

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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October 30, 2020

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 our obligations under 28 U.S.C. § 994(o) to comment at least annually on the work of the Commission, Defenders submit this letter. Because the Commission lacks the quorum of Commissioners required to amend the guidelines, we focus here, as we did last year, on the Commission's data reporting practices. The Commission's responsibility as a clearinghouse and information center on federal sentencing practices is critical and demands the highest level of objectivity and transparency.¹ Unfortunately, we remain concerned about the transparency of the Commission's data reporting practices.

Last year, Defenders addressed changes the Commission made to its data reporting effective for the FY 2018 individual data set, related Annual Report and Sourcebook of Federal Sentencing Statistics, and Quick Facts publications.² Problems with those changes persist. We reiterate a few of them below and identify additional areas in the Commission's data reporting practices where more transparency is

¹ See 28 U.S.C. § 994(a)(12); see also Letter from Michael Caruso, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Charles R. Breyer and Honorable Danny C. Reeves, Commissioners, U.S. Sentencing Comm'n (Oct. 10, 2019) ("2019 Letter") (describing the importance of the Commission's data obligations).

² See 2019 Letter at 2 & n.8.

needed. In short, we urge the Commission to clearly report all critical data “concerning the sentencing process” on its website so that information on federal sentencing practices is available to all for review and independent analysis.³

Placement of Sentences Relevant to the Guideline Range. Changes the Commission made to its data reporting last year continue to obfuscate the rate of sentences above and below the guideline range even though this data is fundamental to stakeholders.

That data users should be able to easily ascertain how often a guideline range is rejected as too high or too low is axiomatic. Practitioners rely on this metric to inform plea negotiations and sentencing requests. Courts rely on it to assess whether a sentence within the guideline range is consistent with their obligations under 18 U.S.C. § 3553(a). And policymakers rely on it to inform sentencing policy.⁴

Unfortunately, instead of transparently reporting the rate of above and below guideline sentences, the Commission continues to elevate the distinction between sentences imposed “Within the Manual” and “Variances” above all else. Aside from facilitating the appearance of higher “compliance” rates,⁵ the distinction between departures and variances serves little value and conceals the variety of factors that motivate actual sentences.⁶ What’s worse, the Commission’s emphasis of this (often arbitrary) data point has proven confusing and misleading to data users.

³ 28 U.S.C. § 995(a)(14); *see also* 28 U.S.C. § 995(a)(15) (obligating the Commission to “collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code”).

⁴ *See* 28 U.S.C. § 994(o). The Supreme Court has also repeatedly recognized the “significant role” the guideline range plays in the sentencing process. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016); *see also Peugh v. United States*, 569 U.S. 530, 541-42 (2013).

⁵ *See* USSC, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics* 8 (2020), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf> (“2019 Sourcebook”) (emphasizing that “75% of all offenders received sentences under the Guidelines Manual in FY19” even though only 51.4% of sentences were actually within the Guideline *range*).

⁶ *See* 2019 Letter at 5 (recognizing that because the Commission broadly classifies sentences as “departures” so long as “*any* departure reason is cited by the court,” even if the most or weightiest reasons are not covered by the manual, “many sentences are artificially shoehorned into the ‘departure’ category”); *see also id.* at n.23 (quoting Letter from Marjorie

Take the Quick Facts for example. The Quick Facts on §2B1.1 offenses reports that “62.2% of theft, property destruction, and fraud offenders [were] sentenced under the Guidelines Manual.”⁷ This statistic is also prominently displayed in a large pie chart. The document further indicates that of these 62.2% of cases, “70.5% were sentenced within the guideline range.”⁸ Nowhere on the Quick Facts does the Commission report that over 54% of all §2B1.1 sentences are imposed *below the guidelines range*, nor can this rate be readily gleaned by the other data provided in the document. And, if users turn to the Interactive Data Analyzer (IDA) for this salient information, they must manually add the rates of all below-range sentencing categories identified by the Commission to arrive at the total rate.⁹

The Career Offender Quick Facts is similarly misleading. The Commission emphasizes that “[o]f the 50.6% of career offenders [who] were sentenced under the Guidelines Manual[,] 44.7% were sentenced within the guideline range.”¹⁰ Defenders are aware of even savvy data users who have confused this figure to mean there was a drastic increase in career offenders sentenced within the guideline range in FY 2019. In fact, consistent with past years, the career offender guideline was followed only 22.6% of the time in FY 2019 and 76.5% of the time it was rejected as too high.¹¹

Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 2 (July, 1, 2015)) (“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.’”).

⁷ USSC, *Quick Facts on Theft, Property Destruction, and Fraud Offenses 2* (May 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY19.pdf.

⁸ *Id.*

⁹ See USSC, *Interactive Data Analyzer*, <https://ida.ussc.gov/analytics/saw.dll?Dashboard> (last visited Oct. 29, 2020) (selecting Guideline Application tab and filtering for all §2B1.1 offenses and adding FY 2019 rates for all below-range categories on table entitled “Sentence Imposed Relative to Guideline Range,” yields a rate of 54.1% below-range sentences).

¹⁰ USSC, *Quick Facts on Career Offenders 2* (Apr. 2020), <https://www.ussc.gov/research/quick-facts/career-offenders>.

¹¹ See USSC, *FY 2019 Datafiles*.

Defenders appreciate that the IDA allows users to identify the rate of sentences above or below the guideline range by primary guideline, type of crime, district and circuit. But this information should be readily accessible in future Sourcebooks and Quick Facts as well. We urge the Commission to redirect its emphasis from relatively meaningless figures—such as distinguishing sentences classified as “departures” from “variances”—to transparently reporting on data points critical to the parties, courts, policymakers, as well as to the effective evolution of the guidelines.

Raw Data on Commission’s Website. As the Sourcebook indicates, the Commission “regularly analyzes the current and prior fiscal years’ data to identify how courts sentence offenders and use the guidelines” and “publishes many analyses and data reports as a resource for policymakers and the criminal justice community.”¹² The reports the Commission issues are based on information from several separate datafiles: (1) one that provides information on sentences imposed in cases involving individuals; (2) one on sentences imposed on organizations; (3) one for appeals; and (4) one regarding resentencings and modifications.¹³ But the Commission provides only the first two datafiles on its website.¹⁴ While the appeals datafile used to be available from the University of Michigan’s Inter-University Consortium for Political and Social Research, the most recent datafile presently available there is from FY 2016.¹⁵ The Commission should make all of these datasets (current and historical) publicly available on its website.

Data Underlying Commission Reports. Defenders appreciate that the Commission published to its website the raw data underlying several of its reports issued from 2018 through 2020.¹⁶ We urge the Commission to make public, with

¹² 2019 Sourcebook, at 6.

¹³ *See id.* at 29-30.

¹⁴ *See* USSC, *Commission Datafiles*, <https://www.ussc.gov/research/datafiles/commission-datafiles> (last visited Oct. 29, 2020) (limiting available sets of datafiles, other than special files, to “Individual Offenders” and “Organizational Offenders”).

¹⁵ *See* ICPSR, *Monitoring of Federal Criminal Convictions and Sentences: Appeals Data Series*, <https://www.icpsr.umich.edu/web/ICPSR/series/75> (last visited Oct. 29, 2020).

¹⁶ *See* USSC, *Commission Datafiles*, <https://www.ussc.gov/research/datafiles/commission-datafiles> (last visited Oct. 29, 2020) (providing datafiles for the following 2018, 2019, and 2020 reports: *Federal Probation and Supervised Release Violations* (2020); *What Does*

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appropriate precautions to ensure confidentiality, the underlying data for all its issued reports, particularly data on its recidivism reports.

Trend Analyses. The ability to observe guideline application trends over time is integral to improving the guidelines system. For this reason, we are pleased that the Commission has published supplemental data files containing the post-2018 variables for FY 2014 through FY 2017,¹⁷ and request that supplemental files going back farther than five years are made available.¹⁸ Ideally, the Commission would provide supplemental data files going back to pre-*Booker*, or to FY 2003, so that full trend analyses—including from when the Commission started distinguishing government-sponsored departures—may be conducted.

We hope the Commission will consider our views in this letter and, as always, we remain available to discuss our perspectives on these and other matters related to federal sentencing policy.

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

cc: Candice C. Wong, Commissioner *Ex Officio*
Patricia K. Cushwa, Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Federal Economic Crime Really Look Like (2019); *Mandatory Minimum Penalties for Federal Sex Offenses* (2019); *Mandatory Minimum Penalties for Federal Identity Theft Offenses* (2018); and *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* (2018)).

¹⁷ We continue to assess the extent to which these supplemental files provide sentence length variables defined identically to past years.

¹⁸ See generally 2019 Sourcebook, at 85, fig. 8 (reflecting ten-year trend of “Sentences Under the Guidelines Manual and Variances” using revised data variables).