that punishment remains certain, fair, and proportional, as Congress intended.

II. Uncharged and Dismissed Conduct

In addition to setting forth a default mens rea requirement and amending the "reasonable foreseeability" standard, the Commission should restrict §1B1.3's use of uncharged and dismissed conduct (including cross-references to more serious guidelines in Chapter Two) to increase sentences. As Defenders explained in detail last July, the use of unadjudicated conduct to often dramatically increase an individual's sentencing range enhances prosecutorial power to manipulate sentences; offends basic notions of fairness, notice, certainty, and proportionality; leads to unwarranted sentencing disparities; and conflicts with the Commission's Enabling Statute.¹² Focusing the guidelines on the offense(s) of conviction makes sense as a logical next step to the Commission's limitation on the use of acquitted conduct, and aligns with the sentencing policies of most states.¹³

III. Youthful Individuals

In light of the expert comment and testimony it received during the 2023–2024 amendment cycle about youthful individuals, the Commission should amend §4A1.2(d), which assigns criminal history points for certain offenses committed prior to age 18. In December 2023, the Commission proposed a two-part amendment related to the guidelines' treatment of youthful individuals ("2023 Youthful Individuals Amendment").¹⁴ Part A, which it did not adopt, would have changed the criminal history computation rules for offenses committed prior to age 18, limiting or eliminating the impact of these youthful offenses on a person's guidelines range. Part B, which it did adopt, amended the "Age" policy statement at §5H1.1 to add

¹¹ [Defenders' 2022 Annual Letter](#), at 11–12 (citations and quotation marks omitted).

¹² See [Defenders' 2024–2025 Priority Letter](#), at 11–14.

¹³ See *id.* at 9, 15–16.

¹⁴ USSC, [Proposed Amendments to the Sentencing Guidelines](#), at 13–38 (Dec. 26, 2023).

language providing for a downward departure “due to the defendant’s youthfulness at the time of the offense or prior offenses.”¹⁵

The Commission should now revisit Part A of the 2023 Youthful Individuals Amendment. As Defenders pointed out then, §4A1.2(d) suffers several major flaws, as does the rest of Chapter Four.¹⁶ Specifically, that provision: (1) creates unwarranted disparities based on differing jurisdictional practices; (2) compounds the gross racial and ethnic injustices prevalent in the juvenile legal system; (3) relies on adjudications that lack procedural protections and reliability; (4) fails to recognize case law and scientific research confirming that kids are different; and (5) injects unnecessary complexity into Chapter Four.¹⁷

Defenders were not the only advocates for this change. The Commission heard from “experts in the science and data community conveying advancements in the understanding of youthful development and sentencing, including recognition of the age-crime curve and that cognitive changes lasting into the mid-20s affect individual behavior and culpability,”¹⁸ which ultimately led to the updated age

¹⁵ USSG, App. C., [Amend. 829](#) (Nov. 1, 2024).

¹⁶ Focusing first on the outdated §4A1.2(d) makes sense given the Commission’s recent work on this issue, but Chapter Four is full of outdated vestigial structures inherited from the Parole Commission. See USSC, [A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score](#), at 3–4 (2005). It needs an overhaul. See [Defenders’ 2024 Annual Letter to the USSC](#), at 12 (May 15, 2024) (discussing disparities and undue complexity). Notably, as a recidivism prediction proxy, Chapter Four fails to incorporate recent scholarship on the importance of dynamic risk factors (such as mental health, employment, and other circumstances) in risk assessment tools, as opposed to mere focus on static, or fixed, risk factors (such as criminal history). See Denis Yukhnenko et. al., [Risk factors for recidivism in individuals receiving community sentences: a systematic review and meta-analysis](#), 25 CNS Spectrums 252 (2019). In addition to eliminating youthful convictions from the criminal history calculation, we urge the Commission to: (1) exclude revocation sentences (§4A1.2(k)); (2) modify the career offender guideline’s CHC VI requirement (§4B1.1(b)); and (3) amend the single sentence rule (§4A1.2(a)(2)). See [Defenders’ 2024 Annual Letter](#), at 12–13 n. 27 (citing sources).

¹⁷ [Defender Comments on the USSC’s 2024 Youthful Individuals Proposed Amendment](#), at 4–25 (Feb. 22, 2024).

¹⁸ USSC, [2024 Amendments in Brief: Youthful Individuals](#) (June 2024) (highlighting statutory duty “under 28 U.S.C. § 991(b)(1)(C) to establish and amend sentencing policies to

policy statement (Part B). While Defenders supported removing departures from the Manual this year, the “Simplification of the Three-Step Process” (Simplification Amendment) came at the cost of losing this policy statement.¹⁹ But the Commission should not disregard the volumes of empirically supported comments and testimony that informed the age policy statement. Instead, the Commission should incorporate its evolved understanding of youthful culpability, race and jurisdictional disparities, and juvenile court deficiencies into Chapter Four by excluding sentences resulting from offenses committed before age 18 from the criminal history calculation.

At a minimum, the Commission can publish a new report that explores young people’s brain chemistry and the potential impact of excluding youthful criminal history from the guidelines. This would build on the Commission’s previous work to highlight advancements in our understanding of youthful culpability.²⁰

IV. The Broken Economic Crimes Guideline

The Commission should also overhaul §2B1.1 to tie sentences to individual culpability, rather than loss or imaginary loss.²¹ Scholars, judges, and other stakeholders have long criticized the empirically unsound economic crimes guideline; particularly its over-reliance on loss as a proxy for offense seriousness and culpability.²² Section 2B1.1’s loss table—including its use of “the greater of”

reflect such ‘advancement in knowledge of human behavior as it relates to the criminal justice process.’”); USSC, [Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines](#) (Mar. 7, 2024).

¹⁹ See USSC, [Amendments to the Sentencing Guidelines](#), at 478 (Apr. 30, 2025).

²⁰ In addition to contributing to the wealth of information collected from the Commission’s March 2024 hearing on youthful individuals, this publication would build upon the Commission’s [2017 report](#), and would further its statutory information management goals. See 28 U.S.C. §§ 991(b) and 995(a)(12)–(16) (obligation to collect and disseminate information on federal sentencing practices).

²¹ [Statement of Daniel Dena on behalf of Defenders to the USSC on 2024 Economic Crimes Proposed Amendments](#), at 20 (Feb. 27, 2024) (proposing that loss “be measured with reference to actual loss or intended loss” depending on which measure best reflects culpability).

²² See *id.* at 3 & nn.6–8 (Feb. 27, 2024) (summarizing lack of empirical basis and scholarship on history of fraud guideline); see also [Statement of James E. Felman on behalf of the American Bar Association to USSC on Proposed Amendments to the Federal](#)

actual or intended loss—often produces draconian sentencing ranges that bear little relation to individual culpability or real world harms.²³ And when combined with the guidelines’ expansive use of “relevant conduct,” §2B1.1’s loss table can lead to ranges that are patently absurd.²⁴

While headlines draw the imagination to high profile Ponzi schemes, in reality, Defenders represent thousands of indigent individuals convicted of low-level participation in economic crimes. Sentences on the ground reflect this reality: In fiscal year 2024, 44% of cases sentenced under §2B1.1 involved a downward variance or departure, even after excluding cases that received substantial assistance or fast track departures.²⁵ And this is not new. In fiscal year 2012, only 50% of §2B1.1 sentences fell within the guideline range.²⁶ This long-running trend of below-range sentences tells the Commission that §2B1.1 produces excessive ranges that run afoul of § 3553(a)’s requirement for sentences to be sufficient, but not greater than necessary.

In addition, fixing §2B1.1 would further the goal of simplification. Currently, §2B1.1 spans 20 pages in the Manual, with the complex loss table and 20 SOC’s,

[Sentencing Guidelines regarding Economic Crimes](#), at 8–9 (Mar. 12, 2015) (urging Commission to “reduce the reliance on loss as the primary measure of culpability”); ABA, *A Report on Behalf of The American Bar Association Criminal Justice Section Task Force on The Reform of Federal Sentencing for Economic Crimes* (Nov. 10, 2014); *United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (Underhill, J., concurring) (explaining that “the loss guideline is fundamentally flawed,” and “those flaws are magnified where . . . the entire loss amount consists of intended loss.”).

²³ See [Defenders’ 2024–2025 Priority Letter](#), at 17.

²⁴ See, e.g., [Dena Statement](#), at 17–18 (describing Ms. Alexander, who faced an 18-level loss enhancement based primarily on her codefendant’s conduct).

²⁵ USSC, [2024 Sourcebook of Federal Sentencing Statistics](#), at 133 tbl. E-7. Less than 42% of §2B1.1 cases were sentenced within guidelines in fiscal year 2024. *Id.* And when judges go below guidelines in these cases, they do so in a major way. See [Defenders’ 2024–2025 Priority Letter](#), at 7 (showing that from fiscal years 2019 to 2023, in cases sentenced under primary guideline §2B1.1 that were sentenced below the guideline range (excluding cases involving a §5K1.1 departure), received sentences 57% below the advisory guideline range, on average).

²⁶ [Defenders’ 2013 Annual Letter to the USSC](#), at 16 (May 17, 2013).

although it began with only six.²⁷ Last year, the Commission flagged that it “may undertake a comprehensive review of §2B1.1 in a future amendment cycle.”²⁸ And that this review would be “part of [its] simplification priority[.]”²⁹ Having just taken a major step to decrease the guidelines’ complexity through the Simplification Amendment,³⁰ the Commission should now turn to this comprehensive examination of §2B1.1 and prioritize creating a more rational, simple, and just economic crimes guideline.

V. Alternatives to Incarceration

As in past years, Defenders urge the Commission to continue its work on alternatives to incarceration (ATI), diversion programs, and alternative courts.³¹ After the Sentencing Reform Act of 1984 and the introduction of the Guidelines, the percentage of noncustodial sentences dropped drastically.³² This continues on today; in fiscal year 2024, only 7% of sentenced cases received a sentence of probation or fine alone.³³ And the BOP overcapacity crisis continues unabated.³⁴

²⁷ See Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 753 (2001) (discussing factor creep); [Defenders’ 2024–2025 Priority Letter](#), at 6 (discussing factor creep and punitive upward drift of common offense guidelines, including §2B1.1).

²⁸ USSC, App. C., [Amend. 827](#) (2024).

²⁹ USSC, [2023 Proposed Amendments to the Sentencing Guidelines](#), at 12 (Dec. 26, 2023).

³⁰ See [Defender Comment to the USSC on Offenses Involving Fentanyl, Fentanyl Analogues, and Other Opioids](#), at 15–16 (May 1, 2025) (discussing history of Commission simplification efforts).

³¹ See [Defenders’ 2023–2024 Priority Letter](#), at 6–7 (Aug. 1, 2023); [Defenders’ 2022–2023 Priority Letter](#), at 18 (Oct. 17, 2022); [Defenders’ 2022 Annual Letter](#), at 25–27.

³² See [Defenders’ 2024–2025 Priority Letter](#), at 4 (“The original Commission actively chose to disregard past practice and it prioritized imprisonment over the use of probation, fine-only, or alternative sentences. . . . [F]or federal convictions terminating in 1985 . . . 34% were sentenced to imprisonment only”).

³³ USSC, [2024 Sourcebook of Federal Sentencing Statistics](#), at 35.

³⁴ [Defender Comment on the USSC’s 2025 Drug Offenses Proposed Amendments](#), at 8–13 (Mar. 3, 2025) (discussing Commission’s statutory obligations to address BOP overpopulation crisis fueled by lengthy drug incarceration sentences).

The resulting boom in federal carceral sentences has not achieved victory in the drug war, nor has it made our communities safer.³⁵ Instead, community corrections offer proven public safety and fiscal benefits.³⁶ Defenders appreciate that the Commission has been exploring the availability of problem-solving courts across the country and publishing related online resources for courts and stakeholders to access.³⁷ Likewise, we are encouraged by the recent, commonsense supervised release amendments, which focus on the importance of an individual's needs and capacity for rehabilitation.³⁸ Such individualization is just as important in determining whether someone truly requires a custodial sentence or whether they can flourish under an ATI program. Thus, to build on its prior work, the Commission should amend the guidelines to promote alternative sentences for anyone demonstrating presentence rehabilitation potential.³⁹ The Commission should also exercise its empirical might by updating its 2017 report on ATI court programs.⁴⁰

VI. Data Transparency and Publication

Defenders were pleased to learn that the Commission is establishing an Ad Hoc Advisory Group on Research and Data Practices (the “RDPAG”) to study data-related practices and policies and recommend ways for the Commission to

³⁵ See *id.* at 7 (discussing how drug war incarceration has “hollowed out some low-income minority neighborhoods, destabilizing families and communities—factors that are linked to increased crime and increased demand for drugs”).

³⁶ See [Defender Comment on the USSC's 2023 Alternatives-to-Incarceration Programs Proposed Amendment](#), at 1–2 (Mar. 14, 2023).

³⁷ See USSC, [Problem Solving Courts Toolkit](#) (updated May 2024).

³⁸ See USSC, [Amendments to the Sentencing Guidelines](#), at 32 (Apr. 30, 2025).

³⁹ [Defenders' 2022 Annual Letter](#) collected past Defender proposals to better encourage alternatives to incarceration and discussed many of those proposals, including: (1) eliminating the zones on the Sentencing Table or expanding Zones B and C; (2) revising §5C1.1 to permit non-prison sentences for all zones; and (3) deleting §5C1.1 Comment 6, which discourages alternatives to incarceration for people in CHC III or higher. *Id.* at 26. We urged (and continue to urge) the Commission to, at a minimum, revisit some of the reforms it proposed, but did not adopt, in 2018. *Id.* at 26–27

⁴⁰ USSC, [Federal Alternative-to-Incarceration Court Programs](#) (2017).

incorporate them into its work.⁴¹ The creation of this ad hoc advisory group in the wake of the Simplification Amendment provides a unique opportunity for the Commission to overhaul its data collection and publication processes to improve transparency and incorporate best practices.⁴²

Now more than ever, stakeholders draw upon the Commission's sentencing data to inform their work.⁴³ It is imperative that the Commission revisit its outdated agreement with the AO and grant Defenders equal access to its datafiles.⁴⁴ The Commission should also share on an annual basis its resentencing and supervised release datasets, as well as the dynamic datasets underlying its JSIN tool. These changes would promote transparency and better enable Defenders to comply with our statutory duty to comment on the Commission's work.⁴⁵

Defenders have, in the past, pointed out practical limitations with Commission data reporting practices,⁴⁶ and we view the new two-step process as an opportunity to improve both data collection and publication. Take, for example, the Commission's reporting of sentence placement relative to the guideline range. That practice may be obscuring many downward variances, because the placement

⁴¹ See USSC, [Notice Seeking Applications for 2025 Ad Hoc Research and Data Practices Advisory Group](#) (2025).

⁴² Reviewing how the Commission collects, maintains, analyzes, and disseminates its data with an eye toward employing special expertise and best practice also aligns with the Commission's final priorities last year. See USSC, [Notice of Final Priorities for 2024–2025 Amendment Cycle](#), at 3 (Aug. 2024) ("Expanding the Commission's use of expertise, evidence, and best practices.").

⁴³ U.S. Courts, [Judiciary Studies Use of Online Tool in Presentence Reports](#) (April 28, 2023) (discussing JSIN pilot study).

⁴⁴ See [Defenders' 2024 Annual Letter](#), at 16.

⁴⁵ See 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.").

⁴⁶ See [Defenders' Annual Letter to the USSC](#), at 3 (Oct. 10, 2019) (discussing problem of classification of departure, as opposed to variance, reasons for a below range sentence pursuant to the Statement of Reasons form). Unlike the academic world, the Commission's work is not subject to peer review and often draws on datasets that are not made public.

variable operates in the disjunctive. This means that if a case involved a §5K1.1 departure, fast track departure, and a downward variance, it would only be reported as a case involving a §5K1.1 departure. We believe this, along with other factors, has potentially resulted in the underreporting of variances.⁴⁷

The elimination of most departures, along with the creation of the RDPAG, offers a fresh opportunity to revisit the Statement of Reasons form as well.⁴⁸ This would allow the Commission to better fulfill its statutory data obligations.⁴⁹ The advent of simplification offers an exciting opportunity to rethink systemic data collection and court data reporting practices, and Defenders stand ready to offer our unique insights and practical expertise.

VII. Defender Representation

As the Commission studies data-related best practices, it should also consider ways to more fully include Defenders in its work. Specifically, Defenders have advocated at meetings and in correspondence for the Commission to add a Defender Representative to serve in the same capacity as the DOJ *ex officio* member.⁵⁰ And we have previously pointed out that the vast majority of states with active sentencing commissions specifically mandate either a public defender or criminal defense attorney representative.⁵¹ This is best practice.

⁴⁷ See *id.* at 5.

⁴⁸ See generally Jelani Jefferson Exum & Paul J. Hofer, *The Evolution of the Statement of Reasons Form*, 28 Fed. Sent. Rep. 169 (2016) (discussing history and critiques of Statement of Reasons form); Paul J. Hofer, *How Well Do Sentencing Commission Statistics Help in Understanding the Post-Booker System?*, 22 Fed. Sent. Rep. 89 (2009) (making recommendations for Statement of Reasons form and data collection).

⁴⁹ 28 U.S.C. § 995(a)(12)(A) (directing the Commission to “serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices”).

⁵⁰ In August 2023 and August 2024, Defenders submitted letters to the Commission asking for a Defender Representative to be invited to attend and participate in the Commission’s nonpublic meetings and deliberations and outlining a proposed process for selecting who that representative member would be. These letters are on file with Defenders and the Commission and are not available online.

⁵¹ See Letter from Heather E. Williams, Chair, Fed. Defenders Sent’g Guidelines Comm. to the Honorable Carlton W. Reeves, Chair, U.S. Sent’g Comm’n, at 1–2 (Aug. 29, 2024) (Re:

From the beginning, this Commission has vowed to operate in “a deliberative, empirically based, and inclusive manner.”⁵² And in many ways, it has held true to its word. The Commission has hosted roundtables on career offender, the drug guidelines, and supervised release that brought together stakeholders from around the country with different backgrounds and viewpoints to brainstorm solutions to challenging problems. It has invited impacted people to those roundtables and to testify on proposed amendments, allowing them to share unique perspectives from their lived experiences. Now, the Commission is adding two new advisory groups to help inform its work—the RDPAG (referenced above), and the Sentence Impact Advisory Group (the “SIAG”) for people previously sentenced under the federal guidelines and their family members.⁵³

In short, this Commission has made great strides to increase the public’s access to, and influence in, its work. But, without a Defender Representative on the Commission who enjoys the same level of participation as DOJ, the Commission will remain inherently imbalanced,⁵⁴ and Defenders will remain hampered in our ability to most effectively provide the Commission valuable support at crucial stages of the amendment process.⁵⁵ While only Congress can rectify the statutory lack of a Defender *ex officio*—and we continue to ask that you support a legislative fix to this imbalance—the Commission need not wait for Congress to invite a Defender representative to serve in a similar role. As the primary stakeholders with the

Defender Proposal on Process for Selecting Defender Representative to the Sentencing Commission) (on file with author).

⁵² [Remarks of Judge Carlton W. Reeves](#), Chair of the U.S. Sent’g Comm’n, Washington, D.C., at 4 (Oct. 28, 2022).

⁵³ See USSC, [Notice Seeking Applications for 2025 Sentence Impact Advisory Group](#) (2025).

⁵⁴ [Defenders’ 2022 Annual Letter](#), at 28 (“Numerous scholars and judges have recognized that the lack of a Defender *ex officio* deprives the Commission of an essential balance. 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.” (citing scholarship)).

⁵⁵ While we always aim to bring our unique insights to our discussions with the Commission and its staff, inclusion of a Defender voice earlier in the process, with greater access to the materials and data that help inform the Commission’s decisions, would allow us to engage more productively. The fact that the Parole Commission (which represents a mechanism that was abolished almost four decades ago) has an *ex officio* member on the Commission, while Defenders do not, makes no sense.

unique legal and human insights gained from representing those impacted and sentenced under the guidelines every day, we have a perspective unlike any other stakeholder. Further, adding a Defender Representative to the Commission would increase transparency, fairness, and the appearance of fairness.

* * *

Defenders are keen to collaborate with the Commission during the 2025–2026 Amendment Cycle to help extend the many successes of the past three years. Continuing to push the guidelines in the direction of greater simplicity, certainty, fairness, and proportionality, in the ways identified above, would move federal sentencing ever closer to the idealized system Congress envisioned when it passed the Enabling Act and instructed the Commission to establish policies that “reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process.”⁵⁶ So too would adjusting the Commission’s own internal operating procedures to provide better access and balance, all while giving stakeholders and impacted people greater confidence in the Commission’s ability to operate “in a deliberative, empirically based, and inclusive manner.”

Very truly yours,



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

Sentencing Resource Counsel
Federal Public and Community Defenders

⁵⁶ 28 U.S.C. § 991(b)(1)(C).

Hon. Carlton W. Reeves

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cc:

Hon. Luis Felipe Restrepo, Vice Chair

Hon. Laura E. Mate, Vice Chair

Hon. Claire Murray, Vice Chair

Hon. Candice C. Wong, Commissioner

Patricia K. Cushwa, Commissioner *Ex officio*

Scott A.C. Meisler, Commissioner *Ex officio*

Kenneth P. Cohen, Staff Director

Kathleen C. Grilli, General Counsel