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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.

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[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

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[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)

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[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 offenses[16] 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

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[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]

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[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

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[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,

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[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

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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

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[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.

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[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 choice[51] 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

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[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

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[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

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[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,

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[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]

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[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

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[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.

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[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
Michael Caruso
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

Jayme L. Feldman
Leslie E. Scott
Sentencing Resource Counsel
Federal Public and Community Defenders

Enclosures

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

[85] *See, e.g.*, *Defender Sept. 14, 2022 Letter*, at 27–28.

APPENDIX

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

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Chair: Michael Caruso Phone: 305.533.4200

September 14, 2022

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Priorities for the 2022-2023 Amendment Cycle

Dear Judge Reeves:

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

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

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

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

I. Compassionate Release

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

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

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

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[3] *See* 28 U.S.C. § 991(b)(1)(B).

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

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

[6] 18 U.S.C. § 3582(c)(1)(A).

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

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

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

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

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

[10] *Id.* at 55.

[11] *McGee*, 992 F.3d at 1045.

[12] S. Rep. No. 98-225 at 55.

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

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

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

II. Prohibit Acquitted Conduct

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

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[14] 28 U.S.C. § 991(b)(1)(C).

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

[16] USSG §1B1.13 cmt. n.4.

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

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

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

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

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

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

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

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

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

[23] *Canania*, 532 F.3d at 776.

[24] *Bell*, 808 F.3d at 928.

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

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

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

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

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

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

[28] *Ibanga*, 454 F. Supp. 2d at 536.

[29] *Faust*, 456 F.3d at 1353.

[30] *Canania*, 532 F.3d at 777.

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

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

Avoid unwarranted disparities. Acquitted conduct sentencing also conflicts with the Commission's mission to establish policies that "avoid unwarranted sentencing disparities."[36]

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

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

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

[33] *See* 28 U.S.C. § 991(b)(1)(B).

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

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

[36] 28 U.S.C. §§ 991(b)(1)(B), 994(f).

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

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

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

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

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

[38] 18 U.S.C. § 3553(a)(6).

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

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

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

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

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

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

III. Mens Rea Reform

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

A. Ensure guideline increases require evidence of intent.

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

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

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

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

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

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

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

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

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

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

[49] *See id.* (collecting cases).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Reform the Drug Trafficking Guidelines

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

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

[60] *See* Letter from Marjorie Meyers, Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 2-5 (Mar. 18, 2015).

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

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

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

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

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

A. Amend §2D1.1.

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

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

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

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[65] 28 U.S.C. §§ 994(f), (g).

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

[67] *See Kimbrough v. United States*, 552 U.S. 85, 96 (2007) ("The Commission did not use [an] empirical approach in developing the Guidelines sentences for drug-trafficking offenses.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[78] *See* 28 U.S.C. § 994(a).

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

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

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

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

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[80] USSG §2D1.1 cmt. n.8(A).

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

[82] *See, e.g.*, Letter from Marjorie Meyers, Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. William H. Pryor, Jr., Acting Chair, U.S. Sent'g Comm'n, at 12-15 (Mar. 10, 2017) ("Defender Mar. 10, 2017 Letter"); Letter from Marjorie Meyers, Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 7-13 (July 15, 2013) ("Defender July 25, 2013 Letter"); Letter from Marjorie Meyers, Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 7-15 (May 17, 2013).

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

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

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

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

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

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

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

[87] *See Sepling*, 944 F.3d at 145.

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

[89] *See, e.g.*, Defender Mar. 10, 2017 Letter, at 1-15; Letter from Marjorie Meyers, Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 2-5 (May 12, 2014); *see also* Letter from Michael Caruso, Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. William H. Pryor, Jr., Acting Chair, U.S. Sent'g Comm'n, at 15 (June 14, 2018) ("Defender June 14, 2018 Letter").

reflect the "advancement in knowledge of human behavior" as it relates to drug trafficking offenses.[90]

B. Revise §4B1.2's definition of "controlled substance offense."

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

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

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

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[90] 28 U.S.C. § 991(b)(1)(C).

[91] *See* USSG §4B1.1 cmt., backg'd.

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

[93] USSC, *Fiscal Year 2021 Quick Facts on Career Offenders* 1 (2022), https://bit.ly/3AKpBnY ("CO Quick Facts").

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

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

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

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

V. Deemphasize Criminal History

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

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

[96] USSC, *Report to Congress: Career Offender Sentencing Enhancements* 7-8 (2016), https://bit.ly/3AGjS2A ("CO Report").

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

[98] CO Report, at 6.

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

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

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

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

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

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

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

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

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

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

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

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

[106] *See, e.g.*, Richard A. Mendel, *Diversion: A Hidden Key to Combating Racial and Ethnic Disparities in Juvenile Justice* 1-2, The Sentencing Project (2022), https://bit.ly/3ew5Rx4 (reporting that youths of color are more likely to be arrested and less likely to be diverted than white peers); U.S. Dep't of Justice, *OJJDP Statistical Briefing Book* (revised June 2022), https://bit.ly/3cYqO35 (reporting Black juveniles were arrested more than twice as often as white peers in 2020); Lindsey E. Smith et al., *Reimagining Restitution: New Approaches to Support Youth and Communities* 16-17, Juvenile Law Center (2022), https://bit.ly/3x3t0gC (discussing racial disparities at various stages in juvenile justice

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

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

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

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

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

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

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

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

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

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

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

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

[112] *Id.* at 30.

[113] *See* USSG §4A1.2 cmt. n.11.

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

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

[116] 81 Fed. Reg. 92003, at 92012.

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

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

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

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[117] USSC, *Revisiting Status Points* 2 (2022), https://bit.ly/3RXl3lf ("Revisiting Status Points").

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

[119] *Id.* at 3.

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

[121] Defender July 31, 2017 Letter, at 19.

[122] *See* Revisiting Status Points, at 18.

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

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

VI. Alternatives to Incarceration and "First Offenders"

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

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

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

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

[124] CO Quick Facts, at 1.

[125] *See supra* notes 92, 94, & 95.

[126] S. Rep. No. 98-225, at 50, 59.

[127] 18 U.S.C. § 3553(a)(3).

[128] 28 U.S.C. §994(j).

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

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

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

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

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

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

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

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

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

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

VII. Support a Federal Defender Ex Officio

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

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

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

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

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

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

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

Federal Defenders bring a "distinct and essential perspective"[140] to sentencing policy. Along with CJA counsel, Defenders represent the vast majority of persons charged with federal crimes. Among our ranks are lawyers who have devoted their entire professional careers to indigent defense work and possess the kind of experience and judgment that can only be acquired through continuous day-to-day interaction with all players in the criminal justice system—judges, probation officers, prosecutors, law enforcement officials, correctional administrators, community treatment providers, and other stakeholders.

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

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

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

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

VIII. Conclusion

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

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

cc: Hon. Luis Felipe Restrepo, Vice Chair
Laura E. Mate, Vice Chair
Claire Murray, Vice Chair
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February 19, 2019

Honorable Charles R. Breyer
Honorable Danny C. Reeves
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Re: Public Comment on Proposed 2019 Amendments

Dear Judge Breyer and Judge Reeves:

The Federal Public and Community Defenders are pleased to comment on the proposed 2019 Amendments. We appreciate the Commission's consideration of our views on the important issues presented this year.

I. Proposed Amendment: Career Offender

The Commission has a critical role to play in ensuring fairness at sentencing. In light of this, Defenders were pleased when, not that long ago, the Commission called on Congress to make the career offender directive more equitable.[1] Defenders were encouraged by the Commission's recommendation to exclude defendants with only drug-related convictions.[2] Unfortunately, the Commission's current proposal diverges from this path. The proposed amendment fails to heed the recommendations contained in the Career Offender Report and the data underlying them. Instead of reserving the career offender guideline for the most serious repeat offenders, the Commission's proposal would expand this already over-inclusive

[1] *See* USSC, *Report to the Congress: Career Offender Sentencing Enhancements* (2016) ("*Career Offender Report*").

[2] *See id*. at 43-44.

penalty. Defenders urge the Commission to stay the course it charted a few years ago and not promulgate any part of the proposed amendment.

The career offender guideline (§4B1.1) is among the most problematic in the federal system. In FY 2017, just 21.7% of individuals deemed to be career offenders were sentenced within the guideline range, with nearly all the rest sentenced below the range.[3] Despite this high below-range rate, sentences are long (in recent years averaging over 12 years), and individuals classified by the guidelines as career offenders account for over 11% of the federal prison population.[4] Moreover, the career offender guideline has a severe adverse impact on black defendants. In FY 2017, over 60% of individuals classified as career offenders were black—nearly three times their share of the overall federal defendant population.[5] Because, as discussed below, the career offender guideline sweeps in far more defendants than necessary to protect the public or advance any other purpose of sentencing, this adverse impact is rightly considered a form of racial discrimination.[6] Indeed, as

[3] USSC, Individual Datafiles FY 2017.

[4] *See* USSC, *Career Offender Report*, at 2.

[5] USSC, Individual Datafiles FY 2017. Among all FY 2017 individuals for whom the Commission received complete information, 21.6% were black, while 61.6% of those deemed career offenders were black.

[6] For a discussion of racial disparity research methods and of structural rules that are properly viewed as a form of racial discrimination, see Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 JUST. Q. 231-261 (2013). Incapacitation of especially dangerous offenders is generally recognized as the justification for recidivist enhancements such as the career offender guideline and other "three strikes" laws. The Commission has occasionally suggested in passing that the guideline might be justified on some other ground. *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004) ("*Measuring Recidivism*") ("In sum, it appears that assigning offenders to criminal history category VI, under the career criminal or armed career criminal guidelines, is for reasons other than their recidivism risk."). But no other justification has been offered by Congress or the Commission, and none seem available. As discussed in previous Defender comment, longer incarceration of defendants does not serve deterrence or rehabilitation. Nor are there grounds to believe repeat drug or violent offenders are somehow more culpable than other repeat offenders. *See* Rhys Hester, *et al.*, *Prior Record Enhancements at Sentencing: Unsettled Justifications & Unsettling Consequences*, 47 CRIME & JUST. 209, 220-31 (2018). Of the various rationales that have been proposed for treating repeat offenders more severely, none would single out repeat

noted fifteen years ago, next to the now-discredited 100-to-1 quantity ratio between powder and crack cocaine, the career offender guideline is one of the greatest sources of racial disparity in federal sentencing.[7]

Commission research over several decades has made clear that the offenses singled out by the career offender guideline—both drug-related and violent—do a poor job of identifying defendants at the greatest risk of recidivism and actually make the Criminal History Category (CHC) a worse predictor of recidivism.[8] Defendants classified as career offenders are automatically placed in CHC VI. But defendants in CHC IV, V, and VI, based on point calculations under §4A1.2, all have higher rates of recidivism than do persons classified as career offenders and armed career criminals taken as a whole.[9] While the over-prediction of recidivism is worst for defendants qualifying as career offenders or armed career criminals based on drug offenses, the Commission's latest report shows that the over-prediction is true for those with violent offenses as well.[10]

The Commission's proposal to expand the scope of the career offender guideline is inconsistent with decades of evidence and its own previous recommendation to Congress.[11] We urge the Commission to turn its attention to its earlier

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drug or violent offenders for uniquely enhanced punishment. This means the current rule is both discriminatory and arbitrary.

[7] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 131-34 (2004) ("*Fifteen Year Review*").

[8] *See id*. at 134; USSC, *Measuring Recidivism*, at 9; USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19, figs. 7A & 7B (2016) ("*Recidivism Report*"); USSC, *Recidivism Among Federal Violent Offenders* 14, fig. 2.9 (2019) ("*Recidivism: Violent Offenses*"); *id*. at 36, fig. 4.7.

[9] *See* USSC, *Recidivism Report*, at 19, figs. 7A & 7B (2016); USSC, *Recidivism: Violent Offenses*, at 14, fig. 2.9 (2019); *id.* at 36, fig. 4.7.

[10] USSC, *Recidivism: Violent Offenses*, at 14, fig. 2.9.

[11] *See* USSC, *Career Offender Report*, at 44.

recommendation to narrow the scope of the guideline,[12] and thus reduce racial disparity and increase fairness in federal sentencing.

A. Part A: Categorical Approach

Next year marks the thirtieth anniversary of *Taylor v. United States*,[13] in which the Supreme Court interpreted the Armed Career Criminal Act (ACCA)[14] to require the categorical approach. Since then, courts have used the categorical approach as the analytical framework to determine whether an individual is subject to enhanced penalties under recidivist enhancements such as the ACCA and the career offender guideline.[15] And Congress, in the recently enacted First Step Act, once again identified certain categories of convictions, not underlying facts, as triggers for recidivist enhancements.[16]

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[12] *See id.* at 44 (recommending that Congress amend its directive to the Commission to exclude defendants with only drug convictions).

[13] 495 U.S. 575 (1990).

[14] 18 U.S.C. § 924(e).

[15] *See*, *e.g., Taylor*, 495 U.S. at 602 (interpreting the ACCA to require the categorical approach); *Walker v. United States,* 595 F.3d 441, 443, n.1 (2d Cir. 2010) ("[W]e apply the same categorical approach irrespective of whether the enhancement is pursuant to the ACCA or the Guidelines."); *United States v. Jonas*, 689 F.3d 83, 86 (1st Cir. 2012); *United States v. Wilson*, 880 F.3d 80, 83-84 (3d Cir. 2018); *United States v. Covington*, 880 F.3d 129, 132 (4th Cir. 2018); *United States v. Johnson*, 880 F.3d 226, 234 (5th Cir. 2018); *United States v. Harris*, 853 F.3d 318, 320 (6th Cir. 2017); *United States v. Mancillas*, 880 F.3d, 297, 303 (7th Cir. 2018); *United States v. Harper*, 869 F.3d 624, 625 (8th Cir. 2017); *United States v. Werle*, 877 F.3d 879, 881 (9th Cir. 2017); *United States v. Kendall*, 876 F.3d 1264, 1267-68 (10th Cir. 2017); *United States v. Lipsey*, 40 F.3d 1200, 1201 (11th Cir. 1994); *United States v. Brown*, 892 F.3d 385, 402 (D.C. Cir. 2018).

[16] First Step Act of 2018, Pub. L. No. 115-391, §§ 401-02, 132 Stat. 5194 (2018) (referring to "serious violent felony," "serious drug felony," and "violent offense"). The categorical approach is used for other recidivist and prior-record enhancement statutes as well. *See*, *e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567-68 (2017) (applying categorical approach to 8 U.S.C. § 1101(a)(43)(A) as incorporated in 8 U.S.C. § 1227(a)(2)(A)(iii)); *Mellouli v. Lynch,* 135 S. Ct. 1980, 1986-87 (2015) (applying categorical approach to 8 U.S.C. § 1227(a)(2)(B)(i)); *United States v. Castleman*, 572 U.S. 157, 168 (2014) (applying categorical approach to 18 U.S.C. § 922(g)(9)); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575-78, n.11 (2010) (applying the categorical approach to 8 U.S.C. § 1101(a)(43)(B) as incorporated in 8 U.S.C. § 1229b(a)(3)); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (applying categorical approach to 18 U.S.C. § 16 as incorporated in 8 U.S.C. § 1101(a)(43)(F) and 8

Against this backdrop, the Commission proposes amending the guidelines to provide that the categorical approach does not apply when determining whether a conviction is a "crime of violence" or a "controlled substance offense."[17] Instead, the Commission proposes a "Conduct-Based Inquiry," directing courts to consider "conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such elements."[18] The Commission wisely has not proposed considering *all* ancient, unreliable allegations of conduct, as the Department of Justice requested.[19] The Commission's proposal, however, directing consideration of unproven allegations in documents such as complaints, assertions in plea agreements that defendants had no incentive to contest, and any "comparable" records, would still significantly undermine the fairness and consistency of the well-established categorical approach. Defenders oppose this proposal.

Defenders' opposition to the Commission's proposal is not made lightly. We recognize that some courts and stakeholders have lodged complaints about the categorical approach. We believe, however, the Supreme Court got it right almost 30 years ago when it interpreted the ACCA to require the categorical approach and its central feature: "a focus on the elements, rather than the facts, of a crime."[20]

U.S.C. §1227(a)(2)(A)(iii)); *United States v. Beardsley*, 691 F.3d 252, 259 (2d Cir. 2012) (applying categorical approach to 18 U.S.C. § 2252A(b)(1)); *United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007) (same); *United States v. Leaverton*, 895 F.3d 1251, 1253-54 (10th Cir. 2018) (applying categorical approach to 18 U.S.C §3559(c)); *United States v. Berry*, 814 F.3d 192, 195-97 (4th Cir. 2016) (applying categorical approach to 34 U.S.C. § 20911(4)(A)).

[17] 83 Fed. Reg. 65400, 65401 (Dec. 20, 2018).

[18] *Id*.

[19] Letter from David Rybicki, Commissioner, *ex officio*, Dep't of Justice, U.S. Sentencing Comm'n, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 12 (Aug. 10, 2018); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 26-28 (Dec. 13, 2018).

[20] *Descamps v. United States*, 570 U.S. 254, 263 (2013).

Abandoning the categorical approach not only "threaten[s] to undo all its benefits,"[21] but also carries serious costs.

Below we begin with an explanation of why the categorical approach is the best available rule. We then discuss some of the many costs of the Commission's proposal. Finally, we describe why, in the end, even if the Commission wanted to abandon the categorical approach, doing so is inconsistent with Congress's directive in 28 U.S.C. § 994(h), and would exceed the Commission's authority.

1. The Case for the Categorical Approach

The Supreme Court has repeatedly articulated three driving reasons for the formal categorical approach. "First, it comports with ACCA's text and history. Second, it avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries. And third, it averts 'the practical difficulties and potential unfairness of a factual approach.'"[22] These three reasons first identified in *Taylor* when interpreting the ACCA are no less true today than they were in 1990, and apply with equal force to the career offender guideline.

a. The Text: Congress Says What It Means

The Supreme Court in *Taylor* recognized that Congress enacted enhanced penalties for "'a person . . . who has three previous *convictions*' for—not a person who has committed—three previous violent felonies or drug offenses."[23] The word Congress chose—"conviction"—shows, "as *Taylor* explained, that 'Congress intended the

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[21] *Id*. at 267.

[22] *Id*. at 267 (quoting *Taylor*, 495 U.S. at 601); *see also Mathis v. United States*, 136 S. Ct. 2243, 2252-53 (2016).

[23] *Taylor*, 495 U.S. at 600 (quoting 18 U.S.C. § 924(e)(1)) (emphasis added). Title 18 U.S.C. § 924(e)(1) states in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, not withstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.'"[24] The *Taylor* Court declined to interpret the ACCA to permit courts to look to the particular facts underlying a defendant's prior offense because that approach could not be reconciled with the text.[25]

Congress made the same choice when directing the Commission, in 28 U.S.C. § 994(h), to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for *categories* of defendants in which the defendant . . . has been *convicted*" of a felony and "has previously been *convicted* of two or more prior felonies" where those felonies are a "crime of violence" or a drug offense "described" in specified statutes.[26] With nearly identical language, Congress indicated the critical inquiry in both provisions is "about whether 'the defendant had been convicted of crimes falling within certain categories,' and not about what the defendant had actually done."[27]

Section 994(h) was enacted in the same Public Law as the original version of the ACCA.[28] The ACCA was subsequently amended in 1986, but Congress did not alter its choice to trigger the enhanced penalty only with categories of convictions.[29]

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[24] *Descamps*, 570 U.S. at 267 (quoting *Taylor*, 495 U.S. at 601).

[25] *Taylor*, 495 U.S. at 600-01. The Supreme Court has made clear that the categorical approach applies to both the enumerated offense clause, *see Taylor*, 495 U.S. at 602, and the force clause. *See Leocal v. Ashcroft*, 543 U.S. at 7 ("the statute directs our focus to the 'offense' of conviction. . . . Th[e] [force clause] language requires us to look at the elements and the nature of the offense of conviction, rather to the particular facts relating to petitioner's crime.").

[26] 28 U.S.C. § 994(h)(1)-(2) (emphases added). Congress imposed the categorical approach even more explicitly in § 994(h), requiring a guideline that applies to "categories" of defendants with a particular kind and number of "convict[ions]." *Id.*

[27] *Mathis*, 136 S. Ct. at 2246 (quoting *Taylor*, 495 U.S. at 600).

[28] *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 1837 (1984) (§ 994(h) directive); Armed Career Criminal Act of 1984, Pub. L. No. 98-473, §§ 1801-03, 98 Stat. 1837 (1984) (Armed Career Criminal Act, repealed and recodified in 1986 by Pub. L. No. 99-308, § 104, 100 Stat. 449 (1986)).

[29] *See* Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207 (1986).

Nearly 30 years have elapsed "without any action by Congress to modify the statute[s] as subject to [the Supreme Court's] understanding" that they require the categorical approach.[30] This passage of "time has enhanced even the usual precedential force" of *Taylor*'s interpretation.[31]

b. The Sixth Amendment: Conviction not Conduct

The Supreme Court also adheres to the categorical approach because a conduct-based approach would run afoul of the Sixth Amendment.[32] Sixth Amendment concerns were briefly mentioned in *Taylor*,[33] which predated both *Apprendi v. New Jersey*[34] and *Alleyne v. United States.*[35] After *Taylor*, however, the Court confirmed that a primary benefit of the categorical approach is that it avoids the Sixth Amendment concerns that would attend a conduct-based inquiry.[36] As the Court explained, a sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of."[37]

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[30] *Shepard v. United States*, 544 U.S. 13, 23 (2005).

[31] *Id*.

[32] *See*, *e.g.*, *Mathis*, 136 S. Ct. at 2252.

[33] *Taylor*, 495 U.S. at 601 ("If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?").

[34] 530 U.S. 466 (2000) (holding that, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element that must be submitted to the jury and proven beyond a reasonable doubt).

[35] 570 U.S. 99 (2013) (holding that the same constitutional protections that apply to facts that raise the statutory maximum also apply to facts that increase the penalty for a crime beyond the prescribed statutory minimum).

[36] *See Descamps*, 570 U.S. at 269; *Mathis*, 136 S. Ct. at 2252; *Shepard*, 544 U.S. at 24-26 (plurality opinion).

[37] *Mathis*, 136 S. Ct. at 2252. *See also Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that the fact of a prior conviction may be found by a judge by a preponderance of the evidence, even if it increases the penalties for a defendant's crime).

The Commission's proposed amendment also implicates the Sixth Amendment in at least two ways. First, while the guidelines were rendered advisory to avoid Sixth Amendment problems,[38] career offender sentences imposed under the Commission's proposal would in many cases violate the Sixth Amendment. As three Supreme Court Justices explained not long ago: "We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge."[39]

The fact-findings the Commission proposes would significantly increase the guideline-recommended sentences of those deemed to be career offenders. This is borne out in Commission data. In FY 2017, over 1,500 individuals were deemed career offenders under the guidelines.[40] The average sentence was 144 months imprisonment.[41] Almost all (over 91%) of these individuals were placed in a higher guideline range due to application of the career offender guideline than they would have been without it.[42] For 48.4% of these defendants, the career offender guideline increased the average guideline minimum by 169% (from 70 to 188 months); for 30.8% of defendants, the career offender guideline increased the average guideline minimum by 124% (84 to 188 months); and for 12.6% of defendants, the career offender guideline increased the average guideline minimum approximately 25%.[43]

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[38] *United States v. Booker*, 543 U.S. 220, 245 (2005).

[39] *Jones v. United States*, 135 S. Ct. 8 (Mem) (2014) (Scalia, J., joined by Thomas, J. & Ginsburg, J., dissenting from denial of certiorari to address whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be substantively unreasonable) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)).

[40] USSC, *Career Offender Quick Facts* 1 (2018) (identifying 1,593 cases in which defendants were deemed to be career offenders).

[41] *Id*. at 1.

[42] *Id*. at 1-2.

[43] *Id*.

The average sentence imposed on career offenders was 2.2 times that imposed on non-career offenders convicted of the same offense types.[44]

Individuals subject to the career offender guideline based only on drug trafficking offenses may be particularly affected by these judge-found facts. The Commission found that "drug trafficking only career offenders are often impacted more substantially by the career offender guideline. "This impact is further increased by the fact that drug trafficking offenders are less likely to have otherwise fallen into Criminal History Category VI absent application of the career offender guidelines."[45] Because "drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders," and do not warrant the significant increases in penalties provided under the career offender guideline,[46] there is little question that, but for the findings that these individuals are career offenders, their sentences would be substantively unreasonable. And if those findings were based on prior *conduct* as the Commission proposes, their sentences would violate the Sixth Amendment.

Second, the Commission's proposal implicates the Sixth Amendment because the words "conviction" and "convicted" must be read consistently.[47] Congress used the word "conviction" in the ACCA, and the word "convicted" in § 944(h). This language "impos[es] the categorical approach."[48] Indeed, while these two provisions are in separate titles of the United States Code (albeit both recidivist provisions originally enacted at the same time in the same Public Law), the Supreme Court has

[44] USSC, Individual Datafiles FY 2017 (considering only career offenders and non-career offenders convicted of the eight major offense types found among career offenders (murder, sexual abuse, assault, robbery, arson, drug trafficking, firearms, racketeering/extortion), the average guideline minimum was 145 months for career offenders, and 67 months for non-career offenders).

[45] USSC, *Career Offender Report*, at 32.

[46] *Id*. at 27.

[47] *See generally* 28 U.S.C. § 994(a) (requiring that all guidelines be "consistent with all pertinent provisions of any Federal statute").

[48] *Shepard*, 544 U.S. at 19.

consistently interpreted the word "conviction" to require the categorical approach across similar sections of the United States Code.[49]

In other words, "conviction" must mean the same thing in both the ACCA and § 994(h). But the Commission's proposed interpretation—directing a conduct-based approach—is constitutionally untenable as to statutes like the ACCA. Accordingly, the only possible, consistent meaning to give the word requires the categorical approach.[50]

c. Practical Concerns: The Difficulties and Unfairness Are Daunting

Last but not least, the Supreme Court rightly endorsed the categorical approach because it avoids the serious impracticalities and unfairness that would accompany a conduct-based approach. The Court identified several impracticalities and inequities that make judicial fact-finding about the conduct underlying a prior conviction implausible. First, courts would rely on unreliable facts because "[s]tatements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary."[51] Second, a conduct-based approach would require mini-trials often regarding what happened long ago, and in other jurisdictions.[52] Third, and "still worse," a conduct-based approach would

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[49] *See*, *e.g.*, *Taylor* 495 U.S. at 600 (interpreting "conviction" and applying the categorical approach to 18 U.S.C. § 924(e)); *Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1567-67 (interpreting "conviction" and applying the categorical approach to 8 U.S.C. § 1227(a)(2)(A)(iii)); *Mellouli v. Lynch*, 135 S. Ct. at 1986-87 (interpreting "conviction" and applying categorical approach to 8 U.S.C. § 1227(a)(2)(B)(i)); *United States v. Castleman*, 572 U.S. at 168 (applying categorical approach to determine whether defendant had been "convicted" of a misdemeanor crime of domestic violence as required under 18 U.S.C. § 922(g)(9)); *United States v. Carachuri-Rosendo v. Holder*, 560 U.S. at 576 ("The text [of 8 U.S.C. § 1229b(a)(3)] thus indicates that we are to look to the conviction itself as our starting place, not to what might have or could have been charged.").

[50] *See Shepard*, 544 U.S. at 25-26 (plurality opinion) ("The rule of reading statutes to avoid serious risks of unconstitutionality therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury's verdict." (internal citations omitted)).

[51] *Mathis*, 136 S. Ct. at 2253.

[52] *See generally Taylor*, 495 U.S. at 601; *Descamps*, 570 U.S. at 270.

"deprive some defendants of the benefits of their negotiated plea deals."[53] It would look behind the deals and "allow a later sentencing court to rewrite the parties' bargain."[54]

Nothing has happened since *Taylor* to allay these practical concerns. If anything, developments in the criminal justice system have made them even more formidable. And they are just as significant for the guidelines as they are for the ACCA. The conduct-based approach the Commission proposes, though limited to documents identified in *Shepard*,[55] raises all the same concerns the Court determined would be avoided with the categorical approach.

Unreliable Facts. The Supreme Court recognized that records from a prior conviction will often include both elemental and non-elemental facts.[56] But "the only facts the court can be sure the jury so found are those constituting elements of the

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[53] *Descamps*, 570 U.S. at 271.

[54] *Id*.

[55] The Commission proposes that "the court shall look only to the statute of conviction and the following sources—

(i) The charging document.

(ii) The jury instructions, in a case tried to a jury; the judge's formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

(iii) Any explicit factual finding by the trial judge to which the defendant assented.

(iv) Any comparable judicial record of the information described in subparagraphs (i) through (iii)."

83 Fed. Reg., at 65409; *see also Shepard*, 544 U.S. at 16, 20-21, 26.

[56] *See generally Descamps*, 570 U.S. at 259 (rejecting district court's review of plea colloquy to consider prosecutor's proffer of defendant's conduct); *Mathis*, 136 S. Ct. at 2250 (rejecting district court's review of *Shepard* records to discern the means by which defendant committed the offense).

offense—as distinct from amplifying but legally extraneous circumstances."[57] This is because "[a]t trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court."[58] The Commission's proposed conduct-based approach, directing courts to look to means, would require courts to rely on these inherently unreliable, misleading, and often incorrect factual allegations to increase a defendant's sentence.

The Commission's proposal to limit its conduct-based approach to *Shepard* documents would not avoid the unfairness, impracticality, or undue burden the Supreme Court warned against because the documents would be used in an entirely different way than the Court approved and in every case (except where no such documents exist). The Court specifically limited the use of these documents to "a

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[57] *Descamps*, 570 U.S. at 269-70 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

[58] *Mathis*, 136 S. Ct. at 2253 (quoting *Descamps*, 570 U.S. at 270). While most defendants sustain prior convictions through pleas, *see infra* notes 82 & 83 and accompanying text, those who elect to go to trial are equally at risk to have unproven and uncorrected facts in their records. As first recognized in *Taylor*, the charging documents will not always accurately or completely reflect the theory or theories of the case presented to the jury. 495 U.S. at 601; *see also Mathis*, 136 S. Ct. at 2553. What if multiple theories were alleged in the indictment and presented at trial? *See* Fed. R. Crim. P. 7(c)(1). A later sentencing court has no way to know which of the theories ultimately informed the jury's verdict or even if all jurors agreed on one theory. *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (plurality opinion) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)) ("[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree on the bottom line. Plainly there is no requirement that the jury reach agreement on preliminary factual issues which underlie the verdict."). What if a charging document alleges non-elemental facts along with the elements essential to the crime? A subsequent guilty verdict does not prove that the jury adopted the non-elemental facts. *Descamps*, 570 U.S. at 269-70; *see also Schad*, 501 U.S. at 659 (Scalia, J., concurring) ("It has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission."). And seldom will *Shepard*-approved documents include information on a defendant's theory of defense, prompting defendants to present these theories at impractical sentencing hearings years later. *See*, *e.g.*, *Aguila-Montes de Oca*, 655 F.3d 915, 962 (9th Cir, 2011) (Berzon, J., concurring in judgment only), *maj. op. overruled by Descamps*.

narrow range of cases,"[59] not in "case after case."[60] The Court also directed that the documents should not be "repurposed as a technique for discovering whether a defendant's prior conviction . . . rested on facts (or otherwise said, involved means) that could have satisfied the elements of a generic crime."[61] The purpose of consulting *Shepard* documents is limited: "It [is] not to determine 'what the defendant and the state judge must have understood as the factual basis for the prior plea,' but only to assess whether the plea was to the version of the crime . . . corresponding to the generic offense."[62]

Looking to *Shepard* documents in case after case for non-elemental conduct would waste resources and fail to identify actual conduct. "[E]xpend[ing] resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy . . . facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense," would lead to unreliable findings.[63] A defendant simply has no incentive to correct facts that do not impact his conviction; and why would he? "At trial, extraneous facts and arguments may confuse the jury. . . . And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations."[64] Consequently, "[f]ind them or not, by examining the record or anything else, a court still may not use [surplus facts] to enhance a sentence."[65]

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[59] *Taylor*, 495 U.S. at 602.

[60] *Descamps*, 570 U.S. at 270.

[61] *Mathis*, 136 S. Ct. at 2254.

[62] *Descamps*, 570 U.S. at 262-63 (quoting *Shepard*, 544 U.S. at 25 (plurality opinion)); *see also Mathis*, 136 S. Ct. 2553-54.

[63] *Descamps*, 570 U.S. at 270.

[64] *Id.* (recognizing that a defendant "likely was not thinking about the possibility that his silence could come back to haunt him in a [federal] sentencing 30 years in the future").

[65] *Mathis*, 136 S. Ct. at 2253.

Non-elemental facts are not made reliable simply because they appear in *Shepard* documents.[66] *Shepard* documents may not reveal "actual conduct" at all. Surplus facts—regardless from where they come—will often be uncertain in their meaning, unreliable, or "downright wrong."[67] And facts that are "prone to error precisely because their proof is unnecessary"[68] should not be used to determine that a defendant is a career offender.

Mini-Trials. The *Taylor* Court also warned against mini-trials and protracted sentencing proceedings that would become routine if courts considered extra-elemental facts as a matter of course.[69]

The Commission's proposed approach would be as time-consuming and impractical as the Supreme Court feared. While the sources the courts would consider may be limited, courts would consider them in every case in which they are found. For old convictions or for convictions in courts with poor recordkeeping, obtaining these documents would take time and result in disparity.[70] Reviewing, deciphering, and disagreeing about facts other than the elements of the offense would consume significant resources.

Relatedly, defendants would fight to test the reliability of non-elemental facts contained in the *Shepard* documents. Both the guidelines and due process afford defendants the right to challenge disputed facts that the court may rely on prior to

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[66] *Descamps*, 570 U.S. 270 (discussing the pitfalls of consulting a plea colloquy to discern non-elemental facts).

[67] *Id.*

[68] *Mathis*, 136 S. Ct. at 2253.

[69] *See Taylor*, 495 U.S. at 601 (warning of mini-trials with fact-based approach); *Moncrieffe v. Holder*, 569 U.S. 184, 200-01 (2013) (citing *Chambers v. United States*, 555 U.S. 122, 125 (2009), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015)) (same).

[70] For example, what if only a charging document is available, but the facts contained therein are incorrect as demonstrated in a plea colloquy of which there is no record? *See generally United States v. Rosa*, 507 F.3d 142, 155 (2d Cir. 2007) ("[W]e do not think that every document properly classified as a charging document in a state case to which a defendant pleads guilty is *ipso facto* probative on the issue of whether the defendant necessarily pleaded guilty to a [crime of violence].").

imposing a sentence.[71] Presented with non-elemental facts in, for example, an indictment, defendants would seek to refute them by submitting affidavits,[72] and requesting evidentiary hearings[73] at which they would present witnesses[74] and put on experts.[75] In some cases, the defense would have no ability to effectively challenge alleged, unreliable, surplus facts contained in documents like an indictment because refuting documents would have been destroyed and witnesses would be unavailable. It would be unfair to subject a defendant to the severe additional penalty of the career offender guideline simply because he did not object to a legally extraneous fact that had no bearing on his prior conviction.

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[71] *See* §6A1.3 ("When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor . . . provided that the information has sufficient indicia of reliability to support its probably accuracy."); *see also United States v. Juwa*, 508 F.3d 694, 700-01 (2d Cir. 2007) (recognizing a due process right to be sentenced on accurate information) (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948)).

[72] *United States v. Pless*, 982 F.2d 1118, 1127-28 (7th Cir. 1996) ("Due process entitles defendants to fair sentencing procedures, especially a right to be sentenced on the basis of accurate information. If a defendant raises the possibility of reliance on misinformation in the PSI, the court must provide an opportunity to rebut the report. That may take a number of forms: by allowing defendant and defense counsel to comment on the report or to submit affidavits, or other documents or by holding an evidentiary hearing." (internal citations omitted)).

[73] *See*, *e.g.*, *United States v. Jimenez Martinez*, 83 F.3d 488, 494-95 (1st Cir. 1996); *United States v. Fatico*, 603 F.2d 1053 1057, n.9 (2d Cir. 1979).

[74] Fed. R. Crim. P. 32(i)(2); *see also United States v. Johnson*, 554 Fed. App'x 139, 141 (4th Cir. 2014) (per curiam) (vacating sentence where court denied defendant's petitions for writs of habeas corpus *ad testificandum* for two inmates to testify at defendant's sentencing hearing).

[75] *See*, *e.g.*, *United States v. Chase*, 499 F.3d 1061, 1066-68 (9th Cir. 2007) (holding that the district court abused its discretion when it denied defendant's request to retain an expert to testify about drug quantity at the sentencing hearing); *United States v. Hardin*, 437 F.3d 463, 470 (5th Cir. 2006) (finding error where district court denied to appoint an expert "on a disputed factual issue regarding the primary issue to his sentence determination").

Rewrite Plea-bargains. A conduct-based approach would effectively "rewrite the parties' [plea] bargain[s]" and deprive defendants of their negotiated pleas.[76]

When a defendant enters into a plea deal, he gives up substantial rights including a vast array of trial and appellate rights.[77] In exchange for relinquishing these fundamental rights, a defendant must admit "the *elements* of a formal criminal charge."[78] He need not admit more. Yet under the Commission's proposal, "a later sentencing court could still treat the defendant as though he had pleaded to a [more serious charge], based on legally extraneous statements found in the old record."[79] As the *Taylor* Court recognized many years ago, "if a guilty plea to a lesser [ ] offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [the original offense]."[80]

For better or worse, our criminal justice system is "a system of pleas, not a system of trials."[81] In 2012, the Supreme Court estimated that 97% of federal convictions and 94% of state convictions were resolved by plea.[82] And these rates appear to be

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[76] *Descamps*, 570 U.S. 271.

[77] Fed. R. Crim. P. 11(b)(1)(B)-(E), (N); *Class v. United States*, 138 S. Ct. 798, 803-06 (2018) (explaining the claims a defendant waives when pleading guilty, including all "technical and formal objections of which defendant could have availed himself by any other plea or motion" (internal marks and citation omitted)).

[78] *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (emphasis added).

[79] *Descamps*, 570 U.S. at 271.

[80] *Taylor*, 495 U.S. at 601-02; *see also Descamps*, 570 U.S. at 271.

[81] *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (recognizing that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system").

[82] *Frye*, 566 U.S. at 143.

rising.[83] Indeed, the system is reliant on pleas[84] and is structured to encourage them.[85]

The Supreme Court has repeatedly acknowledged the problems that would follow when "a trial court w[ill] have to determine what th[e] conduct was."[86] If courts were directed to determine a defendant's conduct and not merely the elements of his conviction, these problems would occur in every case.

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[83] *See* Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It?*, 111 NW. U. L. REV. 1429, 1432 (2017) ("In 2015, only 2.9% of federal defendants went to trial, and, although the state statistics are still being gathered, it may be as low as less than 2%."); *see also* USSC, *2017 Sourcebook of Federal Sentencing Statistics* S-25-28 (2017) (plea rates increased from 96.9% in FY 2013 to 97.2% in FY 2017. In FY 2017 numerous federal districts had plea rates higher than 98% and several districts had rates over 99%).

[84] *See*, *e.g.*, *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("Properly administered, [plea bargaining] is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."); Emily Yoffe, *Innocence is Irrelevant*, THE ATLANTIC (Sept. 15, 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ ("Taking to trial even a significant proportion of [the 11 million people arrested annually] would grind proceedings to a halt.").

[85] *See*, *e.g.*, §§3E1.1, 5K1.1; *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995) (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978)) ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government 'may encourage a guilty plea by offering substantial benefits in return for the plea.'"); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 881 (2009) ("[E]ven conservative estimates of the acceptance of responsibility discount at the federal level show a roughly 35% sentence reduction for that factor alone."); *see also* National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 15 (2018), https://www.nacdl.org/trialpenaltyreport/ ("The United States Sentencing Commission's data on federal sentencing confirms the existence of a trial penalty. In 2015, in most primary offense categories, the average post-trial sentence was more than triple the average post-plea sentence.").

[86] *Taylor* 495 U.S. at 601.

2. The Additional Costs of a Conduct-Based Approach

The reasons provided by the Supreme Court should be sufficient on their own to compel commitment to the categorical approach. But it is also worth considering the additional costs that would accompany a conduct-based approach: expanding the reach of an already over-inclusive, and severe, guideline; exacerbating unwarranted disparity, uncertainty and complexity; and expanding the guidelines' reliance on relevant conduct.

a. Unjustified Expansion: Reaching for More, When the Evidence Calls for Less

The Commission proposes a conduct-based approach under which "the court shall consider the conduct that formed the basis of the conviction, *i.e.*, only the conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such element."[87] By looking to the means, the Commission's proposal would expand the reach of the career offender guideline beyond its current limitation to the elements of convictions. All of the evidence, however, indicates reform of the career offender guideline should be focused on narrowing its scope. As discussed above, Commission data show the career offender guideline is already over-inclusive.[88] Expanding its reach would increase unnecessary over-incarceration.

To the extent the proposed expansion is intended to cover anomalies—defendants that courts determine should be sentenced as career offenders, but for one reason or another are not—those anomalies already can be addressed with upward departures or variances.[89] It makes no sense to further expand the guideline with over 75% of individuals deemed to be career offenders already sentenced below the guideline.[90] In addition, §4A1.3(b)(3) limits downward departures from the career

[87] 83 Fed. Reg., at 65409.

[88] *See supra* notes 3, 8-10 and accompanying text.

[89] *See* §4A1.3(b)(2).

[90] USSC, Individual Datafiles FY 2017 (77.5% sentenced below the guideline).

offender guideline to one criminal history category. No such limitation exists for upward departures.[91]

b. Unwarranted Disparity: Exacerbated Not Alleviated

The proposed expansion of the career offender guideline also risks increasing its already significant disparate impact. While approximately 2 out of 10 individuals sentenced in federal court are black, approximately 6 out of 10 individuals deemed to be career offenders are black.[92] That is reason enough not to further expand the reach of the career offender guideline. But the unwarranted disparity arising from the Commission's proposal does not end there.

Additional unwarranted disparity would result from the Commission's proposal to use *Shepard* documents in more than a "narrow range of cases"[93] and for more than a "limited function."[94] The Commission's proposal would direct the use of *Shepard* documents in every case, but the same *Shepard* documents would not be available in every case. The availability of these documents varies, not only district-to-district, but between counties within a single district. For example, Defenders have observed that document retention policies differ from county-to-county and state-to-state, such that in some places, it is unlikely that more than a docket sheet exists, especially for older convictions.[95] Defenders have also found that responsiveness to document requests can vary county-to-county.

Under the Commission's proposal, individual judges would make decisions under a preponderance of the evidence standard about whether there was "conduct that met one or more elements of the offense of conviction or that was an alternative means

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[91] *See* §4A1.3(b)(2).

[92] USSC, Individual Datafiles FY 2017. Among all FY 2017 individuals for whom the Commission received complete information, 21.6% were black, while 61.6% of those deemed career offenders were black.

[93] *Decamps*, 570 U.S. at 261 (citing *Taylor*, 495 U.S. at 602).

[94] *Id*. at 260.

[95] Because the guidelines' 15-year look back rule for prior felonies starts from the date the defendant was released, the date of the prior conviction can be significantly older than 15 years. *See* §4B1.2, comment. (n.3); §4A1.2(e).

of meeting any such element."[96] It is easy to imagine different judges within the same district—and even the same judge in different cases—making different decisions about whether the same conduct, alleged in one document or another, qualified as a "crime of violence" or "controlled substance offense," particularly when the availability and content of the documents differ. The events that transpired after the Ninth Circuit's decision in *United States v. Aguila-Montes de Oca*, prove this point.[97] After *Aguila-Montes*, courts were allowed to look to documents "to discover what the defendant actually did."[98] Overruling *Aguila-Montes*, the Supreme Court noted the conduct-based approach endorsed in that case resulted in "exactly the differential treatment we thought Congress, in enacting ACCA, took care to prevent."[99] That is, "[i]n the two years since *Aguila-Montes*, the Ninth Circuit has treated some, but not other, convictions under [the same California statute] as ACCA predicates, based on minor variations in the cases' plea documents."[100] The Commission's proposal would result in the same disparities.

c. New Uncertainty: Navigating a New Standard

The Commission's proposal would discard decades of precedent in favor of uncharted waters. The years of litigation under the categorical approach have brought us to a point where the significant issues have been settled. We know what to do with prior convictions based on guilty pleas,[101] we know what to do with convictions under statutes that are missing an element of the generic offense,[102] and we know what to do with convictions under statutes that list both elements and means.[103] Love it or hate it, judges, probation officers, prosecutors and defense attorneys are all familiar with the categorical approach.

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[96] 83 Fed. Reg., at 65409.

[97] *See* 655 F.3d 915 (9th Cir. 2011), *abrogated by Descamps*, 570 U.S. 254.

[98] *Descamps*, 570 at 268.

[99] *Id*.

[100] *Id*.

[101] *See Shepard*, 544 U.S. 13.

[102] *See Descamps*, 570 U.S. 254.

[103] *See Mathis*, 136 S. Ct. 2243.

The Commission's proposal rejects this precedent, specifying that the "'categorical approach' and 'modified categorical approach' adopted by the Supreme Court . . . *do not apply* in the determination of whether a conviction is a 'crime of violence' or a 'controlled substance offense.'"[104] With this proposal, we would be starting over. Years of litigation, uncertainty and inconsistency would ensue. There would be the big picture challenges to the proposal's constitutionality, and whether the Commission has the authority to promulgate this change that is inconsistent with Congress's directive in § 994(h). But that is not all. Every word and phrase in the new definitions and commentary prescribing a "conduct-based inquiry" would be tested. And it would take years to sort out.

In addition, even once the parties and courts have sorted the parameters of the process, there would be greater uncertainty on a case-by-case basis about whether a prior conviction is a "crime of violence" or a "controlled substance offense." Currently, the parties and courts know, for a significant number of prior convictions, whether they are, or are not, categorically, qualifying predicates. The Commission's proposal for a "conduct-based" approach would require investigation into what happened in every individual case. Sometimes the *Shepard* documents would contain facts that were not necessary to the conviction, and investigation and litigation would be required to determine whether the defendant actually engaged in that conduct. In other cases, some or all of the documents would not exist. This uncertainty, from one case to the next, would negatively affect plea negotiations, while also consuming resources and time.

d. Additional Complexity: Two Rules Instead of One

Rather than simplifying, the Commission's proposal would complicate sentencing. As discussed above, both the career offender guideline directed by Congress in § 994(h) and the ACCA, call on courts to enhance sentences on the basis of certain—and similar—categories of convictions.[105] Currently, to determine whether convictions fall into the specified categories, courts rely on an identical analytical framework for both provisions: the categorical approach.[106] The Commission's proposal would disrupt this consistency and require that courts use two separate

[104] 83 Fed. Reg., at 65409 (emphasis added).

[105] *See supra* notes 24-26 and accompanying text.

[106] *See supra* note 15.

analyses: the categorical approach for the ACCA and a conduct-based approach for the career offender guideline. In other words, and importantly for those who want to abandon the categorical approach, the Commission's proposal would not save courts or parties from the categorical approach. It would add a separate, untested, analysis.

The Commission recently concluded that a "single definition of the term 'crime of violence' in the guidelines and other federal recidivist provisions is necessary to address increasing complexity and to avoid unnecessary confusion and inefficient use of court resources."[107] The Commission's injection of a new and different standard for the guidelines is contrary to this conclusion, particularly since Congress recently re-committed itself in the First Step Act to enhancements for prior convictions determined as a matter of law under the categorical approach.[108]

We urge the Commission to heed its own advice regarding the hazards of complexity, and value the relative simplicity of what we have now: a single analysis that applies to both the career offender guideline and the ACCA.

e. Relevant Conduct: A Bad Rule Made Worse

The Commission's proposal also extends the guidelines' reliance on relevant conduct further than ever before.[109] Currently, relevant conduct is generally focused on actions, omissions and harms related to what "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[110] These rules relate to the instant offense and affect a defendant's placement on the vertical axis of the sentencing grid. With the proposed amendment to the career offender guideline, courts would be required to consider relevant conduct from prior offenses

[107] USSC, *Career Offender Report*, at 3.

[108] *See* First Step Act, Pub. L. No. 115-391, at §§ 401-02.

[109] Defenders have repeatedly requested the Commission consider a comprehensive review of the relevant conduct rules under §1B1.3. For a more complete discussion of the problems with and criticisms of relevant conduct, see Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 24-31 (May 17, 2013).

[110] §1B1.3.

to determine a defendant's placement on the horizontal axis of the grid as well.[111] The current scope of "relevant conduct" works enough mischief as it is, and has been subject to significant criticism.[112] It would be a mistake to expand it further.

The federal guidelines are the only guidelines in the United States that require increased sentences for uncharged, dismissed, or acquitted conduct.[113] "Instructing judges to consider 'real' conduct was a discretionary decision by one set of Commission members [from the first Commission] who seemed to believe the Guidelines could and should occupy the entire field."[114] Adopting a "real offense" model was not directed by Congress.[115] Indeed, it is "arguably contrary to the [Sentencing Reform Act's] most basic instructions," which directed the Commission to take into account the circumstances under which the "offense was committed."[116]

The Commission's relevant conduct rules have been subject to significant criticism. And for good reason. Among other problems, the rules lead to unwarranted

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[111] Classification as a career offender causes both (1) an increase in a defendant's offense level, and (2) automatic placement in Criminal History Category VI. §4B1.1.

[112] *See*, *e.g.*, Meyers Letter *supra* note 109, at 24-31 (discussing criticism of relevant conduct rules).

[113] *See* Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1626 (2012) ("only the federal guidelines take this approach"). State guideline systems, before and after the Federal Sentencing Guidelines, have never required or allowed the use of uncharged or acquitted crimes in calculating the guideline range. *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, 69 (Sept./Oct. 1995) ("Virtually all states, in contrast to the federal system, have adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines.").

[114] Barkow*, supra* note 113, at 1628.

[115] *Id*. at 1626 ("Nor is there any evidence in the Sentencing Reform Act's legislative history that suggests Congress even intended the outcome.").

[116] Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1661 & n.157 (2012) ("The Commission was to take into account 'the circumstances under which the *offense was committed*' and 'the nature and degree of the harm caused by the *offense*.' [Sentencing Reform Act], Pub. L. No. 98-473, tit. II, ch. 2, sec. 217(a), §994(c)(2)-(3), 98 Stat. 1987, 2020 (codified at 28 U.S.C. §994(c)(2)-(3) (2006)) (emphasis added).").

disparity,[117] are costly,[118] and provide prosecutors with "indecent power."[119] They also lead to disrespect for the law because they are contrary to what ordinary citizens take for granted: that defendants will be punished based on a conviction.[120] The requirement that the guideline-recommended sentencing range be based even on acquitted conduct, poses particular concern.[121] The Commission's proposal to

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[117] *See* USSC, *Fifteen Year Review*, at 50, 87 (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).

[118] One study, for example, "concluded that one half of all sentences imposed in the districts studied had been increased, sometimes doubled or tripled, by uncharged conduct." Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 289, 311-12 (1992).

[119] Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420, 1425 (2008). The relevant conduct rules give prosecutors the twin benefits of (1) increased punishment through inflating guideline ranges on the basis of uncharged, dismissed and acquitted conduct, a lower standard of proof and inadmissible evidence; and (2) increased power to coerce guilty pleas, because they can obtain the same sentence even if no charge is filed or conviction obtained. *See*, *e.g.*, Kate Stith & Jose Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 442, 449-50 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 STAN. L. REV. 523, 550 (1993) ("Implementation of a conviction-offense system [rather than a 'real offense' system] places a burden on prosecutors to file and prove, or bargain for, conviction charges that reflect the seriousness of an offenders' criminal behavior. If, with respect to certain nonconviction crimes, this is an obligation they cannot discharge, then we should have grave doubts that the imposition of punishment is justified.").

[120] *See*, *e.g.*, *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) ("[M]ost people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted."), *vacated*, 271 Fed. App'x 298 (4th Cir. 2008).

[121] John Steer, former General Counsel and Vice-Chair of the Commission has called for the Commission to exclude acquitted conduct from the guidelines and permit its use only as a discretionary factor. *See An Interview with John R. Steer*, 32 CHAMPION 40, 42 (2008). *See also United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to

extend this concept to a court's consideration of a defendant's prior conduct would exacerbate these problems, and should be rejected.

3. The Commission Exceeds its Authority

The Commission's conduct-based approach is inconsistent with the plain language of Congress's directive in 28 U.S.C. § 994, and adopting it would exceed the Commission's authority.

Congress imposed upon the Commission several "specific requirements."[122] Among those, Congress required that the Commission "shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for *categories* of defendants in which the defendant . . . has been *convicted* of a [qualifying] felony . . . and has previously been *convicted* of two or more prior [qualifying] felonies."[123] The Commission "sought to implement this directive by promulgating the 'Career Offender Guideline.'"[124]

Addressing this very congressional requirement in § 994(h), the Supreme Court recognized that while the Commission has "'significant discretion in formulating guidelines,'"[125] this discretion is not "unbounded."[126] If a guideline is inconsistent with the plain language of a specific congressional directive, that guideline must "give way."[127]

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impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *Barkow*, *supra* note 113 at 1627 ("Allowing sentencing courts to consider conduct for which the defendant has been acquitted disregards the constitutional role of the jury."); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235 (2009) (objecting to the use of acquitted conduct on both constitutional and policy grounds).

[122] *United States v. LaBonte*, 520 U.S. 751, 753 (1997) ("Congress imposed upon the Commission a variety of specific requirements" and § 994 is "[a]mong those requirements").

[123] 28 U.S.C. § 994(h) (emphases added).

[124] *LaBonte*, 520 U.S. at 753.

[125] *Id.* at 757 (quoting *Mistretta v. United States*, 488 U.S. 361, 377 (1989)).

[126] *Id.* at 753.

[127] *Id.* at 757 (citing *Stinson v. United States*, 508 U.S. 36, 38 (1993)); *see also United States v. Nottingham*, 898 F.2d 390, 393 (3d Cir. 1990) (citing 28 U.S.C. § 994(a)) ("To the extent

Section 994(h) "is designed to cabin the Commission's discretion in the promulgation of guidelines for career offenders."[128] And in doing so, Congress unambiguously required that *categories* of defendants *convicted* of certain offenses be sentenced at or near the maximum. As discussed above, the Supreme Court has already held that when Congress refers to "conviction," it "impos[es] the categorical approach."[129] Directing courts to look beyond the elements of a conviction to conduct is inconsistent with the statute's plain language.

Because a conduct-based approach is "at odds with § 994(h)'s plain language," the Commission's authority under § 994(a)-(f) cannot save the Commission's proposal.[130] Any discretion the Commission may have under (a)-(f) "must bow to the specific directives of Congress."[131] Section 994(h) is a "specific requirement,"[132] which includes that a defendant be "convicted." The conduct-based approach the Commission proposes renders the "convicted" requirement a "virtual nullity."[133] The Commission lacks the authority to eliminate this congressional requirement.

B. Parts B-D: Application Issues

As discussed above, all available evidence shows that the career offender guideline is over-inclusive and fails to meet the Commission's stated goal of "focusing . . . on the most dangerous offenders."[134] Despite this evidence, the Commission proposes three amendments to address "application issues" with the career offender

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that the enabling legislation contains specific direction, the guidelines must comport with that direction") *superseded on other grounds by* USSG §5G1.3 (1989); *United States v. Quesada*, 972 F.2d 281, 282 (9th Cir. 1992) ("Congress has given us the authority to invalidate a guideline section that is contrary to the Sentencing Reform Act.").

[128] *LaBonte*, 520 U.S. at 761, n.5.

[129] *Shepard*, 544 U.S. at 19.

[130] *LaBonte*, 520 U.S. at 757. *See* 83 Fed. Reg., at 65411 (citing 28 U.S.C. § 994(a)-(f)).

[131] *LaBonte*, 520 U.S. at 757.

[132] *Id.* at 753.

[133] *Id.* at 760 ("Congress surely did not establish enhanced penalties for repeat offenders only to have the Commission render them a virtual nullity.").

[134] 83 Fed. Reg., at 65411 (quoting USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016)); *see supra* notes 3, 8-10 and accompanying text.

guideline, each of which would expand the guideline's already over-inclusive reach. Defenders oppose this unwarranted expansion. The Commission's proposed amendments are out of step, not only with the Commission's own research and prior recommendations, but also with recent congressional action in the First Step Act to reduce mass incarceration and unduly harsh inflexible penalties.[135]

Before addressing each of the proposed amendments, we note that nothing in the Commission's recent report regarding recidivism following a violent offense shows that more offenses should be classified as "violent" for career offender purposes. Commission reports have often touted the correlation between criminal history and recidivism,[136] because risk prediction is the primary purpose of the criminal history rules.[137] Both this recent report and the Commission's previous report on career offenders found somewhat higher re-arrest rates among defendants with "prior" or "instant" violent offenses under the reports' definitions than among non-violent offenders.[138] But this does not show that prediction would be improved by classifying more prior offenses as "violent" predicates.[139] We know that the current career offender and armed career offender guidelines grossly over-predict recidivism risk for defendants who would not otherwise fall in CHC VI, and that the unjustly enhanced sentences under those rules fall disproportionately on black defendants.[140] Nothing in the Commission's reports shows that violent prior offenses in general—or the particular prior offenses that would be affected by the proposed amendments—should enhance sentences more than they already do under the current criminal history rules in Chapter 4, Part A. Indeed, the most recent report confirms that even career offenders and armed career offenders classified as

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[135] *See* First Step Act, Pub. L. No. 115-391.

[136] *See*, *e.g.*, USSC, *Recidivism: Violent Offenses*, at 14.

[137] *See* USSC, *Fifteen Year Review*, at 13.

[138] *See* USSC, *Recidivism: Violent Offenses*, at 3; USSC, *Career Offender Report*, at 40-41.

[139] Such research requires a different methodology—with better control variables and concern with inter-correlations. The Commission has undertaken such research in the past. *See*, *e.g.*, USSC, *A Comparison of Federal Sentencing Guidelines Criminal History Category and the U. S. Parole Commission's Salient Factor Score* (2005).

[140] *See supra* notes 5-10 and accompanying text.

"prior violent offenders" under the reports' definitions have lower recidivism rates than defendants placed in CHC VI under the normal criminal history rules.[141]

1. Part B: Robbery

At the Department of Justice's urging, the Commission proposes to amend §4B1.2 to define robbery as an offense "described in 18 U.S.C. § 1951(b)(1)," Hobbs Act robbery.[142] This amendment would expand the reach of the career offender guideline to encompass all forms of robbery-like offenses including those involving force to property or threatened immediate or future force to property. In light of what is known about the career offender guideline—that it is already over-inclusive and imposes a more severe sanction than required—we fail to understand why the Commission would reach out to sweep in offenses involving force against *property*. This proposed amendment would not focus the career offender guideline on "the most dangerous offenders."[143] Defenders oppose it.

The "Hobbs Act is unmistakably broad,"[144] and "does not lend [itself] to restrictive interpretation."[145] Important here, it prohibits among other things, takings "by means of actual or threatened force . . . immediate or future, to [a] person or property." This stands in contrast to the "modern trend [which] is to consider robbery as an offense against the person."[146] The vast majority of state robbery

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[141] *See* USSC, *Recidivism: Violent Offenses*, at 36, fig. 4.7.

[142] 83 Fed. Reg., at 65411-12 (citing 18 U.S.C. § 1951(b)(1), which defines robbery under the Hobbs Act). Alternatively, the Commission proposes to amend the commentary of §4B1.2 to define robbery, consistent with § 1951(b)(1), as: "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." The same objections set forth above apply to this alternative proposal.

[143] *Supra* note 134.

[144] *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016).

[145] *United States v. Culbert*, 435 U.S. 371, 373 (1978).

[146] 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3, n.3 (3d ed. Oct. 2018 update).

statutes require the taking of property from another by the use of force against a person or by the threat of immediate force against a person.[147]

The Commission's proposal is not necessary to ensure that defendants who engage in violent conduct and are convicted under the Hobbs Act receive severe sentences. Even without the career offender enhancement, individuals convicted of dangerous robberies would be subject to severe penalties. For example, under §2B3.1 (Robbery), a defendant's base offense level starts at 20.[148] If the robbery included bodily injury, the defendant would be subject to a 2- to 6-level upward enhancement.[149] And the defendant would be subject to further upward increases if a firearm or dangerous weapon was used, possessed, brandished, or discharged, or if a threat of death was made.[150] In addition, prior convictions would be accounted for in the regular criminal history calculation, which evidence shows is a better predictor of recidivism than the career offender designation.[151] If a court determines the advisory guideline range from these calculations would be too low, upward departures and variances would be available.[152] Addressing such cases in this manner makes far more sense than expanding the scope of the career offender guideline to sweep in less culpable, less serious offenses.

2. Part C: Inchoate Offenses

Currently, the commentary to §4B1.2 defines "crime of violence" and "controlled substance offense" to "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." The Commission proposes to remove this

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[147] *See United States v. O'Connor*, 874 F.3d 1147, 1155 (4th Cir. 2017) (citing *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380, nn.5 & 6 (5th Cir. 2006), *abrogated on other grounds by United States v Rodriguez*, 711 F.3d 541, 554-55 (5th Cir. 2013)) (recognizing "that a substantial majority of states have adopted a definition of robbery that includes either use of force or threats of imminent force against a person").

[148] §2B3.1(a).

[149] §2B3.1(b)(3)(A)-(E).

[150] §2B3.1(b)(2). Still more enhancements would apply if the defendant abducted or physically restrained a person (2-4 levels); if a firearm or controlled substance was taken (1 level); or if the loss exceeded $20,000 (1-7 levels). §2B1.3(b)(4), (6), (7).

[151] *See supra* notes 8-10, 140-41 and accompanying text.

[152] §4A1.3; 18 U.S.C. § 3553(a).

language from the commentary and add to the text of §4B1.2 a significantly expanded set of inchoate offenses, including a new catch-all provision: "other [unnamed] . . . offenses arising from accomplice liability."[153] The Commission also proposes additional guidance as outlined in three different options. Given the absence of any evidence that these lesser offenses warrant the severe sanctions of the career offender guideline, and the already overly broad reach of the guideline, Defenders oppose this proposal.

The Commission should exclude inchoate offenses from the career offender guideline. As we have previously explained, these offenses cover a broad range of conduct, much of which is non-violent.[154] Attempt offenses can be completed by mere reconnoitering, planning, or obtaining tools to commit a substantive offense;[155] conspiracies often require even less.[156] The Commission's proposal to *add* to the list

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[153] The language the Commission proposes is as follows:

> The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.'

83 Fed. Reg., at 65414.

[154] Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 13-15 (Nov. 25, 2015).

[155] *Id.* at 13; *see also Short v. State,* 995 S.W.2d 948, 951-52 (Tex. Ct. App. 1999) (convicted of attempted delivery of a controlled substance to an inmate even though package received was actually rolled alfalfa hay and carrot tops); Model Penal Code § 5.01(2) (2017) (listing conduct that constitutes a "substantial step," including reconnoitering, seeking to entice a victim, or soliciting an innocent agent).

[156] *See, e.g.*, *United States v. Whitson*, 597 F.3d 1218, 1221, 1223 (11th Cir. 2010) (noting that South Carolina conspiracy requires an agreement with at least one other person to perform an unlawful act, but recognizing that there is "no violence or aggression in the act of agreement"); *United States v. King*, 979 F.2d 801, 803 (10th Cir. 1992) ("Because the crime of conspiracy in New Mexico is complete upon the formation of the intent to commit a felony, and does not require that any action be taken on that intent, the elements of a conspiracy to commit a violent felony do not include the threatened use of physical force."); *State v. Rozier*, 316 S.E.2d 893, 901 (N.C. Ct. App. 1984) (affirming conspiracy to traffic in

of inchoate offenses cannot be supported. A conviction for criminal solicitation is often complete upon mere communication.[157] And the Commission's proposal to add an exceptionally broad catch-all—which would include *any* offense "arising from accomplice liability," regardless of severity—is particularly troubling.

If the Commission persists in its proposal to treat these lesser offenses on par with more serious offenses subject to the severe sanctions of the career offender guideline, Option 3A, with a requirement that a conspiracy count "only if" an "overt act must be proved as an element," is the least harmful of the proposed options.[158]

Options 1 and 2 should be rejected. Both options direct courts determining whether an offense is a "crime of violence" or a "controlled substance offense" to look "only to the underlying substantive offense" and "not consider the elements of the inchoate offense or offense arising from accomplice liability."[159] This approach would treat defendants who have not been convicted of the object of the inchoate offense (*i.e.*,

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cocaine where the defendant merely had access to cocaine, was physically present during drug sales and relayed messages to co-defendant about cocaine transactions).

[157] *See*, *e.g.*, *Lopez v. State*, 864 So.2d 1151, 1153 (Fla. Dist. Ct. App. 2003) ("No agreement is needed, and criminal solicitation is committed even though the person solicited would never have acquiesced to the scheme set forth by the defendant. Thus, the general nature of the crime of solicitation lends support to the conclusion that solicitation, by itself, does not involve the threat of violence even if the crime solicited is a violent crime." (internal citations omitted)); *People v. Lubow*, 272 N.E.2d 331, 332 (N.Y. 1971) ("[The crime of solicitation] rest[s] solely on communication without need for any resulting action . . . . [N]othing need be done under the statute in furtherance of the communication ('solicits, commands, importunes') to constitute the offense. The communication itself with intent the other person engage in the unlawful conduct is enough. It needs no corroboration."); *see also* Model Penal Code § 5.02 (2017) (defining "Solicitation" as commanding, encouraging, or requesting another person to engage in specific conduct that would constitute a crime, with the purpose of promoting or facilitating the crime's commission. "It is immaterial . . . that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such a communication.").

[158] 83 Fed. Reg., at 65414. At a bare minimum, in light of the Commission's conclusions regarding drug trafficking only offenses, and new findings about non-violent offenses, the Commission should require an overt act for conspiracy to commit a "controlled substance offense," as proposed in Option 3B. *See* USSC, *Career Offender Report*, at 44; USSC, *Recidivism: Violent Offenses*, at 14, fig. 2.9.

[159] 83 Fed. Reg., at 65414.

the underlying offense) as if they have been convicted of the underlying offense. In so doing, it raises all of the same issues discussed above regarding the Commission's proposal to abandon the categorical approach: it is inconsistent with the evidence regarding the over-inclusiveness of the current guideline, Supreme Court law, and Congress's directive in § 994(h) to use only offenses of which the defendant has been "convicted."[160]

The Supreme Court has long recognized that an inchoate offense and a substantive offense are distinct crimes with different elements.[161] Bypassing the determination of whether a specific inchoate conviction corresponds to the generic definition of that offense would improperly erase the distinction between inchoate offenses and completed offenses.[162] It would treat defendants convicted of inchoate offenses as if

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[160] *See supra* Part I.A.

[161] *Braverman v. United States*, 317 U.S. 49, 54 (1942) ("A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object."); *James v. United States*, 550 U.S. 192, 197 (2007) (recognizing that "[attempted burglary] is not 'burglary' because it does not meet the definition of burglary" and instead contains a separate element that "defendant fail in preparation or be intercepted or prevented in the execution of the underlying offense" (internal marks and citation omitted)), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). *See also*, *e.g.*, *Berry v. State*, 996 So. 2d 782, 789 (Miss. 2008) ("Consequently, the elements of conspiracy and the elements of the underlying crime, possession of precursors, are not the same."); *State v. Leyba*, 600 P.2d 312, 313 (N.M. Ct. App. 1979) ("[B]ut conspiracy is an initiatory crime, and it is a separate common design or mutually implied understanding between two or more persons to accomplish a criminal act at some time subsequent to reaching the common design or mutual understanding to do so." (citation and marks omitted)); *State v. Lippard*, 25 S.E.2d 594, 596 (N.C. 1943) ("The charge of conspiracy to violate the law and the charge of the consummation of the conspiracy by an actual violation of the law are charges of separate offenses.").

[162] And since inchoate offenses are often seen as lesser offenses than the completed offense, treating the two as equal would also deprive many defendants of their negotiated plea bargains. *See Taylor*, 495 U.S. at 601 ("if a guilty plea to a lesser [ ] offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [the original offense]."); *see also*, *e.g.*, N.Y. Penal Law § 110.05 and Practice Commentary (McKinney 2014) (classifying attempts of all offenses except several enumerated A-1 felonies as a class less than the completed offense because "the consequences of an attempt [are] generally less serious than those of the consummated crime, [and therefore] the attempt deserved a less severe penalty."); Me. Rev. Stat. Ann. tit. 17-A, § 152(1)(B)-(E) (2003) (reflecting that attempt crimes are one class lower than the corresponding substantive crime); Fla. Stat. Ann. § 777.04 (West 2008) (providing most

they had been convicted of a completed underlying offense. But these defendants were not convicted of the underlying offense, and in many cases were not even charged with it. Options 1 and 2 would rely on "labels"—whether an offense is called "attempt" or "conspiracy"—rather than determining whether the actual conviction corresponds to the generic definition of the inchoate offense. But as the Supreme Court has made clear, the "label a State assigns a crime . . . has no relevance."[163] The determination of whether someone has been "convicted" of an offense requires an examination of the elements, "regardless of its exact definition or label."[164] The Commission should reject Options 1 and 2.

3. Part D: Controlled Substance Offense

The Commission also proposes two expansions to the definition of "controlled substance offense."[165] First, the Commission would amend the definition to include offenses involving an "offer to sell." Second, the Commission would add a subsection to the existing definition to include "an offense described in 46 U.S.C. § 70503(a) or § 70506(b)." The Commission's definition of "controlled substance offense" is already broader than what Congress required.[166] In addition, all the evidence shows that the career offender guideline directs more severe sentences than necessary to protect the public, particularly for defendants with only controlled substance convictions.[167] The last thing the Commission should do is expand the definition of "controlled substance offense."

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criminal attempt, solicitation, and conspiracy offenses are ranked "one level below the ranking" of the completed offense); Haw. Rev. Stat. Ann. § 705-512 (West 1997) ("Criminal solicitation is an offense one class or grade, as the case may be, less than the offense solicited").

[163] *Mathis*, 136 S. Ct. at 2251 (citing *Taylor*, 495 U.S. at 590-92).

[164] *Taylor*, 495 U.S. at 599. *See also id.*, at 588 ("Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary' by the laws of the State of conviction.").

[165] 83 Fed. Reg., at 65415.

[166] *Compare*, 28 U.S.C. § 994(h)(1)(B), (2)(B) (enumerating qualifying drug felonies), *with* §4B1.2(b) (defining "controlled substance offense"); *see also* Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 52-57 (2010).

[167] *See supra* notes 8-10 and accompanying text.

Expanding the definition of "controlled substance offense" to include offers to sell would prove particularly misguided. In some jurisdictions, a person can be convicted of offering to sell a controlled substance even though no actual transfer of the controlled substance takes place.[168] A person need not actually possess a controlled substance or even have the ability to transfer the substance in the future.[169] Such convictions should not subject a defendant to the severe sanction of the career offender guideline.

If the Commission's concern is that there are specific cases where a controlled substance offense does not count under the categorical approach because an indivisible statute can be violated by an "offer to sell,"[170] the best solution is for the sentencing court to depart or vary upward if it concludes the conduct at issue was sufficiently serious. The solution is not to sweep countless less culpable defendants into to a guideline that judges already reject as too severe over 75% of the time.[171]

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[168] *See Stewart v. State*, 718 S.W.2d 286, 288 (Tex. Crim. App. 1986) (en banc) ("However, when delivery is by offer to sell no transfer need take place. A defendant need not even have any controlled substance. . . . The offense is complete when, by words or deed, a person knowingly or intentionally *offers* to sell what he states is a controlled substance.").

[169] *See id*. *See also State v. Mosley*, 380 N.E.2d 731, 734 (Ohio Ct. App. 1977) (affirming defendant's conviction for offering to sell heroin where the defendant sold a mixture of baking soda, coffee, and sugar because "[t]he defendant made an offer to sell heroin, thereby violating the law"); *State v. Lorsung*, 658 N.W.2d 215, 216 (Minn. Ct. App. 2003) (affirming offer to sell conviction where defendant accepted the money, left, and never returned with the drugs); *State v. Strong*, 875 P.2d 166, 167 (Ariz. Ct. App. 1993) ("[The statute] requires proof that the defendant 'knowingly' offered to sell the drug. There is thus no reason to read into the statute the additional requirement of proof of intent to sell."); *State v. Brown*, 301 A.2d 547, 553 (Conn. 1972) ("[T]here is no question that the allegation of sale offense in the information does not include the elements of a possession violation. . . . [T]here is no requirement that one be in possession of goods or have control over them in order to sell them."), *overruled on other grounds by State v. Hart*, 605 A.2d 1366 (Conn. 1992).

[170] *See*, *e.g.*, *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017).

[171] USSC, Individual Datafiles FY 2017. This number has steadily increased over the past decade. In FY 2008 approximately 55% of those designated as career offenders were sentenced below the guideline. In FY 2013, 69.2% were sentenced below the career offender range. USSC, Individual Datafiles FY 2008 & 2013.

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March 15, 2019

Honorable Charles R. Breyer
Honorable Danny C. Reeves
Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
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Re: Reply Comment on Proposed 2019 Amendments

Dear Judge Breyer and Judge Reeves:

The Federal Public and Community Defenders write in reply to comments submitted by the Department of Justice (DOJ)[1] and others regarding the Commission's Proposed 2019 Amendments.

I. Proposed Amendment: Career Offender

The Commission's proposed amendments share a common, but costly feature: all would expand the already over-inclusive reach of the career offender guideline. The DOJ, however, pushes the Commission to reach even further. The DOJ urges the Commission to look to a wider array of documents as part of the proposed conduct-based approach, and to expand the definition of extortion, which the Commission recently narrowed in an effort to "focus[ ] the career offender and related enhancements on the most dangerous offenders."[2]

As explained in our initial comment, expanding the reach of the career offender guideline is inconsistent with decades of research and the Commission's own

[1] *See* Letter from David Rybicki, Commissioner, *ex officio*, Dep't of Justice, U.S. Sentencing Comm'n, to the Honorable Charles R. Breyer & the Honorable Danny C. Reeves, Commissioners, U.S. Sentencing Comm'n (Feb. 19, 2019) (DOJ 2019 Comment).

[2] USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016); *see also* DOJ 2019 Comment, at 9-10.

previous recommendations to Congress.[3] More than three-quarters of individuals deemed to be career offenders were sentenced below the guideline range in FY 2017;[4] Commission research shows the guideline does a poor job of identifying defendants at the greatest risk of recidivism;[5] and the guideline has an adverse impact on black defendants.[6] The Commission should not promulgate any of the proposed amendments to the career offender guideline and, instead, should return its attention to its earlier recommendation to Congress to narrow the scope of the guideline.

A. Categorical Approach (Part A)

***Shepard* Documents.** As discussed in our initial comment, the Commission's proposal to reject the categorical approach and instead direct courts to consider unproven allegations in *Shepard* documents would result in unfairness, unpredictability, disparity, and undue litigation.[7] But the DOJ's proposal that courts consider "*any information* with a sufficient indicia of reliability" would be even worse.[8]

Undeterred by thirty years of Supreme Court precedent, the DOJ asks the Commission to implement the precise approach the Supreme Court prohibited. In *Shepard v. United States*, the government urged the Supreme Court to allow district courts to consult police reports and complaint applications to establish that

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[3] *See* Letter from Michael Caruso, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Charles R. Breyer & the Honorable Danny C. Reeves, Commissioners, U.S. Sentencing Comm'n, at 2-4 (Feb. 19, 2019) (Defender 2019 Comment); USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 44 (2016).

[4] *See* USSC, Individual Datafiles FY 2017 (77.5% sentenced below the guideline).

[5] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004); USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19, figs. 7A & 7B (2016); USSC, *Recidivism Among Federal Violent Offenders* 14, fig. 2.9 (2019); *id*. at 36, fig. 4.7.

[6] *See* Defender 2019 Comment, at n.6 and accompanying text and authorities.

[7] *See* Defender 2019 Comment, at 11-26.

[8] DOJ 2019 Comment, at 4 (emphasis added).

the defendant was convicted of a predicate offense under the Armed Career Criminal Act (ACCA).[9] The Supreme Court rejected this approach, even in cases where the government-proffered information is "free from any inconsistent or competing evidence."[10]

The Court's rationale was not, as the DOJ represents, solely based on avoiding collateral trials.[11] Rather, *Shepard*'s holding was dictated by the ACCA's text; the constitutional infirmities of a conduct-based approach; *and* the host of impracticalities and unfairness that would flow from looking at allegations regarding a defendant's prior conduct—including mini-trials.[12] The categorical approach is "impose[d]" by Congress's language.[13] In urging the Commission to look to mere allegations in a wide variety of documents, the DOJ ignores that the text of § 994(h)—like the text of the ACCA—refers to defendants "convicted" of particular offenses.[14]

Moreover, while the DOJ may "welcome" collateral trials, the Supreme Court does not.[15] Since 1990, one of the several rationales for the categorical approach has been that determining "what th[e] conduct was" would be impractical, unfair, and frequently futile.[16] As explained in *Descamps*, non-elemental facts are often uncertain, unreliable and "downright wrong."[17]

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[9] *See Shepard v. United States*, 544 U.S. 13, 17-23 (2005).

[10] *Id.* at 22-23.

[11] *See* DOJ 2019 Comment, at 4.

[12] *See id.* at 19-20 ("*Taylor's* reasoning controls" (citing *Taylor v. United States*, 495 U.S. 575, 600-01 (1990))).

[13] *Id.* at 19.

[14] *See* Defender 2019 Comment, at 6-8, 26-27 (interpreting the text of 28 U.S.C. § 994(h)).

[15] DOJ 2019 Comment, at 4.

[16] *Taylor*, 495 U.S. at 601; *see also Descamps v. United States*, 570 U.S. 254, 270-71 (2013).

[17] *Descamps*, 570 U.S. at 270.

Despite the DOJ's assertion, §6A1.3 would not sufficiently limit courts' consideration of unreliable allegations, nor provide defendants with fair process.[18] As Defenders have previously indicated, §6A1.3 fails to provide adequate procedural protections.[19] Defendants would not be protected by the rules of evidence,[20] a jury,[21] the right to confrontation,[22] or proof beyond a reasonable doubt.[23] While the lack of procedural protections is already troubling when applied to conduct relating to the instant offense, it would be even worse when applied to *prior* conduct. Defendants would be forced to refute years-old state court PSRs, police reports, witness statements, and other investigative materials offered up by the government that in some courts would be presumed reliable.[24] In many cases, refuting documents

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[18] *See* DOJ 2019 Comment, at 4-5.

[19] *See*, *e.g.*, Statement of Alan DuBois before the U.S. Sentencing Comm'n, Washington, D.C., at 4 (Mar. 13, 2014); Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 31-33 (May 17, 2013).

[20] *See* USSG §6A1.3(a).

[21] *See United States v. Booker*, 543 U.S. 220, 246-48 (2005).

[22] *See*, *e.g.*, *United States v. Littlesun*, 444 F.3d 1196, 1199 (9th Cir. 2006); *United States v. Stone*, 432 F.3d 651, 654 (6th Cir. 2005); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 242-43 (2d Cir. 2005).

[23] *See* §6A1.3, comment. ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.").

[24] For example, in some courts, allegations in presentence investigation reports are presumed reliable unless "the defendant creates 'real doubt.'" *United States v. Meherg*, 714 F.3d 457, 459 (7th Cir. 2013); *see also United States v. Fuentes*, 411 F. App'x 737, 738 (5th Cir. 2011) (defendant bears burden of showing information in presentence report is materially unreliable); *United States v. Carbajal*, 290 F.3d 277, 287 (5th Cir. 2002) (information in the presentence report is "presumed reliable and may be adopted by the district court 'without further inquiry' if the defendant fails to demonstrate by competent rebuttal evidence that the information is 'materially untrue, inaccurate or unreliable'" (marks and citations omitted)); *United States v. Mustread*, 42 F.3d 1097, 1101 (7th Cir. 1994) ("Generally, where a court relies on a PSR in sentencing, it is the defendant's task to show the trial judge that the facts contained in the PSR are inaccurate."); *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (defendant's "mere objection" to information in a presentence report is insufficient to challenge its accuracy and reliability) (cited in *United States v. Powell*, 650 F.3d 388, 394 (4th Cir. 2011)).

would be destroyed, memories would have faded, and witnesses would be unavailable, making it impossible for defendants to challenge old, untested allegations.

The Commission's Authority. Despite assurances that it would address the Commission's authority to promulgate the proposed amendment in its comment,[25] the DOJ offers no such analysis. Instead, the DOJ summarily thanks the Commission for the *Commission's* "legal assessment that the categorical approach is not required under the guidelines."[26] The DOJ's citation for this statement, however, is not a legal analysis by the Commission, but only an observation by the Commission that "the guidelines do not expressly require [the categorical approach]."[27] Regardless of whether the *guidelines* are explicit, any inquiry regarding the Commission's statutory authority should not begin with the

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In others, "a presentence report is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact." *United States v. Wise*, 976 F.2d 393, 404 (8th Cir. 1992) (en banc) (marks and citations omitted); *United States v. Stapleton*, 268 F.3d 597, 598 (8th Cir. 2001).

Still other courts take a third approach, allowing the consideration of allegations contained in a PSR only if the government proves its reliability. *See United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc) ("[B]y placing the burden on [the defendant] to disprove the factual statements made in the PSR, the district court improperly shifted the burden of proof to [the defendant] and relieved the government of its burden of proof to establish the offense level."); *United States v. Martinez*, 584 F.3d 1022, 1027 (11th Cir. 2009).

Consequently, in addition to being both impractical and unfair, the DOJ's proposal would create unwarranted disparity as well.

[25] *See* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 26 (Dec. 13, 2018) ("The Department . . . will further explain our reasoning [as to why Part A is consistent with the Commission's authority under § 994] in a letter in response to the proposed amendments.") (Rybicki, Commissioner, *ex officio*).

[26] DOJ 2019 Comment, at 2.

[27] DOJ 2019 Comment, at 2 & n.10 (quoting 83 Fed. Reg. 65400, 65408 (Dec. 20, 2018) ("The Supreme Court cases adopting and applying the categorical approach have involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guidelines. However, courts have applied the categorical approach to guideline provisions, even though the guidelines do not expressly require such an analysis.")).

guidelines, but with the *statute*. As addressed in our initial comment, the statute requires the categorical approach.[28]

B. Application Issues (Parts B – D)

Robbery (Part B). Defenders oppose expanding the definition of robbery to include offenses involving injury, or fear of injury, to property. This change is not supported by empirical evidence and is not necessary to ensure that those who are convicted of dangerous robberies receive severe penalties.[29]

The "significant majority of states have determined that robbery requires property to be taken from a person under circumstances involving danger or threat of potential injury *to the person*."[30] The DOJ requests that the Commission cast aside this "generally accepted contemporary meaning,"[31] and craft a definition of robbery to target the minority of jurisdictions that define robbery more broadly.[32] The DOJ's

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[28] *See* Defender 2019 Comment, at 6-8; 26-27.

[29] *See* Defender 2019 Comment, at 30.

[30] *United States v. O'Connor*, 874 F.3d 1147, 1155 (4th Cir. 2017) (emphasis in original) (citing *United States v. Lockley*, 632 F.3d 1239, 1243-44 (11th Cir. 2011); *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380, nn.5 & 6 (5th Cir. 2006), *abrogated on other grounds by United States v Rodriguez*, 711 F.3d 541, 554-55 (5th Cir. 2013)). Circuits have recognized this prevailing view and have adopted generic robbery definitions that require force to person, not property. *See*, *e.g.*, *O'Connor*, 874 F.3d at 1155; *Lockley*, 632 F.3d at 1244; *Santiesteban-Hernandez*, 469 F.3d at 380; *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008), *superseded on other grounds*; *United States v. Yates*, 866 F.3d 723, 733-34 (6th Cir. 2017); *United States v. Gattis*, 877 F.3d 150, 156 (4th Cir. 2017).

[31] *Taylor*, 495 U.S. at 596.

[32] *See* DOJ 2019 Comment, at n.22 (citing *O'Connor*, 874 F.3d 1147; *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018); *United States v. Nickles*, 249 F. Supp. 3d 1162 (N.D. Cal. 2017)).

The other cases cited by the government in support of its proposed definition do not address injury against property, but rather whether the statutes at issue in those cases require the requisite force *against a person*. *See United States v. Peppers*, 899 F.3d 211, 233 (3d Cir. 2018); *Cross v. United States*, 892 F.3d 288, 297 (7th Cir. 2018); *Yates*, 866 F.3d at 727-28; *United States v. Fluker*, 891 F.3d 541, 548-49 (4th Cir. 2018); *United States v. Mulkern*, 854 F.3d 87, 91-94 (1st Cir. 2017); *United States v. Starks*, 861 F.3d 306, 318-19, 320-22 (1st Cir. 2017); *United States v. Gardner*, 823 F.3d 793, 802-04 (4th Cir. 2016); *United States v. Winston*, 850 F.3d 677, 683-85 (4th Cir. 2017).

proposal, however, like the Commission's proposals, would sweep in less serious offenses, and move in the opposite direction from the Commission's stated goal of "focusing. . . on the most dangerous offenders."[33] Both the Commission's and the DOJ's proposed definitions of robbery should be rejected.

Inchoate Offenses (Part C). The DOJ supports the Commission's proposal to ignore a defendant's actual conviction and instead sentence him as if he was convicted of a different, more serious offense. While the DOJ may not want to address "complicated" questions like what the defendant was actually convicted of,[34] this is the inquiry that Congress imposed.[35] Pretending a defendant was convicted of an underlying offense when he was not, is not only unjust and inaccurate, it is contrary to Congress's directive.[36]

If the Commission opts to include inchoate offenses in the career offender guideline, the Commission must require an overt act for conspiracy to commit a "controlled substance offense" or "crime of violence." In requesting the Commission forego an overt act requirement, the DOJ makes two claims: First, that "any overt act requirement is not the majority view of the federal appellate courts;" and second, that to require an overt act "would yield counterintuitive and absurd results."[37] Neither claim supports the DOJ's request.

First, the cases cited by the DOJ do not show that circuits disagree on whether the generic definition of conspiracy requires an overt act. Only two of the cases cited by

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Further, several of these cases dealt with the ACCA, not the guidelines. *See Peppers*, 899 F.3d at 233; *Mulkern*, 854 F.3d at 91; *Starks*, 861 F.3d at 314; *Gardner*, 823 F.3d at 801; *Winston*, 850 F.3d at 679. These holdings would remain unaffected by any change the Commission makes to the definition of robbery.

[33] 83 Fed. Reg., at 65411 (quoting USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016)).

[34] DOJ 2019 Comment, at 7.

[35] *See* 28 U.S.C. § 994(h)(1)-(2) (requiring a guideline that applies to "categories" of defendants with a particular kind and number of "convict[ions].").

[36] *See* Defender 2019 Comment, at 32-34.

[37] DOJ 2019 Comment, at 8.

the DOJ address that issue and both agree that an overt act is required.[38] The remaining two cases did not address this question. Rather, in those cases, the courts determined that identifying the generic definition of conspiracy and applying the categorical approach was unnecessary because they found the Commission's commentary dispositive.[39]

The DOJ further urges the Commission not to impose an overt act requirement because adopting this requirement would mean some state conspiracy offenses would qualify under §4B1.1, while some federal conspiracy offenses would not. This perceived problem has a simple fix: if a court believes a defendant is deserving of a career offender sentence, that "court retains discretion to impose the enhanced sentence."[40] It is neither absurd nor counterintuitive to trust judges to exercise their statutory obligation to consider all 18 U.S.C. § 3553(a) factors and depart or vary when appropriate.

What is absurd, however, is to punish people for offenses of which they were never convicted, or perhaps even charged with. If the Commission opts to include inchoate offenses in §4B1.1, Option 3A, with the requirement that a conspiracy count "only if" an "overt act must be proved as an element," is the least harmful of the proposed options.

II. Proposed Amendment: §1B1.10

The Commission proposes amending §1B1.10 "in light of the Supreme Court decision" in *Koons v. United States*, 138 S. Ct. 1783 (June 4, 2018).[41] Defenders oppose the amendment because: (1) *Koons* requires no change; and (2) the current rule, supported by Defenders *and* the DOJ at the time it was promulgated, helps

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[38] *See* DOJ 2019 Comment, at n.34 (citing *United States v. McCollum*, 885 F.3d 300, 308 (4th Cir. 2018); *United States v. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016)).

[39] *See id.* (citing *United States v. Rivera-Constantino*, 798 F.3d 900, 906 (9th Cir. 2015); *United States v. Sanbria-Bueno*, 549 F. App'x 434, 438-39 (6th Cir. 2013)). *But see United States v. Garcia-Santana*, 774 F.3d 528, 534-36 (9th Cir. 2014) (recognizing in an immigration case that 40 out of 54 U.S. jurisdictions, the federal general conspiracy statute, the Model Penal Code, and secondary sources require an overt act and therefore generic conspiracy requires an overt act).

[40] *Beckles v. United States*, 137 S. Ct. 886, 894 (2017).

[41] 83 Fed. Reg., at 65402.