Before the United States Sentencing Commission
Public Hearing on Criminal History

Statement of Jami Johnson, Appellate Attorney
Federal Defenders of San Diego, Inc.
on Behalf of the Federal Public and Community Defenders

March 8, 2023

Statement of Jami Johnson
Appellate Attorney for the
Federal Defenders of San Diego, Inc.
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
Public Hearing on Criminal History
March 8, 2023

My name is Jami Johnson, and I am an appellate attorney at the Federal Defenders of San Diego, Inc., the Federal Community Defender Organization for the Southern District of California. Thank you for inviting me to testify on behalf of the Federal Public and Community Defenders in support of the Commission's proposed amendments on criminal history.

Aside from offense level, an individual's criminal history score is the single most powerful factor in determining their guideline range. Congress did not mandate this structure; the Commission selected it.[1] There are good reasons why criminal history should not play such a prominent role in the sentencing process. The criminal history rules are numerous and complex. They often lead to unjust, unnecessarily long sentences that exacerbate racial disparities. And research confirms that increasing sentences based on prior criminal convictions is often not justified by any commonly recognized goal of sentencing.[2] Defenders hope to continue to work alongside the Commission to consider ways to reduce the outsized effect criminal history has on guidelines calculations.

We appreciate the Commission's efforts to make Chapter 4 fairer and to better encourage alternatives to incarceration. In my decade as a criminal

---

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

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

defense attorney, I have seen firsthand the outsized impact criminal history plays in federal sentencing. Moreover, while the guidelines consider numerous aspects of a person's criminal history to *increase* the guideline range, there are few rules that recommend a decrease in sentence based on the nature or extent of a person's criminal history. While this year's proposed criminal history amendments retain the guidelines' undue emphasis on a defendant's criminal history score, we recognize that each proposal would go a long way towards implementing the Commission's statutory duties under 28 U.S.C. §§ 991(b)(1), 994(g), and 994(j).[3] For these reasons, Defenders are pleased to support them.

I address Part B (persons with zero criminal history points) and Part A (status points) of the proposed criminal history amendments below. Defenders will address Part C (impact of simple possession of marijuana offenses) in our comment letter submitted on a later date.

I. Persons with Zero Criminal History Points

Defenders commend the Commission's efforts to change to the way the guidelines treat persons with zero criminal history points. Amendments that encourage more frequent use of non-prison sentences are consistent with the Commission's duties under 28 U.S.C. §§ 994(j) and (g), further the purposes of sentencing, and are reinforced by the Commission's research.

When Congress enacted the Sentencing Reform Act in 1984, it believed there was "too much reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty that results from imprisonment."[4] Through the

---

[3] *See* 28 U.S.C. §§ 991(b)(1)(C) (requiring the Commission to establish sentencing policies that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process"); 944(g) (requiring the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons"); 994(j) (requiring the Commission to ensure that "first offenders" who commit non-serious offenses generally receive non-custodial sentences).

[4] S. Rep. No. 98-225, at 59 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3242. *See also id.* at 50 (finding that the law "is not particularly flexible in providing the sentencing judge with a range of options," such that "a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available" or "a longer term than would ordinarily be appropriate simply because

SRA, Congress sought to "assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case,"[5] including probation with meaningful conditions, and alternatives to all or part of a prison term such as fines, community service, and intermittent confinement.[6]

As Defenders, however, we have seen first-hand the under-utilization of alternatives to incarceration, particularly for clients whose offenses fall within Zone C or Zone D of the guidelines.[7] District court judges take seriously, as they should, the guidance of the Commission in fashioning sentences. We have observed that judges are often reluctant to award the kind of variances that would be necessary to impose a non-custodial sentence in cases that fall within these zones, even when other relevant sentencing factors suggest that a sentence other than imprisonment would be appropriate.

I've had many clients over the years that would benefit from the Commission's proposals regarding first-time offenders, but three in particular come to mind.

I represented Julio when I was an Assistant Federal Public Defender in the District of Arizona.[8] Julio was a 19-year-old U.S. citizen who was born in Yuma, Arizona to Mexican citizen parents. His parents returned to Mexico shortly after his birth, and apart from spending a few months in Arizona at the age of 10, he grew up entirely outside of the United States. When he began school in Mexico, he was diagnosed with an intellectual disability and enrolled in a program for students with special needs. Despite seven years of full-time education, Julio never learned to read or write very well. He had difficulty learning and retaining new material, repeated multiple grades, and

---

there were no available alternatives that served the purposes he sought to achieve with a long sentence.").

[5] *Id.* at 39.

[6] *See id.* at 50, 59.

[7] *Cf.* USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5, 8 (2015), https://tinyurl.com/yck3j8rp (recognizing statutory and citizenship limits on some types of alternative sentences).

[8] I am referring to "Julio" by an alias to respect his privacy with regard to certain medical and mental health information.

failed to make significant academic progress despite receiving services both at school and at home.

As is unfortunately common for individuals with intellectual disabilities, Julio experienced bullying at school and had difficulties finding friends among his same-age peers. He spent his social time playing with his younger siblings and with the much-younger grade school children in his neighborhood. Even as a teenager, his mother reported that he was "childlike" and had few, if any, friends his own age.

When Julio was 10, his parents separated, and his father died by suicide shortly thereafter. His father's suicide was traumatic for Julio and further limited both his academic and social progress. He ultimately left school at the age of 13 because he found even the modified curriculum too challenging, and he was unable to keep up.

When he was 15 or 16, Julio began crossing the border into the United States to pick lettuce and watermelon on the farms in Southern Arizona. Because he did not know how to read a map, ask for or follow directions, or find his way to unfamiliar places without assistance, Julio never crossed the border by himself. Other workers looked out for him and made sure he made it home safe every night.

Finally, when he was 19 years old, Julio was approached in Mexico by someone who lived on his block and asked if he would like to make some extra money by carrying drugs into the United States. Julio initially said he would be interested, but after he had time to think about it, he decided he did not want to do it after all. Having changed his mind, Julio had no intention of carrying drugs into the United States, but one morning, a person he had never seen before showed up at his house and told him that he was going to carry drugs that day. Julio didn't know what to do, so he got into the man's car, and the man drove him to a place near the border, where other unknown individuals taped methamphetamine to him. He was then led to the San Luis port of entry by the unknown man.

At the port of entry, Julio was quickly referred to secondary inspection. When asked if he had anything attached to his body, Julio immediately volunteered that he had "ice" strapped to his thighs. He made this admission before agents patted him down or called a narcotics dog. He was arrested and

charged with attempted importation of methamphetamine and possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 960(b)(3) and 841(b)(1)(C).

During his post-arrest interview, Julio told the agents everything he knew. Julio's intellectual disabilities were apparent throughout the interview. He declined the written *Miranda* advisory, explaining he could not read. He was unable to supply the agents with basic biographical information about himself, such as his height or weight, or to provide reasonable guesses of the same. He didn't know his own phone number, or the phone numbers of any family members. When asked, he was unable to tell the agents that he was attempting to enter the state of Arizona, but rather knew only that he was entering the "United States."

Julio had no criminal history whatsoever. But knowing no one in the United States and having nowhere to live, he remained in pretrial detention during the pendency of his case. A neuropsychological exam performed while he was in custody confirmed that Julio was "severely impaired" in the areas of learning, recognition, and working memory and in executive function, which measures individuals' ability to plan, strategize, and make decisions. The examiner opined that these characteristics made him unusually susceptible to exploitation and likely contributed to his becoming involved in the offense.

The same characteristics that made Julio vulnerable to exploitation by unscrupulous elements within his community also made him vulnerable in jail. While in pretrial detention, Julio was repeatedly exposed to negative influences. Having never been in a fight in his life, he was told by other prisoners that if one of them got into a fight, he had to "help," or he would be beaten up.

Julio ultimately pleaded guilty to one count of possessing methamphetamine with the intent to distribute. At sentencing, he faced guidelines of 33 to 41 months. Notwithstanding these guidelines, I asked the court to sentence Julio to time served. What Julio needed most desperately was access to services, in particular services for adults with special needs. He also needed to stay as far away as possible from influences of the sort he was virtually certain to be exposed to in jail. The probation office and the

government both agreed that a variance was appropriate, though they disagreed about the amount, and recommended a sentence of 24 months.

The Court ultimately sentenced Julio to 21 months in prison. In imposing sentence, the district judge agreed that Julio's age and his developmental issues were factors that warranted a variance. Nevertheless, the district court cited "the judgement of Congress and the Sentencing Commission" that such offenses should be dealt with "harshly" in explaining why it declined to vary further.

If the guidelines contained a departure which invited a sentence other than imprisonment, Julio might not have been sentenced to prison at all. Julio's track record on supervision demonstrated his amenability and ability to perform well while supervised outside a custodial setting. He began a three-year term of supervised release in November 2017 and completed it in November 2020 without violation.

Another client who illustrates the need for special consideration for "first offenders" is Vania Alvarado. When I met Ms. Alvarado in 2018, she was a 27-year-old United States citizen with no criminal history and no prior contacts with law enforcement. She was born in the United States and grew up in both the United States and Mexico, moving back and forth between the two countries with her permanent resident parents and three U.S.-citizen siblings.

When Ms. Alvarado was in high school, she met and entered into a relationship with a man who was several years her senior. She became pregnant, and they married. The marriage was not happy. Her husband was physically abusive, controlling, and addicted to drugs. He introduced her to drugs and used drugs to control her.

Ms. Alvarado, very young, addicted to meth, and with a small child, lacked the strength to leave the relationship until 2013, when her second child was born. Her child tested positive for methamphetamine upon its birth, and as a result, the state of Arizona took custody of both of her children and placed them with relatives of her husband.

The intervention of the state motivated Ms. Alvarado to change her life and regain custody of her children. Ms. Alvarado tried to get herself into drug treatment but was unable to secure a residential treatment placement

because of backlogs caused by lack of state funding. With an open family court case and the threat of losing her children over her head, Ms. Alvarado nevertheless persisted in her determination to stop using drugs and, against the odds, managed to get sober all on her own. She also divorced her husband when his own attempts at sobriety proved less successful than hers.

Sadly, in 2016, despite three years of sobriety and three years of diligent compliance with the family court requirements, the family court terminated Ms. Alvarado's parental rights. The termination of Ms. Alvarado's parental rights sent Ms. Alvarado into a self-destructive downward spiral. She relapsed on drugs, using much more than she ever had before. She also began intentionally to engage in reckless and self-destructive behaviors.

In the midst of this binge of self-destructive behavior, Ms. Alvarado impulsively agreed to drive a load of drugs across the border. She was arrested at the San Luis port of entry with drugs in her car and charged with attempted importation and possession with intent to distribute methamphetamine. She was granted pretrial release on condition that she reside at a residential drug rehabilitation center. This was the first organized drug treatment program she'd ever been offered. She spent four months living at Crossroads for Women in Phoenix, a residential drug treatment facility, where she thrived.

Particularly helpful to Ms. Alvarado was the mother's group at Crossroads. Many of the women in the group were older than Ms. Alvarado. Some even had grown children. One day, one of the women pointed out to Ms. Alvarado that while she couldn't control what had happened in the past, she could control what her children would find if and when they ever came looking for her. They could either find a drug-addicted woman who made them grateful that their adoptive parents had taken them away, or they could find a sober, healthy woman with whom they wanted to build a relationship. She realized that because she had no control over when or if that day might ever arrive, she had to stay sober every day for the rest of her life.

Ms. Alvarado ultimately pleaded guilty to possession with intent to distribute 50 grams or more of methamphetamine. She faced guidelines of 41 to 51 months. I argued for a significant downward variance because of her lack of criminal history and post-offense rehabilitation. At sentencing, the

judge commended Ms. Alvarado for her efforts on pretrial release. He expressed sympathy for her losses and expressed confidence that in light of the changes she had made that he would not see her in his courtroom again. Nevertheless, in imposing sentence, the judge deferred to the guidelines and imposed a 41-month sentence—the bottom of the recommended range.

This sentence shows the seriousness with which judges take the guidelines and their recommendations. The district judge expressed confidence that Ms. Alvarado was on the right path and would not recidivate. But despite his confidence, he ultimately imposed the sentence recommended by the guidelines.

Like Julio, Ms. Alvarado's performance on supervised release continues to demonstrate that she was a good candidate for supervision and services instead of incarceration. She was released from custody in April 2021 and has remained out of custody on supervision without incident for the last two years.

A third client who exemplifies why "first offenders" should be treated differently is Mario Chavez. Mr. Chavez is a United States citizen who was born in Chandler, Arizona. His parents divorced when he was very young, and his mother moved to Mexico to be near her family and took Mr. Chavez with her. His father remained in Chandler.

Mr. Chavez had a good childhood. Both his parents were active in his upbringing and worked hard to provide him with the basic necessities. He was able to travel frequently to Chandler to spend time with his U.S.-based family. Because he lived in Mexico he was not, however, eligible to attend school in the United States and thus never learned English. Even with supportive parents, at 15 he started making poor choices. He started going to parties and clubs in Mexico, where he drank alcohol and occasionally experimented with cocaine.

Mr. Chavez was not yet 18 when he met a man in one of these clubs who offered him money to transport drugs into the United States. He was arrested transporting these drugs in November 2019—less than 3 months after his 18th birthday.

Mr. Chavez was released to the custody of his father. He pleaded guilty quickly to one count of possession with intent to distribute

methamphetamine in February 2020, a few weeks before the then-emerging COVID-19 pandemic brought courts to a standstill. The district court sua sponte reset his sentencing four times through April 2021. By the time his sentencing date arrived, Mr. Chavez had been on pretrial release for almost 16 months.

During his 16 months of pretrial release, Mr. Chavez grew up. His father found him a job at the construction company where he worked. He received a promotion and a raise, and received glowing reviews from his supervisor, who told the probation office that he was welcome to return to work at the company at any time.

The structure of living with his father and going to work every day also helped Mr. Chavez make better choices about how to spend his free time. He didn't drink or use drugs while on pretrial release. He saved his money and paid cash to buy his first car. He got his driver's license. He also learned English. At the time of his arrest, Mr. Chavez spoke almost no English, knowing only what he had picked up through casual interactions with his U.S.-based family. By sentencing, Mr. Chavez's English improved to a point that he required only minimal assistance from an interpreter.

In light of Mr. Chavez's age and his exceptional performance on pretrial release that demonstrated his amenability to community supervision, I requested that he not receive any additional time in custody, even though his guidelines were 41 to 51 months. The district judge was also impressed with Mr. Chavez's turnaround—so impressed that he gave Mr. Chavez what he reported was the lowest sentence he believed he'd ever imposed in a drug courier case: 6 months.

The district judge clearly viewed the variance he gave Mr. Chavez as exceptional. It was the largest one he'd ever given in a case of this sort. But notwithstanding the exceptional nature of this case, the district judge nevertheless felt obligated to impose a custodial sentence. Had the guidelines made clear that the district judge was authorized or encouraged to consider alternatives to incarceration, Mr. Chavez might have received a different sentence.

These cases demonstrate the importance of reform, in particular for "first offenders." In enacting the SRA, Congress tasked judges and the

Commission with assuring that the full range of sentencing options, not merely incarceration, were available. Judges were instructed to consider "the kinds of sentences available" prior to imposing a sentence sufficient but not greater than necessary to serve the purposes of sentencing.[9] And the Commission was instructed to ensure "that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[10]

Unfortunately, the use of probation and other alternatives to prison dramatically decreased after the SRA. When the SRA was enacted "almost 50 [percent] of federal sentences were sentenced to straight probation."[11] Under the initial guidelines, approximately 15 percent of sentences were to straight probation.[12] Last year, straight probation was imposed in only 6.2 percent of cases.[13] And no matter the sentencing zone, alternative sentences other than probation are exceedingly rare.[14]

We recognize the modest steps the Commission has taken so far to increase sentencing options and encourage alternatives to incarceration.[15]

---

[9] 18 U.S.C. § 3553(a)(3).

[10] 28 U.S.C. § 994(j).

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

[12] See *id.* at 1222.

[13] *See* USSC, *2021 Sourcebook of Federal Sentencing Statistics* fig. 6 & tbl. 14 (2022), https://bit.ly/3TL44UL ("FY 2021 Sourcebook") (excluding non-U.S. citizens, probation only sentences were imposed 8.1 percent of the time); *see also* Cecelia Kingele, *What's Missing? The Absence of Probation in Federal Sentencing Reform* 34 Fed. Sent'g Rep. 322, 324 (2022) (recognizing that while for some offenses, probation is prohibited by statute, judges are still imposing imprisonment in many cases where probation is available).

[14] *See* FY 2021 Sourcebook, at tbl. 14; *see also* USSC, *Public Data Presentation for Proposed Criminal History Amendment*, slide 58 (2023), https://tinyurl.com/2p9989vf ("CH Data Briefing") (reporting that people sentenced last year who would have been eligible for the proposed §5C1.1 application note 4 departure received prison-only sentences 79.3 percent of the time).

[15] *See*, *e.g.*, USSG App. C, Amend. 811 (Nov. 1, 2018) (adding cmt. n.4 to §5C1.1 defining "first offender" and recommending "the court should consider imposing a sentence other than a sentence of imprisonment"); *id.*, Amend. 738 (Nov. 1, 2010) (expanding Zone B and Zone C of the Sentencing Table by one level each); *id.*,

But, as the Commission's data and research reflect, more can be done.[16] To better capture the purpose and spirit of § 994(j) and better encourage sentences that are no greater than necessary to serve the purposes of 18 U.S.C. § 3553(a), the Commission should adopt Option 2 of the proposed amendment with the narrowest set of exclusions. The Commission should also make clear that a sentence other than imprisonment is generally appropriate for persons who qualify as "zero-point offenders" under Option 2 of the proposed amendment, regardless of their zone on the sentencing table.

A. The Commission should adopt Option 2 of the proposed amendment, which defines "first offender" as a person with zero criminal history points.

The Commission has proposed two alternative definitions of a "first offender." Option 1 would define a "first offender" as a person with "no prior convictions or other comparable judicial dispositions of any kind," including juvenile adjudications or diversionary or deferred dispositions.[17] Option 2 would define a "first offender" as someone with zero countable criminal history points.[18] Option 2 is the superior policy choice for several reasons.

Fairness. Option 2 is the fairer option. Excluding persons with non-countable convictions from the "first offender" status—no matter the nature or type of the disposition—would raise significant fairness concerns and perpetuate unwarranted disparities.

Option 1 would exclude far too many people with prior contacts with law enforcement, the outcomes of which are not worthy of confidence. It would exclude, for example, many residents of Ferguson, Missouri, where a 2015 report by the Department of Justice Civil Rights Division found that the municipal court system, which "handle[d] most charges brought by [the

---

Amend. 462 (Nov. 1, 1992) (expanding the number of cells of the Sentencing Table in which straight probation is permissible).

[16] *See* USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5 (2015), https://tinyurl.com/yck3j8rp ("Alternative Sentencing") (finding that the "low rate" of alternative sentences "primarily is due to the predominance of offenders whose sentencing ranges were in Zone D of the Sentencing Table").

[17] Proposed Amendments, 88 Fed. Reg. 7180, 7221 (proposed Feb. 2, 2023) ("2023 Proposed Amendment").

[18] *See id.*

Ferguson Police Department]" did so "not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue."[19] The DOJ report found that the municipal court system imposed harsh financial penalties for minor code violations and harsher penalties if a defendant was unable to pay.[20] The DOJ ultimately concluded "[t]he impact that revenue concerns have on court operations undermines the court's role as a fair and impartial judicial body" and that these unlawful practices had a disproportionate effect on the African-American residents of Ferguson.[21]

Problems with municipal court systems are not isolated to Ferguson. Arizona, for example, operates a city court system not unlike the one used in Ferguson, Missouri. A 2017 report by the Goldwater Institute, a conservative and libertarian think tank, laid bare the problems with the Arizona courts.[22] As in Ferguson, city court judges in Arizona are appointed by the city council and the mayor and are not elected by the people.[23] They are therefore beholden not to the electorate but to the city officials who are responsible for raising revenue. Municipal judges are not required by Arizona law to be lawyers.[24] As in Ferguson, municipal courts in Arizona often boast of the revenue they raise for the city.[25]

City courts in Arizona have jurisdiction over violations of city code, which are frequently classified as criminal misdemeanors. Charges can include such violations as "having excessively tall weeds in your yard, littering, failing to return a library book, and violating city smoking ordinances, all of which are considered criminal infractions in some

---

[19] U.S. Dep't of Just. Civ. Rts. Div., *Investigation of the Ferguson Police Department* 42 (2015), https://tinyurl.com/5av262ja.

[20] *See id.*

[21] *Id.* at 42 & 4–5.

[22] *See* Goldwater Inst., *City Court: Money, Pressure and Politics Make It Tough to Beat the Rap* 2–4 (2017), https://tinyurl.com/mrxddfvn ("Goldwater Inst. Rep.") (summarizing the financial pressures on courts).

[23] *Id.* at 4.

[24] *Id.* at 6.

[25] *Id.* at 7–8.

municipal codes across Arizona."[26] Municipal judges can impose sentences of up to six months in jail and $2,500 in fines for criminal misdemeanors, though as a practical matter, few of these offenses result in jail time.[27] Instead, individuals who find themselves in city court are often offered diversion and fees in order to avoid a conviction. Many accept simply to avoid the costs or hassle of litigating a minor charge, or the risk of ending up with a criminal record.

Also as in Ferguson, municipal courts in Arizona disproportionately affect communities of color. In 2013, the Arizona District Court found that Maricopa County Sheriff Joe Arpaio was engaging in discriminatory practices under Title VI of the Civil Rights Act of 1964 by targeting Latino residents of Phoenix and the surrounding area for selective enforcement.[28] Notwithstanding a permanent injunction, the unlawful racial profiling continued, and in October 2016, the DOJ filed criminal contempt charges against Arpaio for continued violation of the injunction.[29] Arpaio was ultimately found guilty of criminal contempt for repeated disregard of the order to stop discriminating.[30]

Municipal courts play an outsized role in the state system. More than half of all cases in Arizona are heard in a city court.[31] As a defender in Arizona, I saw first-hand the way that municipal courts handling minor charges operated to disadvantage poor people and people of color. During my time in Arizona, I routinely saw clients with no countable criminal history who had received one or more convictions or diversionary sentences for minor charges in municipal court.

The Commission does not have the power to end the injustices and racial inequities frequently present in municipal court systems. It can and should, however, prevent those injustices from being perpetuated within the federal system. Under the current guidelines, many of the kinds of cases

---

[26] *Id.* at 6.

[27] Goldwater Inst. Rep., *supra* note 22, at 6.

[28] *Ortega-Melendres v. Arpaio*, 989 F. Supp. 2d 822, 910–11 (D. Ariz. 2013).

[29] *United States v. Arpaio*, No. 2:16-cr-01012-SRB, doc. 1 (D. Ariz.) (order concerning criminal contempt).

[30] *See id.* doc. 210 at 14 (order finding Arpaio willfully violated court order).

[31] *See* Goldwater Inst. Rep., *supra* note 22, at 5.

routinely handled in municipal courts are appropriately excluded from consideration under §4A1.2(c). Permitting them to be used to deny "first offender" status in federal court would only exacerbate racial disparities and disadvantage poorer communities.[32]

Option 1's definition would also appear to exclude people with tribal convictions from "first offender" relief.[33] Tribal courts play an important role in our federal system. But many convictions in tribal courts do not include the same procedural safeguards as those in federal or state courts. Tribal courts are chronically under-resourced. They also frequently employ methods of dispute resolution that are culturally dissimilar from those used in state and federal court and consider factors federal courts would not deem relevant in a criminal case. Many people who are convicted in tribal courts lack effective counsel. Many tribal courts, for example, permit "lay advocates" to represent the accused—meaning counsel may not have graduated from law school, or even from high school. Some courts lack counsel entirely.[34]

Option 1 would also include all offenses committed before age 18 and all juvenile adjudications. Research continuously shows that juveniles are less culpable than adults. Juveniles are more impulsive and more vulnerable to peer pressure because "adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[35] Similar to tribal

---

[32] *See* Statement of Miriam Conrad Before the U.S. Sentencing Comm'n, Washington, D.C., at 3 (Mar. 14, 2018); Defenders' Comments to the Commission's Proposed 2017 Amendments 8 (Feb. 20, 2017) ("Defenders' 2017 Comments") (collecting authorities).

[33] *See* USSG §4A1.2(i). Excludable expunged, military, foreign, and juvenile diversionary dispositions also would appear to potentially qualify as "convictions" under Option 1. *See id.* §4A1.2(f), (g), (h), (j).

[34] *See, e.g.*, Brief of Amici Curiae of the National Association of Criminal Defense Lawyers and Experienced Tribal Court Criminal Litigators in Support of Respondent, at 16, *United States v. Bryant*, 579 U.S. 140 (2016) (No. 15-420), 2016 WL 1055618, at *16 (describing difficulties in accessing effective counsel in tribal courts); *see also* Samuel Macomber, *Disparate Defense in Tribal Courts: The Unequal Right to Counsel as a Barrier to the Expansion of Tribal Court Jurisdiction*, 106 Cornell L. Rev. 275, 279 (2020) (same).

[35] *Miller v. Alabama*, 567 U.S. 460, 472 & n. 5 (2012) (quoting Brief for American Psychological Association et al. as Amici Curiae); *see also* Amber Venturelli, *Young Adults and Criminal Culpability* 23 U. Pa. J. Const. L. 1142,

courts, juvenile adjudication practices vary widely among jurisdictions—including on issues of counsel, age limits, competency, diversion, and release.[36] And because it is well-recognized that young persons of color are overrepresented at every stage of the juvenile justice system, adopting a rule that would prevent people with juvenile adjudications from qualifying for "first offender" relief would adversely impact minorities.[37] Further, permitting any juvenile adjudication to disqualify a person from "first offender" status, no matter how old that person would be at sentencing, is inconsistent with the Commission's research that a person's recidivism risk drops as they age.[38]

Admittedly, Option 2 does not prevent these problems. It would still include offenses committed before age 18 and juvenile adjudications if those prior convictions were assessed criminal history points.[39] For the reasons just

---

1161–69 (2021) (collecting research); *Miller*, 567 U.S. at 472 (recognizing blameworthiness is "not as strong with a minor as with an adult") (citation omitted).

[36] *See, e.g.,* Juvenile Justice: Geography, Policy, Practice & Statistics (JJGPS), http://www.jjgps.org/ (last visited Feb. 26, 2023) (identifying various standards for age boundaries, waivers to adult court, competency, waiver and timing of counsel, diversion, and release decisions).

[37] *See, e.g.*, Richard A. Mendel, The Sentencing Project, *Diversion: A Hidden Key to Combating Racial and Ethnic Disparities in Juvenile Justice* 1–2 (2022), https://tinyurl.com/2p8fhn35 (reporting that youths of color are more likely to be arrested and less likely to be diverted than white peers); U.S. Dep't of Justice, *OJJDP Statistical Briefing Book* (rev. June 2022), https://bit.ly/3cYqO35 (reporting Black juveniles were arrested more than twice as often as white peers in 2020); Lindsey E. Smith et al., Juvenile Law Center, *Reimagining Restitution: New Approaches to Support Youth and Communities* 16–7 (2022), https://bit.ly/3x3t0gC (discussing racial disparities at various stages in juvenile justice system); Eli Hager, *Racial Inequality in US Youth Detention Wider Than Ever, Experts Say*, The Guardian (Mar. 8, 2021), https://bit.ly/3Rpak39 (discussing racial gap in detention in and release rates from juvenile detention facilities).

[38] *See, e.g.*, USSC, *Recidivism of Federal Offenders Released in 2010* 6 (2021), https://tinyurl.com/2p922sns ("2021 Recidivism Report") (finding lower rearrest rates for older individuals); USSC, *The Effects of Aging on Recidivism Among Federal Offenders* 3 (2017), https://tinyurl.com/2zvcaptk (finding "[o]lder offenders were substantially less likely than younger offenders to recidivate"); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 23, fig. 11 (2016) https://tinyurl.com/3aeybdsp ("2016 Recidivism Report") (showing lower rearrest rates for recidivism for older individuals).

[39] *See* 2023 Proposed Amendments, at 7219.

stated, we strongly encourage the Commission to exclude all juvenile adjudications from the "first offender" analysis. Short of that, Option 2, which would exclude juvenile adjudications that are not assessed criminal history points, is preferable.

Simplicity. Option 2 is the simplest option. As the Commission alludes to in its issues for comment, Option 1 would pose numerous practical challenges.[40] Option 1 would inject further complexity into Chapter 4 because it would require courts to use one set of rules to calculate a person's criminal history category under Chapter 4A, and then use another set of rules to assess whether a person qualifies as a "first offender" under the proposed §4C1.1. Option 1 would also increase complexity and litigation at sentencing. Indeed, it is challenging enough to obtain documentation to prove or refute prior convictions that are counted under Chapter 4A.[41] But Option 1 would require parties to dig up case documents from potentially decades ago and from a variety of different tribunals. Records of convictions—particularly if they are too old or minor to count for criminal history points—may be lost, incomplete, or unavailable. Indeed, the "incomplete nature of disposition data" is a reason cited by the Commission for using rearrest as the measurement for its own recidivism studies.[42] Because our clients have the right to be sentenced on accurate sentencing information,[43] Defenders would

---

[40] *See* 2023 Proposed Amendments, at 7223.

[41] *See Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) ("The Guidelines are complex").

[42] 2021 Recidivism Report, *supra* note 38, at 6; *see also* USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* 2 (2017), https://tinyurl.com/5n8hn77f ("Past Predicts the Future") ("While states have improved the completeness of criminal history records, a recent federal study found significant gaps in reporting of dispositions following an arrest.").

[43] *See* USSG §6A1.3 ("When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor . . . provided that the information has sufficient indicia of reliability to support its probable accuracy."); *see also Molina-Martinez,* 578 U.S. at 198 (holding that when a person is sentenced under an incorrect guidelines range, that error will often be "sufficient to show a reasonable probability of a different outcome absent the error"); *United States v. Juwa*, 508 F.3d 694, 700–01 (2d Cir. 2007) (recognizing a due process right to be sentenced on accurate information).

seek to refute incomplete or inaccurate disposition records at sentencing if those records were being used to exclude a client from §4C1.1 relief.[44]

Evidence-Based. Option 2 is supported by research. The Commission has repeatedly recognized that its criminal history rules—including the rules that exclude certain prior convictions from the point-calculation—do a strong job of predicting future rearrests.[45] It has also recognized that persons with zero criminal history points have a significantly lower rate of rearrest than other groups, meaning Option 2 would pose little risk to public safety.[46]

Research from outside the Commission supports Option 2 as well. For example, one study assessing whether more severe types of sanctions decreased recidivism rates for "first-time felons" found that probation is more effective than prison in reducing reoffending.[47] Other reports similarly conclude that prison alternatives are often the superior sentencing option.[48]

---

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

[45] *See, e.g.*, Past Predicts Future, *supra*, note 42, at 6 ("Criminal history score and Criminal History Category (CHC) are strong predictors of recidivism.").

[46] *See, e.g.*, 2021 Recidivism Report, *supra* note 38, at 24; Past Predicts Future, *supra* note 42, at 7, fig. 1; 2016 Recidivism Report, *supra* note 38, at 18, fig. 6; *see also* CH Data Briefing, *supra* note 14, at slide 36 (reporting that the vast majority of eligible persons under Option 2 who had a prior conviction committed non-violent prior convictions and that the most common prior conviction by far was public order offenses).

[47] *See* Daniel Mears & Joshua Cochran, *Progressively Tougher Sanctioning and Recidivism: Assessing the Effects of Different Types of Sanctions*, 55 J. Res. Crime & Delinq. 194, 207–217 (2018).

[48] *See, e.g.,* Damon M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 Crime & Just. 353, 357 (2021) ("[C]ustodial sanctions have a null or criminogenic effect on reoffending when compared with noncustodial sanctions such as probation."); *see also* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 28–29 (Apr. 18, 2017) (Faye Taxman, Ph.D.); Rebecca Umbach et al., *Cognitive Decline as a Result of Incarceration and the Effects of a CBT/MT Intervention*, 45 Crim. Just. & Behav. 31 (2018) (finding that incarceration worsens cognitive functioning—"a known risk factor for crime").

In implementing Option 2, the Commission should provide at least a two-level decrease for persons who qualify under the proposed §4C1.1. As the Commission's recent research confirms,[49] a two-level decrease would move the average guideline minimum closer to the sentences that courts "actually impose" in these types of cases.[50] Providing at least a two-level decrease would best reflect the Commission's "ongoing" and "continuous evolution helped by the sentencing courts."[51]

B. §4C1.1's remaining exclusionary criteria should be narrow.

Defenders recognize that § 994(j) provides a presumption of non-imprisonment for persons who have not been convicted of a "crime of violence" or an "otherwise serious offense." However, we fear that some of the Commission's proposed exclusions in §4C1.1(a) sweep too broadly and may prevent persons with no criminal history points who were convicted of sufficiently non-serious offenses from getting relief. We encourage the Commission to adopt a narrow ineligibility criteria and permit courts to ascertain whether to depart or vary from the §4C1.1 adjustment in outlier cases.

For example, the Commission proposes to exclude anyone who "possess[ed] a firearm or other dangerous weapon (or induce[d] another participant to do so) in connection with the offense[.]"[52] While we appreciate this exclusion is narrowed to "the defendant's own conduct,"[53] it is still substantially broader than § 994(j) requires. The SRA directs that a "first offender who has not been convicted of a crime of violence or an otherwise

---

[49] *See* CH Data Briefing, *supra* note 14, at slide 43.

[50] *See* 28 U.S.C. § 995(a)(15).

[51] *Rita v. United States*, 551 U.S. 338, 350 (2007); *see also* 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 promulgated pursuant to the provisions of this section.").

[52] 2023 Proposed Amendments, at 7222.

[53] *Id.* ("Consistent with §1B1.3 (Relevant Conduct), the term 'defendant' limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.").

serious offense," should receive a sentence other than imprisonment.[54] But it only singled out "a person convicted of a crime of violence that results in serious bodily injury" for a prison sentence.[55] Therefore, nothing in the statute precludes the Commission from encouraging non-incarceration sentences for "first offenders" not "convicted of a crime of violence that results in serious bodily injury."

Defenders recognize that the proposed §4C1.1(a)(2) exclusion is identical to 18 U.S.C. § 3553(f)(2).[56] But adopting the (f)(2) exclusion here could pose serious problems. First, this rule could exacerbate racial disparities because Black individuals are disproportionately targeted and sentenced for firearms possession offenses.[57] This rule could also prompt unwarranted disparities, preventing deserving individuals from obtaining §4C1.1 relief. As Defenders explained in 2018, adopting (f)(2)'s exclusion in this context would compound a circuit split on whether constructive possession is sufficient to constitute "possess[ing] a firearm or other dangerous weapon . . . in connection with the offense."[58] There is also a split of authority on whether a person possesses a weapon in connection with the offense if they receive an enhancement under §2D1.1(b)(1).[59] Further, this

---

[54] 28 U.S.C. § 994(j).

[55] *Id.*

[56] *Compare* 18 U.S.C. § 3553(f)(2), *with* 2023 Proposed Amendments, at 7222.

[57] *See* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L. J. 1011, 1021–25 (2020) (examining racial disparities in federal gun possession prosecutions arising from law enforcement practices that target communities of color); *see also* Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 315–17 (2007); Statement of Michael Carter before the U.S. Sentencing Comm'n, Washington, D.C., (Mar. 7, 2023).

[58] 2023 Proposed Amendment at 7222. *See* Defenders' 2017 Comments, *supra* note 32, at 10 (attached to Statement of Miriam Conrad, *supra*, note 32). *See also United States v. Carillo-Ayala*, 713 F.3d 82, 97 n. 13 (11th Cir. 2013) (summarizing circuit conflict).

[59] *Compare, e.g.*, *Carillo-Ayala*, 713 F.3d at 89-91 (holding that not all defendants who receive the enhancement under §2D1.1(b)(1) are precluded from safety valve relief), *with United States v. Ruiz*, 621 F.3d 390, 397 (5th Cir. 2010) (actual and constructive possession of a weapon under §2D1.1(b)(1) excludes safety valve relief).

exclusion is inconsistent with the Commission's guidance in §4B1.2 which excludes most firearms possession offenses from the "crime of violence" definition.[60]

We encourage the Commission to replace the exclusion proposed at §4C1.1(a)(2) with the "crime of violence" definition articulated in 18 U.S.C. § 16. This definition was recently recognized by Congress in the amended safety valve statute as an appropriate definition for a "violent offense"[61] and, along with the additional exclusions in §4C1.1, would fully comply with §994(j)'s mandate.

The Commission should also revise proposed §4C1.1(a)(3) ("the offense did not result in death or serious bodily injury") so that it is limited to the conduct of the individual being sentenced. Because "the offense" includes "the offense of conviction and all relevant conduct under §1B1.3"[62] —including the conduct of others—Defenders are concerned that persons deserving of §4C1.1 relief who played a minor and non-violent role in an offense may be excluded because of co-conspirator conduct. This can be easily remedied by revising §4C1.1(a)(3) to state: "the defendant did not cause death or serious bodily injury." At a minimum, the exclusion should be limited to "the offense of conviction."[63]

Defenders similarly urge the Commission to adopt the narrowest eligibility alternatives proposed in §4C1.1(a)(4) and (6).[64]

C. An invited downward departure should be added to Option 2.

The Commission proposes to include an invited upward departure in Option 2 for cases in which a §4C1.1 adjustment "substantially

---

[60] *See* USSG §4B1.2(a)(2).

[61] 18 U.S.C. §3553(f)(1)(C) & (g).

[62] USSG §1B1.1 cmt. n.1(I).

[63] *See* USSG §1B1.2(a) (defining "offense of conviction" as "the offense conduct charged in the count of the indictment or information of which the defendant was convicted").

[64] 2023 Proposed Amendments, at 7222 (excluding persons whose acts or omissions resulted in substantial financial hardship to 25 or more victims and persons who were subject to §4B1.5).

underrepresents the seriousness of the defendant's criminal history."[65] It proposes that an upward departure may be warranted if an individual "has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence."[66] We encourage the Commission to include a downward departure as well. The representation of a person's criminal history swings both ways[67]—and a downward departure may be particularly warranted in circumstances where someone does not qualify as a "first offender" under Option 2 solely because of a juvenile adjudication or other minor offense.

D. Section 5C1.1's downward departure for Zones C and D should match the downward departure proposed for Zones A and B.

We are pleased the Commission has proposed to replace Application Note 4 in §5C1.1 and provide an invited downward departure for all persons who would qualify as "first offenders" under §4C1.1.[68] However, we urge the Commission to provide the same invited departure for persons in Zones C and D as it proposes for Zones A and B.

The Commission proposes that for persons who qualify as "first offenders" in Zones A and B, "a sentence other than a sentence of imprisonment. . .is generally appropriate."[69] But for persons who qualify as "first offenders" in Zones C and D, the Commission proposes that "a sentence of imprisonment [may be appropriate] [is generally appropriate]" only if the "instant offense of conviction is not an otherwise serious offense."[70] The Commission should provide the same presumption of non-imprisonment that it proposes for persons in Zones A and B to all persons who receive the §4C1.1 adjustment for several reasons.

First, asking courts to assess whether "the defendant's instant offense of conviction is not an otherwise serious offense" is unnecessary and

---

[65] *Id.*

[66] 2023 Proposed Amendments, at 7222.

[67] *See* USSG §4A1.3.

[68] 2023 Proposed Amendments, at 7222–23.

[69] *Id.* at 7222.

[70] *Id.* at 7222–23.

duplicative of the §4C1.1 analysis. By the time a court would assess whether a §5C1.1 downward departure is warranted, the court would have already determined not only that the person being sentenced has zero criminal history points but also that the instant offense did not meet any of §4C1.1's exclusionary criteria. Since everyone eligible for §4C1.1 would be in Criminal History Category I, and "[t]here is no correlation between recidivism and guidelines' offense level,"[71] adding an extra layer of analysis is unwarranted. Similarly, because anyone eligible for the §5C1.1 downward departure would have been convicted of an offense that did not meet §4C1.1's exclusionary criteria, additional guidance on what constitutes "an otherwise serious offense"[72] is not necessary.[73]

Second, there are strong reasons to not punish persons who qualify as "first offenders" simply because of their sentencing zone. Because all "first offenders" would necessarily be in Criminal History Category I, their zone would be driven exclusively by offense level. But as Defenders have often noted, a person's offense level often provides little indication of the seriousness of the offense. Offense levels are frequently driven by things like drug quantity, drug type, and loss amount—factors bearing little relationship to culpability.[74] Leaving the departure for Zones C and D as proposed may make judges less inclined to consider a sentence other than imprisonment for people like Julio, Vania Alvarado, and Mario Chavez.

---

[71] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 15 (2004), https://tinyurl.com/2p9xrrf9 ("Measuring Recidivism") ("Whether an offender has a low or high guideline offense level, recidivism rates are similar.").

[72] 2023 Proposed Amendments, at 7223.

[73] Because §4C1.1 would provide an analysis to determine whether an instant offense is "otherwise non-serious," so as to warrant "first offender" relief, the Commission should delete the confusing and arguably conflicting portion of Policy Statement 4(d) in Chapter 1, Part A. USSG Ch. 1, Pt. A, cmt. 4(d) ("Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'"). *See also* 2023 Proposed Amendments, at 7223 (seeking comment on conforming changes).

[74] *See*, *e.g.*, Defenders' Annual Letter to the U.S. Sentencing Comm'n 13–17 & n. 88 (Sept. 14, 2022).

II. Status Points

Defenders are excited to see the Commission's proposed changes to the status points rule, USSG §4A1.1(d). Under the current §4A1.1(d), two points are added to a person's criminal history score if they committed the instant offense while under a criminal justice sentence, including parole, probation, supervised release, imprisonment, work release, or escape status. A "criminal justice sentence" is any "sentence countable under §4A1.2" which has "a custodial or supervisory component, although active supervision is not required."[75] Because status points lack an empirical basis, do not serve the purposes of sentencing, and fail to further the Commission's purpose, Defenders strongly believe the Commission should implement Option 3 and eliminate status points from the criminal history calculation.

A. The Commission should adopt Option 3 of the proposed amendment and eliminate status points from the criminal history calculation.

The Commission has proposed three options for amending §4A1.1(d).[76] Each option would de-emphasize, in different ways and to varying degrees, the importance of person's "status" (i.e., being "under a criminal justice sentence") in determining their sentence.

Option One. Option 1 would add a downward departure to Application Note 4 of the Commentary to §4A1.1 for cases where status points are applied. It would read: "There may be cases in which adding points under §4A1.1(d) results in a Criminal History Category that substantially overrepresents the seriousness of the defendant's criminal history. In such a case, a departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History)."

Option Two. Option 2 would decrease the number of points added under §4A1.1 from two to one. It would also add a departure provision to the Commentary of §4A1.1 to provide for an upward or downward departure, depending on the circumstances. It would read: "There may be cases in which adding a point under §4A1.1(d) results in a Criminal History Category that

---

[75] USSG §4A1.1, cmt. n.4.

[76] 2023 Proposed Amendments, at 7221.

substantially overrepresents or underrepresents the seriousness of the defendant's criminal history. In such a case, a departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History Category)."

Option Three. Option 3 would eliminate the status points altogether. It would also amend the Commentary to §4A1.3 to provide an example of an instance in which an upward departure may be warranted. It would read: "An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances: *** (v) The defendant committed the instant offense (i.e., any relevant conduct to the instant offense under §1B1.3 (Relevant Conduct)) while under any criminal justice sentence having a custodial or supervisory component (including probation, parole, supervised release, imprisonment, work release, or escape status)."

The Commission should adopt Option 3.

1. The History of Status Points.

Status points and the other Chapter 4 criminal history rules were designed to reflect both culpability (*i.e.*, just punishment) and risk of recidivism (*i.e.*, the likelihood of rearrest).[77] The factors used to measure culpability and recidivism were meant to be "consistent with the extant empirical research," and to incorporate "additional data insofar as they become available in the future."[78] However, because of time and resource constraints, the original Commission did not use its own empirical data and research to develop the criminal history rules.[79] Instead, it reviewed four prediction measures being used in the mid-1980s and ultimately incorporated aspects of two: the Parole Commission's Salient Factor Score (SFS) and the Proposed INSLAW scale.[80] Status points emanated from the SFS Item E, which used criminal justice sentence status as a predictor of greater

---

[77] *See* Measuring Recidivism, *supra* note 71, at 1–2.

[78] USSG Ch. 4, Pt. A, introductory cmt.

[79] *See* Measuring Recidivism, *supra* note 71, at 1.

[80] *See* USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 3–4 (2005), https://tinyurl.com/5fw3ezpw, ("Salient Factor Score").

recidivism risk.[81] But, as discussed below, more recent Commission data reveal that "status" is a poor predictor of recidivism risk.

Status points were justified on similar grounds as the related (former) "recency points" rule and should be eliminated for the same reasons that recency points were eliminated from the criminal history computation in 2010. Under the original guidelines, one or two points were added to a person's criminal history score if the convicted person committed the instant offense less than two years after release from prior imprisonment.[82] Both status and recency points were considered measures of the "recency" of prior criminal conduct and were predicated on the now disproven assumption that more recent criminal activity was a reliable predictor of future criminal conduct.[83] However, the Commission eliminated recency points from the criminal history calculation in 2010, stating that "[r]ecent research isolating the effect of §4A1.1(e) on the predictive ability of the criminal history score indicated that consideration of recency only minimally improves the predictive ability."[84] Additionally, it received public testimony that "recency does not necessarily reflect culpability."[85] As further explained below, the same is true for status points. Indeed, when Defenders urged the Commission to eliminate recency points in 2010, we also urged it to eliminate status points because neither measure accurately predicts recidivism nor effectively distinguishes individuals who are more culpable than others.[86]

---

[81] *See id.* at 7.

[82] *See* USSG §4A1.1(e) (Nov. 1, 1987).

[83] *See* Salient Factor Score at 7 (stating that status points "capture[ ] the higher recidivism likelihood when the instant offense is committed while the offender is still meeting a sentence obligation for an earlier offense" and recency points "[identified] as more likely to recidivate an offender" who committed the instant offense "less than *two* years after release from an imposed imprisonment sentence of 60 days or longer.").

[84] USSG App. C., Amend. 742, Reason for Amendment (Nov. 1, 2010).

[85] *Id.*

[86] *See* Statement of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, Washington, D.C., at 90 (Mar. 17, 2010) ("Meyers and Mariano 2010 Statement").

2. Impact, Recidivism Prediction, and Culpability.

Status points increase the time our clients spend in prison and lead to higher federal incarceration rates but have low recidivism prediction value and are a poor measure of culpability. In the last five years §4A1.1(d) applied in 37.5 percent of cases and increased a person's criminal history in 61.5 percent of cases in which it was applied.[87] Status points are also connected with higher sentences. "The average prison sentence imposed for [a person assessed status points] was 66 months, which is 21 months longer than the average for [people who were not assessed status points] (45 months)."[88] By increasing the length of sentences imposed, the status points rule contributes to prison overcrowding. The Bureau of Prisons ended Fiscal Year 2021 with 264 more inmates than the prior year and BOP continues to "experience substantial crowding in high, and medium security facilities."[89]

While §4A1.1(d) exacerbates imprisonment lengths and rates, the Commission's own data shows that the rule lacks an empirical basis. As far back as 2005, Commission research established that recency and status points *combined* did not significantly increase the criminal history score's ability to predict recidivism risk.[90] "The [2005] study found that the full criminal history score, with all components included, successfully predicted rearrest 69.9 percent of the time."[91] Yet, when "both status points and recency points were removed, the score still would successfully predict rearrest 69.8 percent of the time."[92] Thus, "status points and recency points together improved prediction of rearrest by only 0.1 percent."[93]

---

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

[88] *See id.* at 12, fig. 5.

[89] Federal Bureau of Prisons, Program Fact Sheet (Dec. 31, 2021) (noting the "first increase in inmate population after 6 years of decreases"); Federal Bureau of Prisons, Program Fact Sheet (Feb. 2, 2023).

[90] *See* Meyers and Mariano 2010 Statement at 92 (citing Salient Factor Score, at 13 & Ex. 5).

[91] Revisiting Status Points, *supra* note 87, at 5.

[92] *Id.*

[93] *Id.*

Last summer, the Commission updated its research with respect to status points by examining people who were released from prison or began a term of probation in 2010.[94] The Commission determined that "[people] who received status points were rearrested at similar rates to those without status points who had the same criminal history score."[95] Similarly, it found that "the inclusion of status points in the criminal history score improved successful prediction of rearrest by less than 0.2 percent."[96] These figures are comparable to those found by the 2005 study.[97] Therefore, "[d]espite the sentencing impacts resulting from the application of status points, the status points provision only minimally improves the overall recidivism predictivity of the criminal history score."[98]

While the Commission admits that status points lack an empirical basis, it notes that these points "may address culpability and other statutory purposes of sentencing."[99] The Commission therefore asks for comment on whether the §4A1.1(d) rule should still apply in specific instances, such as if a person was under a criminal justice sentence for "certain categories of prior offenses" or if a person was "recently placed under a criminal justice sentence involving a custodial or supervisory component."[100] Because §4A1.1(d) is not needed to further any purpose of sentencing, the rule should be eliminated in all circumstances, and an upward departure should not be adopted.

The guidelines and relevant statutes already account for the scenarios such as those that the Commission identifies and increase penalties accordingly. For example, if a person was "under a criminal justice sentence resulting from a violent offense,"[101] he would likely be subject to a violation of his supervision, probation, or parole in addition to facing the new criminal

---

[94] *See id.* at 14.

[95] *Id.* at 3.

[96] *See* Revisiting Status Points, *supra* note 87, at 17. To phrase it differently, "status points improve the criminal history score's successful prediction of rearrest for only 15 out of 10,000 offenders." *Id.* at 18.

[97] *See id.*

[98] *Id.* at 18.

[99] *Id.*

[100] 2023 Proposed Amendments, at 7221.

[101] *Id.*

charge. If found guilty of the violation, his sentence on that violation may be imposed consecutive to his sentence for the instance offense.[102] The prior violent offense would also count towards his criminal history score.[103] And, if the offense was sufficiently violent to constitute a "crime of violence" or to trigger application of a recidivism statute, the prior violent offense may further increase his guideline range or subject him to enhanced mandatory penalties.[104]

Guidelines and statutes also already account for committing a crime while under a criminal justice sentence with a custodial component.[105] If a person commits a federal crime while in custody, his prior offense would count towards his criminal history score.[106] The guidelines further provide numerous offense level increases, adjustments, and departures to account for offenses occurring in custody and, if applicable, the status of the victim.[107] And the guidelines direct that for any offense committed while a person "was serving a term of imprisonment (including work release, furlough, or escape status). . . the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment."[108] Compounding these existing penalties with criminal history points that lack an empirical basis is unwarranted.

---

[102] *See* USSG §7B1.3(f) ("Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation.").

[103] *See* USSG §§4A1.1, 4A1.2. Unless the offense otherwise constituted relevant conduct, in which case the prior violent offense would increase the individual's offense level for the instant offense. *See* USSG §4A1.2 cmt. n. 1.

[104] *See, e.g.*, USSG §§4B1.1, 4B1.2, 2K2.1(a), 2L1.2(b); 18 U.S.C. § 924(e); 21 U.S.C. § 841(b)(1)(A) & (b)(1)(B).

[105] *See* 2023 Proposed Amendments, at 7221.

[106] *See* USSG §4A1.2(e).

[107] *See, e.g.*, USSG §§2A3.1(b)(3); 2D1.1(b)(4); 2D2.1(b)(1); 2P1.1; 2P1.2; 2P1.3; 3A1.2(c)(2); *see also generally id.* §§4A1.3(a); 5K2.7.

[108] USSG §5G1.3(a).

3. Unwarranted Disparities and Adverse Impact.

Far from furthering other purposes of sentencing, status points create disparities and have an adverse impact.

Section 4A1.1(d) perpetuates unwarranted disparities in two ways—both by treating dissimilar circumstances alike, and by treating similar circumstances differently.[109] Because §4A1.1(d) applies to any "criminal justice sentence"—whether actively supervised, or not; custodial or non-custodial—§4A1.1(d) treats dissimilar types of criminal justices sentences the same. And because community-based supervision practices vary from state to state, §4A1.1 treats similar circumstances differently.

I have seen unjustified disparities caused by status points firsthand. From 1998 to 2016, the state of Arizona operated a program colloquially known as "half-term to deport," under which non-citizens convicted of certain crimes who were subject to an order of removal could be released to the custody of ICE after serving half of the state sentence imposed.[110] If, however, the person ever returned to the United States without permission, the Arizona Department of Corrections would revoke the person's release and require them to serve the remaining half of the sentence.[111]

Individuals granted early release were not under any form of supervision or subject to any conditions other than the condition that they not return to the United States, but they were considered to be "under a criminal justice sentence" under §4A1.1(d). Individuals who returned to the country and faced federal charges, often for illegal reentry, were therefore assessed "status points." And because service of the remaining half of the DOC sentence "refreshed" the age of the state conviction under §4A1.2(e), it was not uncommon to see defendants who were assessed five criminal history

---

[109] *See* 18 U.S.C. § 3553(a)(6); *Gall v. United States*, 552 U.S. 38, 55– 56 (2007) (recognizing that avoiding "unwarranted similarities among [individuals] not similarly situated" is relevant to the disparity analysis); USSC, *Fifteen Years of Guideline Sentencing* 113 (2004), https://bit.ly/2BZj3XB ("Fifteen Year Report") (recognizing disparities occur from both unwarranted different and unwarranted similar treatment).

[110] Ariz. Rev. Stat. § 41-1604.14 (repealed Aug. 6, 2016).

[111] Ariz. Rev. Stat. § 41-1604.14(B).

points for state convictions that were quite dated, placing them immediately in criminal history category III.

Arizona is far from the only state where such idiosyncrasies exist. My office represents a man who is receiving status points for an offense so old that it no longer scores for purposes of his criminal history. In 2006, Mr. Morales pleaded no contest to a misdemeanor offense for which he received 3 years of probation in Yolo County Superior Court in Woodland, California. A bench warrant issued in 2007 following a failure to appear, but Yolo County has failed to either execute or quash the warrant despite multiple opportunities to do so. The presence of the warrant means Mr. Morales remains "under a criminal justice sentence" and continues to receive status points even though the underlying offense has not counted for purposed of his criminal history since 2016.

Section 4A1.1(d) also has a disparate impact on Black people. Data from the Commission's report confirms that Black people are 1.4 times more likely to get status points than other groups combined.[112] This disparate impact is unsurprising. Research shows that Black people are far more likely than whites to be targeted by law enforcement for stops, searches, arrests, and criminal prosecutions,[113] even in the face of evidence that Black and

---

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

[113] *See, e.g.*, Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases*, 65 Clev. State L. Rev. 491, 500–01 (2017) (reviewing statistics on crime and arrest rates by race and concluding that the overrepresentation of people of color in the criminal justice system results from "racial disparity in law enforcement practices" rather than "a problem of crime within the black community alone"); Jessica Eaglin & Danyelle Solomon, Brennan Center for Justice, *Reducing Racial Disparities in Jails: Recommendations for Local Practice* 17 (2015) ("Evidence demonstrates that once stopped by a police officer, African Americans are arrested at a higher rate than other racial groups. A recent study of 3,528 police departments found that blacks are more likely to be arrested in almost every city for almost every type of crime. . . . African Americans are almost four times more likely to be arrested for selling drugs and more than twice as likely to be arrested for possessing drugs, even though whites are more likely to sell drugs and equally likely to consume them. African Americans constitute 30% of arrests for drug violation offenses even though they make up only 13% of the total population."); Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a*

white people commit certain offenses at similar rates.[114] Black people are more likely to be on supervision and to be subject to longer terms of supervision than whites,[115] which underscores the uneven impact of the status point rule on minority groups.

While retaining status points would frustrate the Commission's mission to provide guidelines that promote sentences not greater than necessary, eliminating them would help the Commission fulfill its obligations. The Commission would act in its characteristic institutional role to "base its determinations on empirical data and national experience."[116] By adopting Option 3, the Commission would improve the accuracy and reliability of the guidelines. It would make the guidelines more certain and fairer in fulfilling the goals of sentencing. It would reduce unwarranted

---

Response to Racial Injustice, 20 Stan. L. & Pol'y Rev. 463, 477 (2009) ("The war on drugs, and particularly the special intensity with which it has been waged against open-air drug dealing and crack cocaine, has fueled a massive and demographically disproportionate increase in the number of black males held in the nation's prisons."); William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1893 (2000) (describing "anti-vice crusades that target racial or ethnic minorities who live in urban poverty"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 957 (1999) ("Recent studies support what advocates and scholars have been saying for years: The police target people of color, particularly African Americans, for stops and frisks."); *cf. Jamison v. McClendon*, 476 F. Supp. 3d 386, 414–15 (S.D. Miss. 2020) (Order Granting Qualified Immunity) ("Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike. United States Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as 'the world's greatest deliberative body.' The 'vast majority' of the stops were the result of 'nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial.'" (citations omitted)).

[114] *See* Eaglin & Solomon, *supra* note 113, at 17.

[115] *See* Kendra Bradner & Vincent Schiraldi, *Racial Inequities in New York Parole Supervision* 3, Columbia University Justice Lab (2020), https://bit.ly/3Dkiyp1 (collecting research on national racial inequities in parole and reporting that "Black people are 4.15 times more likely to be under parole supervision than white people," that Black people "remain on probation and parole longer than similarly situated white people," and that research suggests that disparities exist in parole violation charges and outcomes); *see also* Alex Roth et al., *The Perils of Probation: How Supervision Contributes to Jail Populations* 8, Vera Institute of Justice (2021), https://bit.ly/3QxNrZX.

[116] *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

disparities and better reflect the advancement of human knowledge.[117] And it would further the Commission's statutory obligation to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons[.]"[118] For all these reasons, we urge the Commission to adopt Option 3 of the proposed amendment.

[117] 28 U.S.C. § 991(b)(1)(A)–(C).

[118] 28 U.S.C. § 994(g).