FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

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August 11, 2023

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: Defenders' Proposal for Increased Defender Involvement in Commission Work

Dear Judge Reeves:

The Defenders' Commission Liaison Subcommittee (CLS) appreciated our meeting with the Commission last month and are grateful for its demonstrated interest to increase Federal Public and Community Defenders' involvement in the Commission's work.

Complete and lasting balance can be achieved only through a congressionally mandated Defender *ex officio* Commissioner. We ask you to support the *Sentencing Commission Improvements Act*.[1] Short of this legislative change, however, the Commission can take common-sense steps now to permit Defenders more meaningful access and participation by:

- Inviting a representative of the Federal Public and Community Defenders, with their staff person, to attend and participate in all nonpublic meetings during deliberations or when substantive work of the Commission is discussed; and

[1] S. 851, 118th Cong. (Introduced Mar. 16, 2023). The Judicial Conference of the United States has historically endorsed adding a Defender *ex officio* as have other advocacy groups.

- Providing the Defender representative with all substantive materials—including those related to data, research, priorities, and amendments—at the same time the Commission receives such materials.

This participation and access can commence immediately on a discretionary basis, consistent with Rule 3.3 of the Commission's *Rules of Practice and Procedure* and § 994(o)'s mandate that Defenders' comment on the work of the Commission "whenever they believe such communication would be useful." We also urge the Commission to amend its *Rules of Practice and Procedure* in the near future to make this Defender involvement standard practice.

Similar Defender involvement has been permitted before. For instance, in the late 1980s and early 1990s, in addition to attending and participating at public meetings and providing formal comment, Defenders were represented on Commission working groups, provided feedback at Commission meetings where guideline amendments were considered, were invited to join Commissioners at the table during extended discussion, and were supplied the same amendment proposals and supporting documents that the Commissioners received in advance of Commission meetings.

More meaningful Defender access would result in more valuable and useful input for the Commission. To be sure, Defenders endeavor to convey legal analyses, practical experience, empirical data, and specific proposals the best we can through formal comment and testimony. We appreciated hearing from Vice Chair Murray in July that our feedback is helpful to the Commission. But the Commission should have the benefit of our perspective at all stages of its work. We would be better able to support the Commission if we could share our insights at all critical junctures when policymaking decisions are made.

These following few examples illustrate our point.

Priorities. Through our annual letter, our comment on tentative priorities, and CLS meetings with Commissioners, Defenders provide the best input we can on those priorities we believe the Commission should and should not adopt in the coming year. Yet this input is necessarily limited. The published proposed priorities are often broadly worded—for example "exploration of

ways to simplify the guidelines,"[2] making it difficult to identify what Defender insights or information would best aid the Commission. And issues not on the proposed priority list are added to the final priority list without explanation or opportunity for comment.[3] If a Defender representative could attend meetings where the Commission's priorities are brainstormed and adopted, we could help process the advantages and practicalities of potential priorities (and proposed amendments that naturally flow from them) and be better equipped to provide productive feedback responsive to the Commission's interests. Our Fall CLS meetings with the policy teams regarding the final priorities are helpful, but they are not a substitute for the meaningful access we request. Without knowing the internal proposals, data, and research the Commission considers as to the priorities and connected proposed amendments, our feedback at these meetings invariably lacks specificity and may not adequately address the issues most significant to the Commission.

Amendments. Defenders appreciate the opportunity to testify at public hearings when Commissioners consider amendments to the *Guidelines Manual*. However, our input on proposed amendments would be far more valuable if we were able to also engage with the Commission outside of public hearings and formal comment. At hearings, witnesses are subject to the pressures of time constraints and this forum does not fully permit the type of reasoned debate, discussion, and back-and-forth necessary for us to provide the Commission with pertinent and timely information critical to inform its policymaking.

As with hearing testimony, our written comments on proposed amendments respond exclusively to those materials the Commission chooses to make public. Yet, as last year's amendment cycle illustrated, much of the Commission's work and deliberations on proposed amendments occur outside the public eye. Several amendments the Commission ultimately adopted looked very different from any alternatives publicly proposed for comment. Since the language ultimately adopted was drafted, debated, and finalized in

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[2] USSC, 2023–2024 Proposed Priorities (2023).

[3] *Compare e.g.*, USSC, 2022–2023 Proposed Priorities (2022), *with* USSC, 2022–2023 Final Priorities (2022) (adding sexual abuse offenses and mismarketing and misrepresentation of controlled substances to the final priority list).

non-public meetings, the Commission did not benefit from our perspective on potential advantages or disadvantages of the adopted language. Nor could the Commission consider any alternative language we would have contributed to the brainstorming process.

Research and Data. As a "clearinghouse and information center" for federal sentencing data, the Commission collects and publishes data and reports concerning the sentencing process.[4] As part of this duty, the Commission is also supposed to "collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process."[5] Because Defenders do not have access to much of the Commission's data and are not privy to research reports until they are public, the Commission is not fully informed by our experience, expertise, research, and insights when executing its research function. Defenders have issued critiques of the Commission's published research reports in the past,[6] but we are eager to dialogue with the Commission on the front-end to provide more constructive feedback before reports and data are publicly available.

We recognize this Commission's members bring diverse professional experiences, including some with criminal defense experience. But—just as Department of Justice's (DOJ) involvement and insights cannot be replaced by Commissioners who are former prosecutors—the Defender perspective cannot be replaced by a person who used to be a Federal Defender. Unlike Commissioners, a Defender representative would have their finger on the pulse, so to speak. They are part of a nationwide community of attorneys who represent clients and use the guidelines daily. They are current on how everchanging sentencing law, policy, and research affect the people being sentenced. And they would be able to share with the Commission this valuable community insight at all points during the Commission's substantive work.

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[4] 28 U.S.C. § 995(a)(12)(A), (13), (14), (15), (16).

[5] *Id.* at § 995(a)(13).

[6] *See, e.g.*, Tina Woehr & Allison Bruning, *Limitations of the Commission's 'Length of Incarceration and Recidivism' Report*, 35 Fed. Sent. R. 43 (2022) (critiquing USSC, *Length of Incarceration and Recidivism* (2022)).

Finally, neither ethical considerations nor confidentiality concerns prevent a Defender representative from taking on the increased involvement we propose.

Ethical Considerations. I taught legal ethics for seven years at the University of Arizona College of Law and am confident the ethical rules governing criminal defense work allow us to serve in this role. The *Federal Public Defender Employees' Code of Conduct* permits Defenders to engage in activities other than representing clients, including those concerning the legal system and administration of justice.[7] Just as these rules permit Defenders to participate as members of the Advisory Committees on Evidence and Criminal Rules, these rules also permit a Defender representative to serve on the Commission—an agency devoted to improving sentencing policy and the administration of justice. The American Bar Association's Model Rules of Professional Conduct and Criminal Justice Standards for the Defense Function also sanction this work.[8]

Indeed, just this month, the American Bar Association adopted the *ABA Ten Principles of a Public Defense Delivery System*, including:

> **PRINCIPLE 10: Public Defense as Legal System Partners**
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> Public Defense Providers should be included as equal participants in the legal system. Public Defense Providers are in a unique position to identify and challenge unlawful or harmful conditions adversely impacting their

[7] The Code states: "A defender employee may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice." Admin. Off. of the U.S. Courts, Guide to Judiciary Policy, Vol. 2A, Ch. 4, § 420, Canon 4(B) (1993).

[8] *See* Model Rules of Pro. Conduct r. 6.4 (Am. Bar. Ass'n 1983) ("A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer."); Crim. Just. Standards for the Defense Function, Standard 4-1.2(e) (Am. Bar Ass'n 2017) ("Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, counsel should stimulate and support efforts for remedial action.").

> clients. Legislative or organizational changes or other legal system reforms should not be considered without soliciting input from representatives of the defense function and evaluating the impact of such changes on Public Defense Providers and their clients. . . . .[9]

Defenders' existing work with the Commission has long required us to balance our interest in policy-level reform with sometimes-conflicting individual client interests. At times we have taken policy positions generally reflecting the Defender community's collective views yet may be contrary to some clients' interests.

Consider, for instance, the last amendment cycle. The Commission proposed to increase the base offense level (BOL) for sexual abuse offenses committed by law enforcement and correctional personnel in custodial settings.[10] In my witness statement, I acknowledged Defenders' "unique position" "in responding to this horrific issue" because we may represent both the people who have been (or might be) victimized while in custody and those people accused of victimizing them.[11] I urged systemic institutional reform, explaining why an 8-level BOL increase would not solve this problem.[12]

Any voting Commissioner who continues to represent clients charged with federal crimes during their tenure on the Commission must balance these competing interests at times. Similarly, DOJ's *ex officio* member sets forth the collective views of the Department even while an individual U.S. Attorney's Office would benefit from a different position.

Confidentiality. The Defender representative would follow the confidentiality rules applying to *ex officio* Commissioners when working both with the Commission and the greater Defender community to improve federal sentencing law and policy. From attorney-client confidentiality to court

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[9] Ten Principles of a Public Defense Delivery System, Principle 10 (Am. Bar Ass'n 2023).

[10] *See* USSC, 2023 Proposed Amendments (2023).

[11] Statement of Heather E. Williams Before the U.S. Sent'g Comm'n, Washington, D.C., at 1 (Feb. 24, 2023).

[12] *See id.* at 7–14.

protective orders, Defenders regularly keep confidences in our roles as advocates and officers of the court. Our work with the Commission would be no different.

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We appreciate the Commission's interest in possible greater Defender participation in the Commission's work and thank the Commission for considering our proposal. As always, Defenders look forward to providing more meaningful input in the Commission's work this and each year.

Very truly yours,



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

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
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