

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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October 10, 2019

Honorable Charles R. Breyer
Honorable Danny C. Reeves
Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Defender Comment Pursuant to 28 U.S.C. § 994(o)

Dear Judge Breyer and Judge Reeves:

Pursuant to 28 U.S.C. § 994(o), the Federal Public and Community Defenders submit comment on work of the Commission. This year, because the Commission is composed of two voting members, fewer than the quorum required for amending the guidelines,¹ we do not address the guidelines manual as we have in the past. Instead, we focus on an area in which the Commission has made significant changes: data.

Earlier this year, the Commission released its Fiscal Year (FY) 2018 individual datafile; related 2018 Annual Report and Sourcebook of Federal Sentencing Statistics; and Quick Facts publications.² With the new data and publications came significant methodological changes, which, according to the Commission, “reflect[] a year-long process to update and revise the way the Commission reports sentencing data to the public.”³ While the Commission intended to “make the *Sourcebook* more

¹ See 28 U.S.C. §§ 994(a), (p).

² See <https://www.ussc.gov/research/datafiles/commission-datafiles>;
<https://www.ussc.gov/research/sourcebook-2018>; <https://www.ussc.gov/research/quick-facts>.

³ USSC, *2018 Annual Report and Sourcebook of Federal Sentencing Statistics*, 28 (2019) (“*2018 Sourcebook*”).

comprehensive, more informative, and easier to use,”⁴ some of the revisions have yielded opposite results. These changes, implemented apparently without consulting outside stakeholders or experts, disrupt the ability to conduct trend analyses and obfuscate critical information.⁵ Most importantly, the Commission no longer reports by primary sentencing guideline the total rate of sentencing above and below the guideline range.

The Commission’s data obligations are critical. In addition to promulgating and amending the sentencing guidelines, Congress directed the Commission to “serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices.”⁶ To that end, the Commission is required to “publish data concerning the sentencing process;” “collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a);” and to collect and report “information regarding the effectiveness of sentences imposed.”⁷ These data responsibilities are necessarily intertwined with the Commission’s other duties because the data the Commission chooses to collect and report affects the operation, evaluation, and evolution of the guidelines.⁸

⁴ *Id.*

⁵ These revisions have been replicated in the Commission’s FY 2019 Third Quarterly Data Report. See https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_3rd_FY19.pdf.

⁶ 28 U.S.C. § 995(a)(12)(A).

⁷ 28 U.S.C. § 995(a)(14)-(16).

⁸ See generally, e.g., 28 U.S.C. § 994(o) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines. . . . In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.”); *Rita v. United States*, 551 U.S. 338, 350 (2007) (“The Commission’s work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The courts of appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties

Placement of Sentences Relative to the Guideline Range. Both the Commission and outside observers have used data on the placement of sentences relative to the guideline range as an important metric. Yet without consulting stakeholders,⁹ and without adequate explanation, the Commission this year made a “major revision” to the key variable characterizing the placement of sentences outside the guideline range.¹⁰ The new system elevates a distinction between “Sentences Under the *Guidelines Manual* and Variances”¹¹ above all other information about the reasons for the sentence, and even above whether the sentence is above or below the guideline range.

Of greatest concern is that the revised Sourcebook no longer reports the most basic rates that have been used to evaluate particular guidelines and to compare individual sentences—the rates of sentencing above and below the guideline range. For each primary sentencing guideline, “type of crime,”¹² and circuit and district, the Commission now reports the rate or number of defendants receiving a sentence within the range, and upward or downward departures of different types.¹³ But critically, all types of variances are included in the same category, *regardless of whether the sentence was above or below the range*.¹⁴ The effect of this reporting

associations, experts in penology, and others. And it can revise the Guidelines accordingly.”); *United States v. Booker*, 543 U.S. 220, 264 (2005) (“the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly”).

⁹ At least Defenders were not consulted. *See infra* pp. 7-8.

¹⁰ *2018 Sourcebook* at 29.

¹¹ *Id.*

¹² Previously referred to as “offense type,” the “type of crime” is determined based on “the guideline (or guidelines) that the court applied in determining the sentence. . . . [C]ases with more than one count of conviction [are] assigned to the type of crime that aligns with the guideline that produced the highest sentencing range.” *2018 Sourcebook* at 29.

¹³ *See, e.g., 2018 Sourcebook* at 87-92, tbls. 30, 31 and 32.

¹⁴ *See id.*

choice is that it is no longer possible to use these tables to calculate a total rate of sentencing above or below the range.¹⁵

For example, the Commission reports in Table 32 of the Sourcebook, that in FY 2018, 2,552 out of 5,942 (43%) of sentences with §2B1.1 as the primary sentencing guideline fell within the guideline range.¹⁶ This table also shows there were 1,127 downward departures.¹⁷ And while the table reports data indicating that more than one third (38%) of all defendants with §2B1.1 as a primary guideline were sentenced outside the guideline range pursuant to a variance, the Commission no longer reports whether the sentence imposed was above or below the guideline range.

Because in prior years the Commission reported information about placement of all sentences relative to the guideline range,¹⁸ it was possible to determine from the Sourcebook, for example in FY 2017, that 3,417 defendants sentenced primarily under §2B1.1, whether categorized as a departure or variance, were sentenced below the guideline range, and that 53.8% of defendants were sentenced below the guideline range compared to 44.1% within.¹⁹ The Commission's decision to stop reporting such critical information, without explanation, and without notice and opportunity to comment, hinders both stakeholder and expert feedback that the

¹⁵ In prior years, the tables that showed sentences relative to the guideline range by (a) primary sentencing guideline, (b) type of crime (previously primary offense category), and (c) circuit and district, all provided information that could be used to calculate a total rate of sentencing above and below the range. *See, e.g.*, USSC, *2017 Annual Report and Sourcebook of Federal Sentencing Statistics*, S-73-S-80, S-82-S-85, tbls. 26, 27 and 28 (2018) (“*2017 Sourcebook*”).

¹⁶ *See 2018 Sourcebook* at 91, tbl. 32.

¹⁷ *See id.*

¹⁸ *See, e.g.*, USSC, *2017 Sourcebook*, S-82, tbl. 28 (“Sentences Relative to the Guideline Range by Each Primary Sentencing Guideline”).

¹⁹ §2B1.1 does not stand alone. FY 2017 data shows 63.4% of defendants sentenced primarily under §2D1.1 were sentenced below the guidelines, compared with 35.1% within. It is not possible to make this comparison using the data reported in the 2018 Sourcebook. *Compare 2017 Sourcebook* at S-82, tbl. 28, *with 2018 Sourcebook* at 91, tbl. 32.

Commission is required to solicit and consider,²⁰ and restricts sentencing courts' ability to comply with their obligations under § 3553(a).²¹

Another concern is that the new “under the *Guidelines Manual*” category creates the illusion that “departures” based on general guideline commentary are more similar to sentences within the precisely calibrated guideline range as calculated under Chapters 2 and 3 than they are to “variances” based on the general provisions of 18 U.S.C. § 3553(a). In terms of evaluating the adequacy of a guidelines' recommendation, however, departures are more similar to variances than to sentences within the range.

A final concern with this metric is that the Commission did not repair, and instead perpetuates, the problem that many sentences are artificially shoehorned into the “departure” category.²² So long as a sentencing court checks any box in Part V of the Statement of Reasons form (“Departures Pursuant to the Guidelines Manual”), the Commission classifies the sentence as a “departure,” even if the most or weightiest reasons for the sentence are *not* covered by the manual.²³ Indeed, sentences are considered “departures”—and therefore “under the *Guidelines Manual*”—as long as *any* departure reason is cited by the court, even if one or more other reasons *are*

²⁰ The Commission's obligation to consider data and feedback regarding the effectiveness of the guidelines and to amend the guidelines accordingly is well settled. *See supra* note 8.

²¹ These changes in the data the Commission reports are also apparent in the Quick Facts that are based on FY 2018 dataset. Without engaging in complicated math, and knowledge of the data that should be reported, it is impossible to determine from the data the Commission now reports in the Quick Facts how many sentences were imposed below the guideline range. This data was readily available in prior versions of the Quick Facts.

²² *See* Jelani Jefferson Exum & Paul J. Hofer, *The Evolution of the Statement of Reasons Form*, 28 Fed. Sent'g Rep. 169 (2016); Paul J. Hofer, *How Well Do Sentencing Commission Statistics Help in Understanding the Post-Booker System?* 22 Fed. Sent'g Rep. 89 (2009).

²³ *See 2018 Sourcebook*, App. A, 201, 210. Further, this broad classification arbitrarily distinguishes similar sentences. Defenders continue to doubt that a court's “indication, for example of ‘family ties and responsibilities’ as a reason for a variance will reliably track meaningful differences with cases where it is indicated as a reason for a departure.” Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 2 (July, 1, 2015); *see also* Exum & Hofer, *supra*, note 22.

specifically prohibited by the manual.²⁴ These classification rules—apparently designed to count as many sentences as “under the *Guidelines Manual*” as possible,²⁵—obscure the variety of factors that underlie actual sentences.

Changes to variables in the datafile. Problems with the way data are reported in the Sourcebook might be overcome by persons able to use the Commission’s Interactive Sourcebook or work with the individual datafiles themselves. Prior to the recent changes, the BOOKER2 variable collapsed sentences into within, above, and below the guideline range. Unfortunately, in the FY 2018 datafile released by the Commission, the BOOKER2 variable was removed. Savvy data users can construct a variable similar to BOOKER2 from the new SENTRNGE variable, but this important data would be easier to access if the Commission continued to provide BOOKER2 or a similar variable. Most important, however, is that when the Commission releases its new Interactive Sourcebook with FY 2018 data, it allow users to categorize all sentences, including variances, as above or below the guideline range.

Trend Analyses. The Commission’s revisions to key variables will make simple comparisons between pre- and post-FY 2018 years’ data more difficult, if not impossible.²⁶ This is a loss because historical context is important. Defenders regularly track changes in sentence length back to even the pre-guidelines era. Commission data from 1992 until 2018 have been used to track changes in sentence placement relative to the guideline range, and the use of alternatives to incarceration. The elimination of two sentence length variables, along with changes to the remaining two variables in their treatment of sentences to time served, life, or terms longer than 470 months, will require extra care by data users to ensure comparability across the years.

We were pleased to learn from Commission staff that there are plans to release a supplemental datafile for the most recent five years, which will contain re-

²⁴ See *2018 Sourcebook*, App. A, 201, 210.

²⁵ See, e.g., *id.* at 8 (spotlighting “75% of all offenders received sentences under the *Guidelines Manual* in FY18”).

²⁶ See *id.* at 29 (“[D]irect comparisons between data for fiscal year 2018 and later years cannot always be made to data reported in the *Sourcebook* for years before fiscal year 2018.”).

calculations of pre-2018 sentence length variables to match the new definitions. The sooner this file is made available, the sooner users can take full advantage of the FY 2018 data. It would be even more helpful if the Commission would provide recalculations of the affected variables for a longer time period, or alternatively, explain the mapping or algorithm that is used to create the redefined variables from existing variables in prior years so that data users can construct full trend analyses.

Involvement of Stakeholders. There is no indication that the Commission consulted with any outside stakeholders or experts before making changes to the content of the Sourcebook, Quick Facts, or the underlying data on which these publications are based. At least we were not consulted.²⁷ The Commission's failure to involve interested parties in the revision process runs contrary to its statutory obligations and its own Rules of Practice and Procedure to involve interested members of the public to the "maximum extent practicable."²⁸

It would prove productive when considering changes to the data to involve stakeholders who regularly use them. For example, Defenders and our professional staff regularly use Commission data both in our comment on the work of the Commission and in individual sentencing proceedings, and have previously published reviews and analyses of the Commission's data collection work.²⁹ Defenders, therefore, are an obvious stakeholder and potential resource to consult when attempting to make the Sourcebook "easier to use."³⁰ Our involvement in the revision process could have provided (a) valuable insight into how the Commission's

²⁷ Without express consultation, Defenders are not privy to internal Commission discussion and decisions. Unlike the Department of Justice, Defenders do not have an ex officio member on the Commission.

²⁸ See 28 U.S.C. § 994(o) ("In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system."); USSC, Rules of Practice and Procedure, 1 (Amended Aug. 18, 2016) ("[t]he Commission . . . desires to involve interested members of the public in its work to the maximum extent practicable."); see also S. Rep. No. 98-225, 3364 (1983) ("The Commission should consider as broad a cross-section of views and consult as diverse a group of interested parties as possible during all stages of guideline development.").

²⁹ See, e.g., Exum & Hofer, *supra* note 22; Hofer, *supra* note 22; Meyers, *supra* note 23.

³⁰ 2018 Sourcebook at 28.

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data are used in both policymaking and individual sentencing proceedings, and (b) ideas on making the data more useful. Unfortunately, without the benefit of this input, the Commission implemented several revisions that make the Sourcebook, Quick Facts publications, and datafile less useful.

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We appreciate the Commission's consideration of our views in this letter. We encourage the Commission to seek comment from stakeholders and data experts specifically as part of a reconsideration of the data collection and reporting changes made in FY 2018, with an eye toward improvements in FY 2019, and, more generally, in connection with any significant changes in the future. We also ask that the Commission ensure users of its new Interactive Sourcebook with FY 2018 data will be able to calculate the total rate of sentences above and below the guideline range for each primary sentencing guideline, type of crime, district and circuit. We welcome the opportunity to participate in future data discussions and look forward to working with the Commission on this and other important federal sentencing issues.

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

cc: David Rybicki, Commissioner *Ex Officio*
Patricia K. Cushwa, Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
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