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August 10, 2018

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

Re: Comment on USSC Tentative Priorities for Amendment Cycle Ending May 1, 2019

Dear Judge Pryor:

Defenders welcome this opportunity to comment on the Commission's tentative priorities for the amendment cycle ending May 1, 2019.[1] We are pleased that the Commission continues to support possible legislative reforms to address unduly harsh and rigid sentences. We also appreciate the Commission's commitment to improvements to the guidelines that can be made without Congressional action, and our comments here focus on those priorities. In addition, we attach our June letter to the Commission that identifies additional issues we hope the Commission will consider this year.[2]

I. Tentative Priority No. 7: Study of Chapter Four, Part A (Criminal History)

Defenders are pleased to support the Commission's interest in studying both revocations and the single sentence rule.

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[1] 83 Fed. Reg. 30477 (June 28, 2018).

[2] *See* Letter from Michael Caruso, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (June 14, 2018) ("*Defender June 2018 Letter*") (Appendix B).

A. Revocations

The Commission proposes a study of "how the guidelines treat revocations under §4A1.2(k) for violations of conditions of supervision for conduct that does not constitute a federal state, or local offense punishable by a term of imprisonment."[3] Defenders support this study and anticipate it will lead to the conclusion that §4A1.2(k) should be amended to exclude this subset of revocations from the criminal history calculation. Defenders also encourage the Commission to take a generous view of the scope of the study, or explicitly expand it, to allow amendments that would exclude a broader category of revocations–even all revocations–as supported by the study's findings.

Before addressing the specifics of the Commission's proposed study, we reiterate our position that the best, and simplest, rule is to exclude all revocations from the criminal history score.[4] The conditions that lead to the revocations at issue here "are enforced through a shadow policing and adjudication system."[5] Counting revocations at all in the criminal history score creates unwarranted disparity. State revocation practices and rates vary widely.[6] A comprehensive report by the Robina Institute of Criminal Law and Criminal Justice illustrates the "tremendous variety in the formal law of probation across American states."[7] It also notes that the

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[3] 83 Fed. Reg. 30477 (June 28, 2018).

[4] *See Defender June 2018 Letter* at 10-11. *See also* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 37-42 (Feb. 20, 2017) ("*Defender Feb. 2017 Letter*"). Defenders previously suggested that if the Commission wants to guide courts on counting some, but not all, revocations, it might look to familiar categories such as those in Chapter 7, and treat a revocation that would qualify as a Grade C violation differently from one that would qualify as Grade A or B violations. *See Defender Feb. 2017 Letter* at 41-42.

[5] Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 Geo. L.J. 291, 316 (2016) (citing the investigatory police power granted to probation officers, the lack of fundamental protections for probationers, and the ability to punish via an extra-judicial sanction system).

[6] *See*, *e.g.*, The Pew Center on the States, *When Offenders Break the Rules* 4 (Nov. 2007) ("different policies and practices result in radically different rates at which violators are returned to prison"); Cecelia Klingele, *Rethinking the Use of Community Supervision,* 103 J. Crim. L. & Criminology 1015, 1031 (2013) ("revocation rates vary tremendously from one jurisdiction to another").

[7] Robina Institute of Criminal Law and Criminal Justice, University of Minnesota, *Profiles in Probation Revocation: Examining the Legal Framework in 21 States* 5 (2014),

"realities of probation and probation revocation are geographically different *within* states" and that the "statewide legal frameworks . . . are almost certainly implemented in vastly different ways from district to district, or county to county."[8]

The many revocation frameworks and practices are not guided by the same constitutional protections that attach to criminal proceedings. "Probationers are not entitled to the presumption of innocence or to a jury determination of guilt. They have no automatic constitutional right to appointed counsel or to cross-examine government witnesses. The exclusionary rule does not apply."[9] And, "[p]erhaps most significantly, the state is not required to prove a violation of probation beyond a reasonable doubt. . . . The burden of proof at revocation applies equally to hearings dealing with claims of new criminal conduct (as a violation of the condition barring such conduct) and hearings dealing with alleged technical violations."[10] Without these constitutional guides, states have adopted different processes for revocations, with varying degrees of procedural protections. For example, "some states provide appointed counsel in all revocation proceedings while many provide counsel only in designated circumstances," and "[s]tates also differ on the relevant standard of proof of contested facts."[11]

In addition to the disparity arising from the variety of state court practices, Defenders remain concerned about racial disparity. "Studies of state revocation practices have found that individuals of color are in some instances more likely to be revoked from community supervision than are their white counterparts for identical violations."[12] As one scholar has noted, "the racial dynamics of probation enforcement must be investigated more deeply."[13] Counting revocations pushes

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https://robinainstitute.umn.edu/publications/profiles-probation-revocation-examining-legal-framework-21-states.

[8] *Id.*

[9] Doherty, *supra* note 5 at 322.

[10] *Id.* at 323 ("Judges can imprison probationers for criminal conduct even if they do not believe the state can prove the crime beyond a reasonable doubt. Indeed, judges can revoke probation because of a new criminal charge, even if the person is acquitted of the same charge in a criminal trial.").

[11] Robina Institute, *supra* note 7 at 7.

[12] Klingele, *supra* note 6 at 1046 (citation omitted).

[13] Doherty, *supra* note 5 at 354.

people into higher criminal history categories, triggers career offender status, and precludes individuals from qualifying for safety valve relief. These are all areas where black defendants are disproportionately negatively impacted.[14]

That said, it would be a step in the right direction to at least exclude a subset of revocations, like the one the Commission proposes studying: revocations for conduct that does not constitute a new offense punishable by a term of imprisonment. Currently, revocations for minor and technical violations negatively affect our clients' criminal history status in a manner identical to revocations for new criminal conduct punishable by imprisonment. We see revocations negatively affect our clients' criminal history for such things as: (1) failing to report to a probation officer and failing to pay probation fees and costs; (2) failing a drug test, (3) failing to notify probation before changing address, failing to report to probation officer and failing to pay court costs; (4) failing to pay restitution, and changing residences without permission or advising his officer; (5) failing to report as directed, testing positive for marijuana, and being behind in paying probation fees.

Studies show that revocations for technical violations of conditions are common. In many jurisdictions, more than half of revocations are for technical violations.[15]

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[14] *See* USSC, Individual Offender Datafiles 2017 (in 2017, black defendants comprised 21.3 percent of all defendants, but 35 percent of defendants in the top three criminal history categories, and 61.6 percent of defendants sentenced under the career offender guideline); USSC, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* ("*Mandatory Minimum Report*"), xxviii, 354 (2011) (black defendants qualify for the safety valve far less often than any other group, primarily because of criminal history).

[15] *See* Ronald P. Corbett, Jr., *Probation and Mass Incarceration: The Ironies of Correctional Practice*, 28 Fed. Sent'g Rep. 278, 279 (Apr. 2016) ("A study in Michigan in 1996 found that revocations based on new criminal offenses accounted for a mere 10 percent of all revocations.") (citation omitted); Urban Inst., *The Justice Reinvestment Initiative: Experiences from the States* 2 (July 2013) ("A substantial portion of revocations—sometimes greater than half—are technical violations rather than new crimes."); Pew Center, *supra* note 6 at 3 ("A significant number of returns, however, are solely for violations of the conditions of probation or parole . . . . In some states, these so-called 'technical' or 'condition' violators account for more than half of all those returned to prison."). *See also* The Pew Center on the States, *State of Recidivism: The Revolving Door of America's Prisons* 13 & Ex. 2 (Apr. 2011) (across 33 states "19.9 percent of all released offenders were reincarcerated for a new crime" whereas "25.5 percent were returned for a technical violation"); Klingele, *supra* note 6 at 1030-31 ("One study followed individuals released from prison in 2004 and found that in thirteen states, 25% or more of those released were incarcerated for purely 'technical' violations of community supervision within three years.").

Technical violations can include such things as "failed drug tests, failure to report, failure to meet financial obligations"[16] or failing to "observ[e] a curfew."[17] In addition, "a number of states allow for the possibility of revocation for conduct not explicitly covered by the conditions of probation."[18] For example, "[i]n Idaho, the court can order revocation if it finds that the probationer has violated any condition of probation or 'for any other cause satisfactory to the court.'"[19] Under §4A1.2(k) all of these revocations are counted – on equal footing – with revocations for serious new crimes. We support changes that would narrow the category of revocations counted under the criminal history rule.

B. Single Sentence Rule

As part of its proposed study of Chapter Four, Part A (Criminal History), the Commission seeks comment on "whether unwarranted sentencing disparities arise under the single sentence rule at §4A1.2(a)(2) as a result of differences in state practices."[20] Defenders are pleased that the Commission has tentatively scheduled this study. We have seen such disparity and encourage the Commission to address it.[21] We also urge the Commission to expand the priority to study the situation where the single sentence rule can lead to different criminal history scores based on the serendipity of whether a defendant is charged in both state and federal court for the same criminal conduct, an issue the Commission considered as a possible priority last year.[22]

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[16] Corbett, *supra* note 5 at 279.

[17] *Id.* at 280.

[18] Doherty, *supra* note 5 at 322 (specifically referencing California, Michigan, Minnesota, and Idaho).

[19] *Id.*

[20] 83 Fed. Reg. 30477 (June 28, 2018).

[21] *See Defender June 2018 Letter* at 2-3.

[22] 82 Fed. Reg. 28381 (June 22, 2017); *see also* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n 14-16 (July 31, 2017) ("*Defender July 2017 Letter*").

In 2007, the Commission amended what was then known as the related case rule, and is now known as the single sentence rule.[23] The amendment was intended to "simplif[y] the rules for counting multiple prior sentences and promote[ ] consistency in the application of the guideline."[24] In this effort to simplify, the amendment appears to have had the unintended consequence of excluding from the rule some prior sentences arising from the same criminal conduct based only on happenstance, such as unique state practices and whether the offense is prosecuted in both state and federal court. Indeed, judges have explicitly asked about the Commission's intent regarding these seemingly unintended effects. For example, at one recent sentencing, a district court judge queried whether the Commission "would have been aware of" the disparity with state court procedures at the time it amended the single sentence rule in 2007.[25] The court asked whether the Commission could "have easily carved out an exception for the states that have this type of sentencing scheme?"[26] Similarly, a circuit court judge reviewing a sentence on appeal, questioned whether the effects "may not have been specifically intended

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[23] USSG App. C, Amend. 709 (Nov. 1, 2007). The related cases rule directed that "[p]rior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c)." USSG §4A1.2(a)(2) (1987). It further provided that offenses not separated by an intervening arrest "are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing." USSG §4A1.2, comment. (n.3) (1991). The rule was originally based in the concept that offenses separated by an intervening arrest "was a key factor in measuring the likelihood of recidivism." Daniel P. Bach, *Reconsidering Related Conduct*, 9 Fed. Sent'g Rep. 4, 198-99 (Feb. 1997) (citing USSC*, Supplementary Report on the Initial Sentencing Guideline and Policy Statements* 41-43 (1987); and 28 C.F.R. § 2.20, Salient Factor Scoring Manual).

[24] USSG App. C, Amend. 709, Reason for Amendment (Nov. 1, 2007).

[25] *See* Transcript of Sentencing at 8, *United States v. Martinez-Vaca*, No. 3:16-CR-203 (N.D. Tex. Feb. 15, 2017) (ECF No. 39) (While the court ultimately granted the requested departure to address the disparity, it first had questions about the Commission's intent: "I guess my next question is this. Is not this something that the Sentencing Commission would have been aware of at the time the [*sic*] it prepared or wrote the Sentencing Guidelines?").

[26] *Id*. at 8-9 (the offenses at issue resulted from a single arrest for DUI—a misdemeanor charged in state county court—in which the defendant also possessed drugs—a felony charged in state district court).

by the Sentencing Commission."[27] We urge the Commission to study this issue and consider appropriate amendments.

1. Different State Practices

Under the current rules at §4A1.2(a)(2), unwarranted disparity arises because similarly situated federal defendants face different criminal history scores simply because all fifty states do not process related cases the same way. We have previously identified Texas as an example, where unique state court processes mean defendants with Texas priors may have a higher criminal history score simply because the priors came from Texas rather than neighboring Oklahoma or many other states.[28] In Texas, where misdemeanors and felonies are prosecuted in different courts, the same criminal conduct with a single arrest can result in separate charging documents and sentencing dates, which translate into additional criminal history points under the guidelines.[29] Texas is not alone. Similar disparities may arise due to processes in Nevada, Virginia, and Alabama.[30] In each of these states, separate charging documents and separate sentencing dates can result from a single arrest for the same criminal conduct.[31] This means that defendants with priors from Texas, Nevada, Virginia, or Alabama may be subject to more criminal history points than defendants in other states because their prior sentences, for the same criminal conduct, do not qualify as a single sentence under the guidelines.

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[27] *United States v. Marcoccia*, 686 F. App'x 138, 144 (3d Cir. 2017) (Krause, J., concurring).

[28] *See Defender June 2018 Letter* at 2-3.

[29] Tex. Crim. Proc. Code Ann. arts. 4.05, 4.07, 4.11.

[30] There may be more. These states were identified through a survey of federal defenders.

[31] In Nevada, county justice courts have jurisdiction over misdemeanor offenses and the ability to transfer jurisdiction to district courts is limited to cases in which the offender participates in specified treatment programs. Nev. Rev. Stat. § 4.370(2). Nevada district courts have jurisdiction in all cases excluded from county justice courts, as well as appeals from justice and municipal courts. Nev. Rev. Stat. Const. art. 6, § 6. Virginia has a similar structure, where general district courts have original jurisdiction of misdemeanors and traffic infractions, Va. Code Ann. § 16.1-123.1(1)(b), and circuit courts have jurisdiction over felonies and appeals, Va. Code Ann. § 17.1-513. Alabama district courts have exclusive original jurisdiction of misdemeanors, Ala. Code § 12-12-32, and while circuit courts can hear misdemeanor cases that occurred in conjunction with felonies, Ala. Code § 12-11-30, consolidation does not always occur.

Defenders challenging the assignment of additional criminal history points for the same conduct in these states sometimes request variances or departures based on overrepresentation of criminal history with mixed results. Prosecutors take different positions on the appropriateness of below-guideline sentences to account for the disparity.[32] Some district courts have granted a departure or variance on this basis.[33]

But many courts deny requests to depart or vary to account for the disparity.[34] For example, a defendant recently sentenced in the Northern District of Texas received four criminal history points for a single offense, deriving from a single traffic stop in which the defendant voluntarily surrendered several types of drugs in his possession.[35] Four charges arose from this single incident. Three felonies for

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[32] *See*, *e.g.*, Transcript at 10, *United States v. Martinez-Vaca*, No. 3:16-CR-203 (N.D. Tex. Feb. 15, 2017) (ECF No. 39) (granting departure with no government objection; however, the government attorney noted that he was filling in for another attorney and would personally oppose such departures in the future).

[33] *See*, *e.g.*, Sentencing Memorandum and Judgment, *United States v. Brown*, No. 2:17-CR-58 (D. Nev. May 22, 2018) (ECF Nos. 76 and 80) (imposing defendant's requested sentence); Minutes, *United States v. Jiminez*, No. 2:14-CR-343 (D. Nev. Apr. 9, 2018) (ECF No. 30) (departure granted); Minutes Sheet, *United States v. Jones*, 3:17-CR-28 (E.D. Va. Feb. 20, 2018) (ECF No. 75) (noting removal of one criminal history point); and Motion for Downward Departure and Judgment, *United States v. Reyes*, No. 4:13-CR-122 (E.D. Va. June 4, 2015) (ECF Nos. 28 and 30) (granting time served sentence as requested by defense).

[34] *See*, *e.g.*, *United States v. Chester*, No. 2:06-CR-309, 2015 WL 8041547 (D. Nev. Dec. 4, 2015) (noting that even though defendant showed that both of his prior convictions were resolved as part of the same plea negotiation the offenses "almost certainly" were not included in the same charging document "as [they] were charged in different courts, i.e., the Las Vegas Justice Court and the Eighth Judicial District Court"); Minutes Sheet, *United States v. Ortiz-Rodas*, No. 4:17-CR-472 (S.D. Tex. Dec. 29, 2017) (ECF No. 29) (overruling defendant's objections and adopting PSR); Transcript at 5-10, *United States v. Romo-Vera*, No. 4:16-CR-495 (S.D. Tex. Mar. 10, 2017) (ECF No. 33) (denying any departure); and *United States v. Rubio-Lopez*, No. 3:11-CR-350 (N.D. Tex. Nov. 2, 2012) (defense request for departure denied).

[35] The probation officer in this case noted that the misdemeanor conviction was "related" to the felonies prosecuted in district court. Upon a traffic stop, defendant admitted to having smoked marijuana and when asked if there were any other drugs in the vehicle handed the officer his remaining drugs. The marijuana possession was a misdemeanor and tried in county court, while possession of other narcotics is a felony in Texas, which must be tried in district courts. *See United States v. Smith*, No. 3:17-CR-413-1 (N.D. Tex. July 6, 2018); and Tex. Crim. Proc. Code Ann. arts. 4.05, 4.07, 4.11.

possession of narcotics were processed in district court, but a misdemeanor charge for possession of marijuana was processed separately in county justice court. The felonies qualified as a single sentence under the guidelines and received a total of three criminal history points. The misdemeanor, however, was not contained in the same charging instrument, nor sentenced on the same day due to the unique separate court system, and thus did not qualify as a single sentence with the felony charges under the guidelines. The defendant received an additional criminal history point for the misdemeanor conviction, which pushed him into a higher criminal history category and a higher guideline range. The district court denied the defendant's motion for a downward departure and defendant's criminal history category remained one category higher than it otherwise would have been for a similarly situated defendant in a neighboring state where courts prosecute felony and misdemeanor cases together.

2. Federal and State Prosecutions

While studying the single sentence rule, we urge the Commission also to review the effect of the current rule on situations where a defendant is charged in both state and federal court for the same criminal conduct, an issue the Commission considered as a possible priority last year.[36] As noted in Judge Krause's concurring opinion in *United States v. Marcoccia*, 686 F. App'x 138 (3d Cir. 2017), the serendipity of prosecutions by two separate sovereigns for the same criminal conduct can significantly increase the guideline recommended sentence.[37]

The effects of the current rule are particularly harsh where the sentences the guidelines deem to be separate, though they arise from the same conduct, result in career offender status.[38] For instance in *Marcoccia*, the defendant had two prior

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[36] 82 Fed. Reg. 28381 (June 22, 2017); *see also Defender July 2017 Letter* at 14-16.

[37] 686 F. App'x at 146; *see also United States v. Jones*, (federal and state convictions counted as separate career offender predicates even though they "were "inextricably intertwined" and part of a single, ongoing offense" and to do otherwise "would ignore the clear instruction from section 4A1.2(a)(2)").

[38] *See e.g.*, *United States v. Pender*, 537 F.App'x 102, 104-05 (3d Cir. 2015); and Appellant Brief, *United States v. Pender*, No. 12-3963, 2013 WL 1089903 *4 (3d Cir. Mar. 6, 2013) (Defendant was sentenced as a career offender to 292 months' incarceration based upon state and federal sentences arising from a single bank robbery and its consequent attempt at flight. Prior to Amendment 709, the offenses would likely have been considered related and defendant would instead have been subject to an offense level 35 and criminal history category III.)

felony convictions: one a state conviction for possession of methamphetamine and the other a federal conviction for conspiracy to possess with intent to distribute in excess of 50 grams of methamphetamine.[39] The state and federal charges were contained in separate charging documents, and Mr. Marcoccia was sentenced for the two convictions on different days.[40] As a result, the "unambiguous text of the guidelines" deemed these two separate prior felonies and Mr. Marcoccia a "career offender."[41] The career offender enhancement "increased dramatically" the guideline recommended range from 27-33 months to 151-188 months.[42] Judge Krauss wrote separately "to highlight the concerns raised by the application of §4A1.2(a)(2) in this situation" and urged the Commission "to provide further guidance at the earliest opportunity" if it "did not intend the 2007 Amendment to §4A1.2(a)(2) to cover this situation."[43]

In another case, the defendant was convicted and sentenced first in federal court for a counterfeit checks conspiracy that encompassed conduct from March 9 through April 29, 2005.[44] After his release from federal prison, the state court convicted him for a single counterfeit check passed during the same conspiracy period. The state court ran the sentence concurrent to the federal offense, resulting in an effective time served term. Upon a later federal prosecution, these convictions were counted separately for a total of six criminal history points and one criminal history category higher than he would have been had the single sentence rule applied as it was originally intended. The defense requested a departure and/or variance to account for this, but the district court denied it.

As with unwarranted disparity that may arise from different state court practices, separate criminal history points may result from separate prosecutions for the same conduct by different sovereigns. It seems this application of §4A1.2(a)(2) is an unintended consequence of the amendment in 2007, and the same reasons exist for the Commission to remedy the problem.

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[39] 686 F. App'x at 139.

[40] *Id*.

[41] *Id*. at 141.

[42] *Id*. at 146 (Krause, J., concurring).

[43] *Id*. at 144, 147.

[44] *See United States v. Shabazz*, No. 3:17-CR-254 (N.D. Tex. Dec. 15, 2017).

II. Tentative Priority No. 9: Miscellaneous

Defenders support the Commission's interest in studying the operation of §5H1.6 with respect to the loss of caretaking or financial support of minors, and whether §1B1.13 effectively encourages the Director of the Bureau of Prisons to file a motion for compassionate release when "extraordinary and compelling reasons" exist. Defenders, however, do not believe it is necessary for the Commission to consider amendments to the commentary of §1B1.10 in light of *Koons v. United States*, No. 17-5716 (June 4, 2018).

A. §1B1.10 Commentary

The Commission has indicated it may consider "possible amendments to the commentary of §1B1.10 . . . in light of *Koons v. United States*, No. 17-5716 (June 4, 2018)."[45] Defenders urge the Commission to focus its resources on other issues this year because *Koons* does not require any changes to the commentary of §1B1.10. The Commission's 2014 amendment to this commentary, following written public comment, a public hearing and careful reflection, with support from both Defenders and the Department of Justice, among others, provides important, appropriate, and still-relevant guidance to courts.[46]

The Supreme Court's decision in *Koons* is a narrow one, limited to the facts of "what actually happened" at the original sentencing.[47] "[W]hat happened here" is that the sentencing "court discarded the advisory ranges in favor of the mandatory minimum

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[45] 83 Fed. Reg. 30477, 30478 (June 28, 2018).

[46] USSG App. C, Amend. 780 (Nov. 1, 2014); Letter from Jonathan J. Wroblewski, U.S. Dep't of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 4 (Mar. 6, 2014) (supporting the proposed amendment later adopted by the Commission and stating: "the correct policy - for proportionality reasons and to properly account for substantial assistance - is to permit a reduction from the applicable guideline range without regard to any mandatory minimum"); Letter from Marjorie A. Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 2-4 (Mar. 18, 2014) (supporting the proposed amendment later adopted by the Commission); Public Comment on Proposed Amendments (Mar. 2014), https://www.ussc.gov/policymaking/public-comment/public-comment-march-26-2014; Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., (Mar. 13, 2014); USSC Public Meeting (Apr. 10, 2014) (including Commissioners discussion of amendment before vote), video available at https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-april-10-2014.

[47] 138 S. Ct. 1783, 1789 n.2 (2018).

sentences" and then "departed downward from the mandatory minimum because of petitioners' substantial assistance."[48] And "[i]n no case did the court consider the original drug Guidelines ranges that it had earlier discarded."[49] From these facts, the Court concluded that "petitioners' sentences were 'based on' their mandatory minimums and on their substantial assistance to the government, not on sentencing ranges that the Commission later lowered,"[50] and they therefore were "ineligible for § 3582(c)(2) sentence reductions."[51] With this narrow holding, the Court explicitly declined to "resolve the meaning of 'sentencing range'" under 18 U.S.C. § 3582(c)(2).[52] The Court also took "no view" on whether 18 U.S.C. § 3553(e) "prohibits consideration of the advisory Guidelines ranges in determining how far to depart downward."[53]

What happened in *Koons* is different than what happens in many original sentencing proceedings where a defendant has provided substantial assistance and the government files a § 3553(e) motion. For example, in *In re Sealed Case*, a decision the Commission considered when amending §1B1.10 in 2014, the sentencing court "announced that it would 'do somewhat of a reduction, not only from' the mandatory minimum, but also *a further reduction* from 'what he would have gotten without the mandatory minimums.'"[54] A recent Defender survey confirms that sentencing courts across the country regularly use guideline ranges as anchors or targets in crafting sentences in such circumstances.[55]

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[48] *Id.* at 1787

[49] *Id.*

[50] *Id.* at 1787.

[51] *Id.*

[52] *Id.* at 1788 n.1 ("We need not resolve the meaning of 'sentencing range' today.").

[53] *Id.* at 1790 n.3.

[54] *In re Sealed Case,* 722 F.3d 361, 366 (D.C. Cir. 2013).

[55] *See* Brief of National Ass'n of Federal Defenders as Amicus Curiae in Support of Petitioners, *Koons v. United* States, 138 S. Ct. 1783 (2018), 2018 WL 620251, at *18-*24 (reporting results of national survey of Federal Defender offices, including that in 78% of 81 responding districts, "judges expressly based sentences in whole or in part on the applicable guideline range").

The current commentary, as amended in 2014, provides useful and appropriate guidance in the many cases in which judges do not do what the judge did in *Koons*. Importantly, it operates to prevent unwarranted disparity and unjust results. First, as the Commission explained in its reason for the 2014 amendment, the intent was to "ensure that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance."[56] The Commission further explained:

> The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.[57]

Second, it helps avoid the unwarranted disparity that would arise if only those defendants with original guideline ranges above the mandatory minimums were eligible for retroactive reductions. Without the current rule and commentary, many defendants with less serious offenses and less serious criminal histories would remain incarcerated longer than defendants with more serious offenses and criminal histories. Take, for example, Aaron and Brian, both first time offenders, sentenced under the current guidelines for the same drug quantity, 50 grams of "Ice," and facing the same 120-month mandatory minimum sentence under 21 U.S.C. § 841. In both cases the government filed § 3553(e) motions, and in both cases the court anchored the §3553(e) reduction to the guideline ranges, and imposed sentences of 60 months. Brian's guideline range, however, was higher than Aaron's because he had a higher offense level based on a 2-level enhancement for possessing a gun. Brian's offense level was 32, with a guideline range of 121-151

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[56] USSG App. C, Amend. 780, Reason for Amendment (Nov. 1, 2014).

[57] *Id.* (quoting USSG App. C, Amend. 759, Reason for Amendment (Nov. 1, 2011)). *See also* USSC Public Meeting (Apr. 10, 2014) (discussion by Chief Judge Ricardo H. Hinojosa, then Vice Chair and former Chair, U.S. Sentencing Comm'n, regarding the proposed amendment, beginning at 21:54), video available at https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-april-10-2014.

months. Aaron's offense level was 30, with a guideline range of 97-121 months. The current commentary ensures that both Aaron and Brian are eligible for any future amendments to the drug quantity table, not just Brian, who received the sentencing enhancement for a gun, pushing his guideline range above the mandatory minimum. Aaron, who received no weapon enhancement, should be similarly eligible for a retroactive reduction.

In sum, *Koons* compels no changes to the commentary at §1B1.10 and there is good reason to retain the commentary in its current form.

B. §5H1.6-Family Ties and Responsibilities

Defenders support the Commission's proposal to "study the operation of §5H1.6."[58] We expect such a study will support several changes to the current guideline. As discussed below, a growing body of scientific research shows that incarceration has significant negative impact on families. In addition, feedback from the courts shows courts are increasingly relying on family ties and responsibilities as a basis for lesser sentences, a practice that is consistent with the court's obligation to consider the "history and characteristics of the defendant that are relevant to the purposes of sentencing."[59] Finally, there is some indication of possible disparate application of below guideline sentences based upon family ties and responsibilities.

In the past, Defenders have recommended that the Commission delete §5H1.6, as well as the other guidelines in Ch. 5 Pts. H and K, that restrict consideration of an individual's characteristics.[60] But so long as the Commission retains these departure provisions, it should acknowledge the scientific research on the impact of incarceration of a family member and invite departures for family ties and responsibilities. To do so, it could amend §5H1.6 in several ways including making clear that: (1) family ties and responsibilities are ordinarily relevant to the court's decision to impose a lower term of incarceration; (2) a defendant's caregiving and financial support are generally critical to a family's well-being and protecting public safety; (3) the defendant's caretaking or financial support need not be irreplaceable to the defendant's family for a defendant to qualify for a departure; and (4) the loss

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[58] 83 Fed. Reg. 30477, 30478 (June 28, 2018).

[59] 18 U.S.C. § 3553(a).

[60] *See* Statement of Nicole Kaplan & Alan Dubois Before the U.S. Sentencing Comm'n, Atlanta, Georgia, at 1-4 (Feb. 10, 2009); Statement of Thomas W. Hillier II & Davina Chen, Before the U.S. Sentencing Comm'n, Stanford, Cal., at 31-35 (May 27, 2009).

of caretaking or financial support need not "substantially exceed the harm ordinarily incident to incarceration for a similarly situated defendant."[61]

1. Scientific Research

A vast amount of research shows the devastating impact that incarceration has on children and other family members.[62] Children of incarcerated parents are "collateral damage" and "invisible victims."[63] Because children of incarcerated parents are more likely than their peers to be involved in the criminal justice system, longer terms of imprisonment for parents creates a cycle of criminality that neither protects the public nor supports general deterrence.

In 2001, the U.S. Dep't of Health and Human Services discussed the stressful effects of parental incarceration on young children,[64] noting that "[m]any of the problems associated with either separation from the parent or co-detention can be avoided by provision of some form of community-based sentencing, instead of prison-based incarceration."[65] Among other issues, the report noted:

> social policy needs to address the issue of public attitudes toward incarcerated individuals and their families. By educating the wider

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[61] The Commission has the authority to encourage more departures based upon family ties and responsibilities given the Supreme Court's decision in *Booker* that the PROTECT ACT, which instructed the Commission to limit the number of available departures, is no longer relevant. *United States v. Booker*, 543 U.S. 220, 261 (2005).

[62] *See*, *e.g.*, Sara Wakefield & Christopher Wildeman, National Council on Family Relations, *How Parental Incarceration Harms Children and What to Do About It* (Jan. 2018) (citing numerous studies showing the impact of parental incarceration and "[p]olicies that both decrease imprisonment and provide support to the most vulnerable families will yield substantial benefits"); and Sage Journals (listing 178 articles discussing parental incarceration), http://journals.sagepub.com/action/doSearch?content=articlesChapters&countTerms=true&target=default&field1=Abstract&text1=parental+incarceration&field2=AllField&text2=&Ppub=&Ppub=&AfterYear=&BeforeYear=&earlycite=on&access=.

[63] Amy Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 Md. L. Rev. 385 (2018).

[64] U.S. Dep't of Health & Human Services, *Effects of Parental Incarceration on Young Children* (2001), https://aspe.hhs.gov/basic-report/effects-parental-incarceration-young-children.

[65] *Id.* at 11. It also identified research and policy issues to be addressed in order to better understand the issues of parental incarceration. *Id.* at 16-17.

> community about the needs of incarcerated parents, their children, and their families, more humane policies may emerge and the difficulties faced by these individuals will be better appreciated. . . [And] in recognition of the diversity in our society and the disproportionate numbers of minority group members who are incarcerated, social policies should be made more culturally sensitive.[66]

Since the Dep't of Health and Human Services released its report, the scientific research and literature has shown that the impact of incarceration on families supports policy changes. The research is extensive and highly relevant to the Commission's study. To facilitate the Commission's study, we highlight a few of the most important points in the attached Appendix A, Collected Research: Effects of Incarceration on Families.

Research also makes clear that so-called "remedial or ameliorative programs" referenced in §5H1.6, note 1(B)(iii) are not effective replacements for a defendant's caretaking or financial support. For example, "[c]hildren in foster care have disproportionately high rates of physical, developmental, and mental health problems."[67] Foster care, therefore, is not an acceptable replacement for a child with an incarcerated parent. And while some non-profit and government organizations try to help children of incarcerated parents, they cannot replace all caretaking and financial support.[68] Nor is a nursing home an acceptable replacement for a defendant who takes care of a family member with dementia or other health issues.[69] And given the excessive costs of day care[70] and long-term care,[71] the financial support and caretaking abilities of indigent defendants cannot be replaced.

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[66] *Id*. at 17.

[67] American Academy of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics (Nov. 2000), http://pediatrics.aappublications.org/content/106/5/1145.

[68] *See*, *e.g*., ConnectNetwork, *7 Helpful Programs for Children of Incarcerated Parents*, https://web.connectnetwork.com/programs-for-children-of-incarcerated-parents/.

[69] *See*, *e.g*., Alice Dembner, *Right Move, Right Time: Dementia Patients Live Longer When Families Delay Putting Them in a Nursing Home, Research Suggests*, The Boston Globe, Aug. 7, 2006); eCaring, *9 Reasons to Care for Aging Parents at Home* (May 2, 2012) (Home care promotes recovery, saves money, honors the loved one's dignity and independence, is personalized, keeps families together, is safe, extends and improves qualify of life, goes hand-in-hand with technology, and is the oldest and most respected forms of health care), http://ecaring.com/9-reasons-to-care-for-aging-parents-at-home/.

2. Judicial Feedback and Possible Disparity

The Commission's 2010 Survey of United States District Judges shows that 62% of the survey respondents believed that family ties and responsibilities are ordinarily relevant to departure and/or variance consideration.[72] Defenders are confident the percentage would be even greater today. The Commission's dataset and case law shows that many courts have given lesser sentences because of family ties and responsibilities, consistent with the court's obligation to consider the "history and characteristics of the defendant that are relevant to the purposes of sentencing."[73] As the chart below shows, over the past decade a growing number of courts have cited family ties and responsibilities as a reason for sentences below the guideline range, rising to above 3000 times in FY 2016.[74]

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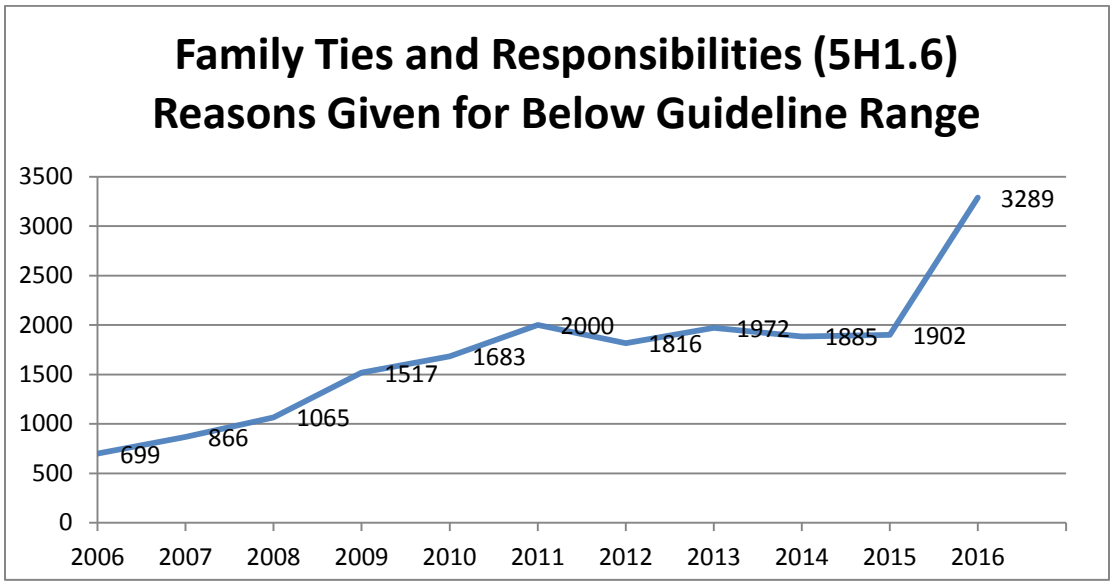
[70] *See*, *e.g.*, Katie Bugbee, *How Much Does Child Care Cost*? (Mar. 2018) ("average cost of center-based day care for infants is about $10,468 per year, but prices can range from $6,605 to $20,209"; "average cost of center-based day care for toddlers is about $9,733, but prices can range from $8,043 to $18,815"), https://www.care.com/c/stories/2423/how-much-does-child-care-cost.

[71] *See*, *e.g.*, U.S. Dep't of Health & Human Services, *Costs of Care* (national average costs for long-term care are $6,844 per month for a semi-private room in a nursing home; $7,698 per month for a private room; $3,628 per month in assisted living; $20 an hour for home care services; $68 per day for services in adult day health care center), https://longtermcare.acl.gov/costs-how-to-pay/costs-of-care.html.

[72] USSC, *Results of Survey of United States District Judges: January 2010 through March 2010* (2010).

[73] 18 U.S.C. § 3553(a).

[74] USSC, Interactive Sourcebook, *Reasons Given By Sentencing Courts For All Sentences Below The Guideline Range*, FY 2006-2016.



At the same time, Commission data indicates there may be geographic disparity in courts' reliance on §5H1.6 as a reason for a below guideline sentence. For example, in 2016, two districts cited §5H1.6 more often than any other reason for imposing a below guideline sentence.[75] In three other districts §5H1.6 was the second most-used reason.[76] Conversely, seven districts never cited it at all.[77]

Case law also indicates differences among courts in their approach to considering family ties and responsibilities. Several courts have focused on the guideline statement that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted."[78] Other courts have at least acknowledged that extraordinary circumstances support a departure or variance,

[75] *Id.* (C.D. Cal.; E.D.N.Y.).

[76] *Id.* (S.D.N.Y.; W.D.N.Y.; E.D. Pa.).

[77] *Id.* (D. Ala., D. Guam, W.D. La., D. R.I., M.D. Tenn., D. V.I.).

[78] *See, e.g.*, *United States v. Underwood*, 639 F.3d 1111, 1114 (8th Cir. 2011) (affirming court's refusal to grant a downward departure under §5H1.6, claiming that "district court correctly explained at sentencing that family circumstances are not a factor ordinarily considered when sentencing a defendant under the Guidelines" even though the defendant's son suffered from muscular dystrophy, requiring "around-the-clock care" that his wife could not provide by herself); *United States v. Williams*, 505 F. App'x 426 (6th Cir. 2012) (finding that court's statement: "'[u]nder the guidelines, we really don't depart in terms of the calculation because of family circumstances, because everybody has got family circumstances,'. . . matches the directive of the sentencing guidelines").

but do not always agree on what family circumstances should be considered "extraordinary."[79] Some courts that have sentenced below the guidelines based upon family circumstances do not rely upon §5H1.6. For example, in a drug case last year, a court imposed a five-year term of probation rather than the guidelines recommended range of 46 to 57 months imprisonment. In doing so, the court relied heavily on "compelling scholarship that demonstrates the need for courts to consider a defendant's family circumstances at sentencing," particularly given the "detrimental effects . . . felt disproportionately in minority communities."[80]

In light of the scientific research, feedback from courts and possible disparity in application, amending the guidelines to encourage rather than discourage departures for family ties and responsibilities would help ensure that courts meaningfully and consistently consider the impact of incarceration on families and promote just deserts, proportionality, and respect for the law.

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[79] *Compare United States v. Prosperi*, 686 F.3d 32, 48-49 (1st Cir. 2012) (affirming below guideline sentence because defendant's wife was "battling terminal cancer"), *United States v. Thavaraja*, 740 F.3d 253, 262 (2d Cir. 2014) (rejecting government appeal that district court gave improper weight to the defendant's family circumstances – providing care for her daughter and grandson), *United States v. Adams*, 2017 WL 2615440 (E.D.N.Y. June 16, 2017) (drug trafficker's care of her daughter and grandchild, as well as need to avoid unwarranted sentencing disparities because Second Circuit has affirmed downward departures in cases "where a Guidelines sentence would impose extraordinary hardship on a defendant's family, and particularly in cases where defendants are 'solely responsible for the upbringing of . . . children,'" warrants departure), *and United States v. Husein*, 478 F.3d 318, 321-27 (6th Cir. 2007) (rejecting government appeal that district court should not have departed based on defendant's care for her incapacitated father and three younger minor siblings), *with United States v. Young*, 387 F. App'x 229, 230-31 (3d Cir. 2010) ("placement of a child in foster care for the poor decisions of the parents, though tragic, is not extraordinary"), *United State v. Smith*, 860 F. 3d 508, 518 (7th Cir. 2017) (recognizing that "[e]xtraordinary family circumstances may constitute a legitimate basis for imposing a below-guideline sentence," but vacating below guideline sentence because court did not cite anything unusual in family circumstances), *and United States v. Camacho-Montalvo*, 583 F. App'x 552, 553–54 (7th Cir. 2014) (caring for sick mother and taking her to medical appointment "does not represent extraordinary family ties and responsibilities that would remove his case out of the heartland of cases sentenced under the guidelines," considering nursing home care a "feasible alternative" that can replace the family caregiver).

[80] *See United States v. Cox*, 271 F. Supp. 3d 1085, 1088-90 (S.D. Iowa 2017).

C. §1B1.13-Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)

Defenders greatly appreciate the Commission's 2016 amendments to the §1B1.13 application notes[81] and support the Commission's proposed priority to conduct a "study of whether §1B1.13 effectively encourages the Director of the Bureau of Prisons to file a motion for compassionate release when 'extraordinary and compelling reasons' exist."[82] Defenders expect such a study will show that the Commission's 2016 amendments have not meaningfully changed past practices, and may provide insight into additional steps the Commission can take to better encourage the filing of such motions. A detailed study, that would essentially update the 2013 report of the Office of Inspector General, would be particularly instructive.[83]

After the Office of Inspector General and the Commission noted problems with BOP's program statement and the small number of motions filed in response to inmates' compassionate release requests, BOP considered changing its "Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g)," but has not done so. Specifically, in June 2016, BOP proposed several changes to its procedures that would have been more consistent with the Commission's 2016 amendments.[84] The procedures, however, have not been changed and are still the same as those adopted

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[81] After reviewing the Bureau of Prison's Program Statement 5050.49, CN-1 pertaining to "compassionate release," the Commission amended §1B1.13 to "broaden[ ] certain eligibility criteria and encourage[ ] the Director of the Bureau of Prisons to file a motion for compassionate release when 'extraordinary and compelling reasons' exist." USSG App. C, Amend. 799, Reason for Amendment (Nov. 1, 2016).

[82] 83 Fed. Reg. 30477, 30478 (June 28, 2018).

[83] Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* (Apr. 2013).

[84] 81 Fed. Reg. 36485 (June 7, 2016). For example, BOP proposed "deleting language which indicates that the Bureau will only allow reductions in sentence for circumstances 'which could not reasonably have been foreseen by the court at the time of sentencing'" and using the phrase "extraordinary and compelling" rather than "particularly extraordinary or compelling." *Id*. BOP also proposed changes to expand the authority of the Acting Medical Director, the Acting Assistant Director, Correctional Programs Division, and multiple staff in the Office of General Counsel to review requests for compassionate release, anticipating that such a change would "expedite processing of the requests." *Id*.

in August 2013 and March 2015.[85] And earlier this year, the Department of Justice (DOJ) made clear in a letter to Congress that BOP continues to review requests based upon the existing criteria rather than what the Commission suggested in its 2016 amendments.[86]

1. Ongoing Problems

Recently released reports from DOJ[87] and The Marshall Project[88] show that BOP continues to have lengthy reviews of compassionate release applications and low approval rates. DOJ's report to Congress identified five common reasons for denying requests for compassionate release,[89] but it is also known that "prison officials reject many prisoners' applications on the grounds that they pose a risk to public safety or

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[85] U.S. Dep't of Justice, Federal Bureau of Prisons, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g) (Program Statement 5050.49, CN-1) (2015), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf. *See also* 28 C.F.R. § 571.60-64 (2018).

[86] Letter from Stephen E. Boyd, Ass't Attorney General, U.S. Dep't of Justice, Office of Legislative Affairs to the Honorable Brian Schatz, United States Senate, at 2 (Jan. 16, 2018), https://famm.org/wp-content/uploads/Response-from-BOP-re.-Compassionate-Release-Letter-1-16-2018.pdf.

[87] *Id*. at 1-2 (since January 2014, wardens recommended release for 842 out of the 3,182 individuals who requested compassionate release/reduction in sentence (RIS); the BOP Director approved 306 requests and denied 2,405 requests; "81 inmates [ ] died while their requests were under consideration in the BOP central office;" "BOP's average processing time is approximately 141 days for approvals and 196 days for denials.").

[88] Christie Thompson, The Marshall Project, *Old Sick and Dying in Shackles*, at 3 (Mar. 2018) (produced in partnership with The New York Times) ("From 2013 to 2017, the federal Bureau of Prisons received about 5,400 applications for compassionate release. Of those, 312 have been approved so far. During that same time period, 266 applicants have died in custody."); *see also* Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. Times, Mar. 7, 2018.

[89] Letter from Stephen E. Boyd, at 2 (stating that "requests are most commonly denied because: [1] the inmate did not meet the terminal or debilitated medical condition criteria; [2] the inmate's medical condition did not impact his/her ability to function in a correctional setting; [3] the inmate had not served a sufficient amount of time toward his/her sentence as required by the elderly-medical and elderly-other criteria; [4] the inmate was unable to demonstrate he/she was the sole family member capable of providing care to his/her child, spouse, or registered partner; or [5] the inmate lacked stable residence and release plans").

that their crime was too serious to justify early release."[90] For example, some prison officials consider an elderly inmate able to reoffend if he has served extensive time in prison for fraud and suffers from a debilitating medical condition, but does not suffer from a cognitive deficit and is capable of making phone calls.[91]

Other evidence shows that information DOJ provided to Congress did not paint a complete picture when it indicated that BOP's average processing time for a compassionate release request is "141 days for approvals and 196 days for denials," approximately 5 to 7 months.[92] Defenders have seen it take much longer. For example, in December 2016 a Defender client suffered a double stroke. He is bed-ridden and has limited speech/movement. His request for compassionate release, filed over a year ago, is still under consideration.

While anecdotal examples and the available data show that BOP continues to resist meritorious requests for compassionate release, a more comprehensive study by the Sentencing Commission could shed light on why the Director of the Bureau of Prisons so rarely exercises the authority to file a motion under 3582(c)(1)(A) when the criteria in §1B1.13 are met.[93]

2. Defender Recommendations

Before engaging in its proposed study, Defenders recommend that the Commission staff meet with representatives of interested groups including the Federal Defender Guideline Committee, Practitioners Advisory Group, Families Against Mandatory Minimums (FAMM),[94] The Marshall Project, and the Office of Probation and

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[90] Thompson, *supra* note 88 at 4.

[91] *See* Program Statement, at 3 ("A cognitive deficit is not required in cases of severe physical impairment, but may be a factor when considering the inmate's ability or inability to reoffend.").

[92] Letter from Stephen Boyd, at 1-2.

[93] The Commission's study also could help ascertain whether BOP's current policies are consistently applied. For example, Defenders who have tried to help clients seek compassionate release have been met with confusing directions about how to apply, mixed messages on whether an application can be submitted by counsel or must be submitted by the inmate, and blanket denials without any reason given.

[94] FAMM has done extensive studies on compassionate release in both federal and state systems. *See, e.g.*, Mary Price, General Counsel for FAMM, *Everywhere and Nowhere: Compassionate Release in the States* (June 2018); FAMM and Human Rights Watch, *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons* (Nov. 30, 2012),

Pretrial Services. The groups will have helpful ideas on relevant inquiries for the study. In the meantime, Defenders include here some recommended inquiries:

- specific reasons given by each decision-maker, *i.e.*, individual Wardens, Medical Director, Assistant Director, Correctional Programs Division, Office of General Counsel, Bureau of Prisons Director, and Attorney General/ Deputy Attorney General, for approving or denying a request for release;

- how each decision-maker considers the factors listed in section 7 of the BOP program statement,[95] especially the criteria used to assess whether the "inmate's release would pose a danger to the safety of any other person or the community,"[96] if any, or whether the inmate has the "ability or inability to reoffend";[97]

- how each decision-maker considers the criteria listed in Application Note 1 of §1B1.13;

- how BOP determines whether an inmate diagnosed with "a terminal, incurable disease" has a life expectancy of 18 months or less and whether BOP's assessment of life expectancy has been accurate;[98]

- amount of time each decision-maker takes to decide whether to approve or deny a request for release;

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https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons.

[95] Program Statement, at 10.

[96] USSG §1B1.13(2).

[97] Program Statement at 3 ("functional impairment…. [and] cognitive deficit…may be a factor when considering the inmate's ability or inability to reoffend").

[98] Even though the Commission's 2016 amendment made clear that a "specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required," the BOP has still required a life expectancy of 18 months or less. This rule has had unfair effects. For example, "[w]hen Anthony Bell applied for compassionate release in October 2014, he had served all but one of a 16-year sentence for selling cocaine. Prison doctors treating his lupus and liver failure estimated that he had less than six months to live. It took about that long for the bureau to hand down its response-Denied. After reading Bell's medical records, officials concluded that he had more than 19 months to live. Two days later, he died." *Old Sick and Dying in Shackles*, at 5.

- methods each Warden or other decision-maker uses to obtain assistance from the Office of Probation and Pretrial Services;

- policies and practices each Probation office uses when BOP requests information on resources available for those who seek compassionate release and how long it takes each Probation office to return information to the BOP;

- whether BOP, as indicated by Jonathan Wroblewski in 2016,[99] has considered seeking the opinion of the sentencing judge and why it chose not to do so;

- review the policy and practices of each institution, including handbooks provided to inmates upon arriving at the institution, to ensure that they clearly and correctly inform inmates of how to apply for compassionate release;

- whether the inmate's request for compassionate release procedurally complied with the requirements set forth in the BOP Program Statement;[100]

- determine which institutions allow attorneys to apply for compassionate release and/or help inmates provide the information required in the BOP program statement - e.g. death certificates, verifiable medical documentation of the incapacitation, birth certificates, adoption certificates, verification of paternity, documentation of custodial skills or obligations, inmate's living arrangements before incarceration, and unresolved detainers;[101]

- breakdown demographics, offense type, percentage of time-served, reasons for applying for a reduction in sentence, inmate classification, opinion of AUSA contacted by BOP, and reasons for denial/approval.

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[99] Transcript of Public Hearing Before the U.S. Sentencing Comm'n on Compassionate Release and Conditions of Supervision 47 (Feb. 17, 2016) (responding to Judge Breyer's suggestion that BOP seek the courts' input, former Ex Officio Commissioner Wroblewski stated: "I will make certain that we consider the idea of seeking the judge's you know, sending a letter, for example, to the sentencing judge and seeing what that judge's opinion is.") (Jonathan Wroblewski, Principal Deputy Assistant Attorney General, Office of Legal Policy, U.S. Dep't of Justice).

[100] *See Program Statement*, at 3, 5, 8 (listing information inmate should include in request).

[101] *Id*.

As our comments reflect, Defenders are pleased the Commission is considering this important study, and stand ready to help.

III. Conclusion

As always, we appreciate the opportunity to comment on the Commission's tentative priorities, and look forward to working with the Commission this year.

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

Enclosures

cc (w/encl.): Rachel E. Barkow, Commissioner
Hon. Charles R. Breyer, Commissioner
Hon. Danny C. Reeves, Commissioner
David Rybicki, Commissioner *Ex Officio*
J. Patricia Wilson Smoot, Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel

APPENDIX A

Appendix A
Collected Research: Effects of Incarceration on Families

- One extensive study includes several important findings:
    - (1) "[p]eople with convictions are saddled with copious fees, fines, and debt at the same time that their economic opportunities are diminished, resulting in a lack of economic stability and mobility";
    - (2) "[m]any families lose income when a family member is removed from household wage earning and struggle to meet basic needs while paying fees, supporting their loved one financially, and bearing the costs of keeping in touch";
    - (3) "[w]omen bear the brunt of the costs—both financial and emotional—of their loved one's incarceration";
    - (4) "families incur large sums of debt due to their experience with incarceration";
    - (5) "[d]espite their often-limited resources, families are the primary resource for housing, employment, and health needs of their formerly incarcerated loved ones, filling the gaps left by diminishing budgets for reentry services";
    - (6) "[i]ncarceration damages familial relationships and stability by separating people from their support systems, disrupting continuity of families, and causing lifelong health impacts that impede families from thriving"; and
    - (7) "[t]he stigma, isolation, and trauma associated with incarceration have direct impacts across families and communities."

Saneta deVuono-powell et al., *Who Pays, The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design (2015), http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf (The research team for this study included 26 organizations from across the country.).

- "Our research concludes that mass incarceration is (1) a direct cause of significant to extreme psychological distress and trauma, and (2) a serious obstacle to the financial health and economic agency of women with incarcerated loved ones." Gina Clayton et al., *Because She's Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones*, Essie Justice Group (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Power-Report.pdf.

- Children with incarcerated fathers are at risk for diminished learning capability and employment prospects into adulthood. "The best evidence produced thus far links paternal incarceration to childhood mental health and behavioral problems, problems that are strongly linked to difficulty in school, trouble finding work, and becoming involved in crime. Paternal incarceration increases behavioral problems by one third to one half a standard deviation and is global in nature, influencing both externalizing behaviors and internalizing behaviors in roughly equal measure. Using conservative estimates and a variety of stringent modeling strategies, we show that the influence of mass incarceration has increased racial disparities in externalizing problems by up to 26% and in internalizing problems by up to 45%." Sara Wakefield & Christopher Wildeman, *Mass Imprisonment and Racial Disparities in Childhood Behavioral Problems*, 10 Criminology & Pub. Pol'y 793, 806 (2011).

- A University of California-Irvine study "found significant health problems, including behavioral issues, in children of incarcerated parents and also that, for some types of health outcomes, parental incarceration can be more detrimental to a child's well-being than divorce or the death of a parent." Am. Sociological Ass'n, *Parental Incarceration Can Be Worse for a Child than Divorce or Death of a Parent*, Science Daily (Aug. 16, 2014), https://www.sciencedaily.com/releases/2014/08/140816204411.htm.

- "Children of incarcerated parents are more likely to experience financial hardship, residential instability, changes in caregiver arrangements, and trauma associated with the loss of a loved one, all of which may translate into short- and long-term mental and physical health issues, poor academic performance and achievement, substance abuse, and delinquency." Akiva M. Liberman & Jocelyn Fontaine, Urban Institute, *Reducing Harms to Boys and Young Men of Color from Criminal Justice System Involvement* 10 (Feb. 2015), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000095-Reducing-Harms-to-Boys-and-Young-Men-of-Color-from-Criminal-Justice-System-Involvement.pdf.

- "[P]arental incarceration leads to an array of cognitive and noncognitive outcomes known to affect children's performance in school, and . . . our criminal justice system makes an important contribution to the racial achievement gap." Leila Morsy & Richard Rothstein, Economic Policy Institute, *Mass Incarceration and Children's Outcomes: Criminal Justice Policy is Education Policy* (2016), https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/.

- "[P]aternal incarceration is consistently associated with adolescent delinquency," and is "strongly associated with aggressive behavior in both childhood and adolescence." Raymond Swisher & Unique R. Shaw-Smith, *Paternal Incarceration and Adolescent Well-Being: Life Course Contingencies and Other Moderators*, 104 J. Crim. L. & Criminology 929, 956 (2014).

- "Incarceration breaks up families, the building blocks of our communities and nation. It creates an unstable environment for kids that can have lasting effects on their development and well-being. These challenges can reverberate and multiply in their often low-income neighborhoods, especially if they live in a community where a significant number of residents, particularly men, are in or returning from jail or prison. And different obstacles emerge once parents are released and try to assume their roles as caregivers, employees and neighbors." The Annie E. Casey Foundation, *A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families, and Communities* 1 (2016), http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf.

- Research on the consequences of mass imprisonment for childhood inequality suggest that: (1) "recent paternal (but not maternal) incarceration substantially increases the risk of child homelessness"; (2) "effects are concentrated among" African American children; and (3) increases in familial economic hardship and decreases in access to institutional support explain some of the relationship. "Taken together, the findings indicate the prison boom was likely a key driver" of the growing racial disparities in child homelessness, increasing black-white inequality in this risk by 65 percent since the 1970s. Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment* (2017), https://pdfs.semanticscholar.org/8fb3/325c477f4b8666ff55f9eb5e85e5125dbe75.pdf.

- "Children with incarcerated parents are nearly three times as likely to experience health conditions such as depression and anxiety. They are also more likely to have speech and other cognitive delays. These increased risks contribute to an intergenerational cycle of poverty, since any of these problems make it harder for children to succeed in school, which in turn may prevent them from graduating and/or finding a job that pays enough to support their own families—reinforcing hunger across generations." Marlysa Gamblin, *Mass Incarceration: A Major Cause of Hunger*, 35 Briefing Paper, Bread for the World Institute (Feb. 2018), http://bread.org/sites/default/files/downloads/briefing-paper-mass-incarceration-february-2018.pdf?_ga=2.242239426.1909272678.1526001574-1386660582.1526001574.

- "Not only is parental criminal justice involvement experienced by millions of children, but also it can lead to negative outcomes. A growing body of research indicates that *children often experience trauma, family disruption, and loss of their primary caregiver* as a result of parental incarceration. Approximately 40 percent of children of an incarcerated parent lose a resident parent, and 20 percent of children lose their primary caregiver. As a result, they are at a heightened risk for foster care placement and permanent separation from family members. In addition, they are more likely to live in a household facing economic strain, to experience financial hardship, and to be at risk of homelessness. Losing a parent to incarceration can be particularly traumatic to a child. The children are at risk of a variety of emotional and behavioral problems, such as mental health problems, major depression, and attention disorders. Children of incarcerated parents may also have below-average academic performance and are more likely to fail or drop out of school. They may also face stigma and shame in school. Further, parental incarceration has been shown to be a risk factor for antisocial and delinquent behavior, poor mental health, drug use, school failure, unemployment, and criminal activity." Bryce Peterson, et al. *Children of Incarcerated Parents Framework Document: Promising Practices, Challenges, and Recommendations for the Field*, Urban Institute (June 2015) (citations omitted) (emphasis in original), https://www.urban.org/sites/default/files/publication/53721/2000256-Children-of-Incarcerated-Parents-Framework-Document.pdf.

- "This study extended work on the consequences of incarceration for families by linking parents' incarcerations to their material support of children entering adulthood . . . The study confirms that the impact of parental incarceration extends beyond childhood and may disadvantage youths during the transition to adulthood." Sonja E. Siennick, *Parental Incarceration and Intergenerational Transfers to Young Adult*s, J. Family Issues (Sept. 15, 2014) (abstract).

APPENDIX B

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

150 West Flagler Street, Suite 1500
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Chair: Michael Caruso Phone: 305.533.4200

June 14, 2018

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

Re: Proposed Priorities for 2018-2019 Amendment Cycle

Dear Judge Pryor:

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

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

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

[2] *See* 28 U.S.C. § 994(g).

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

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

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

I. Refinement and Clarifications

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

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

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[4] *Id.* at 2.

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

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

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

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

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

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

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

[8] Okla. Const. art. VII, §7.

[9] §4A1.1, comment. (n.4).

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

II. Additional Proposed Priorities

A. Relevant Conduct

1. Prohibit the use of acquitted conduct.

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

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

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

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

[12] S*ee* 62 Fed. Reg. 152,161 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Criminal History

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

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[20] 79 Fed. Reg. 31410 (June 2, 2014).

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

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

[23] *Id*. at 2011.

[24] *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

[30] *Id.*

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

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

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

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

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

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

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

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

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

3. Recognize the relevance of time served.

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

4. Narrow the career offender guideline.

a. Amend the definition of a controlled substance offense.

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

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

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

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

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

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

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

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

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

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

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

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

C. Alternatives to Incarceration

Defenders appreciate the Commission's recent consideration of alternatives to incarceration and the amendment for "nonviolent first offenders." We urge the Commission to keep this issue on the table, and work toward doing even more to encourage alternatives to incarceration. As noted above, and as the Commission is well aware, the Commission faces the challenging statutorily-directed task of formulating guidelines "to minimize the likelihood that the Federal prison population will exceed its capacity of the federal prisons."[41] While the prison population has declined in the past few years, the BOP remains overcrowded.[42] And grave concerns exist about planned staff reductions as the BOP also estimates an increase in the prison population in FYs 2018 and 2019.[43] Encouraging alternatives to incarceration could prove critical under these circumstances.

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

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[41] 28 U.S.C. § 994(g).

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

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

first offenders," those individuals whose prior judicial dispositions were for offenses committed before the age of 18, or at least juvenile adjudications. Due to the racial disparity in the juvenile justice system, as discussed in prior defender submissions,[44] including individuals with only juvenile adjudications in the definition of "first offenders" could help ameliorate racial disparity in the federal system[45] as well as the size of the prison population.

D. Drug Guidelines

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

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

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

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

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

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

III. Conclusion

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

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

cc: Rachel E. Barkow, Commissioner
Hon. Charles R. Breyer, Commissioner
Hon. Danny C. Reeves, Commissioner
Zachary Bolitho, Commissioner *Ex Officio*
J. Patricia Wilson Smoot, Commissioner *Ex Officio*
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