

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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

Chair: Michael Caruso

Phone: 305.533.4200

June 14, 2018

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Priorities for 2018-2019 Amendment Cycle

Dear Judge Pryor:

With this letter Defenders identify issues with the guidelines, small and large, that we believe merit the Commission's consideration as it sets priorities for the coming amendment cycle.¹

We appreciate the Commission's recent work in a variety of areas, including last year's consideration of alternatives to incarceration and effort to address issues with acceptance of responsibility. As Commissioners and Staff know, the Commission's responsibilities are large, and its actions directly affect lives, including the lives of our clients. In setting priorities for the next year, we specifically urge the Commission to be wary of increasing recommended terms of imprisonment, and to keep in mind its obligation to consider the impact of possible changes on the federal prison population.² Despite declining in recent years, the Bureau of Prisons (BOP) "projects that the inmate population will increase by about 2 percent in FY 2018 and by about 1 percent in FY 2019."³ And the current BOP

¹ This letter is submitted pursuant to 28 U.S.C. § 994(o).

² See 28 U.S.C. § 994(g).

³ U.S. Dep't Justice, *FY 2019 Performance Budget, Congressional Submission, Federal Prison System, Buildings and Facilities*, at 1, <https://www.justice.gov/jmd/page/file/1034401/download>.

population already “exceeds the rated capacity of its prisons by 14 to 24 percent on average, depending on the security level.”⁴

When reviewing what follows, Commissioners and Staff may recognize topics that Defenders have raised repeatedly over the years, and that the Commission has already studied. We repeat them here because we continue to believe they are important issues in ensuring just sentences. We hope our brief discussion of these issues not only signals our continued hope for change in these areas, but also sparks new thoughts or discussion that will eventually lead to important reform.

I. Refinement and Clarifications

There are three discrete issues under the criminal history rules that we urge the Commission to consider including in its priorities this year.

First, we ask the Commission to refine the single sentence rule (§4A1.2(a)(2)) to better address unwarranted disparity resulting from differences in state practices. For example, under Texas law, state district courts have original jurisdiction over felony offenses and, with only two narrow exceptions, they have no jurisdiction over misdemeanors.⁵ Misdemeanors fall under the original jurisdiction of the state county courts and the justices of the peace.⁶ As a consequence, felony and misdemeanor offenses in Texas arising from the same arrest for the same criminal conduct are usually charged in different charging instruments, assigned to different courts, and sentenced on different dates.⁷ This means that defendants with priors from Texas may be subject to additional criminal history points because the priors, for the same criminal conduct, do not qualify as a single sentence under the guidelines.

⁴ *Id.* at 2.

⁵ Tex. Crim. Proc. Code Ann. art. 4.05.

⁶ Tex. Crim. Proc. Code Ann. arts. 4.07, 4.11.

⁷ In one Defender case, for example, the defendant previously had been arrested and charged in separate courts in Texas for resisting arrest (misdemeanor) and assault on public servant (felony) for the same conduct. Due to the unique separate court system in Texas, these two offenses were not contained in the same charging instrument, nor sentenced on the same day, and thus did not qualify as a single sentence under the guidelines. He received 1 criminal history point for each conviction.

By contrast, in neighboring Oklahoma, state district courts have original jurisdiction over felonies and misdemeanors.⁸ Accordingly, felony and misdemeanor offenses in Oklahoma that stem from the same arrest are usually charged in the same charging instrument and assigned to one district court. With this unified approach, sentences are almost always imposed on the same day by the Oklahoma district court. Here, the single sentence rule works as the Commission intended, and such related cases are treated as one sentence.

Under the current rules of §4A1.2(a)(2), unwarranted disparity arises because similarly situated federal defendants face different criminal history scores simply because all fifty states do not process related cases the same way. Should the Commission set this as a priority, we would welcome the opportunity to work with the Commission on a practical and appropriate amendment to the guidelines to address this disparity.

Second, we urge the Commission to clarify the rule in §4A1.2(k)(2)(C) that for adult sentences of 13 months or less (including both the original sentence and any revocation), the date of the original sentence should be used to determine the relevant time period. We have observed in Commission seminars and elsewhere that the rule in §4A1.2(k)(2)(C) is either misunderstood or overlooked. The rule itself is simple and consistent with the guidelines' criminal history framework. The source of the confusion may well be the current structure and language of the provision. It comes at the end of a long subsection, and uses generic "any other case" language immediately after a fairly lengthy part (B) addressing the less common issue of sentences for offenses committed before age 18. Should the Commission pursue this priority, Defenders are eager to work with the Commission on re-drafting the provision.

Third, we recommend the Commission clarify the rule governing status points under §4A1.1(d). We have observed in Commission seminars and elsewhere that the current provision is sometimes misunderstood to mean that 2 status points are appropriate regardless of whether the sentence that created the status receives points under §4A1.1(a)-(c). Careful review of the commentary reveals the 2 points do not apply unless the sentence is "countable under §4A1.2,"⁹ but a more direct statement that the status must be tied to sentences that receive points under

⁸ Okla. Const. art. VII, §7.

⁹ §4A1.1, comment. (n.4).

4A1.1(a)-(c) could save hours of discussion and debate in numerous cases. As with the first two issues, should the Commission pursue this as a priority, Defenders would be happy to work with the Commission on specific language to address the confusion.

II. Additional Proposed Priorities

A. Relevant Conduct

1. Prohibit the use of acquitted conduct.

Defenders encourage the Commission to revisit the relevant conduct guideline under USSG §1B1.3 to prohibit the use of acquitted conduct at sentencing. The Commission has been aware for many years of concerns with the guidelines' reliance on acquitted conduct. In 1996, the Commission announced as a priority for the 1996-97 amendment cycle "developing options to limit the use of acquitted conduct at sentencing," and for future amendment cycles, "[s]ubstantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence."¹⁰ Commission staff began to "investigate ways of incorporating state practices; e.g., using an offense of conviction system for base sentence determination; providing a limited enhancement for conduct beyond the offense of conviction; or limiting acquitted conduct to within the guideline range."¹¹ Proposals to abolish the use of acquitted conduct were published for comment at various times.¹² But the Commission has declined to act. We urge the Commission to address the issue now.

As the Commission knows, a sizable majority of judges believe that it is not appropriate to consider acquitted conduct at sentencing (84%).¹³ Some judges have

¹⁰ See 61 Fed. Reg. 34,465 (July 2, 1996).

¹¹ See Phyllis J. Newton, Staff Director, U.S. Sent'g Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent'g Rep. 68, 1995 WL 843512 *3 (Sept./Oct. 1995); see also USSC, *Guidelines Simplification Draft Paper, Relevant Conduct and Real Offense Sentencing* (Nov. 1996).

¹² See 62 Fed. Reg. 152,161 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992).

¹³ See USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 5 (2010). Supreme Court justices as well as district and appellate court judges have issued sharply worded opinions criticizing the use of acquitted conduct. See, e.g., *Jones v. United States*, __ U.S. __, 135 S. Ct. 8 (2014) (Scalia, J., joined by Thomas, J. & Ginsburg, J., dissenting from denial of cert.) ("This has gone on long enough . . . [w]e

called for the Commission to act on this issue.¹⁴ Their opposition is well-placed because the relevant conduct rules work great mischief at sentencing: they contribute to unwarranted disparity, undue severity, and disrespect for the law.¹⁵

should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment.”); *United States v. Lasley*, 832 F.3d 910, 920-22 (8th Cir. 2016) (Bright, J., dissenting) (“the use of acquitted conduct to enhance a defendant’s sentence should be deemed unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment”); *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millet, J., concurring in denial of r’hrng en banc) (“allowing a judge to dramatically increase a defendant’s sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment’s jury-trial guarantee”); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *United States v. White*, 551 F.3d 381, 386-87 (6th Cir. 2006) (Merritt, J., dissenting) (“the use of acquitted conduct to punish is wrong as a matter of statutory and constitutional interpretation and violates both our common law heritage and common sense”); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (“I strongly believe . . . that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”); *United States v. Bertram*, 3:15-CR-14, 2018 WL 993880 *5 (E.D. Ky. Feb. 21, 2018) (Van Tatenhove, J.) (declining to consider acquitted conduct in the guidelines calculation because “when that intended loss is determined based on acquitted conduct, the sentencing calculation seemingly ignores the jury’s verdict”); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.) (“Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafkaesque result.”), *vacated by*, 271 Fed. Appx. 298 (4th Cir. 2008); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (Gertner, J.) (“To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic.”). *See also State v. Cote*, 530 A.2d 775, 784 (N.H. 1987) (it is “disingenuous at best to uphold the presumption of innocence . . . while at the same time punishing a defendant based upon charges in which that presumption has not been overcome”).

¹⁴ *See, e.g., Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of r’hrng en banc) (“Given the Supreme Court’s case law, it will likely take some combination of Congress and the Sentencing Commission to *systematically* change federal sentencing to preclude use of acquitted or uncharged conduct.”) (emphasis original); *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (“Congress or the Sentencing Commission certainly could conclude as a policy matter that sentencing courts may not rely on acquitted conduct.”).

¹⁵ The relevant conduct rules conflict with an essential provision of the Sentencing Reform Act, which directed the Commission to take into account “the circumstances under which the *offense was committed*,” the “nature and degree of the harm caused by the *offense*.” 28 U.S.C. § 994(c)(2), (3) (emphasis added). It was also to provide “certainty and fairness” and “avoid[] unwarranted sentencing disparities among defendants . . . who have been *found*

They create hidden disparities because of their complexity and inconsistent application among prosecutors, courts, and probation officers.¹⁶

The relevant conduct rules also deprive defendants of their Sixth Amendment right to a jury trial,¹⁷ and undermine the legitimacy of the presumption of innocence by

guilty of similar criminal conduct.” 28 U.S.C. § 991(b)(1)(B) (emphasis added). And they promote disrespect for the law. *See, e.g., Settles*, 530 F.3d at 923-924 (noting that the defendant’s sentiment (“I just feel as though, you know, that that’s not right. That I should get punished for something that the jury and my peers, the found me not guilty.”) was similar to that of “[m]any judges and commentators” who have “argued that using acquitted conduct to increase a defendant’s sentence undermines respect for the law and the jury system”); *United States v. Magallanez*, 408 F.3d 672, 683 (10th Cir. 2005) (defendant “might well be excused for thinking that there is something amiss” with using acquitted conduct to increase his sentence by 43 months); and *Ibanga*, 454 F. Supp. 2d at 539 (“most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they are acquitted”), *vacated and remanded*, 271 Fed. Appx. 298 (4th Cir. 2008).

¹⁶ *See* USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50, 87 (2004) (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement’s role in establishing it, and untrustworthy evidence); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent’g Rep. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants); Lucius T. Outlaw III, *Giving an Acquittal its Due: Why a Quartet of Sixth Amendment Cases Means the End of United States v. Watts and Acquitted Conduct Sentencing*, 5 U. Denv. Crim. L. Rev. 173, 194 (2015) (disparities are an “inescapable consequence of defendants who appear before judges who reject acquitted conduct sentencing and those who embrace it in varying degrees”). *See also United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned different offense levels based upon counting of relevant conduct).

¹⁷ Although appellate courts have generally upheld the use of acquitted conduct after *United States v. Booker*, 543 U.S. 220 (2005), serious questions remain about whether it violates the Sixth Amendment to sentence a defendant on the basis of such conduct. The Court in *United States v. Watts*, 519 U.S. 148 (1997), held only that the use of acquitted conduct did not violate the Double Jeopardy Clause. In *United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (en banc), six dissenting judges concluded that *Watts* did not govern the Sixth Amendment issue and “[b]ecause the sentence cannot be upheld as reasonable without accepting as true certain judge-found facts, the sentence represents an as applied violation of White’s Sixth Amendment rights.” (Merritt, J., dissenting). Supreme Court justices later questioned the propriety of continued inaction, commenting in *Jones*, 135 S.

permitting the use of acquitted conduct. In *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015), for example, the defendant was sent to prison for 11 *additional* years based on crimes for which a jury had acquitted him. The enhancement more than tripled the sentence to 16 years, “over 300% above the top of the Guidelines range for the crimes of which he was actually convicted.” *Bell*, 808 F.3d at 929 (Millet, J., concurring).¹⁸ Cross-references based upon acquitted or uncharged conduct provide a particularly egregious example of how the rules work an end-run around fundamental constitutional rights. Under USSG §2K2.1(c)(1)(B), a defendant convicted of nothing more than possessing a firearm after being convicted of a felony can be sentenced as a murderer even when he had a strong defense to a murder charge had he been charged and tried for that offense.¹⁹

For all of these reasons, we encourage the Commission this year to consider prohibiting the use of acquitted conduct as relevant conduct under the guidelines.

2. Heighten the mens rea requirement for jointly undertaken activity.

Defenders also encourage the Commission to revisit another aspect of relevant conduct it has considered more recently: the appropriate mens rea for jointly undertaken activity. In 2014, the Commission requested comment on whether the guidelines should require a higher state of mind than reasonable foreseeability

Ct. at 8, that “[t]his has gone on long enough . . . [w]e should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment.” Similarly, in *Lasley*, 832 F.3d at 920-22, the dissent argued that “the use of acquitted conduct to enhance a defendant’s sentence should be deemed unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment.” “Despite the fact that there is a consensus that use of acquitted conduct is questionable sentencing policy, and in tension with the purposes underlying the Sixth Amendment right to a jury trial, use of acquitted conduct has continued.” Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 45 (2016).

¹⁸ “[W]hile the panel understandably rows with the tide of past decisions allowing the use of acquitted conduct at sentencing, my reading of more recent Sixth Amendment precedent from the Supreme Court casts substantial doubt on the continuing validity of that categorical rule, at least when acquitted conduct causes a dramatic and otherwise substantively unreasonable increase in sentence.” *Bell*, 808 F.3d at 931 (Millet, J., concurring in denial of r’hrgr en banc).

¹⁹ See Statement of Alan DuBois Before the U.S. Sent’g Comm’n, Atlanta, Ga., at 24 (Feb. 10, 2009) (describing case in Eastern District of North Carolina where defendant would have had excellent argument for self-defense had he been tried for murder before a jury).

before a person's sentence may be based on jointly undertaken activity.²⁰ Defenders then and now support such a change.²¹ Ample reason exists for the Commission to consider this issue again now and heighten the mens rea requirement.

The Supreme Court held in *Elonis v. United States*,²² that a "reasonable person standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct—awareness of some wrong doing.'"²³ The Court confirmed that the "reasonable person" standard "reduces culpability" to "negligence."²⁴ Commentators have pointed out that applying a reasonable foreseeability standard in federal sentencing "effectively imposes a negligence standard for a co-conspirator's crime," which is inconsistent with our "intuitive sense of justice."²⁵ Yet the standard still applies to lengthen the sentences of criminal defendants.

The purposes of sentencing are not furthered by holding a defendant responsible for the acts of another merely because he was negligent in not understanding what the other person might do and the consequences of the other person's actions. Indeed, using a negligence standard to increase a person's term of imprisonment undercuts the purposes of just punishment, destroys proportionality, and undermines respect for the law. Accordingly, the Commission should heighten the mens rea required for relevant conduct.

B. Criminal History

Defenders appreciate the Commission's interest in and study of several issues related to the criminal history rules in recent years, and encourage the Commission

²⁰ 79 Fed. Reg. 31410 (June 2, 2014).

²¹ Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 7 (June 15, 2015); Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 2-5 (Mar. 18, 2015).

²² *Elonis v. United States*, 135 S. Ct. 2001 (2015).

²³ *Id.* at 2011.

²⁴ *Id.*

²⁵ Mark Noferi, *Towards Attention: A "New" Due Process Limit on Pinkerton Conspiracy Liability*, 33 Am. J. Crim. L. 91, n.4 at 100 (citing Paul Robinson, *Imputed Criminal Liability*, 93 Yale L. J. 609, 646 (1984)).

to continue its consideration of changes to the criminal history rules. Defenders remain deeply concerned about the role of the criminal history rules in creating unwarranted disparity under the guidelines. As Defenders have previously indicated, one source of unwarranted disparity is the failure of the criminal history rules to account for the variety of state court practices. Yet another source is the rules failure to account for the disparate treatment of people of color in connection with prior sentences.

Beginning as early as preschool, Black students are disproportionately subjected to suspensions and law enforcement contact.²⁶ This trend continues into adulthood. Recent studies show that Black individuals are more likely to be stopped, searched, and arrested by law enforcement and become entangled in the criminal justice system than other races.²⁷ Even after legalization or decriminalization in some states, Black people remain disproportionately arrested for marijuana offenses such as public consumption, a result of “the forces that contributed to the disparity in the first place, such as the over-policing of low-income neighborhoods, racial profiling, and other racially motivated police practices.”²⁸ This creates a climate where

²⁶ American Bar Association, *School-to-Prison Pipeline: Preliminary Report* 10, 16, 27-31 (2016).

²⁷ The Stanford Open Policing Project, *Findings* (2017), <https://openpolicing.stanford.edu/findings/>; see also Emma Pierson et al., *A Large Scale Analysis of Racial Disparities in Police Stops Across the United States* (2017), <https://5harad.com/papers/traffic-stops.pdf>. See also Benjamin Mueller, Robert Gebelopp & Sahil Chinoy, *Surest Way to Face Marijuana Charges in New York: Be Black or Hispanic*, The New York Times, May 13, 2018 (“Black and Hispanic people are the main targets of arrests even in mostly white neighborhoods. In the precinct covering the southern part of the Upper West Side, for example, white residents outnumber their black and Hispanic neighbors by six to one, yet seven out of every 10 people charged with marijuana possession in the last three years are black or Hispanic, state data show.”).

²⁸ Drug Policy Alliance, *From Prohibition to Progress: A Status Report on Marijuana Legalization*, at 30 (2018) (citing Keith Humphreys, *Pot Legalization Hasn’t Done Anything to Shrink the Racial Gap in Arrests*, The Washington Post (Mar. 21, 2016)), http://www.drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf (Also citing statistics from four states including Colorado, showing that post-legalization arrests rates for blacks were triple that of whites in 2014. In Washington, the rate is double that of other races. In Alaska—where blacks represent only 4% of the population—the marijuana arrest rate for blacks (17.7 per 100,000) is ten times greater than that of whites (1.8 per 100,000). And in Washington, D.C., one in every 970 black people were arrested for public consumption, while only one in every 10,331 white people were—a rate showing that blacks were 11 times more likely to be arrested for marijuana

minorities experience more interaction with law enforcement than non-minorities, starting at an early age. We ask the Commission to accept the challenge issued by the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota, for each sentencing commission to “examine the racial impact of its criminal history score and all score components.”²⁹ And “[i]f a particular component is found to have a strong disparate impact on nonwhite offenders, the commission should carefully evaluate the rationales for including that component to ensure that the degree of added enhancement is narrowly tailored to meet the chosen goals without unnecessary severity and disparate impact.”³⁰

1. Eliminate revocations from determinations of the sentence length and the relevant time period.

On a more specific level, Defenders renew their recommendation that the Commission simplify the criminal history rules by amending §4A1.2(k) to provide that revocations of probation, parole, supervised release, special parole, or mandatory release do not affect the length of sentence imposed nor affect the relevant time period for calculating criminal history points.

As addressed in more detail in prior Defender submissions, the current rule is unnecessarily complicated and can have a devastating and unjust impact on defendants in a number of different ways, including (1) rendering defendants “career offenders” on the basis of old convictions that would not otherwise have counted; (2) deeming defendants ineligible for safety valve relief; and (3) elevating the criminal history score based on very old convictions.³¹ Many good reasons

than a white person. Concluding that “[p]olice reform is required to end the racial disparities in marijuana enforcement.”). *See also* The Innocence Project, *Racial Disparities Evident in New York City Arrest Data for Marijuana Possession* (2018) (Of the 4,081 arrests for marijuana possession during the first three months of this year, 93% of those arrested were people of color—2,006 black, 1,621 latino, and only 287 white.), <https://www.innocenceproject.org/racial-disparities-in-nyc-arrest-data-marijuana-possession/>.

²⁹ Richard S. Frase et al., Robina Institute of Criminal Law & Criminal Justice, *Criminal History Enhancements Sourcebook* 116 (2015).

³⁰ *Id.*

³¹ Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable William H. Pryor, Acting Chair, U.S. Sentencing Comm’n, at 37-42 (Feb. 20, 2017) (*Defenders Feb. 2017 Letter*).

support excluding revocation sentences from the criminal history calculation, including that (1) revocations are not necessarily criminal in nature and are often for technical violations; (2) technical violations extend the period of supervision far beyond its original term, often for years, heightening a defendant's exposure to violations and rearrests and, in some cases, extending the applicable time period for the original conviction;³² (3) because the length of sentence imposed is used as a proxy for the seriousness of the offense, aggregating revocations with the original sentence artificially inflates the severity of a prior conviction; (4) when a revocation results from a new conviction, that conviction can be double counted to apply criminal history points both for the revocation and the new conviction; (5) counting revocation sentences in the criminal history score exacerbates unwarranted disparity because revocation practices and rates vary widely between jurisdictions; and (6) excluding revocation sentences may ameliorate the disproportionate impact of the criminal history rules on racial minorities.³³

2. Exclude sentences for offenses committed before age 18, or at least juvenile adjudications.

Defenders also encourage the Commission to again consider the treatment of prior offenses committed before 18, and particularly juvenile adjudications.³⁴

At minimum, the Commission should act to exclude juvenile adjudications from the criminal history rules. Many reasons support this change including that (1) young

³² Human Rights Watch, “*Set Up to Fail*” *The Impact of Offender-Funded Private Probation on the Poor* (2018), <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor> (“defendants without adequate resources [who need] to pay court fees, or who need more time to make payments, often must continue under supervision, subjecting them to additional fees, testing, and monitoring. Increased supervision, monitoring, and testing create more opportunities for a violation of probation . . . If an individual is using his or her limited income to pay probation supervision fees and court costs, they may have difficulty saving enough to also cover a required course, regular drug testing, or background checks. Some probationers, fearing the consequences of reporting to probation without enough money in hand, stop reporting entirely. As a result, probationers were not facing incarceration for failing to pay their fines and fees, but rather for ‘proxies’ for failure to pay, including not completing classes, submitting to drug tests and treatment, conducting background checks, or other conditions that impose” a financial burden.).

³³ *Defenders Feb. 2017 Letter*, at 37-42.

³⁴ Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable William H. Pryor, Acting Chair, U.S. Sentencing Comm’n, at 17-18 (July 31, 2017) (*Defenders July 2017 Letter*); *Defenders Feb. 2017 Letter*, at 20-27.

people are less culpable than adults; (2) juvenile adjudications are less reliable than adult convictions due to fewer procedural protections; (3) the length of a juvenile “sentence” is a poor proxy for the seriousness of the offense, and not comparable to the length of sentence imposed for an adult conviction; and (4) their inclusion exacerbates the disproportionate impact of the criminal justice system on racial minorities.³⁵

3. Recognize the relevance of time served.

Once again, Defenders encourage the Commission to consider amendments that would look to time served rather than sentence imposed when considering past criminal conduct and, at minimum, add an invited departure to help address the unwarranted disparity arising from different state court practices.³⁶

4. Narrow the career offender guideline.

a. Amend the definition of a controlled substance offense.

Defenders continue to encourage the Commission to narrow its definition of a controlled substance offense in the career offender guideline (§4B1.2(b)). The Commission could make this change now, consistent with the directive in 28 U.S.C. § 994(h). And doing so would reduce the severe consequences of the career offender guideline on the “drug trafficking only offenders” the Commission has recognized “should not categorically be subject to the significant increases in penalties required by the career offender directive.”³⁷ Specifically, Defenders recommend that the Commission (1) eliminate state drug offenses from the definition of controlled substance offense; or, at minimum, (2) align the definition of controlled substance offense with that of a “serious drug offense” under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(A).³⁸

³⁵ *Id.* More detail about each of these reasons is available in Defenders earlier submissions, cited above.

³⁶ *Defenders July 2017 Letter*, at 17-18; *Defenders Feb. 2017 Letter*, at 20-27.

³⁷ USSC, *Report to Congress: Career Offender Sentencing Enhancements* 3 (2016).

³⁸ Defenders have commented previously on this issue. *See Defenders July 2017 Letter*, at 4-6; Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 3-6 (June 15, 2015); and Letter from Marjorie Meyers, Chair, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 31-33 (July 23, 2012).

The Commission's decision to include low-level prior state-level drug-trafficking convictions has a significant adverse impact on minorities, particularly Black people.³⁹ In addition, it sweeps in state misdemeanors that involve small quantities of drugs for which a defendant may have served little or no incarceration. Because these offenses are considered less serious and do not carry with them the significant collateral consequences of a felony conviction, the state courts and litigants do not treat them with the same level of scrutiny as they would a felony. Yet under §4B1.2, these are treated the same as serious drug felonies, resulting in unwarranted uniformity among dissimilarly situated defendants.⁴⁰

The Commission could ameliorate these problems, and still comply with the directive at 28 U.S.C. § 994(h)(2)(B), by eliminating state drug offenses from the definition of controlled substance offense. Such a definition would account for disparity that results from varying state court laws and practices and would more appropriately ensure due process while reducing unnecessary protracted litigation. It also would mark an important step forward in addressing the racial disparities in the career offender guideline.

At minimum, the Commission could match the controlled substance offense definition to the definition of "serious drug felony" located in the ACCA, 18 U.S.C. § 924(e)(2)(A). Limiting the definition of "controlled substance offense" to those convictions punishable by "a maximum term of imprisonment of ten years or more" would comply with the mandate at § 994(h) and, importantly, filter out less serious state drug offenses that do not warrant the severe penalties recommended by the career offender guideline.

³⁹ See USSC, *Interactive Sourcebook FY 2016* (2017) (23.3% of all drug trafficking defendants were Black and 50.8% were Latino, while 22.9% were White—while 58.7% of career offenders were Black and 16.2% were Latino, while a proportionate 22.9% of career offenders were White); and USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 131, 133-34 (2004).

⁴⁰ USSC, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 356 (2011) (the Commission recommended that Congress consider incorporating into 21 U.S.C. § 802(44) "the particular state's classification of an offense as a "felony" or "misdemeanor" to better reflect the state's judgment concerning the seriousness of a prior offense, or by excluding simple possession offenses from the definition of "prior drug offense.").

b. Permit application of mitigating role adjustments to individuals sentenced as career offenders.

The Commission should also consider permitting persons sentenced under the career offender guideline to receive a reduction in offense level if an adjustment under §3B1.2 (Mitigating Role) applies. In this way, the Commission can promote an important purpose of sentencing by “avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.” 28 U.S.C. § 991(b)(1)(B).

C. Alternatives to Incarceration

Defenders appreciate the Commission’s recent consideration of alternatives to incarceration and the amendment for “nonviolent first offenders.” We urge the Commission to keep this issue on the table, and work toward doing even more to encourage alternatives to incarceration. As noted above, and as the Commission is well aware, the Commission faces the challenging statutorily-directed task of formulating guidelines “to minimize the likelihood that the Federal prison population will exceed its capacity of the federal prisons.”⁴¹ While the prison population has declined in the past few years, the BOP remains overcrowded.⁴² And grave concerns exist about planned staff reductions as the BOP also estimates an increase in the prison population in FYs 2018 and 2019.⁴³ Encouraging alternatives to incarceration could prove critical under these circumstances.

One step in the right direction on alternatives would be to include within the definition of “first offender,” for purposes of the new commentary on “nonviolent

⁴¹ 28 U.S.C. § 994(g).

⁴² See U.S. Dep’t Justice, *FY 2019 Performance Budget*, *supra* note 3 at 2.

⁴³ See *id.*, at 1; Jessie Bur, *Federal Prison Workers Decrease, Dangers Increase in Trump’s Budget*, Federal Times (Feb. 15, 2018), <https://www.federaltimes.com/management/budget/2018/02/15/federal-prison-workers-decrease-dangers-increase-in-trumps-budget/>. See also Office of the Inspector General, U.S. Dep’t of Justice *FY2019 Performance Budget, Congressional Justification* 7 (2018) (DOJ “continues to face challenges within the federal prison system,” including “significant overcrowding in the federal prisons, which potentially poses a number of important safety and security issues.”), <https://www.justice.gov/file/1034121/download>.

first offenders,” those individuals whose prior judicial dispositions were for offenses committed before the age of 18, or at least juvenile adjudications. Due to the racial disparity in the juvenile justice system, as discussed in prior defender submissions,⁴⁴ including individuals with only juvenile adjudications in the definition of “first offenders” could help ameliorate racial disparity in the federal system⁴⁵ as well as the size of the prison population.

D. Drug Guidelines

Defenders appreciate the Commission’s decision to provide invited departures based on potency and concentration for synthetic cathinones and synthetic cannabinoids. The remaining drug guidelines would benefit from similar provisions.

As the Commission is aware, Defenders have long advocated a comprehensive, start from scratch, study of the drug guidelines.⁴⁶ Defenders and many others have questioned the excessive emphasis the drug guidelines place on drug quantity, and whether linking the guidelines to mandatory minimums through the Drug Quantity Table advances any purposes of sentencing. We also have urged major revision of the guidelines to reflect the relative harm of different drugs, as measured by direct harms, and accounting for dosage weight and potency.⁴⁷ Unless and until the Commission pursues such a study of the drug guidelines, Defenders encourage the Commission to adopt departure provisions for all substances that would account for potency and concentration.

⁴⁴ *Defenders July 2017 Letter*, at 17-18; *Defenders Feb. 2017 Letter*, at 20-27.

⁴⁵ USSC, *Alternative Sentencing In the Federal Criminal Justice System* 15-16 (2015) (“Black and Hispanic offenders consistently were sentenced to alternatives less often than White offenders.”).

⁴⁶ Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable William H. Pryor, Acting Chair, U.S. Sentencing Comm’n, at 1-15 (Mar. 10, 2017) (*Defenders Mar. 2017 Letter*); Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable William H. Pryor, Acting Chair, U.S. Sentencing Comm’n, at 1-6 (Aug. 7, 2017).

⁴⁷ *Defenders Mar. 2017 Letter*, at 2.

Honorable William H. Pryor, Jr.

June 14, 2018

Page 16

III. Conclusion

Defenders appreciate the Commission's consideration of these issues we believe merit the Commission's attention. We look forward to continuing to work with the Commission this year.

Very truly yours,

/s/ Michael Caruso

Michael Caruso

Federal Public Defender

Chair, Federal Defender Sentencing
Guidelines Committee

cc: Rachel E. Barkow, Commissioner
Hon. Charles R. Breyer, Commissioner
Hon. Danny C. Reeves, Commissioner
Zachary Bolitho, Commissioner *Ex Officio*
J. Patricia Wilson Smoot, Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel